IN THE SUPREME COURT OF SOUTH AFRICA
(BLOEMFONTEIN)

SCA Case No: 866/22
Case No: 21/40441

In the matter between:

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

SEVENTH RESPONDENT'S AFFIDAVIT
OPPOSING APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

NICOLE FRITZ

make oath and state:

NLF

1. I am an adult female director of the seventh respondent, the Helen Suzman Foundation ("*HSF*"), situated at 6 Sherborne Road, Parktown, Johannesburg.

2. I am duly authorised to depose to this affidavit on behalf on the HSF.

3. The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge."

A. INTRODUCTION

4. The applicant ("*Republic of Mozambique*") applies for leave to appeal to this Honourable Court, against the Order and judgment of the Gauteng Local Division of the High Court, Johannesburg, dated 10 November 2021 (annexure "D" to the application before this Court) and 7 December 2021 (annexure "E" to the application before this Court), respectively.

5. Leave to appeal was refused by the High Court on 27 July 2022 (a copy of the Order refusing leave is annexed to the application marked "C").

6. The background to the application is as follows.

7. The second respondent ("*Mr Chang*") is the former Finance Minister of Mozambique, a position which he held from 2005 and 2015. Mr Chang stands accused of various charges of corruption, fraud and money-laundering. It is alleged that Mr Chang personally received millions of dollars in kickbacks for abetting a massive scheme that defrauded international aid investors of some $2 billion in loans purportedly for the purchase of fishing and military patrol vessels by the Mozambique government.

8. Mr Chang was arrested at OR Tambo International Airport in South Africa on 29 December 2018 pursuant to an Interpol "Red Notice". He has remained in custody since.

9. In January 2019, the United States of America ("*United States*") submitted a request to the South African authorities for the extradition of Mr Chang to the United States. In February 2019, Mozambique issued a competing request for extradition.

10. On 21 May 2019, the former Justice Minister took a decision to extradite Mr Chang to Mozambique ("*first extradition decision*").

11. In June 2019, however, the new Justice Minister made an application to Court to self-review the first extradition decision. This application was supported by both FMO and HSF, and resulted in the judgment of the Full Court reported as *Chang v Minister of Justice and Correctional Services and Others; Forum de Monitoria do Orcamento v Chang and Others* (22157/2019; 24217/2019) [2019] ZAGPJHC 396; [2020] 1 All SA 747 (GJ); 2020 (2) SACR 70 (GJ) (1 November 2019) ("*Chang I*").

12. The effect of the judgment was to review and set aside the Justice Minister's decision to extradite Mr Chang to Mozambique and to remit the decision back to the Justice Minister for redetermination.

13. There was a lengthy delay following the judgment in *Chang I*. However, on around 23 August 2021, the Minister took a *new* decision to extradite Mr Chang to Mozambique ("*second extradition decision*").

14. FMO approached the High Court seeking relief that:

NLF

14.1. The second extradition decision (taken by the third respondent, the Minister of Justice and Correctional Services ("*Minister*") on or around 23 August 2021 to extradite Mr Chang to the Republic of Mozambique) is declared to be inconsistent with the Constitution of the Republic of South Africa and invalid and set aside;

14.2. The second extradition decision of the Minister is substituted with a decision that Mr Chang be surrendered and extradited to the United States of America to stand trial for his alleged offences.

15. FMO brought the application in its capacity as 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.

16. The HSF was cited in the application as a respondent because of its direct and substantial interest in the proceedings by virtue of it having participated in the 2019 proceedings as *amicus curiae*, its public interest standing and because it retains an interest in the relief sought in the High Court proceedings

17. The HSF is a non-governmental organisation whose objectives are to defend the values that underpin our constitutional democracy and to promote respect for the rule of law, constitutionality and human rights. The HSF has a longstanding history of promoting South Africa's domestic and international law commitments in the realm of upholding democracy and the rule of law, constitutionality and human rights. The HSF has specialised expertise and interest in national, regional and international law standards in relation to the issues before this Court and has an interest in the litigation.

18. In the High Court proceedings, HSF abided the Court's decision and delivered an explanatory affidavit to assist the Court by addressing four submissions. These were as follows:

18.1. That *all* exercises of public power are subject to judicial scrutiny and that the international law implications of the Minister's decision do not mean that this decision is shielded from the Court's oversight;

18.2. That analysis of the record of decision and reasons reveals that the Minister's decision fails to advance the rule of law, constitutionality and human rights on the dual basis that (i) there is no reason to believe that Mr Chang would be arrested in Mozambique; and (ii) there is no reason to believe that justice would be served by extraditing him to Mozambique instead of the United States;

18.3. That the reasons for the Minister's decision must be located in the record and not in editorialised written reasons delivered after the record and which are not confirmed independently by the record; and

18.4. That the Minister's decision overlooked or ignored the Department of Justice and Constitutional Development's own recommendation to extradite Mr Chang to the US, or unlawfully (and without rational basis) reversed it.

19. The High Court granted the FMO relief as set out in paragraphs 1 and 2 of the High Court order, declaring the second extradition decision of the Minister to be inconsistent with the Constitution, and invalid; and substituting the Minister's decision with one for Mr Chang's extradition to the US.

NLF

20. Before I address the merits of Mozambique's application for leave to appeal to this Court, I seek to clarify HSF's position before this Court.

B. HSF'S POSITION BEFORE THIS COURT

21. Despite being a party to the application, cited as a respondent, and having delivered an explanatory affidavit in the High Court proceedings, and presented oral argument both in the hearing before the High Court and in the leave to appeal application, the HSF has been miscited in these proceedings by the Republic of Mozambique as an as amicus curiae, both in the header and in the content of the affidavit.

22. As a party before the High Court, the HSF remains a party (respondent) in these proceedings, and ought to have been cited as such. The HSF is, in that capacity, entitled to participate as a respondent in the application for leave to appeal before this Court

23. The miscitation of the HSF was addressed by the HSF in a letter to the Republic of Mozambique's attorneys, in which the HSF requested the Republic of Mozambique to amend its notice of motion in the application for leave to appeal so as to cite the HSF correctly, as a respondent in the application.

24. It was therein explained that should the Republic of Mozambique not indicate in writing that it agrees that the HSF should be cited as a respondent and amend its notice of motion accordingly by 23 September 2022, the HSF would have no option but to bring the incorrect citation to the attention of this Honourable Court and to seek any necessary order or directive in relation to the HSF's participation in the matter and reserved its rights to

NLF

seek appropriate costs orders against the Republic of Mozambique in that regard. No response to that correspondence has been received to date.

25. For convenience, and subject to direction by this Court, the HSF has been cited and referred to in this affidavit as the seventh respondent and opposes the application in this capacity.

C. REPUBLIC OF MOZAMBIQUE'S APPLICATION FOR LEAVE TO APPEAL BEFORE THIS COURT

26. The Minister, the decision-maker who took the decision found by the High Court to be unlawful, does not persist in defending its lawfulness – the Minister has not sought leave to appeal the decision, either before the High Court, the Constitutional Court or before this Court. The Minister has, or must have, accepted the High Court judgment and the findings in it to the effect that the second extradition decision was unlawful for the reasons stated therein.

27. Only the Republic of Mozambique, the requesting country in whose favour the Minister's decision was made, persists in seeking to appeal the High Court decision which found the Minister's decision to be unlawful.

28. The Republic of Mozambique, in its application before this Court, attacks the merits of the judgment of the court *a quo* contending:

28.1. Firstly, that "*in particular on the appropriate remedy, the High Court granted substitution in conflict with what the Constitutional Court said in Tr[e]ncon judgment*"

NLF

and contending that the High Court "*stepped into the shoes of the Minister and ordered that Mr Chang be extradited to the United Stated of America ('US') instead of remitting the matter to the Minister for reconsideration*". This, it is alleged by the Republic of Mozambique, "*offended the principle of separation of powers and performed the function in which it had no requisite expertise*" and that it was not "*a foregone conclusion that the only country Mr Chang was extraditable to was the US*" (para 15 of the application for leave to appeal).

28.2. Secondly, the Republic of Mozambique contends that "*the issue of immunity from prosecution under the SADC protocol on extradition raises an important arguable point of law*" which should be resolved by the Constitutional Court (para 20 of the application for leave to appeal).

28.3. Thirdly, the Republic of Mozambique contends that a further important "*arguable point of law*" is "*the issue of concurrent extradition requests by two competing States [and] which of the two takes precedence*" (para 20 of the application for leave to appeal).

29. On why leave to appeal should be granted, the Republic of Mozambique contends that:

29.1. Firstly, the above provide a reasonable prospect of success on appeal; and

29.2. Secondly, there are compelling reasons why the appeal should be heard, even if prospects are weak, because the application raises arguable points of law of general public importance, namely:

NLF

29.2.1. that "*there is no precedent in South African jurisprudence where the South African Authorities were confronted with two extradition requests*" (para 15 of the application for leave to appeal);

29.2.2. that "*the matter of the continued incarceration of Chang pending his extradition ... be resolved as a matter of priority by the apex court*" (para 21 of the application for leave to appeal).

30. In addressing the Republic of Mozambique's contentions on leave to appeal, it is necessary again to highlight the broader context in which the Minister's decision was made.

31. Before doing so, however, I note the following:

31.1. the grounds of appeal on which the Republic of Mozambique places reliance appear to be aimed at the Constitutional Court and the importance of the legal issues to be resolved by that body as the apex court. It is unclear to what end those averments are made. I shall, for the purposes of this affidavit, however, assume that the same grounds are mobilised for the current application, and an envisioned appeal to the Supreme Court of Appeal.

31.2. the Republic of Mozambique does not explain why it has reasonable prospects of success on any of the above issues.

31.3. in respect of the issue of immunity under the SADC Protocol, this ground is difficult to understand. The SADC Protocol clearly provides that immunity in the receiving state of

NWF

ЛЯ

a person sought to be extradited is a ground for refusing the extradition request. This ground thus takes the Republic's case no further.

31.3.1. The issue of a just and equitable remedy is within the discretion of the High Court, which will not be lightly interfered with on appeal. The High Court had the full record and all the evidence before it: it did not misdirect itself as to the applicable principles. On the basis of the record and the affidavits, there could only be one answer to the extradition requests in question. In any event, there had been material and unacceptable delay. The High Court applied the relevant principles arising from the case law and did not misdirect itself in any way.

31.3.2. There is no magic in having two extradition requests. The question on review remains the same, and is well-settled, as articulated in this matter by the High Court. The Republic of Mozambique does not explain how the additional context will change the outcome or, for that matter, the principles to be applied in arriving at the outcome.

D. ALL PUBLIC POWER SUBJECT TO OVERSIGHT BY THE COURT (INCLUDING THE MINISTER'S EXTRADITION DECISION)

32. South Africa has extradition agreements with both the US and Mozambique:, namely:

32.1. The Extradition Treaty between South Africa and the United States, signed on 16 September 1999 and which entered into force on 25 June 2001; and

NWF

32.2. The SADC Protocol on Extradition, which governs extradition between South Africa and Mozambique.

33. These extradition agreements create binding international obligations on South Africa.

34. In addition, extradition in South Africa is governed by the Extradition Act 67 of 1962 ("*Extradition Act*"), which domesticates and operationalises extradition agreements ratified by South Africa. The Extradition Act regulates the process for extradition from South Africa to another state. The process culminates in the Minister making a determination under section 11 of the Act whether or not to surrender the person for extradition.

35. That decision - involving as it does the fields of international relations and administrative law - remains subject to the Constitution and the rule of law and enjoys no immunity from the Courts. Like all exercises of public power, including executive action, it is subject to the Constitution and review by our courts.

36. Before the High Court, and again in this Court, the contention is raised by Mozambique that the Minister's decision is polycentric and policy-laden and the court must show appropriate deference to the decision, given the requirements of the separation of powers.

37. However, the spectre of the separation of powers and deference are no reason for this Court not to consider and evaluate the exercise of public power that gave rise to the impugned decision for constitutional compliance, and compliance with South Africa's international obligations. There can be no deference to an unlawful decision, as the Constitution in section 172(1)(a) itself mandates that unlawful decisions are declared as

such. A decision can and must be set aside if it is an unlawful exercise of public power, and that is precisely what the High Court did.

38. The suggestion that the High Court's judgment in this regard raises novel issues and that this is a "*compelling circumstance*" justifying this Court's intervention is misplaced. The judgment and order of the High Court is not novel. The Courts have not hesitated to set aside similar decisions and to hold the government to account under the Constitution and international law, notwithstanding that the decision which is at stake is one involving the executive sphere of government in its diplomatic relationship with other states, or on the international plane.

39. For example:

39.1. The North Gauteng High Court upheld a judicial review of the Minister of International Relations' granting of immunity to Ms Mugabe, wife of the then President of Zimbabwe, Robert Mugabe, holding that the Minister's decision to grant immunity to Ms Mugabe was contrary to customary international law and domestic legislation and finding that the Minister had "*committed an error of law*" which was "*fundamental and fatal*".[1]

39.2. This Court rejected the South African government's argument that President Al Bashir enjoyed immunity from arrest as head of state because he had been granted "*temporary immunity*" under the hosting agreement for the AU Summit, and in doing so held the government firmly to the Rome Statute, issuing a declaratory order that: "*the conduct of*

---

1 *Democratic Alliance v Minister of International Relations and Co-operation and Others; Engels and Another v Minister of International Relations and Co-operation and Another* (58755/17) [2018] ZAGPPHC 534; [2018] 4 All SA 131 (GP); 2018 (6) SA 109 (GP); 2018 (2) SACR 654 (GP) (30 July 2018) at para 42.

[the government] in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir… was inconsistent with South Africa's obligations in terms of the Rome Statute… and unlawful".[2]

39.3. The Constitutional Court found that the President's participation and the decision-making process and his decision to suspend the operations of the SADC Tribunal to be unconstitutional, unlawful and irrational. The relevant treaty had as one of its objectives the obligation to promote access to justice, democracy, human rights and the rule of law. The relevant Protocol signed by the President took away a pre-existing right to access to the SADC Tribunal. The power to negotiate and sign the Protocol derived from section 231(1) of the Constitution. The question was thus whether section 231(1) read with the Bill of Rights and duly guided by a proper appreciation of the Constitution and binding international law, allowed the President to make the decision. The Court reiterated that the Constitution is our supreme law and any conduct inconsistent with it is invalid and falls to be set aside. The President was ordered to withdraw his signature from the Protocol in question.[3]

---

[2] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016); para 1 of the Order.

[3] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018)

NLF

39.4. The Constitutional Court dismissed the defence the South African authorities raised in support of their decision not to investigate serious allegations of torture committed by Zimbabwean officials in Zimbabwe when challenged by civil society groups.[4]

39.5. The High Court set aside the government's tabling of the international agreement between Russia and South Africa ("IGA") in relation to nuclear procurement under section 231(3) of the Constitution (which would make the agreement binding without parliamentary approval), after determining that it made substantive commitments that could only be made binding with the approval of Parliament, despite the Government having argued that the Russian IGA was non-justiciable as it involved foreign relations and determining the true agreement between two states. The Court accepted the applicants' arguments that the foreign relations concerns did not stand in the way of the Court considering and ruling on the domestic lawfulness of the South Africa Minister's actions in tabling the Russian IGA, and set aside the IGA.[5]

39.6. Finally, in a matter of particular relevance to this application, in the first round of this litigation in *Chang I*,[6] as set out above, the Full Court reviewed and set aside the Minister's first extradition decision to extradite Mr Chang to Mozambique.

39.6.1. The HSF had argued in *Chang 1* (as an *amicus*) that, taking into account South Africa's constitutional and international law obligations, it was unlawful,

---

4 *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) (30 October 2014)

5 *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017)

6 *Chang v Minister of Justice and Correctional Services and Others; Forum de Monitoria do Orcamento v Chang and Others* (Annexure "FA3" to the application for leave to appeal to this Court).

irrational and unconstitutional for the former Minister to take the decision to extradite Mr Chang to Mozambique.

39.6.2. On 1 November 2019, the Full Court held that the former Minister did not have the power to extradite Mr Chang to Mozambique and held that "*it would make no sense to extradite a person to a place where he cannot be prosecuted.*"

39.6.3. The Full Court set aside the Minister's decision and remitted it to the current Minister for redetermination.

40. *Chang I* is important not only because of its judicial precedent, but because it provides the context in which the decision which is the subject of these proceedings was made – i.e. *after* the matter has been remitted to the Minister, following a finding and Full Court judgment explaining the defects in the Minister's earlier decision.

41. Yet, as the High Court emphasised in the judgment which is the subject of this application for leave to appeal, despite the guidance of the Court in *Chang 1*, the Minister again took a decision to extradite Mr Chang to a country in which his prosecution was improbable and uncertain, against legal advice that the Minister had received.

42. In doing so, the Minister failed to pay sufficient heed to the heightened obligations on the South African government, under both domestic and international law, to fight the "*scourge of corruption*".[7] I discuss this duty in the section which follows.

---

[7] See para 1 and 2 of the High Court's judgment.

NLF 16

Heightened duty regarding scourge of corruption

43. The Republic of Mozambique's plea for deference and non-interference is not only not supported by the jurisprudence of this Court and the Constitutional Court, but offends against South Africa's international law duties in respect of corruption.

44. There are particularised obligations for South Africa under the Prevention and Combating of Corrupt Activities Act, 2004 ("PRECCA"). The Act place obligations on South Africa 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. . . "*

45. Moreover, South Africa's commitments and obligations when it comes to investigating and prosecuting corruption are recognised in a number of international instruments, including the United Nations Convention Against Corruption, the AU Convention Against Corruption, the OECD Anti-Bribery Convention and the SADC protocol Against Corruption.

46. South Africa is thus part of a global effort to eradicate corruption and has bound itself internationally and domestically to taking effective steps to investigate and prosecute corruption wherever it occurs. The result is that it falls weightily upon a state like South

NLF

Africa to ensure that its obligations to combat corruption are properly understood and effected extraterritorially.

47. In this context, there is an enhanced duty of the South African authorities to ensure that extradition does not advance immunity, that the scope for immunity is diminished and that no-one accused of serious acts of corruption falls between two stools from a jurisdictional perspective.

48. The SADC Protocol on Extradition ("the Protocol"), the very treaty on which the Republic of Mozambique relies for Mr Chang's extradition, recognises the need to ensure that extradition does not result in immunity. It states in Article 4 (e) of the Protocol that extradition shall be refused:

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

49. This Court's judgment in *Chang I* emphasised this obligation. The Full Court set aside the previous Minister's first extradition decision precisely because Mr Chang enjoyed immunity in Mozambique. The Full Court explained the *ultra vires* and irrational nature of the first extradition decision as follows:

> *"As a starting point the former Minister did not have the power to extradite Mr Chang to Mozambique because this was prohibited by his immunity. Thus his decision was ultra vires. The Minister also did not take into account that Mr Chang had immunity because he did not know of it. It would furthermore be irrational for a person to be extradited so they could be prosecuted for their crimes if they were immune from*

NLF

10

prosecution for such crimes. In reality, there was no choice to make between the USA and Mozambique. ***The Minister did not have the option to extradite Mr Chang to Mozambique. He was faced with only one valid request - that of the USA.*** *" (my emphasis)*

50. The Court continued in *Chang I*:

"The underlying crimes of which Mr Chang is accused involve corruption. Corruption takes place with no regard to national boundaries. Thus the effective eradication of corruption requires concerted and coordinated efforts internationally. This need has brought about various international treaties against corruption of which South Africa is a signatory. South Africa is thus part of a global effort to eradicate corruption and has bound itself internationally and domestically to taking effective steps to investigate and prosecute corruption wherever it occurs. It acknowledges as part of this participation that corruption and organised crime undermines the rights enshrined in the Bill of Rights, endangers the stability and security of society and jeopardises sustainable development and the Rule of Law."[8]

51. Despite this, the Minister took the second extradition decision again to extradite Mr Chang to the Republic of Mozambique. The Minister ostensibly premises the decision on Mr Chang being prosecuted and facing justice, but this say-so does not stand up to scrutiny.

51.1. A key consideration to whether the decision would achieve this purpose was whether Mr Chang would be prosecuted in Mozambique if he is extradited there.

[8] *Chang I* at para 77.

NLF

19

51.2. This is in turn dependent on whether Mr Chang would be *immune* from prosecution and whether Mr Chang would be *likely to be arrested* upon his extradition to Mozambique.

52. I deal with the issues of immunity and the likelihood of arrest in turn.

The question of immunity

53. The question of immunity, and whether there was a valid arrest warrant, and evidence that such warrant would be acted on to effect an arrest of Mr Chang on his arrival in Mozambique, was therefore critical in order for the Minister to discharge his lawful duty to satisfy himself that the extradition decision was not advancing corruption and impunity.

54. The record that the High Court considered and had regard to confirmed that the Minister was not, and could not have ben, so satisfied.

55. In relation to immunity, the Memorandum of 27 July 2020 ("*July 2020 Memorandum*") that served before the Minister was firmly in favour of acceding to the US extradition request, over Mozambique's request, including on the basis of Mr Chang's immunity or potential immunity in Mozambique.

56. This Memorandum was based on five legal opinions received by the Chief Directorate: International Legal Relations in the Department of Justice. These opinions were not disclosed in the record, but they were summarised in the Report.

57. The consensus of the experts (including two South African counsel, and two Mozambiquan lawyers) was that Mr Chang still enjoys immunity in Mozambique. One of the opinions –

NWF

received by South African counsel – warned that should the Minister grant the request of Mozambique "*it is likely that his decision will be subject to review*".

58. On the basis of these five legal opinions, the July 2020 Memorandum concluded that in all likelihood Mr Chang had immunity in Mozambique from criminal prosecution, and recommended that Mr Chang be extradited to the US, and not to Mozambique.

59. This recommendation was in fact accepted and signed-off by both the Deputy Minister of Justice and Constitutional Development and the Minister on around 9 October 2020.

60. The evidence before the Minister therefore indicated that the US request ought to be accepted and would more likely or certainly have achieved the stated purpose of the decision.

61. Despite this, in the Minister's reasons, the Minister asserted that Mr Chang "*no longer has any immunity against prosecution (or arrest)*". This is contradicted by the July 2020 Memorandum, supported by the five legal opinions.

62. The Minister's reasons do not deal with the issue of immunity at a sufficient level to rebut the very real concerns around Mr Chang's immunity in Mozambique, or to explain what had changed between July 2020 and August 2021 which led the Minister to being satisfied on this score.

63. There was, quite simply, insufficient evidence before the Minister in the record of decision on this issue for the Minister to be satisfied that the purpose of extradition – the

prosecution of guilty persons – would be achieved through the extradition of Mr Chang to Mozambique.

64. This renders the decision irrational – yet again.

The likelihood of arrest

65. In relation to the consideration as to whether Mr Chang would be arrested in Mozambique, the record and reasons confirmed that there was no such evidence and the Minister did not expressly consider whether there was a valid arrest warrant in Mozambique.

66. There is no evidence that the Minister was satisfied Mr Chang would be arrested on his arrival in Mozambique. Indeed, before the High Court, the Minister adopted the stance that it did not matter whether Mr Chang is arrested in Mozambique. However, plainly it did because – without an impending arrest – impunity would or may well arise. This was more so because the record before the High Court confirmed that there was every prospect of Mr Chang freely leaving Mozambique after extradition to Mozambique:

66.1. Mr Chang's failed bail applications which regarded him as a flight risk;

66.2. Mr Chang's interception and arrest in South Africa where he was bound for Dubai;

66.3. There was, at the time that the Minister's decision was taken, no valid arrest warrant for Mr Chang's arrest in Mozambique.

67. The Minister's failure to take these facts in account – because on his own evidence he did not consider it relevant – vitiated the impugned decision.

NLF

68. Finally, the reasons and record also confirmed that the Minister did not consider the comparative position: i.e. whether South Africa's constitutional and international obligations would be better served by acceding to the US request, rather than the Mozambique request.

Conclusion: the decision was unlawful

69. In the premises, the High Court's judgment correctly found that the Minister's second extradition decision was taken contrary to the Minister's duty to advance the fight against corruption, inasmuch as it failed to ensure that Mr Chang (a person charged with corruption) would not escape prosecution as a result of the extradition decision.

70. It furthermore correctly found that the Minister took a decision to extradite Mr Chang to Mozambique when he was a flight risk and without any assurance that he was not still immune from prosecution in Mozambique.

71. The Minister's decision was accordingly held to be one which failed adequately to protect against, and fight the scourge of, corruption and advance South Africa's international law commitments, as the Minister was duty-bound to do.

72. The High Court also held that decision was taken contrary to the stated reason for which the decision was taken. i.e. Mr Chang's prosecution in Mozambique - and was therefore irrational.

NLF

E. THE EX POST FACTO REASONS FOR A DECISION

73. The High Court also upheld the complaint relating to the Minister's reliance on the reasons for the decision.

74. The reasons for the decision were contained in a document titled "*Reasons for decision – Requests for Extradition of Mr Manuel Chang by the United States of America and the Republic of Mozambique*", which was delivered the day after the Record of Decision and prepared *after* the institution of the legal proceedings and *after* the compilation of the Record of Decision, rather than contemporaneously.

75. The Minister's stated reasons entirely ignore the July 2020 Memorandum and/or departed from the recommendation without any reason/s provided. In his reasons, the Minister adopted an inexplicable and unexplained change of tack, which the High Court relied on as a further basis for impugning the Minister's decision.

F. LEAVE TO APPEAL GROUNDS: NONE STANDS UP TO SCRUTINY

76. None of the above is satisfactorily addressed in the Republic of Mozambique's application for leave to appeal before this Court. The High Court's conclusions are unimpeachable. There are accordingly no prospect of success of another court reaching a different conclusion on the question of the reviewability of the Minister decision.

77. There is also no prospect of this Court interfering with the High Court's exercise of its just and equitable remedial discretion in terms of section 172(1)(b), to substitute its own decision in the circumstances. The exercise of discretion by the High Court are not matters

NLF

on which an appeal court lightly interferes.[9] There is no basis set out in the application for leave to appeal for this Court to do so – the High Court judgment confirms that the correct legal test was considered, the correct authorities were considered, the correct factors were considered and a conclusion reached applying those legal prescripts, in the exercise of the court's "true discretion".[10]

78. Moreover, the Republic of Mozambique has failed to explain any arguable matter of general public importance arising from this matter. In particular, there are no competing or conflicting precedents requiring this Court's clarification for how the Minister should in future deal "with two extradition requests". The law is clear – the Minister must consider such requests rationally, lawfully, constitutionally and conscious of South Africa's international law obligations.

G. CONCLUSION

79. In the result, the application for leave to appeal should be dismissed with costs, including the costs of two counsel.

DEPONENT

---

[9] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at paras 83 and 84.

[10] See *Trencon* at para 88: "*When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.*' "

The Deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at Johannesburg on this the 6 th day of October 2022 the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS

PHELISA PHELOKAZI JWAJWA
8 Sherborne Road
Parktown
Johannesburg
Commissioner Of Oaths
Ex Officio Practising Attorney R.S.A