IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 21/40441

In the matter between:

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

FOURTH RESPONDENT'S HEADS OF ARGUMENT IN PART B: REVIEW APPLICATION

A. INTRODUCTION AND HSF'S POSITION IN THE LITIGATION

1 The applicant ("*FMO*") seeks relief that:

1.1 The decision by the second respondent ("*Minister*") on or around 23 August 2021 to extradite the first respondent ("*Mr Chang*") to the Republic of Mozambique is declared to be inconsistent with the Constitution of the Republic of South Africa and invalid and set aside;

1.2 The decision of the Minister is substituted with a decision that Mr Manuel Chang be surrendered and extradited to the United States of America to stand trial for his alleged offences.[1]

2 The fourth respondent, the Helen Suzman Foundation ("**HSF**") was cited by the applicant in this application because it participated in the 2019 proceedings as *amicus curiae*, and because it retains an interest in the relief sought in these proceedings.[2]

3 The HSF is a non-governmental organisation whose objectives are to defend the values that underpin our liberal constitutional democracy and to promote respect for the rule of law, constitutionality and human rights.[3]

---

[1] Applicant's Notice of motion, Part B, 01-03.

[2] HSF's explanatory affidavit, paragraphs 5-6, 06-248.

[3] HSF's explanatory affidavit, paragraph 2, 06-247.

4 The HSF abides the Court's decision and has delivered an explanatory affidavit to assist the Court.[4] In these submissions, the HSF highlights four aspects under the rule of law which arise in this matter.

5 These are as follows:[5]

5.1 That all exercises of public power are subject to judicial scrutiny and that the international law implications of the Minister's decision do not mean that this decision is shielded from the Court's oversight;

5.2 That analysis of the record of decision and reasons reveals that Minister's decision fails to advance the rule of law, constitutionality and human rights on the dual basis that there is no reason to believe or stated belief that Mr Chang would be arrested in Mozambique; or that justice would be served by extraditing him to Mozambique instead of the United States;

5.3 That the reasons for the Minister's decision must be located in the record and not in editorialised written reasons delivered after the record and which are not confirmed independently by the record;

5.4 The Minister's decision overlooked or ignored the Department of Justice and Constitutional Development's own recommendation to extradite Mr Chang to the US, or unlawfully (and without rational basis) reversed it.

---

[4] HSF's explanatory affidavit, paragraph 8, 06-249. *Rinaldo Investments (Pty) Ltd v Minister of Public Works and Others* (D2213/2019) [2021] ZAKZDHC 16; [2021] 2 All SA 541 (KZD) (9 March 2021) para 96.

[5] HSF's explanatory affidavit, paragraph 10, 06-249.

6 We deal with these in turn.

B. ALL PUBLIC POWER SUBJECT TO OVERSIGHT BY THE COURT (INCLUDING THE MINISTER'S DECISION)

Overview of South Arica's international and domestic framework for extradition decisions

7 The South Africa has extradition agreements with both the US and Mozambique:

7.1 The Extradition Treaty between South Africa and the United States, signed on 16 September 1999 and which entered into force on 25 June 2001; and

7.2 The SADC Protocol on Extradition, which governs extradition between South Africa and Mozambique.

8 These extradition agreements create binding international obligations on South Africa.

9 In addition, extradition in South Africa is governed by the Extradition Act 67 of 1962, which domesticates and operationalises extradition agreements ratified by South Africa. The Extradition Act regulates the process for extradition from South Africa to another state. The process is divided into three phases:

9.1 The administrative phase (in which a formal diplomatic request is made from one state to another, and the suspect is arrested);

9.2 The judicial phase (in which a magistrate conducts an extradition enquiry to determine whether the minimum legal requirements for extradition of the suspect are fulfilled); and

9.3 The executive phase (where the Justice Minister makes a determination under section 11 of the Act whether or not to surrender the person for extradition).

10 In assessing the review applications, which are primarily aimed at the executive phase of the decision-making process, the HSF wishes to highlight that even so-called “executive decisions” involving the field of international relations are subject to the Constitution and the rule of law and enjoy no immunity from the Courts.

The exercise of all public power subject to the Constitution

11 All exercises of public power, including executive action, are subject to the Constitution and review by our courts.[6]

12 The Minister contends, in his answering affidavit, that the decision is polycentric and policy-laden and the court must show appropriate deference to the decision.[7]

13 The spectres of the separation of powers and deference relied upon by the second respondent are no reason for this Court not to consider and evaluate the exercise of public power that gave rise to the impugned decision for constitutional

---

[6] *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (“*Pharmaceutical Manufacturers*”) at para 40.

[7] Minster’s answering affidavit, para 7.2, 06-174.

compliance, and compliance with South Africa's international obligations.[8] It is also not a question of deference – there can and should be no deference to an unlawful decision.

14 The Courts have not hesitated to set similar decisions and to hold the government to account under the Constitution and international law, notwithstanding that the decision which is at stake is one involving the executive sphere of government in its diplomatic relationship with other states, or on the international plane.

15 This is so particularly where the issue is one (as in this case) which relates to the lawfulness of a decision-maker's powers as judged against the standards of legality prescribed under the Constitution and under international law.

16 In ***DA v Minister of International Relations and Co-operation*** (the *Grace Mugabe* matter),[9] the Democratic Alliance launched a judicial review of the Minister of International Relations' granting of immunity to Ms Mugabe, wife of the then President of Zimbabwe, Robert Mugabe. The immunity had been granted to shield Ms Mugabe from prosecution for the alleged assault of a South African women, Mr Engle, in Johannesburg. The North Gauteng High Court (per Vally J) upheld the DA's challenge, holding that the Minister's decision to grant immunity to Ms Mugabe was contrary to customary international law and domestic legislation and finding that the Minister had "*committed an error of law*" which was

[8] HSF's explanatory affidavit, paragraph 11, 06-250.

[9] *Democratic Alliance v Minister of International Relations and Co-operation and Others* 2018 (6) SA 109 (GP)

"*fundamental and fatal*".[10] The decision was reviewed and set aside under both the common law and PAJA.[11]

17 In ***Minister of Justice and Constitutional Development v Southern Africa Litigation Centre*** (the *Al Bashir* matter),[12] the Southern Africa Litigation Centre challenged the failure of the South African Government to take steps to cause President Al Bashir of Sudan to be arrested when he attended the African Union (AU) Summit in June 2015 as unlawful and unconstitutional. The Government opposed the application on the basis that President Al Bashir enjoyed immunity from arrest as head of state and (before the High Court) because he had been granted "*temporary immunity*" under the hosting agreement for the AU Summit.

18 The Supreme Court of Appeal rejected the government's argument and held the government firmly to the Rome Statute, issuing a declaratory order that: "*the conduct of [the government] in failing to take steps to arrest and detain, for surrender to the International Criminal Court, the President of Sudan, Omar Hassan Ahmad Al Bashir… was inconsistent with South Africa's obligations in terms of the Rome Statute… and unlawful*".

19 In ***Law Society of South Africa and Others v President of the Republic of South Africa and Others (*the *SADC Tribunal* matter*)***,[13] the Constitutional Court

---

[10] The *Grace Mugabe matter* at para [42].

[11] The *Grace Mugabe matter* at para [42].

[12] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA).

[13] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018).

found that the President's participation and the decision-making process and his decision to suspend the operations of the SADC Tribunal to be unconstitutional, unlawful and irrational. The relevant treaty had as one of its objectives the obligation to promote access to justice, democracy, human rights and the rule of law.[14] The relevant Protocol signed by the President took away a pre-existing right to access to the SADC Tribunal. The power to negotiate and sign the Protocol derived from section 231(1) of the Constitution. The question was thus whether section 231(1) read with the Bill of Rights and duly guided by a proper appreciation of the Constitution and binding international law, allowed the President to make the decision. The Court reiterated that the Constitution is our supreme law and any conduct inconsistent with it is invalid and falls to be set aside.[15] The President was ordered to withdraw his signature from the Protocol in question. In terms of the ***SADC Tribunal*** matter, decisions made in the international sphere by South African officials remain subject to and must be consistent with the Constitution. Such conduct is also subject to review on the grounds of rationality for the same reason. Importantly, the Court held that steps which undermine or take away from the values, principles and rights in the Constitution are impermissible and would be unlawful: "*it is constitutionally impermissible, as long as our Constitution and the Treaty remain unchanged, for the President to align herself with and sign a*

---

14 *Law Society* para [67].

15 *Law Society* para [72].

regressive international agreement that seeks to take away the citizens' right of access to justice at SADC level".[16]

20 In ***Commissioner of Police v Southern African Human Rights Litigation Centre*** **(the *Torture Docket* decision)**,[17] the South African authorities had taken a decision not to investigate serious allegations of torture committed by Zimbabwean officials in Zimbabwe. Civil society groups successfully challenged the constitutionality of the police's decision not to investigate the allegations of torture. In its judgment, the Constitutional Court dismissed the defence that "*any investigation would be potentially harmful to South Africa – Zimbabwe relations on a political front*" arguing that these considerations were outweighed by the international law obligations upon South Africa.[18]

21 Similarly, in ***DA v the Minister of International Relations***, the DA and various civil society organisations relied on both procedural and substantive grounds to argue that the government's depositing of an instrument of withdrawal from the International Criminal Court, with the UN Secretary General, was unconstitutional and invalid. The Court upheld the applicants' argument that the absence of parliamentary involvement and approval in the executive act of withdrawal rendered the act unlawful. The Court ordered the government to revoke the notice of withdrawal that South African had deposited with the UN.[19]

---

16 *Law Society* para [82].

17 *Commissioner of Police v Southern African Human Rights Litigation Centre* 2015 (1) SA 315 (CC).

18 *Torture Docket* decision at para 74.

19 *DA v Minister of International Relations* 2018 (6) SA 109 (GP).

22 In ***Earthlife***[20] the court was called upon to determine whether the Minister of Energy's tabling of an intergovernmental agreement with Russia (the Russian IGA) before Parliament in terms of s 231(3) of the Constitution (which did not require Parliamentary approval), instead of s 231(2) (which did require such approval), was unconstitutional. The Russian IGA concerned the entering into of a cooperation treaty with Russia for the supply of nuclear energy, and involved the conduct of foreign sovereign states. The challenge brought by the applicants in ***Earthlife*** was against a domestic government respondent (the Minister of Energy) who had failed to comply with a domestic constitutional requirement (to table the Russian IGA before the South African Parliament under a specific section, which would have required Parliament's approval to make the agreement binding). If the Russian IGA had been tabled under the incorrect provision of the Constitution, s 172(1)*(a)* of the Constitution required the court to declare this unconstitutional. In ***Earthlife***, the High Court set aside the government's tabling of the international agreement between Russia and South Africa in relation to nuclear procurement under section 231(3) of the Constitution (which would make the agreement binding without parliamentary approval), after carefully considering the content of the agreement, and determining that it made substantive commitments that could only be made binding with the approval of Parliament.[21]

23 The government argued that the Russian IGA was non-justiciable as it involved foreign relations and determining the true agreement between two states. The

[20] *EarthLife Johannesburg & Another v Minister of Energy & Others* [2017] ZAWCHC 50; 2017 (5) SA 227 (WCC).

[21] The Court held that such agreement had to be tabled under section 231(2) since it required parliamentary approval to be made binding.

Court accepted the applicants' arguments that the foreign relations concerns did not stand in the way of the Court considering and ruling on the domestic lawfulness of the South Africa Minister's actions in tabling the Russian IGA,[22] and set aside the IGA.

24 Finally, in the first round of this litigation ("***Chang I***"),[23] the Full Court reviewed and set aside the decision of the Minister to extradite Mr Chang to Mozambique. The HSF argued that, taking into account South Africa's constitutional and international law obligations, it was unlawful, irrational and unconstitutional for the former Minister to take the decision to extradite Mr Chang to Mozambique.

25 On 1 November 2019, the Full Court handed down its judgment. It held that the former Minister did not have the power to extradite Mr Chang to Mozambique and held that "*it would make no sense to extradite a person to a place where he cannot be prosecuted*." The Court therefore set aside the Minister's decision and remitted it to the current Minister for redetermination.

Heightened duty regarding scourge of corruption

26 Moreover, the reason for or the subject matter of the extradition decision involves corruption, in terms of which South Africa has duties domestically and

---

22 *Ibid* paras [101]–[105].

23 *Chang v Minister of Justice and Correctional Services and Others; Forum de Monitoria do Orcamento v Chang and Others* (22157/2019; 24217/2019) [2019] ZAGPJHC 396; [2020] 1 All SA 747 (GJ); 2020 (2) SACR 70 (GJ) (1 November 2019).

internationally. There are particularised obligations for South Africa under the Prevention and Combating of Corrupt Activities Act, 2004 ("**PRECCA**").

27 The Preamble to PRECCA states that the Act seeks to provide for the strengthening of measures to prevent and combat corruption and corrupt activities and, specifically, to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities.

28 Section 35 of PRECCA provides that "*[e]ven if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged*". This jurisdiction applies, *inter alia*, to persons arrested in the territory of the Republic.

29 The Act thus seeks to place obligations on South Africa for the prosecution of corruption, even where the offence was committed outside the Republic. PRECCA recognises an international component to corruption and seeks to place greater duties on South Africa for its persecution. The importance of the prevention and combatting of corruption have been recognised in cases such as ***Glenister II***.[24]

[24] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011). See too *S v Shaik and Others* 2008 (5) SA 354 (CC) at para 72 where the Constitutional Court warned that corruption is "*antithetical to the founding values of our constitutional order*." Similarly, in *South African Association of Personal Injury Lawyers v Heath and* 2001 (1) SA 883 (CC) at para 4 the Constitutional Court held that— *"[c]orruption and maladministration are inconsistent with the rule of law and the fundamental values of our*

30 Sought Africa's international commitments when it comes to investigating and prosecuting corruption are recognised in a number of international instruments.

31 Important international instruments regarding the international crime of corruption include the following:

31.1 The UN Convention Against Corruption, to which South Africa is a party and which came into force in 2005. Under the UN Convention against Corruption, members are required to take steps to prevent corruption, criminalise corruption[25] and cooperate with other countries in the fight against corruption.[26] The Convention requires state parties to promote active participation of individuals and groups, including civil society and community-based organisations in the prevention of and fight against corruption.[27]

31.2 The AU Convention against Corruption was adopted in 2003 and came into force in 2005. South Africa ratified the Convention in 2004. The AU Convention imposes a number of positive provisions similar to the provisions in the UN Convention Against Corruption on its members. The AU Convention requires signatories to establish, maintain and strengthen

---

Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

[25] Articles 5 and 6 of the UN Convention against Corruption.

[26] Chapter IV deals with "International Cooperation". See in particular Article 43 and 44 (dealing with extradition).

[27] Article 13 of the UN Convention Against Corruption.

independent, national anti-corruption authorities or agencies to take effective steps to combat corruption.[28]

31.3 The OECD Anti-Bribery Convention. South Africa is a non-member country of the OECD, but has adopted the OECD Anti-Bribery Convention to which it became a party in 2007. The Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. Under the OECD Convention, parties are required to take measures to establish that it is a criminal offence under their own laws for any person to offer a foreign public official any pecuniary or other advantage in order to obtain an improper benefit in international business. Parties to the Convention are required to ensure that bribery of foreign public officials is punishable by effective, proportionate and dissuasive criminal sanctions.

31.4 The SADC Protocol Against Corruption (2001). The SADC Protocol against Corruption provides for the prevention, detection and punishment of corruption;[29] as well as for cooperation between states.[30] It covers corruption in both the public and private sectors. The Protocol recognises that demonstrable political will and leadership are

[28] Article 5.3 of the AU Convention.

[29] Article 2 of the SADC Protocol.

[30] Article 10 of the SADC Protocol; Article 9 deals with extradition.

essential in the fight against corruption. It affirms the need to garner public support for initiatives to combat corruption.[31]

32 Corruption is considered a transnational phenomenon requiring inter-state cooperation and effective eradication through concerted efforts of all actors in the community of nations and particularly those who have adopted (as South Africa has) the UN, AU, OECD and SADC conventions and protocols against corruption.

33 South Africa is thus part of a global effort to eradicate corruption and has bound itself internationally and domestically to taking effective steps to investigate and prosecute corruption wherever it occurs. The Constitutional Court in *Glenister II*[32] stated that South Africa's international obligations, and the provisions of the Constitution, give rise to clear constitutional obligations on the part of the state to create an independent corruption-busting agency to ensure that corruption is effectively and fully detected, investigated and prosecuted, and that those who are guilty of corruption do not slip through the law enforcement net. In the same way, the South African state and the Minister in this case is under a constitutional obligation to ensure that, in considering requests for extradition for crime of corruption, that he makes a decision that best ensures that corruption is effectively and fully investigated and prosecuted and that those responsible are brought to book. This is no less than what the Constitution requires of him.

[31] Preamble to the SADC Protocol.

[32] Paras [179]-[195].

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

35 In this context, there is an enhanced duty of the South African authorities to ensure that the scope for immunity is diminished and that no-one accused of serious acts of corruption falls between two stools from a jurisdictional perspective.

36 Of relevance in this regard is the SADC Protocol on Extradition ("the Protocol"). Article 4 (e) of the Protocol provides that extradition shall be refused

> *"if the person whose extradition is requested has, under the law of either State Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty;"*

37 This Court's judgment in ***Chang I*** emphasised this obligation. The Full Court held previous Minister's decision was set aside precisely because Mr Chang enjoyed immunity in Mozambique. The Full Court explained the *ultra vires* and irrationality of the decision as follows:

> *"As a starting point the former Minister did not have the power to extradite Mr Chang to Mozambique because this was prohibited by his immunity. Thus his decision was ultra vires. The Minister also did not take into account that Mr Chang had immunity because he did not know of it. It would furthermore be irrational for a person to be extradited so they could be prosecuted for their crimes if they were immune from*

prosecution for such crimes. In reality, there was no choice to make between the USA and Mozambique. The Minister did not have the option to extradite Mr Chang to Mozambique. He was faced with only one valid request - that of the USA."

38 South Africa's obligations extend beyond its boundaries and must, in its international relations, ensure that it does not act contrary to its duties to ensure effective investigation and prosecution of corruption – including when making decisions to extradite those persons charged with corruption. The obligation on South Africa to ensure that persons charged with corruption do not escape prosecution is heightened.

39 As this Court held in ***Chang I***:

"The underlying crimes of which Mr Chang is accused involve corruption. Corruption takes place with no regard to national boundaries. Thus the effective eradication of corruption requires concerted and coordinated efforts internationally. This need has brought about various international treaties against corruption of which South Africa is a signatory. South Africa is thus part of a global effort to eradicate corruption and has bound itself internationally and domestically to taking effective steps to investigate and prosecute corruption wherever it occurs. It acknowledges as part of this participation that corruption and organised crime undermines the rights enshrined in the Bill of Rights, endangers the stability and security of

society and jeopardises sustainable development and the Rule of Law."[33]

40 On application of the principles in ***Glenister II***, ***Law Society*** and ***Chang I*** to the present facts:

40.1 The Minister had a duty to honour its international obligations and act consistently with that commitment and that extends to ensuring effective investigation and prosecution of corruption as part of any decision to extradite;

40.2 Ensuring South Africa acts in accordance with its international commitments is an essential tool in ascertaining whether South Africa's constitutional obligations have been discharged and fundamental rights upheld;

40.3 Our court have held that ensuring effective investigation and prosecution of corruption is a constitutional duty;

40.4 Any exercise of power such as a decision to extradite must promote and seek to fulfil, rather than undermine, these duties. This must include that when any decision to extradite on corruption charges is made.

41 The approach to assessing official conduct on the international plane in terms of the Constitution was succinctly summed up in the ***SADC Tribunal*** matter[34] as

[33] *Chang I* at para 77.

follows: In interpreting the Bill of Rights, courts are required to consider international law[35] and our Constitution also insists that they not only give a reasonable interpretation to legislation but also that the interpretation accords with international law.[36] Unless otherwise inconsistent with our Constitution, customary, international law is law in this country.[37]

42 The Court went on to state that implicit in this position is that consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country. It is this framework that the Court found ineluctably ought to inform any approach to the assessment of official conduct in the international sphere. [38]

43 Referring to *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) ("***Fick***") and *Glenister II* the Court was of the view that a proper determination of the Constitutionality of the President's conduct required that several principles be taken into account.

43.1 *First*, the Bill of Rights is not only the cornerstone of our democracy, but also binds all arms of the State and applies to all law;

---

[34] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018)

[35] Section 39(1)(b) of the Constitution.

[36] Section 232 of the Constitution.

[37] Section 232 of the Constitution.

[38] *Law Society* para [5]; In addition, in *Glenister II* at para 97 the court in outlining these constitutional provisions, emphasised that our Constitution thus reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law.

43.2 *Second*, the State has a constitutional obligation to protect, respect, promote and fulfil the Bill of Rights;

43.3 *Third*, the State has a duty to honour its international obligations and act consistently with that commitment and that extends to not undermining or subverting the authority of the Tribunal;

43.4 *Fourth*, international law that is reconcilable with our Constitution is an essential tool in ascertaining whether our constitutional obligations have been discharged and fundamental rights upheld;

43.5 *Fifth*, the Court recognised access to the Tribunal as an important instrument for the reinforcement on the constitutional right to access to justice in South Africa;

43.6 *Sixth*, the exercise of power must promote and seek to fulfil, rather that undermine, the rights in the Bill of Rights.[39]

44 These principles are equally applicable to the Minister's conduct in this case due to the international nature of any decision to extradite. The Minister's conduct in the international sphere must thus be consistent with the Constitution.

---

[39] *Law Society* para [75]

C. DECISION FAILS TO ADVANCE THE RULE OF LAW: UNLAWFUL AND IRRATIONAL

45 The Minister appears to have accepted that he was obliged it take into account international law in making the decision,[40] and purports to have done so. The Minister's reasons for the decision also rely on the interests of the government of Mozambique in bringing to book Mr Chang and relies on Mozambique's commitment to corruption fighting. The Minister premises the decision on Mr Chane being prosecuted and facing justice.

46 However, simply stating that South Africa's international law obligations were considered, and that the end of rooting out corruption was sought to be achieved[41] is unavailing when the effect of the decision is to undermine those obligations and to achieve a contrary purpose, and where the record reveals that the impugned decision will undermine these very requirements.

47 Put differently, the Minister was not required merely to state that regard had been had to South Africa's international law obligations but in making the decision, the Minister was also required to ensure that the state's obligations under the Constitution to ensure effective prosecution of crimes such as corruption were complied with.

[40] HSF's explanatory affidavit, paragraph 18.2, 06-252; Record of Decision, paras 3-4, 09-367.
[41] Record of Decision, paras 9-10, Caselines ref 09-373.

Stated objective not achieved

48 A key consideration to whether the decision would achieve this purpose was whether Mr Chang would be prosecuted in Mozambique if he is extradited there. This is in turn dependent on whether Mr Chang would be immune from prosecution and whether or not Mr Chang would be subject to arrest in order to stand trial on being extradited to Mozambique.

49 The question of immunity, and whether there was a valid arrest warrant, and evidence that such warrant would be acted on to effect an arrest of Mr Chang on his arrival in Mozambique, is therefore critical.

50 In relation to immunity, the Memorandum of 27 July 2020 ("**July 2020 Memorandum**")[42] was firmly in favour of acceding to the US extradition request, over Mozambique's request, including on the basis of Mr Chang's immunity or potential immunity in Mozambique. This Memorandum was based on five legal opinions received by the Chief Directorate: International Legal Relations in the Department of Justice. These opinions have not been disclosed, but they are summarised in the Report. The consensus of the experts (including two South African counsel, and two Mozambiquan lawyers) is that Mr Chang still enjoys immunity in Mozambique. One of the opinions – received by South African

[42] July 2020 Memorandum, Caselines ref 06-206.

counsel – warns that should the Minister grant the request of Mozambique "*it is likely that his decision will be subject to review*".[43]

51 On the basis of these five legal opinions, the July 2020 Memorandum concludes that in all likelihood has immunity in Mozambique from criminal prosecution, and recommends that Mr Chang is extradited to the US, and not to Mozambique.

52 This recommendation was in fact <u>accepted and signed-off</u> by both the Deputy Minister of Justice and Constitutional Development and the Minister on around 9 October 2020.[44] The evidence before the Minister therefore indicated that the US request ought to be accepted and would more likely or certainly have achieved the stated purpose of the decision.

53 In the Minister's reasons of 30 August 2021, the Minister asserted that Mr Chang "*no longer has any immunity against prosecution (or arrest)*". But this is contradicted by the July 2020 Memorandum, supported by the five legal opinions. The reasons document of 30 August 2021 does not deal with the issue of immunity at a sufficient level to rebut the very real concerns around Mr Chang's immunity in Mozambique, or to explain what had changed between July 2020 and August 2021 which led the Minister to being satisfied on this score. There was, quite simply, insufficient evidence before the Minister in the record of decision on this issue for the Minister to be satisfied that the purpose of extradition – the prosecution of

[43] July 2020 Memorandum Caselines ref 06-229.
[44] July 2020 Memorandum, Caselines ref 06-240.

guilty persons – would be achieved through the extradition of Mr Chang to Mozambique. This renders the decision irrational.

54 In relation to the consideration as to whether Mr Chang would be arrested in Mozambique, the record and reasons confirms that there was no such evidence and the Minister did not expressly consider the question of Mr Chang's arrest. There is no evidence that the Minister was satisfied Mr Chang would be arrested on his arrival in Mozambique. Indeed, before this Court, the Minister adopts the stance that it does not matter whether Mr Chang is arrested in Mozambique.[45]

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

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

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

55.3 There was, at the time that the Minister's decision was taken, no valid arrest warrant for Mr Chang's arrest in Mozambique.[46]

[45] Minister's Answering Affidavit in Part B, para 43; Caselines ref 06-93.

[46] The Minister and the Mozambique Government rely on the "*International Warrant of Arrest*" dated 19 January 2019, but the Prosecutor has indicated that the 19 January 2019 warrant is no longer valid for failure to comply with certain timelines under international law. In addition, the warrant was issued while Mr Chang was a Member of Parliament and it is not clear whether Parliamentary immunity attaches to Mr Chang invalidating the warrant. The "*new warrant*" dated 14 February 2020 which appears are Caselines, 06-147, was not before the Minister and could not have formed a basis for the Minister's decision.

56 The Minister's failure to take these facts in account – because on his own evidence he did not consider it relevant – vitiates the impugned decision.

57 Finally, the reasons and record also confirm that the Minister did not consider the comparative position: i.e. whether South Africa's constitutional and international obligations would be <u>better</u> served by acceding to the US request, rather than the Mozambique request.

58 The decision therefore undermines the success of anti-corruption efforts in Southern Africa and would have an effect contrary to South Africa's constitutional and international law duties to fight corruption either for two reasons: firstly, the decision was unable to advance the objective of fighting corruption through ensuring Mr Chang stood to face a trial; and secondly, because there was another option which would better advance that option (extradition to United States).

59 This also renders the decision contrary to the stated reason for which the decision was taken. i.e. Chang's prosecution in Mozambique and therefore irrational. A rational decision at least requires that the decision is rationally related to the purpose for which the power was given and the decision was taken.[47]

D. THE *EX POST FACTO* REASONS FOR A DECISION

60 The reasons for the decision appear from the "document titled "Reasons for decision – Requests for Extradition of Mr Manuel Chang by the United States of

[47] *Pharmaceutical Manufacturers* at para 85.

America and the Republic of Mozambique", dated 31 August 2021, and delivered the day after the Record of Decision.[48]

61 The reasons were prepared after the institution of the legal proceedings and after the compilation of the Record of Decision,[49] rather than contemporaneously. The reasons appear to be retrofitted to address the FMO's case in this application. As the Supreme Court of Appeal stated, it is against the contemporaneous reasons and the contemporaneous reasons "alone" that the legality of state conduct is to be tested.[50]

62 The neatly polished reasons are unsupported by documents to confirm that the wide-ranging considerations in truth featured in the mind of the Minister at all when he took the decision. This is impermissible[51] and subverts the reason for producing a Record of Decision and reasons.

---

[48] HSF's explanatory affidavit, paragraph 27, 06-255.

[49] HSF's explanatory affidavit, paragraph 28, 06-255.

[50] *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (771/2016, 1170/2016) [2017] ZASCA 146; [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA); 2018 (1) SACR 123 (SCA) (13 October 2017), para [24].

[51] It is trite that the decision-maker's decision must be gleaned from the decision itself and cannot ex post facto be motivated. See *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 27; *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC) at para 39. See also *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others, In Re: Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others* [2014] 3 All SA 171 (GJ) (31 March 2014).

E. REASONS IGNORE JULY MEMORANDUM

63 There is a further problem with the Minister's stated reasons: they entirely ignore the July 2020 Memorandum and/or departed from the recommendation without any reason.[52]

64 The duty to explain the departure is amplified because the Minister had signed the recommendation already (and therefore ostensibly already accepted and approved it).

65 This is a further ground for unlawfulness of the decision.

65.1 Either the Minister impermissibly ignored or overlooked or departed from the recommendation for no reason, itself renders the entire decision irrational;[53] or

65.2 The Minister sought to reverse his earlier approval of the recommended decision, which also is unlawful.[54]

F. CONCLUSION

66 The HSF submits that the Minister had obligations under the Constitution to ensure the effective arrest and prosecution of Mr Chang for corruption. The Minister was

[52] HSF's explanatory affidavit, paragraph 32, 06-256.

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

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

required to take necessary steps to ensure that there would be a prosecution and this included a duty to satisfy himself that Mr Chang would be arrested on his arrival in Mozambique, and would not be immune from prosecution.

67 The decision to extradite Mr Change to Mozambique was in the circumstances unlawful, irrational and unconstitutional.

SARAH PUDIFIN-JONES

TONI PALMER

Chambers, Durban

15 September 2021