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

CASE NO: 40441/21

In the matter between:

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

SEVENTH RESPONDENT'S SHORT HEADS OF ARGUMENT

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1. In **Webster vs Mitchell**,[1] the Court enumerated the test for interim interdict. The test was postulated as follows:

> *"In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient is such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the*

[1] 1948 (1) SA 1186 (WLD)

respondent which 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, and if serious doubt is thrown upon the case of applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the respondent."

2. In the opening paragraph of Clayden J, in Webster vs Mitchel supra, the learned judge referred with approval to the passage in **Setlogelo vs Setlogelo, 1914, AD, 221 at page 227,** by Innes JA, dealing with the need to show irreparable harm as set out by Van Der Linden, and says:

"That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such a case he says the test must be applied where the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party."

3. Setlogelo vs Setlogelo was applied and adapted to constitutional precepts of our democratic state by Moseneke DCJ in **National Treasury and others vs Opposition to Urban Tolling Alliance and others**[2] when he stated as follows:

"Under the Setlogelo test, the prima facie right claimant must establish is not merely the right to approach a Court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that it threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."

[2] 2012 (6) SA 223 (CC) at para 50

4. Against the backdrop of the authorities cited above, when applied to the facts and circumstances of the applicant's case here seeking an interdict against the Minister of Justice and Correctional Services ("Minister") restraining the handing over of Mr Emanuel Chang ("Chang") through extradition process to the authorities of the Republic of Mozambique ("Mozambique") demonstrate without a shadow of doubt, that this applicant does not meet any of the requirements of an interim interdict. Those requirements were set out in case law as follows: a prima facie right, irreparable harm, balance of convenience and absence of alternative remedy.

5. The applicant has not established a prima facie right though open to some doubt. This should be the end of the enquiry. However, if it is found that the applicant has established a prima facie right, it has not established irreparable harm. There is certainly no harm that is suffered by the applicant for one simple reason. That is, the Minister has extradited Chang to Mozambique in order for him to stand trial for the corruption and money-laundering offences that he is alleged to have committed in Mozambique. The offences for which Chang is inducted by the Attorney General of the Republic of Mozambique were committed on Mozambican soil.

6. The Magistrate, Kempton Park, in an enquiry conducted in terms of section 10 of the Extradition Act 67 of 1962 ("Extradition Act") found that Chang is extraditable to Mozambique. He also conducted an enquiry in respect of the request made by the United States of America ("USA") for Chang to be

extradited to the USA. In respect of that enquiry, the Magistrate found that Chang was also extraditable to the USA. Essentially, there were two enquiries conducted before a Magistrate, and the Magistrate found that in respect of both requests, Chang is extraditable to any of the two. This was for the Minister to decide.

7. The Minister made his decision to extradite Chang to Mozambique after he has considered representations from the applicant, Chang, USA and the Republic of Mozambique. The procedure was fair, transparent and lawful.

8. Chang does not enjoy immunity from prosecution in Mozambique. He only enjoyed immunity from prosecution when he was a member of Parliament. Chang is no longer a member of Parliament. Chang has been indicted by the Attorney General of the Republic of Mozambique to stand trial for corruption, money-laundering and other related charges over the embezzlement of almost $2 billion US dollars received by the Republic of Mozambique as donations largely from the USA.

9. All what is outstanding in order for Chang's criminal trial to commence in Mozambique is his arrival in Mozambique. An international warrant of arrest for Chang has been issued lawfully by the Supreme Court Judge in Maputo, Mozambique. That warrant is enforceable and awaits to be implemented upon Chang's arrival in Mozambique. The extradition of Chang ex facia the decision of the Minister and communicated to the High Commissioner of Mozambique, is that Chang is to be handed over to the authorised officials of Mozambique through Interpol. Interpol South Africa has been activated with Interpol

Mozambique for the smooth surrender of Chang to the Mozambican authorities in order for him to stand trial in Mozambique.

10. On this basis, there is no harm that is to be suffered by the applicant at all. Chang is to be extradited to Mozambique without any further delay in order for him to stand trial in that country. The applicant's only contention is that Chang would not stand trial in Mozambique. The applicant however produces no evidence to support this false claim.

11. The applicant alleges that there is no warrant of arrest for Chang. This is patently false. The applicant states that Chang should be extradited to the USA because the USA made request for his extradition to the United States of America first. There is no merit in this submission at all. The mere fact that USA made its request first does not give it an entitlement to have Chang's extradition to the USA. In fact, it is convenient and even in the interest of justice that Chang be extradited to Mozambique because he is a citizen of Mozambique, committed these serious offences in Mozambique, and Mozambique is a signatory to the SADEC protocol and a member of SADEC.

12. Mozambican judiciary is independent so is the office of the Attorney General. Chang will not only receive a fair trial in Mozambique but will be tried in accordance with the laws of Mozambique and if found guilty, he will be convicted and sentenced to imprisonment for the statutorily prescribed period.

13. Once the applicant failed to show prejudice and irreparable harm, it is the end of the enquiry. What then it means is that it serves no legitimate purpose to

keep Chang here until the aborted review is heard. This review has no merit at all as the seventh respondent has shown briefly in its short answering affidavit which was prepared in haste without any time to consider other aspects of the application in detail.

14. The mere fact that the extradition of Chang now to Mozambique will render the review moot is not a basis to keep Chang unlawfully here in South Africa and in South African prisons when he is wanted in Mozambique for illegitimate purpose of him standing trial there. In any event, there is no merit to such a suggestion that it will render the review moot. The review can still continue, and the Court hearing the review is at large to give just and equitable remedy if ever the review succeeds. In any event the review is doomed to fail as the prospects of success are almost nil.

15. On these facts and circumstances, there can be no doubt that the balance of convenience does not at all favour the applicant. The applicant has not shown irreparable harm, let alone a prima facie right. This should be the end of the matter. The interest of justice demands that Chang should be extradited to Mozambique without any further delay.

16. The mere fact that the applicant has launched a review in part B is not a basis for the applicant to be entitled to an interdict. This much was said by Moseneke DCJ in National Treasury supra in paragraph 50.

17. There is yet another insurmountable huddle on the applicant's path. The applicant seeks to interdict the Minister in respect of a decision that has already occurred and to prevent the Minister from implementing a decision taken pursuant to the powers conferred on the Minister by statute.

18. In paragraph 63 of National Treasury supra, Moseneke DCJ quoted with approval a passage from **Doctors for Life** as follows:

> *"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, Courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a Court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy laden as well as polycentric."*

19. What the applicant seeks the Court to do in this matter through this interdict, is for the Court to interfere with the statutory powers conferred on the Minister in respect of a decision which is policy laden or polycentric. The Court can only interfere when the Minister has acted unlawfully in a sense that he acted outside the scope of the legislation that confer the power to him. In this case, the Minister acted the legislation which empowered him to make the decision to extradite Chang to Mozambique.

20. Where the applicant seeks the Court to interfere with the exercise of statutory power conferred on the Minister, the applicant must demonstrate exceptional

circumstances. This the applicant has failed to demonstrate abysmally. Moseneke DCJ stated in paragraph 65 of National Treasury as follows:

"When it evaluates where the balance of convenience rest, a Court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. It must assess carefully how and to what extent its interdict would disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of the division of powers. Whilst a Court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and strong case has been made out for the relief and even so, only in the clearest of cases."

21. The applicant has completely failed to establish the clearest of cases, and does not have a strong case at all in Part B. For this reason alone, no interdict can be granted by this Court.

22. Just to return to the passage from Webster vs Mitchell quoted above, what evidently appears is that a serious doubt is thrown upon the case of the applicant. As a result, the applicant could not succeed. The test, as formulated in Webster vs Mitchell, is whether having regard to the inherent probabilities of the applicant's case, the applicant could on those facts obtain final relief at a trial. Put differently, having regard to the inherent probabilities, and the patently false statements which underpin the review grounds, whether the applicant could obtain the order it seeks in part B. The answer is certainly in the negative.

23. For this reason, it follows that this Court should decline to grant the interdict. We must mention at this stage that the Court does not have the discretion to grant an interdict where the requirements have not been met. However, the

Court has a discretion not to grant an interdict where the requirements have been met if it is not in the interest of justice to do so. In this case we submit that in the light of the fact that the requirements for an interdict have not been established, it is not open to the Court to exercise a discretion in favour of granting the interdict. It should dismiss the application.

24. However, we further state that should for whatever reason the Court finds that the requirements of an interdict have been established, in the interest of justice, the Court should exercise a discretion not to grant the interdict.[3]

25. The application should accordingly be dismissed.

26. It is only in the event that the Court is of the view that part B should be entertained by the Court whilst Mr Chang is incarcerated unlawfully in South African prisons, that the proposed order in paragraph 24 of the seventh respondent's answering affidavit should be granted. We should state that it will not be in the interest of justice for this court to keep Chang in the South African prison pending Part B, when there is no legal basis for the court to do so. Chang should be extradited to Mozambique immediately and without further delay.

27. It follows that the Part A should be dismissed with costs inclusive of costs of two counsel

[3] See: Knock D'Archy

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