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PART I

INTERNATIONAL LAW IN GENERAL

IV.—Relation to Municipal Law

International law in general—Relation to municipal law—Treaties —Federal State—Effect of conclusion of treaty by Federal Government on legal powers of States—The law of Australia

See p. 181 (*Koowarta* v. *Bjelke-Petersen*).

International law in general—Relation to municipal law—Treaties —Federal State—Effect of conclusion of treaty by Federal Government on legal powers of States—The law of Australia

See p. 266 (*Commonwealth of Australia* v. *State of Tasmania*).

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PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

States as international persons — Sovereignty and independence — Conduct of foreign relations—Foreign relations power in a federal State—Effect of conclusion of treaty by Federal Government on legal powers of States—The law of Australia

See p. 181 (*Koowarta* v. *Bjelke-Petersen*).

States as international persons — In general — Sovereignty and independence — Conduct of foreign relations — Foreign relations power in a federal State — Effect of conclusion of treaty by Federal Government on legal powers of States—The law of Australia

See p. 266 (*Commonwealth of Australia* v. *State of Tasmania*).

D—RECOGNITION

I.—Of States

States as international persons — Recognition — Of States — Implied recognition—Consequences of international refusal to recognize entity as a State — Rhodesia — State succession — The law of South Africa

See p. 3 (*State* v. *Oosthuizen*).

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E—STATE SUCCESSION

X.—In Matters of Extradition

States as international persons—State succession—In matters of extradition—Treaty of extradition with British colony—Unilateral declaration of independence of colony—Whether treaty continues—Rhodesia—The law of South Africa

STATE *v.* OOSTHUIZEN

South Africa, Supreme Court, Natal Provincial Division. 31 *August* 1976

(Van Heerden and Kriek JJ.)

SUMMARY: *The facts*:—In 1965 an extradition agreement was in force between South Africa and the British colony of Southern Rhodesia. On 11 November 1965 the Prime Minister of Southern Rhodesia made a unilateral declaration of independence. South Africa did not formally recognize the new State, nor was there any evidence that recognition had taken place tacitly. The main issue before the Court was whether the extradition agreement was still in force notwithstanding the unilateral declaration of independence.

Held:—The extradition agreement was not in force between South Africa and the new "State" of Rhodesia. The fact that Rhodesia did not enjoy international recognition did not mean that it was not a State, but the new Rhodesia was not the entity with which the agreement had been concluded. There was no information before the Court regarding either South Africa's or Rhodesia's intentions in connection with the continued existence of the agreement.

The following is the text of the judgment of the Court:

The appellant has noted an appeal against an order issued by a magistrate, in terms of the provisions of sec. 12 of Act 67 of 1962, that he be extradited to Rhodesia.

The magistrate held that it had been proved that:

(1) . . . the documents on which the State's application was based were in order;

(2) . . . the offences for which the accused was to be charged were extraditable offences, in terms of the extradition agreement;

(3) the extradition agreement as proclaimed in Proc. 151 of the *Gazette Extraordinary* 1156, dated 25/6/1965, was still in force as far as the Republic of South Africa and Rhodesia were concerned.

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Mr Combrink conceded on appellant's behalf that the first two of these findings were incontestable. In respect of the third finding he argued that the magistrate

> erred in finding that the agreement in terms whereof respondent had brought the application had remained in force notwithstanding the fact that the Federation of Rhodesia and Nyasaland had dissolved and further that Rhodesia was declared unilaterally independent.

It was formally admitted by the State that Rhodesia had declared unilateral independence on 11 November 1965 and that since then she had acted as an independent State, the Republic of Rhodesia, and no longer recognized the authority of the British Crown. It was common cause that at least until the date of the declaration of independence the extradition order proclaimed in Proc. R. 151 of 1965 (whereto I shall henceforth refer as "the agreement") had been in force—*cf. State* v. *Eliasov,* 1967 (4) S.A. 583 (A.D.)[1]—and that if it was still in force, this appeal could not succeed. The only question therefore, is whether the agreement is still in force notwithstanding the unilateral declaration of independence.

Before the magistrate, neither the State nor the defence adduced any oral evidence; all that the magistrate had had before him was:

(*a*) A warrant for appellant's arrest, issued by a Rhodesian magistrate.

(*b*) An affidavit by Rhodesia's Attorney-General—

(i) wherein he quotes the statutory provisions averred to have been contravened by appellant and the relevant penal provisions;

(ii) attached to which was a copy of the indictment against the appellant;

(iii) wherein he states that appellant was not for any valid reason absolved from prosecution in respect of the alleged offences, and that in his opinion the warrant (mentioned in (*a*) above) had been properly issued.

There was no evidence whatsoever before the magistrate, either oral or written, regarding the continued existence or otherwise of the agreement and the appellant's only resistance against the application was that which is now also being argued before us.

The relevant facts, in my opinion, are the following:

1. When the agreement was concluded Rhodesia was a British Crown Colony.
2. Since 11 November 1965 Rhodesia has acted as an independent State.
3. It is generally known that South Africa (like all other countries) did not give any formal recognition to the "new" Rhodesia,

[1 52 *I.L.R.* 408.]

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but, although judicial cognisance cannot be taken of this fact, the State did not prove that such recognition was in fact given. The State also did not adduce any evidence justifying the inference that recognition by South Africa had taken place tacitly. That recognition can take place in this manner is clear (Starke, *An Introduction to International Law,* 5th ed., pp. 127, 128).

4. The fact that Rhodesia does not enjoy international recognition, does not mean that it is not a State (1969 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg,* p. 330), but the "new" Rhodesia is not the Rhodesia with which the agreement was concluded.

The change in Rhodesia's status and the effect thereof on the continued existence of the agreement raises the "somewhat controversial question" mentioned by Ogilvie Thompson, C.J., in *State* v. *Devoy,* 1971 (3) S.A. 899 (A.D.) at p. 904.[2] At p. 905 the learned CHIEF JUSTICE reached the following conclusion regarding this question[3]:

> Having regard to the aforegoing it does not appear to me to be possible to formulate any universal international law rule regarding the continuation or otherwise of treaties consequent upon the dissolution of the Federation of Rhodesia and Nyasaland. Each case must, I think, be decided upon the particular facts relating to it, but, specifically as regards extradition treaties, at the same time also bearing in mind the existence of a general tendency in favour of their continuance. It may here not inappositely be mentioned that Starke (*op. cit.* p. 280), after stating that
>
> > 'State practice on the subject is unsettled and full of inconsistencies', goes on to say that 'it is, however, a sound general working rule . . . to ascertain what was the intention of the State or States concerned as to the continuance or passing of any rights or obligations'.
>
> It is against the above background that the extradition treaty presently in issue should, in my opinion, be examined;

In that case there were before the Court:

(i) a certificate by the Minister of Justice (see 1971 (1) S.A. at p. 361) wherein it was indicated that the South African government considered itself bound to the extradition agreement relevant in that case;

(ii) a certificate by Malawi's Director of Public Prosecutions and Attorney-General wherein steps by the government of Malawi, with the aim of ensuring the continued existence of the agreement in question, were set out (see 1971 (1) S.A. at p. 360).

On the basis of the information in these two certificates, the Court *a quo* and the Appellate Division held that both South Africa and Malawi had intended that the agreement concerned should continue to exist and that it had continued to exist.

[2 55 *I.L.R.* 89 at 91.]
[3 *Ibid.* at 92.]

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In the present case there is no information whatsoever, regarding either South Africa's or Rhodesia's intentions in connection with the continued existence, or not, of the agreement and consequently I am of the opinion that the magistrate's finding that the agreement is still in force is incorrect.

The appeal succeeds and the magistrate's order that appellant be extradited to Rhodesia is set aside.

VAN HEERDEN, J., concurred.

[Report: 1977 S.A. Translation 199 and 1977 (1) S.A. 823.]

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PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

ix.—Irregular Apprehension

Jurisdiction — In general — Territorial jurisdiction — Irregular apprehension—Alleged irregular apprehension and arrest on foreign soil—Whether a violation of public international law—Whether a bar to jurisdiction of court—The law of South Africa

NDHLOVU AND ANOTHER *v.* MINISTER OF JUSTICE AND OTHERS

South Africa, Natal Provincial Divison. 9 July 1976

(Van Heerden J.)

SUMMARY: *The facts*:—The plaintiffs, South African-born citizens, had been residing in the Kingdom of Swaziland where they had been granted political asylum. They had been taken into custody by members of the South African police on the border between Swaziland and South Africa and had been brought before the Court on criminal charges. They applied for an order that they be returned, alleging that the Court lacked jurisdiction since they had illegally been taken into custody on the Swaziland side of the border in violation of Swaziland sovereignty. The defendants disputed these allegations.

Held:—The Court had jurisdiction to try the plaintiffs even if they had been taken into custody in the territory of Swaziland. A State had jurisdiction to punish a person who had been arrested in violation of public international law for an offence committed against the laws of that State.

The following is the text of the judgment of the Court:

[250] VAN HEERDEN, J.: The two applicants, hereinafter respectively referred to as the first and second applicants, stand indicted, with eight co-accused, upon charges under the Terrorism Act, 83 of 1967, alternatively, under the Suppression of Communism Act, 44 of 1950, allegedly committed during the period from 23 November 1973 to 25 March 1976. The accused were all

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brought before this Court in Criminal Session on 14 May 1976, when they were remanded for trial to 12 July 1976. The present is an application against the five respondents, being the Ministers of Justice, Police, Prisons, [251
Interior and Foreign Affairs of the Republic of South Africa, for an order that the applicants be returned, or be permitted to return, to within the territorial limits of the Kingdom of Swaziland and that the criminal trial above referred to be withdrawn against them or be suspended until such time as they are lawfully brought within the territorial limits of the Republic. I will hereinafter refer to the Republic of South Africa as the Republic. I would have preferred more time to prepare a judgment but, as this is a matter of urgency, this being Friday with the trial set down for Monday, and having heard argument for two days and having come to a firm view in regard to the outcome, it is convenient that judgment should be given immediately.

The applicants are both South African-born citizens who, at the time of the occurrences forming the basis of this application, were and for a number of years had been residing in the Kingdom of Swaziland where they had been granted political asylum, the first applicant in 1968 and the second applicant in 1964. It is common cause that they were taken into custody by members of the South African Police on the night of 25 March 1976 on the border between Swaziland and the Republic at a point between Pongola and Piet Retief. The crucial factual point in issue, apart from certain other legal issues, is whether they were taken into custody on the Swaziland side of the border, as alleged by the applicants, or on the Republican side, as alleged on behalf of the respondents. If it was on the Swaziland side it amounted, so the applicants contend, to a violation of Swazi sovereignty and consequently both the apprehension and subsequent detention of the applicants were illegal, more particularly as there has been no waiver, so it is contended, by the Swaziland Government of its rights in respect of the applicants and, this being so, this Court has no jurisdiction to try them. No such difficulty arises if they were taken into custody on the Republican side of the line. The border at the point in question, as is also depicted in the photograph filed with the papers, is marked by a wire fence along the Republican side of which a road runs.

Counsel were agreed, correctly in my view, that the *onus* rests upon the applicants to establish on a preponderance of probabilities that they are at present in unlawful detention. That the *onus* is on the applicants is in accord with general principles and finds direct support in *Abrahams* v. *Minister of Justice and Others*, 1963 (4) S.A. 542 (C) at p. 545. See also *Bozzoli and Another* v. *Station Commander, John Vorster Square, Johannesburg*, 1972 (3) S.A. 934 (W) at p. 939. The applicants have in discharge of the *onus* upon them set out to prove that they were kidnapped upon Swaziland soil by members of the South African Police and that the Swaziland Government has demanded their return as it had not waived its rights in respect of the applicants. It is pointed out that there is an extradition agreement between the two governments. See article by C. J. R. Dugard, "The Extradition Agreement between South Africa and Swaziland" (1969) 86 *S.A.L.J.* 88.

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Mr. *Muller*, who argued the matter on behalf of the applicants, submitted that on this issue there is a dispute of fact which cannot be resolved on affidavit. Mr. *Booysen*, who appears for the respondents, on the other hand, submitted that the issue could be decided on the papers. The manner in which a matter of this nature should be approached by the Court has been enunciated in numerous cases: *Peterson* v. *Cuthbert & Co. Ltd.*, 1945 A.D.
[252] 420; *Room Hire Co. (Pty.) Ltd.* v. *Jeppe Street Mansions (Pty.) Ltd.*, 1949 (3) S.A. 1155 (T). A Court will not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. *Soffiantini* v. *Mould*, 1956 (4) S.A. 150 (E). It will in every case examine the quality of the evidence in relation to the apparent dispute to see whether it cannot be satisfactorily determined without the aid of oral evidence. It has been held that it does not follow that because, and even if, evidence is uncontradicted, therefore it is true. It may be so improbable that it cannot be accepted. *Siffman* v. *Kriel*, 1909 T.S. 538 at p. 543; *Minister of Justice* v. *Seametso*, 1963 (3) S.A. 530 (A.D.) at p. 534; *Da Mata* v. *Otto, N.O.*, 1972 (3) S.A. 858 (A.D.).

The evidence of the applicants to explain their presence at the Swaziland border on the night in question, Mr. *Booysen* submitted, is highly improbable to the extent of being palpably false.

[The learned Judge analysed the evidence and concluded].

I am satisfied that the applicants have failed to discharge the *onus* which rests upon them to establish that they were taken into custody on the Swaziland side of the border. There is some suggestion that the Swaziland authorities have demanded the return of the applicants but, although this has been put in issue, the evidence in support of it is of a hearsay and inconclusive nature.

The above finding concludes the matter on this part of the arguments. Mr. *Booysen*, however, also made the alternative submission that, even if the applicants were caught on Swaziland soil, they are nevertheless not entitled to be released. Mr. *Muller* contended for the opposite. In developing his argument on this submission, Mr. *Booysen* referred to the evidence which is broadly common cause and in any event not seriously disputed as to what happened at the fence and thereafter. This evidence is to the effect that after the applicants had been taken into custody, or kidnapped as it is also put (leaving aside now on which side of the fence this took place), they were taken to Colonel Dreyer who was in charge of the whole operation and who was waiting in his vehicle 15 kilometres away; Dreyer identified himself to them and informed them that they were being arrested and detained in terms of sec. 6 (1) of the Terrorism Act, 83 of 1967; on 8 April 1976 they were transferred from the Natal Division of the South African Police to the Port Natal Division thereof which is under the command of Colonel Steenkamp and on 14 May 1976, as already mentioned, they appeared before the Criminal Session on remand to 12 July 1976 for trial with an order by the Court that they be detained in custody. There is at present also in existence an order by the Deputy Attorney-General of Natal under sec. 12 (A) of the Suppression of Communism Act, 1950, as amended by sec. 6 of Act 79 of

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1976, that the applicants should not be released on bail or otherwise until sentenced or discharged. In view of the conclusion to which I have come in the matter it is not necessary for me to deal with the submissions which were made in regard to the effect of this order.

Mr. *Booysen* on the above facts submitted that, irrespective of where they were overpowered, the applicants were arrested in terms of sec. 6 of the Terrorism Act on Republican soil and legally detained under that Act until they were indicted upon charges which are offences under South African law and that they were properly brought before the Court for formal remand to the date of their trial. Their present detention, Mr. *Booysen* submitted, is therefore lawful and the fact that they might have been kidnapped beyond [253] the borders of the Republic is legally irrelevant. There is strong support for this submission in *Abrahams'* case, *supra*. Mr. *Muller*, on the other hand, whilst not seriously disputing that they were *arrested* by Dreyer on South African soil, submitted, firstly, that a person is fraudulently deprived of his liberty, quite apart from the territorial rights of another sovereign being invaded, if he is captured beyond the territorial limits of the seizing power and in support of this he cited *Voet*, 48.3.2, which reads as follows:

> "Accused may not be chased or taken in another jurisdiction.—So far however must the limits of jurisdiction be observed in seizing a person accused of crime that, if the Judge or his representative pursues him when he has been caught in the Judge's own area and has taken to flight, he nevertheless cannot seize or pursue further than the point at which the accused has first crossed the boundaries of the pursuer. A Judge is regarded as a private person in the area of another and thus he would in making an arrest in that area be exercising an act of jurisdiction on another's ground, a thing which the laws do not allow. The author next mentioned below however takes a contrary view."

The above point, that it is a fraudulent deprivation of liberty which ousts the jurisdiction of the Court of the seizing power, Mr. *Muller* submitted, was raised but never answered in *Abrahams'* case. Secondly, Mr. *Muller* submitted that on the authority of the above passage from *Voet* the exercise of police powers on territory of another State without its consent is a clear violation of Roman-Dutch and customary international law which, he said, is part of the South African common law and is applied by the South African Courts as part thereof. Mr. *Muller*, citing from an article by Felice Morgenstern, "Jurisdiction in Seizures effected in violation of International Law," published in the 1952 *British Year Book of International Law*, quoted the following question which was posed by the writer:

> "Whether the violation of international law shall be the source of further rights on the part of the delinquent state, namely the right to try and the right to punish for offences against its national law individuals who but for that violation would not be subject to its jurisdiction"

and went on to submit that the Court should apply customary international law and not only hold that the applicants' arrest in Swaziland was unlawful but that it should also go further and hold that the international wrong has not been cured by the fact that they are now held under national law or, to put it differently, the Court should uphold the principles *ex injuria jus non oritur* and refuse to exercise jurisdiction over the applicants. Mr. *Muller* said that, as far as he was aware, South African Courts have never been asked to

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