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

CASE NO.: 40441/2021

In the matter between:

FORUM DE MONITORIA DO ORCAMENTO	Applicant
and	
MANUEL CHANG	First Respondent
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	Second Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG, 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

SECOND RESPONDENT'S HEADS OF ARGUMENT (PART B)

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INTRODUCTION

1. The applicant seeks that the decision of the Minister that the first respondent, Mr Chang be surrendered to the Republic of Mozambique ("Mozambique") must be reviewed and set aside. It asserts that the decision is liable to be set aside on the grounds of irrationality and illegality on the following basis[1] -

    1.1 The Minister was obliged to extradite Mr Chang to the United States of America (USA) because the request of the USA enjoys temporal primacy.

    1.2 There is no clarity that Mr Chang does not enjoy immunity in Mozambique.

    1.3 Mr Chang is sought by Mozambique for the purpose of being a witness in a trial against other persons.

    1.4 There is no valid warrant of arrest against Mr Chang in Mozambique.

    1.5 The Minister has not provided reasons for the delay in arriving at his decision and for the haste to surrender Mr Chang.

    1.6 The Minister has not provided reasons for his decision.

    1.7 The interest of justice demand that Mr Chang be extradited to the USA.

2 The applicant seeks that the court substitute its decision for that of the Minister with an order that Mr Chang must be surrendered to the USA.

[1] FA: p02-5 para 21; SA: p11-8 para 9.

3 The grounds relied upon by the applicant have no basis in fact as appears from the Record and in the law applicable to the extradition of Mr Chang. The application must fail.

4 The submissions we make also apply to the case and submissions of the fourth respondent.

5 We submit that the following principles must guide the Court in considering whether the applicant has made out a case:

5.1 The application is not an opportunity for the applicant to show the court that the Minister's decision is wrong or that an alternative decision is more preferable.

5.2 The decision of the Minister is both administrative and polycentric in nature. It is administrative in so far as he is the authorised functionary that must issue the certificate in terms of section 11(a) of the Extradition Act. In exercising the discretion given by section 11 of the Act, the Minister exercise political authority. Accordingly, in the absence of a clear case for the Court's interference, the Court is required to show appropriate deference to the decision of the executive authority vested with the power.

5.3 Any errors of fact that may be found must be material to displace the Minister's decision.

5.4 The applicant must establish exceptional circumstances for the Court to substitute its decision for that of the Minister.

BRIEF SUMMARY OF RELEVANT FACTS

6 Mr Chang, a Mozambican national and at the time a member of parliament was arrested at OR Tambo International Airport in December 2018, pursuant to an indictment on 19 December 2018 in New York and a warrant of arrest obtained by the USA on 27 December 2018 in the Pretoria Magistrates' Court, in terms of section 5(1) of the Extradition Act, 67 of 1962 ("the Extradition Act"). The arrest arose from his alleged involvement in financial fraud between 2013 and 2015 when he was the Minister of Finance. It is alleged that he and others utilised the USA banking system to commit fraud against USA investors. At the time of arrest, Mr Chang was in transit to the United Arab Emirates. He has remained in custody since his arrest, having been refused bail.

7 The USA submitted to South Africa a request in terms of US Treaty for the extradition of Mr Chang to the USA[2] and Mozambique submitted a request in terms of the SADC Protocol[3] for the extradition of Mr Chang to Mozambique. It is common cause that the USA request preceded that of Mozambique.

8 Following an inquiry in terms of section 10 of the Extradition Act, on 8 April 2019, the Magistrate, Kempton Park, concluded that Mr Chang is extraditable to the USA and to Mozambique and committed him to imprisonment under section 10 of the Extradition Act, pending the decision of the former Minister of Justice and Correctional Services ("Adv Masutha"), on whether to extradite

[2] USA and South Africa Extradition Treaty dated 16 September 1999.

[3] Southern African Development Community Protocol on Extradition 2006.

Mr Chang to the USA or to Mozambique. The question whether Mr Chang is extraditable to anyone of the two countries is not in issue in this application.

9 On 21 May 2019, Adv Masutha issued orders in terms of section 11 of the Extradition Act that Mr Chang must be surrendered to Mozambique ("Adv Masutha's decision"). Following Adv Masutha's decision, it became apparent that under Mozambican domestic law, Mr Chang was subject to immunity from prosecution and that the immunity would need to be lifted before Mr Chang could stand trial in Mozambique. Adv Masutha was not aware of Mr Chang's immunity or the implications thereof at the time of making his decision[4].

10 On 27 June 2019, Mr Chang applied to court for a *mandamus* directing the Minister who at that stage had replaced Adv Masutha as Minister of Justice and Correctional Services to surrender him to Mozambique in accordance with Adv Masutha's decision of 21 May 2019 (Chang 1). The Minister opposed the application and by way of a counter-application sought that the decision of Adv Masutha be reviewed and set aside.

11 The court set aside Adv Masutha's decision that Mr Chang be surrendered to Mozambique and to dismiss the USA extradition request. The court held that "*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*

[4] Record Judgment p 09-26 para 80.

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." The court upheld the order of the Magistrate that Mr Chang was extraditable to the USA or Mozambique. The court refused to substitute its decision for the Minister's decision with an order that Mr Chang be extradited to the USA and remitted the matter to the Minister for re-determination[5].

12 In the aftermath of the judgment in Chang 1, the Minister invited interested parties to make submissions before he made the Decision. Mr Chang, the USA, Mozambique and the applicant made submissions. The Minister also invited and received submission from experts in Mozambique law.

13 The Minister issued an order in terms of section 11(a) of the Act and on 22 August 2021, communicated the Decision to the applicant.

THE APPLICABLE LAW

[5] Record: Judgment p 09-29 para 94.

14 The extradition of Mr Chang is regulated by the Extradition Act[6], the SADC Protocol[7], the US Treaty[8], and the Constitution of the Republic of South Africa[9].

14.1 Section 11 of the Extradition Act gives the Minister the discretion to order or refuse extradition requests. It authorises the Minister to refuse to surrender a person, *inter alia*, if he is satisfied that the request is not made in good faith[10].

14.2 Article 4 of the SADC Protocol prescribes mandatory grounds for refusal to extradite. Subsection (e) is of particular importance and makes provision for the refusal of an extradition in circumstances where the person whose extradition is requested has, under the law of either state party, become immune from prosecution or punishment for any reason, including the lapse of time or amnesty.

14.3 Article 6 of the SADC Protocol sets out the requirements for an extradition request[11].

14.4 Article 11 deals with multiple requests and provides that 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

[6] AA: p06-28 paras 25 – 27.

[7] AA: p06-28 to 06-32 paras 28 – 37.

[8] AA: p06-32 to 06-33 paras 38 – 40.

[9] AA: p06-34 paras 41 – 43.

[10] Section 11(b)(3) of the Extradition Act.

[11] AA: p06-29 to 06-30 para 32.

to be extradited and shall notify those states of its decision. Article 11 lists the factors which the Requested State must have regard to in particular[12].

14.5 Article 15 of the US Treaty deals with multiple requests and sets out the factors that the Requested State must take into account[13]. The factors set out in Article 15 are mirrored in Article 11 of the SADC Protocol.

15 Evidently, neither the US Treaty nor the SADC Protocol mandate that a request that was received first in time enjoys priority. If that was the intention, the two instruments would have so stipulated. There is therefore no merit in fact and in law for the applicant's contention that the request of the USA enjoyed preference by virtue of submission ahead of Mozambique.

16 In addition to the above instruments, South Africa is enjoined by the Constitution to give effect to international law, especially that which is binding on it. It is bound by various international instruments that require it to assist in the tackling of corruption abroad. These include,

16.1 the UN Convention Against Corruption, which requires members to take steps to prevent corruption and to cooperate with other countries in the fight against corruption; and

[12] AA: p06-31 to 06-32 para 34.

[13] AA: p06-32 to 06-33 para 39.

16.2 the SADC Protocol Against Corruption which enjoins member states to cooperate to deal effectively with corruption.

THE DECISION OF THE MINISTER IS RATIONAL

17 In *Scalabrini*[14], the Supreme Court of Appeal set out the test for rationality as follows:

> "*… rationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary – which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare*."

18 This test for rationality was expressed by the Constitutional Court in an earlier decision, *Pharmaceutical Manufacturers*[15] as follows

> "*decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement*".[16]

[14] Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA) par 65.

[15] Pharmaceutical Manufacturers Association of South Africa and Another: In re *Ex Parte* President of the Republic of South Africa and Others 2000 (2) SA 674 para XXX; 2000 (3) BCLR 241.

[16] Pharmaceutical Manufacturers (above) para 85.

19 Accordingly, the question for the court's determination is whether there is a rational connection between the decision of the Minister and its legitimate purpose. Thus, the inquiry is whether the Minister acted within the scope of his legal authority and made a decision which is rationally connected to the facts and information which were before him.

20 We submit that the decision of the Minister is rationally connected to the purpose for which the statutory power was conferred, namely, to surrender Mr Chang to Mozambique to stand trial for the offences of which he is accused.

21 In *Bel Porto*[17], the Constitutional Court cautioned that:

> *"The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."*[18]

[17] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC).

[18] *Bel Porto*, para 45.

22 Thus, the Court may not usurp the power given to the Minister by legislation, section 11 Extradition Act, by making a decision that it prefers. As the court stated in *Doctors for Life*[19], quoted with approval in *National Treasury*[20],

> "*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*."

23 And yet, this is what the applicant invites the court to do. We respectfully submit that the court must decline the invitation. There is simply no merit in the grounds for review.

[19] Doctors for Life International v Speaker of the National Assembly and Others [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[20] National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012) para 63.

THE APPLICANT'S GROUNDS FOR REVIEW

24 in *Harksen*[21] the Constitutional Court stated the law applicable to extraditions as follows,

> "*Where South Africa is bound by an extradition treaty, its terms will govern the international obligations of this country to the foreign State. Nonetheless, as far as domestic law is concerned the implementation of those international obligations is expressly made subject to the provisions of the Act. Similarly, in a non-treaty extradition, the surrender of the person sought is subject to the requirements of the Act. In other words, before the person whose extradition is sought may be surrendered to the foreign State, the procedures prescribed in the Act must be completed. This includes the arrest of the person under section 5(1), the holding of an enquiry under section 9(1), and a finding by a magistrate under section 10 that the evidence is sufficient to make the person liable to surrender. If the magistrate makes that finding, the Minister of Justice is given a discretion under section 11 to order the surrender of the requested person to any person authorised by the foreign State to receive him or her.*"[22]

[21] Harksen v President of the Republic of South Africa [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 (CC) (Harksen).

[22] Id at para 14.

25 The Minister exercises a political power when he exercises his discretion in terms of section 11 of the Extradition Act whether to surrender the person concerned to the requesting state.[23]

26 In exercising his discretions in terms of section 11(a) of the Act, the Minister rightly took into account the submissions made by the parties, including any new facts that were not before Adv Masutha.

27 We submit that taking into account the above, the applicant's grounds for review are not well-founded. We consider each ground for review.

The USA's extradition request enjoys temporal primacy

28 The applicant asserts that the Minister was obliged to extradite Mr Chang to the USA because the request of the USA enjoys temporal primacy. The contention is wrong.

29 The order in which multiple requests are received is only one of the factors, and not more important than any of the other factors, that the Minister is required to and must take into account, when multiple requests are received. This is apparent from the Article 11, SADC Protocol and Article 15, US Treaty. The applicant's contention for temporal primacy of the USA request is accordingly not founded in any law applicable to the extradition of Mr Chang. It is also not supported by the language of the SADC Protocol and the US

[23] Smit v Minister of Justice and Correctional Services and Others 2021 (3) BCLR 219 (CC); 2021 (1) SACR 482 (CC) para 50 & 88.

Treaty. Neither is it supported by any international instrument binding on South Africa which the applicants have pointed to.

30 Notably, the USA has not asserted temporal primacy. We point out that in its further representation to the Minister dated 7 April 2020, the applicant does not assert temporal primacy for the USA. On the contrary, the applicant correctly accepted that the Minister was required to consider and afford appropriate weight to all relevant factors[24]. We agree with the applicant that this is a correct exercise of the discretion of the Minister. Indeed, were the Minister to do what the applicant now asserts for the first time in the application, he would have failed to exercise his discretion and power rationally and that would render his decision liable to be set aside.

31 This ground for review is without merit and must accordingly fail.

It is possible that Mr Chang still enjoys immunity in Mozambique

32 Article 4 of the SADC Protocol prescribes mandatory grounds for refusal to extradite. Article 4(e) precludes extradition if the person whose extradition is sought has, under the law of either State, become immune from prosecution or punishment for any reason, including the lapse of time or amnesty.

33 The applicant contends that it remains a possibility that Mr Chang is still immune from prosecution in Mozambique. It does not assert more than "a

[24] Record: FMO's representations p09-124 to 09-127 paras 34-38.

possibility". We submit that this is no more than conjecture which must not be entertained.

33.1 The applicant has not referred to any facts from which it appears that Mr Chang enjoys immunity still.

33.2 Mozambique submitted that Mr Chang does not enjoy any immunity from prosecution after he ceased to be a member of parliament in October 2019[25]. Mr Chang submitted the same[26].

33.3 Mr Chang was not a member of parliament at the time of the decision of the Minister.

33.4 The opinions of experts in Mozambique law state that Mr Chang does not enjoy immunity after he ceased to be a member of parliament[27]. The applicant does not assert expertise in Mozambique law. It also offers no evidence that Mr Chang enjoys immunity.

33.5 Mr Chang has been indicted in Mozambique[28]. Persons alleged to have acted in concert with Mr Chang have been indicted[29]. The applicant has not provided a valid reason why the Minister should not have accepted this to be the case.

[25] Record: Mozambique's supplementary representations p09-199 para 5.7.

[26] Record: Mr Chang's representations p09-44 para 16.4.

[27] AA: 06-189 para 31; Annexure "AA1" 06-233, p06-234 para 9.3, 9.5.5 & 06-236 para 10.5.

[28] Record: p09-292 to 09-357.

[29] Record: Mozambique's representations p09-145 para 5.4.

33.6 High profile persons such as Mr Chang have been successfully prosecuted in Mozambique[30].

33.7 None of the legal opinions considered by the Minister conclude that Mr Chang enjoys immunity in Mozambique. In fact, the two experts in Mozambique law, expressly state that because Mr Chang is no longer a Member of Parliament, he automatically no longer enjoys immunity in Mozambique. It is therefore not correct that all the legal opinions state Mr Chang in all likelihood has immunity in Mozambique from criminal prosecution as asserted by the applicant.

34 We submit that the decision of the Minister to take into account the expert legal opinion is rational.

35 This ground for review must fail.

No warrant for Mr Chang's arrest in Mozambique

36 The applicant asserts that Mr Chang will flee Mozambique because there is no valid warrant for his arrest[31].

37 Mr Chang has been indicted in Mozambique. We submit that even if it were the case that there is no warrant for his arrest upon surrender to Mozambique

[30] Record: Mozambique's representations p09-150 para 9.6.

[31] FA: p02-12 to 02-13 paras 51 – 53.

this does not render the decision of the Minister liable to be set aside. The error of the Minister, such as there may be is, not material.

38 Corbett CJ in *Hira*[32], pointed out that our courts drew a distinction between an error of law on the merits and the mistake which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result the power is not exercised.[33] It was the latter error which was taken as amounting to a ground of review that justified interference. This accords with the distinction our law draws between a review and appeal. A court does not interfere merely because the decision was wrong in a review application. In *Hira* the test was reformulated in these words:

> *"Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (i.e., where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (i.e., in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its*

[32] *Hira v Booysen* 1992 (4) SA 69 (A).

[33] *Hira* para 90.

error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review."[34] (our underlining)

39 We point out that section 11(a) of the Extradition Act provides that:

"The Minister may -

(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".

40 In *Harksen*, the court recognised this to be what is required of the Minister when ordering that a person be surrendered to a requesting state.

41 Thus, the Minister is required in terms of section 11(a) to deliver Mr Chang to a person authorised by Mozambique. There is no requirement in the law that he may not be surrendered in absence of a warrant for his detention upon surrender.

42 Finally, we point out that that the indictment records that Mr Chang must be held in custody whilst undergoing trial. Mozambique therefore

[34] *Hira* para 93.

recognises and has made provision in the indictment that he be held in custody whilst on trial. There is no valid basis on which the Minister's decision to take this into account could be irrational.

43 We submit that this ground for review too has no merit and must fail.

Mozambique has acted in bad faith

44 In terms of section 11(b)(iii) of the Extradition Act, the Minister may refuse to surrender a person if he is satisfied that the request is not in good faith.

45 There is no evidence that the Minister was not so satisfied or that he was irrational in accepting that the information placed before him is satisfactory.

46 The applicant asserts that the Minister failed to consider that the Mozambique request was made in bad faith[35]. It appears that the assertion is made on the following basis:

46.1 In Chang 1, Mozambique failed to disclose that Mr Chang enjoyed immunity in Mozambique. The applicant alleges that the Mozambique request was made only after Mozambique received knowledge of the USA request; there is the distinct possibility that it was made principally to assist Mr Chang in avoiding being extradited to the USA. The Mozambique government is therefore not seriously interested in investigating, prosecuting and, if appropriate, sentencing Mr Chang.

[35] FA: p02-13 para 55.

46.2 Mr Chang is sought by Mozambique for the purpose of being a witness in a trial against other persons.[36]

47 The criticism of the Minister is misconceived. The decision of the Minister is a decision *de novo* in respect of which the Minister was entitled to and took into account the undisputed evidence that Mr Chang does not enjoy immunity, that he has been indicted and that his alleged co-accused are presently facing trial. The applicant did not place before the Minister and does not do so before this court evidence from which the contrary appears. The proposition that the Minister should not have ordered surrender of Mr Chang to Mozambique notwithstanding the submissions that he no longer enjoys immunity is therefore nonsensical.

48 From the representations of Mozambique, Mr Chang is sought so that he may face trial. An indictment has been issued[37] and Mozambique stated that it has sufficient evidence for his conviction[38]. There is therefore no basis for the contention that Mozambique seeks Mr Chang for purpose of him being a witness.

49 In its representations, Mozambique stated that Mr Chang is key to the conviction of his co-accused and that, without him being charged and prosecuted in Mozambique, the chances of convicting his co-accused could be negatively affected. That he may also be sought as a witness is irrelevant

[36] SA: p11-18 para 50-52.

[37] Record: p09-292 to p09-357.

[38] Record: Mozambique's representations p09-145 para 6.3.

– in making his decision, the Minister considered the submission and evidence that he is indicted to stand trial. In any event, the importance of his evidence against co-accused, properly construed, is mentioned as a benefit to Mozambique if he is surrendered to that country. The applicant's interpretation of the position of Mozambique as seeking Chang's return to be a clarifying witness is therefore strained.

50 This ground for review has no merit and should accordingly fail.

The Minister has failed to provide reasons for the delay in making his decision

51 The applicant asserts that the Minister has not provided reasons for the delay in arriving at his decision and for the haste to surrender Mr Chang.

52 Suffice to say that this is not a valid ground for review and does not render the decision of the Minister irrational of unlawful. In any event, the delay in making a decision to extradite Mr Chang to Mozambique is not a valid ground for review available to the applicant. It is a complaint available to Mr Chang, Mozambique and the USA, neither of whom has raised the complaint as a ground for review.

53 The delay has in any event been remedied. The Minister made a decision and ordered that Mr Chang must be surrendered to Mozambique.

The Minister has failed to provide reasons for his decision

54 The applicant contends that because the reasons document was delivered after the Record, and the reasons document bears a date which is after the date when the Minister made a decision in terms of section 11(a), the Minister has not delivered the reasons.

55 Further, the applicant asserts that the Minister has not provided reasons why he changed his decision after approving the recommendation that Mr Chang be surrendered to the USA[39]. In the exercise of his discretion, the Minister decided and ordered that Mr Chang must be surrendered to Mozambique, contrary to the recommendation of the Deputy Director General Mr H van Heerden, Chief Directorate: International Legal Relations ("Mr van Heerden"), that he must be surrendered to the USA[40]. The applicant alleges that the Minister approved that Mr Chang be surrendered to the USA. It does so on the basis that the Minister's signature appears on the memorandum.

56 Both assertions are without merit.

57 The Minister has provided the reasons for his decision. These were signed by the Minister on 31 August 2021 and filed on 2 September 2021.

58 The fact that the reasons were not delivered at the same time or on the same day as the Record does not negate the fact that the Minister has reasons for the decision or that the reasons have been provided. Neither

[39] Annexure "AA1" p09-205 to 09-240.

[40] Annexure "AA1" p09-205 to 09-240.

does it, without evidence otherwise, imply that the reasons are a *post facto* creation.

59 The reasons provided by the Minister do not contain considerations extraneous to the Record. In his reasons, the Minister references the representations of the parties, especially Mozambique and the USA. It is clear from the Reasons for Decision that his decision is based on what is contained in the representations.

60 There is therefore no basis for the contention that the reasons were a *post facto* creation.

61 The applicant clearly confuses - (1) the reasons for a decision, and (2) the written recordal of the reason for the decision. The document delivered on 2 September 2021 is a written recordal of the reasons why the Minister took the decision. Nothing in Rule 53 precludes written reasons from being filed after the Record. The fact that the written recordal of the reasons for a decision is given sometime after the event (which is common), is neither here nor there – it makes no difference at all, and certainly does not make the reasons an *ex post facto* creation.

62 The applicant inexplicably misrepresents the signature of the Minister in the Memorandum of 27 July 2020.

63 The purpose of the memorandum is to:

63.1 notify the Minister of the orders made by the Magistrate Kempton Park, committing Mr Manuel Chang (the accused) to custody to await the Minister's decision in terms of section 11 of the Extradition Act, 1962 (Act No. 67 of 1962) (the Act), and

63.2 **request the Minister, should he approve, to sign an order in terms of section 11(a) of the Act**, for the surrender of the accused to either the United States of America to stand trial on its preferred charges, OR to the Republic of Mozambique to stand trial on its preferred charges.

64 *Ex facie* the memorandum, the signature of the Minister does not signify approval of the recommendations. Neither does it signify rejection. There is no basis to attribute the signature of the Minister to either of the 2 options available to him *ex facie* the memorandum.

65 On a proper reading of the memorandum, it is clear that it does no more than appraise the Minister of the parties, the applicable law, compliance of the request with applicable law, and concludes that, in the light of the information before the Minister, and "**taking the specific under mentioned factors into consideration**", it is recommended that Mr Chang be surrendered to the USA. The recommendation does not make an assessment of the submissions of the requesting States against each other but just states what the submissions are. There is no weighing of one submission against the others. This is a function of the Minister in the exercise of his discretion.

66 The factors relied upon in the memorandum to recommend that Mr Chang be surrendered to Mozambique are that[41]:

66.1 The USA request was first in time.

66.2 The USA request was based on an Extradition Treaty concluded in 2001 (therefore prior to the SADC Protocol) and South Africa has a duty fight corruption and to honour its international obligations in that regard. Therefore, undertakings made by South Africa in the SADC Protocol on extradition which came into force in 2006, cannot dispense South Africa from its duty to fulfil the extradition treaty with the USA concluded in 2001.

66.3 Virtually all the banking activities in support of the commission of the alleged crimes was based or passed through the USA banking system.

66.4 The USA had indicated that should Mr Chang be extradited to the USA, they would seek to secure significant restitution to collect the proceeds of the alleged crimes, and if successful would be to the benefit of Mozambique.

66.5 Should Mr Chang be extradited to Mozambique, he could not on completion of his trial be extradited by Mozambique to the USA. The USA would however be in position to extradite Mr Chang to Mozambique after the conclusion of proceedings in that country pending the outcome of the trial.

[41] Annexure “AA1” p09-238 para 11.

67 Notably, the Department did not recommend surrender to the USA on the basis that Mr Chang enjoyed immunity in Mozambique.

68 The Minister was not constrained to consider only the factors listed by the Department in the July 2020 Memo to arrive at its recommendation to surrender Mr Chang to the USA. Neither was the Minister required to accept the correctness of any of the factors relied upon for the recommendation to surrender Mr Chang to the USA. The memorandum expresses the views of the officials, including that the USA request be acceded to because it came first in time. We have shown that there is no legal requirement that this should be a determining factor. The USA and South Africa did not agree that this will be the case. Neither does the SADC Protocol grant such advantage. The decision what weight, if any, to attach to this factor, is a matter in the discretion of the Minister and is not prescribed by law.

69 The Minister took into account the following factors[42]:

69.1 the existence or non-existence of treaties applicable to the extradition;

69.2 the nature and seriousness of the offences involved, and their impact on the victims;

69.3 the nationality of the alleged offender and victims;

69.4 the conduct of the parties and what they reveal about their good or bad faith in seeking the extradition;

[42] Record: Minister's Reasons p09-268 para 4.

69.5 the timing of their requests;

69.6 the interests of the respective states; and

69.7 whether or not extradition to one country would make a later extradition to the other requesting country more or less feasible.

70 All of these are factors which the Minister can and in fact legitimately had regard to.

Interests of justice demand that Mr Chang be extradited to the USA

71 Section 11 of the Extradition Act vests in the Minister the ultimate decision to surrender to a foreign state a person who has been committed by a magistrate. Under section 11(b) the Minister is given a discretion to refuse to surrender a person on very specific grounds. None of which applied in the present case.

72 The applicant alleges that the Minister failed to consider the interest of justice when deciding to extradite Mr Chang to Mozambique. There is no valid basis for this assertion.

73 The factors that the Minister must take into account are set out in the Extradition Act, the SADC Protocol, the US Treaty, the Constitution and international instruments binding on South Africa. The Minister considered these factors in arriving at his decision. This appears from the record and from the Reasons for Decision.

74 Nothing in the decision of the Minister indicates that the Minister did not have regard to these factors. On the contrary, it is evident that the Minister took into account that Mr Chang will be caused to stand trial for his alleged conduct and the harm caused to the people of Mozambique. This is in the interest of justice. The interests of American investors that the applicant is obviously concerned to champion does not, in terms of the applicable law, enjoy primacy of the interests of Mozambicans as considered by the Minister in his decision. We submit that the reasons set out by the Minister for his decision evidence that the decision of the Minister is in the interest of justice.

APPROPRIATE REMEDY

75 The applicant seeks that the Court substitute its decision for the decision of the Minister with an order that Mr Chang be extradited to the USA.

76 It is trite that the courts will be reluctant to substitute their decision for that of the original decision maker. This necessary reluctance to intervene and substitute flows directly from the doctrine of separation of powers, which requires the courts to recognise their institutional limitations and respect the comparative institutional competence of administrative agencies, particularly in polycentric matters.[43]

[43] Record: Judgment p09-28 89-91.

77 The typical course following the setting aside of a decision taken is therefore to remit the decision back to the decision-maker for proper consideration unless there are exceptional circumstances which merit a departure from the default position and substitute its own decision for that of the decision-maker.

78 The SCA in *Gauteng Gambling Board v Silverstar Development Ltd*[44] held that:

> *"a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary".*

79 An "*exceptional circumstances enquir*y" as to remedy must, in any event, take place in the context of what is just and equitable.[45]

80 To grant the order as sought by the applicant, the Court should consider[46]:

80.1 whether the Court is "*in as good a position"* and thus as well qualified as the original authority to make the decision;

[44] *Gauteng Gambling Board v Silverstar Development Ltd* 2005 JOL 14068 (SCA); 2005 4 SA 67 (SCA).

[45] Record: Judgment p09-28 para 88.

[46] Trencon Construction v Industrial Development Corporation of South Africa (Pty) Ltd and another [2015] ZACC 22; 2015 (5) SA 245 (CC) paras [44] - [55].

80.2 whether the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter;

80.3 whether additional delay would cause unjustifiable prejudice; and

80.4 whether the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

81 None of the factors apply in the present matter.

82 The applicant has not made out a case for exceptional circumstances that warrant the Court making a decision in the place of the Minister.

83 In its replying affidavit, the applicant for the very first time in its papers, makes reference to the substitution enquiry which it requires the court to undertake. The applicant alleges that its allegations in its founding and supplementary founding affidavits justify substitution, without identifying what those allegations are.[47]

84 We submit that the substitution is inappropriate.

85 It is undeniable that the decision is quintessential one of a policy-laden and polycentric nature, that the legislation has deemed appropriate for the executive sphere of government to determine. Carrying out a successful

[47] RA p16-40 para 78.

extradition involves the co-operation and input of various branches of government and encompasses a series of acts, partly judicial, executive and administrative in nature.[48] The court in Chang 1 accepted this to be the case.

86 The applicant has suffered no prejudice in this regard. The issue of delay, in so far as it relates to substitution, is not that of the applicant to raise - it is for the USA, Mozambique and Mr Chang to raise. None of whom have done so in these proceedings. In any event, this factor alone would not justify substitution in the circumstance. There are less drastic measures available to the court such as an order directing that the Minister make the decision on an urgent basis and/or within a definitive period.

87 There is no evidence that the Minister is in any way biased. The scandalous allegation is not supported by any facts. The applicant's disagreement with the Minister's decision is not evidence of bias.

88 The Minister's opposition of the application is not inexplicable. There is nothing in law that precludes the Minister from defending his decision, especially considering the hostile manner in which the applicant has elected to litigate this matter with unwarranted attacks on the person of the Minister.

89 In paragraphs 6 to 28 of the replying affidavit the applicant uses intemperate language against the Minister and in paragraphs 82, 84, 85 accuses the Minister of, *inter alia*, incompetence.

[48] Tucker v Additional Magistrate, Cape Town and Others; Tucker v S [2019] ZAWCHC 36; [2019] 2 All SA 852 (WCC) par 33.

90 The USA has elected not to participate in these proceedings well aware of the Minister's decision. It would appear that the USA, having not intervened in this matter before Court, will abide the decision of the Court and is not intent on enforcing surrender of Mr Chang to it instead of to Mozambique, as the applicant is intent to do.

91 There is no evidence of how soon Mr Chang, who has spent more than two years in custody, if surrendered to the USA, will undergo trial. This information is not before the Court.

92 Mr Chang's allegations that his co-accused awaited trial for over a year before he was acquitted, is not gainsaid. And yet, his co-accused in Mozambique are presently undergoing trial.

93 An order such as is sought by the applicant has no regard for the interests of Mozambique to hold Mr Chang accountable for the corruption against that country and the harm caused to its people. It is solely concerned with the harm caused to the USA financial systems and loss of citizens of the USA. It is inappropriate that the court should be required to make such a choice, which it is a policy choice.

94 The reasons advanced by the Minister, read in context with the papers filed, the Record of the decision and the reasons for the Ministers decision justify why substitution is inappropriate in the circumstances.

95 A case in which an order of substitution is sought requires courts to be mindful of the need for judicial deference and their obligations under the Constitution.[49]

96 In *Logbro Properties*[50] the SCA enunciated the approach (in relation to administrative decisions) as follows:

> *"… judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for - and the consequences of - judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal"*[51]

[49] Record: Judgment p09-28 to 09/29 para 91-93.

[50] Logbro Properties CC v Bedderson NO and Others (372/2001) [2002] ZASCA 135; [2003] 1 All SA 424 (SCA) (18 October 2002).

[51] Logbro Properties para 21-22.

97 We submit that substitution is not appropriate for all the above reasons.

COSTS

98 The applicant belatedly seeks that the Minister show cause on affidavit on or before 24 September 2021 why he should not pay 15% of costs of the application from his own pocket, alternatively on an attorney and client scale.[52] It seeks that the issue is deferred for later determination.

99 We submit that there are no reasons why the issue of costs ought to be deferred or that the court should grant the order as proposed.

100 As explained in Black Sash 2, the common-law rules for holding public officials personally responsible for costs are now buttressed by the Constitution:

> *"Within that constitutional context the tests of bad faith and gross negligence in connection with the litigation, applied on a case by case basis, remain well founded. These tests are also applicable when a public official's conduct of his or her duties, or the conduct of litigation, may give rise to a costs order."*[53]

101 None of the reasons relied upon by the applicant merit a punitive cost order.

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[52] Applicant's Practice Note para 4.4.

[53] Black Sash Trust v Minister of Social Development [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (Black Sash 2) para 9.

101.1 The decision of the Minister, even if it is found liable to be set aside does not of itself warrant a punitive cost order.

101.2 The delay in delivering a complete record does not warrant a punitive cost order in the absence of evidence of bad faith. There is no evidence that the Minister acted in bad faith.

101.3 Nothing in law precluded the Minister opposing the relief claimed by the applicant in Parts A and B.

101.4 The applicant has made allegations which impute improper conduct on the part of the Minister. The baseless allegations of dishonesty, incompetence and bias warrant a response from the Minister.

101.5 The application was brought on an extremely urgent basis which required compliance with extremely truncated periods.

101.6 The applicant did not suffer any prejudice.

102 For all the above reasons, the court must refuse to grant a punitive cost order as sought by the applicant.

CONCLUSION

103 For the reasons set out above, we respectfully submit that the applicant has not made out a case for the relief claimed in Part B. The application must accordingly fail.

104 In the premises, we pray that the application is dismissed with costs, including costs of two counsel.

MS BALOYI SC

PJ DANIELL

Second Respondent's Counsel

Chambers

16 September 2021