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

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

FMO'S HEADS OF ARGUMENT: PART A

I Introduction

1. Should Mr Manual Chang remain in the country while the lawfulness of the decision to extradite him be determined?

2. The answer is obvious—Yes. Once Mr Chang is extradited, the lawfulness of the decision to extradite him becomes academic. There will be no way to reverse or redress the illegal extradition decision if it is found to be unlawful. Mr Chang will be outside of South Africa's jurisdiction, subject only to the powers of Mozambican authorities.

3. On the other hand, if Mr Chang remains in the country, and it turns out the decision to extradite him was lawful, Mr Chang would at most have suffered another month of detention in South Africa. While this is a limitation on his freedom, the prejudice caused to Mr Chang is outweighed by the imperative to afford various parties, and this Court, the opportunity to review the decision to extradite him. To achieve that balance, FMO has done everything in its power to bring this application as quickly as possible, aligned with an expedited timetable for the Part B hearing.

4. These submissions deal with the various reasons for why. But two reasons need to be stressed from the start. First, Mr Chang's extradition is at the heart of a corruption scandal of international proportions. Mr Chang is not being extradited for stealing a pigeon.[1] He is a sought person because of the role he allegedly played in diverting over **US$2.2 billion** of funds intended for public benefit in Mozambique into the pockets of unscrupulous politicians and their cronies.

5. The crimes of which Mr Chang stands accused implicate South Africa's international legal duties. South Africa has signed and ratified three treaties that impose international legal duties in respect of corruption.

6. First, South Africa has signed and ratified the United Nations Convention against Corruption (UN Convention), along with 185 other states.[2] Kofi Anan, in his foreword to the UN Convention, as cited by the Constitutional Court in *Glenister*,[3] held that corruption—

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[1] As has been the case under the European Arrest Warrant scheme. Rosemary Davidson "A sledgehammer to crack a nut? Should there be a bar of triviality in European arrest warrant cases?" *Crim. L.R.* (1) 2009 31-36 at 34.

[2] (2004) 43 *ILM* 37. South Africa signed the UN Corruption Convention on 9 December 2003 and ratified it on 22 November 2004.

[3] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 167.

> "is found in all countries—big and small, rich and poor—but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development."

7. This description of corruption applies with significant force to the facts of this case and Mr Chang's alleged corruption.

8. The UN Convention was enacted because the General Assembly of the United Nations was "[c]oncerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law".[4]

9. Article 1(b) of the UN Convention provides that the purpose of the treaty is to "promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption".

10. Chapter IV of the UN Convention deals with international cooperation. State parties are obliged to cooperate in criminal matters concerning corruption.[5]

11. The UN Convention obliges state parties to extradite persons sought for the crime of corruption.[6] Importantly, the UN Convention obliges state parties to prosecute the person sought for corruption if the state party refuses to extradite them.[7]

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[4] See the preamble to the UN Convention.

[5] Article 43(1).

[6] See article 44. It even obliges them to expedite extraditions involving corruption. See article 44(9).

[7] Article 44(11).

12. Secondly, South Africa has signed and ratified the African Union Convention on Preventing and Combating Corruption (AU Convention).[8] Like the UN Convention, the AU Convention aims to promote cooperation among African states in eradicating corruption.[9]

13. The AU Convention obliges member states to ensure that crimes of corruption are extraditable.[10] It obliges member states to prosecute those persons sought for corruption if they cannot be extradited.[11]

14. Thirdly, South Africa has signed and ratified the SADC Protocol against Corruption (**SADC Corruption Protocol**).[12] The SADC Corruption Protocol has provisions concerning cooperation and extradition that are substantively like those of the UN and AU Convention.[13]

15. South Africa has acknowledged the importance of these treaties and the eradication of corruption domestically through legislation and in case law.[14]

16. The sum of these three Conventions is that South Africa is obliged to cooperate with foreign states in combatting corruption. Such cooperation is not limited to but certainly includes extradition.

17. **Extraditions that frustrate this purpose**, viz. extraditions that do not result in criminal accountability for persons guilty of corruptions, contravene South Africa's international (corruption combatting) obligations. This is the first reason why the legality of this extradition must be determined before the issue becomes academic.

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[8] (2004) 43 *ILM* 5. The AU Convention was adopted on 11 July 2003. South Africa signed the Convention on 16 March 2004, ratified the Convention on 11 November 2005 and it entered into force on 5 August 2006.

[9] Article 2(2).

[10] Article 15(2).

[11] Article 15(6).

[12] The SADC Corruption Protocol was signed by the Heads of State of all 14 SADC member states on 14 August 2001. South Africa ratified the Protocol on 15 May 2003 and it entered into force on 6 July 2005.

[13] See articles 1(b) and 9.

[14] See the preamble to the Prevention and Combating of Corrupt Activities Act 12 of 2004; *Glenister* above at para 176; *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) at para 51; *S v Shaik and Others* [2008] ZACC 7; 2008 (5) SA 354 (CC) ; 2008 (2) SACR 165 (CC) ; 2008 (8) BCLR 834 (CC) at para 75.

18. The second reason relates to the nature of extraditions generally. Extradition is a highly invasive decision by a state. The Constitutional Court has repeatedly recognised that extradition severely limits numerous rights to which Mr Chang is entitled.[15] At the same time, extradition serves the important purpose of ensuring that those accused of a crime are held accountable for their conduct through a fair and proper trial. Extradition should not be done in haste and without punctilious consideration of the guarantees in the Extradition Act, the Constitution and international law.[16] All FMO asks, essentially, is that before ordering the Minister to effect Mr Chang's surrender, the **Court pause and consider whether the decision was lawful**. This cannot be done once the Court allows for the surrender of Mr Chang, and it cannot do so without seeing the full record of the Minister's decision. Hence this application.

19. These two reasons are presented up front as crucial background to the determination of Part A of the relief sought by FMO. Legally, the determination of Part A is straightforward. The question is whether FMO has made out a case for interim relief. These heads of argument first set out the test for granting interim relief. That test is then applied to the facts of this case. The test points in one direction only: Mr Chang must stay in South Africa pending Part B.

20. Before concluding, we deal with the Minister's allegation that Ms van Deventer lacks the requisite authority and admissibility of evidence.

II The test for interim relief

21. An interim interdict is a provisional order designed to protect the rights of an applicant pending an application to establish the respective rights of the parties.

22. It does not involve a final determination of the rights of the parties and does not affect such determination. Its effect is to 'freeze' the position until the court decides where the right lies.

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[15] *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) at para 1:

> "Extraditing a person, especially a citizen, constitutes an invasion of fundamental human rights. The person will usually be subject to arrest and detention, with or without bail, pending a decision on the request from the foreign state. If surrender is ordered, the person will be taken in custody to the foreign state."

[16] *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) ("*Jeebhai*") at paras 21-22

It is aimed at ensuring, as far as it is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief.[17]

23. In terms of the test for an interim interdict, an applicant must establish:

    a. a prima facie right, though open to some doubt;
    b. a reasonable apprehension of irreparable and imminent harm to the right;
    c. the balance of convenience; and
    d. the applicant must have no other satisfactory remedy.[18]

24. In addition, when granting an interim interdict against an organ of state, a Court must consider the probable impact on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.[19] Where those duties are infringed by the interim order, interim orders must be granted only in exceptional circumstances and in the clearest of cases.[20]

25. The application of these factors is done on a sliding scale. The stronger the prospects of success (i.e., the strength of the applicant's case), the less need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.[21]

26. We apply each of these factors to this matter.

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[17] *Airoadexpress (Pty) Ltd v Chairman, Local Road Trans-portation Board, Durban* 1986 (2) SA 663 (A) at 681D–F.

[18] *Setlogelo v Setlogelo* 1914 AD 221; *City of Tshwane Metropolitan Municipality v Afriforum* (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) at para 49.

[19] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC)at para 46.

[20] *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) at para 53.

[21] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A)*; Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D).

III A prima facie case

27. A court will grant an interim interdict upon a degree of proof less exacting than that required for the grant of a final interdict. The approach laid down by Clayden J in *Webster v Mitchell* is as follows:

> "[T]he right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "*prima facie* established though open to some doubt" that is enough. ...
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> The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."[22]

28. FMO has made out a prima facie case that the Minister's decision is unlawful. It bases its review on five grounds. We explain these five grounds of review here. We then link these grounds of review to rights.

(a) No warrant for arrest

29. The first ground for reviewing the Minister's decision is that there is no warrant for Mr Chang's arrest in Mozambique. A sought person cannot be extradited to a country where there is no warrant for their arrest, especially where they were found to be a flight risk in the requested state. Extradition in that context would be irrational. The sought person could escape the jurisdiction of the requesting state as they did previously. The sought person would not stand trial, which is the whole point of extradition.[23]

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[22] 1948 (1) SA 1186 (W) at 1189, as approved in *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D–E.

[23] *Chang v Minister of Justice and Correctional Services and Others; Forum de Monitoria do Orcamento v Chang and Others* [2019] ZAGPJHC 396; [2020] 1 All SA 747 (GJ); 2020 (2) SACR 70 (GJ) at para 80 (*Chang* decision).

30. In Mr Chang's case, he was denied bail in South Africa. The implication is that he was a flight risk. The proof is in the pudding: he was able to leave Mozambique, notwithstanding mounting evidence of criminal activity (at that time, Chang had not been charged in Mozambique because he was immune). Accordingly, it is irrational to extradite Mr Chang to Mozambique, where he is at liberty to flee the country once again. At the very least, there is prima facie evidence (even if open to some doubt) that he will not stand trial.

31. The Minister, in his media release, says that Mozambique has "duly indicted" Mr Chang. FMO has not seen this indictment. It anticipates seeing the indictment in the record to be filed by the Minister. But even if Mozambique has duly indicted Mr Chang, that cannot be enough. There is no point to indicting an accused, who is a flight risk, without issuing a valid warrant for their arrest.

32. Both the Minister and Mozambique contend that an arrest warrant dated 29 January 2019 suffices to demonstrate that there is a warrant for Mr Chang's arrest. We have four responses to this.

    a. First, the warrant was issued over two and a half years ago. We are not told whether under Mozambican law the warrant is still valid or whether it has prescribed.

    b. Second, the warrant was issued while Mr Chang was immune from prosecution. It may be unlawful given his immunity at the time. If Mr Chang could not be prosecuted under Mozambican law, it may be that the warrant is not valid. Mr Chang may be able to challenge the warrant, assuming it even exists as a matter of law in Mozambique.

    c. Third, assuming the warrant was lawfully issued, the warrant was made by the Supreme Court of Mozambique pursuant to a procedure to arrest members of parliament. It is unclear whether the warrant still applies to Mr Chang now that he is, on Mozambique's version, no longer a member of parliament.

d. Fourth, the warrant is an "international" warrant for Mr Chang's arrest. It was issued while Mr Chang was outside the country. It may be that it does not apply for when Chang enters the country after his extradition.

33. These responses deal with the warrant point. At best for the respondents, the 2019 warrant casts some doubt on this ground of review. But that is consistent with the test for a prima facie right in urgent proceedings such as this for interim relief.

(b) First in time first in right

34. The second ground for reviewing the decision is that the Minister failed to consider or consider appropriately the fact that the US was the first country to request the extradition of Mr Chang. Article 15 of the US-SA Extradition Treaty provides:

> (1) Where requests are received from two or more States for the extradition of the same person, either for the same offence or for different offences, the executive authority of the Requested State shall determine to which of those States, if any, the person is to be extradited and shall notify the Requesting State of its decision.
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> (2) In determining to which State the person is to be extradited, the Requested State shall consider all relevant factors, including but not limited to:
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> (a) whether the requests were made pursuant to an extradition treaty;
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> (b) the relative seriousness of the offences, should those requests relate to different offences;
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> (c) the time and place of commission of each offence;
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> (d) the respective dates on which the requests were received from the respective States;
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> (e) the interests of the respective States;
>
> (f) the nationality of the victim; and
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> (g) the possibility of any subsequent extradition between the respective States.

35. Article 11 of the SADC Protocol, the treaty between Mozambique and South Africa, provides:

> (1) Where requests are received from two or more States for the extradition of the same person either for the same offence or for different offences, the Requested

State shall determine to which of those States the person is to be extradited and shall notify those States of its decision.

(2) In determining to which State a person is to be extradited, the Requested State shall have regard to all the relevant circumstances, and, in particular, to:

(a) if the requests relate to different offences, the relative seriousness of those offences;

(b) the time and place of commission of each offence;

(c) the respective dates of the requests;

(d) the nationality of the person to be extradited;

(e the ordinary place of residence of the person to be extradited;

(f) whether the requests were made pursuant to this Protocol;

(g) the interests of the respective States; and

(h) the nationality of the victim.

36. There are four points about these two articles.

37. First, they are substantively similar. Both provide that the requested state has a discretion in deciding between two competing requests. Both provide that the requesting state must ("shall") consider certain factors in deciding between competing requests.

38. Second, the factors that are first listed in the respective articles relate to a situation where the extradition requests concern different offences. But whether the extradition requests concern the same offence, the **first factor** to be considered is the respective dates of the requests. This factor is listed before any other factor relevant to two requests concerning the same offence.

39. Third, the doctrine of first in time first in law is entrenched in South African law. The maxim is expressed as *qui prior ext tempore potior est jure.* In the context of competing claims, "the priority of the competing claims [has] to be decided [. . .] according to the *qui prior est tempore potior est iure* principle *unless the respondent had raised special circumstances that would tilt the balance of fairness in his favour*".[24]

[24] Per Brand JA in *Wahloo Sand Bk v Trustees, Hambly Parker Trust* (2002) (2) SA 776 (SCA) at 779A-B and 784F–G. See *Krauze v Van Wyk* 1986 (1) SA 158 (A).

40. Where a party exercises its legal rights before another, or has rights that predate the other's, the first party is generally afforded their remedy over the later party. The doctrine encourages expedition and rewards those who are decisive in exercising and acquiring their rights.

41. In the context of extradition, the doctrine's rationale is critical. It ensures that extraditions can happen speedily, ensuring that accountability is not thwarted. If the doctrine was ignored, requested states can hold off on extradition to state A in the hope of another state (state B) making a request. And state B can hold off requesting extradition of its own nationals to see if there is a competing request by state A – and then when or if state A makes the request, quickly put in a competing request to thwart or delay the process. So requesting states would not be incentivized to make their request efficiently, allowing fugitives to go unpunished or resulting in arrested fugitives languishing in custody.

42. Fourth, if a requested state failed to consider this factor, or failed to consider it appropriately, then it would be breaching international law. Accordingly, if the Minister failed to consider it, then he would be in breach of South Africa's international duties, rendering his decision unlawful.[25]

43. Finally, on these facts, there is no evidence that the Minister considered this factor. His media statement does not explain why the US, despite being off the mark first with a perfectly competent request that the Full Court has already recognised as "valid"[26], will not have its request acceded to. In his answering affidavit, the Minister simply says without more that he considered the fact that the US was first. But this is not enough, without the record, to dispel FMO's ground of review. FMO has raised a prima facie case that the Minister could not without more accede to an extradition request that proceeded a first request.

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[25] *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) at para 77.

[26] Para 80, *Chang* decision: "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**".

(c) International legal duties

44. The third ground is that the Minister failed to consider or violated South Africa's international legal duties to combat corruption and ensure accountability for corruption. These legal duties were canvassed above. They are central to the determination of this matter.

45. The Minister was faced with (a) a request for Mr Chang's extradition by a country that has only ever demonstrated commitment to prosecute Mr Chang for his corruption and (b) a country that has at best been recalcitrant in prosecuting Mr Chang. In fact, the US has been trial-ready for Mr Chang for years. It has all the evidence it needs and is ready to proceed.[27] In that context, South Africa's international duties demand that the Minister accede to the former country's request, barring exceptional circumstances. No exceptional circumstances exist here or have been disclosed by the Minister.

(d) Good faith and interests of justice

46. The fourth ground is that the Minister failed to consider that the Mozambican request was made in bad faith or acceded to the request notwithstanding its bad faith. The Extradition Act[28] provides that the Minister may refuse to surrender a sought person if the request is not required in good faith. Mozambique's request cannot be said to have been made in good faith. The

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[27] FMO FA para 56; Record at 02-13.

[28] Section 11 reads:

> "The Minister may—
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> *(a)* order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
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> *(b)* order that a person shall not be surrendered—
>
> (i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
>
> (ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
>
> (iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or
>
> (iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion."

FMO is criticized by the Mozambiquan and South African governments for suggesting this. But that criticism is misplaced, given that the Full Court in this division has already recognised that "Mr Chang has resigned as MP with the purpose of relinquishing his immunity in Mozambique. He says that this is because wants to answer for the charges against him in his home country. **The more cynical view, as suggested by the civil society litigants in this matter, is that he has the impression that in Mozambique he may be given a measure of protection due to cronyism or a largesse which harks back to his former positions in government**."[29]

47. The initial request was made notwithstanding Mr Chang's immunity. The Full Court previously held that there was a failure to disclose that immunity, and – tellingly – the very Minister now before this Court contended under oath that the failure by Mozambique to disclose was deliberate.[30]

48. Now, Mozambique claims that Mr Chang has been duly indicted and will stand trial. However, no warrant has been issued for his arrest – other than the old warrant which for the reasons we have given is open to doubt. Mozambique and the Minister have not explained the details of Mozambique's withdrawing of Mr Chang's immunity, including whether he is still a member of Parliament. And this, in the context of the previous findings by the Full Court that: "*Proper reference to this document shows that it merely records that the Standing Committee of National Parliament "Approves the enforcement of maximum coercion measures against Mr Chang". It pertinently does not provide for the lifting of immunity from prosecution and, for that matter, also does not expressly consent to Mr Chang's arrest*."[31]

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[29] Para 36, *Chang* decision.

[30] *Chang* decision: para 32 "**The current Minister contends that Mr van Heerden was deliberately misled**. Ms Buchili denies this. She seeks to explain that this was the first extradition request made by her office involving a Member of Parliament, implying that there was a lack of experience at play. She states that she believed that South Africa was properly apprised of the immunity and its nature and extent. She puts any misunderstanding in relation to Mr Chang's immunity down to the different legal systems and different languages at play.

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

[31] Para 22, *Chang* decision.

49. We also note that the Minister, under oath, has said that there is no reason for why the US cannot prosecute Mr Chang after he is prosecuted or extradited to Mozambique.[32] Mozambique, in its affidavit, does not dispute this. But this is patently false. Article 67 of the Mozambique Constitution provides:

> "O cidadão moambicano não pode ser expulso ou extraditado do território nacional [No Mozambican citizen may be expelled or extradited from the national territory.]"[33]

50. There are two implications to this mistake on the part of the Minister. First, his decision to extradite Mr Chang to Mozambique is unlawful and irrational. It was based on the mistaken assumption that sending Mr Chang to Mozambique would not prevent the US from prosecuting Mr Chang. It should be reviewed on that ground alone. Second, the fact that Mozambique did not correct this mistake, either when the Minister was making his decision or on affidavit, impugns its good faith in requesting the extradition of Mr Chang.

51. Finally, the interests of justice and reasonableness were not considered by the Minister. Alternatively, the Minister acted unreasonably by deciding to extradite Mr Chang to Mozambique. For the reasons given above, the interests of justice and the balance of reason demanded that Mr Chang be extradited to the US, not Mozambique.

(e) Rights

52. The Minister argues that FMO, despite raising these grounds of review, has failed to show a prima facie right. This argument cannot be sustained.

53. First, FMO's standing in Chang's extradition proceedings has never been challenged. Accordingly, it follows that FMO has rights that are implicated in these proceedings and by the Minister's decision. That is why the Full Court in this division heard FMO's case and granted relief in its favour in respect of the previous extradition decision. Notably, on that occasion when FMO's case was aligned with and in support of the Minister's self-review of his predecessor's decision, the Minister was only too happy with FMO's standing. It is

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[32] Minister's Answering Affidavit at para 65; Record at 06-41.

[33] The official Mozambican Constitution is available here: http://www.cconstitucional.org.mz/Legislacao/Constituicao-da-Republica . The English translation is available here: https://www.constituteproject.org/constitution/Mozambique_2007.pdf?lang=en.

opportunistic and does the Minister little honour for him to now raise the standing point when his decision is challenged.

54. Indeed, there is no basis to challenge FMO's standing. FMO's interest in this matter is obvious. FMO was formed against the backdrop of widespread government corruption and maladministration in Mozambique. Its affiliates represent vulnerable members of Mozambican society who are impacted by poor governance, political grafting and bribery. FMO, on behalf civil society, oversees and monitors government financial activity to ensure that the funding the Mozambican government receives reaches its intended targets. Unfortunately, all too often such funding does not do so, but finds its way to the bank accounts of unscrupulous politicians.

55. Secondly, specifically, FMO represents Mozambican victims of the corruption allegedly committed by Mr Chang. Those persons' various rights are directly implicated by the Minister's decision. The rights are those of any victim of corruption. Those rights include the right to dignity,[34] fair administrative action,[35] and equality.[36]

56. Moreover, South Africa's obligations to combat corruption are extraterritorial, particularly in respect of its international law obligations. The implication is that all persons in South Africa have a justiciable right against the South African government to comply with South Africa's anti-corruption duties. FMO, as part of its public interest standing, seeks to vindicate these rights in this application. That much is apparent from the Constitutional Court's understanding of corruption as a transnational crime. In *Glenister*, the Court said this.

> "[*167] This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own legislation,3 in regional4 and international5 conventions and in academic research. …*
> *[170] Perhaps the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it is to be found in our own domestic legislation …*

[34] Section 10 of the Constitution.

[35] Section 33 of the Constitution.

[36] Section 9 of the Constitution.

The preamble notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that regional and international co-operation is essential to prevent and control corruption and related crimes".[37]

57. Thirdly, in the context of an interim interdict preventing statutory breach, the Constitutional Court has held that "quite apart from the right to review and to set aside impugned decisions, [an applicant for an interim interdict] should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm". However, that was in the context where "[t]he right to review the impugned decisions did not require any preservation *pendente lite*".[38]

58. Accordingly, where the right to review an impugned decision *requires* preservation during litigation, all an applicant needs to show is that they have good grounds of review. More accurately, they need to show that they are entitled to bring the review and that that right requires preservation during the review.

59. In this case, FMO has good grounds of review. Moreover, FMO's right to bring the review is endangered. If the Minister's decision is implemented, that is the end of the matter. FMO could not then bring its review, because it would be academic or moot. Similarly, if during litigation the decision was implemented, then FMO's right to brig and prosecute the review would be extinguished.

60. Fourthly, quite apart from the rights given above, FMO's right to a remedy is threatened in this matter. If FMO has standing to bring this application, then it has the right to an effective

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[37] And the Full Court in this division in *Chang* said this at para 77: "The underlying crimes of which Mr Chang is accused involve corruption. **Corruption takes place with no regard to national boundaries. Thus the effective eradication of corruption requires concerted and coordinated efforts internationally. This need has brought about various international treaties against corruption of which South Africa is a signatory**. **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.

[38] *OUTA* at para 50.

remedy. If the Part A relief is not granted, Mr Chang will be deported, depriving FMO of any effective remedy.

61. Finally, even if FMO's prospects of success are weak, the balance of convenience in this matter means that FMO does not need to demonstrate strong prospects of success. As explained above, the two factors work on a sliding scale: the greater the balance of convenience, the less weight is attached to prospects of success.

IV Irreparable harm

62. The point is not that Mr Chang may not be prosecuted in Mozambique. The point is that if the Minister's decision is implemented before reviewing it, there can be no way to provide FMO with effective relief if the decision ends up being found as unlawful. As we highlighted above, Mozambique does not extradite its own nationals, so any chance of Mr Chang thereafter being handed to the American (or any other) authorities is zero.

63. In any event, there is evidence to suggest that Mr Chang will not be prosecuted in Mozambique.

a. First, Mozambique previously sought his extradition even though Mr Chang was immune.
b. Second, the Minister, tellingly, does not put up an indictment from Mozambique or any evidence that Mr Chang's immunity has been lifted. He does not even provide this Court with the assurance from Mozambique that Mr Chang's immunity has been lifted. All we are told, without any basis, is that the Mozambican elections happened while Mr Chang was here, *ergo* he is no longer immune.
c. Thirdly, the Minister puts up an arrest warrant for Mr Chang dated 29 January 2019—over two and a half years ago. This warrant was issued while Mr Chang was immune from prosecution. It was issued pursuant to a special process for warrants for the arrest of members of parliament. We are not told by the Minister if the warrant was validly issued or whether it is still valid, particularly

since there is no evidence that Mr Chang is not immune in Mozambique (recalling that on the Minister's argument before this Court, the Mozambican elections happened while Mr Chang was here and hence he is no longer immune).

64. If Mr Chang leaves South Africa, then that is it for the FMO. The FMO cannot review the Minister's decision. It cannot obtain substantive relief if the Minister's decision is unlawful.

V Balance of convenience

65. Once Mr Chang is extradited, the lawfulness of the decision to extradite him becomes academic. There will be no way to reverse or redress the illegal extradition decision if it is found to be unlawful. Mr Chang will be outside of South Africa's jurisdiction, subject only to the powers of Mozambican authorities.

66. On the other hand, if Mr Chang remains in the country, and it turns out the decision to extradite him was lawful, Mr Chang would at most have suffered another month of detention in South Africa. We stress that FMO has suggested tight deadlines for the finalisation of Part B precisely to avoid further unnecessary detention for Mr Chang. The Minister conveniently ignores this in his answering affidavit (compare with Mozambique's answer, where Mozambique agrees with FMO that Part B should be heard as soon as possible and that Part A could be foregone if the Minister's undertaking were extended – had the Minister's undertaking been given on Monday, we would already have saved a full five court days that could have been dedicated to Part B of this case, and hence it is the Minister's election not to provide that undertaking that has caused Mr Chang five days longer in detention before Part B can be heard).

VI Alternative remedies

67. As for alternative remedies, the Minister argues that FMO can compel the Mozambican government to prosecute Mr Chang once he is in Mozambique.

68. We have already explained that there are serious concerns about whether Mr Chang would in fact be prosecuted in Mozambique – this makes the alternative remedy chimerical. It is trite that an alternative remedy in this context means an effective legal remedy.[39]

69. The Minister also does not place any evidence before this Court about the availability of or prospects of such a mandamus before the Mozambican courts.

70. Also, this is not a remedy that is alternative to an interdict preventing an unlawful extradition to Mozambique. Even if Chang is prosecuted in Mozambique, his extradition could nonetheless have been unlawful as a matter of South African law (there will be no remedy for that violation, a fundamental one under both the South African rule of law, and under our international obligations, including to the United States of America).

71. The Minister's point also misses entirely that this is a particularly poor alternative remedy (bring an expensive and time-consuming mandamus to try and compel a recalcitrant government to prosecute one of its own) to the one that FMO has already placed before this Court: the United States, which is ready, willing, and far advanced to begin Mr Chang's prosecution immediately.

VII Authority to depose and admissible evidence

72. The Minister objects to Ms van Deventer's authority to bring this application on behalf of FMO. For the reasons given in the replying affidavit, we strong reject this contention.

73. We wish to add a further objection. It is that the deponent to the Minister's affidavit, the Director General, has failed to file a confirmatory affidavit by the Minister. All the evidence in that affidavit, accordingly, is hearsay and inadmissible.

74. This objection has been affirmed in a long line of cases, especially in the context of reivews. In *Gerhardt v State President and Others*, the Court held:

[39] *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) at para 36.

> "Clearly one person cannot make an affidavit on behalf of another and Mr Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible". (emphasis added).[40]

75. Even if a confirmatory affidavit is provided at a later stage, this would be inappropriate in the context of this case. In *Kalil*, the SCA held:

> "Confirmatory affidavits at times may have their place but, by and large, constitute a slothful means of placing evidence before a court which is entitled to expect that the actual witnesses to an event depose to the facts. Be that as it may, when no facts are alleged, either in a respondent's answering affidavit or in a supporting confirmatory affidavit, to substantiate a denial of the version alleged by an applicant, the denial can be disregarded."[41]

76. For that reason, the Minister's evidence is not properly before this Court. No case then has been made out against the relief sought by FMO in Part A.

VIII The relief sought and urgency

77. With respect to **PART A**, FMO has applied for an urgent interdict restraining the Minister from surrendering Mr Chang. The Minister has insisted that he will go ahead with extraditing Mr Chang, despite our stated intention to review his decision.

78. Most importantly: if the Minister goes ahead with his decision, the relief in Part B is moot. Mr Chang will be in Mozambique. There will be no way to ensure his return. There will be no point in declaring the Minister's decision as unlawful. As the old Afrikaans adage goes, the bullet will have gone through the church.

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[40] 1989 (2) SA 499 (T) at 504 D- H. See in this regard *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TkSC) at 550E-G; *Pretoria Portland Cement and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) at para [63], *Da Mata v Otto NO* 1972 (3) SA 858 (T) at 868G – 869E, Ngcobo J in *Thint (Pty) Ltd v National Director of Public Prosecutions and others: Zuma and Another v National Director of Public Prosecutions and Others* 2008 (2) SACR 421 (CC) at para [325] and footnote 112); *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others (*210/2014) [2014] ZASCA 90; [2014] 3 All SA 291 (SCA); 2014 (5) SA 123 (SCA) (4 June 2014).

[41] *Kalil* id. See further *Altron TMT Holdings Proprietary Limited and Another v Minister of Trade and Industry and Others* (2019/46376) [2020] ZAGPJHC 162 (8 July 2020) at para 26 onwards, and the authorities cited there.

79. For these reasons, the relief in **PART A** should be granted together with the costs of the hearing on 24 August and the costs of the hearing on 26 August 2021 (if the relief is not granted, *Biowatch* should apply given the FMO's status as an NGO and its attempts to vindicate a clearly important constitutional and international law case).

MAX DU PLESSIS (SC)
ESHED COHEN (PUPIL)

Chambers, Durban and Cape Town

27 August 2021