IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN) **[REPORTABLE]**

Case no: A 153/2024

In the matter between:

PERRY OSAGIEDE	First appellant
ENORENSE IZEVBIGIE	Second appellant
FRANKLYN EDOSA OSAGIEDE	Third appellant
OSARIEMEN ERIC CLEMENT	Fourth appellant
COLLINS OTUGHWOR	Fifth appellant
MUSA MUDASHIRU	Sixth appellant
TORISEJU GABRIEL OTUBU	Seventh appellant
PRINCE IBEABUCHI MARK	Eighth appellant

and

THE STATE	Respondent

Coram: Sher J et Bhoopchand AJ

Heard: 15 August 2025

Further submissions: 15 September 2025

Summary: Extradition- Application of double criminality principle that an extraditee can only be extradited for an offence which constitutes a crime in both the requesting and the requested state- Principle given effect to in extradition legislation and treaties either

in terms of the conduct of the extraditee or in terms of the offences for which their extradition is sought- The approach which has been adopted by a state is to be determined by an interpretation of its extradition legislation and treaties.
-Interpretation of the definition of an extraditable offence in the extradition treaty concluded between the USA and SA (which came into force on 25 June 2001) and the Extradition Act 67 of 1962- Conduct-based approach to apply to the treaty, consistent with foreign and international law and extradition treaties entered into by SA and foreign states between 2001 and 2021.
-Method to be followed by a magistrate in an extradition enquiry in terms of s 10 of the Extradition Act, where an extradition treaty which concerns SA proposes a conduct-based approach to double criminality, set out.

ORDER

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1. First, Third, Fourth, Fifth, Sixth and Eighth Appellants' appeal against the order which was made by the magistrate of Cape Town on 19 February 2024 in terms of s 10(1) of the Extradition Act, 67 of 1962 ('the Act'), whereby 1) it was held that they are liable to be extradited to the United States of America and 2) they were committed to prison whist awaiting the decision of the Minister of Justice and Constitutional Development as to their surrender, is dismissed.
2. The Registrar shall provide a copy of this judgment to the magistrate of Cape Town, for inclusion in the record of the proceedings which were held in the extradition enquiry in terms of s 10 of the Act, which record is to be submitted to the Minister by the magistrate together with such report as may be necessary, in terms of s 10(4).

JUDGMENT DELIVERED (VIA EMAIL) ON 7 APRIL 2026

SHER J (BHOOPCHAND AJ concurring):

1. This is an appeal against an order which was made by the magistrate of Cape Town on 19 February 2024, in terms of s 10 (1) of the Extradition Act, [1] whereby it was held that the appellants were liable to be surrendered to the USA pursuant to requests that were made by it for their extradition, and they were committed pending the decision of the Minister of Justice and Constitutional Development as to their surrender.
2. The order followed upon earlier rulings which were made on 6 July 2023 and 25 January 2024. In the first of these the magistrate held that for the purpose of determining whether the appellants were liable to be surrendered for extraditable offences in terms of the USA-SA Extradition Treaty (the Treaty'), which came to effect in June 2001, the elements of the offences rather than the conduct of the appellants were determinative. After further submissions were made the magistrate held, in a follow-up ruling on 25 January 2024, that as the elements of the offences corresponded with certain SA offences, the terms of the Treaty had been complied with.
3. Although notices of appeal were lodged by all eight of the appellants, when the matter came before us we were informed that the 2nd and 7th appellants were not proceeding with their appeals.
4. On appeal the appellants contend that the magistrate erred in holding that the elements of the offences for which they are sought to stand trial in the USA correspond with offences in terms of our law. The Director of Public Prosecutions in turn contends that the magistrate correctly held that the appellants were extraditable but was wrong in doing so based on the elements of the offences for

[1] Act 67 of 1962.

which they were sought and should have held that they were liable for surrender based on their conduct.

5. As neither of the parties had dealt with certain decisions of the highest courts of the UK and other commonwealth countries on the point in issue, aside from a reference by the State to the decision of the Supreme Court of Canada in *Fischbacher,*[2] after hearing oral argument we called for further written submissions. Regrettably, the submissions we received were perfunctory. Neither of the parties made any attempt to enlighten us as to the legislative provisions that apply in terms of the extradition laws of the UK (from whom our extradition law is derived), or any of the other commonwealth countries with whom we share a colonial and common law heritage. We were also not provided with substantive submissions as to the treatment of the point in issue by the USA, UK and other courts, and other than the Treaty which is in issue, were not provided with copies of or submissions as to, any other extradition treaties which SA has entered into. In addition, the submissions which we received in relation to the treatment of the issue by our courts were, unfortunately, superficial.

The relevant facts and circumstances

6. In support of their request for the extradition of the appellants, who are Nigerian citizens who were resident in SA at the time, the US authorities filed affidavits by State Attorneys for the Districts of New Jersey and Eastern Texas (who are responsible for the preparation and prosecution of criminal matters within their areas of jurisdiction), which set out the history of the pending matters against each of the appellants; and by agents from the US Secret Service and the FBI, which detailed the investigations which were carried out. In addition, copies of the indictments which were returned by grand juries, which set out the charges for which the appellants are to stand trial and the warrants which were issued for their arrest, were also provided. First to Seventh Appellants were charged by the United States District Court for New Jersey on 22 July 2021 and the Eighth Appellant by the United States District Court for Eastern Texas on 18 November 2021.

[2] *Canada (Justice) v Fischbacher* [2009] 3 SCR 170; 2009 SCC 46.

7. In their affidavits the State Attorneys set out an exposition of the charges the appellants face, with reference to the US Code which makes provision for them, and the constituent elements of the offences involved. It is not necessary to detail the individual charges which each appellant faces, as they are largely common although they differ in number, and a summary of the case which was put forward against them will suffice.

8. It was alleged that during the period 2011-2021 the appellants participated in an international criminal enterprise in which they committed various acts of 'wire' fraud, 'aggravated identity theft' and money laundering.[3] The reference to 'wire' fraud is a reference to a form of statutory fraud in the USA which is committed by means of a 'wire'. Although in its original form it envisaged the use of physical lines or 'wires' by which persons communicate with one another, such as telephone and telegraph lines, it evolved to include fraud committed by electronic or digital means over the internet.

9. Using these means the appellants allegedly defrauded several individual victims in the USA, as well as corporate and government entities across the world, of at least $17 million, which they laundered by moving their ill-gotten gains through various structures, entities and banks. To do so the appellants made use of false aliases, which they adopted by 'stealing' and utilizing the identities of real people. In several alleged 'romance scams' the appellants lured vulnerable women and deceived them into believing they were romantically inclined towards them, thereby getting them to part with large sums of money.

The issue: double criminality

10. At the heart of the appeal is the question of whether the principle of double (or dual) criminality, which is internationally recognized as central to extradition law,[4] was satisfied in the extradition request. The principle is part of the matrix[5] of international law standards within which extradition treaties are to be interpreted. Reduced to its essence, it requires that a person should not be extradited unless

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[3] Under Title 18 of the United States Code ('U.S.C.'): Sections 1028A (identity theft), 1343 & 1349 (wire fraud and conspiracy to commit wire fraud) and 1956(h) (conspiracy to commit money laundering).

[4] *Patel v National Director of Public Prosecutions* 2017 (1) SACR 456 (SCA) para 8.

[5] *Riley v Commonwealth* [1985] HCA 82; (1985) 159 CLR 1 para 6; *Ortmann v USA* [2020] NZSC 120 para 46.

the crime for which they are sought by a requesting state is one for which, in turn, the requested state would be able to demand extradition. It is premised on the underlying notions of reciprocity and mutuality which underpin extradition. Amongst the purposes it serves is to ensure that a person is not deprived of their liberty at the instance of a requesting state for an offence which is not recognized by the requested state, and to avoid the political embarrassment which would ensue were the requested state to extradite a person who according to its own standards would not be guilty of acts deserving of punishment. It also ensures that a requested state will not be required to extradite categories of persons for which it would never have occasion to make similar demands of a requesting state.[6]

11. As the principle is not a mandatory rule of international law it does not constitute a restrictive limitation on the powers of states, and they are accordingly at liberty to depart from it when concluding extradition treaties. Thus, a treaty may provide for the surrender of a person who is charged with an act that is criminal only by the law of the requesting state.[7] In this regard, as in the Treaty which is in issue in this matter,[8] extradition treaties commonly contain a provision that a requested state may not refuse extradition for offences pertaining to tax, customs duties, exchange control or other 'revenue' offences because it does not impose the same kind of tax, duty or exchange regulation, in terms of its law. The European Convention on Extradition of 1957 ('the Convention'), as amended, to which SA acceded in May 2003 [9] has a similar provision in it [10] which allows for the exclusion of the double criminality principle in such instances, by countries who are party to it.

12. In 1985 the High Court of Australia remarked in *Riley*[11] that, notwithstanding its wide acceptance as a general standard which is to be observed in international relations, the precise content of the double criminality principle was still 'unsettled'.

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[6] *Patel* n 4 para 9, citing Shearer *Extradition in International Law* (1971) at 137-138.
[7] *Riley* n 5 para 5.
[8] Article 6.
[9] GG 24872, GN 666.
[10] Article 5.2, introduced in terms of Art 2 of the 2nd Additional Protocol to the Convention.
[11] Per Brennan J (as he then was), in *Riley* n 5 para 7.

The decision in *Riley* and subsequent decisions by that Court[12] and the highest courts of other commonwealth countries such as New Zealand[13] and Canada,[14] as well as the UK,[15] have contributed towards the formulation of a commonly adopted international position in relation to the determination of how the principle is to be satisfied in extradition matters. This was made possible by the adoption of certain common guidelines in the extradition legislation of these countries, derived from the UN Model Treaty on Extradition, which was adopted by the General Assembly in 1991; to which I will revert.

13. Before continuing it may be useful to point out how domestic statutes and treaties which deal with extradition fit with one another in the framework of international and domestic law, as this guides the interpretive approach that follows.

14. International law does not recognize an inherent right by a state to require another to surrender to it a person who it alleges is guilty of a criminal offence against its laws. Thus, any right to require the extradition of a person is ordinarily[16] dependent on a treaty with another state which provides for it, and the 'primary' principle of international law that effect must be given to such an agreement, as expressed in the maxim *pacta sunt servanda*.[17] Consequently, the content of any right to require or to grant extradition must be determined by reference to the terms of such a treaty. However, the existence of an extradition treaty is not sufficient on its own for the process to be given effect to. For the governments of contracting parties to have the legal right and power to detain and surrender persons for extradition, they require the conferment of the necessary authority to do so, by way of authorizing domestic legislative acts or statutes.[18] In terms of our Act[19] until an extradition

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[12] *O'Donoghue v Ireland; Zentai v Republic of Hungary; Williams v USA* [2008] HCA 14; *Minister for Home Affairs v Zentai* [2012] HCA 28.
[13] *Ortmann* n 5.
[14] *USA v McVey* [1992] 3 SCR 475; *Fischbacher* (2009) n 2.
[15] *Norris v USA* [2008] UKHL 16; [2008] 2 All ER 1103; *El-Khouri v Government of the USA* [2025] UKSC 3.
[16] In certain instances (SA is such a case), the Head of a state may have delegated authority (as per s 3(2) of our Extradition Act) to agree to the extradition of persons, pursuant to a request from countries with whom the state does not have an extradition treaty.
[17] *Riley* n 5 para 3.
[18] Id.
[19] Section 2(3)a).

treaty has been ratified or acceded to by our Parliament, it does not have any force or effect.

15. As was noted by the UK Supreme Court in *Norris,*[20] in setting out what will constitute an extraditable offence in its domestic statute and any treaty which it may conclude with another state, a legislative or executive authority must inevitably make a choice as to how to give effect to the double criminality principle. It will do so either by defining it in terms of conduct (i.e. acts or omissions) on the part of an offender, or in terms of the elements of the offences for which their extradition is sought. And it may adopt either an enumerative or an eliminative approach i.e. one in terms of which the offences for which a person may be extradited (which are commonly referred to in extradition acts and treaties as 'extradition crimes' or 'extraditable offences'), are expressly listed, or one in terms of which the offences for which extradition may not be granted or are excluded, are stipulated.

16. As it is universally accepted that offenders should not be extradited for petty offences which would attract only minor terms of incarceration as punishment, the first qualification in an extradition statute or treaty as to what will constitute an extraditable offence, is commonly to set a threshold limit in this regard. Our Act provides[21] that an extraditable offence is one which in terms of our law and that of a foreign state is punishable with a sentence of imprisonment, or other form of deprivation of liberty, for a period of 6 months or more. The Treaty in issue in this matter stipulates[22] that an offence shall be extraditable as between the USA and SA if it is punishable under the laws of both states by deprivation of liberty for a period of at least a year, or a more severe penalty.

The proceedings before the magistrate

17. In their submissions to the magistrate the appellants contended that the use of the word 'offence' in the definition of an extraditable offence in the Act and the Treaty, as opposed to extraditable 'conduct', required the court to consider the elements

[20] Note 15 para 65.
[21] Section 3(1).
[22] Article 2.1

of the offences for which extradition was sought, to determine whether there was double criminality. The meaning of the word 'offence' was plain and unambiguous: an 'offence' was constituted when a person's conduct complied with the definitional elements of a crime to which it pertained. Consequently, the court was required to consider the elements of the offences for which the appellants were sought in the USA and had to be satisfied that they were 'the same' or 'substantially similar' to the elements of offences for which the appellants could be charged in SA had they been committed here. As there was no exact correspondence between the various elements of the USA and SA offences, or one or more of their elements were lacking, there was no double criminality.

18. In support of these contentions the appellants referred to the remarks by Goldstone J in the decision of the CC in *Geuking*,[23] that in the determination of whether an offence is an extraditable one a magistrate will have to consider whether the evidence which is produced by a foreign, requesting state, in relation to it, constitutes an offence in our law.

19. In response the State contended, also with reference to the decision in *Geuking* [24] and the decision of this court in *Carolissen,* [25] that the question for determination was actually whether the *conduct* which is alleged to have been performed by an extraditee, constitutes an extraditable offence, in that it constitutes a crime in both the requesting state as well as in our law.

20. The magistrate was of the view that the matter was not that 'straightforward'. She said that there was case law (no reference was provided) that seemed to require that the elements of the offences in the two states had to be similar. She was not persuaded that the use of the word 'conduct' in the cases referred to by the State, meant conduct 'in the larger sense' of the actions alleged to have been committed by the appellants. In her view there was confusion, because the only way to determine which offences were applicable in an extradition matter was to have regard for the conduct of the offenders for whom extradition was sought. Without

[23] *Geuking v President of the Republic of South Africa & Ors* 2003 (1) SACR 404 CC, 2003 (3) SA 34 (CC) para 39.
[24] Para 40.
[25] *Carolissen v Director of Public Prosecutions* 2016 (2) SACR 171 (WCC).

knowing what their alleged actions were, a court in a requested state could not determine what offences were in issue, in order to consider whether their elements accorded with the elements of the offences in the requesting state.

21. After considering the differences between the wording of the instant Treaty and that which SA had concluded with Hong Kong (which was put before her by the appellants' counsel), and the principles of interpretation that were applicable, the magistrate was of the view that the Treaty contemplated a consideration of the elements of the offences rather than the conduct of the appellants, as this seemed to her to be the clearly expressed intention of the contracting State parties.

22. In follow-up proceedings the magistrate considered the elements of two of the offences for which the appellants' extradition was sought viz. wire fraud and aggravated identity theft. She gave no consideration, seemingly, to the offence of money laundering.

23. She rejected the contention by the appellant's counsel (with reference to the US Department of Justice's Civil Resources Manual) that, contrary to the definition of wire fraud which was provided by the US authorities in their papers, it did not require the making of a misrepresentation and could be committed merely by devising or participating in a 'scheme' or 'artifice' which might, or might not, be implemented by way of a misrepresentation. From certain federal court of appeal decisions that were referred to by the appellants' counsel,[26] the magistrate was of the view that the making of a misrepresentation was an element of the offence of wire fraud, as was the case for the South African common law offence of fraud. In similar vein, she rejected the contention that, unlike SA law, prejudice (either actual or potential), was not required for the American offence. She concluded that as the elements of both the US offences of wire fraud and aggravated identity theft corresponded with those of the common law offence of fraud in SA, the appellants were extraditable.

24. During the hearing of argument we pointed out to the appellants' counsel that in its decision in *Kousisis,* [27] which was delivered in May 2025, the US Supreme Court

[26] *US v Drake* 932 F.2d 861 863 (10th Cir. 1991); *US v Faulkner* 17 F.3d 745 771 (5th Cir.1994).
[27] *Kousisis v US* 605 US 114.

confirmed that a defendant may be convicted of wire fraud and a conspiracy to commit it where they induce a victim to enter into a transaction with them under materially false pretenses i.e. by way of a material misrepresentation, even if they did not seek to cause the victim economic loss, and thus the causing of actual loss or harm is not required; potential loss or prejudice will do. In the circumstances the magistrate was correct in her understanding that according to US law the offence of 'wire fraud' requires both the making of a misrepresentation and prejudice, actual or potential.

Double criminality in the UK, Australia, New Zealand, Canada and the USA

(a) Legislative provisions

25. Prior to the adoption of the Act in 1962, following upon our declaration as a Republic independent from Britain, SA was subject to the terms of the British Extradition Act of 1870 ('the BEA') and the Fugitive Offenders Act of 1881, which was later replaced by the Fugitive Offenders Act of 1967 ('the FOA'), as were other British colonies.

26. The BEA regulated extradition between the British Empire (i.e. the UK and her colonies and possessions) and foreign states, and the FOA regulated extradition *inter se*, between states within the British dominion. The BEA could be made applicable to a foreign state, by agreement between it and the UK's head of state the Queen, and was thus the forerunner of ss 2(1) and 3(1) of our Act, which allows our President, as head of state, to enter into an agreement with a foreign state which provides for the surrender, on a reciprocal basis, of persons who are accused or convicted of the commission of an extraditable offence, as specified in such agreement. Our Act also allows[28] for a person to be extradited to a foreign state with which we do not have an extradition treaty, if the President consents thereto in writing.

27. As in our case, after attaining their independence other former colonies of Britain including New Zealand (1947), Canada (1982) and Australia (1986), also adopted their own extradition statutes, with subsequent iterations thereto. Australia's

[28] Section 3(2).

current Extradition Act was adopted in 1988 and those of New Zealand and Canada in 1999. The UK's current statute is the Extradition Act of 2003.

28. As in the case of our Act, each of those former commonwealth countries' extradition acts also adopted, as a preliminary requirement for what they consider to be an extraditable offence, a minimum punishment threshold: In Australia[29] and New Zealand[30] extraditable offences are those punishable with a period of imprisonment of at least a year or more. Canada's Extradition Act requires offences to be punishable with a period of imprisonment of 2 years or more in the foreign state (and 5 years or more in Canada in certain instances), where there is an existing treaty in place between Canada and a foreign state,[31] and in non-treaty cases with a period of 2 years imprisonment or more.[32]

29. But, unlike our Act, in addition to this qualification the extradition Acts in these countries have additional conditions in them which must be satisfied for an offence to be an extraditable one. The Australian statute provides[33] that persons are only eligible for surrender if the magistrate or judge is satisfied that their *conduct* (or the 'equivalent' thereof), had it taken place in Australia, would constitute an offence. In determining this question any 'difference' between the 'denomination or categorization' of offences under the laws of the foreign state and that of Australia must be disregarded.[34]

30. The New Zealand Act stipulates that, in determining whether the *conduct* of the person for whom extradition is sought would have constituted an offence in the other country or in New Zealand had it occurred there, the 'totality of the acts' alleged to have been committed must be taken into account,[35] and it does not matter whether under the laws of the other country or New Zealand the acts or

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[29] Sections 5(a)(i) and (b) of its Extradition Act 1988.
[30] Sections 4(1)(a) and (b) of its Extradition Act 1999.
[31] Sections 3(1)(a) and (b)(ii) of its Extradition Act 1999.
[32] Section 3(1)(b)(ii).
[33] Section 19(2)(c).
[34] Section10(3)(b).
[35] Sections 4(2) and 5(2).

omissions constituting such *conduct* are 'categorized or named' differently, or the 'constituent elements' of the offences in the two states differ.[36]

31. In terms of the Canadian Act[37] a person may likewise be extradited if their *conduct*, had it occurred within its territory or jurisdiction, would constitute an offence that is punishable in terms of its law. To this end, the Canadian Act provides,[38] 'for greater certainty', (sic) that it is not relevant whether the *conduct* is 'named, defined or characterized' by Canada's 'extradition partner' i.e. the other state in an application for extradition, in the same way as it is in Canada.

(b) <u>Case law</u>

32. in seeking to define a mutually extraditable offence as one in terms of which the *conduct* of an offender is criminal in both the requesting and the requested state and stating that in this regard the categorization of the *crime or offence* in each of the states, or its constituent elements, is immaterial or irrelevant, or must be disregarded, the extradition acts of the commonwealth countries referred to seemingly sought to avoid divergences of interpretation by courts of requesting and requested states in extradition matters, as occurred in the UK in relation to its two Acts, before they were repealed by the (UK) Extradition Act 1989; which consolidated its 2 regimes. The 1989 Act was understood to impose the conduct test in extraditions to and from the UK i.e. that the conduct of persons to be extradited was to be assessed in the sense of the *acts and/or omissions they were accused of*, and not in the sense of the *offences* of which they were accused.[39]

33. Prior to the repeal of the BEA and the FOA in 1989, the requirement of double criminality was understood to differ for each statute. In terms of the BEA an 'extradition crime' was one which, if committed within England or its jurisdiction, would be one of the crimes described in a schedule to the BEA. Paradoxically, this was interpreted to mean that in cases involving extradition from and to states outside the British Empire, the court was not concerned with what provision of foreign criminal law the person for whom extradition was sought was charged: the

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[36] Sections 5(2)(a)-(b).
[37] Section 3(1)(b).
[38] Section 3(2).
[39] *Norris* n 15 paras 72-73; *R v Secretary for the Home Department, Ex p Hill* [1999] QB 886.

test was whether their *conduct*, had it been committed in England, would constitute a crime which fell within the description of an offence in the BEA i.e. in England. This was because an exact correspondence between the *offences* in the 2 states was not required. Thus, the House of Lords held[40] that the extradition magistrate was not required to determine whether the *offence* for which extradition was sought by a foreign state was the same or 'substantially similar' to an offence in the schedule to the BEA.

34. In contrast to this, however, to qualify as an extraditable offence in relation to extraditions to and from states within the Empire, the FOA of 1967 required that the 'acts or omissions *constituting the offence*' (my emphasis) or their equivalent, would constitute an *offence* against the laws of the UK had it occurred there. This was interpreted by the House[41] to mean that there had to be a matching correspondence between the ingredients i.e. the elements of the offences, in the requesting and requested states.

35. In 2008 the House held in *Norris*, [42] after reviewing case law pertaining to the earlier Acts and the decision of the Canadian Supreme Court in *McVey*[43] that, as the purpose of an extradition statute was to bring to justice those accused of serious crimes, a matter in which there was a 'transnational interest',[44] a broader, 'generous' construction which examined the conduct of an offender on which a requesting state sought to rely, was to be adopted when interpreting the provisions of the 2003 Act. Such a construction would avoid the need to always investigate the ingredients or elements of foreign offences, a problem which had long complicated and delayed extradition proceedings.[45] In this regard, it noted, as was pointed out in Canada in *McVey,* [46] that an offence/elements-based approach often required evidence as to the content and meaning of provisions of criminal law in a

[40] *Norris* n 15 para 67 referring to *In re: Nielsen* [1984] AC 606 and *Government of the USA v McCaffery* [1984] 1 WLR 867.
[41] *Government of Canada v Aronson* [1990] 1 AC 579; *Norris* paras 69-70.
[42] Note 15 paras 86-91.
[43] *USA v McVey* [1992] 3 SCR 475 at 513.
[44] *In re Ismail* [1999] 1 AC 320 at 326-327.
[45] Id para 89.
[46] Note 43 at 528.

foreign state, which could hamper the expeditious operation of extradition proceedings. Similar sentiments were expressed by the HCA in *Riley,* [47] where it was noted that an approach which placed primary emphasis on labels and a correspondence of the legal elements of offences, would frustrate the effectiveness of extradition arrangements between states with dissimilar systems of criminal law.

36. The House was of the view that adopting a broad, conduct-based approach, which was ‘almost universally followed’ (in this regard it referred to the UN Model Treaty on Extradition), would place UK law on the same footing as most of the rest of the common law world.[48] Consequently, the House held that the conduct test should be applied by having regard for the acts and omissions of an offender, as described in the documents that were lodged in support of a request for their extradition, ignoring ‘mere narrative background’.[49]

37. That the conduct-based approach is currently the one which is applied in extraditions involving the UK was confirmed in 2025 by the Supreme Court in *El-Khouri*,[50] a case which involved the extradition of an offender to the USA on charges of securities and wire fraud and conspiracy to commit such offences. The Supreme Court reiterated[51] that the determination which was to be made was whether the *conduct* specified in an extradition request would constitute an offence under UK law if it occurred there. Thus, the focus when applying the conduct-based approach was on the substance of the criminality alleged by the requesting state, rather than on the technical definition of its offences.[52]

38. In *O’Donoghue* [53](2008) and later *Zentai* [54](2012) the High Court of Australia similarly endorsed the conduct-based approach to extradition requests which involve Australia. The HCA referred,[55] with approval, to the commentary of Prof

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[47] Note 5 para 8.
[48] Id n 15 para 90.
[49] Para 91.
[50] *El-Khouri v Government of the USA* [2025] UKSC 3.
[51] Paras 13, 17 and 20.
[52] Id paras 64-66.
[53] Note 12 para 70.
[54] Note 12 para 23.
[55] *Zentai* id.

Bassouini (in his work on US extradition law and practice),[56] that the requirement of double criminality will be met for the purposes of an extraditable offence if the conduct of the offender is criminal in both the requesting and the requested state, even though it may not be defined identically by them. In this regard it appears that as early as 1922 the US Supreme Court also eschewed an elements-based approach when it held in *Collins*,[57] which concerned a request by Britain for the extradition of an offender to India on a charge of having 'feloniously obtained a pearl button', that it was not necessary that the name by which the crime was described in the two countries should be the same, or that the offender's scope of liability be 'co-extensive' in both.

39. In the HCA's view the double criminality principle does not require a 'precise correspondence' between the names or the elements of offences in the requesting and requested states.[58] It will be sufficient if an alleged offence against the law of the requesting state would necessarily 'involve' a criminal offence against the law of the requested state, had the acts constituting it been performed in the latter state.[59]

40. In 2009, a year after the decisions of the highest courts in the UK and Australia, the Canadian Supreme Court held in *Fischbacher,* [60] that in determining how the principle of double criminality should be satisfied in extradition proceedings, Canada's chosen approach was 'unquestionably' conduct based. Thus, extradition to and from Canada was permitted where the conduct underlying a foreign offence, had it occurred in Canada, would constitute an offence in terms of its law, however 'named or characterized'.[61]

41. In 2020 the Supreme Court of New Zealand was called upon to decide how the requirement of double criminality was to be met, in *Ortmann* ,[62] where the USA sought the extradition of offenders who were wanted on charges of racketeering,

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[56] Bassiouni *International Extradition: US Law and Practice* 5th ed (2007).
[57] *Collins v Loisel* 259 US 309 at 312.
[58] *Zentai* n 12 para 23, referring to the decision in *Riley* n 5 at 18.
[59] Id.
[60] Note 2 para 4.
[61] Id.
[62] Note 5.

copyright infringement, wire fraud and money laundering. It held[63] that as New Zealand's Extradition Act of 1999 provided that when making a determination as to an offender's extraditability, the totality of the acts or omissions which they were alleged to have committed had to be taken into account and it did not matter whether under the laws of the extradition country and New Zealand such acts or omissions were 'categorized or named' differently, or whether the 'constituent elements' of the offences which such acts or omissions might entail in the two states differed, the focus was on the conduct of the offender and not on the technical definitions of the possible offences of which the offender might be guilty, in either state.

Double criminality in our case law

42. Our case law on the application of the principle of double criminality in extradition matters has not been harmonious or consistent. Three of the decisions which require consideration emanate from this division.

43. As was pointed out, both parties contend that the decision of the CC in 2003 in *Geuking,* [64] is supportive of the positions they take. The appellants contend (with reference to para 39 of the judgment) that it endorses an offence or elements-based approach to the issue of double criminality, whereas the State contends (with reference to paras 40 and 45) that, properly read, it endorses a conduct-based approach.

44. Geuking had been convicted in the then Federal Republic of Germany ('the FRG'), with whom SA did not have an extradition treaty, on 2 counts of fraud and arson for which he was sentenced to imprisonment for a period of 2 years and 9 months. He fled after his appeal was unsuccessful. Four years later the FRG filed a note *verbale* with the SA authorities in which it requested the President to consent to his extradition, in terms of s 3(2) of the Act, so that he could serve his sentence and stand trial on a further 15 counts of fraud, to which request the President acceded.

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[63] Paras 35-36, 158 (citing *Norris*).

[64] Note 23.

45. Pursuant thereto a warrant was issued for Geuking's arrest, and he was brought before the magistrate for an enquiry in terms of ss 9(1) and 10(1), to determine whether he was liable to be surrendered. The DPP indicated that it intended to submit a certificate from the German authorities in terms of s 10(2) of the Act, at the enquiry. The section provides that for the purpose of satisfying himself that there is sufficient evidence to warrant the prosecution of a person who is sought to be extradited to a foreign state, the magistrate shall accept, as conclusive proof, a certificate which appears to have been issued by a competent authority in charge of the prosecution, which states that it has sufficient evidence at its disposal to warrant such prosecution. Geuking then made application to this court for an order reviewing and setting aside the President's consent and declaring that the section was unconstitutional. The court dismissed the application.

46. In his appeal to the CC, Geuking contended that whilst s 3(2) *required* the President's consent for an extradition it did not *empower* him to grant it, as this was a function and power which was to be exercised by the Minister,[65] and the fact that the President had not been informed at the time when he gave his consent that Geuking was a naturalized SA citizen, impugned the validity thereof. He also contended that s 10(2) violated his constitutional right of access to court, as it obliged the magistrate to commit him without being able to determine the merits of any underlying dispute as to his culpability or extraditability.

47. The CC held that neither of the points that were raised could succeed. In relation to the attack on s 10(2) Goldstone J pointed out that in terms of s 10(1) the magistrate was required to consider the evidence which was put before him in an extradition enquiry, and in order to issue a committal warrant had to be satisfied of and rule on, only two aspects viz that the extraditee was liable to be surrendered to the foreign state and that there was sufficient evidence to warrant his prosecution in that state.

48. To determine whether an extraditee (in a non-treaty case) was liable to be surrendered the magistrate in turn had to be satisfied that the President had consented to his surrender and that the offences for which he was to be extradited,

[65] In terms of s 11.

were extraditable ones. In this regard Goldstone J made reference to the definition of an extraditable offence in s 1 of the Act, which, as previously pointed out, defines it simply as an offence which in terms of the law of South Africa and of the foreign state concerned, is punishable with a sentence of imprisonment for a period of 6 months or more, and does not say anything, expressly, as to how it must be interpreted in relation to the requirement of double criminality.

49. In paragraph 39 of the judgment Goldstone J held that, as the determination of whether an *offence* was an extraditable one (within the meaning of its definition in s 1) required the magistrate to consider whether the evidence which was produced by the foreign state would 'constitute an *offence*' under the law of the Republic, sufficient detail of the alleged *offence* which had been committed by the extraditee would have to be placed before the magistrate. This could be done by way of a deposition, or a statement under oath or affirmation. The magistrate would then have to consider whether the evidence which had been so produced 'constituted an offence' in terms of our law. To this point the comments made are consistent with an offence-based approach and one can read them as having been made within the context of the preliminary threshold requirement in s 1 of the Act that, in order to be extraditable offences in terms of the Act, the offences for which extradition were sought were to be punishable in the FRG and SA with a sentence of imprisonment of 6 months or more. To make this determination the magistrate would obviously have to consider the definitional requirements of any possible SA offence that was identified and the sanction that could be imposed for it.

50. However, in para 40 Goldstone J went on to say that the name of the offence would not be determinative' as the question for consideration was whether the '*conduct*' which the evidence disclosed constituted an offence in our law which would be punishable with a sentence of imprisonment for a period of 6 months or more.[66] In para 45 he went on to state that, from his earlier analysis as to what the magistrate was required to consider it was clear that they had to be satisfied that the *conduct* alleged by the foreign state constitutes *criminal conduct* in this country. If the magistrate considered that the evidence which had been tendered did not disclose

[66] Para 40.

criminal conduct under SA law that would be the end of the matter. On the face of it, these comments are strongly supportive of a conduct-based approach being applicable.

51. In dealing with *Geuking* it is important to point out, as is evident, that it concerned a review of the decision of the President, made in terms of s 3(2) of the Act, to consent to an *ad hoc* request for extradition of an alleged offender to a state with whom SA did not have an extradition treaty. On this ground alone it is distinguishable from treaty-based extraditions in terms of s 3(1), such as the one in issue in this matter. In this regard, as was noted in the judgment[67] the grant of presidential consent to an *ad hoc* request for extradition is a policy decision which may be based on considerations of comity <u>*or*</u> reciprocity between SA and a requesting state. The President may therefore grant consent to a request for extradition purely out of comity, without the double criminality principle having to be satisfied on the basis of reciprocity, on either a conduct-based approach (where SA does not recognize that the conduct of the offender constitutes *any* offence in terms of our law,) or an elements-based one (where we do not have the same or a substantially similar offence in our law).

52. In this regard, *Geuking* was not called upon directly to determine whether a conduct or offence-based approach to double criminality applied in our law, in relation to either treaty-based extraditions in terms of s 3(1), or presidential consent-based ones in terms of s 3(2). There is no indication that, in arriving at its judgment, the CC had regard for the contents of any extradition treaties which SA had entered into. Thus, as I read the judgment, whilst the remarks made in it favour a conduct-based approach, they were *obiter* in relation to the issue of double criminality and were not specifically directed at a determination of how the principle is to be satisfied in *treaty*-based extraditions. In my view, read in their context they do not serve, unequivocally and clearly, to constitute authority for the adoption of a conduct-based approach to the substance of the principle of double criminality in *treaty*-based extraditions in SA.

[67] Para 26.

53. In *Van Rooyen* [68] the Gauteng High Court held, on appeal in 2014, that the requirement of double criminality had been met as the 25 charges of wire fraud and 26 charges of fraudulent misbranding of drugs, for which the appellant was sought in the USA, corresponded with the common law offence of fraud in SA. Thus, it appears that the court adopted an elements-based approach in that matter.

54. In *Carolissen,* [69] a 2016 decision of this court (per Gamble J, Donen AJ concurring), an appeal against an order that was made by the magistrate of Kuilsriver which held that the appellant was liable to be extradited to the USA to stand trial in a federal court in Maine on three counts of the sexual exploitation of a minor[70] and five counts of the transportation of child pornography, was unsuccessful. [71] The case which was put up by the US authorities in their request for extradition was that the appellant had sexually molested and raped several children in SA and had manufactured child pornography in SA which he distributed to persons in the USA. After the appellant's arrest on the US warrant the SAPS opened a local case against him on charges pertaining to sexual offences against children and the manufacturing, possession and distribution of child pornography.

55. In considering whether double criminality was established Gamble J referred, with approval, to the opinion expressed by Prof Dugard [72] (an eminent SA scholar and authority on international law), that although the principle requires that conduct which is alleged to be an extraditable offence should constitute a crime in both the requesting and requested state, it is not necessary that they should have the 'same name', and it is sufficient if they are 'substantially similar', an approach which Gamble J understood was supported by the *dictum* of Goldstone J in *Geuking* (at para 40). However, Goldstone J did not advocate for a 'substantially similar' test in *Geuking*, and as will be apparent from the earlier discussion of the decision of the House in *Norris,*[73] enquiring whether an offence in a requested state is

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[68] *Van Rooyen v S [*2014] ZAGPJHC 177; 2014 JDR 1583 (GJ) paras 31-32.
[69] Note 25.
[70] In violation of title 18 USC SS 2251 (c) and (e).
[71] Contra S 2252A(a)(1) of the USC.
[72] *International Law: A South African Perspective* 4th Ed at 219
[73] *Norris* n 15 para 67 referring to *In re: Nielsen* [1984] AC 606 and *Government of the USA v McCaffery* [1984] 1 WLR 867.

'substantially similar' to the one specified in an extradition request by a requesting state, is not the question to be asked if one adopts a conduct-based approach to double criminality. It is the question which is asked when applying an elements or offence-based approach.

56. In *Carolissen* the selfsame treaty which is in issue in this matter was operative, and Gamble J cited the contents of article 2.3(a) thereof, which provide that an offence shall be an extraditable one whether or not the laws of the requesting state and of the requested state 'place' it 'within the same category' of offences or describe it by the 'same terminology'. In his view the wording was in line with the trend which was followed by the US in its extradition treaties. [74] Notwithstanding this wording he referred to comments made by Michael Abbell, [75] an American writer and former official in the US Department of Justice, that, while dual criminality did not require that the provisions of the statutes of the USA and the requesting country should be identical in relation to the offences they criminalized in each state, they had to be 'substantially analogous', or directed at 'functionally identical conduct'. Whilst saying that statutory provisions in the requesting and the requested state should be directed at 'functionally identical conduct' favours a conduct-based approach, saying that they should be 'substantially analogous' seems to me to favour an elements-based one.

57. After setting out the provisions of the statutory molestation/rape offences for which the appellant was sought in the USA, in terms of title 18 of the USC, and comparing them with ss 20(1) and 20(2) of our Criminal Law (Sexual Offences and Related Matters) Amendment Act ('SORMA'), [76] Gamble J was of the view that the SA legislation corresponded with the American, by criminalizing 'similar conduct'.[77] In relation to the pornography charges he was of the view that the appellant would be liable in SA under the Films and Publications Act,[78] for contraventions that were 'similar in substance' to offences under which the US sought to indict him.[79] Thus,

[74] Paras 53-54.
[75] *Extradition to and from the United States* (2010), at 215.
[76] Act 32 of 2007.
[77] Para 58.
[78] Act 65 of 1996.
[79] Para 64.

as I understand the judgment in *Carolissen*, it effectively applied a 'substantially similar' offence approach i.e. an elements-based approach as well as a conduct-based one, or a mixture of the two.

58. In *Patel,*[80] (which was also heard in 2016)*,* the SCA confirmed that the double criminality principle was central to extradition law and that an extradition under our Act and the USA-SA treaty must be determined on the basis thereof and the threshold requirement of a minimum punishment of imprisonment for a year or more. The SCA did not pronounce what the applicable test was for determining how, and whether, the principle is established in an extradition application.

59. The appellant in that matter sought to avoid extradition to the USA on 12 counts of 'structuring', a statutory offence which is committed by making numerous, small deposits of cash into bank accounts, rather than single, large deposits which would require reporting to the authorities. The appellant contended that as the offences had allegedly been committed in the USA between 2005 and 2007, and the corresponding offences in this country [81] only came into being in 2010, the necessary requirement of double criminality had not been met. The question that required determination was whether double criminality should exist at the time of the commission of the offences for which extradition is sought, or whether it would be sufficient if it was present at the time of the request for extradition.

60. The SCA held that, with a view to providing more effective co-operation between SA and the USA in the fight against crime, double criminality needed to be present as at the date of the request for extradition and not on the date on which the offences were allegedly committed in the requesting state. Consequently, it held that the appellant had correctly been held liable for surrender to the USA.

61. The two remaining decisions which must be considered were handed down in 2025, by courts of this division. In *Wares,*[82] Gamble J (with Henney J concurring), had occasion to revisit the application of the double criminality principle. The appellant was sought for extradition to the UK, in terms of the EU Convention, on

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[80] Note 4 paras 8 and 16.
[81] In terms of the Financial Intelligence Centre Act 38 of 2001.
[82] *Wares v Additional Magistrate, Simonstown, Cape Town & Ors* 2025 (1) SACR 130 (WCC).

several charges of 'lewd and indecent practices and behaviour' in terms of Scottish Law, which had allegedly been perpetrated on teenage boys.

62. Gamble J rejected the appellant's contention that the test for double criminality in extraditions in terms of the Convention was an elements-based one, because of article 14(3) of the Convention. The article provides that when the description of an offence with which an extraditee is charged, is altered during the course of proceedings, the extraditee should only be prosecuted insofar as the offence, under its new description, is shown by its 'constituent elements' to be one which would allow extradition. He held that, properly construed, the provision had nothing to do with double criminality and was akin to one that dealt with the amendment of a charge-sheet. Given that article 14 deals with the rule of speciality i.e. the rule that an extraditee may not be prosecuted or sentenced for an offence other than the one for which he has been extradited, Gamble J's interpretation of article 14.3 was undoubtedly correct.

63. As far as double criminality was concerned, he went on to state[83] that, in his view, based on the remarks that were made (by Goldstone J) in *Geuking* [84] and (by him) in *Carolissen*, the conduct or 'fact'-based approach was settled law in SA. As the appellant had readily admitted before the extradition magistrate that the criminal *conduct* with which he was to be charged in the UK constituted the offences of sexual assault and rape in our law in terms of SORMA,[85] double criminality had therefore been shown. Thus, in this matter a conduct-based approach was followed.

64. The final matter which needs to be dealt with is that of *DPP, Western Cape v Louie*,[86] a decision (per Saldanha et Slingers JJ) in December 2025, in which the appellant was sought for extradition to the USA on several counts of conspiracy pertaining to 'drug trafficking', concerning the importation, possession and distribution of Buphedrone, a synthetic drug, contrary to the provisions of the US Controlled Substances Act; and money laundering in relation to the proceeds

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[83] Para 76.
[84] In paras 39-40 read with para 44.
[85] Para 80.
[86] *Director of Public Prosecutions, Western Cape v Louie* [2025] ZAWCHC 598; 2026 (1) SACR 345 (WCC).

thereof. Although Buphedrone is not classified as a dangerous, dependence-producing or 'banned' substance in terms of SA legislation, the State tendered evidence from a forensic analyst that it is 'homologous' i.e. chemically related, to Cathinone, a substance which is.

65. The magistrate discharged the appellant on the grounds that the necessary double criminality had not been shown. In reversing this decision and declaring that the appellant was liable to be extradited the court referred[87] to the same comment by Prof Dugard, which the court in *Carolissen* referred to i.e. that although double criminality requires that the conduct of an offender should constitute a crime in both the requesting and in the requested state, it is not necessary that the crimes in both states should have the 'same name', and it will suffice if they are 'substantially similar'. The court held that, given the forensic evidence which was tendered as to the chemical connection between Buphedrone and Cathinone, the SA offence was 'substantially similar' to the US offence and double criminality had therefore been established.[88] In the circumstances an elements-based approach was adopted in this matter, contrary to the decision in *Wares*.

An assessment

66. From the aforegoing analysis of foreign and domestic law, the following conclusions can be drawn. In the first place, unlike legislation in the UK and other, primary commonwealth countries, our old-order extradition Act, which dates from 1962, does not define what constitutes an extraditable offence, based on, or with reference to the *conduct* of an offender for whom extradition from or to SA is sought. In terms of our Act an extraditable offence is defined only in relation to a minimum punishment of imprisonment which must apply to it, in terms of our law and that of the foreign state concerned. In its formulation the definition mirrors, and is as anodyne, as that adopted by the EU Convention.

67. Whereas old-order extradition statutes in the UK were construed as providing for an elements/offence-based approach in determining whether the principle of double criminality has been satisfied, more recent iterations thereof and those in

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[87] Para 34.
[88] Para 76.

other primary commonwealth jurisdictions, including Australia, New Zealand and Canada, have been interpreted by the highest courts of those countries as opting for a conduct-based approach. As will be apparent from the discussion above and from what follows, in the formulations of their extradition legislation these jurisdictions essentially adopted the terms of the UN Model Treaty. So have numerous European and Asian countries.

68. Our Act allows for two forms of extradition: either in terms of an extradition treaty which we have entered into with a foreign state, or, where there is no treaty in place, pursuant to presidential consent which is provided on an *ad hoc* basis.

69. As far as the principle of double criminality is concerned, on the basis solely of the definition of what constitutes an extraditable offence in terms of s 1 thereof, our Act allows for the adoption of either approach, in either form of extradition we allow i.e. in extradition treaties we conclude, or in *ad hoc* extraditions which we agree to. In the circumstances, and in both forms of extradition, whether an elements/offence-based approach or a conduct-based approach to satisfying the principle of double criminality applies, will depend on the terms of the underlying agreement which has been entered into, either as per the treaty we have concluded or as per the *ad hoc* agreement granting presidential consent.

70. As we were not provided with any information as to the terms of any requests that have been made in, and *ad hoc* presidential consents that have been granted pursuant to, extradition requests in non-treaty cases, we are unable to say which of the two approaches to double criminality has been adopted in such instances, and whether there is a single, consistent pattern thereto. Given that *ad hoc* presidential consent extraditions would pertain to requests for surrender of individuals in respect of offences which are not specified in a treaty, it is as possible that they were granted on the basis of an elements-based approach, as a conduct-based one.

71. As to whether there is a discernable pattern regarding the approach which has been followed in treaty-based extraditions, the treaty which is in issue in this matter, which came into force on 29 June 2001, appears to be the second extradition treaty SA concluded post our transition to a constitutional state, a month

after the one we entered into with Canada .[89] Thereafter we concluded extradition treaties with the following countries, which came into force on the dates listed in parentheses: Australia (1 August 2001),[90] Lesotho (15 November 2001),[91] Egypt (14 November 2002),[92] the EU Convention (acceded to on 13 May 2003), the Republic of China (1 November 2004),[93] India (16 November 2005),[94] Korea (signed on 3 May 2007 but not yet in force), Hong Kong (2 December 2011),[95] Argentina (14 July 2017),[96] and the UAE (10 July 2021).[97]

72. Save for the EU Convention and the Hong Kong treaty, from a perusal of the terms of the other treaties we have entered into it appears they all largely follow, in almost identical format and wording, the UN Model Treaty on extradition, which sets out conditions which will apply as a conduct-based approach to double criminality.

73. To this end article 2.1 of the Model Treaty provides that an extraditable offence is one which is punishable under the laws of the parties by imprisonment for a period of at least 2 years or more and article 2.2 provides that, in determining whether an offence is so extraditable, it shall not matter whether the laws of the parties (a) place 'the acts or omissions constituting the offence' (i.e. the offender's alleged conduct) within the 'same category' of offences or 'denominate it by the same terminology' (b) whether under the laws of the parties the 'constituent elements' of the offences differ, it being 'understood' that the totality of the acts and omissions as presented by the requesting state shall be taken into account.

74. The extradition treaties we concluded with Canada, Australia, and Argentina have adopted variations of both sub-provisions of article 2.2 in their formulation. Those we concluded with the USA (the one which is in issue in this matter), Egypt, Hong Kong and the UAE, differ somewhat, and none of them expressly incorporate the

[89] GG 7063 18 May 2001
[90] GG 7132 1 August 2001.
[91] GG 26375 28 May 2004.
[92] GG26497 2 July 2004.
[93] GG 27168 21 January 2005.
[94] GG 28680 7 April 2006.
[95] GG 35640 30 August 2012.
[96] GG 40978 14 July 2017.
[97] GG 46164 1 April 2022.

provisions of article 2.2(b) of the Model Treaty, which refers to the constituent elements of offences.

75. The question that arises from this is whether, because the treaty in this matter does not pertinently include a reference to the constituent elements of the offences in the requesting and requested states in extraditions between SA and the USA, it is open to an interpretation that it advocates an elements-based approach and excludes a conduct-based one.

76. In answering this question, the following principles of interpretation are applicable. In the first place, as was pointed out in *Patel,* [98] as one is dealing with a treaty its terms are to be interpreted in accordance with the principles of interpretation that are set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which was adopted by the UN in May 1969 and came into force in January 1980.

77. Article 31(1) provides that a treaty shall be interpreted in good faith in accordance with the 'ordinary meaning' which is to be given to its terms 'in their context and in the light of its object and purpose'. Article 31(2) provides that the context shall, in addition to the text, which incorporates its preamble and annexes, include any agreement or instrument relating to the treaty which was made by the parties, in connection with its conclusion. Article 32 provides that in order to confirm the meaning of a treaty, resulting from the application of article 31, or to determine its true meaning when an interpretation according to article 31 leads to an ambiguous or obscure meaning or a result which is manifestly absurd or unreasonable, regard may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances leading up to its conclusion.

78. It will be evident that the interpretive principles set out in articles 31 and 32 coincide substantially with those that are applicable in our law, to the interpretation of any agreement or statutory instrument, as set out in the oft-cited decision in *Endumeni*.[99] In this regard, as recently summarized in *Amabhungane* [100] the method that applies is to start with the words, affording them their ordinary

[98] Note 4 para 35.
[99] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18
[100] *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (1) SA 1 (CC) para 36.

meaning, bearing in mind that the statutory provision should always be interpreted purposively, properly contextualized, and construed consistently with the Constitution. Context may be determined by considering other subsections, sections, or the chapter in which the key word or expression to be interpreted is located, and the statutory instrument as a whole. A sensible interpretation should be preferred to one that is absurd or which leads to an unbusinesslike outcome.

79. In the second place, our interpretation must, as far as possible, be compliant with international law, [101] and in the interests of comity, must be such as to give the widest possible effect to our international obligations in terms of the Treaty.

80. Thirdly, our interpretation must be consistent with the Constitution, and thus insofar as the fundamental human rights of freedom of movement, liberty and dignity are implicated, our interpretation must be one that gives consideration to international and foreign law, and promotes the values that underlie an open and democratic society based on dignity, equality and freedom.[102]

81. As there is no 'and' or 'or' between sub-articles 2.2(a) and (b) of the UN Model Treaty, it is not apparent whether the two provisions are to be read conjunctively or disjunctively. On my reading of the article as a whole, a sensible interpretation requires that they are to be read disjunctively. I arrive at such an interpretation because of the injunction at the end of article 2.2(b), that the 'totality of the acts or omissions' as presented by a requesting state must be taken into account. The injunction would not make sense if it were only to apply to article 2.2(b) and not to article 2.2(a), as article 2.2(a) also makes refence to 'acts and omissions'. The 'acts or omissions' contemplated in sub-article 2.2(a) are those which constitute the offence, and thus pertain to the *conduct* of an offender, whereas those referred to in sub-article 2.2(b) pertain to the *constituent elements of the offence* the offender is alleged to have committed. Thus, as I understand it, the intention was to make article 2 applicable in requesting and requested states, even if the formulation of their laws allow for differing conduct and elements-based

[101] *Glenister v President of the Republic of South Africa* [2011] ZACC 16; 2011 (3) SA 347 (CC) para 97; *National Commissioner of Police v South African Human Rights Litigation Centre & Ano* [2014] ZACC 30; 2015 (1) SA 315 (CC) para 22.

[102] Sections 39(1) and (2) of the Constitution.

interpretations of extraditable offences, so there will be no disjunct in its application in and between the two states.

82. There is an important difference between the wording of article 2.3(a) of the treaty in this matter, which provides that an offence shall be an extraditable one whether or not the laws in the requesting and requested states place *the offence* within the same category of offences or ‘describe the offence by the same terminology’ i.e. its denomination, and that of article 2.2(a) of the UN Model Treaty, which provides that it shall not matter whether the *acts or omissions constituting the offence* i.e the *conduct* of the offender, fall within the same category of offences, or the offences are denominated by the same terminology.

83. Thus, the wording of article 2.3(a) of the Treaty is aimed at excluding differences pertaining to the definitions, and therefore the constituent elements of, the offences in the two states, whereas that in the wording of article 2.2(a) of the Model Treaty is aimed at excluding differences pertaining to the conduct of the offender.

84. On my understanding, by stipulating in the Treaty in issue that differences pertaining to the categorization and denomination of *offences* shall not matter when determining whether an offence listed by a requested state in an application for extradition is an extraditable one, the contracting parties intended to exclude any differences in the elements or ingredients of the offences in their states. This means that, contrary to the conclusion that was arrived at by the magistrate, they intended to exclude the elements/offence-based approach in extraditions between the USA and SA and implicitly intended that the conduct-based approach should apply.

85. That the intention was to adopt a conduct-based approach to USA/SA extraditions in terms of the Treaty and not an elements-based one, is supported by article 2.3(b), which provides that an offence shall be an extraditable one whether or not it is one for which US federal law requires the ‘showing of such matters’ as ‘interstate transportation’ or the use of the ‘mails or of other facilities affecting interstate or foreign commerce’, and such matters are to be considered as ‘being merely for the purposes of establishing jurisdiction’(sic), in a US federal court.

86. In the indictments which charged the appellants with conspiracy to commit money laundering it is alleged that, in violation of Section 1956 of Title 18 of the US Code, they unlawfully conducted financial transactions affecting interstate and foreign commerce which involved the proceeds of the unlawful activity of wire fraud, which was committed by way of the internet, thereby transporting monetary instruments or funds pertaining to such activity from the USA to, or through, places outside of it.

87. Given that in terms of article 2.3(b) of the Treaty the elements of interstate transportation and the use of mail facilities and those affecting interstate or foreign commerce as alleged in the charges the appellants are facing were not relevant to the determination of whether they were to be surrendered for extraditable offences (other than to establish the jurisdiction of the courts to which they were to be extradited), this too is an indication that the intention of the parties was to exclude an elements-based approach to the issue of double criminality.

88. Insofar as the magistrate relied on the SA-Hong Kong extradition treaty to arrive at her conclusion, as in the case of all the other treaties SA has entered into it contains a minimum punishment threshold of imprisonment (in *casu* for a period of a year or more).[103] Article 2(1) of the treaty goes on to provide that extradition shall be granted for an offence which 'comes within the descriptions' (sic) of a long list of specified offences, ranging from offences against persons (including genocide, murder, manslaughter, trafficking and sexual offences of rape and sexual assault), to offences pertaining to property (such as theft, robbery, burglary, embezzlement, extortion), or 'fiscal matters' involving fraud, forgery or uttering, bribery, corruption, securities and futures trading and bankruptcy and insolvency contraventions.

89. At first blush, given the wording of article 2 and its reference to the 'descriptions of offences', it would seem to suggest that an elements-based standard was to be applicable. However, what the magistrate was not alerted to is that article 2(3) provides that for the purposes of the article as a whole, the totality of the acts or omissions alleged are to be taken into account, without reference to the elements of the offences presented by the law of the requesting state. In addition, article 2(4)

[103] Article 2(1).

provides that an offence shall be an offence against the law of both parties if the *conduct* constituting the offence was an offence against the law of the requesting party at the time it was committed and an offence against the law of the requested state at the time of the request for the surrender of the offender. Thus, the SA-Hong Kong treaty has also adopted a conduct-based approach to double criminality.

90. In the result, in my view the USA-SA Treaty, which is in issue in this matter, envisages that a conduct-based approach is to be adopted when considering whether the double criminality principle has been satisfied in any extradition request as between the USA and SA.

91. In the application of such an approach, in accordance with the test which has been adopted by the courts of the UK, Australia, New Zealand and Canada, and the UN Model Treaty, the conduct of the offender i.e. the totality of the acts and/or omissions they are alleged to have committed in the requesting state must be taken into account, not the description or denomination of the offences which they are alleged to have committed and for which extradition is sought, in and in terms of, the laws of the requesting state. If such conduct, had it been committed in the requested state, would constitute *an* offence in terms of the laws of the requested state, double criminality will be established. In applying this approach, the focus is to be on the nature of the conduct [104] of the offender and not upon the name or elements of the offence in either state. Thus, whether the laws of the two states categorize or denominate the offences which the offender may be guilty of, in their jurisdictions, as the same, or substantially similar or analogous insofar as their constituent elements are concerned, is not required or relevant.

92. In the circumstances, in our view the 'substantially similar' offence test or approach which was adopted in *Carolissen* and *Louie*, was not the correct one.

93. From a consideration of the contents of all the other extradition treaties that SA has entered, into, as referred to above (save for the EU Convention, whose terms as to what constitutes an extraditable offence correspond with those in our Act and do not expressly reference the formulations set out in the UN Model Treaty), it is

[104] *Ortmann* n 5 para 158.

evident also that a conduct-based approach is generally followed in our country, in treaty-based extraditions.

94. Given this, we suggest that the method which magistrates should follow when holding an extradition inquiry[105] as to whether a person is liable to be extradited to, or from, a foreign state with whom we have entered into any of the treaties referred to above, should be that which was propounded by the Supreme Court of New Zealand in *Ortmann.* [106] This requires that the magistrate determine the issue of double criminality, by asking three questions, to wit 1) does the *conduct* relied upon by the requesting state constitute an extraditable offence as defined in the treaty 2) does such *conduct* constitute an offence in the requesting state, which is punishable in such state, with a sentence of imprisonment equal to or in excess of the minimum threshold prescribed 3) had the *conduct* alleged to constitute the offence in the requesting state, occurred in the requested state, would it be punishable in such state with a sentence of imprisonment equal to or in excess of the minimum threshold prescribed.

95. By applying this method and having regard for the documents filed in support of the request for the appellants' surrender, we arrive at the following conclusions. The alleged conduct of the appellants i.e. the acts and omissions that make it up, were committed over the internet, across both the USA and SA, from residences in SA. These acts and omissions constitute extraditable offences in terms of article 2 of the Treaty. In the USA they constitute the offences specified in the indictments viz wire fraud and aggravated identity theft, and a conspiracy to commit such offences, as well as money laundering, in terms of various sections of title 18 of the US Code, all of which are punishable with terms of imprisonment in excess of one year.

96. The fact that SA does not have statutory offences of wire fraud and aggravated identity theft is immaterial. The alleged conduct of the appellants, in 'stealing' the identities of other persons and using them to establish false online personas, to enable them to make false misrepresentations and thereby induce victims in the

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[105] In terms of s 10 of the Act.

[106] Id para 151.

USA and elsewhere to part with sums of money to their prejudice, which was largely committed from and within SA, constitutes in SA 1) the common law offence of fraud and 2) statutory offences of cyber fraud and cyber forgery and uttering, in contravention of various provisions[107] of the Cybercrimes Act, [108] which, given the nature and seriousness of the offences and the amounts involved, would merit sentences of imprisonment well in excess of one year.[109] The alleged conduct of the appellants in 'laundering' the proceeds which they derived from these unlawful activities, through various bank accounts, and structures and entities in various countries, had it been committed in SA (if it was not), would constitute contraventions of the Prevention of Organized Crime Act, [110] for which sentences of imprisonment of up to 30 years may be imposed.

97. In the circumstances, the magistrate correctly held that the appellants were liable to be surrendered to the USA, albeit for the wrong reasons.

98. In the court a *quo* the appellants advanced several additional complaints relating to the lawfulness of domestic search and seizure operations, the admissibility of evidence, and their wrongly alleged association, by the US authorities, with an international criminal organization the Neo Black Movement of Africa (NBMA), also known as 'Black Axe'. The appellants contended that the Neo Black Movement was a legitimate Pan African organization to which they belonged which has, as its principal objects and tenets, the promotion and support of African culture and values and was not a criminal organization or association which is affiliated with, or which is part of, the Black Axe movement.

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[107] Section 8 provides that a person who unlawfully and with intent to defraud makes a misrepresentation (a) by means of a data or computer program or (b) through any interference with data or a computer program, data storage medium or computer system; which causes actual or potential prejudice to another, is guilty of an offence. Section 9(1)(a) provides that any person who unlawfully and with intent to defraud makes false data to the actual or potential prejudice of another person, is guilty of the offence of cyber forgery; and in terms of s 9 2) if they pass off false data to the actual or potential prejudice of another, they shall be guilty of cyber uttering.

[108] Act 10 of 2020.

[109] In terms of s 19(4) of the Cybercrimes Act, a contravention of ss 8 or 9 thereof is punishable with such sentence of imprisonment or other punishment, as may be considered appropriate, in terms of s 276 of the Criminal Procedure Act 51 of 1977.

[110] Section 4, read with s 2 of Act 121 of 1998, which makes it an offence to conceal or disguise the nature, source, location, disposition, or movement of property which is the proceeds of unlawful activities.

99. These matters did not fall within the scope of the s 10 enquiry. As held in *Robinson*,[111] the magistrate was not empowered to determine the admissibility or reliability of the evidence which was tendered, or to adjudicate any alleged constitutional infringements arising from the conduct of local law enforcement authorities. Those issues are for the trial court in the requesting state or, where appropriate, for the Minister's consideration under s 11.

100. The evidence which formed the basis of the request for extradition was obtained and certified prior to the appellants' arrest in SA. Allegations concerning the manner of the appellants' arrests, the execution of the arrest warrants, and the seizure of the appellants' devices therefore did not affect the validity of the documents that were tendered by the US authorities. Likewise, the alleged wrongful conflation of the appellants' membership of NBMA with an international criminal organization known as 'Black Axe', did not affect the validity of the processes that were followed in terms of the Act. It appeared only as background to the narrative which was set out by the US authorities and did not form part of any of the essential elements of the charges for which extradition was sought.

101. In our view, none of these residual complaints establish procedural unfairness or undermine the magistrate's orders under s 10(1).

102. Finally, before proceeding to make the appropriate order, it may be pointed out that although in their notices of appeal the appellants sought to contend 1) that the magistrate erred in accepting the certificates that were tendered by the US State Attorneys in terms of s 10(2) of the Act, as conclusive proof that the US authorities have sufficient evidence at their disposal to warrant their prosecution and 2) that in effect s 10(2) was unconstitutional, as it may not allow offenders to contest bogus or false certificates which are totally unfounded, during the hearing of argument the appellants' counsel indicated that they were no longer proceeding with these grounds of appeal. There is, accordingly, no need for us to deal with them. Whilst logic and fairness dictates that there may be instances where an extraditee should not be irrefutably bound to a s 10(2) certificate (in *Fischbacher*[112]

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[111] *Director of Public Prosecutions Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC) paras 51 and 71.

[112] Note 2 para 40.

the Canadian Supreme Court suggested this could be where the underlying evidence tendered in support of a certificate is so defective or appears to be so unreliable that it would be 'dangerous or unsafe' to act on it), this is not one of them.

103. In the result we make the following order:

1. First, Third, Fourth, Fifth, Sixth and Eighth Appellants' appeal against the order which was made by the magistrate of Cape Town on 19 February 2024 in terms of s 10(1) of the Extradition Act, 67 of 1962 ('the Act'), whereby 1) it was held that they are liable to be extradited to the United States of America and 2) they were committed to prison whist awaiting the decision of the Minister of Justice and Constitutional Development as to their surrender, is dismissed.

2. The Registrar shall provide a copy of this judgment to the magistrate of Cape Town, for inclusion in the record of the proceedings which were held in the extradition enquiry in terms of s 10 of the Act, which record is to be submitted to the Minister by the magistrate together with such report as may be necessary, in terms of s 10(4).

[redacted]

M SHER

Judge of the High Court

[redacted]

A BHOOPCHAND

Acting Judge of the High Court

<u>Appearances</u>:

Appellants' counsel: J Van der Berg

Appellants' attorneys: Liddell, Weeber & Van Der Merwe Inc (Cape Town)

Respondent's counsel: LJ Badenhorst (DPP, Cape Town)