

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(BRAAMFONTEIN)**

CONSTITUTIONAL COURT CASE NO: CCT 30/23

SCA CASE NO: 866/2022

GHC – JHB COURT CASE NO: 40441/2021

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 LOCAL DIVISION, JOHANNESBURG	Fourth Respondent
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
HELEN SUZMAN FOUNDATION	Seventh Respondent

FILING SHEET

PRESENTED HEREWITH FOR SERVICE AND FILING:

1. The seventh respondent's opposing affidavit.

Dated at **Sandton** on this the **23rd** day of **February 2023**.

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**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(BRAAMFONTEIN)**

**Constitutional Court Case Number: CCT30/23
SCA Case Number: 866/2022
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	Fifth 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:

1. I am the 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.
4. In this affidavit I refer to the applicant as the “*Republic of Mozambique*”, the first respondent as “*FMO*”, the Minister of Justice and Correctional Services as the “*Minister*” and Manual Chang as “*Mr. Chang*”.

A. INTRODUCTION

Litigation history and background

5. The 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 (“*Chang II*”), as well as for condonation for the late filing of its application.
6. The background to the application is as follows.
 - 6.1. Mr Chang is the former Finance Minister of Mozambique, a position which he held between 2005 and 2015.

- 6.2. 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.
- 6.3. Mr Chang was arrested at OR Tambo airport in South Africa. He has remained in custody since December 2018.
- 6.4. 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.
- 6.5. In February 2019, Mozambique issued a competing request for extradition.
- 6.6. On 21 May 2019, the former Minister took a decision to extradite Mr Chang to Mozambique (“*first extradition decision*”).
- 6.7. In June, however, the 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* [2020] 1 All SA 747 (GJ); 2020 (2) SACR 70 (GJ) (“*Chang I*”).
- 6.8. The effect of the judgment was to review and set aside the former Minister’s decision to extradite Mr Chang to Mozambique and to remit the decision back to the Minister for redetermination.

- 6.9. 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*”).
7. FMO approached the High Court seeking relief that:
- 7.1. The second extradition decision (taken by the Minister on or around 23 August 2021 to extradite Mr Chang to the Republic of Mozambique) is declared to be inconsistent with the Constitution, invalid and set aside;
- 7.2. The second extradition decision of the Minister is substituted with a decision that Mr Chang be surrendered and extradited to the United States to stand trial for his alleged offences.
8. 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.
9. The HSF was cited in the application as a *respondent* in recognition of its direct and substantial interest in the proceedings by virtue of it having participated in the 2019 proceedings as *amicus curiae*, and because it retains an interest in the relief sought in the High Court proceedings.
10. The High Court upheld FMO’s application in a judgment reported as *Forum De Monitoria Do Orcamento v Chang and Others* (40441/2021) [2021] ZAGPJHC 808; [2022] 2 All SA 157 (GJ) (7 December 2021), referred to in the papers as (“*Chang II*”). In *Chang II*, the

conduct of the Minister was declared to be inconsistent with the Constitution, and invalid; and the Minister's decision was substituted with one for Mr Chang's extradition to the US.

11. It is against *Chang II* that the Republic of Mozambique now seeks leave to appeal to this Court.

12. This is not the first application for leave to appeal.

12.1. Following the judgment and Order in *Chang II*, the Republic of Mozambique elected to approach *this Court* directly for leave to appeal, while another application was simultaneously before the High Court for leave to appeal. In its application to this Court, the Republic of Mozambique contended that Mr Chang's continued incarceration pending his extradition warranted the urgent attention of this Court.

12.2. That application was opposed by HSF and FMO. This Court granted an order refusing leave to appeal on 7 June 2022. A copy of that order is annexed to the founding affidavit as "PMB4".

12.3. Thereafter, leave to appeal was pursued before, and refused by, the High Court on 27 July 2022 (a copy of the order refusing leave is annexed to the application marked "PBM5").

12.4. Likewise, the Supreme Court of Appeal refused Mozambique's application for leave to appeal to that Court.

13. Mozambique is accordingly back before this Court, again seeking leave to appeal. The present application repeats the submissions and grounds set out in the previous applications for leave. HSF submits that this application, too, falls to be dismissed.

14. In what follows, we deal first with HSF's status in these proceedings (given that HSF has been erroneously cited as *amicus curiae*). Thereafter, we deal with HSF's opposition to the application for leave to appeal, which bears no prospects of success, and in respect of which the interests of justice do not favour the granting of leave.

B. THE HSF AND ITS PARTICIPATION IN THE PROCEEDINGS

15. The HSF is a non-governmental organisation whose objectives are to defend the values that underpin a liberal constitutional democracy and to promote respect for the rule of law, constitutionality and human rights.

16. 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.

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

17.1. 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;

17.2. 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 or stated belief 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;

17.3. 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

17.4. 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.

18. Before I address the merits of Mozambique's application for leave to appeal to this Court, I seek to correct an error in the Republic of Mozambique's citation of HSF's in the proceedings before this Court.

The incorrect citation of HSF

19. Despite the HSF being a party to the main application (i.e. cited as a respondent) and having delivered an explanatory affidavit in the High Court proceedings, and despite having

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presented oral argument in that capacity (both in the opposed hearing and in the leave to appeal application before the High Court), the HSF has been miscited in these proceedings.

20. The HSF is cited as an *amicus curiae*.

21. The same error was made in Mozambique's Supreme Court of Appeal application. HSF in its affidavit opposing leave to appeal in that Court, explained the miscitation.

22. The error is repeated in this Court and again requires correction.

23. As a party before the High Court, the HSF remains a party (respondent) in these proceedings, and it ought to have been cited as such.

24. The HSF is, in that capacity, entitled to participate as a respondent in the application for leave to appeal before this Court.

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.

26. The HSF opposes the application in that capacity.

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

27. The Republic of Mozambique, in its application before this Court, accuses the High Court of "*unjustified judicial bias*" (paragraph 4.63 of the application before this Court) and attacks the merits of the judgment of the High Court on the following bases:

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- 27.1. Firstly, the Republic of Mozambique avers that the High Court judgment undermines its sovereignty (para 16 of the application before this Court);
- 27.2. Secondly, the Republic of Mozambique avers that the High Court “*showed its hand and personal choice of the destination country*” (paragraph 47.1 of the application before this Court) and committed “*judicial overreach*” (paragraphs 21, 37, 50.7 and 50.9.5 of the application before this Court); and
- 27.3. Thirdly, the Republic of Mozambique avers that the High Court misdirected itself in finding that there was uncertainty as to whether Mr Chang still enjoyed immunity from prosecution, and in finding that the Minister had tried to justify his decision with *post-hoc* reasons (paragraph 22 of the application before this Court).
28. The Republic of Mozambique contends that it would be in the interests of justice for this Court to grant it leave to appeal. In this regard it contends in its application before this Court that the issues arising from the application (on the question of immunity from prosecution) raise an “*important arguable point of law*” (paragraph 38 – 42 of its application before this Court); and that a decision to extradite is polycentric in nature (paragraph 47.2 of the application before this Court).
29. On condonation, the Republic of Mozambique contends:
- 29.1. That its delay is “*not inordinate*” (paragraph 55 of the application before this Court);
- 29.2. That new counsel had to be briefed to prepare the application to this Court (paragraph 57-58 of the application before this Court);

- 29.3. The respondents suffer no prejudice from the delay (para 63 of the application before this Court).
30. The HSF opposes Mozambique's application for leave to appeal, and application for condonation, on the basis that there are no reasonable prospects of success and it is not in the interests of justice to grant leave to appeal.
31. Rather, the granting of leave to appeal would be contrary to the interest of justice. There is a pressing need now to bring this matter to finality – a point the Republic of Mozambique itself recognised when it sought to leap-frog to this Court for urgent hearing in February 2022, some 12 months ago.
32. 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 Supreme Court of Appeal or before this Court. The Minister 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.
33. 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. Its grounds for doing so are, as I will demonstrate below, unsustainable.
34. I turn now to address the High Court judgment.

D. THE JUDGMENT OF THE HIGH COURT

35. The High Court granted FMO the relief it sought. The High Court ordered:

35.1. The decision by the Minister on or around 23 August 2021 to extradite Mr Chang to the Republic of Mozambique is declared to be inconsistent with the Constitution and invalid and set aside;

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

36. The salient features of the High Court judgment are as follows:

36.1. The Court found that Mr Chang was immune from prosecution¹ and that only in *post hoc* reasons did it emerge that he *may not* have been immune. The Court held that, in the absence of a full and proper explanation as to this “change in stance”, the Court must conclude – based on the clear evidence – that he was so immune.

36.2. The evidence before the Minister – which could not be gainsaid – confirmed this. There was only Dr Paulo’s say-so to the contrary.

36.3. Mr Chang and the Republic of Mozambique also offered contradictory accounts of Mr Chang’s immunity. On one version, he must surrender to Mozambique to have it lifted, and on another his immunity is moot following his resignation from

¹ Para 52 of the High Court judgment.

Parliament.² There was no clear evidence regarding what the outcome of a defence of immunity would be, should Mr Chang raise it.³

36.4. Accordingly, the Court held that Mr Chang's lack of immunity from prosecution had not been securely proven, and there were not sufficient facts before the Minister to make the decision. In the light of the unresolved *uncertainties regarding Mr Chang's immunity*, the Minister could not have taken a rational decision to extradite Mr Chang to the Republic of Mozambique.⁴

36.5. The Court also found the Minister had failed to take account of Mr Chang's being a flight risk and the systematic corruption in Mozambique, and particularly the concern that politically connected persons would not face prosecution.⁵

36.6. As to the warrant of arrest, the Court held that the international warrant of arrest upon which the Republic of Mozambique had sought to rely was defective, as it provided for arrest outside of Mozambique. The Court held further that the 2019 warrant was invalid, based on the public prosecutor's provisional indictment to the Minister (due to failure to comply with timelines) and because it was issued during a time when Mr Chang was a member of Parliament and immune. There was also no

² Para 56.

³ Para 60.

⁴ Para 54.

⁵ Para 63.

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explanation for the second warrant issued and the Minister provided no reasons in support of the validity of such warrant in the light of these concerns.⁶

36.7. The Minister's reasons are incongruent and fail to support the decision. They do not justify a rational decision.⁷

36.8. The Court granted substitution relief. It held that Mr Chang had been incarcerated for almost two years; that the matter had been remitted in *Chang I* only for a second unlawful decision to have been taken; that all the relevant information was before the Court and that the Minister had shown an intention to extradite to Mozambique without reason to do so and "*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*".⁸

E. ISSUES FOR DETERMINATION

37. The Republic of Mozambique applies for leave to appeal against the High Court judgment to this Court.

38. The first issue the Republic of Mozambique must satisfy this Court of is that it is in the interest of justice to grant leave to appeal. The HSF submits that it is not.

39. The HSF also submits that there are poor prospects of success in any appeal.

⁶ Para 69.

⁷ Para 88.

⁸ Para 95.

F. THE FIRST ISSUE: LEAVE TO APPEAL – JURISDICTION AND THE INTERESTS OF THE JUSTICE

40. There can be no dispute that the matter raises issues which are pre-eminently constitutional matters.

40.1. The issues raised in the review application dealt with South Africa's obligations under the Constitution as well as international law (including both UN and SADC conventions, and under the Extradition Treaty between South Africa and the United States).

40.2. The High Court's consideration of the matter is premised on the principle of legality, which is sourced in the rule of law and section 1(c) of the Constitution and the matter involves the question of extradition, and the Extradition Act.

40.3. The matter therefore engages the Court's jurisdiction in terms of section 167(3)(b)(i) of the Constitution.

41. However, while the matter is one of general public importance, it does not raise an arguable point of law in terms of section 167(3)(b)(ii).

42. Nor is it, in HSF's submission, in the interests of justice for this Court to address these issues.

42.1. The matter has been authoritatively dealt with by the High Court in a well-reasoned judgment and adjudication before this Court would only mean yet further litigation and further delays in finality; and

42.2. The Republic of Mozambique enjoys no prospects of success in the appeal.

G. GROUNDS ON WHICH THE HIGH COURT IS ALLEGED TO HAVE ERRED – NO PROSPECTS ON APPEAL

43. I turn now to the grounds on which the Republic of Mozambique bases its application and its attack on the High Court judgment. The Republic of Mozambique's case may be answered thematically.

All public power is subject to judicial scrutiny – including policy-laden decisions

44. A central argument of the HSF before the High Court was that all exercises of public power, including executive action, are subject to the Constitution and review by our courts.⁹

45. The Minister's decision - involving as it does the fields of international law 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.

46. Before the High Court, and again in this Court, the contention is raised by the Republic of Mozambique that the Minister's decision is polycentric and policy-laden and the Courts must accordingly show appropriate deference and not engage in "judicial overreach".

47. 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

⁹ *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) ("*Pharmaceutical Manufacturers*") at para 40.

decision for constitutional compliance, and compliance with South Africa's international obligations.

48. 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.

49. The Courts, including this Court, 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.

49.1. Thus, for example, in *Law Society*,¹⁰ this Court found that the President's participation in 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) of the Constitution read with the Bill of Rights allowed the President to make the decision. This Court reiterated that the Constitution is our supreme law and any conduct inconsistent with it is invalid and

¹⁰ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC).

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falls to be set aside. The President was ordered to withdraw his signature from the Protocol in question.¹¹

49.2. This Court also dismissed the defence the South African authorities raised in defence of their decision not to investigate serious allegations of torture committed by Zimbabwean officials in Zimbabwe when challenged by civil society groups.¹²

50. The High Court in *Chang II* was therefore correct in its scrutiny of the Minister's decision and the exercise undertaken by the High Court was not to ask whether it liked the decision, but to scrutinise the legality of the decision, through the lens of procedural and substantive rationality review.

51. That is not, as the Republic of Mozambique alleges, the High Court imposing its selection or preferences.

52. This is also not judicial overreach:

52.1. The Court rightly did not shirk away from this responsibility to declare the decision unconstitutional.

52.2. The Court must not hesitate to hold the government to account under the Constitution and international law, notwithstanding that the decision which is at stake is one

¹¹ *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)

¹² *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)

involving the executive sphere of government in its diplomatic relationship with other states, or on the international plane.

52.3. This is so particularly where the issue is one (as in this case) which relates to the lawfulness of a decision-maker's powers as judged against the standards of legality prescribed under the Constitution and under international law and particularly where the subject matter of the extradition decision involves corruption, in terms of which South Africa has duties domestically and internationally.

53. This is also relevant to the Court's treatment of substitution.

53.1. The Court did not grant the order because it "preferred" the United States. It granted substitution, with reference to this Court's test in *Trencon*.¹³

53.2. It did so with reference to the fact that there had already been a prior review in *Chang I*, in which the guidance provided by the Full Court had not been appreciated by the Minister. The result was a second unlawful decision in favour of Mozambique.

53.3. 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 I*, 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.

¹³ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) (CC).

53.4. As the Court observed, the decision in favour of Mozambique was in the face of multiple indications that the United States' request ought to have been satisfied.

53.5. 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*".¹⁴ I discuss this duty in the section which follows.

Heightened duty regarding scourge of corruption

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

55. There are particularised obligations for South Africa under the Prevention and Combating of Corrupt Activities Act, 2004 ("*PRECCA*"). *PRECCA* places obligations on South Africa to strengthen measures to prevent and combat corruption and corrupt activities.

56. 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.

57. 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.

¹⁴ See para 1 and 2 of the High Court's judgment.

58. The result is that it falls weightily upon a state like South Africa to ensure that its obligations to combat corruption are properly understood and effected extraterritorially.

59. 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.

60. 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;"

61. The High 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 irrationality 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 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)*

62. 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.”¹⁵

63. There is, in any event, 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.

63.1. The exercise of discretion by the High Court is not a matter in which an appeal court lightly interferes.¹⁶

63.2. 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”.¹⁷

¹⁵ *Chang I* at para 77.

¹⁶ *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.

¹⁷ 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.’”

Approach to the question of immunity – international law obligations and rationality

64. The Court's approach to the question of immunity was likewise correct.

64.1. The Court's careful approach to the question of rationality required the Minister to have *satisfied* himself that Mr Chang was not immune.

64.2. On the evidence *in the record*, no such conclusion could be reached by the Minister.

64.3. To require this *certainty* from the Minister is entirely appropriate given that South Africa's obligations extend beyond its boundaries and given that it must, in its international relations, ensure that it does not act contrary to its duties to ensure effective investigation and prosecution of corruption – including when making decisions to extradite those persons charged with corruption.

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

65.1. This was dependent on whether Mr Chang would be immune from prosecution and whether Mr Chang would be subject to arrest in order to stand trial on being extradited to Mozambique.

65.2. 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 to determining if the decision was

constitutional (both in respect of South Africa's international law obligations and in order for that decision to be rational).

- 65.3. The Court's findings are borne out *by the record* and in particular the Memorandum of 27 July 2020 ("*July 2020 Memorandum*"), which 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. This Memorandum was based on five legal opinions received by the Chief Directorate: International Legal Relations in the Department of Justice.
- 65.4. These opinions were not disclosed in the record, but they were summarised. 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 – received by South African counsel – warns that should the Minister grant the request of Mozambique "*it is likely that his decision will be subject to review*".
- 65.5. On the basis of these five legal opinions, the July 2020 Memorandum concluded that in all likelihood Mr Chang has immunity in Mozambique from criminal prosecution, and *recommends that Mr Chang is extradited to the US, and not to Mozambique*.
- 65.6. 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. The evidence before the Minister therefore indicated that the United

States request ought to be accepted and would more likely or certainly have achieved the stated purpose of the decision.

65.7. In the Minister's reasons of 30 August 2021, the Minister asserted that Mr Chang "*no longer has any immunity against prosecution (or arrest)*". But this is contradicted by the July 2020 Memorandum, which is supported by the five legal opinions.

65.8. The reasons document of 30 August 2021 did 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 explain what had changed between July 2020 and August 2021 which led the Minister to being satisfied on this score.

66. There was, *based on the record*, insufficient evidence before the Minister to be satisfied that the purpose of extradition – the prosecution of alleged guilty persons – would be achieved through the extradition of Mr Chang to Mozambique. This rendered the decision irrational. The High Court correctly found as much.

67. The record also confirms that there was every prospect of Mr Chang freely leaving Mozambique after extradition to Mozambique:

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

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

- 67.3. There was, at the time that the Minister's decision was taken, no valid arrest warrant for Mr Chang's arrest in Mozambique.
68. The Minister's failure to take these facts in account – because on his own evidence he did not consider it relevant – vitiates the impugned decision.
69. Finally, the reasons and record also confirm 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 United States' request, rather than Mozambique's request.
- 69.1. The decision therefore undermines the success of anti-corruption efforts in Southern Africa and would have an effect contrary to South Africa's constitutional and international law duties to fight corruption for two reasons: firstly, the decision was unable to advance the objective of fighting corruption through ensuring Mr Chang stood to face a trial; and secondly, because there was another option which would better advance that objective (extradition to United States).
- 69.2. This also renders the decision contrary to the stated reason for which the decision was taken, i.e. Mr Chang's prosecution in Mozambique, and is, therefore, irrational. A rational decision at least requires that it be rationally related to the stated purpose for which the power was given and the decision was taken.¹⁸
70. Moreover, the Minister's stated reasons entirely ignore the July 2020 Memorandum and/or depart from the recommendation without any reason. I turn to this next.

¹⁸ *Pharmaceutical Manufacturers* at para 85.

Reasons for the decision – and the duty to explain a change in tack

71. The Republic of Mozambique is critical of the High Court for having regard to the fact of the Minister's departure from his own recommendation. Yet the High Court was correct in doing so, as the flip-flopping reveals irrationality.

72. The duty to explain the departure from the recommendation was amplified because the Minister had *signed the Recommendation* already (and therefore ostensibly already accepted and approved it) just one month prior to the (contrary) decision being taken.

73. This was a further ground for the unlawfulness of the decision.

73.1. Either the Minister impermissibly ignored or overlooked or departed from the recommendation for no reason, which itself renders the entire decision irrational;¹⁹ or

73.2. The Minister sought to reverse his earlier approval of the recommended decision, which also is unlawful.²⁰

74. The High Court thus correctly found that the Minister's change of tack was unexplained by him or from the record. The explanations - offered by the Republic of Mozambique in this application – cannot undo that finding.

¹⁹ *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017).

²⁰ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

H. THE EX POST FACTO REASONS FOR A DECISION

75. The High Court also upheld the complaint relating to the Minister's impermissible evolution of reasoning for the decision.

76. 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, *after* the Minister had had sight of the grounds for challenging the decision, and *after* the compilation of the Record of Decision, rather than contemporaneously with the decision itself.

77. The Minister's stated reasons entirely ignore the July 2020 Memorandum and/or depart 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.

I. CONCLUSION: THE DECISION WAS UNLAWFUL

78. 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.

79. 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.

80. 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.

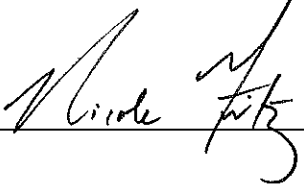
81. The High Court also held that the decision was taken contrary to its stated rationale – i.e. Mr Chang's prosecution in Mozambique and was, therefore, irrational.

J. LEAVE TO APPEAL SHOULD BE REFUSED

82. For the reasons set out above, the prospects of success in appealing the High Court judgment are poor, and militate against leave to appeal being granted. So too, the interests of justice weigh in favour of refusing leave to appeal and bringing the matter to finality.

K. CONCLUSION

83. In the result, HSF opposes the application on the bases set out in this affidavit and seeks an order that the application is dismissed with costs.



DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at *Johannesburg* this the *23rd* day of February 2023 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 JWAWA
8 Sherborne Road
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Johannesburg
Commissioner Of Oaths
Ex Officio Practising Attorney R.S.A

Mali Ndwandwe

From: Kevin Kudakwashe Chimeramombe <Kudakwashe@mabundainc.com>
Sent: 23 February 2023 11:34
To: Mali Ndwandwe; Busani Mabunda (Gov)
Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty; Ahmed Rajan
Subject: Re: Chang / FMO and Others: MR MANUEL CHANG EXTRADITION - Seventh Respondent's opposing Affidavit

Importance: High

Good Day

1. The above matter refers.
2. We acknowledge receipt of the seventh respondent's opposing affidavit herein.
3. We trust the above guides this matter accordingly.

Warm Regards



Kudakwashe Chimeramombe – Associate
MABUNDA INCORPORATED
Address: 2 Protea Road, Corner Riley, Bedfordview, 2007
PO BOX 61235, Marshalltown, 2107
DOCEX 424 JHB
Tel: (011) 450 1641/2284
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Email: Kudakwashe@mabundainc.com

From: Mali Ndwandwe <Mali.Ndwandwe@webberwentzel.com>
Date: Thursday, 23 February 2023 at 11:26
To: Busani Mabunda (Gov) <govm@mabundainc.com>, Kevin Kudakwashe Chimeramombe <Kudakwashe@mabundainc.com>
Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>, Pooja Dela <pooja.dela@webberwentzel.com>, Dylan Cron <dylan.cron@webberwentzel.com>, Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>, Ahmed Rajan <Ahmed.Rajan@webberwentzel.com>
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3. Please also acknowledge receipt by return email as a matter of urgency.

Kind regards

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T: +27115305881 | M: +27662908782 | mali.ndwandwe@webberwentzel.com | www.webberwentzel.com

From: Mali Ndwandwe
Sent: 23 February 2023 11:17
To: govm@mabundainc.com; kudakwashe@mabundainc.com
Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>;

Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>; Ahmed Rajan <Ahmed.Rajan@webberwentzel.com>

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From: Mali Ndwandwe

Sent: 23 February 2023 10:42

To: 'govm@mabundainc.com' <govm@mabundainc.com>; 'kudakwashe@mabunainc.com' <kudakwashe@mabunainc.com>; 'nicole@ianlevitt.co.za' <nicole@ianlevitt.co.za>; 'ian@ianlevitt.co.za' <ian@ianlevitt.co.za>; 'stiaan@krauseinc.co.za' <stiaan@krauseinc.co.za>; 'JohVanSchalkwyk@justice.gov.za' <JohVanSchalkwyk@justice.gov.za>

Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>; Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>; Ahmed Rajan <Ahmed.Rajan@webberwentzel.com>

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From: Nicole van Deventer <nicole@ianlevitt.co.za>
Sent: 23 February 2023 11:10
To: Mali Ndwandwe; govm@mabundainc.com; kudakwashe@mabunainc.com; Ian Levitt; stiaan@krauseinc.co.za; JohVanSchalkwyk@justice.gov.za
Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty; Ahmed Rajan
Subject: RE: Chang / FMO and Others: MR MANUEL CHANG EXTRADITION - Seventh Respondent's opposing Affidavit

Dear Sirs

We confirm receipt hereof.

**NICOLE VAN DEVENTER
ATTORNEY**



IAN LEVITT ATTORNEYS

**THE LEONARDO
OFFICE LEVEL 12
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SANDTON**

P.O.BOX 783244, SANDTON, 2146

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Sent: Thursday, February 23, 2023 10:42 AM

To: govm@mabundainc.com; kudakwashe@mabunainc.com; Nicole van Deventer <nicole@ianlevitt.co.za>; Ian Levitt <ian@ianlevitt.co.za>; stiaan@krauseinc.co.za; JohVanSchalkwyk@justice.gov.za

Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>; Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>; Ahmed Rajan <Ahmed.Rajan@webberwentzel.com>

Subject: Chang / FMO and Others: MR MANUEL CHANG EXTRADITION - Seventh Respondent's opposing Affidavit

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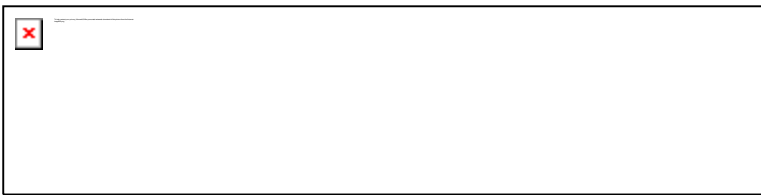
Mali Ndwandwe

From: Stiaan Krause <stiaan@krauseinc.co.za>
Sent: 23 February 2023 12:25
To: Mali Ndwandwe
Cc: Arno Van Niekerk; Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty; Ahmed Rajan
Subject: Re: Chang / FMO and Others: MR MANUEL CHANG EXTRADITION - Seventh Respondent's opposing Affidavit

Dear Madam,

We acknowledge receipt.

Kind regards,



Stiaan Krause | Director | Krause Attorneys Incorporated

Cell: [+27 63 775 0299](tel:+27637750299) | Email: stiaan@krauseinc.co.za

Web: www.krauseinc.co.za

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T: +27115305881 | M: +27662908782 | mali.ndwandwe@webberwentzel.com | www.webberwentzel.com

From: Mali Ndwandwe

Sent: 23 February 2023 10:42

To: 'govm@mabundainc.com' <govm@mabundainc.com>; 'kudakwashe@mabunainc.com' <kudakwashe@mabunainc.com>; 'nicole@ianlevitt.co.za' <nicole@ianlevitt.co.za>; 'ian@ianlevitt.co.za' <ian@ianlevitt.co.za>; 'stiaan@krauseinc.co.za' <stiaan@krauseinc.co.za>; 'JohVanSchalkwyk@justice.gov.za' <JohVanSchalkwyk@justice.gov.za>

Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>; Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>; Ahmed Rajan <Ahmed.Rajan@webberwentzel.com>

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<image001.jpg>

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<Chang v FMO and Others Seventh Respondent's Opposing Affidavit 23022023.pdf>

Mali Ndwandwe

From: Motsoko Matome <MMotsoko@justice.gov.za>
Sent: 23 February 2023 13:31
To: Mali Ndwandwe; e3792@discoverymail.co.za
Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty; Ahmed Rajan
Subject: RE: Republic of Mozambique // FMO and others (case no. CCT 30/23)

We acknowledge receipt hereof.

Warm regards



PU# DWRPH# RWVRNR#

Office of the State Attorney Johannesburg

Fax: 086 452-7622

email: MMotsoko@justice.gov.za

"make a list of all the reasons you want, to be major success in your field, reasons are the fuel in the furnace of achievement"

Brian Tracy.

From: Mali Ndwandwe [mailto:Mali.Ndwandwe@webberwentzel.com]
Sent: 23 February 2023 10:50 AM
To: Motsoko Matome; e3792@discoverymail.co.za
Cc: Vlad Movshovich; Pooja Dela; Dylan Cron; Daniel Rafferty; Ahmed Rajan
Subject: Republic of Mozambique // FMO and others (case no. CCT 30/23)

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From: Mali Ndwandwe
Sent: 23 February 2023 10:42
To: 'govm@mabundainc.com' <govm@mabundainc.com>; 'kudakwashe@mabunainc.com' <kudakwashe@mabunainc.com>; 'nicole@ianlevitt.co.za' <nicole@ianlevitt.co.za>; 'ian@ianlevitt.co.za' <ian@ianlevitt.co.za>; 'stiaan@krauseinc.co.za' <stiaan@krauseinc.co.za>; 'JohVanSchalkwyk@justice.gov.za' <JohVanSchalkwyk@justice.gov.za>

Cc: Vlad Movshovich <vlad.movshovich@webberwentzel.com>; Pooja Dela <pooja.dela@webberwentzel.com>; Dylan Cron <dylan.cron@webberwentzel.com>; Daniel Rafferty <Daniel.Rafferty@webberwentzel.com>; Ahmed Rajan <Ahmed.Rajan@webberwentzel.com>

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