IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO:
GHC CASE NO: 40441/2021

In the matter between:

REPUBLIC OF MOZAMBIQUE	Applicant
and	
FORUM DE MONITORIA DO ORÇAMENTO	1ST Respondent
MANUEL CHANG	2ND Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	3RD Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	4TH Respondent
HELEN SUZMAN FOUNDATION	5TH Respondent
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	6TH Respondent
MINISTER OF HOME AFFAIRS	7TH Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the applicant applies in terms of Rule 19(1)(2) of the rules of the Constitutional Court for leave to appeal against the judgment and orders of the Gauteng Local Division, Johannesburg under case number 40441/2021, handed down on 10 November and 7 December 2021 in the following terms:

1. That the applicant be granted leave to appeal to the Constitutional Court in terms of section 167(3)(b)(i), alternatively section 167(3)(b)(ii) of the Constitution of the Republic of South Africa, 1996 against the order and or judgment, except a costs order made by Honourable Justice Victor sitting in the Gauteng Local Division, Johannesburg.

2. If leave to appeal is granted, the applicant will on appeal seek the following orders:

2.1 that the appeal is upheld with costs, including the costs of two counsel;

2.2 that the orders of the High Court are set aside and replaced with the following orders:

(a) the application is dismissed with costs including costs of two counsel,

(b) Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the affidavit to deposed to by **PRITZMAN BUSANI MABUNDA**, the attorney of record of the Republic of Mozambique, attached hereto will be used in support of this application.

TAKE NOTICE FURTHER THAT if any of the respondents wish to oppose, may respond to this application in writing within 10 days from the date upon which this application is lodged indicating whether or not the application for leave to appeal is opposed, and if so state in such statement, the grounds of such opposition.

DATED AT JOHANNESBURG ON THIS THE 15TH DAY OF DECEMBER 2021

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And to: **IAN LEVITT ATTORNEYS**
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And to: **THE STATE ATTORNEY**
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Ref: Mr J Van Schalkwyk
Ref: 3242/19/P45/nm

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MINISTER OF HOME AFFAIRS	7TH Respondent

FOUNDING AFFIDAVIT

I, the undersigned;

PRITZMAN BUSANI MABUNDA

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do hereby make oath and state that:

1. I am an admitted attorney of the High Court of South Africa, practicing as such under the name and style of Mabunda Incorporated, at 2 Protea Road, Corner Riley Road, Bedfordview, 2007, Germinston, an attorney of record of the Republic of Mozambique ("applicant"). I am duly authorised by the applicant to depose to this affidavit and to institute this application before the Constitutional Court.

2. Save where otherwise stated or the context indicates to the contrary the facts herein contained are within my personal knowledge and belief both true and correct. I make legal submissions on advice from counsel appointed in this matter on behalf of the applicant and I accept the legal advice as correct.

THE PARTIES

3. The applicant is the Republic of Mozambique, a sovereign state and a member of the United Nations, South African Development Community ("SADC") and other international bodies and organisations. The applicant has appointed the address of its attorneys of record which appears at the foot of the notice of motion for purposes of service and all other process in this application.

4. The first respondent is Forum De Monitoria Do Orcamento ("FMO"), a civil society organisation based in Mozambique. The first respondent has appointed the address of its attorneys which appear in the notice of motion as the address at which it will accept serve and all other process in this application.

5. The second respondent is Manuel Chang ("Chang"), the former finance minister of the Republic of Mozambique, who is currently incarcerated in a South African prison awaiting extradition in terms of the Extradition Act. Chang has appointed the address of his attorneys which appear in the notice of motion for purposes of accepting service and process in this application.

6. The third respondent is the Minister of Justice and Correctional Services of the Republic of South Africa who is represented by the office of the state attorney, Johannesburg. Service of the application on the Minister will be done at the office of the state attorney.

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7. The fourth respondent is the Director of Public Prosecution, Gauteng Local Division, Johannesburg. Service of the application will similarly be done at the office of the state attorney.

8. The fifth respondent is Hellen Suzman Foundation which has appointed the address of its attorneys appearing on the notice of motion for purposes of service and process in this application.

9. The sixth respondent is the Director-General of the Department of Home Affairs. Service of the application will be done at the office of the state attorney.

10. The seventh respondent is the Minister of Home Affairs. Service of the application will be done at the office of the state attorney.

11. Only the applicant, the Minister of Justice and Correctional Services, FMO and the Hellen Suzman Foundation participated and made submissions in the High Court. The other parties did not play a part nor file any process.

THE PURPOSE OF THE APPLICATION AND THE CONSTITUTIONAL ISSUES THAT ARISE

12. This is an application for leave to appeal to this Honourable Court against the judgment and orders made by the High Court, sitting in Gauteng Local Division, Johannesburg, per Victor J. The order was made on 10 November 2021 a copy of which is annexed hereto marked **"MOZ1"**. The written judgment was delivered electronically on 7 December 2021, a copy of which is annexed hereto marked **"MOZ2".** The application for leave to appeal is predicated on rule 19(1)(2) of the Constitutional Court rules.

13. This rule provides that:

> *"(1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.*
>
> *(2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that*

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where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

14. The applicant is applying directly to this Court against the judgment and orders of the High Court. The application is brought within 15 days from the date the written judgment was handed down on 7 December 2021. The applicant could not approach this Court after 10 November 2021 when the order mas made as it had to await written reasons for the order which were only provided on the 7th of December 2021.

15. The applicant has also filed an application for leave to appeal with the High Court, asking for leave to appeal to the Supreme Court of Appeal ("SCA"). The leave to appeal in the High Court is still pending and has not yet been adjudicated. The leave to appeal direct to this Court is not dependent on the outcome of the leave to appeal before the High Court. This is because this matter and the order by the High Court raises a constitutional matter other than constitutional invalidity under section 172(2)(a) of the Constitution.

16. Section 167(3) of the Constitution provides that:

"(3) The Constitutional Court-

(a) is the highest court of the Republic; and

(b) (b) may decide-

(i) constitutional matters; and
(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) (c) makes the final decision whether a matter is within its jurisdiction."

17. The order of the High Court raises a constitutional matter for two reasons. First, it involves interpretation of the Extradition Act. Interpretation of Extradition Act is a constitutional matter. Second, it involves the review of a decision of the executive under section 1(c) of the Constitution, the legality review. A review under legality predicated on the rule of law and the supremacy of the Constitution is a constitutional matter. Section 167(3)(b)(i) of the Constitution is implicated.

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18. The order of the High Court also raises an arguable point of law of general public importance which ought to be resolved by the Constitutional Court without delay for two reasons. First, the issue of immunity from prosecution under the SADC protocol on extradition raises an important arguable point of law. Second the issue of concurrent extradition requests by two competing States, both of which were found to be lawful by the Magistrate, which of the two takes precedence.

19. Lastly it is important that the matter of the continued incarceration of Chang pending his extradition to either the United States of America ("USA") or to Mozambique be resolved as a matter of priority by the apex court.

20. This application raises arguable points of law of general public importance which ought to be considered by the Constitutional Court in terms of section 167(3)(b)(ii) of the Constitution.

21. The arguable points of law briefly are summarised as follows:

21.1 does Chang enjoy immunity from prosecution in Mozambique despite that he is not a member of Parliament?

21.2 is the South African Court competent to disregard a warrant of arrest issued by a foreign country (Mozambique) for the arrest of Chang upon his arrival in Mozambique on the basis that the South African Court is of the view that the warrant of arrest is defective?

21.3 was the High Court correct as a matter of fact and law that Chang was a flight risk if extradited to Mozambique?

21.4 did the High Court correctly interpret the Extradition Act, and the SADC protocol on extradition?

21.5 did the High Court correctly substitute the decision of the Minister and extradite Chang to the United States of America, despite that the Minister's decision is political and polycentric?

THE DECISION OR ORDER APPEALED AGAINST

22. The order appealed against appears at page 27 of the judgment of the High Court dated 7 December 2021. It reads as follows:

"(1) The decision by the second respondent (Minister) on or about 23 August 2021, to extradite the first respondent (Chang) to the Republic of Mozambique, is declared to be inconsistent with the Constitution of South Africa 1996 and is invalid and set aside.

(2) The decision of the second respondent on 21 May 2019 is substituted with the following:

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"Mr Manuel Chang is to be surrendered and extradited to the United States of America to stand trial for his alleged offences in the United States of America, as contained in the extradition request, dated 28 January 2019"."

23. The applicant does not appeal against paragraph 3 of the order which orders that the costs be borne by the Minister.

24. The leave to appeal should be granted on the basis that the High Court has erred in material respects.

25. In the event that leave is granted, the applicant will pray that the appeal be upheld, and the orders of the high court, except as to the order of costs be replaced with the following order:

25.1 the application is dismissed with costs including costs of two counsel;

BACKGROUND FACTS

26. I first deal with background facts briefly. The High Court has briefly dealt with background facts in its judgment which is not controverted.

27. It is common cause that Chang was arrested on 29 December 2018 by members of the South African Police Service ("SAPS" at the OR Tambo International Airport, in transit to the United Arab Emirates. The arrest was on the request of the government of the USA, which had issued a warrant for his arrest authorized by the District Court for Eastern District of New York. On 19 December 2018, Chang and others were indicted in the United States on charges of conspiracy to commit fraud, conspiracy to commit securities fraud, and conspiracy to commit money laundering, among others.

28. The investigation allegedly revealed that Chang, during his tenure as the Minister of Finance for Mozambique, and his co-conspirators, took part in a large securities fraud scheme during 2012/13, in which they arranged over US$2 billion in loans from international investment banks to state entities controlled by the Mozambican government.

29. Chang and his co-conspirators made material misrepresentations of fact in the loan agreements regarding how funds were to be spent. The loans were supposed to fund maritime projects that would benefit Mozambique, but a significant portion of the funds were diverted to government officials in Mozambique in the form of kickbacks and bribes. The evidence presentec

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alleges that Chang signed guarantees on behalf of Mozambique for all loans secured as part of the loan scheme. Mozambique alleges that Chang acted *ultra vires* in signing for the loans.

30. In late January 2019, the government of USA submitted a formal request for the extradition of Chang to face criminal prosecution in the USA. On learning about the request by the USA for extradition of Mr. Chang, the Republic of Mozambique forwarded a Note Verbale on 11 February 2019 to the Department of International Relations and Co-operation, requesting the extradition of Chang to Mozambique. Chang was charged by Mozambique with similar charges that the USA indicted him on.

31. Subsequently, an inquiry was held by the Magistrate of Kempton Park in terms of the Extradition Act, No. 67 of 1962 as amended. On 8 April 2019 the Kempton Park Magistrate concluded his inquiry and issued an order that Chang was extraditable to both the USA and Mozambique and committed Chang to detention at Modderbee Correctional Facility. The Magistrate submitted his reports to the Minister in terms of section 10(4) of the Extradition Act.

32. Upon receipt of the Magistrate's report, the Central Authority of the Department of Justice prepared a Report for the Former Minister, in which it recommended that Chang be extradite to the USA.

33. On 21 May 2019 the Former Minister decided that the interest of justice will be best served by acceding to the Mozambican request for extradition of Chang to Mozambique.

34. After a considerable delay in implementing the former Minister's decision and lack of response from the Department of Justice, Chang brought an application against the Minister of Justice and Correctional Services in the High Court seeking immediate transfer from South Africa to Mozambique, alternatively to be released on his own recognizance.

35. The Minister decided to oppose the application. The Minister instead counter-applied for the review and setting aside of the Former Minister's decision. The Minister sought to review the Former Minister's decision on the grounds of legality and irrationality. Further, the Minister requested the court *a quo* to remit the decision of the Former Minister to him for reconsideration and determination.

36. Mozambique opposed the Minister's counter-application and counter-applied that the Minister be compelled to implement the decision of the Former Minister to surrender Chang to Mozambique on the ground that the Former Minister's decision is lawful and rational. In the first alternatively, Mozambique requested

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that the court *a quo* should decide to which State Chang should be extradited and surrendered on the ground that the Minister has shown that he would not be able to act impartially, should the court remit the decision to him for reconsideration and determination. In the second alternative, Mozambique requested that, in the event that the High Court decided to remit the decision to the Minister, the Minister should make his decision based on current information as has been made available and known in the application. Mozambique also opposed Chang's alternative prayer that he be released from custody.

37. The FMO sought to set aside the decision of the Kempton Park Magistrate ("the Magistrate") to commit Chang to custody, pending the decision of the Former Minister to extradite Chang to either the USA or Mozambique, on the ground of legality. The FMO argued that the extradition request of Mozambique did not establish that Chang was an accused person. Accordingly, Chang was not liable to be extradited to Mozambique, as contemplated in section 3 and 10 of the Extradition Act. The High Court found that Chang was an accused for the purposes of the Extradition Act and dismissed the FMO's request. This finding by the High Court has not been appealed against. The decision of the Magistrate that Chang is extraditable to both Mozambique and the USA stands. It was for the Minister to decide in the light of concurrent extradition request as to which State he would extradite Chang to, taking into account the SADC protocol on extradition to which South Africa and Mozambique are members.

38. The FMO also sought to have the decision of the Former Minister set aside on the ground that if the Magistrate's decision to commit Chang to custody was erroneous, it follows that the Minister's decision to extradite Chang to Mozambique is unlawful. This argument also failed and the finding by the High Court was not appealed against.

39. The Helen Suzman Foundation ("the HSF) was admitted as an *amicus curiae* to assist the Court on the constitutional matters the application raised, especially on South Africa's obligation to ensure that people charged with corruption are effectively prosecuted. Chang and Mozambique have not opposed the application of the HSF; however, Mozambique sought to correct factual inaccuracies raised in the affidavit of the HSF and raised certain concerns on the stance adopted by the HSF in aligning itself with the application of the Minister. The concern was an erroneous inference by the HSF that Mozambique was unwilling to prosecute Chang merely as it had investigated him since 2015.

40. This baseless inference was persisted on despite an extensive explanation by Mozambique about its investigation. Further, the HSF made an inference that

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because Chang was immune from prosecution by virtue of being a member of parliament, Mozambique could not prosecute him effectively. This inference did not consider that the national parliament of Mozambique had approved Chang's prosecution and that upon him being extradited to Mozambique, the conditional immunity that he enjoyed would be lifted through following due process.

41. The litigation in Chang 1 was concluded with the judgment that was handed down by the High Court. For the convenience of this Court, I attach the judgment in "***Chang* 1**" marked " **MOZ3**". In Chang 1 the High Court remitted the matter back to the current Minister to make a fresh decision as to whether Chang should be extradited to Mozambique or the United States of America. The Minister was required to take into account all relevant facts including the current prevailing facts as at the time he was taking the decision.

42. What was important at the time the current Minister took the decision, although more than two years since the judgment in Chang 1 was handed down is that at that time, Chang no longer enjoyed diplomatic immunity or at the very least the uncertainty as to whether Chang enjoyed immunity was no longer there because Chang had ceased to be a member of Parliament in Mozambique. There had been elections in Mozambique in October 2019 in which new government was installed and new members of Parliament elected. Chang was not one of them.

43. Immunity from prosecution in terms of Mozambican law is enjoyed by members of Parliament. Once one ceases to be a member of Parliament, the immunity automatically ceases. Chang's immunity ceased automatically when he was no longer a member of Parliament or the uncertainty about his immunity ceased then. This fact was known to the Minister when he made the decision to extradite Chang to Mozambique.

44. Importantly before the Minister made the decision to extradite Chang to Mozambique, he invited written representations from the interested parties. All interested parties made representation including FMO which were considered by the Minister before he made the decision. It is not necessary at this stage to attach the written submissions that were made by various parties to the Minister as this will make these papers prolix. What is important to state is that the Minister considered all relevant material before him.

45. The Minister was also furnished with an indictment of Chang lawfully issued by the Attorney General of Mozambique authenticated by a Supreme Court Judge in Mozambique. The Minister also was furnished with a warrant of arrest of Chang (the international warrant of arrest). Before the High Court in the current application, Mozambique also disclosed to the Court another warrant of arrest issued against Chang in Mozambique. The High Court has accepted the

existence of the second warrant and has not questioned its lawfulness. In any event, the High Court was not competent to question the validity of the warrant of arrest issued by a foreign State in the absence of credible evidence impugning that warrant.

46. In respect of whether Chang still enjoyed immunity or not, the Minister obtained several opinions from South African lawyers and Mozambican lawyers. The opinions were inconclusive with divergent views. The fact of the matter is that an opinion is simply a view held by the writer and does not bind the Minister let alone the Court. It is the Court that has the sole prerogative to decide whether as a matter of law and fact Chang still enjoyed immunity from prosecution. The High Court incorrectly interpreted the law and found that Chang still enjoyed immunity. The High Court erred on fact and law. This Court on proper interpretation of the law and the SADC protocol on extradition would come to the conclusion that Chang did not enjoy immunity from prosecution at the time the current Minister made the decision to extradite Chang to Mozambique.

47. Importantly, the High Court did not find that Mozambique is not serious about prosecuting Chang. In fact, the High Court found that Mozambique wants to prosecute Chang, but expressed its preference to send Chang to the USA. It was not open for the High Court to substitute the Minister's decision to send Chang to Mozambique with its own preference. By so doing, the High Court erred on the law and its order falls to be set aside by this Court.

ON GROUNDS OF APPEAL AND THE MISDIRECTION BY THE HIGH COURT

48. The applicant contends that the High Court misdirected itself on the facts and the law when it reviewed and set aside the Minister's decision to extradite Chang to Mozambique.

49. The applicant further states that even if the Minister's decision were to be reviewed and set aside, and that there were grounds justifying the setting aside of the Minister's decision, the Court overreached when it stepped into the shoes of the Minister and substituted the Minister's decision with its own decision that Mr Chang be extradited to the United States of America. In so doing, the High Court ventured into a highly polycentric decision-making, which falls outside the purview of the Court. Further, the High Court offended the principle of separation of powers.

50. The trite principle of the law is that the Court substitutes the decision of the decision maker only where it is a foregone conclusion. In this matter, the decision was not a foregone conclusion. The High Court ought to have remitted the matter back to the Minister for the reconsideration of the matter and for a

fresh decision. The Court did not have all the material before it. Even if it had, the Court was in no position to pronounce itself on a polycentric matter.

51. Extradition is a political decision, and the Extradition Act has deliberately left such decisions to the executive and not to the courts. The High Court did not interpret the importance of the Extradition Act or it did not interpret the Extradition Act correctly.

52. The High Court found that Chang enjoys immunity in Mozambique. There are no facts that the High Court relied on to come to this finding. The finding by the Court that Chang enjoys immunity in Mozambique has motivated the outcome of the proceedings resulting in the Court incorrectly reviewing and setting aside a lawful decision by the Minister.

53. The High Court also inappropriately criticised a warrant of arrest lawfully issued by a Mozambican Court. It was not open to the High Court to cast doubt on a lawfully issued warrant of arrest by another member State of SADC.

54. The High Court incorrectly found that Chang was a flight risk when there were no facts to justify such finding.

55. The High Court placed undue emphasis on the Minister having changed his mind when the Minister never made a decision to extradite Mr Chang to the United States of America. The Minister only made one decision which was to extradite Chang to Mozambique.

56. In Chang 1, the High Court reviewed and set aside former Minister Masutha's decision to extradite Chang to Mozambique purely on the basis that it found that Chang enjoyed immunity from prosecution as at that time he was still a member of Parliament of Mozambique.

57. When the current Minister took the decision to extradite Chang, Chang was no longer a member of Parliament. That constituted a new material before the current Minister. Indeed, Chang lost his immunity the moment he ceased to be a member of Parliament in Mozambique.

58. The High Court relied on the speculative submissions by FMO that it is not clear whether Chang will be able to raise a defence of immunity at the trial.

59. The High Court accepted that the Mozambican extradition request was a lawful request. It accepted that there were two concurrent or competing extradition requests one by Mozambique and the other by the United States of America.

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60. Once it was accepted by the High Court that both extradition requests were lawful, it was not open to the Court to choose or have its own preference to the United States of America as against that of the Minister.

61. Whilst the High Court correctly quoted a passage referred to the Court by the Minister in argument of Pharmaceutical Manufacturers Association of SA: in re: *ex parte* President of the Republic of South Africa 2000(2) SA 674(CC), which affirm the principle that a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. In this case, the High Court simply preferred the United States of America and disagreed with the Minister's decision. That did not entitle the High Court to substitute the decision of the Minister simply because it disagrees with it nor did it entitle the High Court to review and set aside the decision of the Minister.

62. The Minister maintained that there was a proper warrant for arrest for Chang in Mozambique. The Minister was correct that there was a proper warrant of arrest in Mozambique. There is still a valid warrant of arrest of Chang in Mozambique.

63. Whilst the Court also referred to the judgment of Bel Porto School Governing Body vs Premier, Western Cape 2002(3) SA 265 (CC), at paragraph 45, which was referred to the Court by the Minister and quoted the most relevant passage which reads as follows:

"The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."

64. Despite this powerful passage from Bel Porto, the High Court simply decided otherwise. I submit that the High Court misdirected itself when it did not follow the trite authorities of this Court on rationality review.

65. The Court ignored the evidence under oath by the Mozambican government that there is a valid warrant of arrest for Chang in Mozambique and that the moment he touches on Mozambican soil he will be incarcerated and brought before a judge of the Supreme Court. The Court also ignored the evidence of Mozambique under oath that there is an indictment from the Attorney General with leave from the Supreme Court judge which was with the authority of the Supreme Court judge issued to be served on Chang outside the country i.e. in South Africa. That indictment was in possession of the Minister when he made the decision. There was no basis for the High Court in South Africa to second

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guess an indictment lawfully issued by an Attorney General of the Republic of Mozambique.

66. The allegation without facts made by FMO that Chang enjoys immunity from criminal prosecution in Mozambique was baseless and the High Court ought not to have accepted such say-so assertions by FMO.

67. Again, in paragraph 46 of the judgment, the Court quoted a relevant passage from Albutt vs Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC), paragraph 51 which states that:

"The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objectives sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."

68. The High Court did not follow this reasoning in Albutt despite quoting it with approval. Had it done so, it would have acknowledged that by extraditing Chang to Mozambique, this was one of the means available to the Minister and that the Court could not second guess that decision simply because it preferred the United States of America. Both countries are eligible to have Chang extradited to one of them.

69. The Court did not deal with the compelling considerations why it would have been preferable to extradite Chang to Mozambique rather than to the United States of America. First the Court ought to have applied the SADC protocol on extradition. Had it done so, it would have realised that the SADC protocol sets out the requirements that must be taken into account when an extradition is considered. One important factor is the nationality of the person to be extradited, the proximity and other related factors. For instance, Chang is a citizen of Mozambique, which is a neighbouring country. It would have been convenient and cost-effective to extradite Chang to Mozambique than to the United States of America. The High Court has accepted that Chang is indicted in Mozambique to face criminal charges. Once the Court accepted that, it followed that it ought to have accepted that Chang will be prosecuted in Mozambique.

70. For instance, in paragraph 14, the High Court stated as follows:

"There are currently 19 defendants who are facing prosecution in Mozambique, but it is alleged that Mr Chang is a primary or principal protagonist: the linchpin of this crime. The Mozambican government wants to bring Mr Chang to book, thus it seeks his extradition from South Africa, where he is currently incarcerated".

MISDIRECTION OF THE HIGH COURT ON THE REMEDY

71. The High Court also misdirected itself on the remedy as set out in paragraphs 93 to 97. The Court relied on Trencon Construction (Pty) Ltd vs Industrial Development Corporation of South Africa Ltd 2015 (5) SA 245 (CC), when the facts in Trencon are completely different to the facts in this matter.

72. Whilst the High Court quoted the relevant passage in paragraph 48 of Trencon, which states that:

"A court will not be as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature. In those instances – if the court has all the relevant information before it – it may very well be in as good a position as administrator to make the decision."

73. In this matter, the decision taken by the Minister is a polycentric decision, and political decision. It is a decision which is best reserved to the executive to take and not to the Court. The Court should defer to the executive in such matters. Secondly the Court did not have all the information. The Court does not have the expertise to make such determination as to where Chang is to be extradited. The Court was not confronted with a decision that is judicial in nature, but it was confronted with a decision which is polycentric and political.

74. In such a situation the Court ought to have deferred to the executive. The Court therefore erred in substituting the decision of the Minister particularly where the

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Minister opposed the substitution. This means that the Minister was in a better position to reconsider the matter on all available facts and make a fresh decision.

CONCLUSION

75. For the above reasons, leave to appeal should be granted to the Constitutional Court.

76. Accordingly, the applicant requests the Court to grant it leave to appeal as per the notice of motion to which this affidavit is attached.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn before me at Sandton on this the 15 day of **DECEMBER 2021**, the regulations contained in Government Notice N0. 1648 dated 19 August 1977 (as amended) having been complied with.

COMMISSIONER OF OATHS

CAMERON GRAHAM BERNHARDT
COMMISSIONER OF OATHS EX OFFICIO
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"MOZ1"

Signed electronically
on 10 November 2021

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

ON THIS THE 10TH DAY OF NOVEMBER 2021
BEFORE THE HONOURABLE JUDGE VICTOR

Case No: 2021/40441

In the matter between:

FORUM DE MONITORIA
DO ORÇAMENTO — Applicant

and

Private Bag X7, Johannesburg 2000
2021 -11- 10
GEO-JHB-001

MANUEL CHANG — First Respondent

MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES — Second Respondent

DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG, JOHANNESBURG — Third Respondent

HELEN SUZMAN FOUNDATION — Fourth Respondent

DIRECTOR GENERAL: DEPARTMENT
OF HOME AFFAIRS — Fifth Respondent

MINISTER OF HOME AFFAIRS Sixth Respondent

REPUBLIC OF MOZAMBIQUE Seventh Respondent

COURT ORDER

After having heard counsel on behalf of the applicant and respondents the following order is made:

1. The decision by the second respondent on or around 23 August 2021 to extradite the first respondent to the Republic of Mozambique is declared to be inconsistent with the Constitution of the Republic of South Africa, 1996, invalid, and is set aside.

2. The decision of the second respondent on 21 May 2019 is substituted with the following: "Mr Manuel Chang is to be surrendered and extradited to the United States of America to stand trial for his alleged offences in the United States of America as contained in the extradition request dated 28 January 2019."

3. The second respondent is to pay the costs of this application, including the costs of two counsel on a party and party scale.

Private Bag X7, Johannesburg 2000

BY THE COURT 2021 -11- 10

GLD-JHB-061

REGISTRAR

Ian Levitt Attorneys

Ian Levitt

"MOZ2"

00-1

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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: Yes/
(2) OF INTEREST TO OTHER JUDGES: Yes/
(3) REVISED: Yes/

7 December 2021
DATE

SIGNATURE

Case No 40441/2021

In the matter between:

FORUM DE MONITORIA DO ORÇAMENTO	Applicant
and	
MANUEL CHANG	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Third Respondent
HELEN SUZMAN FOUNDATION	Fourth Respondent
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent

00-1

JUDGMENT

VICTOR, J:

Introduction

[1] The myth that corruption has no victim is a dangerous fantasy. Corruption causes disastrously inefficient economic, social and political outcomes.[1] It diverts public resources from critical development projects thereby exacerbating job creation, growth and opportunity. It makes poor nations poorer.

[2] The genesis of this matter lies in what has become known as the Mozambican secret debt scandal, in which three Mozambican companies secretly and illegally took out a loan of more than $2bn repayment of which the state guaranteed. Mr Chang, a public official of Mozambique who occupied the position of Minister of Finance for ten years, and the first respondent in this matter, allegedly formed part of the group involved in the scandal. During his time in office, it is alleged that he committed 'grand corruption', otherwise known as the plundering of public resources on a large scale, causing untold hardship to poor communities.[2] At issue here is his extradition.

Factual background: the Mozambican secret debt scandal and the context of this application

[3] In 2013, bankers in Europe, businesspeople based in the Middle East and various politicians and public servants in Mozambique conspired to organise a Euro-based two-billion-dollar loan to Mozambique. Many of the funds derived from American investors. The Vice Attorney General of Mozambique describes this amount as constituting 12 percent of the country's GDP.

[1] Democracy Works Foundation Policy Brief 14: Combatting Corruption in South Africa William Gumede 3 March 2011.

[2] ibid.

[4] The loan was kept hidden. None of the borrowed money, except bribes, went to Mozambique. There were no services or products which inured to the benefit of the Mozambican people. This triggered a response from civil society, and in particular the applicant in this matter, the Forum De Monitoria Do OrÇamento, abbreviated and referred to herein as FMO. FMO is an umbrella organisation comprising of various Mozambican civil society organisations that are non-profit and non-governmental in nature, and is organised in terms of the laws of Mozambique. FMO has addressed the question of corruption and asserts in its founding affidavit that corruption is a pandemic that constitutes a scourge of our times. It therefore took a keen interest in the scandal.

[5] Like South Africa, Mozambique is no stranger to corrupt officials, abusers of public power and the problem of monies intended for public good, greedily diverted into the pockets of the wrong parties.

[6] Mr Chang allegedly abused his public office by funnelling foreign funds away from their intended purposes: community upliftment and maritime projects that would have provided employment. As already described, much of the foreign funds diverted illegally were from American investors. Mr Chang, acting in his official capacity, signed a guarantee on behalf of the Government of Mozambique for these loans, thus making Mozambique liable to repay these loans. Mr Chang stands accused of grand corruption. He has been charged in both the United States of America (USA) and the Republic of Mozambique for various counts of corruption and fraud, committed whilst he was the Minister of Finance in Mozambique.

[7] Mr Chang has yet to face these charges. On 19 December 2018, Mr Chang was indicted in the eastern district Court of New York, USA, for these misdeeds. The American authorities sought his extradition to the USA to stand trial, insisting that he be arrested whilst in South Africa. He has been incarcerated in South Africa ever since. Shortly thereafter, Mozambique also requested that Mr Chang be extradited to Mozambique to stand trial. This created a situation whereby there were two competing requests for his extradition.

[8] In 2018, Mr Chang was arrested at the OR Tambo International Airport on his way to Dubai, at the request of the American authorities. He brought an application in 2019 in which he sought an order directing the current Minister to surrender him to the Government of Mozambique, alternatively, that he be released from custody. That application is known as *Chang 1*.[3]

[9] The current Minister not only opposed the relief sought by Mr Chang but also launched a counter - application to set aside the decision of his predecessor in Office, former Minister Masutha, who had decided to extradite Mr Chang to Mozambique. On 1 November 2019 the full Court in *Chang 1* dismissed Mr Chang's application, reviewing the former Minister's decision and remitting it back to the current Minister for reconsideration.

[10] The current Minister after receiving the remittal in Chang 1 waited almost two years before deciding to extradite Mr Chang to Mozambique. Suddenly his extradition has become urgent. Having reached this point and the continued incarceration of Mr Chang, coupled with the threat of his extradition to Mozambique, it understandable for FMO to seek the urgent relief they have which is to halt his extradition to Mozambique and for him to be extradited to the USA. This application and its urgency is important to all parties.

[11] The question of FMO's legal capacity to sue in these proceedings is not raised. In this matter, the original founding affidavit was unsigned as the authorised person was out of the country and FMO's attorney signed, having been authorised to do so. The original affidavit was eventually signed by the appropriate person, so nothing turns on this.

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[3] *Chang v Minister of Justice and Correctional Services* [2020] 1 All SA 747 (GJ) (*Chang I*).

[12] The main focus of the FMO is to address what they describe as widespread government corruption and maladministration in Mozambique. They assert that members of the Mozambican society are poor, and are heavily impacted by the extent of bribery and corruption that plagues their country. Concerned by Mr Chang's involvement in corruption, FMO asserts that Mozambican civil society does not believe the interests of the country will be served if Mr Chang is extradited to Mozambique instead of to the USA for reasons that will be canvassed presently.

[13] The deponent, on behalf of the Government of Mozambique, asserts that its purpose is to bring Mr Chang and other members of the group that were involved in redirecting the funds, and contends that it is of paramount importance that the perpetrators of the so-called hidden debt scandal, and other acts of corruption and fraud, are held accountable in Mozambique.

[14] There are currently 19 defendants who are facing prosecution in Mozambique but it is alleged that Mr Chang is the primary or principal protagonist: the linchpin of this crime. The Mozambican Government wants to bring Mr Chang to book, thus it seeks his extradition from South Africa, where he is currently incarcerated.

Parties

[15] The applicant is FMO, described above. The first respondent is Mr Chang, who is currently held in prison pending his extradition. The second respondent is the Minister of Justice and Correctional services, whose decision to extradite Mr Chang to Mozambique is being challenged. The third respondent is the Director of Public Prosecutions, Gauteng Local Division. The fourth respondent is the Helen Suzman Foundation (HSF) an NGO holding an interest in these proceedings on account of its mandate: to defend the values of the Constitution, the Rule of Law and human rights. The fifth respondent is the Director General, who controls the ports of entry and exit of the country. The Sixth Respondent is the Minister of Home Affairs, who has an interest in the matter. The seventh Respondent is the Republic of Mozambique which, as indicated, seeks Mr Chang's extradition.

Issues

[16] At the heart of this matter are two issues for determination. The first is whether the Minister's decision was rational and in conformity with the doctrine of legality when he changed his mind from extraditing Mr Chang to the USA, to Mozambique.

[17] The second is whether the Minister ignored relevant facts, thus resulting in the decision and the procedure adopted in arriving at the decision, being marred by irrationality.

Submissions by the parties

The case by FMO

[18] There are two competing endeavours by both Mozambique and the USA to extradite Mr Chang to their respective countries. The current Minister of Justice initially decided that Mr Chang must be extradited to the USA, but then failed to give proper reasons for his change of mind to extradite Mr Chang to Mozambique. FMO asserts that this decision must be reviewed and advances three core bases for doing so. According to FMO, the Minister's decision must be reviewed in terms of (i) a legality review; (ii) a review on the basis that the Minister did not apply the correct law on extradition; (iii) and a review on the basis that the Minister did not consider the relationship between international and domestic law under the Constitution and in terms of International Treaties to which South Africa is a signatory.

[19] FMO submits that the decision to surrender Mr Chang to Mozambique was not rational. This, FMO avers, is because Mr Chang enjoys immunity in Mozambique and the Mozambican warrants of arrest for Mr Chang are defective, as is the indictment. Accordingly, extraditing Mr Chang to Mozambique would not serve the purposes of extradition, namely, to ensure criminal prosecution and to counter corruption and fraud. FMO points out that at the time of *Chang 1*, Mr Chang's immunity from prosecution in Mozambique was the basis to set aside the former Minister's decision to extradite him to Mozambique, and FMO contend it is still a concern. FMO points to further problems

being that Mr Chang remains a flight risk if he is returned to Mozambique and there is no valid and settled legal assurance that he is not immune from prosecution.

[20] FMO contends that before retaking the decision, the Minister had even sought opinions from five independent lawyers to advise him on whether Mr Chang indeed enjoys immunity in Mozambique. On or about September 2020, the Minister accepted, and agreed with, the advice given: that Mr Chang did enjoy immunity. Yet, barely a year later, on 17 August 2021, the Minister nevertheless changed his mind. FMO submits that not only was this contrary to the advice tendered but also flies in the face of the principle on immunity set out in the judgment of *Chang 1*: that it is irrational to extradite a person to where they will be immune from prosecution.

[21] FMO also asserts that the decision taken by the Minister was procedurally fatal and it was problematic that the Minister failed to provide rational reasons for the decision taken. Only after the launch of these proceedings did the Minister give any reasons. FMO submit that the Minster's reasons rationalising his decision *post hoc* the legal challenge is impermissible, and in any event, were arbitrary and irrational and they bore no rational connection to the evidence before the Minister when he changed his mind from extraditing Mr Chang to the USA, then to Mozambique.

The case by the Helen Suzman Foundation (HSF)

[22] The HSF has an interest in highlighting and preventing the surge of corruption, not only in South Africa, but globally. It seeks to highlight four aspects of this matter which affects the rule of law, and upon which, it grounds its interest in the proceedings.

[23] The HSF emphasises that it is trite law that all exercise of public power, including Executive action, is subject to the Constitution and review by the courts, which of course should be mindful not to overstep the mark or overreach into what would be the realm of the Executive. However, courts are fully entitled to assess and weigh whether the principle of legality has been breached or not. It emphasises that the international law implications of the Minister's decision do not shield him from the

Court's oversight. The HSF also analysed the record and submits that the Minister's reasons failed to advance the rule of law, constitutionality and human rights. The HSF also asserts that there is no persuasive evidence to demonstrate that Mr Chang would be properly arrested and tried in Mozambique. Accordingly, that the interests of justice would be served if he were to be extradited to the USA.

[24] A further point that the HSF stresses is that the Minister's decision and reasons thereof, must be located in the written record: editorialised written reasons should not be given after court proceedings have been instituted, nor delivered after the record has been filed. What this means for this case is that the reasons proffered *post hoc*, are not confirmed by the record.

[25] The HSF, in expanding on the duty to counter corruption, referred to a number of statutes and conventions, including PRECCA,[4] which demonstrate South Africa's commitments to strengthen measures to prevent and combat corruption and corrupt activities. Section 35(1)(a) of PRECCA provides that:

> "Even if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged:
>
> (c) was arrested in the territory of the Republic. . . "

[26] The HSF also refers to a number of international instruments, including the United Nations Convention Against Corruption, the AU Convention Against Corruption, the OECD Anti-Bribery Convention and the SADAC protocol Against Corruption. The HSF contends that corruption is a transnational phenomenon requiring inter-state cooperation. The instruments should serve to effectively eradicate the concerted efforts of those participating in corruption at a global level.

[4] Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PRECCA).

The case by the Minister of Justice

[27] It was argued on the Minister's behalf that the decision to return Mr Chang to Mozambique rather than to the USA, in accordance with his earlier decision, was rational. In this regard reliance was placed on the case of *Scalabrini*, and in particular, the reference to the following:

> "All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."[5]

[28] It was submitted that a court cannot substitute its own decision, save in an exceptional circumstance, and the applicant has not made out a case for exceptional circumstances to warrant the Court making an order substituting the decision of the Minister.

[29] It was also argued that the threshold of rationality, as set out in *Pharmaceutical Manufacturers*, had been reached by the Minister:

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."[6]

[30] The argument on behalf of the Minister was that there was a rational connection between his decision and its legitimate purpose, and he was acting within the scope of

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[5] *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) at para 65.

[6] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 90.

legal authority. He submits that the decision he made was rationally connected to the facts and the information that was before him.

[31] Reference was also made to the case of *Bel Porto*, where the Constitutional Court cautioned:

> "The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."[7]

[32] The Minister contends that FMO has not referred to any facts from which it appears that Mr Chang enjoyed immunity in Mozambique. He relied on the opinions of experts in Mozambican law, and he was satisfied that that opinion precluded any immunity defence that Mr Chang could raise. He also took into account that other persons have been indicted for the offence and therefore, concludes that Mr Chang could be successfully prosecuted in Mozambique.

[33] The Minister contends that there is a proper warrant of arrest for Mr Chang in Mozambique, as is required in terms of section 11 of the Extradition Act,[8] to make a decision and to deliver Mr Chang to Mozambique based on the information before him.

[34] The Minister submits that there was no legal necessity for the reasons for his decision to be part of a written recordal in the record. He asserts that it was perfectly permissible for his reasons to be delivered on 2 September 2021, as there is no requirement in Uniform Rule 53 which prevents written reasons from being filed after the record is handed over.

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[7] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) (*Bel Porto*) at para 45.

[8] Extradition Act 67 of 1962.

[35] Finally, the Minister disputes that it is in the interests of justice that the FMO demands be met and that Mr Chang be extradited to the USA. The Minister makes the point in his reasons that there is no bias to Mozambique in his decision.

The case by the Mozambican Government

[36] The Mozambican Government urges this Court to take into account that it is not a question of whether Mr Chang will likely face prosecution in Mozambique.

[37] Dr Paulo, the deponent to the affidavits by Mozambique says he knows the law of his country and the submissions he makes to this Court is the law of Mozambique. Dr Paulo, submits that Mr Chang will definitely face the full brunt of the law should he be returned to Mozambique. He submits that extradition is a critical tool in ensuring that criminals cannot use their resources to leave the country's territory to avoid criminal accountability. Mozambique submits that the facts before the current Minister have changed from those facts before the previous Minister. Those include a fresh warrant of arrest, an indictment from the Attorney General with leave from a Supreme Court Judge to serve it outside the country.

[38] Accordingly, the Government of Mozambique avers that FMO's submission, that the Minister's decision to extradite Mr Chang to Mozambique is irrational because he is immune from criminal liability in Mozambique, is without merit.

Legality review

[39] It is foundational to our Constitution that that the exercise of all public power must be lawful. In this case, the assessment is whether the decision of the Minister as a member of the Executive was rational.

[40] As already expounded, after the hearing of *Chang 1*, the Minister decided to extradite Mr Chang to the USA. Almost a year later, he changed his mind and decided to extradite Mr Chang to Mozambique instead. The extradition procedure provides that after the Minister receives a report and copy of the record of the proceedings by the

Magistrate who committed the person (in this case, Mr Chang) to prison in terms of section 10(3) of the Extradition Act, the Minister has a discretion on whether to extradite or not. In terms of section 11(a) of the Extradition Act:

> "The Minister *may* order any person committed to prison under section 10 to be surrendered to any person authorised by the foreign State to receive him or her."

[41] It must be accepted that the Minister's decision must be rationally related to the purpose for which the power was conferred.[9] If it is not, then the exercise of the power would be arbitrary and at odds with the Constitution.[10] This means that in exercising his power, the Minister must take into consideration all the relevant facts when weighing up a matter pertaining to extradition. The process in leading up to that decision must also be rational.

[42] In *Law Society*, Mogoeng CJ, in relevant part stated:

> "The evolution of our constitutional jurisprudence culminated in a principle that recognises that rationality applies not only to the decision, but also to the process in terms of which that decision was arrived at. . .
> In *Simelane* we reiterated its application to process in these terms:
>
> > 'We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.'
>
> . . .The latter is about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power."[11]

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[9] *Pharmaceutical Manufacturers* above n 8 at para 85. See also *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 75 and *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) (*Masetlha*).

[10] *Masetlha* id.

[11] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) (*Law Society*) at paras 61-4.

Rationality and ignoring relevant factors

[43] FMO submits that the Minister failed to take into account relevant facts and material and that these omissions meant that the means to achieve the object was not met. This, according to FMO, had an impact on the rationality of the entire process. These relevant facts and material included a number of factors: the reliance on the Government of Mozambique's say-so that Mr Chang would be charged in Mozambique; the unsound bases and contradiction in the warrants of arrest; although 19 people are to stand trial in Mozambique there is no definite indication that they will be convicted; lack of reasons for the length of time it has taken to charge the 19 alleged offenders; the fact that the very victims of the crimes, being the citizens of Mozambique, have, through FMO, themselves requested Mr Chang's extradition to the USA as they believe the level of systemic corruption is so deep that their interests would be better served by way of extradition to another country; the bad faith approach by Mozambique as set out in *Chang 1*; and the that recoupment of the money is not for Mozambique but for the investors to whom the money is owed. If the money is returned to the investors then the Government of Mozambique will not have to repay the money out of its own pocket.

[44] The Constitutional Court, in *Democratic Alliance,*[12] postulated a three stage enquiry when a court is faced with an Executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires the court to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is "whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational".[13]

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[12] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (*Democratic Alliance*).

[13] Id at para 39.

[45] If the Minister does not take into account the above material factors, as well as the purpose of the Extradition statute, and if he does not have regard to both domestic and international jurisprudence pertaining to extradition, then the Minister's decision was inconsistent with the purpose for which the power was conferred. If this is so, then there can be no rational relationship between the means employed and the purpose.[14]

[46] In *Albutt*, the following was stated:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[15]

[47] In this regard, FMO submitted that the Minister should have been on high alert because of the very high international duties that South Africa was bound to observe, in particular in this situation, in respect of transnational corruption. The standard is very high and there must be exacting and rigorous compliance with our international obligations. The Minister should pay meticulous detail to all factors when making his decision. In particular, FMO submits that the Minister should have been on notice of these cautionary aspects as he was aware of the legal provisions as established in *Chang I*, when he supported Mr Chang's extradition to the USA. It is important to note that the Deputy Minister of Justice also signed the extradition order to the USA, and there is no word from him as to why there was a change in the decision.

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[14] Id at para 40.

[15] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) para 51.

[48] The Minister was advised by his legal advisors that his decision to extradite to Mozambique would be subject to review. This is in a memo from an advocate. The Minister therefore had a very high duty to make sure that the decision he made was not irrational and that this change of tack should have been properly explained and justified.

[49] On the facts before the Minister one of the primary considerations which illustrates that his decision was not rationally related to the purpose is that of immunity. The question of Mr Chang's immunity was an issue in Chang 1 and continues to be problematic in this matter.

Immunity

[50] In *Chang 1*, the Court found that if Mr Chang was extradited to Mozambique and was immune from prosecution, then the extradition to Mozambique was unlawful and irrational. The question of immunity is also dealt with in Article 4(e) of the SADC Protocol, which similarly maintains that if the person becomes immune from prosecution, then extradition to that State is contraindicated.[16]

[51] In *Chang 1*, the court found that the former Minister's decision was irrational because "[e]xtradition 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."[17]

[52] The record reveals that Mr Chang is immune from prosecution in Mozambique. It is only from the *post hoc* reasons that it now emerges that Mr Chang is not immune from prosecution. In the absence of full and proper reasons from the Minister for his changed stance vis-à-vis the matter, this Court is still left with other evidence which is objective and clear, and it remains that the question of Mr Chang's immunity from prosecution is uncertain.

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[16] The protocol provides: "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".

[17] *Chang I* above n 5 at para 76.

[53] There is evidence in four documents that the Minister has not been able to gainsay except for the word of Dr Paulo and some other legal opinion. No case law has been cited to support Dr Paulo's legal stance that Mr Chang does not enjoy immunity in Mozambique. The documents relied on by FMO to support its argument include: the submission by Mr Chang on 21 February 2020 and the Government of Mozambique that a member of Parliament does enjoy immunity; Mr Chang renounced his membership of Parliament, and it was accepted by Parliament; there was a general election in 2019 after he was incarcerated; he was not voted into Parliament; and there is no written evidence to suggest that he cannot be prosecuted for crimes committed during his tenure as Minister of Finance except for Dr Paulo's say-so.

[54] In the light of the unresolved uncertainties about Mr Chang's immunity, in my view, the Minister could not have made a rational decision. These uncertainties were referred to by FMO and include the fact that Mr Chang has not claimed immunity under international law but under the domestic laws of Mozambique. If it were under international law, then the issue would have turned on whether South Africa could arrest Mr Chang because of the immunity he enjoys under international law. Instead, the issue is whether Mr Chang enjoys immunity under the domestic laws of the requesting State thereby making immunity a dispositive issue.

[55] FMO submits that it is unclear whether further processes, like parliamentary or court approval, are required to prosecute Mr Chang for conduct allegedly committed during his incumbency. FMO argues that there is a difference between personal immunity while occupying office or protection for conduct generally while in office. It may well be the case that Mr Chang is still immune from prosecution for anything done during his term of office, even though he is no longer an MP.

[56] Mr Chang and Mozambique offer contradictory accounts of Mr Chang's immunity. Mr Chang submits that he must be surrendered to Mozambique so that he can have his immunity lifted. He then, in plain contradiction of this statement, says that

his immunity is now "moot" as he has resigned from Parliament and because there is a new Parliament in Mozambique, of which he does not form part.

[57] The further concerning aspect is the supplementary submission filed by the Mozambican Government. In *Chang 1*, the Government claimed that he never enjoyed immunity. In *Chang1*, the Court found this to be incorrect. FMO submits that moving from that incorrect premise, the Government of Mozambique argues that he can now be prosecuted but whilst he was Minister of Finance Mr Chang could not be prosecuted without the consent of Parliament. This contradicts the point that he made in regard to his immunity in *Chang 1*, which found that without Parliament lifting his immunity he could not be prosecuted. Mr Chang could still raise an immunity defence. Mr Van Heerden, the Chief of the Directorate of International Legal Relations in the Department of Justice, stated in his July 2020 memorandum, that Mr Chang still enjoys immunity in Mozambique. There are five opinions of which portions are referred in Mr Van Heerden's opinion. The full opinions have not been made available to FMO. Of importance is that Mr Van Heerden bases his finding statement on those opinions.

[58] An excerpt in a third opinion obtained by the Minister shows that he should not have accepted that Mr Chang no longer enjoys immunity in Mozambique just because he was no longer a member of Parliament, even though Parliament acknowledged that renunciation. An excerpt from a fourth legal opinion procured from Mozambique, FMO asserts that it shows that Mozambique was acting in bad faith when dealing with South Africa on the question of his immunity. At the time the Mozambican opinion was given to South Africa, Mr Chang had not been charged with an offense in Mozambique, which means the request for extradition did not comply with international law.

[59] FMO points out that at the time of the arrest of Mr Chang and the request for extradition, he did not waive his immunity. Mr Chang still enjoys a right not to testify about the time he was the Minister of Finance.

[60] Accordingly, the question of Mr Chang's immunity from prosecution has not been securely proven by the Government of Mozambique, nor were there sufficient facts before the Minister to make the decision on Mr Chang's immunity. There is no incontrovertible evidence to gainsay that Mr Chang could successfully raise an immunity defence when he arrives in Mozambique and what the outcome of his defence would be.

[61] To the extent that Mr Chang's immunity is still uncertain should he return to Mozambique, this still remains a central consideration on whether the Minister's decision was rational when he changed his mind from extraditing him to the USA and then to Mozambique. I shall not belabour the point any further save to state that the Minister has not fully explained his change of heart in the face of his own decision and the legal opinions he received which showed Mr Chang could still enjoy domestic immunity.

Other concerns

[62] There remain further relevant concerns which the Minister did not take into account or failed to give sufficient weight to. These include the problems pertaining to the warrants of arrest, the indictment and ignoring the wishes of Mozambican civil society. In *Chang I* the Full Court found:

> "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."[18]

[63] Mr Chang remains a flight risk in Mozambique. There remain concerns according to FMO that the systemic corruption may facilitate his escape should he be returned. At this stage there is no written progress report of the current prosecutions and conviction of persons politically connected with him in Mozambique. There is a

[18] *Chang I* above n 5 at para 36.

further concern that Mr Chang believes that Mozambique will not be able to effectively prosecute him.

[64] In my view these facts ought to have been carefully considered by the Minister in the process of reaching his decision. In the absence of a rational explanation by the Minister for ignoring or not giving sufficient weight to these undisputed concerns, the requisite threshold for rationality has not been reached. The means adopted by the Minister are not rationally related to the purpose because the procedure by which the Minister's decision was taken did not give serious consideration to these undisputed facts.

Warrants of Arrest

[65] FMO contends that at the time of the Minister's decision, the international warrant of arrest was defective, as it also provided for Mr Chang to be arrested outside the territory of Mozambique. The public prosecutor of Mozambique sent a provisional indictment to the Minister in November 2020, stating that the warrant of 19 January 2019 did not comply with timelines under Mozambican law. This resulted in the issue of a warrant of arrest for pre-trial detention issued by the Maputo City Court. The consequence is the 2019 warrant is invalid and cannot be executed on.

[66] There is a further difficulty. The warrant was issued whilst Mr Chang was a member of Parliament. He was immune from prosecution at that stage.

[67] Because of the concurrent extradition requests from Mozambique and the USA to the South African authorities, the prosecutor then tried to justify why a second warrant was necessary, in order to make sure that the pre-trial detention timeline was met.

[68] The warrant is now over two and half years old. This, to me, is concerning, since the international warrant has not been withdrawn as far as the papers placed before me show, and there is, within the Mozambican justice system an inconsistency about how

the two warrants are to be assessed. And, unfortunately, there is no proper explanation other than a brief reference as to why a second warrant was to be issued.

[69] The Minister has failed to give reasons for why the warrant is valid in the light of the inconsistencies. The Government of Mozambique issued another warrant dated 14 February 2020, by the Maputo City Judicial Court. This warrant was not before the Minister when he changed his decision. It was only filed in these proceedings when the answering affidavits were filed. It is unclear whether timelines apply to the new warrant of arrest. In the absence of this new warrant being before the Minister, his decision is irrational as it must have been clear to him at that point that Mr Chang still had immunity from prosecution in Mozambique. In the light of the new warrant being issued, one can only conclude that the government considered the original warrant invalid, yet that was the warrant on which the Minister made his decision. This fortifies the conclusion of irrationality of his decision.

[70] FMO points out that the crimes listed in the arrest warrant differ from those in the indictment. The arrest warrant refers to passive corruption for an illicit act. The warrant also mentions "unlawful participation in business", a crime which is not mentioned in the extradition request. The arrest warrant does not mention money laundering. It also does not mention the more serious crimes of embezzlement, deception, criminal association, fraud and other crimes which he could potentially be charged with.

[71] It is still unclear whether the warrant could still be enforced against Mr Chang when he is no longer a member of Parliament. This leads to the assessment as to whether this would result in functional immunity whilst he was still a Minister or whether Mr Chang himself has waived his right to immunity. He certainly has not at this stage.

[72] The third reason contended for by the applicant is that the warrant is over two and a half years old. It is unclear whether the warrant is valid as a matter of

Mozambican law, which could prescribe timelines for the validity of such a warrant. On the contrary, even the prosecutors' reference to timelines implies that the international warrant has prescribed and, as I have already stated, it may be defective.

[73] In particular, it makes reference to Mr Chang being arrested outside of Mozambique. This would be invalid as Mr Chang first has to arrive in Mozambique before he can be arrested. He cannot be arrested in another country, outside of those extradition procedures.

[74] Against this backdrop of all the various aspects of invalidity, the Minister simply denies that the warrant is invalid, and he makes no attempt the address the discrepancy between the two warrants, the provisional indictment and the arrest warrant of 19 January 2019. He also does not explain whether the arrest warrant is valid, and simply accepts the bald allegation made by the Government of Mozambique that the 19 January 2019 warrant is valid. The Minister also does not take into account that Mozambique has not explained the discrepancies.

[75] The ease with which new warrants are issued by the Government of Mozambique, also means that the alleged crimes with which Mr Chang can be charged can be changed to much lesser crimes.

[76] Once I recognise that the that the Minister has failed to consider material factors in the process of coming to his decision, then it follows that his decision does not pass the rationality test.

Post hoc reasons for the Minister's decision

[77] The *post hoc* reasons provided by the Minister after the launch of these proceedings demonstrates that important aspects were not before him when he made his decision, thereby making the decision irrational. In addition, his own State law advisors recommended that Mr Chang be extradited to the USA.

[78] The reasons lack an evaluation of all the important aspects pertaining to immunity and the warrants of arrest. Instead, the Minister glosses over these aspects. He does not explain why he did not accept his own legal advisors' recommendations. In one phrase, he accepts that Mr Chang no longer has immunity from prosecution or arrest, yet a plethora of relevant facts were placed before him to the contrary. He gives little weight to the fact that the Government of the USA has undertaken to return Mr Chang to the Mozambican authorities when they have completed their processes. He lists the acquittal in the USA of Mr Boustani, an alleged accomplice of Mr Chang, as a further reason for not extraditing him there. He claims to have no evidence that the same will not happen to Mr Chang. The USA Government would be obliged to comply with their undertaking in that event, yet this is not factored into the Minister's decision.

[79] A decision maker is bound by the reasons it advanced for its decision and is barred from relying on additional, or *post hoc*, reasons.[19] Cachalia JA, in *National Lotteries Board,*[20]while not having to decide the point directly, stated:

> "The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards — even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide."[21]

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[19] *Freedom Under the Law (RF) NPC v National Director of Public Prosecutions* 2018 (1) SACR 436 (GP).

[20] *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA).

[21] Id at para 27. See also *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa* (2014) 3 All SA 171 (GJ) at paras 94 and 97.

[80] In this case new reasons were advanced, which were not stated in the record. In order for the decision to be rational, the reasons for the decision should appear in the record. The reasons cannot be justified or retrofitted after the decision has been taken.

[81] The Court of Appeal in the case of *R v Westminster City Council, ex parte Ermakov* held as follows in this regard:

> "The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should....be very cautious about doing so....Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case- which indicates that the real reasons were wholly different from the stated reasons. . .
> The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to the purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but gives rise to practical difficulties."[22]

[82] It is clear, the reason cannot be contrived *post hoc* the decision. Otherwise this would provide an opportunity to justify a decision after the event, preventing a court from scrutinising the actual reason behind the decision when it was made.

[83] In the judgment of *Motau,* Khampepe J reasoned as follows:

> "as I believe that the reasons cited by the minister in her correspondence to General Motau and Ms Mokoena were sufficient to demonstrate good cause, I do not consider it necessary to deal with the further reasons cited by the minister for her decision in her papers in this court and the high court. In any event, I have reservations about whether it would be permissible for her to rely on these reasons since they were not relied on or disclosed when she took her decision."[23]

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[22] *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302 (CA) at 315-316.

[23] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) dictum in para 55 at footnote 85, where Khampepe J referred to Cachalia JA's judgment in *National Lotteries Board* above n 22 at paras 27-8.

[84] Some six years later, in *NERSA*, Khampepe J, again approving the dicta in *National Lotteries Board*, stated that "it is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful."[24]

[85] A further consideration is the principle that *post hoc* reasons amount to a moving target. The US Supreme Court came to such a conclusion in the *University of California* case, a decision of the majority led by Chief Justice Roberts, where he found that it is a foundational principle of administrative law that judicial review of agency action is limited to the ground that the agency invoked when it took the action.[25]

[86] This case involves the decision about the DACA dreamer's decision.[26] The Court had to decide whether the agency action was satisfactorily explained. The natural starting point is that the explanation must be the reason at the time that the decision was taken. In that case, Secretary Nielsen chose to elaborate, in additional memoranda, on the reasons that the initial rescission of the DACA protection was taken. The Court held that she was limited to the original reason.

[87] In order for a reason to be rational the reason must exist at the time it was taken. The Minister submits that nothing in Rule 53 requires that there have to be contemporaneous reasons. But that is not a critical aspect. The critical aspect is whether the failure to provide contemporaneous reasons goes to the rationality of the decision.

[88] FMO argued that I should not look at the Minister's reasons at all, because they were filed late. I do not accept that argument. Having looked at the reasons it is clear

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[24] *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019] ZACC 28; 2020 (1) SA 450 (CC); 2019 (10) BCLR 1185 (CC) (*NERSA*) at para 39.

[25] *Department of Homeland Security v Regents of the University of California* 591 U.S. 13 (2020).

[26] These were children who had entered the USA illegally and who now as adults were subject to deportation from the USA

that, when properly considered, they are incongruent and lack rational support for the decision he took.

[89] The *post hoc* reasons, in my view, do not have sufficient probative value to justify a rational decision.

Separation of powers and substitution of the Minister's decision

[90] The Minster's case is that this is a separation of powers issue and therefore, the court cannot intervene or substitute his decision. Separation of powers and rationality of a decision are two separate issues. It is therefore, difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry.

[91] In *Democratic Alliance* Yacoob ADCJ, as he then was, clarified the issue as follows:

> "It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational."[27]

[92] Rationality does not have a different meaning when considering a separation of powers issue. The question remains whether the means adopted are rationally related to the ends, in executive decision-making cases. Ultimately the consideration must be

[27] *Democratic Alliance* above n 14 at para 44.

whether the decision was rational or not. And that finding cannot depend or turn on a separation of powers issue.

Remedy

[93] The circumstances in this case are exceptional. Mr Chang has been incarcerated for almost two years. When the matter was remitted in *Chang 1*, the Minister had the opportunity to make a decision that was rational and in accordance with our international obligations, and in accordance with the material placed before him. The extradition process has now been placed and considered before the present and former Minister. The present Minister initially supported extradition to the USA and now has changed his mind on this. There are no new undisputed facts justifying the change. The law as set out in *Chang 1*, remains unchanged.

[94] When substitution of a functionary's decision is indicated, there are a number of factors that must be taken into account. In *Trencon*, the Constitutional Court held:

> "A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision. In other instances some matters may concern decisions that are judicial in nature. In those instances — if the court has all the relevant information before it — it may very well be in as good a position as the administrator to make the decision."[28]

[95] In this matter I have all the relevant information before me. It does not need repeating. The change in the Minister's decision based on the information before him should have steered him towards extraditing Mr Chang to the USA. Instead it did not.

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[28] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at para 48.

He has unequivocally showed his hand as to his intention to accept the position of the Government of Mozambique irrespective of all the other strong indicators to the contrary. This gives rise to unique and exceptional circumstances where this Court is in as good a position to make the decision.

[96] I am alive to the fact that the Minister submits that his decision to extradite is polycentric but for this submission to succeed, his decision must nonetheless be rational. To pass constitutional muster a decision of a member of the Executive must be rational otherwise public policy will be subject to the vagaries of a whim. Important government policies such as extradition cannot be decided on a whim, they have to be carefully and rationally reasoned.

[97] FMO argues that to send the matter back to the Minister would serve no purpose as his decision is a forgone conclusion if regard be had to the manner in which he disregarded relevant facts. The Minister was alerted to the question of immunity in Chang 1 and by his own legal advisors in their written opinions. He initially accepted their advice but a year later chose to ignore it. His post hoc reasons do not engage with the important concerns raised by his advisors about Mr Chang's immunity. This of itself is manifestly irrational and sets the benchmark if I were to remit the matter back to the Minister.

Conclusion

[98] The magnitude of this grand corruption scheme allegedly perpetrated by Mr Chang during his time in office, by plundering public resources on a large scale and thereby causing untold hardship to poor communities, is particularly egregious. In considering the question of extradition, I conclude that the best approach is to ensure measures that Mr Chang is brought to justice and held accountable. Extradition to the USA poses no risks to all parties in this saga for reasons referred to.

Order

1. The decision by the second respondent on or about 23 August 2021, to extradite the first respondent to the Republic of Mozambique, is declared to be inconsistent with the Constitution of South Africa 1996, and is invalid and set aside.

2. The decision of the second respondent on 21 May 2019 is substituted with the following:
"Mr Manuel Chang is to be surrendered and extradited to the United States of America to stand trial for his alleged offences in the United States of America, as contained in the extradition request, dated 28 January 2019."

3. The second respondent is to pay the costs of this application including the costs of two counsel on a party and party scale.

Signed electronically on 7 December 2021

VICTOR, J

Judge of The High Court
Gauteng Local Division
DATE: 10 November 2021

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"MOZ3"

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:

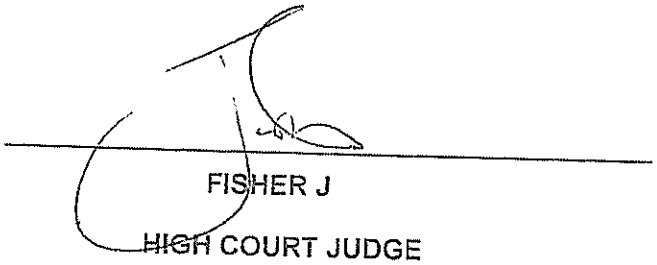
1. Mr Chang's application under case number 22157/2019 is dismissed.

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.

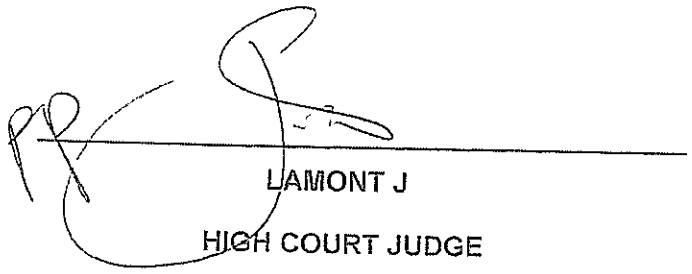


FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

It is so ordered,

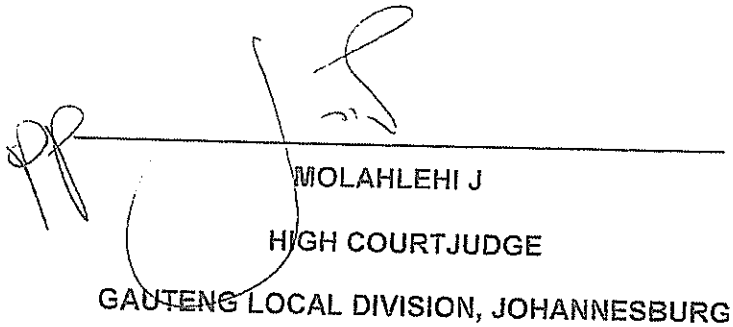


LAMONT J

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.