
Beyond the Text: The test for sourcing implied power

Authority to make outgoing extradition requests – separation of powers – constitutional and statutory authority

On 23 January 2026, the Constitutional Court handed down judgment in *Director of Public Prosecutions, Johannesburg v Schultz; Director of Public Prosecutions, Bloemfontein v Cholota*. The constitutional question which seized the Court was whether the power to authorise outgoing extradition requests lies with the National Prosecuting Authority (NPA) or the National Executive.

The NPA sought the extradition of Mr Jonathan Schultz (Mr Schultz), a South African currently living in the United States. Mr Schultz sought, amongst others, a declarator that only the Minister of Justice has the power to make an extradition request.

In the matter of Ms Nomalanga Cholota (Ms Cholota), another South African citizen, the NPA applied for her extradition from the United States for her to be arraigned in pending criminal proceedings. Ms Cholota was extradited to South Africa and, during the criminal proceedings, raised a special plea challenging the High Court's jurisdiction to try her on the basis that her extradition was unlawful since it was made by the NPA instead of the National Executive.

Before the Constitutional Court, the matters of Mr Schultz and Ms Cholota were consolidated. The provisions of Sections 179(2) and (4) of the Constitution were relevant in the matter.

Section 179(2) of the Constitution states that: "*The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.*" And section 179(4) states that: "*National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.*"

The Director of Public Prosecutions (DPP) submitted that section 179(2), read with section 179(4), of the Constitution decisively points to the NPA holding the power to issue outgoing requests to preserve prosecutorial independence. The DPP also relied on sections 20(1) and 32(1) of the NPA Act and highlighted that the Extradition Act was silent on the matter of who is vested with the power to issue outgoing requests. Therefore, according to the DPP, the power to issue outgoing extradition requests is an implied power flowing from the constitutional and statutory powers granted to the NPA.

In its decision, the Court held that implied powers, unlike express powers, are not explicitly stated in legislative provisions and can only come into existence if they are "*reasonably necessary to give practical effect to the express powers*".

The Court helpfully laid out the factors to be considered in evaluating whether an implied ancillary power exists. These factors are (i) whether the implied ancillary power is necessary to execute the express power; (ii) whether the Legislature's object in conferring the express power would be defeated if the ancillary power were not implied; and (iii) whether the express power could not be carried out in a reasonable manner unless the ancillary power is implied.

In the present case, The Court reaffirmed the NPA's prosecutorial independence, however, it held that outgoing extradition requests are not mere prosecutorial proceedings. Outgoing extradition requests involve both a domestic and an international stage. The domestic stage of outgoing extradition requests – which include the identification of the accused, investigation of criminal conduct, preparation of the docket and initiation of extradition request – comfortably fit within the realm of the NPA's implied powers under section 179(2) of the Constitution.

The international stage of the request, however, does not fit with prosecutorial proceedings. This stage of the request is made through diplomatic channels between sovereign states and involves sensitive political and diplomatic considerations. The powers exercised at this stage are beyond the ambit of prosecutorial authority. The NPA's power to institute criminal proceedings does not include the final power to issue an extradition request to a foreign state.

For these reasons, the Court concluded that the object of prosecutorial powers of the NPA would not be defeated if the ancillary power is not implied. The NPA's express powers to institute criminal proceedings and to carry out necessary functions incidental to the express powers, are capable of being carried out reasonably without the implied power to authorise outgoing extradition requests.

Key takeaways

When evaluating the powers conferred on a body, the Court will consider whether the implied ancillary power is a necessary and a reasonable extension of the express power, and whether the implied ancillary power aligns with the tenor and constitutional object of the express power. While prosecutorial independence is vital for the constitutional democracy, the NPA is not vested with the power to issue outgoing extradition requests.

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