IN THE SUPREME COURT OF APPEALOF SOUTH AFRICA
(BLOEMFONTEIN)

SCA 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
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	5TH Respondent
MINISTER OF HOME AFFAIRS	6TH Respondent
HELEN SUZMAN FOUNDATION	*Amicus Curiae*

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the applicant applies for leave to appeal to the above honourable court on the following terms:

1. That the applicant be granted leave to appeal to the Supreme Court of Appeal.
2. The costs of the leave to appeal shall be costs in the appeal.

3. 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 file an answering affidavit within one month from the date of service of this application.

DATED AT JOHANNESBURG ON THIS THE 23RD DAY OF AUGUST 2022

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TO: THE REGISTRAR OF THE SUPREME COURT OF APPEAL
BLOEMFONTEIN

and to: **IAN LEVITT ATTORNEYS**
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TIME: 08:47
DATE: 24 AUG 2022
SIGNATURE:
WITHOUT PREJUDICE /
SONDER BENADELING VAN REGTE

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FOUNDING AFFIDAVIT
(IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL)

I, the undersigned;

PRITZMAN BUSANI MABUNDA

do hereby make oath and state that:

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1. I am an admitted attorney of the High Court, 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 for leave to appeal by the Republic of Mozambique ("the applicant") before this honourable 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, African Union ("AU"), 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 service 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

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prison awaiting extradition in terms of the Extradition Act. Chang has appointed Krause Inc, his attorneys email address stiaan@krauseinc.co.za for 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.

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 the Director-General of the Department of Home Affairs. Service of the application will be done at the office of the state attorney.

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

10. The seventh party (*amicus curiae)* 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.

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. However, in respect of the Minister of justice, he has intimated that he will abide by the decision of this court and any other court of appeal. The Minister also placed

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this position of his on record through his counsel when leave to appeal was heard by the High Court.

12. As it is the position currently, the applicant first lodged application for leave to appeal with the High Court. Simultaneously thereat the applicant lodged a direct access leave to appeal with the Constitutional Court, which delivered its order dismissing the direct access leave to appeal on the basis that it was not in the interest of justice to hear the appeal at this stage. A copy of the Constitutional Court's order to this effect is annexed hereto marked **"A".**

13. This order prompted the applicant to set down the application for leave to appeal in the High Court, which was heard on the 22nd June 2022, and judgment reserved. On 27 July 2022, the High Court delivered its judgment and dismissed the applicant's leave to appeal on the grounds that it bears no prospects of success and that there is no compelling reason why the appeal should be heard. A copy of the High Court Judgment dismissing the leave to appeal is annexed hereto marked **"B".** A copy of the High Court Order is attached hereto as Annexure **"C"**.

14. I submit that the High Court has erred on both legs set by section 17(1) of the Superior Courts Act. It erred in finding that the appeal if leave is granted would bear no prospects of success. The High Court also erred when it found that there is no compelling reason why the appeal should be heard if leave to appeal is granted.

15. On the merits, and in particular on the appropriate remedy, the High Court granted substitution in conflict with what the Constitutional Court said in

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Trancon judgment. The High Court stepped into the shoes of the Minister and ordered that Mr Chang be extradited to the United States of America ('US") instead of remitting the matter to the Minister for reconsideration. By ordering substitution in these circumstances, the High Court offended the principle of separation of powers and performed the function in which it had no requisite expertise. It was also not a foregone conclusion that the only country Mr Chang was extraditable to was the US.

16. I submit that leave to appeal should be granted on this ground alone. Secondly, the finding that there is no compelling reason why the appeal should be heard if leave is granted is wrong on the facts and the law. For instance, this is a matter where leave ought to be granted even if the court were to be of the view that the prospects of success are weak. There is no precedent in South African jurisprudence where the South African Authorities were confronted with two extradition requests from two sovereign states for one person. The Magistrate has found that Mr Chang was extraditable to both Mozambique and the US. This issue requires the attention of the appeal court.

The purpose of the application and the constitutional issues that arise

17. 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 **"D"**. The written judgment was delivered electronically on 7 December 2021, a copy of which is annexed hereto marked

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"E". The application for leave to appeal is predicated on section 17 of Superior Courts Act after the High Court dismissed the leave to appeal. The SCA has jurisdiction to entertain leave to appeal or a petition where leave has already been refused by the High Court.

18. The applicant is applying for leave to appeal against the judgment and orders of the High Court. The application is brought within 30 days from the date the written judgment dismissing leave to appeal was handed down. The order appealed against was handed down on 10 November 2021. The written judgment with full reasons was handed down on the 7th of December 2021. The application for leave to appeal was dismissed on 27 July 2022.

19. 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.

20. 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

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States, both of which were found to be lawful by the Magistrate, which of the two takes precedence.

21. 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.

22. This application raises arguable points of law of general public importance which ought to be considered by this Court.

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

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

23.2 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?

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

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

23.5 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?

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23.6 Whether the Court can , in the absence of the benefit of the full facts before the decision maker, substitute the decision of the decision maker with its own decision.

The decision or order appealed against

24. 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:*
>
> > *"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"."*

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

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

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27. 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:

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

Background facts

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

29. 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.

30. 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 through state entities controlled by the Mozambican government.

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31. 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 presented 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.

32. 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.

33. 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.

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34. 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 extradited to the USA.

35. On 21 May 2019 the Former Minister of Justice and Correctional Services, Michael Masutha decided that the interest of justice will be best served by acceding to the Mozambican request for extradition of Chang to Mozambique.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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

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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.

41. 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.

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

43. 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 FA3. In Chang 1 the High Court remitted the

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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.

44. 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.

45. 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.

46. 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

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as this will make these papers prolix. What is important to state is that the Minister considered all relevant material before him.

47. 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.

48. 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.

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49. 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

50. 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.

51. 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.

52. The trite principle of the law is that the Court substituents 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

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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.

53. 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 important of the Extradition Act or it did not interpret the Extradition Act correctly.

54. 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.

55. 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.

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

57. 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

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United States of America. The Minister only made one decision which was to extradite Chang to Mozambique.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

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63. 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.

64. 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.

65. 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."*

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66. 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.

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

68. 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.

69. 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

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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."

70. 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.

71. 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

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followed that it ought to have accepted that Chang will be prosecuted in Mozambique.

72. 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

73. 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.

74. 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

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information before it – it may very well be in as good a position as administrator to make the decision."

75. 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.

76. 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 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

77. For the above reasons, leave to appeal should be granted to the SCA.

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

P.B.M

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 Johannesburg on this the 23rd day of **AUGUST 2022** the regulations contained in Government Notice N0. 1648 dated 19 August 1977 (as amended) having been complied with.

COMMISSIONER OF OATHS

SIMONÉ WOLFAARDT
COMMISSIONER OF OATHS / EX OFFICIO
KOMMISSARIS VAN EDE
ATTORNEY / PROKUREUR RSA
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ANNEXURE A: CONSTITUTIONAL COURT ORDER

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/22

In the matter between:

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

ORDER

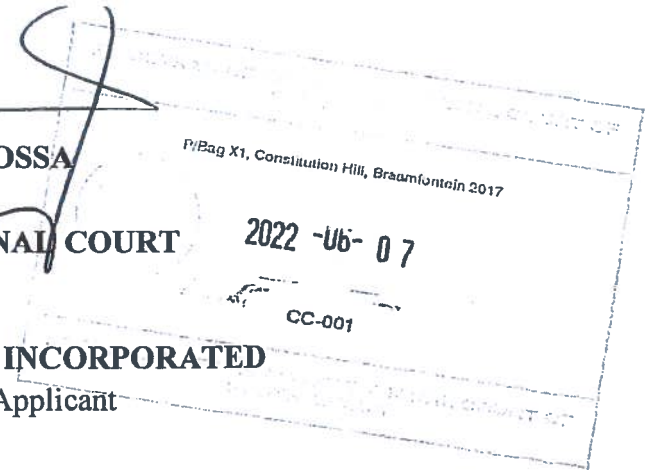
CORAM: Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ.

The Constitutional Court has considered this application for leave to appeal directly to it. It has concluded that the application falls to be dismissed with costs as it is not in the interests of justice to hear it at this stage.

Order: Leave to appeal is dismissed with costs.

P.B.M

SIBUSISO MAPOSSA
REGISTRAR
CONSTITUTIONAL COURT



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P.B.M

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P.B.M

ANNEXURE B: HIGH COURT JUDGEMENT DISMISSING LEAVE TO APPEAL

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

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

27 July 2022 SIGNATURE

Case no. 40441/2021

In the application for leave to appeal between:

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

PRm

LEAVE TO APPEAL JUDGMENT

[1] The applicant seeks leave to appeal to the Supreme Court of Appeal against prayers 1 and 2 of the order given by me on 10 November 2021. The first and fifth respondents oppose the application. The first respondent abides the decision of this Court.

[2] I granted the following relief:

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] On 15 December 2021, the applicant applied for leave to appeal directly to the Constitutional Court. The application was dismissed with costs and the Constitutional Court found that it was not in the interests of justice to hear the case at that stage.

[4] The Minister did not oppose the relief or support the relief sought in the Constitutional Court. The same applies in this application for leave to appeal

P.R.M

[5] The applicant in its Notice of Appeal has relied upon section 17(1)(a)(i)(ii) of the Superior Courts Act 10 of 2013. Section 17(1)(a) provides:

> "Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
>
> (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

[6] I have considered the submissions made by all the parties. I find that the applicant has not presented any compelling reasons why the applicant should be granted leave to appeal. Furthermore the appeal does not have a reasonable prospect of success in a higher court.

[7] In the result the applicant for leave to appeal is refused.

THE ORDER

(1) Leave to appeal is refused.

(2) The applicant shall bear the costs of the application for leave to appeal in respect of the First Respondent including the costs of two counsel and the costs of the Fifith Respondent.

VICTOR, J
JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION
DATE: 27 JULY 2022

P.B.M

Counsel for the Applicant	Adv W Mokari SC
Attorney for the Applicant	Mabunda Incorporated govm@mabundainc.com
Counsel for the 1st Respondent	Adv M de Plessis SC Adv E Cohen
Attorney for 1st Respondent	Ian Levitt Attorneys ian@ianlevitt.co.za
Counsel for Fifth Respondent	Adv Pudifin –Jones Adv T. Palmer
Attorney for Fifth Respondent	Attorney Webber Wentzel Vlad.movshovich@webberwentzel.com

P.B-M

ANNEXURE C: HIGH COURT ORDER

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

CASE NO: 2021/40441

JOHANNESBURG, 27 July 2022

BEFORE THE HONOURABLE JUDGE VICTOR

In the matter between:-

FORUM DE MONITORIA DO ORCAMENTO	**Applicant**
and	
MANUEL CHANG	**1st Respondent**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**2nd Respondent**
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	**3rd Respondent**
HELEN SUZMAN FOUNDATION	**4th Respondent**
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	**5th Respondent**
MINISTER OF HOME AFFAIRS	**6th Respondent**
REPUBLIC OF MOZAMBIQUE	**7th Respondent**

HAVING *read the documents filed of record and having considered that matter:-*

IT IS ORDERED THAT:-

1. Leave to appeal is refused.

2. The Applicant shall bear the costs of the application for leave to appeal in respect of the First Respondent including the costs of two counsel and the costs of the First Respondent.

Private Bag X7, Johannesburg 2000
2022 -08- 18
GLD-JHB-007

BY THE COURT

REGISTRAR
/bbn/

P.B.M

ANNEXURE D: WRITTEN ORDER DELIVERED ON 10 NOVEMBER 2021

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	
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

REGISTRAR OF THE HIGH COURT
Private Bag X7, Johannesburg 2000
2021 -11- 10
GLD-JHB-001

P.B.M

MINISTER OF HOME AFFAIRS Sixth Respondent

REPUBLIC OF MOZAMBIQUE Seventh Respondent

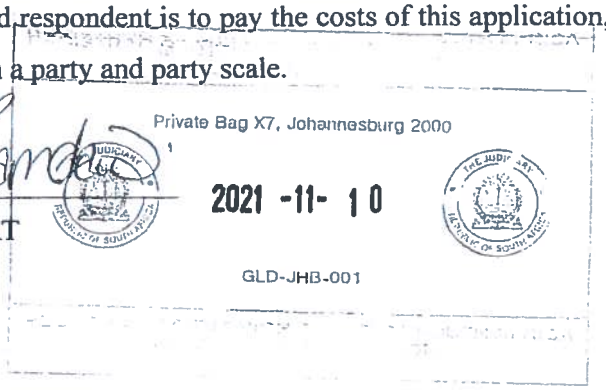
COURT ORDER

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.



BY THE COURT

REGISTRAR

Ian Levitt Attorneys

Ian Levitt

04-16

P.B.M

ANNEXURE E: WRITTEN JUDGEMENT DELIVERED ON THE 7 DECEMBER 2021

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**

F.B.M

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.

P.B.M

[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*).

PB.M

[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.

P.B.M

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

PB·M

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

P.B.M

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).

P.R.M

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

---

[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.

P.B.M

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.

---

[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.

P.B.M

[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

P.B.M

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.

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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.

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[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 1*, 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.

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[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.

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[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

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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.

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[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 1* 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 1* above n 5 at para 36.

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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

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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

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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.

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[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.

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[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.

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[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

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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.

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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.

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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

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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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