REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 22157/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. NO

01 November 2019
DATE SIGNATURE

In the matter between:

MANUEL CHANG	Applicant
And	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICESS	Respondent
FORUM DE MONITORIA DO ORÇAMENTO	First Intervening Party
THE REPUBLIC OF MOZAMBIQUE	Second Intervening Party
HELEN SUZMAN FOUNDATION	*Amicus Curiae*

Case Number: 24217/2019

In the matter between

FORUM DE MONITORIA DO ORÇAMENTO	Applicant
MANUEL CHANG	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG — Third Respondent

ADDITIONAL MAGISTRATE, EKURHULENI NORTH: KEMPTON PARK — Fourth Respondent

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JUDGMENT

FISHER J, (LAMONT J AND MOLAHLEHI J CONCURRING):

INTRODUCTION

[1] This is a tale of two Treaties. On the one hand the SADC Protocol on Extradition ("the Protocol") and on the other the Extradition Treaty between South Africa and the United States of America ("*the US Treaty*").

[2] The treaties are similar. Both allow for the surrender and extradition of persons accused of crimes, between their Member states. Their operation and the fact that Mr Chang has been implicated in crimes perpetrated on an international scale, has led to an unusual situation: competing claims for Mr Chang's extradition from South Africa - one from the USA and the other from Mozambique.

[3] The former Minister[1] of Justice, Mr Michael Masutha in dealing with the competing requests opted to extradite Mr Chang to Mozambique, South Africa's co-member in the Protocol, thus, by implication, rejecting the request of the USA.

[4] The issues before this Court involve a judicial review of these decisions. The applications relating to these reviews have been combined for one special hearing before this Full Court pursuant to an intensive judicial case management process. This

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[1] Then called the Minster of Justice and Correctional Services now called the Minster of Justice and Constitutional Development.

has allowed for the applications to be dealt with on an expeditious basis, given that there is urgency in the matters, which is not least because Mr Chang has been incarcerated at Modderbee Correctional Facility since his arrest on 29 December 2018.

[5] Mr Chang was the Minister of Finance in Mozambique from 2005 to 2015. After his term in Cabinet ended, he became a member of the National Parliament. The parties, save Mr Chang, agree that investigations conducted internationally have revealed that Mr Chang and his co-conspirators took part in schemes of securities fraud during approximately 2013 to 2015. The schemes involved large loans by banks, companies, and persons based in the USA, France, Switzerland, Holland, Britain, and the United Arab Emirates (UAE) to companies under the control of the Mozambican Government. The loans were meant to fund maritime projects that would benefit Mozambique but, it is alleged that funds were diverted to government officials in Mozambique in the form of kickbacks and bribes. Amounts involved in the schemes are said to be in excess of US$2 Billion (approximately R30 Billion).

[6] This corruption has had a profoundly negative effect on Mozambique and its people. For one thing, there has been a sharp reduction in essential donor funding in the wake of the scandal. For another, the loan repayments to which Mozambique is bound are onerous.

[7] The imbroglio began with the arrest of Mr Chang in South Africa in terms of the US Treaty. It had come to the attention of the US authorities that Mr Chang would be travelling via South Africa to the UAE on 29 December 2018. He was indicted in the Eastern District Court of New York on 19 December 2018 and on 21 December 2018 the USA requested South Africa to arrest him in terms of the US Treaty. On 27 December 2018 the Pretoria Magistrate's court authorised the arrest of Mr Chang in accordance with the Extradition Act[2] ("*the Act*"). He was then intercepted and arrested at O R Tambo International Airport where he was bound for a flight to Dubai.

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[2] Act 67 of 1962.

[8] Mozambique is up in arms. It protests that it was unaware of the US investigations and the resultant indictment of Mr Chang in New York State until Mr Chang's arrest in South Africa was made public in December 2018. It says it had been led to believe that Mr Chang would be tried for his crimes in Mozambique with the cooperation and assistance of the USA when, all the while, the USA was covertly involved in its own investigations.

[9] It is claimed that Mozambique has not been serious or exacting in its attempts to bring Mr Chang to book in Mozambique. Understandably, Mozambique is embarrassed by these claims. It has sought some vindication in its attempts at extradition and now in these proceedings. It says that the appropriate place for Mr Chang to be brought to justice is Mozambique. It says that it is important to Mozambique to prosecute this case successfully to demonstrate its commitment, competency, and capacity in fighting corruption. It suggests that its credibility is at stake in relation to various international conventions to combat criminality to which it is signatory and which include the UN Convention against Corruption, UN Convention against Transnational Organized Crime, SADC Protocol against Corruption, AU Convention on Preventing and Combating Corruption.

[10] From the perspective of the USA, it appears that a majority of the investors who were affected by the scheme were from the USA. The USA thus seeks that Mr Chang and others involved in the schemes be prosecuted there. It is not in dispute that Mozambique has been investigating this case since 2015 and that Mr Chang has remained at large, even travelling freely beyond the borders of Mozambique. The USA has indicted that it is ready to prosecute Mr Chang. Mozambique concedes that it is still not ready to prosecute.

[11] As will be dealt with below, Mr Chang's immunity from prosecution in Mozambique qua Member of Parliament (MP) in Mozambique is central to this failure to prosecute him in Mozambique. It is also central to the legality of the former Minister's impugned decisions in this matter and thus of central importance to this case.

[12] Article 4 (e)[3] of the Protocol provides that extradition shall be refused

" *if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;*"

PROCEDURAL HISTORY

[13] After his arrest and on 29 January 2019, the USA submitted a request to South Africa for the extradition of Mr Chang. Mozambique, a few days later (on 01 February 2019) submitted its own warrant and request for extradition.

[14] In terms of section 9 of the Act Mr Chang was required to be brought as soon possible after his arrest before a magistrate in whose area of jurisdiction he had been

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[3] Article 4 reads as follows:

" MANDATORY GROUNDS FOR REFUSAL TO EXTRADITE :Extradition shall be refused in any of the following circumstances:

(a) if the offence for which extradition is requested is of a political nature. An offence of a political nature shall not include any offence in respect of which the State Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the State Parties have agreed is not an offence of a political character for the purposes of extradition;

(b)if the Requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons;

(c) if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law;

(d) if there has been a final judgment rendered against the person in the Requested State or a Third State in respect of the offence for which the person's extradition is requested;

(e) if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;

(f) if the person whose extradition is requested has been, or would be subjected in the Requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and Peoples Rights; and

(g) if the judgment of the Requesting State has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he or she has not had or will not have the opportunity to have the case retried in his or her presence."

arrested, whereupon the Magistrate was obliged to hold an inquiry with a view to the surrender of such person to the foreign State concerned.[4]

[15] Inquiries were thus conducted in the Kempton Park Magistrate's Court in terms of s 10 of the Act in respect of both requests.

[16] On 8 April 2019, the Magistrate committed Mr Chang under section 10(I) of the Act to imprisonment in respect of both requests to await the decision of the Minister under section 11[5] as to whether and to whom Mr Chang should be surrendered in respect each of the requests.

[17] The Minister thus regarded himself as empowered to choose which, if either of the extradition requests he would accede to.

[18] In the normal course in relation to the decision to be taken in respect of a request for extradition, the Minister is advised by the staff of the International Relations Department. On 16 May 2019 the Principal State Law Advisor on International Relations, Advocate Herman van Heerden submitted a memorandum to the then Minister in relation to the competing requests("the Memorandum").

[19] Part of the compiling of the Memorandum involved Mr van Heerden checking whether the requests were compliant with the requirements of South African law. As part of this process and on 06 February 2019, Mr Van Heerden addressed a letter to

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[4] Section 9 provides as follows:
" (1) Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned. "

[5] Section 11 provides as follows :
" The Minister may- (a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
(b) order that a person shall not be surrendered-
(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the

the Attorney General of Mozambique, Ms Beatriz Buchili in relation to Mr Chang's immunity and its source as he understood it. He pointedly directed the following inquiry to the Attorney General:

> *"Article 211 of the Constitution of Mozambique 2004, as amended, provides for the immunity from prosecution of members of government without the permission of the President of Mozambique. In this regard, it is not mentioned in the request for extradition whether the President has in fact lifted the immunity of Mr Chang, and we require clarity on this..."*

[20] Thus, it was clear that Mr van Heerden was aware that there was a relationship between Mr Chang's position in government and his possible immunity and that he required clarification as to whether Mr Chang indeed had such immunity.

[21] Ms Buchili responded to the request for clarification by explaining that Article 211 applied only to serving Government Members and thus did not apply to Mr Chang. She stated that his position was now that of MP and explained that, as such, the "consent for his detention" had to be given by the Mozambican National Parliament, She then stated that attached to the Mozambican extradition request "*...is the document issued by the National Parliament giving consent for the detention of Manuel Chang*".

[22] Proper reference to this document shows that it merely records that the Standing Committee of National Parliament "*Approves the enforcement of maximum coercion measures against Mr Chang*". It pertinently does not provide for the lifting of immunity from prosecution and, for that matter, also does not expressly consent to Mr Chang's arrest[6].

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[6] The document reads as follows:

"Assembly of the Republic" Standing Committee Deliberation No. 17/2019 Of January 29 After the National Parliament received from the Supreme Court, a request for approval of enforcement of the maximum coercion measure against the MP Manuel Chang, the Standing Committee of the National Parliament, under provisions of number 1, of article 173 of the Constitution of the Republic, in conjunction with number 1, of article 13 of the Statutes for Members of Parliament, approved by the Law No. 32/2014 of December 30 and paragraph a) of number 1 of article 66 of the Rules of Procedure of the National Parliament, approved by law No.12/16 of December 30, has decided: Single: Approves the enforcement of maximum coercion measures against Manuel Chang. Maputo, January 29, 2019 (emphasis added).

[23] Quite what "maximum coercion measures" would entail in light of Mr Chang's immunity is unclear. Presumably, this would mean the maximum that can be done subject to the Mozambican law.

[24] What Ms Buchili failed to explain to Mr van Heerden was the procedure for the lifting of immunity and that Mr Chang enjoyed immunity until it was lifted in Mozambique. Her somewhat oblique responses on the matter of Mr Chang's immunity led Mr van Heerden to the mistaken impression that Mr Chang's immunity from prosecution in Mozambique had been lifted. And thus this is what Mr van Heerden conveyed to the former Minister in the Memorandum. The Memorandum contained the following statement as to Mr Chang's immunity:

> *"As a Member of Parliament, consent for his detention must be given by the National Parliament of Mozambique in terms of Article 174 of the Constitution of Mozambique as well as No.1 of Article 13 of the Statute of Members of the National Parliament. This has been done, and Mr Chang no longer enjoys immunity from prosecution by the Mozambican authorities."* (emphasis added).

Furthermore Article 4 of the protocol was duly referenced in the Memorandum and the Minister was assured (incorrectly) that its provisions were met.

[25] The Memorandum also served to inform the Minister of the various submissions made by Mozambique, the USA, Mr Chang, and civil society. It noted that civil society in Mozambique was frustrated by the apparent lack of progress in the investigations in Mozambique.

[26] Mr van Heerden ultimately made the recommendation to the Minister that Mr Chang be extradited to the USA rather than Mozambique. This recommendation was based, in large part, on the state of readiness of the respective prosecutions - the USA being ready to proceed with the prosecution and Mozambique being in a state of unreadiness to prosecute. Importantly, the recommendation did not engage at all with the question of immunity as it proceeded from the assumption that Mr Chang no longer enjoyed immunity.

[27] The former Minister did not follow this recommendation. On 21 May 2019 he took the decision under section 11(a) of the Act to surrender Mr Chang to Mozambique rather than the USA.

[28] The decision of the former Minister and the basis therefor is penned in manuscript by him at the end of the Memorandum, reflecting that the Minister has considered its contents. It reads as follows:

> *"Having considered the submission by the department regarding this matter following the decision of the Kempton Park Magistrate court regarding the extraditabily of Mr Chang to both the USA and the Republic of Mozambique and having considered the following: That the accused is a citizen of Mozambique; That the alleged offence was committed whilst he was a Minister of State; The onerous debt for Mozambique as a result of the alleged fraud; The submission made by Mr Chang to be extradited to his home country; The interests of the States concerned; The request from the USA. I have noted that the request was submitted a few weeks prior to the Mozambican's, however having considered the matter in its full context, taking into account the criteria contained in both the treaty and protocol, I am satisfied that the interest of justice will be best served by acceding to the Mozambican request for extradition and thus it is my decision that the accused Mr Chang be extradited to stand trial for his alleged offences in Mozambique".*

[29] The true legal position as to the law of Mozambique relating to the immunity of MP's is to be found in Article 174 of the Mozambican Constitution[7] and Articles 13.1 and 17 of Law No 31/2014. Article 13.1 provides that MPs shall not be arrested or detained, unless caught in the act ("*flagrante delicto*") and that they shall not face trial without the consent of Parliament.[8] Article 17 deals with the lifting of Immunities by

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[7] Article 174 of the Mozambican Constitution reads as follows:

"Immunities

1. Members of Parliament shall not be detained or arrested, except when caught in the act of committing an offence ('flagrante delicto") nor will they face trial without the consent of the National Assembly.

2.If criminal proceedings are pending in which a MP is the accused, the MP shall be heard by a Counsellor Justice.

3.Members of Parliament are entitled to a special forum and shall be tried by the Supreme Court under provisions of the law."

[8] Article 13.1 reads as follows:

National Parliament and provides that this can only be done in Parliament in plenary session and by secret ballot.[9]

[30] The Mozambican Attorney General, in the main affidavit delivered on behalf of Mozambique, explains the law of Mozambique on the operation and lifting of immunities thus:

> *"The law of Mozambique provides for the lifting of immunity in order to prosecute an offending Member of Parliament (hereafter "MP"). Before an MP can be arrested or detained, the National Parliament must first authorise the arrest or detention. This authorisation is granted in terms of Article 13 of Law No.31/2014. The MP will then appear before a judge of the Supreme Court, who will determine if the charges are not politically motivated or malicious. If the judge is satisfied that the MP has a case to answer, then the judge will request that immunity should be lifted. Article 16 of Law No.31 provides for the procedure to lift the immunity. The immunity will then be lifted in terms of Article 13 and 17 of Law No,31/2014. Therefore, before immunity can be lifted, the MP must appear in person at the Supreme Court inquiry to make his or her representations. It is not possible to lift immunity without this inquiry. The inquiry cannot take place in the absence of the defendant."*[10]

[31] The statement in the Memorandum to the effect that Mr Chang was not subject to immunity from prosecution because of the consent of Parliament was not correct. Parliament had given no such consent and neither was it able to do so in Mr Chang's absence.

[32] The current Minister contends that Mr van Heerden was deliberately misled. Ms Buchili denies this. She seeks to explain that this was the first extradition request

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"Members of Parliament shall not be detained nor arrested, except in cases of being caught in the act of committing an offence (" flagrante delicto"), or face trial without the consent of the National Parliament."

[9] Article 17 reads as follows in relevant part:

Lifting of Immunities:

1. the lifting of immunities and (sic) preceded by debate in plenary of the assembly of the Republic, the closed door.
2. the deliberations of the assembly of the Republic are taken by secret ballot.

[10] Record p 987 [72] of the Attorney General's combined Founding and Answering affidavits.

made by her office involving a Member of Parliament, implying that there was a lack of experience at play. She states that she believed that South Africa was properly apprised of the immunity and its nature and extent. She puts any misunderstanding in relation to Mr Chang's immunity down to the different legal systems and different languages at play.

[33] Whatever the reason for the misinformation, Ms Buchili concedes that there was a failure to disclose that Mr Chang had immunity from arrest and prosecution in Mozambique.

[34] Mr Chang has, throughout all of these proceedings, resisted his extradition to the USA whist actively seeking his extradition to Mozambique. He has recently, and after the fact of the impugned decisions gone as far as resigning from his position as Member of the National Government in order to relinquish the immunity. This he did on 29 July 2019. He thus argues, as does Mozambique, that to the extent that he enjoyed immunity at the time of the impugned decisions, he is no longer subject to such immunity as he is no longer an MP.

[35] This has no impact on the Minister's decisions, as they must be evaluated on the basis of the facts as they were at the date on which the decision was taken.

[36] Mr Chang has resigned as MP with the purpose of relinquishing his immunity in Mozambique. He says that this is because wants to answer for the charges against him in his home country. The more cynical view, as suggested by the civil society litigants in this matter, is that he has the impression that in Mozambique he may be given a measure of protection due to cronyism or a largesse which harks back to his former positions in government.

RELIEF SOUGHT

[37] Mr Chang thus seeks an order directing the current Minister to surrender him to the Government of Mozambique, alternatively, that he be released from custody.

[38] The current Minister has not only opposed the relief sought by Mr Chang but has also counter - applied for to set aside the decision of his predecessor in Office.

[39] The Director of Public Prosecutions ("DPP") makes submissions to aid us to decide whether or not the decision of the Kempton Park Magistrate should be interfered with.

[40] The Forum de Monitoria do Orcamento ("FMO") is a coalition of various Mozambican civil society organisations. It launched its own application to review the former Minister's decision to extradite Mr Chang to Mozambique. By this stage all parties were dealing with the matters in a consolidated manner due to the management of the matters with a view to them being heard together.

[41] The Helen Suzman Foundation ("HSF") was admitted as amicus to be heard from a South African and general perspective as to civil rights involved in the matter.

ISSUES TO BE DECIDED

[42] We are called on to decide whether the decision of the Magistrate in the section 10 proceedings in the Mozambican matter is assailable; whether the decision of the former Minister should be reviewed and set aside; and ,if so, what the remedy should be.

[43] The immunity of Mr Chang is central to the impugned determinations of the Magistrate and the Minister.

[44] Mr Chang was treated by the Magistrate as "*a person accused of...*" the offences enumerated in the Mozambican warrant, as contemplated in the Act for the purposes of the process under section 10. It is argued in this regard by FMO that the immunity means that Mr Chang cannot be subject to prosecution and that it follows that he cannot be a person accused for the purposes of the Act.

[45] It is argued on behalf of the current Minister, FMO, FUL, and the DPP that Article 4(e) of the Protocol creates a prohibition on the extradition of Mr Chang to Mozambique in light of his immunity under Mozambican Law. It is further argued by these parties that, if the former Minister did not know of such immunity or if he did not consider it for other reasons, his decision falls to be set aside on the basis that it is irrational.

[46] Mr Chang makes a different submission as to the meaning and effect of these immunity provisions in terms of the Mozambican law and the manner in which they affect the application of Article 4(e) of the Protocol. He argues that, in terms of Mozambican law, the immunity does not subsist but is only constituted once the National Parliament is called on to consider charges against an MP. He argues also that, given the fact that the immunity can be lifted, it is not of the nature of immunity contemplated in Article 4(e) and thus is not hit by the prohibition therein.

[47] The reviews of the former Minister's decision are legality reviews and are not brought under the Promotion of Administrative Justice Act 3 of 2000 (*"PAJA"*)[11]. This is not in dispute.

[48] With all this in mind, I turn first to the challenge against the Magistrate's decision under the Act.

The Review of the Magistrates Section 10 Decisions

[49] Section 3[12] of the Act deals with when a person is extraditable. It provides that such a person must be "*accused of*" an extraditable offence.

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[11] See: State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) at [37].

[12] Section 3(2) provides as follows:
"Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

[50] It is not disputed that Mr Chang became a defendant in terms of Mozambique's domestic processes in that there were charges formulated against him along the same lines as those in the US indictment. He was, however, not yet indicted in Mozambique. The purpose of the Mozambican extradition request is stated to be to "*extradite the defendant Manuel Chang to Mozambique, for the purposes of criminal, administrative and civil liability*".

[51] FMO argues that while Mr Chang was immune from prosecution he could, axiomatically, not be "*a person accused*". It argues that it follows from this that the Magistrate could not entertain the inquiry as it is required as a jurisdictional fact for the inquiry that Mr Chang be a person accused of extraditable offences.

[52] The DPP counters that a person can be both immune from prosecution and a person accused for purposes of the Act.

[53] The judgment of Lord Steyn in the House of Lords decision of In re: Ismail[13] is instructive as to the proper approach to be adopted by a court determining whether a person is accused for the purposes of extradition. The question posed on the facts of *Ismail* was similar to the issue we deal with here: was Mr Ismail liable to be extradited under the UK Extradition Act as a person "*accused*" of extraditable offences in the Federal Republic of Germany? Mr Ismail contended that he was not an "*accused*" person because no formal criminal charge had yet been made against him in Germany.

[54] Lord Steyn held that it is a question of fact in each case whether the person passes the threshold test of being an "*accused*" person. He stated as follows as to the need to interpret extradition legislation and treaties in context[14] :

> "*Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this*

[13] *In Re Ismail* [1999] 1 AC 320 per Lord Steyn.

[14] Id at at 326F-327G.

aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition."

He went further to state:

"All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused".

[55] This approach commends itself in this case. I am thus satisfied that Mr Chang's immunity from prosecution did not prevent him from being accused of the crimes set out in the warrant. The accusation and prosecution stand apart from one another. Indeed, in terms of the Mozambican law on this point, the very procedures which can bring about a lifting of his immunity pre-suppose that he is accused of the offences for which he will ultimately be charged and prosecuted if the immunity is lifted.

[56] It was argued by FMO that the Magistrate should have made inquiries related to establishing whether Mr Chang was immune from prosecution. On a simple reading of section 10, the magistrate's duties are confined to making certain preparatory findings, while the Minister makes substantive and political decisions under s 11.

[57] Section 10(1)[15] of the Extradition Act explains that a Magistrate, on the consideration of the evidence before her or him, must be satisfied that two conditions are fulfilled before a committal order can be made: first, the person must be liable to

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[15] Section 10(1) provides as follows:

"If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) *(a)* and *(b)* (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court."

be surrendered to the foreign State concerned; second, in the case where such person is accused of an offence, there must be sufficient evidence to warrant a prosecution for the offence in the foreign State.

[58] The section 10 decision of the Magistrate is only to commit or discharge. If the person is committed, then it is the Minister (under the executive phase under section 11) who decides if the person should be surrendered in extradition.

[59] The Magistrate is not a trier of fact. His function is to determine if the person is accused by the requesting state of the crimes for which his extradition is sought and satisfying himself that there is sufficient evidence to warrant a prosecution in the foreign State. This second inquiry does not involve a determination as to the veracity of the facts. The Magistrate in terms of section 10(2)[16] merely accepts as "*conclusive proof*" a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person for the crimes of which he or she is accused.

[60] The determination of whether a person has immunity and how this should affect the decision as to whether he should be extradited or not is clearly within the realm of the substantive and the political. The very debate which has been had here as to the nature and effect of the immunity of Mr Chang on the Minister's decision shows that it is beyond the province of the Magistrate and his ken.

[61] In *Geuking v President of the Republic of South Africa and Others*[17] Goldstone J writing for a unanimous Court, explained the position thus:

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[16] Section 10(2) provides as follows:

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

[17] CCT35/02) [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) (12 December 2002).

"It is not inappropriate or unfair for the legislature to relieve the magistrate of the invidious task of deciding this narrow issue unrelated to South African law.

"As already mentioned, it is a question in respect of which South African lawyers and judicial officers will usually have no knowledge or expertise. The certificate from the appropriate authority in the foreign state to the effect that the conduct in question warrants prosecution in that state is sufficient for the purpose of extradition. Its conclusiveness is binding on the Magistrate only in relation to his consideration of the question whether the person concerned is extraditable. If the person concerned is extradited the foreign court will have to determine the issue covered by the certificate. Furthermore, in the exercise of his discretion under section 11 of the Act the Minister might well be obliged to consider an attack made in good faith against the conclusion of the foreign authority contained in the certificate."[18]

[62] I thus find that the Magistrate conducted the inquiry in accordance with the Act. His decision does not fall to be set aside by this Court.

[63] It was contended on behalf of Mr Chang that the FMO had no standing to challenge the decision made in the section 10 inquiry by the Magistrate as it was not a party to the proceedings in the Magistrate's Court and had no other basis for its intervention in the matter. This point need not be dealt with in light of the finding that the proceedings in the Magistrate's Court were properly conducted and do not fall to be set aside in any event.

[64] FMO also sought to make something of an infelicitous mention by the magistrate in his reasons as Mozambique being an "*associated State*"[19]. There is no dispute that Mozambique is a foreign State and that, as a fact, the Magistrate and the Minister treated it as such. The procedure adopted can thus not be criticised.

[65] I now turn to deal with the Minister's decisions.

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[18] Id at [45] and [46].
[19] If it were an associated State this would attract a different process under the Act which would reside in the Magistrate acting in terms of s 12 instead of s 10.

The Review of the Minister's Decision to extradite to Mozambique

[66] There has been some debate spurred by FUL and the FMO as to whether the protocol has been "*domesticated*" - i.e. made part of our domestic law and thus whether the Minister in failing to comply with Article 4(e) committed directly a breach of the Protocol. It was stated that this Court should determine the question of whether the Protocol was part of our domestic law in order to determine the binding effect of the Protocol on the Minister. In light of the discussion below, I find that it is not necessary that we make this determination.

[67] Our Constitution reveals a clear and uncompromising commitment to ensure that the Constitution and South African law are interpreted to comply with international law and in particular international human rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be "*consistent with the Republic's obligations under international law applicable to states of emergency.*"

[68] The preamble to the Prevention and Combating of Corrupt Activities Act[20] ("*PRECCA*") is an example of the express recognition accorded by the

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[20] 12 of 2004. The preamble states:

"WHEREAS the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;

AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;

AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;

AND WHEREAS the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;

AND WHEREAS there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering;

AND WHEREAS corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both

Legislature to the Executive's part in the global commitment to fighting corruption. it notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that regional and international co-operation is essential to prevent and control corruption and related crimes.

[69] in *Glenister v President of the Republic of South Africa*[21] the Constitutional Court underscored the importance of the recognition of international law obligations on the exercise of executive power as follows:

> *"[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the*

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the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities;
AND WHEREAS a comprehensive, integrated and multidisciplinary approach is required to prevent and combat corruption and related corrupt activities efficiently and effectively;
AND WHEREAS the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption and related corrupt activities efficiently and effectively;
AND WHEREAS the prevention and combating of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation, with the support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community-based organizations, if their efforts in this area are to be efficient and effective;
AND WHEREAS the United Nations has adopted various resolutions condemning all corrupt practices, and urged member states to take effective and concrete action to combat all forms of corruption and related corrupt practices;
AND WHEREAS the *Southern African Development Community Protocol against Corruption*, adopted on 14 August 2001 in Malawi, reaffirmed the need to eliminate the scourges of corruption through the adoption of effective preventive and deterrent measures and by strictly enforcing legislation against all types of corruption;
AND WHEREAS the Republic of South Africa desires to be in compliance with and to become Party to the *United Nations Convention against Corruption* adopted by the General Assembly of the United Nations on 31 October 2003;
AND WHEREAS it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized,
BE IT THEREFORE ENACTED . . . ."

[21] 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

Republic in international law, and makes them the measures of the State's conduct in fulfilling its obligations in relation to the Bill of Rights."[22]

[70] In this vein also our courts have been committed to exacting compliance with our obligations under International Law[23].

[71] South Africa is a signatory and Member State of the Protocol and thus bound thereby. On this basis, it is sufficient that we examine whether the former Minister's failure to comply with Article 4(e) contravened sections 7(2) and 8 of the Constitution which require him to *"respect, protect, promote and fulfil"* South Africa's international law commitments to access to justice for its people.

[72] We thus need not enter into the complexity of examining how an international treaty becomes domesticated within South Africa and whether this can be said to have occurred in respect of the Protocol. It may be noted, as an aside, that in *President of the Republic of South Africa and Others v Quagliani and others*[24] the Constitutional Court found that the US Treaty had become domestic law because of the provisions of the Act.

[73] Mr Chang seeks to interpret Article 4(e) and the Mozambican law so as to suggest that his immunity does not affect his extradition. He raises three interpretative arguments:

a. First, he argues that because this immunity is capable of being lifted, it is not absolute and thus is not hit by Article 4(e).
b. Second, he argues that, in any event, the immunity does not subsist but is only constituted by the National Assembly when the accused is

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[22] Id at [178].

[23] Recent examples which have unfolded on an international stage are: *DA v Minister of International Relations and Co-operation*[23] ("the Grace Mugabe case"); *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* ("the Al Bashir case) ; Law Society of South Africa and Others v President of the Republic of South Africa and Others (CCT67/18) [2018) ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018)("the SADC Tribunal case"); Commissioner of Police v Southern African Human Rights Litigation Centre 2015 (1) SA 315 (CC) (the Torture Docket case).

[24] [2009] ZACC 1; 2009 (4) BCLR 345 (CC); 2009 (2) SA 466 (CC) (21 January 2009).

charged. In this regard he says that the question whether the Member of Parliament is to be afforded an immunity depends upon the decision of Parliament, one way or the other, and that until Parliament decides the issue, the question as to the existence or otherwise of the immunity remains inchoate and thus it did not operate at the time of the impugned decisions.

c. Third, he argues that a purposive interpretation of Article 4(e) should yield the meaning that it is there to protect immune persons from being sent to into the maws of unrelenting States. It should not, the argument goes, be seen as part of the obligation to achieve effective prosecution.

[74] As to the first argument, there is, to my mind, no scope whatsoever for a linguistic interpretation of either Mozambican Articles 13 or 17 or the two read in tandem which permits of such an interpretation. In any event, to the extent that there were uncertainty as to the meaning and operation of these provisions, it is put beyond question by the exposition of the Mozambican Attorney General as to the Mozambican law on this point, that the immunity subsists until lifted.

[75] The second argument is also put paid to by the clear language of Article 4 (e) which states that immunity "*for any reason*" triggers the mandatory refusal. If one needed fortification for this, interpretation, it is to be found in a comparison between Article 8 of the US Treaty and Article 4(e). Article 8 provides for just one reason for immunity i.e. that "*Extradition shall not be granted when the prosecution has become barred by lapse of time according to the laws in the Requesting State.*" Article 4(e) on the other hand is broader - it encompasses " *any reason, including lapse of time or amnesty;"* Thus, on an application of the *expressio unius est exclusio alterius* principle, South Africa must be regarded as having specifically and consciously broadened the range of the types of immunity beyond that brought about by the lapse of time.

[76] As to the third argument, as to the purpose of Article 4 (e) – there is no doubt that it cuts both ways: it protects the person enjoying immunity from unlawful prosecution and, as in this case, it allows for the proper administration of international

justice. Extradition has as its purpose the prosecution of the guilty. Thus it would make no sense to extradite a person to a place where he cannot be prosecuted.

[77] The underlying crimes of which Mr Chang is accused involve corruption. Corruption takes place with no regard to national boundaries. Thus the effective eradication of corruption requires concerted and coordinated efforts internationally. This need has brought about various international treaties against corruption of which South Africa is a signatory[25]. South Africa is thus part of a global effort to eradicate corruption and has bound itself internationally and domestically to taking effective steps to investigate and prosecute corruption wherever it occurs. It acknowledges as part of this participation that corruption and organised crime undermines the rights enshrined in the Bill of Rights, endangers the stability and security of society and jeopardises sustainable development and the Rule of Law.

[78] In *Geuking* Goldstone J encapsulated the position thus:

> *"The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands. The government of the country where the criminal conduct is perpetrated will wish the perpetrator to stand trial before its courts and will usually offer to reciprocate in respect of persons similarly wanted by the foreign State. Apart from reciprocity, governments accede to request for extradition from other friendly States on the basis of comity. Furthermore, governments do not wish their own countries to be, or be perceived as safe havens for the criminals of the world."*[26]

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[25] The UN Convention Against Corruption, AU Convention against Corruption OECD Anti-Bribery Convention. The SADC Protocol Against Corruption.
[26] At [2].

[79] Under section 233 of the Constitution:

> *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."*

[80] Thus there can be no doubt that the Protocol must be interpreted so as to allow empowerment in terms of and compliance with South Africa's international obligations. As a starting point the former Minister did not have the power to extradite Mr Chang to Mozambique because this was prohibited by his immunity. Thus his decision was *ultra vires*. The Minister also did not take into account that Mr Chang had immunity because he did not know of it. It would furthermore be irrational for a person to be extradited so they could be prosecuted for their crimes if they were immune from prosecution for such crimes. In reality, there was no choice to make between the USA and Mozambique. The Minister did not have the option to extradite Mr Chang to Mozambique. He was faced with only one valid request - that of the USA.

[81] It was argued on behalf of Mozambique that, in the absence of having asked for reasons for the Minister's decision, it was not possible to determine whether the Minister had taken the immunity of Mr Chang into account. This argument is misplaced. Firstly, because properly construed, the Minister's manuscript order constitutes the Minister's decision and his reasons; secondly because the FMO did, in fact, ask for reasons in its notice of motion and no further reasons were forthcoming; and thirdly because any further reasons could not conceivably serve to change the illegality which exists in the contravention of Article 4(e), regardless of the former Minister's processes and considerations.

[82] Thus I find that the decision of the Minister to extradite Mr Chang to Mozambique should be set aside.

REMEDY

[83] Mozambique asks that we undertake an enquiry as to whether there are exceptional circumstances which merit a departure from the default position and substitute its own decision for that of the Minister.

[84] The basis for the departure it submits is that the former Minister has demonstrated bias by bringing these proceedings.

[85] It argues that that this Court has all the information that was submitted to the former Minister to make the decision, together with subsequent information that was not available at the time the former Minister made his decision and that it should thus substitute its decision for that of the current Minister.

[86] The accusation of bias is unfortunate, based as it is squarely on the fact that Minister brings the application to review his predecessor's decision.

[87] It is now well established that where an organ of State concludes that a decision taken by such organ fails to comply with constitutional prescripts, the organ of State is not only empowered but also obliged to take steps to "right the wrong" through the medium of judicial review[27].

[88] An exceptional circumstances enquiry as to remedy must, in any event, take place in the context of what is just and equitable. Factors to be considered are whether the end result is in any event a foregone conclusion; where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require

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[27] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) Member of the Executive Council for Health, *Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazar Institute* (3) SA 481 (CC).

the applicant to submit again to the same jurisdiction, and whether the court was in as good a position as the administrator to make the decision[28].

[89] A case in which an order of substitution is sought accordingly requires courts to be mindful of the need for judicial deference and their obligations under the Constitution.

[90] There can be no doubt that the Ministers impugned decisions here are of a policy-laden and polycentric nature as described by Prof. C Hoexter [29]in her succinct characterisation of judicial deference as accepted in in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others.*[30]

[91] Thus, in my view, a substitution order would be untenable in these circumstances.

COSTS

[92] Mr Chang is incarcerated and subject to an existing decision of the former Minister that he be extradited to Mozambique. He was thus entitled to attempt to enforce the decision in order to secure either his extradition or his release. Mozambique seeks here to vindicate its policies at an international level.

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[28] *Trencon Construction v Industrial Development Corporation of South Africa (Pty) Ltd and another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras [44]- [55].

[29] The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 at 501-2. Passage defined judicial deference as follows:

> "a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

[30] [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) at [46].

[93] In the circumstances, I am not disposed to order either of these parties to pay the costs of the successful applicants or any of them.

ORDER

[94] I thus make the following order:

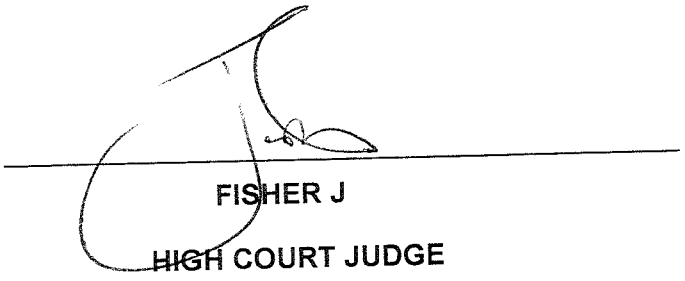
1. Mr Chang's application under case number 22157/2019 is dismissed.

2. The Minister's decision to extradite Mr Chang to Mozambique is set aside.

3. To the extent that the Minister's decision dismissed the US extradition request, it is set aside.

4. Both decisions are remitted to the current Minister for determination.

5. The parties are each to pay their own costs in these applications.

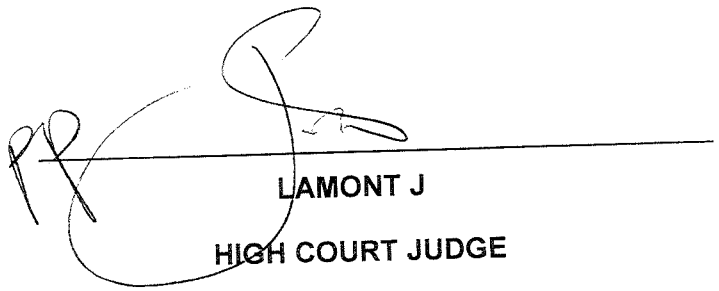


FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

It is so ordered,

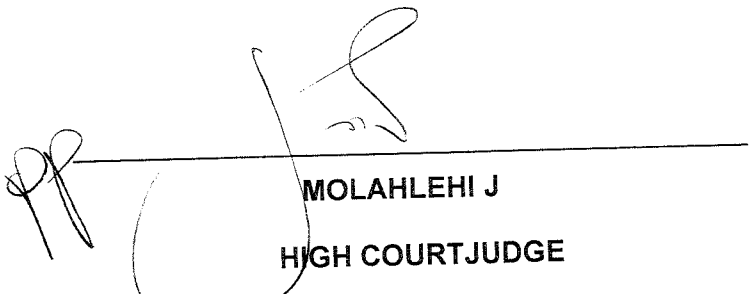


LAMONT J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,



MOLAHLEHI J

HIGH COURTJUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 16 -17 October 2019.

Judgment Delivered: 1st November 2019.

APPEARANCES:

For the Applicant	: Adv W.J Vermeulen SC with Adv J.A Raizon.
Instructed by	: BDK Attorneys.
For the Respondent	: Adv V Maleka SC with Adv Kazee.
Instructed by	: State Attorney.
For the 1st intervening Party	: Adv A. Katz SC with Adv E. Cohen.
Instructed by	: Ian Levitt Attorneys.
For the 2nd Intervening Party	: Adv W. Mokhare SC with Adv M. Ramabulana.
Instructed by	: Mabunda Incorporated.
For the *Amicus Curae*	: Adv Du Plessis SC with Adv S. Pudifin-Jones.
Instructed by	: Webber Wentzel Attorneys.