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 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 HEADS OF ARGUMENT

Introduction

1. The applicant is a Civil Society Organisation based in the Republic of Mozambique ("Mozambique"). The applicant has brought this current application for relief in part A and part B. Part A was an urgent application which has since become water under the bridge. The relief sought in part B, prayer 5.1 thereof, is a declaratory order and review to the effect that the decision by the Minister of Justice and

Correctional Services ("Minister") taken on or around 23 August 2021 to extradite the first respondent ("Chang") to the Republic of Mozambique be declared to be inconsistent with the Constitution of the Republic of South Africa, 1996, invalid, and is set aside.

2. The applicant wants the decision of the Minister to be substituted with one to the effect that Chang be surrendered and extradited to the United States of America ("the US") to stand trial for his alleged offences in the United States of America as contained in the extradition request dated 28 January 2019. Only in the alternative to prayer 5.2, the applicant seeks remittal of the decision to Minister for a fresh decision.

3. Mozambique was initially not cited as a respondent but has since been joined by this Court as the seventh respondent and has filed answering affidavits opposing both part A and part B. The affidavit opposing part A dealt with preliminary matters and did not dwell on the merits. The answering affidavit on part B substantially deals with the merits of the application.

4. The applicant was a participant in *Chang* 1. In *Chang* 1, Chang brought an urgent application seeking an order compelling the Minister to surrender him to Mozambique. In counter to that application, the Minister filed a counter application seeking an order reviewing and setting aside the extradition decision taken by the former Minister ("Masutha"). In *Chang* 1, the applicant made its wish very clear that it wants nothing other than the surrender of Chang to the United States of America. To the applicant, it doesn't matter how much Mozambique can do to satisfy the

necessary requirements for extradition of Chang to Mozambique. The applicant wants only one thing which is the surrender of Chang to the United States of America. To the applicant, it is either its way or the highway. This attitude is demonstrated clearly in this current application.

5. However, what must be mentioned which remains undisputed on the papers and from the reading of the judgment in *Chang* 1 is that the central issue raised by the Minister in the counter application in *Chang* 1 was whether Chang was immune from criminal prosecution in Mozambique by virtue of his membership of Mozambican Parliament. In *Chang* 1, the Minister said that Masutha was unaware at the time he made the decision to extradite Chang to Mozambique that Chang enjoyed immunity from prosecution.

6. In that event, the Minister submitted to the Court that the surrender of Chang to Mozambique whilst he enjoys immunity from prosecution would contravene the Constitution of the Republic of South Africa, South Africa's international obligations against corruption, and the SADC protocol on extradition and the Protocol on combating of corruption (SADC protocol).

7. Whilst Masutha at the time was faced with two extradition requests, first received from the United States of America, and the second from Mozambique, had to make a decision in terms of section 11 the Extradition Act 67 of 1962 ("the Extradition Act") and on the strength of the section 10 report made by the Magistrate, Kempton Park. The Minister was obliged in terms of section 11 read with the SADC protocol to decide whether Chang is extradited to the US or Mozambique. In short, the issue that confronted Masutha was whether to accede to the extradition request of the

United States or Mozambique. Masutha made the decision to extradite Chang to Mozambique.

8. That decision was taken on judicial review brought by the current Minister as a counter application to Chang's application to be extradited to Mozambique. In *Chang* 1 this Court, sitting as a full Court, upheld the current Minister's contention in its judgment dated 1 November 2019 by making the following order:

> *"[94] I thus make the following order:*
>
> *(1) Mr Chang's application under case number 22157/2019 is dismissed.*
>
> *(2) The Minister's decision to extradite Mr Chang to Mozambique is set aside.*
>
> *(3) To the extent that the Minister's decision dismissed the US extradition request, it is set aside.*
>
> *(4) Both decisions are remitted to the current Minister for determination.*
>
> (5) *The parties are each to pay their own costs in these applications."*

9. What is particularly clear in the order of the Court in *Chang* 1 is that the Court remitted both decisions to extradite to Mozambique and the decision not to extradite to the US for reconsideration. That was done and the current Minister gave effect to the court order in *Chang* 1 and made a fresh decision which is the subject matter of the current review application.

10. The Magistrate had submitted the section 10 report and the record of proceedings to the Minister for consideration. One report, as already mentioned established that

Chang was extraditable to the US. The other report established that Chang was equally extraditable to Mozambique. The status of the section 10 inquiry and the powers of the Minister in terms of section 11 received attention as well in the Supreme Court of Appeal ("SCA") judgment in Realite Thabo Mochebelele vs Director of Public Prosecutions Gauteng Local Division, Johannesburg and others, case no. 377/2018, [2019] ZASCA 82 (31 May 2019). In paragraph 16 of the judgment, the SCA stated as follows: "On a simple reading of ss 10 and 11, the magistrate and the Minister both play a role, but with carefully delineated duties and responsibilities. The magistrate's duties are confined to making certain preparatory findings, while the Minister makes substantive and political decisions as regards the extradition or otherwise of a person sought by the requesting state."

11. In paragraph 17 of the judgment, the SCA further stated that: "Section 10 makes plain that the magistrate who conducts an extradition enquiry must determine whether the person is liable to be surrendered to the foreign state concerned and, in the case where the person is accused of the commission of an offence, whether there is sufficient evidence to warrant a prosecution in the foreign state. If the magistrate makes a positive finding in relation to these matters, he or she has no residual discretion but to make an order committing that person to prison 'to await the Minister's decision with regard to his or her surrender."

12. For this proposition, the SCA referred with approval a passage in paragraph 15 of the Geuking v President of the Republic of South Africa and others 2003(3) SA 34 (CC).

13. The Magistrate's enquiry in terms of section 10 is either a quisi judicial enquiry or an administrative enquiry. Whether it is one of the two, the report that he submits,

embodying his decision and recommendations constitutes administrative act or quisi judicial act, which has legal effect and may not be willy-nilly ignored by the Minister. The Magistrate's decision has not been set aside on review. In fact the Magistrate's decision in Chang found resonance with the full court in *Chang* 1 hence the order that the Minister should consider both extradition decisions. In short, what the Minister was called upon was to consider both extradition requests and make a decision. That is what all interested parties that made written representation understood the mandate from the judgment in *Chang* 1 to have been to the current Minister.

14. In *Chang* 1, the applicant, in its counter application, sought an order among others that the decision of the Magistrate be reviewed and set aside. That decision was not set aside by the Court. The Court declined to do so. In fact, the Court affirmed the lawfulness of the extradition enquiry that took place before the Magistrate, Kempton Park. This accords well with what the SCA found in Reatile Thabo Mochebelele supra, and what the Constitutional Court established in Geuking.

Events that occurred after the judgment in *Chang* 1

15. As ordered by the Court in *Chang* 1, the Minister was required to consider the US extradition request as well as Mozambique extradition request and make a decision as to where Chang should be extradited to. In doing so, the Minister followed a procedurally fair administrative process by giving all interested parties an

opportunity to make written representations to him. It appears from the record that the US made written representations; Mozambique made written representations; Chang also made written representations. The applicant, which is not a party with direct and material interest but interest in its capacity as Civil Society in Mozambique, made written representations where it was responding through its legal counsel to the written representations made by Mozambique to the Minister.

16. It remains unclear as to how the applicant got hold of the written representations made by Mozambique. It also appears that the applicant also responded in writing to the Minister to the written representations made by Chang. It is also unclear as to how the applicant got hold of those representations. Enquiries by the attorneys of Mozambique to the Department of Justice and Correctional Services for clarity as to how the applicant got hold of the written representations submitted by Mozambique could not shed any light.

17. All what the Department could do was to offer apology to Mozambique as it also had no idea as to how the applicant got hold of the written representations submitted by Mozambique. Be that as it may, the Minister did not disregard the responding representations made by the applicant to him where it criticised Mozambique's written representations. The Department however, in accordance with the notion of procedural fairness, afforded Mozambique an opportunity to respond to the responding submissions by the applicant. The Minister took into account all the submissions made to him before making a decision.

18. It is important to state as a matter of law that the Minister was obliged as he did when making the decision, to take into account the factual situation as it was as at

the time when he made the decision not the factual situation as it was when Masutha made his decision. Further, the Minister was legally obliged to take into account the current affairs as at the time when he was making the decision and not the factual situation as it was when the Court handed down judgment in *Chang* 1 on 1 November 2019.

19. Simply put, the Minister was to take into account the prevailing factual situation as at the time when he took the decision in August 2021 and taking into account the representations made by the respective parties who professed to have interest in the matter. The record filed demonstrates that the Minister applied both procedural and substantive law correctly. Although correctness is not a yardstick in a review, but only rationality and legality are the issue, the point we make is that the Minister took not only a rational decision but a lawful and correct decision, applying a fair procedure.

20. Two important considerations loom large when the Minister decides whether extradition requests by a foreign state should be acceded to or not. Those are, first, whether the person to be extradited enjoys immunity from prosecution in the requesting state and secondly, whether a warrant of arrest has been issued for the person. In *Chang* 1, this Court only dealt with the issue of immunity and did not deal with the issue of warrant or arrest. It was not necessary for it to deal with the issue of the warrant of arrest at that time because the finding by the Court that Chang enjoyed immunity from prosecution in Mozambique was dispositive of the matter.

21. In the current application, the applicant has again raised the issue of Chang being immune from prosecution in Mozambique and that there is no warrant of arrest issued against Chang in Mozambique. These two material issues raised by the applicant must be considered in the context of motion proceedings with evidence provided in affidavits. It being a review, where a record of decision has been dispatched, these two issues should be considered in the context of what the record has as its contents, or the documents contained in the record filed by the Minister.

22. What is indisputably contained in the record is the warrant of arrest issued by a Supreme Court Judge in Maputo, an Indictment of Chang from the Attorney-General and its service outside Mozambique duly authorised by a Supreme Court judge in accordance with the procedural law of Mozambique.

23. It must be noted that at the time when the applicant launched this application, it had no record. The founding affidavit in support of the relief both in part A and part B was deposed to by Nicole van de Venter, a female attorney practising at Ian Levitt Attorneys. Both the founding and supplementary affidavit are devoid of substance as the deponent has no personal knowledge of the allegations, the allegations are speculative with no benefit of those upon whom the probative value of what is stated by the deponent depends. We turn now to deal why the founding and supplementary affidavits have no probative value.

The deponent to the founding affidavit and supplementary affidavit

24. Mozambique did not take issue with the deposition of the affidavit by Ms Nicole van de Venter in support of the application that was launched on extremely urgent basis. This was so because of what Ms Nicole van de Venter stated under oath in paragraph 1 that she is authorised to depose to the affidavit on behalf of the applicant. But most importantly is what the deponent stated in paragraph 5 of the founding affidavit as follows:

> *"(5) The applicant is a Forum De Monitoria Do Orcamento ("FMO"). As I explain in detail below, FMO is an umbrella organisation of various Mozambican civil society organisations. I depose to this affidavit on behalf of FMO because its general coordinator, Professor Adriano Nuvunga, was unavailable to depose to this affidavit in time for this application to be launched. The general coordinator is in Mozambique and would not have gotten a signed affidavit in time. He would depose to a confirmatory affidavit relating to this application as soon as possible."*

25. Mozambique found this explanation satisfactory given that the application was brought on extremely urgent basis although the contents of the founding affidavit were devoid of merit. This is also because Mozambique was also in a similar situation where its own attorney, Mr Busani Mabunda, had to depose to an affidavit opposing part A of the application on extremely short notice, due to practical difficulties of obtaining the necessary depositions from Mozambique on short notice.

26. However, what the deponent stated in paragraph 5 of the founding affidavit seems not to have been entirely correct given what transpired when the supplementary affidavit was filed and deposed to on 2 September 2021. In the supplementary affidavit, Ms Niccole van de Venter still describes herself in paragraph 1 as a

female attorney practising at Ian Levitt Attorneys. She states that she is the applicant's attorney of record in the application. She states that she is authorised to depose to the affidavit on behalf of the applicant. She also states that she deposed to the founding affidavit in the matter.

27. What she however does not state to the Court is why she is the one deposing to the supplementary affidavit when she has no personal knowledge of the facts and circumstances surrounding what happened in Mozambique, and she was not involved in the matters pertaining to the extradition requests made. There is no confirmatory affidavit attached from the applicant.

28. It is on this basis that Mozambique has taken issue with the probative value of the allegations made by Ms Nicole van de Venter and that such allegations have no probative value. The deponent also speaks about the matters which clearly do not fall within her personal knowledge, and she clearly has no knowledge of Mozambican legal system and its operations.

29. Mozambique therefore submits that when dealing with the allegations made in the founding affidavit and the supplementary affidavit of Ms Nicole van de Venter, should do so on the basis that it is an affidavit of somebody who has no personal knowledge and there is no confirmatory affidavit from anybody with personal knowledge from the applicant. The absence of any affidavit from the applicant, is quite telling.

30. In any event, what is apparent from the supplementary founding affidavit deposed to by Ms Nicole van de Venter is that whatever she states is based on speculation

and hearsay. The founding affidavit and the supplementary affidavit is a departure from the well-established legal principle that he who alleges must prove. On the allegations made in the affidavits deposed to by Ms Nicole van de Venter, the applicant has not discharged any onus resting on it to demonstrate that, firstly, Chang still enjoys immunity from prosecution, and secondly, that there is no warrant of arrest issued against Chang in Mozambique.

31. The onus squarely rests on the applicant to prove to the Court on the applicable civil standard of the preponderance of probabilities that Chang still enjoys immunity from prosecution and that there is no warrant of arrest for him. The applicant has failed to demonstrate this and that should be the end of the matter. The applicant seeks to employ reverse onus impermissibly when the onus squarely rests on it to prove these two material allegations it makes.

32. This being motion proceedings, there is simply no basis for the Court to reject Mozambique's contentions and allegations in the answering affidavit made under oath that Chang no longer enjoys immunity from prosecution, and that there is a warrant of arrest issued by the Supreme Court judge in Mozambique for the arrest of Chang. The applicant does not dispute that an indictment has been issued against Chang and that he has to stand trial in Mozambique on the strength of the said indictment.

33. The applicant has no basis to dispute the warrant attached at page 14-72. The applicant, as a civil society organisation operating in Mozambique and with its members residing in Mozambique issued a statement (see: page 14-73). The applicant has known about the press release of the Attorney-General office at page 14-78. The applicant reacted to that statement when it was issued.

34. The notion that Chang will not be prosecuted in Mozambique and that he is a flight risk is not borne by facts. It was incumbent upon the applicant to place facts before Court in substantiation of its unfounded allegations. The applicant wants a final order on motion and must live with the consequences of Plascon Evans rule. It simply does not go pass the elementary step.

35. Given that the applicant seeks a final order, Plascon Evans applies. Motion proceedings are not determined on probabilities. In **National Director of Public Prosecutions vs Zuma[1] the supreme Court of Appeal ("SCA")**, per Harams DP, stated as follows:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special and they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon Evans rule that where in motion proceedings dispute of fact arise on the affidavit, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers. The Court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."*

36. Having regard to the substantive explanations under oath by Mozambique as to the issue of immunity, and that Chang no longer enjoys immunity from prosecution, it follows that the Court cannot reject Mozambique's version as far-fetched. Mozambique's version does not constitute bare denial. This version is not

[1] 2009 (2) SA 277, para 26

uncreditworthy. It also cannot be that Mozambique's version regarding the warrant of arrest should be rejected as far-fetched. In fact, Mozambique has attached the warrant of arrest, issued by the Supreme Court judge.

37. It is not suggested by the applicant that the warrant of arrest that has been attached is fraudulent. It is also not suggested by the applicant that the warrant of arrest was not issued by Supreme Court judge. What applicant states without facts and without any authority is that the warrant of arrest has expired. As to which law the applicant relies on to say that the warrant has expired is unclear. In fact, this allegation is made by Ms Nicole van de Venter, a South African lawyer who knows nothing about Mozambican law. The applicants, or at least the members of the applicant, including the professor who is the engineer behind the applicant, has not deposed to an affidavit nor obtained any affidavit from a Mozambican lawyer, who can profess knowledge of Mozambican law.

38. Harams DP restated the Placons Evans rule, formulated in **Plascon Evans Paints vs Van Riebeck Paints.**[2] Plascon Evans restated the formulation of the rule in **Stellenbosch Farmers Winery Ltd vs Stellenveile Winery (Pty) Ltd.**[3]

39. 'This rule is to the effect that where there is a dispute as to the facts a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order, or where it is clear that the facts, though not formally admitted, cannot be

[2] 1984 (3) 623
[3] 1957 (4) SA 234 (C) at 235 E – G

denied and must be regarded as admitted, requires clarification and perhaps qualification. In certain cases, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponent's concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and this Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. There may be exceptions to this general rule, e.g. where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

40. The applicant flounders merely at this level in that the applicant has not discharged the onus resting on it to prove that Chang still enjoys immunity and that there is no warrant of arrest issued against Chang, or that the warrant that has been issued has expired.

41. Before we deal with each of the grounds of review that the applicant raises in its founding and supplementary affidavit, we propose to set out the historical facts so that it is demonstrated to the Court as it has been shown in the answering affidavit under historical facts that Mozambique has been serious about prosecuting Chang for the criminal offences that he is alleged to have committed. This will dispel the notion by the applicant that Mozambique simply seeks to harbour Chang and has no intention to prosecute him. These allegations which are made by the deponent

to the founding and supplementary affidavit are not borne by the facts and should be rejected.

Background facts

42. Chang was the Minister of Finance of Mozambique from 2005 to 2015. He was arrested on 29 December 2018 by members of the South African Police Service ("SAPS") at the OR Tambo International Airport ("ORTIA"). Chang's arrest was at the instance and request of the government of the USA, which had issued a warrant for Chang's arrest, authorised by the district Court for the Eastern District of New York.

43. On 19 December 2018 Chang and others were indicted in the United States of America on charges of conspiracy to commit fraud, conspiracy to commit securities fraud, and conspiracy to commit money-laundering, among others. The investigation allegedly revealed that Chang and his co-conspirators took part in the large securities fraud scheme, in which they arranged over $2 billion in loans from international investment bank to state entities controlled by the Mozambican government. Chang and his co-conspirators made material misrepresentations of fact in loan agreements regarding how funds where to be spend.

44. The loans were supposed to fund maritime projects that would benefit Mozambique, but a significant portion of the funds were diverted to government officials in Mozambique in the form of kickbacks and bribes. The evidence presented alleges that Chang signed guarantees on behalf of Mozambique for all loans secured as part of the loan scheme.

45. In December 2018, the USA acted on information that it apparently received elsewhere that Chang would be travelling to the United Arab Emirates in late December 2018. The USA made a provisional arrest request to South Africa on 21 December 2018. On 27 December 2018, the Pretoria Magistrate Court issued a warrant of arrest for Chang, in terms of section 5(1)(a) of the Extradition Act. Chang was arrested and committed to imprisonment at Modderbee Correctional facility.

46. In late January 2019, the government of the USA submitted a formal request for the extradition of Chang to face criminal prosecution in the USA. On 15 February 2019, the former Minister signed a notification in terms of section 5(1)(a) of the Extradition Act, which was directed to the Magistrate, Kempton Park, informing the Magistrate of the request by the USA and requesting the Magistrate to conduct a formal extradition enquiry in terms of section 10 of the Extradition Act. The USA request was based on the treaty concluded between South Africa and the USA on 16 September 1999.

47. On 31 December 2018 Mozambique learned of Chang's arrest from the USA Embassy in Pretoria. Upon becoming aware of the USA's request to the South African government for the extradition of Chang, Mozambique forwarded a note verbal on 11 February 2019 to the South African Department of International Relations and Cooperation, requesting the extradition of Chang to Mozambique. Chang is a prime suspect in Mozambique on the similar charges that the USA has indicted him for.

48. On 15 February 2019, the Honourable Masutha signed a notification in terms of section 5(1)(a) of the Extradition Act, directed to the Kempton Park Magistrate's Court, informing the Magistrate of the request by Mozambique and requesting him to conduct a formal extradition enquiry in terms of section 10 of the Extradition Act. The Mozambican request was based on the SADC extradition protocol to which both Mozambique and South Africa are parties, as the two countries do not have a bilateral extradition treaty.

49. On 7 March 2019, the Kempton Park Magistrate initiated the extradition enquiry relating to USA's request in terms of section 10 of the Extradition Act. Subsequently, the Magistrate proceeded to deal with the request of Mozambique.

50. On 8 April 2019 the Kempton Park Magistrate concluded his enquiry and issued an order that Chang was extraditable to both the USA and Mozambique and committed Chang to detention at Modderbee Correctional facility. The Magistrate submitted his reports to Honourable Masutha in terms of section 10(4) of the Extradition Act.

51. On 21 May 2019 Honourable Masutha decided that the interest of justice would be best served by acceding to Mozambique's request for the extradition of Chang to Mozambique.

52. Honourable Masutha's decision was published in the government website and widely in the local, regional and international media.

53. On 14 June 2019 Mozambique sent an e-mail to Honourable Masutha attaching a letter dated 11 June 2019. In the said letter, Mozambique sought confirmation from Honourable Masutha that a decision had been made to extradite Chang to Mozambique. Mozambique also enquired if the USA had appealed the decision as per the newspaper reports. Mozambique did not receive a response to that letter.

54. On 27 June 2019 Interpol Mozambique received an e-mail from Interpol South Africa to the effect that Interpol South Africa had received an order by the Minister of Justice in terms of section 11(a) of the South African Extradition Act, 1962 that Chang be surrendered to the Republic of Mozambique to stand trial on various charges listed therein.

55. The e-mail stated further that in terms of section 13 of the SADC protocol, Interpol South Africa was informing Interpol Mozambique to make arrangements for the surrender of Chang back to Mozambique. It concludes with a request that Interpol Mozambique should notify Interpol South Africa of the date and place in which Chang will be surrendered to the Mozambican authorities.

56. On 28 June 2019 Mozambique received an e-mail with a letter dated 28 June 2019 from Mr H Van Heerden, Principal State Law Adviser: International Legal Relations, Department of Justice, RSA, informing them that the former Minister has issued an order for the surrender of Chang to Mozambique. The same letter stated that the original order was delivered to the investigating officer at Interpol for execution, in liaison with Interpol office in Mozambique. This is what Mozambique learned on 27

June 2019. In the same letter, the writer requested clarification on immunity of Chang.

57. Mozambique responded to the letter on 1 July 2019 to the effect that Mozambique reiterated what it had said before about the immunity process of Chang.

58. On 12 July 2019 Mozambique received an e-mail with an attached letter dated 11 July 2019 from the South African Department of Justice written by Mr H B Van Heerden, reiterating that the former Minister issued an order for the surrender of Chang to the Mozambican authorities and that this order was delivered to Interpol Pretoria on 24 June 2019 to surrender Chang to the Mozambican authorities. The letter informed Mozambique that Chang brought an application against the Minister of Justice and Correctional Services in the High Court of South Africa seeking immediate transfer from South Africa to Mozambique, alternatively to be released on his own cognisance. The Minister of Justice, Honourable Lamola, was opposing the application by Chang.

59. On 13 July 2019 Mozambique received a letter dated 12 July 2019 directed through the High Commission of the Republic of Mozambique by the Department of International Relations and Co-operation of the Republic of South Africa. The letter was from the South African Department of Justice and Correctional Services, written by the Director-General, Mr V Madonsela.

60. The letter essentially draws an inference that when the former Minister took the decision to authorise the extradition of Chang to Mozambique, he was only aware

of Article 13 of Act 34 of 2002 and not of Article 17 of the same Act. This was reference to Articles 13 and 17 of the Law No. 31/2014, because this is the law and articles that deal with the process of lifting immunity of members of Parliament.

61. The letter from the DG makes reference to Article 4(e) of the SADC protocol on extradition which states, as one of the mandatory prohibitions for extradition, that:

> *"If the person whose extradition is requested has, under the law of either state party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty."*

62. The letter essentially stated that the Minister of Justice has, after careful consideration of Article 17 of Act 34 of 2002 of Mozambique dealing with immunities for members of Parliament, come to the conclusion that the extradition of Chang to Mozambique will not be in compliance with SADC protocol, Constitution of South Africa and the Extradition Act. To that end, the Department of Justice has decided to file papers opposing Chang's application to be surrendered on the basis that the surrender will not meet the requirements of legality.

63. It was on the basis of the foregoing that Honourable Lamola decided to bring the counter application to review and set aside Masutha's decision on the basis that according to Honourable Lamola, the information about the immunity of Chang from prosecution in Mozambique, which was a material fact, was not brought to the attention of Honourable Masutha.

64. There was no any other legal basis that was put forward by Honourable Lamola prior to launching the counter application through the correspondence Mozambique has referred to above, and during the hearing of the counter application in Court other than that the concern that the extradition would contravene the SADC protocol because Chang was still enjoying immunity as member of Parliament. This is the basis which was accepted by the full bench of the High Court, Johannesburg when it reviewed and set aside Honourable Masutha's decision and remitted the matter back to Honourable Lamola for fresh decision.

65. Although Mozambique did not agree with the order of the High Court, and the basis for the setting aside of Honourable Masutha's decision, it filed leave to appeal, which was unsuccessful, petitioned the Supreme Court of Appeal and simultaneously approached the Constitutional Court. Upon legal advice, that the appeal processes will further delay the extradition of Chang and hamstrung the Honourable Lamola's hands from making the decision, that the petition to the Supreme Court of Appeal and the application in the Constitutional Court be withdrawn and that Honourable Lamola be afforded an opportunity to make a fresh decision taking into account relevant factors including the current state of affairs about Chang's status in Mozambique and the status of the alleged immunity from prosecution of Chang.

66. After a considerable period of time, the Minister made his decision to extradite Chang to Mozambique after he has taken into account all relevant factors, the written submissions that he received from all interested parties. It is this decision

that the applicant is not happy with and seeks an order from this Court to review and set it aside, substitute the Minister's decision with one that says that Chang is extradited to the USA. The applicant wants the Court to trample on the doctrine of separation of powers without any factual and legal basis. The applicant has made no case whatsoever for a substitution order, let alone a case to review and set aside the decision of the Minister.

Reasons for requesting the extradition of Chang to Mozambique

67. Mozambique started to investigate Chang and his co-conspirators in 2015 under criminal procedure number 1/PGR/2015 when the office of the Attorney General started receiving tips about what has now become known as the 'hidden debts scandal'. This refers to the loans of over US$2 billion granted by the European Bank Credit Suisse and VTB Capital to 3 companies, Proindicus, Ematum (Mozambique Tuna Company) and MAM (Mozambique Asset Management), on the basis of elicit loan guarantees issued by the government of the time.

68. The information the Attorney General's office was receiving pointed to possible illegalities in the Constitution, loan funding, and functioning of these companies. The preliminary investigations were aimed at assessing whether criminal offences or other irregularities related to the establishment, financing, procurement contracts, and operations of the companies have been committed and if so, by whom. It became clear that Mozambique needed an in-depth analysis of the companies and their operations, as the issues were complex and international in scope.

69. When the new government came into office in 2015, the Head of Government made announcements and addressed the National Parliament about the hidden debts scandal and gave his support to the office of the Attorney General to investigate the matter and for the judiciary to adjudicate on the cases without fear or favour.

70. The amounts involved in the hidden debt scandal obviously concerned the donors and resulted in the reduction in donor funding since 2015. Before the scandal, donor contributions showed an increase from 12.7% of GDP in 2013 to 14.2% in 2014. After the scandal, it went from 8.4% in 2015 to 6.1% in 2018. The impact of the hidden debt scandal is 13.1% on the GDP, which is the amount Mozambique has to pay the debt on an annual basis.

71. These are statistics from the Ministry of Finance. Mozambique took this matter seriously. With the support of donors, Mozambique commissioned an independent international audit to provide the Auditor General of the Republic of Mozambique with:

1.1. a review of the loan agreements (and any other documents relating to the contracted loan such as the underlying quadrantes), and the use of funds obtained from the loans;

1.2. a review of the procurement of goods and services funded through the loans or by each of the companies, including the compliance with

procurement laws, value for money, and actual receipts of the goods and services; and

1.3. an assessment of the performance of fiduciary duties on the part of the management of each of the companies, and an assessment of the possibility of misallocation of the funds, mismanagement, or illicit activity within these companies and or any related parties.

72. The audit was undertaken by Kroll, a firm based in the United Kingdom, and was funded by the government of Sweden.

73. The audit took a year from 2016 to 2017. The audit findings pointed to the complexity, transnational and international scale of the fraud, involving the banks and or companies and or persons based in the USA, France, Switzerland, Holland, Britain, and the United Arab Emirates.

74. Armed with the Kroll report on the audit findings, the AG and the two Deputy Attorney Generals, visited all the above countries from 25 June to 15 July 2017 and requested mutual legal assistance from all these countries. Her office received responses from France, Switzerland, Holland and Britain. Initially there was no cooperation from the United Arab Emirates. However, the United Arab Emirates subsequently started cooperating and sharing information relating to the “hidden debts scandal”. The USA initially seemed to be cooperating. Mozambique found out later that that was not the case.

75. The request of mutual legal assistance of Mozambique to the USA requires special mention as it goes to the core of this matter. Mozambique's first request for mutual legal assistance to the USA was through a letter rogatory dated 30 March 2017 with reference number 87/GAB–PGR/05.343/2017. The essence of the letter and request was that criminal investigations under case number 1PGR/2015 were underway to ascertain existence or violations of criminal nature and or of other nature, to determine the agents of violations and verify their responsibility in the establishment, financing and operation of the three companies, namely Pronidicus, Ematum (Mozambique Tuna Company) and MAM (Mozambique Asset Management).

76. Mozambique informed the USA that altogether the three Mozambican companies contracted loans with banks located in London for a total of US$2.007 billion. Mozambique indicated its suspicions that part of the loan amounts was transferred from several bank accounts held in the USA to individuals and institutions outside the scope of the contract, located in the United Arab Emirates, Mozambique and other countries.

77. The description of the assistance requested, lists Manuel Chang as one of the individuals whose bank accounts Mozambique was interested in. This letter rogatory was send after our preliminary investigations. During Mozambique visit to the USA in the period they visited all the affected countries, they met with the USA Department of Justice, FBI, and DEA. The USA requested the executive summary of the Kroll report and all information they had on the case.

78. It is noteworthy that on page 8 of the letter rogatory, under legal provision supporting the request, Mozambique list, *inter alia*, the following:

78.1. United Nations Convention against organised crime;

78.2. United Nations Convention against corruption:

78.3. Articles 8 and 10 of Law No. 6/2004, which deals with the crimes of corruption and economic participation in business; and

78.4. Articles 4 and 75 of Law No. 14/2013, which provides for and punishes the crime of money-laundering.

79. Mozambique is a party to the mentioned UN conventions and has domestic laws to deal with corruption and related crimes.

80. On 27 April 2017 the office of the Attorney General of Mozambique received an e-mail from one Mandy Gardner, who identified herself as a trial attorney, working for the office of International Affairs, criminal division, in the United States Department of Justice. The e-mail was a response to the letter of rogatory because it referenced to it. Essentially, the e-mail was a request for further information regarding bank account numbers of the suspects Mozambique listed in the letter rogatory to enable the USA authorities to trace the accounts, as it stated that the USA does not have a central database through which it could identify bank numbers.

81. The above was followed by a series of e-mail correspondence between the Attorney General's office and the USA. The e-mail correspondence mainly consists

of the USA requesting further information and the AG's office responding to the request. On 5 May 2017 the AG's office responded to Mandy Gardner and informed her that the Mozambican investigations have identified the bank of New York Melon, one Wall Street, through which Privinvest Shipbuilding SAL Holding transferred funds to Emmatu.

82. On 7 September 2017 Ms Manda Gardner responded to the requests of the AG's office made regarding the bank transaction from Privinvest to Emmatu. She stated that she managed to obtain a Court order and sent a subpoena to the bank of Melon to obtain the records of the AG's office requested. In the same message she enquired if the AG's office was able to discover additional bank accounts linked to the criminal activity in the USA.

83. On 14 March 2018, Mozambique submitted a letter dated 14 March 2018 via the US embassy in Mozambique addressed to the office of International Affairs – Criminal Division, United States Department of Justice. This letter essentially was a follow-up on the information we requested notifying the USA that up to the date of the letter Mozambique had not received the information it had requested from the USA. Mozambique reived no response to this letter.

84. On 30 April 2018, Ms Garner sent the AG's office the information which was no more than the information Mozambique sent her; which is, that Privinvest Shipbuilding SAL Holding transferred fund to Emmatu. There was nothing more. On 25 May 2018, Mozambique replied to Ms Gardner and informed her that the

information was not sufficient as Mozambique already had that information. Mozambique referred her back to the Mozambican request in the letter rogatory.

85. The USA would request information. The AG;s office would provide whatever information it could, but the US never provided satisfactory information from what Mozambique was requesting from them. Whatever they provided at any given time is what Mozambique already had through its investigations. This is how the USA created the impression of cooperation, which Mozambique laboured under.

86. In January 2019, it came to the attention of Mozambique through e-mail correspondence in which the AG's office was copied by the Swedish, that the USA was requesting the audit report from Kroll via the UK's serious fraud office on the basis of mutual legal assistance.

87. Kroll was in a predicament as it was the term of agreement that the audit report was the property of Mozambique, and it could not be made available to anyone without Mozambique's permission or that of the funder. It was surprising that the USA went to that extent because until then, Mozambique believed that the USA was cooperating with it and the USA could have easily requested the report from Mozambique. Mozambique would have simply given the report to the USA if it needed it, in order to understand the scope of the case, so that it could effectively assist Mozambique. However, in retrospect Mozambique came to realise that the USA was building its own case unbeknown to it, using the information Mozambique was giving it and additional information from Kroll audit report.

88. Mozambique brought this case to the attention of the USA authorities as can be illustrated by the correspondence alluded to above. Prior to Mozambique requesting mutual legal assistance from the USA, the USA had no clue or information on the case. If it did, it did not disclose that to Mozambique. Before the executive summary of the audit report was made public by the AG's office and made available to the affected countries including the USA, there was no information on the case. On close inspection, it is clear that the USA indictment is based on the executive summary of the Kroll report.

89. On 7 March 2019 after Chang was arrested, Mozambique directed two letters rogatory dated 26 February 2019 and 27 February 2019 to the office of International Affairs – Criminal Division, United States Department of Justice. It requested the following:

89.1. to interview individuals named in the USA indictment, who were subjects of Mozambique criminal investigations;

89.2. copies of written records, or transcripts, of interviews of all defendants conducted by the US law enforcement or in the possession of the USA law enforcement;

89.3. transcripts of Court hearings where the defendants were present;

89.4. records of persons who visit the defendants while they are custody;

89.5. to identify Mozambique co-conspirator one, co-conspirator two and co-conspirator three.

90. The above letter listed the following individuals: Jean Boustani, Andrew Pearse; Surjan Singh, and Detelila Subeva. These are people charged in the USA indictment. The second letter, requested bank related information, declared income, criminal history reports, stock market licences, compliance, etc of listed individuals and companies.

91. The office of the Attorney General never received any information it requested from the USA in terms of the letters rogatory it submitted to the USA. This is despite Mozambique request being made in terms of the UN Conventions as aforesaid to which the USA and Mozambique are parties. Mozambique requested information on the basis of expected cooperation as provided for in Articles 43 and 46 of the United Nations Convention on corruption to which all the said countries are parties, including the USA. Article 43 on international cooperation, states that:

> *"1. States parties shall cooperate in criminal matters in accordance with Articles 44 to 50 of this convention. Where appropriate and consistent with their domestic legal system, states parties shall consider assisting each other in investigations of and proceedings and civil and administrative matters relating to corruption."*

92. Article 46 of mutual legal assistance, states that:

> *"1. States parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions in judicial proceedings in relation to the offences covered by this convention.*
>
> *2. Mutual legal assistance shall be afforded to the fullest extend possible relevant laws or treaties, agreements and arrangements of the requested state party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person*

may be held liable in accordance with Article 26 of this convention in the requesting State party."

93. Article 46(21) of the UN Convention deals with the grounds for refusing to give a requesting state mutual legal assistance. Article 46(23) states that reasons must be given for refusing to render mutual legal assistance. The USA has not invoked Article 46(21). Therefore, Mozambique has all along been labouring under the impression that the USA was willing to give mutual legal assistance to it.

94. Given the above background, it came as a shock when the USA caused the arrest of Chang when it knew that he was the subject of investigation in Mozambique. The USA never informed Mozambique of the indictment of Chang and others. Mozambique only became aware of the indictment when Chang was arrested.

95. At that time, Chang had been cooperating with Mozambique in the investigation. Mozambique had no reason at that stage to suspect that he was a flight risk. Further, at that time, Mozambique was yet to formally charge him. Mozambique investigations were quite at an advanced stage, based on information that Mozambique acquired from its own investigations and other cooperating countries.

96. Mozambique anticipated that the USA could unearth further evidence over and above what Mozambique already had. At the time of Chang's arrest, Mozambique did not know the extent of the evidence that the USA could provide to it. Therefore, Mozambique's investigations were still open to further evidence. On studying the USA indictment against Chang and his co-conspirators, Mozambique realised that the USA used the information that Mozambique provided to the USA, together with

the information that Mozambique requested from USA, which USA failed to provide to Mozambique.

97. This case is very important to Mozambique as the criminal offences have caused devastating effect to the economy of Mozambique. It has caused donors to suspend and or reduce funding to Mozambique. It is therefore important for Mozambique to prosecute Chang and other co-perpetrators and to do so successfully in order to demonstrate its commitment, competency and capacity in fighting corruption.

98. Mozambique is party to various international conventions to combat criminality, such as the UN Convention against corruption, UN Convention against transnational organised crime, SADC protocol against corruption, AU Convention on preventing and combating corruption. It would make little impact or none at all if corruption of this magnitude is not investigated and perpetrators brought to book. Mozambique has invested significant financial resources and time in investigating this case.

99. The AG travelled with her team internationally to gather evidence and seek cooperation from foreign jurisdictions. It will be gravely unfair for Mozambique to be deprived of its entitlement to prosecute Chang when his co-perpetrators are already facing prosecution in Mozambique. It will be unfair and unjust if Mozambique is prevented from Prosecuting Chang when it has already spent so much time and financial resources in investigating this case.

100. The USA has not played open cards with Mozambique. Mozambique sought its cooperation not knowing that its ultimate objective was to wrestle Chang out of the jurisdiction of Mozambique and prosecute him in the USA for its own accord.

101. In the 2019 affidavit in *Chang* 1 litigation, a reference to a letter under diplomatic note number 301 from the Embassy of the United States of America to the Ministry of Foreign Affairs dated 10 June 2019 came to the AG's attention. The letter was brought to the attention of the court then in order to give context to the USA's attitude towards Mozambique. The letter was addressed to the Mozambican Department of Foreign Affairs and Cooperation of his Excellency Dennis W Hearle in his capacity as Ambassador of the United States of America to Mozambique. The letter was written after the former Minister's decision to extradite Chang to Mozambique.

102. The contents of the letter may be construed to have been intended to undermine the sovereignty, prosecutorial and judicial processes of Mozambique in one or more of the following ways:

102.1. it calls upon Mozambique to immediately withdraw its request for the extradition of Chang to Mozambique;

102.2. it incorrectly states that Mozambique's constitutional limitations on extradition of Mozambican citizens could effectively prevent Chang from ever having to answer for his crimes in the USA;

102.3. it states that the USA's investigation is complete and that its prosecutors are ready for trial.

103. The assertions in the said letter were not correct. The investigation in Mozambique is complete and Chang has been issued with the indictment. The criminal trial of Chang's co-perpetrators has already commenced. Most of the witnesses are in Mozambique and the offences were committed in Mozambique, and it is the citizens of Mozambique most affected by these crimes and are anxiously waiting for justice to be served.

104. The USA letter in essence sought to entice Mozambique inappropriately to withdraw its request and that the withdrawal would significantly enhance possibilities for joint cooperation in Chang's case.

105. The letter further stated that the withdrawal of the request by Mozambique presents the best opportunity for the two governments to collaborate on recovery of assets stolen by Chang and ensure restitution for the victims of its crimes, which, if accomplished, could significantly reduce Mozambique's debt. What the USA could not appreciate is that the Mozambican legal system provides the same remedies that the USA legal system is capable of providing including restitution and recovery of assets.

106. Lastly, the USA letter concluded that the withdrawal of extradition request by Mozambique would facilitate a robust and expeditious exchange of information between the US Department of Justice and the Mozambican office of the Attorney General. As to what purpose that exchange of information would have is not clear when Mozambique would have lost jurisdiction to criminally charge Chang in

Mozambique as he would already have been charged and convicted or acquitted by the US courts.

107. If Chang is tried and prosecuted in the USA, Mozambique could not legally and competently try and prosecute him for the same or similar offences he would have been tried and prosecuted already. Mozambique would have been deprived of prosecuting Chang on Mozambican soil and Chang would have evaded accounting to the Mozambican people.

108. In January 2018, and before Chang was arrested, the AG's office submitted a case for administrative liability of Chang before the accounts section of the administrative Court, requesting financial liability. Parallel to the criminal cases, the office of Attorney General is suing for civil liability against all defendants. Mozambican law permits a claim for civil liability in criminal cases. The office of Attorney General has also submitted a civil liability case in London against banks involved, supplier companies, executives and collaborators. This is the extent to which the office of Attorney General takes seriously this case and its unrelenting push to have Chang successfully prosecuted in Mozambique.

109. The notion that Mozambique is not serious about prosecuting Chang and his co-perpetrators is baseless. Mozambique has investigated these crimes extensively since 2015. The investigation has culminated into the indictment of Chang and his co-perpetrators.

110. This is a complex case which involves cooperation of foreign jurisdictions through mutual legal assistance. The extent and the speed with which Mozambique worked was impacted by the rate of response that Mozambique received from the countries from which Mozambique requested information. This fact was never hidden. The office of the AG has made periodic media updates on the progress in this matter, especially on Mozambique's request to the USA.

111. The complexity of the case was borne by the fact that even the USA took time to investigate and to charge the conspirators, notwithstanding that they have access to the information that Mozambique requested of them, as well as resources which Mozambique does not have. Other countries were affected and have not placed themselves as having better rights to prosecute than Mozambique. They have not sought to doubt Mozambique's ability to prosecute the perpetrators and, unlike the USA, have instead, provided assistance where it was needed to Mozambique.

112. Mozambique is capable of prosecuting Chang and his co-perpetrators. The judiciary and the prosecutorial institutions are effectively used by civil society organisations. The applicant often resorts to Mozambican Courts to assert rights in the Mozambican constitution and in other statutes and at times succeed against the state or government. There is no reason for the applicant to selectively utilise the Mozambican Courts when it suits it and doubt the Mozambican judiciary when it suits it. The applicant has not cast aspersion on the independence of the Mozambican judiciary and the independence of the Attorney General office to prosecute without fear, favour, or prejudice.

113. On available facts, Mozambique's commitment to prosecute Chang and to bring him to book is substantiated. The warrant of arrest and the indictment have been issued against Chang. On his arrival in Mozambique, Chang will be taken to custody and brought before a Judge in accordance with Mozambican law.

The applicable legal regime

114. The Extradition Act 67 of 1962 ("Extradition Act") defines in section 1 extraditable offence to mean any offence which in terms of the law of the Republic and of the foreign state concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of 6 months or more but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign state. The extradition agreement is defined in section 1 of the Extradition Act to mean an agreement in force on deemed to be in force under section 2 including a multilateral convention to which the Republic is a signatory or which it has acceded and which has the same effect as such agreement.

115. Section 2 which deals with extradition agreements, authorise the President to enter into an agreement with any foreign state, other than a designated state, providing for the surrender or a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such state or any territory under the sovereignty or protection of such state, of an extraditable offence or

offences specified in such agreement and may likewise agree to any amendment or revocation of such agreement.

116. Section 3 of the Extradition Act deals with persons liable to be extradited. It provides as follows:

> *"(1) Any person accused of convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign state a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrender to such state in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a Court in the Republic has jurisdiction to trial such person for such offence.*
>
> *(2) Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign state which is not a party to an extradition agreement shall be liable to be surrendered to such foreign state, if the President has in writing has consented to his or her being so surrendered.*
>
> (3) *Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated state shall be liable to be surrendered to such designated state, whether or not the offence was committed before or after the designation.....? of such state and whether or not a Court in the Republic has jurisdiction to trial such person for such offence."*

117. Section 4 of the Extradition Act provides for request for extradition from Republic. It provides as follows:

> *"(1) Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign state shall be made to the Minister by a person recognised by the Minister as a diplomatic or consular representative of that state or by any Minister of that state communicating with the Minister through diplomatic channels existing between the Republic and as such state.*

(2) Any such request received in terms of an extradition agreement by any person other than the Minister shall be handed to the Minister.

(3) *The provisions of subsections (1) and (2) do not apply in respect of a request for the endorsement for execution of a warrant of arrest under section 6."*

118. Section 5 of the Extradition Act provides for the warrants of arrest issued in the Republic. It provides as follows:

"(1) Any Magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person –

(a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign state has been received by the Minister; or
(b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign state, as would in the opinion of the Magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.

(2) *Any warrant issued under this section shall be in the form and shall be executed in the manner as near as maybe as prescribed in respect of warrants of arrest in general by or under the laws of the Republic relating to criminal procedure."*

119. It is common cause in this matter that Chang was arrested in the Republic and brought before a Magistrate in terms whereof the procedure stipulated under section 9 and section 10 of Extradition Act unfolded.

120. Section 9 deals with persons detained under warrant to be brought before Magistrate for holding of an enquiry.

121. This section provides as follows:

"(1) Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a Magistrate in whose area of jurisdiction he has been arrested, whereupon such Magistrate shall hold an enquiry with a view to the surrender of such person to the foreign state concerned.

(2) Subject to the provisions of this Act the Magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic, and shall for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has act a preparatory examination so held.

(3) Any deposition, statement or on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in a foreign state, or any copy or sworn translation thereof, may be received in evidence at any such enquiry if such document is –

(a)(i) accompanied by a certificate according to the example set out in schedule B;

(ii) authenticated in the manner provided for in the extradition agreement concerned; or

(iii) authenticated by the signature and seal of office –

(aa) of the Head of a South African diplomatic or consular mission or a person in the administrative or professional division of the Public Service Serving Act a South African diplomatic, consular or trade office in a foreign state or a South African foreign service officer great VII or an honorary South African consul general, vice consul or trade commissioner;

(bb) of any government authority of such foreign state charged with the authentication of documents in terms of the law of that foreign state;

(cc) of any notary public or other persons in such foreign state who shall be shown by a certificate of any person referred to in item (aa) or (bb) or of any diplomatic or consular officer of such foreign state in the Republic to be duly authorised to authenticate such document in terms of the law of that foreign state; or

(dd) of a commissioned officer of the South African National Defence Force in the case of a document executed by a person on active service; or

(b) certified as original documents or as true copies or translations thereof by a judge or magistrate, or by an officer authorised thereto by one of them, of the associated state concerned, in the case of an enquiry with the view to the extradition of a person to an associated state.

(4) At any enquiry relating to a person alleged to have committed an offence –

(a) in a foreign state other than an associated state, the provisions of section 10 shall;
(b) in an associated state –

(i) the provisions of section 10 shall apply in the case of a request for extradition contemplated in section 4(1); and
(ii) *the provisions of section 12 shall apply in any other case."*

122. An enquiry was held before a Magistrate, Kempton Park in respect of the arrest and detention of Chang, for purposes of an enquiry for his extradition to a requesting state. In this case, it is common cause that the US was the first to make an extradition request, and a few days later Mozambique also made an extradition request. The Magistrate was therefore required to conduct an enquiry in respect of both of them. The Magistrate conducted the enquiry first in respect of the US extradition request and made a finding that Change was extraditable to the US. After that, the Magistrate conducted a separate enquiry in respect of the

Mozambican extradition request and made a finding that Chang was equally extraditable to the Republic of Mozambique.

123. That enquiry took place in terms of section 10 of the Extradition Act. This section provides as follows:

> *"(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the Magistrate finds that the person brought before him or her is liable to be surrendered to the foreign state concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign state concerned, the Magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.*
>
> *(2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign state the Magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecuting in the foreign state concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.*
>
> *(3) If the Magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.*
>
> (4) *The Magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary."*

124. The proceedings that took place before Magistrate, Kempton Park took place in full compliance with the provisions of section 10 of the Extradition Act.

125. The Magistrate, in compliance with section 10(4), submitted the record of the proceedings that were conducted before him together with a report to the Minister for a decision. At that time, the relevant Minister was Masutha.

126. In terms of section 11, the Minister is required to consider the report provided to him by the Magistrate together with the record in order to make a decision whether to order the surrender of a person sought to be extradited to the foreign state or to refuse to surrender such person to the foreign state.

127. Section 11 provides as follows:

> *"The Minister may –*
>
> *(a) order any president committed to prison under section 10 to be surrendered to any person authorised by the foreign state to receive him or her; or*
> *(b) order that the 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 been required in good faith or in the interest 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."*

128. The current Minister after the matter was remitted to him by the order of Court in Chang 1, considered the matter in accordance with the provisions of section 11 for purposes of deciding where Chang should be extradited to. The Minister made a decision that Mr Chang be extradited to Mozambique after the Minister satisfied himself that Chang no longer enjoys immunity from prosecution and the warrant of arrest issued by the Supreme Court judge in Mozambique had been provided to the Minister.

129. There would have been no basis for the Minister to have gainsaid the fact that Chang even on the applicant's version no longer enjoys immunity and there would have been no reason for the Minister to gainsay the warrant of arrest that has been issued by Supreme Court judge in a foreign state, Mozambique, when that warrant is lawful and valid.

130. The applicant or at least its members who reside in Mozambique and are Mozambican citizens have known about this warrant of arrest and have also known that an indictment has been issued against Mr. Chang. The applicants or at least its members took no steps whatsoever in Mozambique to challenge the legality or otherwise of the warrant of arrest issued by Supreme Court judge, nor have they raised any issue of substance against the fact that an indictment has been issued against Mr Chang submitted to the South African authorities through diplomatic channels to the Minister.

131. Accordingly, we submit that that there has been full compliance with section 11 of the Extradition Act. Once it is found that there has been full compliance with the provisions of section 11, there is no basis for the applicant to suggest that the Minister's decision ought to be reviewed and set aside. The Minister's decision once it is found that it is in compliance with the enabling legislation, the Extradition Act, must be respected and given effect to. It does not matter that the applicant does not like the decision. It does not matter whether the Minister's decision is right or wrong. In the context of review, the question is whether the decision by the Minister to extradite Chang to Mozambique meet the constitutional standard and it is in accordance with Extradition Act. The decision once found to be rational and intra vires as the Minister exercise the powers that he has, it is the end of the matter.

132. Another important legal instrument that is relevant for consideration when the Minister makes a decision whether to extradite Chang to Mozambique, is the SADC protocol. In respect of whether extradition is to be made to the United States, there is an extradition agreement between South Africa and the US. That agreement also becomes important. The Minister considered all these legal instruments and concluded that it would be just an equitable that Chang be extradited to Mozambique. This we submit is for obvious reasons such as that Chang is a citizen of Mozambique, he committed the offences that he is charged with in Mozambique, the people who have suffered severely are the people of Mozambique because they have been deprived of the benefits of economic windfall arising from the donations that have been made for purposes of creating jobs and alleviating

poverty and create employment, it is the people of Mozambique that Chang is supposed to account to and he has to do so by facing criminal charges and criminal prosecution in Mozambique.

133. We now turn to the SADC protocol on extradition. We refer to article 4 of the protocol. It provides as follows:

> *"Mandatory grounds for refusal to extradite*
>
> *Extradition shall be refused in any of the following circumstances:*
>
> *(a) If the offence for which extradition is requested is of a political nature. An offence of a political nature shall not include any offence in respect of which the state parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the state parties have agreed is not an offence of a political character for the purposes of extradition;*
>
> *(b) If the requested state has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons;*
>
> *(c) If the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law;*
>
> *(d) If there has been a final judgment rendered against the person in the requested state or a third state in respect of the offence for which the person's extradition is requested;*
>
> *(e) If the person whose extradition is requested has, under the law of either state party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;*
>
> *(f) If the person whose extradition is requested has been, or would be subjected in the requesting state to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or*

would not receive the minimum guarantees in criminal proceedings, as contained in article 7 of the African Charter on human and peoples' rights; and

(g) If the judgment of the requesting state has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he or she has not had or will not have the opportunity to have a case retrite.....? in his or her presence."

134. We respectfully submit that none of the prohibitions in article 4 are applicable to Chang. Chang does not enjoy amnesty. There is also no lapse of time which would impede the prosecution of Chang in Mozambique. Chang has not become immune from prosecution. It is common cause on the papers that Chang no longer enjoys immunity. Chang is no longer a member of Parliament.

135. The only issue that I raised on a speculative basis without any facts by the applicant is that Mozambique does not say whether Chang enjoys immunity in respect of offences that were committed by him whilst he was a member of Parliament. This rhetorical question which is groundless and speculative has been dealt with by Mozambique in the answering affidavit. Chang does not enjoy immunity at all. Chang does not get any protection from being prosecuted for offences that he committed whilst he was a member of Parliament. It is correct that immunity from prosecution will entail immunity for being arrested for offences for which you are immune from being prosecuted.

136. It follows that, if Chang was immunised from prosecution for offences, he committed whilst he was the Minister of Finance and member of Parliament, the Supreme Court judge in Mozambique would not have competently issued an arrest

warrant for Chang. It follows that Chang would not have been indicted as he has now been by Attorney General of Mozambique, and the indictment in terms of Mozambican law has to be served through the authorisation by the Supreme Court judge. That has happened. In fact, uncontested evidence is that the warrant was authorised to be served outside Mozambique by Supreme Court judge given the fact that Chang's circumstances are of a nature that he is not in Mozambique, and he is sitting in jail in South Africa. That indictment is part of the record, and no issue has been taken by the applicant against that indictment. The indictment remains valid and for all intents and purposes constitute an indictment upon which Chang is required to answer to the criminal charges that are contained in the indictment.

137. Article 6 of the protocol which deals with channels of communication and required documents, spells out in article 6(2) a request for extradition and the documents that must accompany that request. This is beyond the issue of dispute because it is accepted as common cause that a request by Mozambique has been scrutinised by a Magistrate in a section 10 enquiry, and the Magistrate found that it passes constitutional muster and also that Chang was extraditable to Mozambique. The warrant for his arrested has been issued and it remains enforceable.

138. The protocol deals with concurrent requests in article 11. It provides as follows:

> *"(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 which of those states the person is to be extradited and shall notify those states of its decision.*

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

(a) if the request 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 request;
(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 interest of the respective state; and
(h) *the nationality of the victim."*

139. In this matter, the Minister was faced with concurrent requests. He was required to act in accordance with article 11(1) by making a decision or a determination as to which of the two states Chang is to be extradited. The Minister has made that decision and therefore he is complied with article 11(1).

140. The request of Mozambique was made pursuant to the protocol. The nationality of the victims is Mozambican. The people of Mozambique lost revenue, the money that has been embezzled, stolen, and fraudulently syphoned, by Chang among others, was money intended for maritime projects of millions of dollars and this money was syphoned through corruption and fraud. The ordinary place of residence of Chang is Mozambique. The nationality of Chang is Mozambican. The offences were committed in Mozambique. The requirements that the Minister is required to consider under article 11, militate strongly for the decision for Chang to be extradited to Mozambique. In fact, to put it bluntly, it would have been irrational for the Minister to have extradited Chang to the United States of America given that the preponderance of factors favoured in all material respects the extradition Chang to Mozambique.

141. Lastly, we consider the provisions of article 13. Article 13 deals with the surrender of a person. It provides as follows:

> *"(1) Upon being informed that extradition has been granted, the state parties shall, without undue delay, arrange for the surrender of the person sought and the requested state shall inform the requesting state of the length of time for which the person sought was detained with a view to surrender.*
>
> *(2) The person shall be removed from the territory of the requested of state within such reasonable period as the requested state specifies and, if the person is not removed within that period, the requested state may release the person and may refuse to extradite that person for the same offence.*
>
> *(3) If circumstances beyond is control prevent either state party from surrendering or removing the person to be extradited, it shall notify the other state party. The two state parties shall mutually decide upon a new date of surrender, and the provisions of paragraph 2 of this article shall apply."*

142. We know that the reason why Chang has not been extradited despite the lawful decision by the Minister that he be extradited to Mozambique is because of this ill-conceived application brought by the applicant. Otherwise, both the requested state (South Africa) and the requesting state (Mozambique) have acted swiftly upon the Minister's decision communicated to Mozambique. The requested state was ready to handover Chang through Interpol South Africa so that he be surrendered to the authorised person in Mozambique through Interpol Mozambique. That has since the halted in order for this application to be ventilated and finalised. Article 13 makes it clear that the surrender of a person upon the Minister's decision must be swift and must be done without undue delay. It is therefore imperative that Chang be extradited without further ado given that Chang

has been in the South African prison for over two years without any hint of where he is supposed to go. Finally, when the light shown as to where Chang is to be extradited which is Mozambique, the applicant is interfering with that process.

143. Other Courts have on occasion dealt with the provisions of the Extradition Act and the circumstances under which South Africa is obliged to extradite a person to a foreign state or in circumstances where South Africa will not be obliged to extradite a person. It is not in issue that the Minister's decision is subject to judicial scrutiny in that it may be taken to Court by way of judicial review. The decision must be one which is lawful in a sense that it must be authorised by the enabling legislation. It must conform with the Constitution, and it must take into account the constitutional obligations of the state set out in section 7 of the Constitution. Section 7 of the Constitution provides that:

> *"(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*
>
> *(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*
>
> *(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the bill."*

144. The principle of legality applies to the decision taken by the Minister. This much was affirmed by the Constitutional Court in Kaunda vs President of the Republic of

South Africa.[4] This was further affirmed by Constitutional Court in another related decision of Geuking vs President of the Republic of South Africa.[5]

145. The Minister should act in accordance with the enabling legislation which provides for the mechanisms for the extradition of a person. See in this regard Mohammed vs President of the Republic of South Africa.[6]

146. It is accepted that South Africa is a member of the international community and international law, and foreign law finds application to the extent necessary and relevant. Section 39 of the Constitution pertaining to interpretation of Bill of Rights provides as follows:

> *"(1) When interpreting the Bill of Rights, a court, tribunal or forum –*
>
> *(a) must promoted the values that underlie and open and democratic society based on human dignity, equality and freedom;*
> *(b) must consider international law; and*
> *(c) consider foreign law.*
>
> *(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*
>
> *(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common-law, customary law or legislation, to the extent that they are consistent with the bill."*

147. The South African obligations and our Courts to apply international law when interpreting the fundamental rights in the Bill of Rights, was echoed by the

[4] 2005 (4) SA 235 (CC)
[5] 2003 (3) SA 34 (CC)
[6] 2001 (3) SA 893 (CC)

Constitutional Court in Harksen vs President of the Republic of South Africa,[7] and quoted in paragraph 33 of the applicant's heads of arguments. We endorse this quotation and reproduce it as is:

> *"An extradition procedure works both on an international and domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign state to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between states. However, before the requested stated may surrender the requested individual, there must be compliance with its own domestic laws. Each state is free to prescribe when and how an extradition request would be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite. In South Africa, extradition is governed domestically by the provisions of the Extradition Act."*

148. This cannot be clearer. As we have set out above, the Minister acted in accordance with the Extradition Act and made a decision that complies with the provisions of the Extradition Act. In addition, the Minister took into account the SADC protocol and other instruments. That cannot be faulted. Rationality which we deal with hereunder involves itself with the means adopted by the Minister to arrive at the decision. The means adopted by the Minister in making the decision is one that is consistent with our constitutional obligations in chapter 2, as well as South Africa's obligation to international community.

149. With the above legal exposition in mind, we now turn to dealing with each of the grounds of review relief upon by the applicant.

[7] 2000 (2) SA 825 (CC)

Is Chang immune from prosecution in Mozambique currently

150. We have disposed of the ground of review pertaining to immunity from prosecution as alleged by the applicant in the founding affidavit and the supplementary affidavit. This ground of review is speculative as it is not grounded on fact. Chang is not immune from prosecution in Mozambique. He has already been indicted to face criminal charges in Mozambique.

151. This ground of review has no merit and should be rejected.

No warrant of arrest

152. The other ground of review is that there is no warrant of arrest for Chang. This is patently false given the warrant of arrest that was issued by the Supreme Court judge in Mozambique.

153. This disposes of this ground of review.

Failure to consider US temporal priority

154. Article 11 of the protocol is clear that when the Minister is faced with two extradition requests or more, regarded as concurrent requests, the Minister must make a decision in respect of where a person to be extradited has to be released to. There

is no such thing as temporal priority. The requirements that must be taken into account are those listed in article 11 of the protocol.

155. The Extradition Act does not make provision for concurrent requests. Concurrent request is dealt with in the Protocol. South Africa and Mozambique are members of SADC and have both signed the protocol. In accordance with the force international and regional instruments have on domestic laws of respective states, we submit that South Africa and Mozambique as signatories to the Protocol are accordingly bound by its terms.

156. There is no basis in this ground of review that the Minister should have accorded the US priority. If it were so, there would have been no reason for the full court in Chang 1 to have remitted the decisions to the Minister for a fresh decision. The full court would have simply ordered that Chang be extradited to the US. However, the full court was alive to the difference principle and the doctrine of separation of powers. In **Trencon** the Constitutional Court cautioned that the court should be wary not to arrogate to itself superior wisdom over other arms of government. Substitution is only resorted to the court in exemptional circumstances, where the decision is a foregone conclusion. This court is in no position to substitute the Minister's decision without trampling on the separation of powers doctrine.

157. In any event, the ground of review foreshadowed here has no merit. It should be rejected.

Mozambique's request is in bad faith

158. The deponent is in no position to speak about Mozambique's request being in bad faith. In fact, no facts have been placed before Court to demonstrate the bad faith. Again, the onus is on the applicant to prove bad faith. Bad faith can not be inferred. In fact bad faith must be pleaded and substantially motivated.

159. Mozambique simply wants to prosecute its citizen for the alleged offences. It has already taken steps to prosecute his co-perpetrators. It has issued an indictment against him. A warrant for his arrest has been issued. A second warrant is also pending enforcement upon him touching on Mozambican soil. He enjoys no immunity from prosecution. All the available facts militate for Chang's extradition to Mozambique than to the US. Mozambique started with the investigation long before Chang was arrested in South Africa on Us warrant. At that time, Chang was not a flight risk, hence no warrant of arrest was in existence. The investigation was at that time still on-going, and the US was in constant communication with Mozambique with both states having committed themselves to mutual assistance.

160. For all of the available facts, this ground of review is devoid of any merit and should be dismissed.

Violation of international legal duties by South Africa

161. This ground of review is that the Minister failed to consider or violated South Africa's international legal duties to combat corruption. This ground of review is devoid of any merit because the very purpose to extradite Chang to Mozambique is for him to face criminal charges on corruption. That on its own is Mozambique's seriousness to combat corruption.

162. Mozambique is a sovereign state with its laws that govern it. It has its criminal law and procedural law that regulates the prosecution of crimes committed and the conviction and sentencing of offenders. It has an independent judiciary and independent Attorney-General office. The suggestion that extraditing Chang to Mozambique will undermine South Africa's commitment to international obligation is rather unfortunate as it may be construed to be undermining the independence of Mozambique's judiciary, AG's office and its legal system.

163. There is no merit in this ground of review, and it should be rejected.

Interest of justice and reasonableness

164. The final ground of review is that the interest of justice and reasonableness is to extradite Chang to the US and not Mozambique. There is no basis in this ground of review, and it should be rejected.

165. In the supplementary affidavit, the deponent embarks on speculation when realising that the record is deadly against the applicant. This is evident from paragraph 9 of the supplementary affidavit.

166. What the deponent now alleges is no longer that there is no warrant of arrest. The deponent now says that there is no valid arrest warrant from Mozambique. This allegation is made in the face of a lawful and authentic warrant of arrest that has been attached to Mozambique's answering affidavit as well as the warrant of arrest which is contained in the record. When the Minister made the decision, he was in

possession of the warrant of arrest of Mr Chang from Mozambique. In addition, in the answering affidavit of Mozambique, a further warrant has been attached. This is simply to demonstrate how serious Mozambique is to prosecute Chang for the alleged offences.

167. In the supplementary affidavit, the applicant is no longer saying that Chang is immune from prosecution. There is a change of heart, what is alleged is that there is insufficient proof from Mozambique that Mr Chang is not immune from prosecution. Mozambique has already asserted under oath that Chang is not immune from prosecution. The onus is on the applicant to prove that Chang is immune from prosecution. The applicant has failed on motion proceedings to discharge that onus. That should be the end of the matter.

168. In the supplementary affidavit the applicant has added a further ground of review that the Minister had no reasons for making his decision. This allegation is devoid of any merit, and it is simply based on speculation. The applicant was provided with reasons before a supplementary affidavit was filed. The applicany elected to take unmeritorious objection to the supplementary record instead of dealing with the reasons. The applicant now wants to see the opinions that the Minister received from various Counsel. This is simply an act of desperation, because an opinion of counsel does not constitute a decision. It is not counsel who must take the decision. The decision must be taken by the Minister and no one else. It does not matter whether the opinions received by the Minister were right or wrong. What matters is that the Minister must take his independent decision. It does not matter what the Minister's advisors say. What maters is that the Minister must take the decision

and own up to it, and that is precisely what the Minister has done. All what is required is that the Minister's decision must be lawful, constitutional, and rational. The decision does not necessarily have to be correct. It must not necessarily be one that the court would have taken. It must be one that rationally can be defended and not out of kilter. The Minister's decision is unassailable.

169. A further ground of review is that the Minister considered how Mr Chang is a witness in another trial when making his decision. This ground of review is clearly misplaced given that the purpose of extradition of Mr Chang to Mozambique is not for him to be a witness, but it is for him to stand trial based on an indictment that was in possession of the Minister at the time when he made the decision. Whether in addition to Chang's extradition to face prosecution the Minister considered other factors is for current purposes of no moment.

170. A further ground of review is that the Minister failed to explain the delay in his decision-making. A failure to explain the delay is not a reviewable ground. Neither is a failure to give reasons for the delay result in an extradition to the US. The remedy to failure to make a decision timeously by the decision maker is an application to court to compel the decision maker to make a decision. A remedy is not a reward with an extradition to the US. In fact, Mozambique did bring an application to compel the Minister to make the decision. This is another indicator of Mozambique's desire to have Chang prosecuted without further delays.

171. A further and final ground of review is that the Minister failed to explain why he did not accede to the US request which was made before Mozambique. There was no

obligation on the Minister to explain why he did not accede to the US request. The US has not complained about the Minister's failure not to explain to it why its extradition request was unsuccessful. The US has sought not to participate in the current litigation, neither did it participate in the previous litigation. If there is a party that was to be aggrieved with the extradition decision of the Minister, it should have been the US. The US has not complained, and it has no intention to complain. It seems the US is content with the fact that a decision adverse to its request has been made. It may not like it, but it is content to live with it. It does not lie in the mouth of the applicant to be the unofficial spokesperson of the US uninvited.

172. The Minister has explained why he made the decision that Chang be extradited to Mozambique. When making the decision that Chang be extradited to Mozambique, the Minister was acting in compliance with article 11 of the protocol which requires him to make a decision where there are concurrent requests to extradite a person to one of the requesting states. The Minister cannot make the decision to extradite Chang to both requesting states. It is simply practically and legally impossible.

173. From paragraph 11 where the deponent deals with the allegation that there is no valid arrest warrant, nothing is factual. All what the deponent states is speculation. There is nothing factual in what is alleged from paragraph 12 to 25 of the supplementary affidavit.

174. It is alleged without facts that Chang is a flight risk. Chang cannot be a flight risk when there is a warrant of arrest awaiting him.

175. In respect of the allegation that Chang is still immune, the deponent deals with it from paragraph 26 to 44 of the supplementary affidavit. There is nothing factual that is stated in these paragraphs. The deponent is simply embarking on the terrain of speculation.

176. It follows that the applicant has failed to set out grounds of review supported by facts which could entitle the applicant to an order.

177. We submit that the applicant has failed to discharge the onus resting on it to demonstrate that Chang still enjoys immunity in Mozambique and that there is no warrant of his arrest.

178. Once the applicant has failed to discharge its onus in respect of these two, the entire application collapses.

179. Finally, we comment about the explanatory affidavit filed by HSF. Nothing turns on it. In terms of the rules of Court, the respondent has an election to either oppose or abide. A respondent that abides has no untrammelled liberty to file some undefined affidavits with no status in terms of the rules of court, and without leave of the court.

180. The HSF had an election to be the co-applicant. It cannot be a ghost applicant disguising as respondent. Its explanatory affidavit has no legal status. The respondent had no way to rebut it because they are also cited as respondents. Had HSF joined as co-applicant, the respondent would have been able to answer to HSF's claims.

181. Similarly, nothing turns on the heads of argument filed on behalf of HSF for the same reasons elaborated above.

182. In this matter, whilst the applicant is apparently a non-governmental organisation operating in Mozambique, the manner in which it litigated, leaves much to be desired. We are not convinced that the applicant is protected by the **Bio-Watch principle**. The litigation was unnecessary.

183. In the circumstances of this case, we submit that the applicant should be ordered to pay the costs.

184. Accordingly, the application should be dismissed with costs inclusive of costs of the employment of two counsel.

W R Mokhare SC
C Lithole
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Chambers
Sandton

16 September 2021