IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(BRAAMFONTEIN)

CONSTITUTIONAL COURT CASE NO:

SCA CASE NO: 866/2022

GHC-JHB COURT CASE NO: 40441/2021

In the matter between:

REPUBLIC OF MOZAMBIQUE	Applicant
and	
FORUM DE MONITORIA DO ORCAMENTO	First Respondent
MANUEL CHANG	Second Respondent
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	Third Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Fourth Respondent
DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
HELEN SUZMAN FOUNDATION	*Amicus Curiae*

INDEX TO THE APPLICATION FOR LEAVE TO APPEAL

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NOTICE OF MOTION (APPLICATION FOR LEAVE TO APPEAL)

BE PLEASED TO TAKE NOTICE THAT the Applicant hereby makes application to the above Honourable court for an order in the following terms on a date to be determined by the Registrar of the above Honourable Court.

1. That the Applicant be granted leave to appeal to the Constitutional Court against the judgment and order handed down by the Gauteng Local Division, Johannesburg under Case No. 40441/2021, per the Honourable Madam Justice Victor, on 10 November 2021.

2. That the applicant is granted condonation for the late filing of the application for leave to appeal.

3. That the costs of this application be costs in the appeal.

4. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the accompanying founding affidavit of **PRITZMAN BUSANI MABUNDA,** together with the annexures thereto, will be used in support of this Application.

BE PLEASED TO TAKE NOTICE THAT the Applicant has appointed the offices of PHRITZMAN **BUSANI MABUNDA INCORPORATED ATTORNEYS**, at which notices and services of all process in these proceedings will be accepted.

TAKE FURTHER NOTICE that should Respondents, intend opposing this application, they are required to lodge their affidavit(s) in support of such opposition, after prior service upon the Applicant, with the Registrar of the Constitutional Court with 10 (ten) days after service of this Application upon them.

BE PLEASED TO TAKE FURTHER NOTICE that the Respondents are required to appoint an address at which they will accept service of all documents in these proceedings.

DATED AND **SIGNED** AT **BEDFORDVIEW** ON THIS 03RD DAY OF **FEBRUARY 2023**.

Mabunda Incorporated Attorneys
Attorneys for the Applicant
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Ref: CIV/19/985/PB Mabunda

TO:

THE REGISTRAR OF THE AVOVE HONOURABLE COURT

AND TO:

AN LEVITT ATTORNEYS
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AND TO:

KRAUSE ATTORNEYS INC
2nd Respondent's Attorneys
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Ref: Mr CF Cross/Chang/Urgent
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AND TO:

State Attorney, Johannesburg
Attorneys for 3rd, 4th, 5th & 6th Respondents
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AND TO:

WEBBER WENTZEL

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(BRAAMFONTEIN)

CONSTITUTIONAL COURT CASE NO:

SCA CASE NO:866/2022

GHC-JHB COURT CASE NO:40441/2021

In the matter between:

REPUBLIC OF MOZAMBIQUE	Applicant
and	
FORUM DE MONITORIA DO ORCAMENTO	First Respondent
MANUEL CHANG	Second Respondent
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	Third Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Fourth Respondent
DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent
HELEN SUZMAN FOUNDATION	*Amicus Curiae*

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APPLICANT'S FOUNDING AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL TO THE CONSTITUTIONAL COURT

I, the undersigned,

PRITZMAN BUSANI MABUNDA,

do hereby make oath and state that:

1. I am a duly admitted attorney of the High Court, and as such practicing as such, being the Attorney of Record for the Republic of Mozambique ("the **Applicant**").

   1.1. I am duly authorised by the Applicant to depose to this affidavit and to institute this application for leave to appeal on behalf of the Republic of Mozambique ("the **Applicant**") to this Honourable Court, the Constitutional Court of South Africa.

   1.2. The facts deposed to herein fall, save where otherwise indicated, within my personal knowledge, and are both true and correct.

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1.3. Where I make legal submissions, I do so on the basis of the advice from the appointed legal representatives of the applicant.

2. In this affidavit, I deal with the following issues:

2.1. Purpose of the application

2.2. The parties;

2.3. Regulatory scheme;

2.4. Succinct constitutional issues;

2.5. Summary of grounds of appeal;

2.6. Background facts;

2.7. Why it is in the interest of justice to grant leave to appeal;

2.8. Condonation; and

2.9. Conclusion.

PURPOSE OF THE APPLICATION

3. The purpose of this application is to seek leave from the above Honourable Court to appeal against the judgment and order of the Gauteng Local Division of the High Court, Johannesburg the Honourable Madam Justice M Victor of 10 November 2021.

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4. Secondly the applicant also seeks condonation for the late filing of this application. The application is being filed outside the prescribed time limit in Rule 19 of the Constitutional Court Rules; it is out time by five days.

5. It is also the purpose of this application to ensure that the Republic of South Africa, being part of the Southern African Development Community and a country signatory to the SADC Extradition Protocol, complies with the extradition requests made by other SADC countries that comply with the Extradition Protocol.

THE PARTIES

6. The **Applicant** is the **REPUBLIC OF MOZAMBIQUE**, a sovereign state and a member of the United Nations (UN), African Union (**AU**), South African Development Community (**SADC**) and other international bodies and organisations. The Applicant has appointed the address of its Attorneys of record, which appears at the foot of the Notice of Motion, for purposes of service and all other process in this Application.

7. The **First Respondent** is **FORUM DE MONITORIA DO ORCAMENTO ("FMO")**, a civil society organisation based in Mozambique. The First Respondent has appointed the address of its attorneys, which appears in the Notice of Motion as the address at which it will accept service and all other process in this Application.

cc P.R.M

8. The **Second Respondent** is **MANUEL CHANG ("Chang")**, the former Finance Minister of the Republic of Mozambique, who is currently incarcerated in a South African prison, awaiting extradition in terms of the Extradition Act, Act, 67 of 1962. Chang has appointed Krause Inc, as his attorneys, with its email address at stiaan@krauseinc.co.za, for accepting service and all other process in this Application.

9. The **Third Respondent** is **THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES OF THE REPUBLIC OF SOUTH AFRICA**, who is represented by the Office of the State Attorney, Johannesburg. Service of the application and all other process on the Third Respondent will be done at the Offices of the State Attorney, Johannesburg.

10. The **Fourth Respondent** is the **DIRECTOR OF PUBLIC PROSECUTION, GAUTENG LOCAL DIVISION, JOHANNESBURG**. Service of the application and all other process will similarly be done at the Offices of the State Attorney, Johannesburg.

11. The **Fifth Respondent** is the **DIRECTOR GENERAL OF DEPARTMENT OF HOME AFFAIRS**. Service of the application and all other process will be done at the Offices of the State Attorney.

12. The **Sixth Respondent** is the **MINISTER OF HOME AFFAIRS**. Service of the application and all other process with be done at the Offices of the State Attorney.

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13. The **Seventh Party (*Amicus Curiae*)** is the **HELEN SUZMAN FOUNDATION**, which has appointed the address of its attorneys appearing on the Notice of Motion for purposes of service of the application and all other process.

14. Only the Applicant, The Minister of Justice and Correctional Services, FMO and the Helen Suzman Foundation ("**SCF**") participated and made submissions in the High Court. The other parties did not play a part or file any process. However, in respect of the Minister of Justice, he has intimated that he will abide by the decision of the court or of any other court of appeal.

THE REGULATORY SCHEME

15. I am advised that the application implicates the following the regulatory scheme:

15.1. Extradition Act, 67 of 1962;

15.2. Republic of South Africa Constitution Act, 108 of 1996 as amended;

15.3. Southern African Development Community Extradition Protocol,

15.4. USA and Republic South Africa Extradition and Mutual Legal Assistance Treaty.

15.5. Southern African Development Community Protocol on Corruption; and

15.6. Republic of Mozambique Constitution.

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SUCCINCT CONSITITUTIONAL ISSUES

16. The application for leave to appeal raises significant constitutional issues regarding:

16.1. The issue of state sovereignty and comity between nations. With the doctrine of state sovereignty, a state exercises authority over all persons and things within their territorial jurisdiction.

16.2. A sovereign nation with bilateral relations with another is entitled to the doctrine of comity and deference to its internal constitutional and judicial processes in matters of mutual co-operation and interest between two sovereign nations.

16.2.1. With the application for leave to appeal, the applicant seeks the reversal of the judgment and order of the High Court and an order that Mr Chang should be extradited to the Republic of Mozambique where he will be charged in a criminal court.

16.2.2. The applicant is aggrieved by the judgment and order of the High Court, which undermines the sovereignty, efficacy and effectiveness of its legal system to comply with international instruments to fight corruption and other crimes within its borders.

16.2.3. There were aspersions cast against the constitutional and judicial order of the Republic of Mozambique, which is a sovereign state

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with a legitimate Constitution and government recognised by other nations of the world.

16.2.4. The Republic of Mozambique has previously demonstrated its abilities to effectively implement its laws, administer justice without fear, favour or prejudice.

16.2.5. The Republic of Mozambique seeks to vindicate its sovereignty, respect for its constitutional order and judicial administration. The unfounded and gratuitous criticism and undermining of its criminal justice processes cannot be allowed to stand.

16.3. Implementation of bilateral treaties such as the Extradition Treaty between the USA and the Republic of South Africa on the one hand, and the regional treaty of the Southern African Development Community (SADC) Extradition Protocol; the SADC Corruption Protocol as well as the UN Convention Against Corruption.

16.4. The application of the principle of legality and rationality test in reviewing executive actions in the application of the Extradition Act in circumstances where the executing authority is faced with competing extradition applications.

16.5. The applicant also seeks clarification on the locus standi of a non-governmental organisation , the first respondent herein, that intervenes in the implementation of bilateral/regional treaty between two sovereign

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states by approaching the judiciary of a requested state in seeking to nullify the requesting state's extradition application.

SUMMARY OF GROUNDS OF APPEAL

17. On 10 November 2021, the Gauteng High Court per the Honourable Madam Justice Victor delivered a judgment in which it reviewed and set aside the Minister's decision of 17 August 2021 to surrender Mr Chang to the Republic of Mozambique.

17.1. I must emphasise that there was only one decision that the Minister made on 17 August 2021, that was the subject of the review application under case number **40441/2021**.

18. Section 11(1) of the Extradition Act provides as follows:

" The Minister may-

(a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or

(b) order that a person shall not be surrendered-

(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;

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(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;

(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith…"

19. Although the High Court judgment traversed a myriad of issues in concluding that the Minister's decision failed the rationality test, it is clear that the learned judge pivoted to the issue of the existence of immunity that Mr Chang allegedly enjoyed that would shield him from prosecution.

20. The court below erred in **paragraph 95** of its judgment, by saying that "***In this matter I have all the relevant information before me. It does not need repeating. The change in the Minister's decision based on the information before him should have steered him towards extraditing Mr Chang to the USA. Instead it did not.*** (own emphasis)

He has unequivocally showed his hand as to his intention to accept the position of the Government of Mozambique irrespective of all the other strong indicators to the contrary. This gives rise to unique and exceptional circumstances where this Court is in as good a position to make the decision." I will elaborate on this later hereunder.

21. The criticism of the Minister's decision in **paragraph 78** of the judgment has absolutely nothing to do with the rationality principle but the personal preferences

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of the court below to the choice that the Minister made on the same set of facts. Such an approach of judicial overreach cannot be sustained.

22. It is the applicant's contention that the court below erred and fundamentally misdirected itself in finding that:

22.1. There was uncertainty as to whether Mr Chang still enjoyed immunity from prosecution or not;

22.2. The Minister tried to justify his impugned decision with post hoc reasons.

23. The Republic of Mozambique, a sovereign state, submitted a legitimate, lawful application for extradition that complied with the Extradition Act 37 of 1967 and the relevant provisions of the SADC Extradition Protocol.

23.1. The learned magistrate Mr W J J Schutte of the Kempton Park Magistrate Court, Gauteng correctly granted the extradition request for the surrender of Mr Chang to the Republic of Mozambique.

23.2. The Minister made a decision to surrender Mr Chang to the Republic of Mozambique in appreciation of the doctrine of comity, recognition of the Republic of South Africa sovereign obligations under the SADC Extradition Protocol

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BACKGROUND FACTS

24. On 08 April 2019, the Kempton Park Magistrate Mr W J J Schutte, after considering two competing applications for extradition of or the surrender of Mr Emanuel Chang by the United States of America (USA) and the Republic of Mozambique ordered that Chang was extraditable to both the USA and the Republic of Mozambique. I annex hereto copies of the magistrate court orders marked **Annexure PBM1A and PBM1B**.

25. On 21 May 2019, Minister Michael Masutha decided that Mr Chang should be surrendered to the Republic of Mozambique. The Minister's decision was communicated to the Republic of Mozambique to make the necessary arrangements for the surrender of Mr Chang.

26. There was a change of guard in the Department of Justice and Constitutional Development and before the Minister's decision could be implemented, a new Minister, Mr R Lamola, MP, was appointed. It was the change of guard that prompted Mr Chang to make the application to compel the new Minister to implement the decision of the former Minister to surrender him to the Republic of Mozambique.

    26.1. The new Minister also sought an order to review and set aside his predecessor's decision on the grounds that it was unlawful. Further that the court should remit the matter to the Minister to make a fresh decision.

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27. On 01 November 2019, the full court judgment of the Gauteng Local Division of the High Court handed down judgment, that is now labelled the Chang 1 judgment. I annex hereto copy of the judgment marked **Annexure PBM2**.

27.1. The judgment in Chang 1 set aside the decision of the former Minister to surrender Mr Chang to the Republic of Mozambique and refusal of the USA extradition request and remitted the matter to the new Minister for reconsideration.

27.2. The court also upheld the extradition enquiry and outcome of the Kempton Park Magistrate Mr W J J Schutte, finding that it was in accordance with the law.

27.3. The new Minister was granted the opportunity to consider the application afresh and to also take into account any new issues and changed circumstances.

28. In the intervening period, the new Minister invited interested parties to submit representations and opinions on the application for extradition of Mr Chang. Interested parties, including the applicant, obliged and submitted their representations to the Minister. The representations of interested parties form part of the record that the Minister furnished to the court below in terms of Uniform Rule 53.

29. On or about 14 May 2021, realising that the Minister was not making a decision after receipt of representations from interested parties, the applicant launched an

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application, under case number 21/23797, to compel the Minister to make the decision regarding the extradition of Mr Chang. Neither Minister nor any respondent notice to oppose nor an answering affidavit in the said application.

30. On 17 August 2021, the new Minister reconsidered the application and decided that Mr Chang should be surrendered to the Republic of Mozambique. On 24 August 2021, after receipt of the Minister's decision, the applicant filed its notice of withdrawal of the application to compel.

31. The decision of the Minister precipitated a further application, by the first respondent herein, for the review and setting aside of the decision, mainly because the Minister did not surrender Mr Chang to the USA. This led to the court judgment that is now labelled Chang 2 judgment, of the Honourable Madam Justice Victor, handed down on 10 November 2022.

31.1. The outcome of judgment in Chang 2, was the setting aside of the Minister's decision to surrender Mr Chang to the Republic of Mozambique. The court also substituted the executive decision with its own by ordering the surrender of Mr Chang to the USA. It is this judgment and order that is the subject matter of the current application for leave to appeal. I annex hereto copy of the judgment marked **Annexure PBM3.**

32. On or about 15 December 2021, the Applicant filed its application for leave to appeal in the Constitutional Court against the judgment of the Honourable Madam Justice Victor handed down on 10 November 2021.

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33. On or about 22 June 2022, the Constitutional Court refused to grant the applicant leave to appeal directly to the Constitutional Court, stating that it was not in the interest of justice to grant such leave at that stage. I annex hereto copy of the order marked **Annexure PBM4**.

34. On or about 27 July 2022, the High Court handed down judgment in which it refused to grant the applicant leave to appeal against its judgment and order of 10 November 2021. I annex hereto copy of the judgment marked **Annexure PBM5.**

35. On or about 23 August 2022, the applicant filed an application for leave to appeal in the Supreme Court of Appeal (SCA), against the lower court's refusal to grant leave to appeal against its judgment of 10 November 2021. On 20 December 2022, the applicant received an order from the SCA refusing to grant leave to appeal. The decision of the SCA appears to have been made on 08 December 2022; however, the order is stamped 20 December 2022. I annex copy of the order marked **Annexure PBM6**.

36. It is as a result of the last-mentioned order of the SCA that the applicant is now approaching this Honourable Court with this application for leave to appeal.

37. It important to demystify certain findings and issues dealt with in the judgment of the court below insofar as the rationality of Minister's decision is concerned.

37.1. The recommendation demonstrates that the Minister considered the exact same issues that he is criticised for having ignored. The only difference is that the Minister's consideration resulted in the surrender of Mr Chang to

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the Republic of Mozambique and the court chose that Mr Chang should be surrendered to the USA.

37.2. A further disconcerting aspect is that the court below discussed the contentious issue of Mr Chang's immunity without reference to the specific provisions of the Mozambican Constitution. The criticism against the Minister for ignoring the recommendations made by the state law advisor is misplaced. An extradition decision is an executive decision that takes into account comity, political, diplomatic, economic cooperation, mutual interests and treaties that exist between the two neighbouring states. The state law advisors can only advise Minister on the legal considerations. The Minister can either accept or reject a recommendation. The failure of the Minister to heed the recommendations of state law advisor in a matter that requires executive action cannot be assailed as irrational.

37.3. Indeed, the Minister chose to surrender Mr Chang to the Republic of Mozambique. The USA has not challenged the decision of the Minister, understanding that it was a decision that the executive authority of a requested state was entitled to make.

37.4. In any event, **Article 15 of the USA-RSA Extradition Treaty** provides that "*1. Where requests are received from two or more States for the extradition of the same person, either for the same offences or different offences, the executive authority of the Requested State shall determine to which of those States, if any, the person is to be extradited and shall notify the Requesting State of its decision.*" Article 15.2 proceeds to list the factors

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that the executive authority of the Requested State can take into account in deciding on competing applications.

37.5. The **SADC Protocol on Extradition** has a similar provision in **Article 11** that reads: "*Where requests are received from two or more States for extradition of the same person either for the same offence or different offences, the Requested State shall determine to which of those States the person is to be extradited and shall notify those States of the decision.*" **Article 11.2** provides for the factors that the executive authority of the Requested State may consider in deciding on competing applications.

37.6. After making the decision to extradite Mr Chang to the Republic of Mozambique, the Minister informed both countries respectively, per letters dated 20 August 2021.

WHY IT IS IN THE INTEREST OF JUSTICE TO GRANT LEAVE TO APPEAL

38. It is important that the matter of continued incarceration of Chang pending his extradition to either the United States of America or Mozambique be resolved as a matter of priority by the apex court. In addition:

38.1. The issue of immunity from prosecution under the SADC protocol on extradition raises an important arguable point of law.

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38.2. The concurrent extradition requested by two competing States, both of which were found to be lawful by a Magistrate, which of the two takes precedence.

39. At the heart of the judgment that set aside the Minister's decision to surrender Mr Chang to the Republic of Mozambique, was the question whether Mr Chang was immune from prosecution or not.

40. The following are the relevant provisions of the Republic of Mozambique Constitution.

"Article 173
Immunities

1. *No deputy may be arrested or detained except in the event of flagrante delicto, or put on trial without the consent of the Assembly of the Republic.*

2. *If criminal proceedings are pending in which a deputy is the accused, the deputy shall be heard by a judge of appeal.*

3. *Deputies shall enjoy a special forum and shall be tried by the Supreme Court in terms of the law.*

Article 174
Non-Liability

1. *The deputies of the Assembly of the Republic may not be sued, detained or put on trial for the opinions voiced or votes cast in exercising their functions as deputies.*

2. *The above does not apply to civil or criminal liability for libel, defamation or slander."* (own emphasis)

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Article 211

Immunities

1. No member of Government may be arrested or detained without the permission of the President of the Republic, unless apprehended in the act of committing a felonious crime that carries a sentence of long-term imprisonment.

2. In the event that criminal proceedings are brought against a member of Government, and the member has been definitively charged, the President of the Republic shall decide whether or not the member should be suspended for the purposes of the proceedings, and a decision to suspend shall be mandatory when the crime in question is of the type referred to in the preceding paragraph.

41. If anything, either read individually or together, the constitutional immunities provided in sections 173, 174 and 211 of the Republic of Mozambique Constitution are clearly not applicable to Mr Chang.

41.1. The immunity in section 173 is a procedural one for the Deputies in the National Assembly to protect them against embarrassment and institution of spurious prosecutions and arrests. The section clearly provides for a procedure in the event that criminal proceedings are pending against any deputy.

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41.2. Section 174 immunity is a parliamentary privilege that is similar to the one enjoyed by members of parliament in the Republic of South Africa. No member of parliament can be detained, sued or prosecuted for something that they did or voted upon in parliament in the course and scope of their representative capacities. This does not cover liability for criminal deeds.

41.3. The immunity in section 211 is a temporal one that applies to serving members of the National Government. Again, this is not immunity from criminal liability but more of status preservation and to give the president an opportunity to deal with the member of government concerned, hence the opportunity to suspend such member.

41.4. There is nothing in the Constitution that can be interpreted as granting Mr Chang a shield against criminal liability.

42. The foregoing is the scope and extent of immunity that is at the centre of the controversy created by the judgment of the court below. It is this immunity that appeared to have reigned supreme in the minds of the judges of both the full court and of Madam Justice Victor.

43. Mr Chang never had and does not have immunity from criminal liability, whether as a current or former member of the Mozambican Assembly. To hold otherwise, let alone debate, will contradict the text of the Republic of Mozambique Constitution.

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44. Clearly, the immunity in section 173 of the Republic of Mozambique Constitution is a procedural one. It is indeed akin to the South African requirement that a judge may not be sued without the approval of the head of the court. Regard must be had to the fact that the Republic of Mozambique is a Portuguese speaking country and that the concept of immunity in the English should be considered with caution and not be accorded a narrow interpretation that the English language does. The Portuguese word *"imunidade"* means both immunity and privilege.

45. The learned judge erred and fundamentally misdirected herself in finding that the Minister's decision was irrational:

45.1. For the Minister's failure to consider the immunity that Mr Chang enjoyed as a Deputy in the Mozambican Assembly;

45.2. For failure to consider that other relevant factors like the Republic of South Africa's international commitment to fighting corruption. The judgment appears to be in direct alignment with the first respondent's submissions to the exclusion of all else and as if there were no other incontrovertible material and cogent submission before the learned judge.

46. In **paragraph 69** of the judgment, the court below stated that "*The Minister has failed to give reasons for why the warrant is valid in the light of the inconsistencies. The Government of Mozambique issued another warrant dated 14 February 2020, by the Maputo City Judicial Court. This warrant was not before the Minister when he changed his decision.*"

46.1. The conclusion that that the warrant issued on 14 January 2020 shortly after the full court judgment of December 2019, was not before the Minister when he made his decision is untenable.

46.2. The finding that the new warrant remained unexplained is belied by the fact that Minister invited interested parties to make representations and was free to consider the application for extradition afresh as if the 2019 application did not exist. So the parties, including the Republic of Mozambique were free to present new and additional information and material for the Minister's consideration.

46.3. The adverse findings of the court below against the Minister decision and the Republic of Mozambique can only be explained as unjustified judicial bias.

47. I have already quoted **paragraph 95** of the judgment in paragraph 20 of this affidavit above. In dealing with what the court stated in the said paragraph I submit the following:

47.1. To the contrary, it is the court below that showed its hand and personal choice of the destination country without all the relevant facts.

47.2. A decision to extradite an individual to a requesting state is not mechanical that implicates legal considerations alone but polycentric in nature.

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47.3. It was certainly incorrect that the court below had all the relevant information before it. It certainly had no information of a political and diplomatic nature. The court did not have information of mutual cooperation and/or economic considerations and/or political dynamism and/or the diplomatic fallout between two neighbouring nations that might occur.

47.4. The executive part of the decision could not be faulted for failure to heed the recommendations of departmental functionaries. In any event, the recommendations of the department's functionaries also navigated conflicting views that were encapsulated in the 27 July 2020 memorandum.

47.5. The reading of the judgment of the court below gives the distinct impression that the Minister was duty bound to implement the position and recommendation made by the state law advisors. The recommendations of the state law advisors remain recommendations and personal choices of the authors of same. They are in the same category as opinions.

47.6. The Minister has not been criticised for inviting interested parties to make representations to him and for soliciting opinions from experts. The Minister is distinctly being criticised for not agreeing with some of the representations and opinions submitted to him. How that falls foul of the rationality test is inexplicable.

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47.7. If these were not executive matters, the law could very well have vested the making of the extradition decisions on the courts and/or National Director of Public Prosecutions.

48. In criticising the Minister's decision, the learned judge demonstrated misgivings about the criminal justice system of the Republic of Mozambique. This is despite the fact that both the Republics of Mozambique and South Africa are signatories to the SADC Extradition Protocol.

48.1. In **paragraph 75** of the judgment the learned judge stated that "*The ease with which new warrants are issued by the Government of Mozambique, also means that the alleged crimes with which Mr Chang can be charged can be changed to much lesser crimes.*" This is certainly judicial affront of the judicial processes of another sovereign state that cannot be justified.

48.2. In **paragraph 98** of the judgment, the court below stated that "*In considering the question of extradition, I conclude that the best approach is to ensure measures that Mr Chang is brought to justice and held accountable. Extradition to the USA poses no risks to all parties in this saga for reasons referred to.*"

48.2.1. This conclusion makes the Republic of Mozambique's national interest subservient to the dictates of the USA by way of the court order of the Republic of South Africa.

48.2.2. It is incorrect that the order that made by the court below posed no risk to all the parties. Mr Chang is a Mozambican citizen who was entrusted with serious responsibilities of trust by virtue of being the Minister of Finance.

48.2.3. The Republic of Mozambique has the superseding interest to ensure that Mr Chang is held accountable for his crimes. The people of Mozambique continue to feel the consequences of the crimes at issue here insofar as the government remains obligated to repay the monies lost in fraudulent and corrupt activities.

48.2.4. It is another attack on the credibility of the constitutional and judicial system of the Republic of Mozambique to conclude that Mr Chang can only be brought to justice and held accountable in the USA, a country that may not even have jurisdiction to put Mr Chang to trial.

49. The learned judge also zoomed into those materials that were not favourable to the decision of the Minister from the very same record of the decision that the Minister furnished, to nit-pick the Minister's decision.

49.1. It is inconceivable how a court could legitimately blame a decision-maker for failing to consider materials that were before him, which are adequately explained in the record of the decision. The learned judge's finding on irrationality of the Minister's decision in her judgment is unsustainable and appealable.

CK P.B.M

50. The learned judge's finding that Mr Chang enjoyed immunity from prosecution was both curious and legally unsustainable insofar as it was contradicted by the incontrovertible evidence in the record before court.

50.1. The court repeatedly drew from the full court judgment of December 2019 despite the fact that the facts that served before the new Minister were completely different from those the former Minister considered. It was as if the application was a repeat of the 2019 application when in truth the court was dealing with changed circumstances and a completely new application.

50.2. When Mr Chang was arrested in December 2018, he was still a Deputy in the Assembly of the Republic of Mozambique. That membership entitled Mr Chang to procedural immunity in terms of section 173 of the Republic Mozambique Constitution, which, in any event, was conditional.

50.3. It was common cause that the procedural immunity that Mr Chang enjoyed vested in him by virtue of being a Deputy. Mr Chang lost the procedural immunity after the October 2019 elections insofar as he neither participated in the election nor was he re-elected. In any event Mr Chang resigned from his position of being Deputy in the Mozambican Assembly in May 2019.

50.4. At the time of the new Minister's decision, there was neither uncertainty nor any question about the immunity of Mr Chang. The Republic of Mozambique issued a warrant of arrest for Mr Chang and indictment detailing the charges that Mr Chang would face in the criminal trial.

CK PBM

50.4.1. The Mozambican Supreme Court Judge authorised the serving of the indictment on Mr Chang.

50.5. It was not open to the learned judge to flag the immunity of Mr Chang as a ground upon which to nullify the Minister's decision. There was no immunity from criminal liability of Mr Chang upon which the learned judge could find that the Minister's decision was irrational.

50.6. The judgment comes across as a political election of the destination country of surrender of Mr Chang that the learned judge inexcusably decided to make for the executive. To that extent, the judgment is an impermissible judicial overreach.

50.7. In **paragraph 63** of the judgment, the it is stated that "*At this stage there is no written progress report of the current prosecutions and conviction of persons politically connected with him in Mozambique.*" This has the effect of placing an invalid and inconceivable obligation upon the Minister for things that were beyond his control. The pending prosecutions were only completed recently, long after the Minister's decision. The accused in the matter were convicted and sentenced to long terms of imprisonment.

50.8. Whilst the court took a dim view of the Mozambican legal system, it remained silent on the unchallenged misconduct of the United States of

CK P.B.M

America and its less than open dealings with the Mozambican government regarding the investigation of Mr Chang's offences.

50.9. In ordering the surrender of Mr Chang to the USA, the court curiously ignored the unchallenged evidence that the USA:

50.9.1. Tried to browbeat the Mozambican government to withdraw its extradition application for Mr Chang with the promise to furnish the information that the USA withheld from the Mozambican government;

50.9.2. USA was clandestinely using the information furnished by the Mozambican government to conduct an investigation and to indict Mr Chang in the USA without informing the Mozambican government.

50.9.3. The USA never disclosed to the Kempton Court magistrate court the evidence and strength of the case that it had against Mr Chang in the light of the fact that the USA investigation was premised on the information furnished by the Mozambican government. The USA attitude was that it was not in the business of sharing evidence with a defendant.

50.9.4. A jury trial of a Mr Jean Boustani, conducted in the Eastern District of New York on similar charges, resulted in acquittal on the basis of a lack of jurisdiction.

50.9.5. The foregoing demonstrated that in comparison with the Mozambican government efforts and extradition request, the USA request was the one that had to be preferred above the Republic of Mozambique's request. In essence, the court adopted the attitude of making a legitimate African country's extradition request founded on the sovereign commitment of mutual cooperation, subservient to a request of a western government because the court did not trust the constitutional and judicial order of the African state. Such a notion and approach constitute unacceptable and dangerous judicial overreach in the administration of justice that undermines the sovereign commitment of the South African government's international treaty commitments and execution. There is a reason why the Extradition Act does not stipulate that the courts have make the election of the country to which a person subject of an extradition request should be surrendered. Political and diplomatic considerations may well play a role in making such a decision.

51. The learned judge criticised the Minister for having changed the decision to surrender Mr Chang to the USA, made in October 2020, which was signed by the Deputy Minister on 09 October 2020.

51.1. The alleged decision was an internal memorandum of recommendation compiled by the state law advisors for the consideration of the Minister premised on the compendium of representations and opinions solicited by

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the Minister from interested parties. The so-called decision was never communicated to anyone.

51.2. It was respectfully inappropriate for the learned judge to elevate an internal document of the department to the status of a decision in terms of section 11 of the Extradition Act .

51.3. The decision that was subject of the review application before court was the one made by the Minister on 17 August 2021, and nothing more.

51.4. It is clear from the judgment that the learned judge selected the portions of the internal memorandum which appeared to be inimical to the decision of the Minister, as the basis for finding that the minister's decision was not rationally connected to the materials that were before him. The truth of the matter is that the Minister considered the exact same issues that he is accused of not taking into account.

52. On the conspectus of the information which the minister disclosed in the record of his decision, the Minister's decision cannot be faulted. I annex hereto copy of the Minister's reasons for the decision marked **Annexure PBM7**.

52.1. It is clear that the Minister's decision took into account factors beyond the legal considerations and requirements of an extradition application.

CK PBM

52.2. There are significant political, social, and territorial integrity of the requesting state that the Minister considered when he decided to surrender Mr Chang to the Republic of Mozambique.

52.3. It is apposite to point out that the SADC Extradition Protocol stipulates that in the event of competing applications, the executing authority of the requested state may, *inter alia*, consider the nationality of the person who is the subject of the application for extradition. In this case, Mr Chang is a Mozambican citizen.

52.4. Lastly, the record of the reasons for the decision belies the assertion of the court below, in paragraph 95 of the judgment, that it all the relevant information to substitute the Minister's decision. It is obvious that court did not have political, diplomatic and social aspects of the Minister's decision.

CONDONATION

53. This is an application for leave to appeal is already out of time by at least five days. Rule 19(2) of the Constitutional Court Rules provides that an application for leave to appeal this should be filed within 15 days of the order against which the appeal is sought to be brought.

54. The order SCA refusing the application for leave to appeal was made on 08 December 2022. However the applicant only became aware of the order stamped 20 December 2022, on 08 January 2023, upon my return from holiday.

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55. The applicant does not downplay compliance with the rules for the filing of process; however, the applicant submits that the extent of the delay is not inordinate but only five days.

56. After receipt of the SCA court order, I furnished same to the applicant's functionaries, which triggered consultations within the Republic of Mozambique government. It was only on 08 January 2023, that I received instructions to brief counsel to prepare an application for leave to appeal to this Honourable Court. Majority of the legal practitioners were on holiday until 16 January 2023, consistent with the *dies non*.

57. Upon return, unfortunately, the counsel who were originally briefed to represent the applicant were not immediately available to assist with the application. I had to find a new set of counsel who had to familiarise themselves with the history of the proceedings and the judgments at issue herein.

58. It was only on 29 January 2023 that I was able to brief counsel to prepare the application. There are over 3500 pages involved in this matter and the new set of counsel had to race through this mountain of documents to churn out the affidavit and notice of motion in this regard. Counsel endeavoured to burn the midnight oil to ensure that the matter is not unnecessarily delayed any further. As already stated, the delay has been kept to the barest minimum number of days.

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59. There was clearly never any disregard for the rules of the above Honourable Court and a genuine effort to file the Application for leave to appeal timeously.

60. Insofar as prejudice to the respondents is concerned, there can be no doubt that matter is of extreme importance to the applicant as already demonstrated elsewhere above.

61. Mr Chang has been in custody ever since his arrest in December 2018. I submit that the delay of five days not change his circumstances. Even if the application was in time, Mr Chang would have remained in custody.

62. The Minister has already taken a decision that was set aside by the court below. The Minister elected to abide by the court decision in the application for leave to appeal to the SCA.

63. All things considered, the respondents will suffer no prejudice if the court grants condonation for the late filing of this application. This is a constitutional matter that deals with sovereign obligations and the duty of one state to comply with the legitimate requests of another made under a binding regional treaty.

64. This matter also has much wider consequences than just the matter between the parties, as has been fully dealt with in the application for leave to itself. It is a matter that raises important legal principle and one of its kind having two sovereign countries submitting requests for extradition over the same individual.

65. Should condonation be refused, the applicant will suffer irreparable prejudice that Mr Chang will immediately be extradited to the USA, thereby depriving the

applicant the opportunity to hold him accountable and bring him to justice in the Republic of Mozambique, an opportunity that is made available by granting the applicant leave to appeal.

66. Insofar as the prospects of success in the application for leave to appeal are concerned, the applicant submits that the application raises novel constitutional points and arguable points of law. The applicants submits that it has good prospects of success on appeal, should leave be granted.

67. The enforcement of the regional treaty between neighbouring states on extradition and the competing application for extraction from another state for the surrender of the same person as well as enforcement of international and transnational treaties on commercial crimes and corruption by sovereign nations, is at the heart of this matter.

CONCLUSION

68. The applicant has presented sufficient grounds and facts for the court to grant both condonation for the late filing of the application for leave to appeal and to grant the applicant leave to appeal.

69. **WHEREFORE** the Applicant prays for granting of the prayers in the notice of motion.

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DEPONENT

SIGNED and **SWORN** to before me at Sandton on this the 03 day of **FEBRUARY 2023**, the Deponent having acknowledged that he or ~~she~~ knows and understands the contents of this affidavit and all the provisions of Act 16 of 1963 and the regulations promulgated in terms thereof concerning the taking of the oath having been complied with in my presence and within the area for which I have been appointed as Commissioner of Oaths.

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
SANDTON
2023 -02- 03
KLIENTE DIENSSENTRUM
SANDTON
SUID-AFRIKAANSE POLISIEDIENS

COMMISSIONER OF OATHS
NAME: Hoera Tawatrock
PLACE: Sandton
AREA: Sandton SAPS
CAPACITY: HPC

CGV

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF EKURHULENI NORTH

HELD AT KEMPTON PARK

IN THE EXTRADITION ENQUIRY BETWEEN:	**CASE NO: D 2689/18**
THE STATE	**APPLICANT**
AND	
MANUEL CHANG	**RESPONDENT**

JUDGMENT

[SCHUTTE WJJ ADD MAGISTRATE]

INTRODUCTION

[1] Between 2013 and 2016 a series of financial transactions were arranged by the Respondent and a number of co-conspirators. This involved fraudulent transactions of over US$ 2 billion. Material misrepresentations were made regarding how the funds were to be spent. The supposed goal was to fund maritime projects, Proindicus, EMATUM and MAM that would benefit Mozambique but a significant portion thereof was corruptly diverted. The Privinvest Group, based in the United Arab Emirates (UAE) was the sole contractor. Funds were paid directly to them to be used to provide equipment, infrastructure and services for the maritime projects.

[2] The Respondent was the Minister of Finance for Mozambique. He, amongst others, facilitated Privinvest's diversion of the proceeds of the fraud. Over US $150 million in bribe and kickback money was paid to Mozambican government officials of which at least US$ 5 million got paid to himself and US $50 million to bankers. The Respondent was an integral part of the scheme. He signed guarantees for the loans on behalf of the Mozambican government for all the fraudulent loans. The members of the conspiracy then helped to repackage the loans and sell them to investors around the globe, including the United States. The nature of the original loans was fraudulently misrepresented. Only a portion of the loans was applied towards the actual maritime projects. The Mozambican entities defaulted on the loans which left the investors exposed to millions in losses. Mozambique has up to date defaulted to the tune of more than US $700 million in loan repayments.

[3] Documents from primary investment banks, correspondent bank account records and e-mail records were obtained. The evidence exposed bribe and kickback payments, payments to front companies controlled by the Respondent and the role of the Respondent in the scheme. The Respondent seemingly received US $7 million in connection with the first two loans and US $5 million in connection with the third loan.

[4] Many victims were and are in the United States of America (USA), significant banking activity was conducted in New York City, and several co-conspirators travelled into and from New York City. In all three the loans agreements payments were to have been made to specified bank accounts in the New York City. Hundreds of millions of dollars were wired into and out of bank accounts in New York City.

[5] In light of the investigations done into this matter by the Federal Bureau of Investigations (FBI) the Grand Jury for the Eastern District of New York issued an indictment for the Respondent to stand trial on:

Count 1: Conspiracy to Commit Wire Fraud – Title 18, United States Code, Sections 1349 – maximum 20 years imprisonment
Count 2: Conspiracy to Commit Securities Fraud – Title 18, United States Code, Sections 371 and Title 15, United States Code section 78j(b) and 78ff – maximum 5 years imprisonment
Count 4: Conspiracy to Commit Money Laundering – Title 18, United States Code, section 1956(h) – maximum 20 years imprisonment.

THE REQUEST

[6] The USA applied for the extradition of the Respondent in the bundle marked Exhibit AA to the record. It contains an affidavit by Mark E. Bini, which was duly commissioned the Chief United States Magistrate Judge of the Eastern District of New York City, Roanne L. Mann, an affidavit by Angela Tassone also commissioned by Chief Magistrate Judge Roanne L. Mann, a photo of the Respondent, a true copy of the redacted indictment, a true copy of the warrant of arrest, copies of the relevant USA statutes, a section 10(2) Act 67 of 1962 certificate and a certificate by Jeffrey M. Olsen from the Department of Justice of the United States of America. All these documents are bound together by a red ribbon and sealed with the Seal of the Department of Justice. This Seal is still intact. Matthew G. Whittaker the Attorney General of the United States confirms the office of Jeffrey M. Olson and that he caused the Seal of the Department of Justice to be affixed. His signature is attested to by Randy Toledo from the Office of International Affairs. This bundle is in turn bound

by a golden ribbon and sealed with the Seal of the Department of State by Michael R. Pompeo, the Secretary of State. His signature is attested to by the Assistant Authentication Officer.

AUTHENTICATION

[7] The issue of authentication and what 'authenticate' actually means has been dealt with in the matter of Benjamin v Additional Magistrate, Cape Town[1] at page 25 par 38 and 39:

[1] Benjamin v Additional Magistrate, Cape Town 2014 JDR 1573 (WCC)

> 38 "In light of the view I have taken of the common law and a reading of the Act I therefore conclude that "authentication" means verifying a document to be genuine, or what it purports to be, whether it be by verifying a signature on a document or by other means.
>
> 39 This interpretation of the word "authenticate" is consistent with the purpose of section 9(3) as set out above, and is also the sensible approach which will give effect to the primary purpose of the proceedings before the Magistrate. The approach of the Applicant to contend that authentication can only mean the verification of a signature ignores, firstly, the plain words of the statute, which refers to documents being authenticated, and secondly, the purpose of section 9(3) and thirdly that such an interpretation is not sensible."

[8] The certificate issued by Michael R. Pompeo states that the document hereunto annexed i.e. the entire bundle, is under the Seal of the Department of Justice of the United States of America, and that the Seal is entitled to full faith and credit. The certification issued by Michael R. Pompeo is an exact replication of the wording used in the Benjamin matter referred to earlier. In closure, it can only lead to one conclusion and that is that the request has been properly authenticated. The USA has since filed an unredacted indictment marked as Exhibit "II".

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LIABLE TO BE EXTRADITED

[9] It is not disputed that the Respondent is the person sought by the United States of America and that he is liable to be extradited. The photograph attached to the request unquestionably resembles his facial features.

SUFFICIENT EVIDENCE

[10] In the section 10(2) Act 67 of 1962 certificate Mark E. Bini, Assistant US Attorney stipulates that the evidence contained in the request is available for trial and is sufficient under the laws of the United States to justify the prosecution of the Respondent. The mere production of a section 10(2) certificate issued by the appropriate authority shall be accepted as conclusive that the foreign state has sufficient evidence at its disposal to warrant a prosecution.[2] The evidence as presented in bundle marked Exhibit AA, the Section 10(2) Act 67 of 1962 and the fact that this aspect is not disputed by the Respondent satisfies the requirement of 'sufficient evidence to warrant a prosecution'.

JURISDICTION

[11] The Respondent places in issue the fact that South African courts lack extra-territorial jurisdiction. As such, so the argument goes, the requirement of dual criminality is not met. In addressing this argument I shall limit the issue to the jurisdiction of the district and/or regional court. Section 90 of the Magistrate's Court Act, Act 32 of 1944 states that:

> (1)"Subject to the provisions of section eighty-nine, **any** person charged with **any** offence committed within any district or regional division may be tried by the court of that district or of that regional division, as the case may be.

[2] Geuking v President of the Republic of South Africa and Others 2003(1) SACR 404 (CC)

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(2) When any person is charged with **any** offence-

-

(e) **begun or completed** within the district or within the regional division, such person may be tried by the court of the district or of the regional division, as the case may be, as if he had been charged with an offence committed within the district or within the regional division respectively.

(3) Where it is uncertain in which of several jurisdictions an offence has been committed, it may be tried in **any** of such jurisdictions.

(4) A person charged with an offence may be tried by the court of **any** district, or any regional division, as the case may be, **wherein any act or omission or event which is an element of the offence took place.**

(5) A person charged with theft of property or with obtaining property by an offence, or with an offence which involves the receiving of any property by him, may also be tried by the court of any district or regional division, as the case may be, **wherein he has or had part of the property in his possession." (My emphasis)**

[12] If two or more people, having a shared purpose to commit a crime, act together in order to achieve that purpose, the one's conduct will be imputed on the other/s according to South African criminal law. There need not be a prior conspiracy.[3] The South African law recognises the offences of theft, fraud, corruption (The Prevention and Combatting of Corrupt Activities Act 12 of 2004) and money laundering (Prevention of Organised Crime Act, Act 121 of 1998). It also recognizes the offence of conspiracy to commit any offence in section 18 of the Riotous Assemblies Act, Act 17 of 1956.

[3] Snyman CR, Criminal law, 4th edition, page 260

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[13] The treaty and the Act define what would amount to be an extraditable offence. The Act prescribes a sentence of the deprivation of liberty of more than 6 months in terms of section 1, and the treaty requires in Article 2(1) a punishment of deprivation of liberty for one year in both countries. Article 2(4) of the treaty provides for the instance where an offence was committed outside the territory of the Requesting State. The USA courts have jurisdiction to hear the matter as significant banking activity were conducted by the co-conspirators in New York City, members travelled to and from New York City, all payments in terms of the three loans would have been made to bank accounts in New York City and the EMATUM Eurobond exchange scheme was promoted in New York City. In any event Section 4 of the Prevention of Organised Crime Act, Act 121 of 1998 extends jurisdiction to offences committed in the Republic or **elsewhere.**

EXTRADITABLE OFFENCES/DUAL CRIMINALITY

[14] It is not disputed that the offences in broad terms do constitute 'extraditable offences' in terms of the municipal law of each of the Requesting and Requested States.[4] It is clear that corruption is a statutory offence in the South African law by means of The Prevention and Combatting of Corrupt Activities Act, Act 12 of 2004. To be more specific section 7 thereof deals with acts by members of the legislature.

[15] Theft is a continuing offence in South African law.[5] If the crime is committed outside the territorial jurisdiction of the court, but the person is found within the territorial jurisdiction of the court in possession of the property, that person may be tried by the latter. What has been said

[4] Section 276 Criminal Procedure Act, Act 51 of 1977
[5] Snyman CR, Criminal Law, 4th edition, page 498.

CK PBM

above in terms of Section 90 of the Magistrate's Court Act, Act 32 of 1944 settles the issue. It is clear that elements of each of the offences were committed within New York City. Had it been committed within the territorial jurisdiction of this court, this court too would have been vested with jurisdiction.

ORDER

16] There is sufficient evidence against the Respondent, which warrants his prosecution on the following counts:

Count 1: Conspiracy to Commit Wire Fraud – Title 18, United States Code, Sections 1349

Count 2: Conspiracy to Commit Securities Fraud – Title 18, United States Code, Sections 371 and Title 15, United States Code section 78j(b) and 78ff

Count 4: Conspiracy to Commit Money Laundering – Title 18, United States Code, section 1956(h)

as set out in the request dated 22 January 2019

And

The Respondent is committed to the Modderbee Correctional Facility pending the decision with regard to his surrender by the Honourable Minister of Justice and Correctional Services.

The Respondent is further informed that he may, within 15 days appeal against this order.

2019 -04- 08

W.J.J. SCHUTTE

ADDITIONAL MAGISTRATE:EKURHULENI NORTH: KEMPTON PARK

COPY

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF EKURHULENI NORTH

HELD AT KEMPTON PARK

IN THE MATTER BETWEEN: **CASE NO: D 2689/18**

THE STATE **APPLICANT**

AND

MANUEL CHANG **RESPONDENT**

EXTRADITION REQUEST EX THE REPUBLIC OF MOZAMBIQUE: ORDER

After hearing the evidence and after both counsel on behalf of the Applicant and the Respondent were afforded the opportunity to state their cases, and after due consideration of the papers and addresses on behalf of both parties, it is ruled in terms of the Extradition Act, 67 of 1962 that:

1. There is sufficient evidence against the Respondent, which warrants his prosecution on the following counts:

   Count 1: Abuse of position and function – Article 16, Law 9/87, Article 507 of the Criminal Code of Mozambique

   Count 2: Violation of Budget Laws – Article 9 of Law 7/98, Article 77 of Law 16/2012

   Count 3: Fraud by Deception - No 3 of Article 451, No 5 of Article 421 of the Criminal Code

   Count 4: Embezzlement – Article 313 and 437 of the Criminal Code

   Count 5: Passive Corruption for an Unlawful Act – Article 7 of Law No 6/2004

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Count 6: Money Laundering – Paragraph a), No 1 of Article 4 and paragraphs i),k) and t) of Article 7 , as well as paragraph a) , No 1 of Article 75 of Law No 14/2013

Count 7: Criminal Association – No 1 of Article 263 of the Criminal Code and No 1 of Article 458 of the Criminal Code

as set out in the request dated 1 February 2019

And

(2) The Respondent is committed to the Modderbee Correctional Facility pending the decision with regard to his surrender as meant in terms of Article 11 of the Protocol on Extradition of the Southern African Development Community.

The Respondent is further informed that he may, within 15 days appeal against this order.

Dated at Kempton Park on this the 8th day of April 2019.

2019 -04- 08

W.J.J. SCHUTTE

ADDITIONAL MAGISTRATE

EKURHULENI NORTH: KEMPTON PARK

P.B.M

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 22157/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED. NO

01 November 2019
DATE SIGNATURE

In the matter between:

MANUEL CHANG	Applicant
And	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICESS	Respondent
FORUM DE MONITORIA DO ORÇAMENTO	First Intervening Party
THE REPUBLIC OF MOZAMBIQUE	Second Intervening Party
HELEN SUZMAN FOUNDATION	*Amicus Curiae*

Case Number: 24217/2019

In the matter between

FORUM DE MONITORIA DO ORÇAMENTO	Applicant
MANUEL CHANG	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent

EK P.B.M

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Third Respondent
ADDITIONAL MAGISTRATE, EKURHULENI NORTH: KEMPTON PARK	Fourth Respondent

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JUDGMENT

FISHER J, (LAMONT J AND MOLAHLEHI J CONCURRING):

INTRODUCTION

[1] This is a tale of two Treaties. On the one hand the SADC Protocol on Extradition ("the Protocol") and on the other the Extradition Treaty between South Africa and the United States of America ("*the US Treaty*").

[2] The treaties are similar. Both allow for the surrender and extradition of persons accused of crimes, between their Member states. Their operation and the fact that Mr Chang has been implicated in crimes perpetrated on an international scale, has led to an unusual situation: competing claims for Mr Chang's extradition from South Africa - one from the USA and the other from Mozambique.

[3] The former Minister[1] of Justice, Mr Michael Masutha in dealing with the competing requests opted to extradite Mr Chang to Mozambique, South Africa's co-member in the Protocol, thus, by implication, rejecting the request of the USA.

[4] The issues before this Court involve a judicial review of these decisions. The applications relating to these reviews have been combined for one special hearing before this Full Court pursuant to an intensive judicial case management process. This

[1] Then called the Minster of Justice and Correctional Services now called the Minster of Justice and Constitutional Development.

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has allowed for the applications to be dealt with on an expeditious basis, given that there is urgency in the matters, which is not least because Mr Chang has been incarcerated at Modderbee Correctional Facility since his arrest on 29 December 2018.

[5] Mr Chang was the Minister of Finance in Mozambique from 2005 to 2015. After his term in Cabinet ended, he became a member of the National Parliament. The parties, save Mr Chang, agree that investigations conducted internationally have revealed that Mr Chang and his co-conspirators took part in schemes of securities fraud during approximately 2013 to 2015. The schemes involved large loans by banks, companies, and persons based in the USA, France, Switzerland, Holland, Britain, and the United Arab Emirates (UAE) to companies under the control of the Mozambican Government. The loans were meant to fund maritime projects that would benefit Mozambique but, it is alleged that funds were diverted to government officials in Mozambique in the form of kickbacks and bribes. Amounts involved in the schemes are said to be in excess of US$2 Billion (approximately R30 Billion).

[6] This corruption has had a profoundly negative effect on Mozambique and its people. For one thing, there has been a sharp reduction in essential donor funding in the wake of the scandal. For another, the loan repayments to which Mozambique is bound are onerous.

[7] The imbroglio began with the arrest of Mr Chang in South Africa in terms of the US Treaty. It had come to the attention of the US authorities that Mr Chang would be travelling via South Africa to the UAE on 29 December 2018. He was indicted in the Eastern District Court of New York on 19 December 2018 and on 21 December 2018 the USA requested South Africa to arrest him in terms of the US Treaty. On 27 December 2018 the Pretoria Magistrate's court authorised the arrest of Mr Chang in accordance with the Extradition Act[2] ("*the Act*"). He was then intercepted and arrested at O R Tambo International Airport where he was bound for a flight to Dubai.

[2] Act 67 of 1962.

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[8] Mozambique is up in arms. It protests that it was unaware of the US investigations and the resultant indictment of Mr Chang in New York State until Mr Chang's arrest in South Africa was made public in December 2018. It says it had been led to believe that Mr Chang would be tried for his crimes in Mozambique with the cooperation and assistance of the USA when, all the while, the USA was covertly involved in its own investigations.

[9] It is claimed that Mozambique has not been serious or exacting in its attempts to bring Mr Chang to book in Mozambique. Understandably, Mozambique is embarrassed by these claims. It has sought some vindication in its attempts at extradition and now in these proceedings. It says that the appropriate place for Mr Chang to be brought to justice is Mozambique. It says that it is important to Mozambique to prosecute this case successfully to demonstrate its commitment, competency, and capacity in fighting corruption. It suggests that its credibility is at stake in relation to various international conventions to combat criminality to which it is signatory and which include the UN Convention against Corruption, UN Convention against Transnational Organized Crime, SADC Protocol against Corruption, AU Convention on Preventing and Combating Corruption.

[10] From the perspective of the USA, it appears that a majority of the investors who were affected by the scheme were from the USA. The USA thus seeks that Mr Chang and others involved in the schemes be prosecuted there. It is not in dispute that Mozambique has been investigating this case since 2015 and that Mr Chang has remained at large, even travelling freely beyond the borders of Mozambique. The USA has indicted that it is ready to prosecute Mr Chang. Mozambique concedes that it is still not ready to prosecute.

[11] As will be dealt with below, Mr Chang's immunity from prosecution in Mozambique qua Member of Parliament (MP) in Mozambique is central to this failure to prosecute him in Mozambique. It is also central to the legality of the former Minister's impugned decisions in this matter and thus of central importance to this case.

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[12] Article 4 (e)[3] 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;*"

PROCEDURAL HISTORY

[13] After his arrest and on 29 January 2019, the USA submitted a request to South Africa for the extradition of Mr Chang. Mozambique, a few days later (on 01 February 2019) submitted its own warrant and request for extradition.

[14] In terms of section 9 of the Act Mr Chang was required to be brought as soon possible after his arrest before a magistrate in whose area of jurisdiction he had been

[3] Article 4 reads 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 the case retried in his or her presence."

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arrested, whereupon the Magistrate was obliged to hold an inquiry with a view to the surrender of such person to the foreign State concerned.[4]

[15] Inquiries were thus conducted in the Kempton Park Magistrate's Court in terms of s 10 of the Act in respect of both requests.

[16] On 8 April 2019, the Magistrate committed Mr Chang under section 10(I) of the Act to imprisonment in respect of both requests to await the decision of the Minister under section 11[5] as to whether and to whom Mr Chang should be surrendered in respect each of the requests.

[17] The Minister thus regarded himself as empowered to choose which, if either of the extradition requests he would accede to.

[18] In the normal course in relation to the decision to be taken in respect of a request for extradition, the Minister is advised by the staff of the International Relations Department. On 16 May 2019 the Principal State Law Advisor on International Relations, Advocate Herman van Heerden submitted a memorandum to the then Minister in relation to the competing requests("the Memorandum").

[19] Part of the compiling of the Memorandum involved Mr van Heerden checking whether the requests were compliant with the requirements of South African law. As part of this process and on 06 February 2019, Mr Van Heerden addressed a letter to

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[4] Section 9 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. "

[5] Section 11 provides as follows :
" The Minister may- (a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or
(b) order that a person shall not be surrendered-
(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;
(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;
(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the

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the Attorney General of Mozambique, Ms Beatriz Buchili in relation to Mr Chang's immunity and its source as he understood it. He pointedly directed the following inquiry to the Attorney General:

> *"Article 211 of the Constitution of Mozambique 2004, as amended, provides for the immunity from prosecution of members of government without the permission of the President of Mozambique. In this regard, it is not mentioned in the request for extradition whether the President has in fact lifted the immunity of Mr Chang, and we require clarity on this..."*

[20] Thus, it was clear that Mr van Heerden was aware that there was a relationship between Mr Chang's position in government and his possible immunity and that he required clarification as to whether Mr Chang indeed had such immunity.

[21] Ms Buchili responded to the request for clarification by explaining that Article 211 applied only to serving Government Members and thus did not apply to Mr Chang. She stated that his position was now that of MP and explained that, as such, the "consent for his detention" had to be given by the Mozambican National Parliament, She then stated that attached to the Mozambican extradition request "*...is the document issued by the National Parliament giving consent for the detention of Manuel Chang*".

[22] Proper reference to this document shows that it merely records that the Standing Committee of National Parliament "*Approves the enforcement of maximum coercion measures against Mr Chang*". It pertinently does not provide for the lifting of immunity from prosecution and, for that matter, also does not expressly consent to Mr Chang's arrest[6].

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[6] The document reads as follows:

> "Assembly of the Republic" Standing Committee Deliberation No. 17/2019 Of January 29 After the National Parliament received from the Supreme Court, a request for approval of enforcement of the maximum coercion measure against the MP Manuel Chang, the Standing Committee of the National Parliament, under provisions of number 1, of article 173 of the Constitution of the Republic, in conjunction with number 1, of article 13 of the Statutes for Members of Parliament, approved by the Law No. 32/2014 of December 30 and paragraph a) of number 1 of article 66 of the Rules of Procedure of the National Parliament, approved by law No.12/16 of December 30, has decided: Single: Approves the enforcement of maximum coercion measures against Manuel Chang. Maputo, January 29, 2019 (emphasis added).

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[23] Quite what "maximum coercion measures" would entail in light of Mr Chang's immunity is unclear. Presumably, this would mean the maximum that can be done subject to the Mozambican law.

[24] What Ms Buchili failed to explain to Mr van Heerden was the procedure for the lifting of immunity and that Mr Chang enjoyed immunity until it was lifted in Mozambique. Her somewhat oblique responses on the matter of Mr Chang's immunity led Mr van Heerden to the mistaken impression that Mr Chang's immunity from prosecution in Mozambique had been lifted. And thus this is what Mr van Heerden conveyed to the former Minister in the Memorandum. The Memorandum contained the following statement as to Mr Chang's immunity:

> *"As a Member of Parliament, consent for his detention must be given by the National Parliament of Mozambique in terms of Article 174 of the Constitution of Mozambique as well as No.1 of Article 13 of the Statute of Members of the National Parliament. This has been done, and Mr Chang no longer enjoys immunity from prosecution by the Mozambican authorities."* (emphasis added).

Furthermore Article 4 of the protocol was duly referenced in the Memorandum and the Minister was assured (incorrectly) that its provisions were met.

[25] The Memorandum also served to inform the Minister of the various submissions made by Mozambique, the USA, Mr Chang, and civil society. It noted that civil society in Mozambique was frustrated by the apparent lack of progress in the investigations in Mozambique.

[26] Mr van Heerden ultimately made the recommendation to the Minister that Mr Chang be extradited to the USA rather than Mozambique. This recommendation was based, in large part, on the state of readiness of the respective prosecutions - the USA being ready to proceed with the prosecution and Mozambique being in a state of unreadiness to prosecute. Importantly, the recommendation did not engage at all with the question of immunity as it proceeded from the assumption that Mr Chang no longer enjoyed immunity.

[27] The former Minister did not follow this recommendation. On 21 May 2019 he took the decision under section 11(a) of the Act to surrender Mr Chang to Mozambique rather than the USA.

[28] The decision of the former Minister and the basis therefor is penned in manuscript by him at the end of the Memorandum, reflecting that the Minister has considered its contents. It reads as follows:

> *"Having considered the submission by the department regarding this matter following the decision of the Kempton Park Magistrate court regarding the extraditabily of Mr Chang to both the USA and the Republic of Mozambique and having considered the following: That the accused is a citizen of Mozambique; That the alleged offence was committed whilst he was a Minister of State; The onerous debt for Mozambique as a result of the alleged fraud; The submission made by Mr Chang to be extradited to his home country; The interests of the States concerned; The request from the USA. I have noted that the request was submitted a few weeks prior to the Mozambican's, however having considered the matter in its full context, taking into account the criteria contained in both the treaty and protocol, I am satisfied that the interest of justice will be best served by acceding to the Mozambican request for extradition and thus it is my decision that the accused Mr Chang be extradited to stand trial for his alleged offences in Mozambique".*

[29] The true legal position as to the law of Mozambique relating to the immunity of MP's is to be found in Article 174 of the Mozambican Constitution[7] and Articles 13.1 and 17 of Law No 31/2014. Article 13.1 provides that MPs shall not be arrested or detained, unless caught in the act ("*flagrante delicto*") and that they shall not face trial without the consent of Parliament.[8] Article 17 deals with the lifting of Immunities by

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[7] Article 174 of the Mozambican Constitution reads as follows:

"Immunities

1. Members of Parliament shall not be detained or arrested, except when caught in the act of committing an offence ('flagrante delicto") nor will they face trial without the consent of the National Assembly.

2.If criminal proceedings are pending in which a MP is the accused, the MP shall be heard by a Counsellor Justice.

3.Members of Parliament are entitled to a special forum and shall be tried by the Supreme Court under provisions of the law."

[8] Article 13.1 reads as follows:

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National Parliament and provides that this can only be done in Parliament in plenary session and by secret ballot.[9]

[30] The Mozambican Attorney General, in the main affidavit delivered on behalf of Mozambique, explains the law of Mozambique on the operation and lifting of immunities thus:

> *"The law of Mozambique provides for the lifting of immunity in order to prosecute an offending Member of Parliament (hereafter "MP"). Before an MP can be arrested or detained, the National Parliament must first authorise the arrest or detention. This authorisation is granted in terms of Article 13 of Law No.31/2014. The MP will then appear before a judge of the Supreme Court, who will determine if the charges are not politically motivated or malicious. If the judge is satisfied that the MP has a case to answer, then the judge will request that immunity should be lifted. Article 16 of Law No.31 provides for the procedure to lift the immunity. The immunity will then be lifted in terms of Article 13 and 17 of Law No,31/2014. Therefore, before immunity can be lifted, the MP must appear in person at the Supreme Court inquiry to make his or her representations. It is not possible to lift immunity without this inquiry. The inquiry cannot take place in the absence of the defendant."*[10]

[31] The statement in the Memorandum to the effect that Mr Chang was not subject to immunity from prosecution because of the consent of Parliament was not correct. Parliament had given no such consent and neither was it able to do so in Mr Chang's absence.

[32] The current Minister contends that Mr van Heerden was deliberately misled. Ms Buchili denies this. She seeks to explain that this was the first extradition request

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"Members of Parliament shall not be detained nor arrested, except in cases of being caught in the act of committing an offence (" flagrante delicto"), or face trial without the consent of the National Parliament."

[9] Article 17 reads as follows in relevant part:
Lifting of Immunities:
1. the lifting of immunities and (sic) preceded by debate in plenary of the assembly of the Republic, the closed door.
2. the deliberations of the assembly of the Republic are taken by secret ballot.

[10] Record p 987 [72] of the Attorney General's combined Founding and Answering affidavits.

made by her office involving a Member of Parliament, implying that there was a lack of experience at play. She states that she believed that South Africa was properly apprised of the immunity and its nature and extent. She puts any misunderstanding in relation to Mr Chang's immunity down to the different legal systems and different languages at play.

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

[34] Mr Chang has, throughout all of these proceedings, resisted his extradition to the USA whist actively seeking his extradition to Mozambique. He has recently, and after the fact of the impugned decisions gone as far as resigning from his position as Member of the National Government in order to relinquish the immunity. This he did on 29 July 2019. He thus argues, as does Mozambique, that to the extent that he enjoyed immunity at the time of the impugned decisions, he is no longer subject to such immunity as he is no longer an MP.

[35] This has no impact on the Minister's decisions, as they must be evaluated on the basis of the facts as they were at the date on which the decision was taken.

[36] Mr Chang has resigned as MP with the purpose of relinquishing his immunity in Mozambique. He says that this is because wants to answer for the charges against him in his home country. The more cynical view, as suggested by the civil society litigants in this matter, is that he has the impression that in Mozambique he may be given a measure of protection due to cronyism or a largesse which harks back to his former positions in government.

RELIEF SOUGHT

[37] Mr Chang thus seeks an order directing the current Minister to surrender him to the Government of Mozambique, alternatively, that he be released from custody.

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[38] The current Minister has not only opposed the relief sought by Mr Chang but has also counter - applied for to set aside the decision of his predecessor in Office.

[39] The Director of Public Prosecutions ("DPP") makes submissions to aid us to decide whether or not the decision of the Kempton Park Magistrate should be interfered with.

[40] The Forum de Monitoria do Orcamento ("FMO") is a coalition of various Mozambican civil society organisations. It launched its own application to review the former Minister's decision to extradite Mr Chang to Mozambique. By this stage all parties were dealing with the matters in a consolidated manner due to the management of the matters with a view to them being heard together.

[41] The Helen Suzman Foundation ("HSF") was admitted as amicus to be heard from a South African and general perspective as to civil rights involved in the matter.

ISSUES TO BE DECIDED

[42] We are called on to decide whether the decision of the Magistrate in the section 10 proceedings in the Mozambican matter is assailable; whether the decision of the former Minister should be reviewed and set aside; and ,if so, what the remedy should be.

[43] The immunity of Mr Chang is central to the impugned determinations of the Magistrate and the Minister.

[44] Mr Chang was treated by the Magistrate as "*a person accused of...*" the offences enumerated in the Mozambican warrant, as contemplated in the Act for the purposes of the process under section 10. It is argued in this regard by FMO that the immunity means that Mr Chang cannot be subject to prosecution and that it follows that he cannot be a person accused for the purposes of the Act.

[45] It is argued on behalf of the current Minister, FMO, FUL, and the DPP that Article 4(e) of the Protocol creates a prohibition on the extradition of Mr Chang to Mozambique in light of his immunity under Mozambican Law. It is further argued by these parties that, if the former Minister did not know of such immunity or if he did not consider it for other reasons, his decision falls to be set aside on the basis that it is irrational.

[46] Mr Chang makes a different submission as to the meaning and effect of these immunity provisions in terms of the Mozambican law and the manner in which they affect the application of Article 4(e) of the Protocol. He argues that, in terms of Mozambican law, the immunity does not subsist but is only constituted once the National Parliament is called on to consider charges against an MP. He argues also that, given the fact that the immunity can be lifted, it is not of the nature of immunity contemplated in Article 4(e) and thus is not hit by the prohibition therein.

[47] The reviews of the former Minister's decision are legality reviews and are not brought under the Promotion of Administrative Justice Act 3 of 2000 (*"PAJA"*)[11]. This is not in dispute.

[48] With all this in mind, I turn first to the challenge against the Magistrate's decision under the Act.

The Review of the Magistrates Section 10 Decisions

[49] Section 3[12] of the Act deals with when a person is extraditable. It provides that such a person must be "*accused of*" an extraditable offence.

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[11] See: State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) at [37].
[12] Section 3(2) provides as follows:
"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 consented to his or her being so surrendered."

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[50] It is not disputed that Mr Chang became a defendant in terms of Mozambique's domestic processes in that there were charges formulated against him along the same lines as those in the US indictment. He was, however, not yet indicted in Mozambique. The purpose of the Mozambican extradition request is stated to be to "*extradite the defendant Manuel Chang to Mozambique, for the purposes of criminal, administrative and civil liability*".

[51] FMO argues that while Mr Chang was immune from prosecution he could, axiomatically, not be "*a person accused*". It argues that it follows from this that the Magistrate could not entertain the inquiry as it is required as a jurisdictional fact for the inquiry that Mr Chang be a person accused of extraditable offences.

[52] The DPP counters that a person can be both immune from prosecution and a person accused for purposes of the Act.

[53] The judgment of Lord Steyn in the House of Lords decision of In re: Ismail[13] is instructive as to the proper approach to be adopted by a court determining whether a person is accused for the purposes of extradition. The question posed on the facts of *Ismail* was similar to the issue we deal with here: was Mr Ismail liable to be extradited under the UK Extradition Act as a person "*accused*" of extraditable offences in the Federal Republic of Germany? Mr Ismail contended that he was not an "*accused*" person because no formal criminal charge had yet been made against him in Germany.

[54] Lord Steyn held that it is a question of fact in each case whether the person passes the threshold test of being an "*accused*" person. He stated as follows as to the need to interpret extradition legislation and treaties in context[14] :

> "*Next there is the reality that one is concerned with the contextual meaning of "accused" in a statute intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this*

[13] *In Re Ismail* [1999] 1 AC 320 per Lord Steyn.

[14] Id at at 326F-327G.

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aim. Extradition treaties, and extradition statutes, ought, therefore, to be accorded a broad and generous construction so far as the texts permit it in order to facilitate extradition."

He went further to state:

"All one can say with confidence is that a purposive interpretation of "accused" ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an "accused".

[55] This approach commends itself in this case. I am thus satisfied that Mr Chang's immunity from prosecution did not prevent him from being accused of the crimes set out in the warrant. The accusation and prosecution stand apart from one another. Indeed, in terms of the Mozambican law on this point, the very procedures which can bring about a lifting of his immunity pre-suppose that he is accused of the offences for which he will ultimately be charged and prosecuted if the immunity is lifted.

[56] It was argued by FMO that the Magistrate should have made inquiries related to establishing whether Mr Chang was immune from prosecution. On a simple reading of section 10, the magistrate's duties are confined to making certain preparatory findings, while the Minister makes substantive and political decisions under s 11.

[57] Section 10(1)[15] of the Extradition Act explains that a Magistrate, on the consideration of the evidence before her or him, must be satisfied that two conditions are fulfilled before a committal order can be made: first, the person must be liable to

[15] Section 10(1) provides as follows:
"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."

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be surrendered to the foreign State concerned; second, in the case where such person is accused of an offence, there must be sufficient evidence to warrant a prosecution for the offence in the foreign State.

[58] The section 10 decision of the Magistrate is only to commit or discharge. If the person is committed, then it is the Minister (under the executive phase under section 11) who decides if the person should be surrendered in extradition.

[59] The Magistrate is not a trier of fact. His function is to determine if the person is accused by the requesting state of the crimes for which his extradition is sought and satisfying himself that there is sufficient evidence to warrant a prosecution in the foreign State. This second inquiry does not involve a determination as to the veracity of the facts. The Magistrate in terms of section 10(2)[16] merely accepts as "*conclusive proof*" a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person for the crimes of which he or she is accused.

[60] The determination of whether a person has immunity and how this should affect the decision as to whether he should be extradited or not is clearly within the realm of the substantive and the political. The very debate which has been had here as to the nature and effect of the immunity of Mr Chang on the Minister's decision shows that it is beyond the province of the Magistrate and his ken.

[61] In *Geuking v President of the Republic of South Africa and Others*[17] Goldstone J writing for a unanimous Court, explained the position thus:

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[16] Section 10(2) provides as follows:

> "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 prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned."

[17] CCT35/02) [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) (12 December 2002).

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"It is not inappropriate or unfair for the legislature to relieve the magistrate of the invidious task of deciding this narrow issue unrelated to South African law.

"As already mentioned, it is a question in respect of which South African lawyers and judicial officers will usually have no knowledge or expertise. The certificate from the appropriate authority in the foreign state to the effect that the conduct in question warrants prosecution in that state is sufficient for the purpose of extradition. Its conclusiveness is binding on the Magistrate only in relation to his consideration of the question whether the person concerned is extraditable. If the person concerned is extradited the foreign court will have to determine the issue covered by the certificate. Furthermore, in the exercise of his discretion under section 11 of the Act the Minister might well be obliged to consider an attack made in good faith against the conclusion of the foreign authority contained in the certificate."[18]

[62] I thus find that the Magistrate conducted the inquiry in accordance with the Act. His decision does not fall to be set aside by this Court.

[63] It was contended on behalf of Mr Chang that the FMO had no standing to challenge the decision made in the section 10 inquiry by the Magistrate as it was not a party to the proceedings in the Magistrate's Court and had no other basis for its intervention in the matter. This point need not be dealt with in light of the finding that the proceedings in the Magistrate's Court were properly conducted and do not fall to be set aside in any event.

[64] FMO also sought to make something of an infelicitous mention by the magistrate in his reasons as Mozambique being an "*associated State*"[19]. There is no dispute that Mozambique is a foreign State and that, as a fact, the Magistrate and the Minister treated it as such. The procedure adopted can thus not be criticised.

[65] I now turn to deal with the Minister's decisions.

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[18] Id at [45] and [46].
[19] If it were an associated State this would attract a different process under the Act which would reside in the Magistrate acting in terms of s 12 instead of s 10.

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The Review of the Minister's Decision to extradite to Mozambique

[66] There has been some debate spurred by FUL and the FMO as to whether the protocol has been "*domesticated*" - i.e. made part of our domestic law and thus whether the Minister in failing to comply with Article 4(e) committed directly a breach of the Protocol. It was stated that this Court should determine the question of whether the Protocol was part of our domestic law in order to determine the binding effect of the Protocol on the Minister. In light of the discussion below, I find that it is not necessary that we make this determination.

[67] Our Constitution reveals a clear and uncompromising commitment to ensure that the Constitution and South African law are interpreted to comply with international law and in particular international human rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be "*consistent with the Republic's obligations under international law applicable to states of emergency.*"

[68] The preamble to the Prevention and Combating of Corrupt Activities Act[20] ("*PRECCA*") is an example of the express recognition accorded by the

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[20] 12 of 2004. The preamble states:

"WHEREAS the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom;
AND WHEREAS the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights;
AND WHEREAS corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime;
AND WHEREAS the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law;
AND WHEREAS there are links between corrupt activities and other forms of crime, in particular organised crime and economic crime, including money-laundering;
AND WHEREAS corruption is a transnational phenomenon that crosses national borders and affects all societies and economies, and is equally destructive and reprehensible within both

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Legislature to the Executive's part in the global commitment to fighting corruption. it notes that corruption is a transnational phenomenon that crosses national borders and affects all societies and economies; that it is equally destructive within both the public and private spheres of life; and that regional and international co-operation is essential to prevent and control corruption and related crimes.

[69] in *Glenister v President of the Republic of South Africa*[21] the Constitutional Court underscored the importance of the recognition of international law obligations on the exercise of executive power as follows:

> *"[O]ur Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the*

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the public and private spheres of life, so that regional and international cooperation is essential to prevent and control corruption and related corrupt activities;
AND WHEREAS a comprehensive, integrated and multidisciplinary approach is required to prevent and combat corruption and related corrupt activities efficiently and effectively;
AND WHEREAS the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption and related corrupt activities efficiently and effectively;
AND WHEREAS the prevention and combating of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation, with the support and involvement of individuals and groups outside the public sector, such as organs of civil society and non-governmental and community-based organizations, if their efforts in this area are to be efficient and effective;
AND WHEREAS the United Nations has adopted various resolutions condemning all corrupt practices, and urged member states to take effective and concrete action to combat all forms of corruption and related corrupt practices;
AND WHEREAS the *Southern African Development Community Protocol against Corruption*, adopted on 14 August 2001 in Malawi, reaffirmed the need to eliminate the scourges of corruption through the adoption of effective preventive and deterrent measures and by strictly enforcing legislation against all types of corruption;
AND WHEREAS the Republic of South Africa desires to be in compliance with and to become Party to the *United Nations Convention against Corruption* adopted by the General Assembly of the United Nations on 31 October 2003;
AND WHEREAS it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized,
BE IT THEREFORE ENACTED . . . ."

[21] 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

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Republic in international law, and makes them the measures of the State's conduct in fulfilling its obligations in relation to the Bill of Rights."[22]

[70] In this vein also our courts have been committed to exacting compliance with our obligations under International Law[23].

[71] South Africa is a signatory and Member State of the Protocol and thus bound thereby. On this basis, it is sufficient that we examine whether the former Minister's failure to comply with Article 4(e) contravened sections 7(2) and 8 of the Constitution which require him to *"respect, protect, promote and fulfil"* South Africa's international law commitments to access to justice for its people.

[72] We thus need not enter into the complexity of examining how an international treaty becomes domesticated within South Africa and whether this can be said to have occurred in respect of the Protocol. It may be noted, as an aside, that in *President of the Republic of South Africa and Others v Quagliani and others*[24] the Constitutional Court found that the US Treaty had become domestic law because of the provisions of the Act.

[73] Mr Chang seeks to interpret Article 4(e) and the Mozambican law so as to suggest that his immunity does not affect his extradition. He raises three interpretative arguments:

a. First, he argues that because this immunity is capable of being lifted, it is not absolute and thus is not hit by Article 4(e).
b. Second, he argues that, in any event, the immunity does not subsist but is only constituted by the National Assembly when the accused is

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[22] Id at [178].

[23] Recent examples which have unfolded on an international stage are: *DA v Minister of International Relations and Co-operation*[23] ("the Grace Mugabe case"); *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* ("the Al Bashir case) ; 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)("the SADC Tribunal case"); Commissioner of Police v Southern African Human Rights Litigation Centre 2015 (1) SA 315 (CC) (the Torture Docket case).

[24] [2009] ZACC 1; 2009 (4) BCLR 345 (CC); 2009 (2) SA 466 (CC) (21 January 2009).

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charged. In this regard he says that the question whether the Member of Parliament is to be afforded an immunity depends upon the decision of Parliament, one way or the other, and that until Parliament decides the issue, the question as to the existence or otherwise of the immunity remains inchoate and thus it did not operate at the time of the impugned decisions.

c. Third, he argues that a purposive interpretation of Article 4(e) should yield the meaning that it is there to protect immune persons from being sent to into the maws of unrelenting States. It should not, the argument goes, be seen as part of the obligation to achieve effective prosecution.

[74] As to the first argument, there is, to my mind, no scope whatsoever for a linguistic interpretation of either Mozambican Articles 13 or 17 or the two read in tandem which permits of such an interpretation. In any event, to the extent that there were uncertainty as to the meaning and operation of these provisions, it is put beyond question by the exposition of the Mozambican Attorney General as to the Mozambican law on this point, that the immunity subsists until lifted.

[75] The second argument is also put paid to by the clear language of Article 4 (e) which states that immunity "*for any reason*" triggers the mandatory refusal. If one needed fortification for this, interpretation, it is to be found in a comparison between Article 8 of the US Treaty and Article 4(e). Article 8 provides for just one reason for immunity i.e. that "*Extradition shall not be granted when the prosecution has become barred by lapse of time according to the laws in the Requesting State.*" Article 4(e) on the other hand is broader - it encompasses " *any reason, including lapse of time or amnesty;*" Thus, on an application of the *expressio unius est exclusio alterius* principle, South Africa must be regarded as having specifically and consciously broadened the range of the types of immunity beyond that brought about by the lapse of time.

[76] As to the third argument, as to the purpose of Article 4 (e) – there is no doubt that it cuts both ways: it protects the person enjoying immunity from unlawful prosecution and, as in this case, it allows for the proper administration of international

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justice. Extradition has as its purpose the prosecution of the guilty. Thus it would make no sense to extradite a person to a place where he cannot be prosecuted.

[77] The underlying crimes of which Mr Chang is accused involve corruption. Corruption takes place with no regard to national boundaries. Thus the effective eradication of corruption requires concerted and coordinated efforts internationally. This need has brought about various international treaties against corruption of which South Africa is a signatory[25]. 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.

[78] In *Geuking* Goldstone J encapsulated the position thus:

> *"The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands. The government of the country where the criminal conduct is perpetrated will wish the perpetrator to stand trial before its courts and will usually offer to reciprocate in respect of persons similarly wanted by the foreign State. Apart from reciprocity, governments accede to request for extradition from other friendly States on the basis of comity. Furthermore, governments do not wish their own countries to be, or be perceived as safe havens for the criminals of the world."*[26]

[25] The UN Convention Against Corruption, AU Convention against Corruption OECD Anti-Bribery Convention. The SADC Protocol Against Corruption.
[26] At [2].

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[79] Under section 233 of the Constitution:

> *"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."*

[80] Thus there can be no doubt that the Protocol must be interpreted so as to allow empowerment in terms of and compliance with South Africa's international obligations. 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.

[81] It was argued on behalf of Mozambique that, in the absence of having asked for reasons for the Minister's decision, it was not possible to determine whether the Minister had taken the immunity of Mr Chang into account. This argument is misplaced. Firstly, because properly construed, the Minister's manuscript order constitutes the Minister's decision and his reasons; secondly because the FMO did, in fact, ask for reasons in its notice of motion and no further reasons were forthcoming; and thirdly because any further reasons could not conceivably serve to change the illegality which exists in the contravention of Article 4(e), regardless of the former Minister's processes and considerations.

[82] Thus I find that the decision of the Minister to extradite Mr Chang to Mozambique should be set aside.

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REMEDY

[83] Mozambique asks that we undertake an enquiry as to whether there are exceptional circumstances which merit a departure from the default position and substitute its own decision for that of the Minister.

[84] The basis for the departure it submits is that the former Minister has demonstrated bias by bringing these proceedings.

[85] It argues that that this Court has all the information that was submitted to the former Minister to make the decision, together with subsequent information that was not available at the time the former Minister made his decision and that it should thus substitute its decision for that of the current Minister.

[86] The accusation of bias is unfortunate, based as it is squarely on the fact that Minister brings the application to review his predecessor's decision.

[87] It is now well established that where an organ of State concludes that a decision taken by such organ fails to comply with constitutional prescripts, the organ of State is not only empowered but also obliged to take steps to "right the wrong" through the medium of judicial review[27].

[88] An exceptional circumstances enquiry as to remedy must, in any event, take place in the context of what is just and equitable. Factors to be considered are whether the end result is in any event a foregone conclusion; where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require

[27] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) Member of the Executive Council for Health, *Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazar Institute* (3) SA 481 (CC).

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the applicant to submit again to the same jurisdiction, and whether the court was in as good a position as the administrator to make the decision[28].

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

[90] There can be no doubt that the Ministers impugned decisions here are of a policy-laden and polycentric nature as described by Prof. C Hoexter [29]in her succinct characterisation of judicial deference as accepted in in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others.*[30]

[91] Thus, in my view, a substitution order would be untenable in these circumstances.

COSTS

[92] Mr Chang is incarcerated and subject to an existing decision of the former Minister that he be extradited to Mozambique. He was thus entitled to attempt to enforce the decision in order to secure either his extradition or his release. Mozambique seeks here to vindicate its policies at an international level.

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

[29] The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484 at 501-2. Passage defined judicial deference as follows:

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

[30] [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004) at [46].

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[93] In the circumstances, I am not disposed to order either of these parties to pay the costs of the successful applicants or any of them.

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.

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FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

It is so ordered,

LAMONT J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,

MOLAHLEHI J

HIGH COURTJUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

It is so ordered,

LAMONT J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,

MOLAHLEHI J

HIGH COURTJUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of Hearing: 16 -17 October 2019.

Judgment Delivered: 1st November 2019.

APPEARANCES:

For the Applicant	: Adv W.J Vermeulen SC with Adv J.A Raizon.
Instructed by	: BDK Attorneys.
For the Respondent	: Adv V Maleka SC with Adv Kazee.
Instructed by	: State Attorney.
For the 1st intervening Party	: Adv A. Katz SC with Adv E. Cohen.
Instructed by	: Ian Levitt Attorneys.
For the 2nd Intervening Party	: Adv W. Mokhare SC with Adv M. Ramabulana.
Instructed by	: Mabunda Incorporated.
For the *Amicus Curae*	: Adv Du Plessis SC with Adv S. Pudifin-Jones.
Instructed by	: Webber Wentzel Attorneys.

CC PBM

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: Yes/
(2) OF INTEREST TO OTHER JUDGES: Yes/
(3) REVISED: Yes/

7 December 2021
DATE SIGNATURE

Case No 40441/2021

In the matter between:

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

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JUDGMENT

VICTOR, J:

Introduction

[1] The myth that corruption has no victim is a dangerous fantasy. Corruption causes disastrously inefficient economic, social and political outcomes.[1] It diverts public resources from critical development projects thereby exacerbating job creation, growth and opportunity. It makes poor nations poorer.

[2] The genesis of this matter lies in what has become known as the Mozambican secret debt scandal, in which three Mozambican companies secretly and illegally took out a loan of more than $2bn repayment of which the state guaranteed. Mr Chang, a public official of Mozambique who occupied the position of Minister of Finance for ten years, and the first respondent in this matter, allegedly formed part of the group involved in the scandal. During his time in office, it is alleged that he committed 'grand corruption', otherwise known as the plundering of public resources on a large scale, causing untold hardship to poor communities.[2] At issue here is his extradition.

Factual background: the Mozambican secret debt scandal and the context of this application

[3] In 2013, bankers in Europe, businesspeople based in the Middle East and various politicians and public servants in Mozambique conspired to organise a Euro-based two-billion-dollar loan to Mozambique. Many of the funds derived from American investors. The Vice Attorney General of Mozambique describes this amount as constituting 12 percent of the country's GDP.

[1] Democracy Works Foundation Policy Brief 14: Combatting Corruption in South Africa William Gumede 3 March 2011.

[2] ibid.

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[4] The loan was kept hidden. None of the borrowed money, except bribes, went to Mozambique. There were no services or products which inured to the benefit of the Mozambican people. This triggered a response from civil society, and in particular the applicant in this matter, the Forum De Monitoria Do OrÇamento, abbreviated and referred to herein as FMO. FMO is an umbrella organisation comprising of various Mozambican civil society organisations that are non-profit and non-governmental in nature, and is organised in terms of the laws of Mozambique. FMO has addressed the question of corruption and asserts in its founding affidavit that corruption is a pandemic that constitutes a scourge of our times. It therefore took a keen interest in the scandal.

[5] Like South Africa, Mozambique is no stranger to corrupt officials, abusers of public power and the problem of monies intended for public good, greedily diverted into the pockets of the wrong parties.

[6] Mr Chang allegedly abused his public office by funnelling foreign funds away from their intended purposes: community upliftment and maritime projects that would have provided employment. As already described, much of the foreign funds diverted illegally were from American investors. Mr Chang, acting in his official capacity, signed a guarantee on behalf of the Government of Mozambique for these loans, thus making Mozambique liable to repay these loans. Mr Chang stands accused of grand corruption. He has been charged in both the United States of America (USA) and the Republic of Mozambique for various counts of corruption and fraud, committed whilst he was the Minister of Finance in Mozambique.

[7] Mr Chang has yet to face these charges. On 19 December 2018, Mr Chang was indicted in the eastern district Court of New York, USA, for these misdeeds. The American authorities sought his extradition to the USA to stand trial, insisting that he be arrested whilst in South Africa. He has been incarcerated in South Africa ever since. Shortly thereafter, Mozambique also requested that Mr Chang be extradited to Mozambique to stand trial. This created a situation whereby there were two competing requests for his extradition.

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[8] In 2018, Mr Chang was arrested at the OR Tambo International Airport on his way to Dubai, at the request of the American authorities. He brought an application in 2019 in which he sought an order directing the current Minister to surrender him to the Government of Mozambique, alternatively, that he be released from custody. That application is known as *Chang 1*.[3]

[9] The current Minister not only opposed the relief sought by Mr Chang but also launched a counter - application to set aside the decision of his predecessor in Office, former Minister Masutha, who had decided to extradite Mr Chang to Mozambique. On 1 November 2019 the full Court in *Chang 1* dismissed Mr Chang's application, reviewing the former Minister's decision and remitting it back to the current Minister for reconsideration.

[10] The current Minister after receiving the remittal in Chang 1 waited almost two years before deciding to extradite Mr Chang to Mozambique. Suddenly his extradition has become urgent. Having reached this point and the continued incarceration of Mr Chang, coupled with the threat of his extradition to Mozambique, it understandable for FMO to seek the urgent relief they have which is to halt his extradition to Mozambique and for him to be extradited to the USA. This application and its urgency is important to all parties.

[11] The question of FMO's legal capacity to sue in these proceedings is not raised. In this matter, the original founding affidavit was unsigned as the authorised person was out of the country and FMO's attorney signed, having been authorised to do so. The original affidavit was eventually signed by the appropriate person, so nothing turns on this.

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[3] *Chang v Minister of Justice and Correctional Services* [2020] 1 All SA 747 (GJ) (*Chang I*).

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[12] The main focus of the FMO is to address what they describe as widespread government corruption and maladministration in Mozambique. They assert that members of the Mozambican society are poor, and are heavily impacted by the extent of bribery and corruption that plagues their country. Concerned by Mr Chang's involvement in corruption, FMO asserts that Mozambican civil society does not believe the interests of the country will be served if Mr Chang is extradited to Mozambique instead of to the USA for reasons that will be canvassed presently.

[13] The deponent, on behalf of the Government of Mozambique, asserts that its purpose is to bring Mr Chang and other members of the group that were involved in redirecting the funds, and contends that it is of paramount importance that the perpetrators of the so-called hidden debt scandal, and other acts of corruption and fraud, are held accountable in Mozambique.

[14] There are currently 19 defendants who are facing prosecution in Mozambique but it is alleged that Mr Chang is the primary or principal protagonist: the linchpin of this crime. The Mozambican Government wants to bring Mr Chang to book, thus it seeks his extradition from South Africa, where he is currently incarcerated.

Parties

[15] The applicant is FMO, described above. The first respondent is Mr Chang, who is currently held in prison pending his extradition. The second respondent is the Minister of Justice and Correctional services, whose decision to extradite Mr Chang to Mozambique is being challenged. The third respondent is the Director of Public Prosecutions, Gauteng Local Division. The fourth respondent is the Helen Suzman Foundation (HSF) an NGO holding an interest in these proceedings on account of its mandate: to defend the values of the Constitution, the Rule of Law and human rights. The fifth respondent is the Director General, who controls the ports of entry and exit of the country. The Sixth Respondent is the Minister of Home Affairs, who has an interest in the matter. The seventh Respondent is the Republic of Mozambique which, as indicated, seeks Mr Chang's extradition.

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Issues

[16] At the heart of this matter are two issues for determination. The first is whether the Minister's decision was rational and in conformity with the doctrine of legality when he changed his mind from extraditing Mr Chang to the USA, to Mozambique.

[17] The second is whether the Minister ignored relevant facts, thus resulting in the decision and the procedure adopted in arriving at the decision, being marred by irrationality.

Submissions by the parties

The case by FMO

[18] There are two competing endeavours by both Mozambique and the USA to extradite Mr Chang to their respective countries. The current Minister of Justice initially decided that Mr Chang must be extradited to the USA, but then failed to give proper reasons for his change of mind to extradite Mr Chang to Mozambique. FMO asserts that this decision must be reviewed and advances three core bases for doing so. According to FMO, the Minister's decision must be reviewed in terms of (i) a legality review; (ii) a review on the basis that the Minister did not apply the correct law on extradition; (iii) and a review on the basis that the Minister did not consider the relationship between international and domestic law under the Constitution and in terms of International Treaties to which South Africa is a signatory.

[19] FMO submits that the decision to surrender Mr Chang to Mozambique was not rational. This, FMO avers, is because Mr Chang enjoys immunity in Mozambique and the Mozambican warrants of arrest for Mr Chang are defective, as is the indictment. Accordingly, extraditing Mr Chang to Mozambique would not serve the purposes of extradition, namely, to ensure criminal prosecution and to counter corruption and fraud. FMO points out that at the time of *Chang 1*, Mr Chang's immunity from prosecution in Mozambique was the basis to set aside the former Minister's decision to extradite him to Mozambique, and FMO contend it is still a concern. FMO points to further problems

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being that Mr Chang remains a flight risk if he is returned to Mozambique and there is no valid and settled legal assurance that he is not immune from prosecution.

[20] FMO contends that before retaking the decision, the Minister had even sought opinions from five independent lawyers to advise him on whether Mr Chang indeed enjoys immunity in Mozambique. On or about September 2020, the Minister accepted, and agreed with, the advice given: that Mr Chang did enjoy immunity. Yet, barely a year later, on 17 August 2021, the Minister nevertheless changed his mind. FMO submits that not only was this contrary to the advice tendered but also flies in the face of the principle on immunity set out in the judgment of *Chang 1*: that it is irrational to extradite a person to where they will be immune from prosecution.

[21] FMO also asserts that the decision taken by the Minister was procedurally fatal and it was problematic that the Minister failed to provide rational reasons for the decision taken. Only after the launch of these proceedings did the Minister give any reasons. FMO submit that the Minster's reasons rationalising his decision *post hoc* the legal challenge is impermissible, and in any event, were arbitrary and irrational and they bore no rational connection to the evidence before the Minister when he changed his mind from extraditing Mr Chang to the USA, then to Mozambique.

The case by the Helen Suzman Foundation (HSF)

[22] The HSF has an interest in highlighting and preventing the surge of corruption, not only in South Africa, but globally. It seeks to highlight four aspects of this matter which affects the rule of law, and upon which, it grounds its interest in the proceedings.

[23] The HSF emphasises that it is trite law that all exercise of public power, including Executive action, is subject to the Constitution and review by the courts, which of course should be mindful not to overstep the mark or overreach into what would be the realm of the Executive. However, courts are fully entitled to assess and weigh whether the principle of legality has been breached or not. It emphasises that the international law implications of the Minister's decision do not shield him from the

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Court's oversight. The HSF also analysed the record and submits that the Minister's reasons failed to advance the rule of law, constitutionality and human rights. The HSF also asserts that there is no persuasive evidence to demonstrate that Mr Chang would be properly arrested and tried in Mozambique. Accordingly, that the interests of justice would be served if he were to be extradited to the USA.

[24] A further point that the HSF stresses is that the Minister's decision and reasons thereof, must be located in the written record: editorialised written reasons should not be given after court proceedings have been instituted, nor delivered after the record has been filed. What this means for this case is that the reasons proffered *post hoc*, are not confirmed by the record.

[25] The HSF, in expanding on the duty to counter corruption, referred to a number of statutes and conventions, including PRECCA,[4] which demonstrate South Africa's commitments to strengthen measures to prevent and combat corruption and corrupt activities. Section 35(1)(a) of PRECCA provides that:

> "Even 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:
> (c) was arrested in the territory of the Republic. . . "

[26] The HSF also refers to a number of international instruments, including the United Nations Convention Against Corruption, the AU Convention Against Corruption, the OECD Anti-Bribery Convention and the SADAC protocol Against Corruption. The HSF contends that corruption is a transnational phenomenon requiring inter-state cooperation. The instruments should serve to effectively eradicate the concerted efforts of those participating in corruption at a global level.

[4] Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PRECCA).

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The case by the Minister of Justice

[27] It was argued on the Minister's behalf that the decision to return Mr Chang to Mozambique rather than to the USA, in accordance with his earlier decision, was rational. In this regard reliance was placed on the case of *Scalabrini*, and in particular, the reference to the following:

> "All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."[5]

[28] It was submitted that a court cannot substitute its own decision, save in an exceptional circumstance, and the applicant has not made out a case for exceptional circumstances to warrant the Court making an order substituting the decision of the Minister.

[29] It was also argued that the threshold of rationality, as set out in *Pharmaceutical Manufacturers*, had been reached by the Minister:

> "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."[6]

[30] The argument on behalf of the Minister was that there was a rational connection between his decision and its legitimate purpose, and he was acting within the scope of

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[5] *Minister of Home Affairs v Scalabrini Centre, Cape Town* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) at para 65.

[6] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 90.

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legal authority. He submits that the decision he made was rationally connected to the facts and the information that was before him.

[31] Reference was also made to the case of *Bel Porto*, where the Constitutional Court cautioned:

> "The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."[7]

[32] The Minister contends that FMO has not referred to any facts from which it appears that Mr Chang enjoyed immunity in Mozambique. He relied on the opinions of experts in Mozambican law, and he was satisfied that that opinion precluded any immunity defence that Mr Chang could raise. He also took into account that other persons have been indicted for the offence and therefore, concludes that Mr Chang could be successfully prosecuted in Mozambique.

[33] The Minister contends that there is a proper warrant of arrest for Mr Chang in Mozambique, as is required in terms of section 11 of the Extradition Act,[8] to make a decision and to deliver Mr Chang to Mozambique based on the information before him.

[34] The Minister submits that there was no legal necessity for the reasons for his decision to be part of a written recordal in the record. He asserts that it was perfectly permissible for his reasons to be delivered on 2 September 2021, as there is no requirement in Uniform Rule 53 which prevents written reasons from being filed after the record is handed over.

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[7] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) (*Bel Porto*) at para 45.

[8] Extradition Act 67 of 1962.

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[35] Finally, the Minister disputes that it is in the interests of justice that the FMO demands be met and that Mr Chang be extradited to the USA. The Minister makes the point in his reasons that there is no bias to Mozambique in his decision.

The case by the Mozambican Government

[36] The Mozambican Government urges this Court to take into account that it is not a question of whether Mr Chang will likely face prosecution in Mozambique.

[37] Dr Paulo, the deponent to the affidavits by Mozambique says he knows the law of his country and the submissions he makes to this Court is the law of Mozambique. Dr Paulo, submits that Mr Chang will definitely face the full brunt of the law should he be returned to Mozambique. He submits that extradition is a critical tool in ensuring that criminals cannot use their resources to leave the country's territory to avoid criminal accountability. Mozambique submits that the facts before the current Minister have changed from those facts before the previous Minister. Those include a fresh warrant of arrest, an indictment from the Attorney General with leave from a Supreme Court Judge to serve it outside the country.

[38] Accordingly, the Government of Mozambique avers that FMO's submission, that the Minister's decision to extradite Mr Chang to Mozambique is irrational because he is immune from criminal liability in Mozambique, is without merit.

Legality review

[39] It is foundational to our Constitution that that the exercise of all public power must be lawful. In this case, the assessment is whether the decision of the Minister as a member of the Executive was rational.

[40] As already expounded, after the hearing of *Chang 1*, the Minister decided to extradite Mr Chang to the USA. Almost a year later, he changed his mind and decided to extradite Mr Chang to Mozambique instead. The extradition procedure provides that after the Minister receives a report and copy of the record of the proceedings by the

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Magistrate who committed the person (in this case, Mr Chang) to prison in terms of section 10(3) of the Extradition Act, the Minister has a discretion on whether to extradite or not. In terms of section 11(a) of the Extradition Act:

> "The Minister *may* order any person committed to prison under section 10 to be surrendered to any person authorised by the foreign State to receive him or her."

[41] It must be accepted that the Minister's decision must be rationally related to the purpose for which the power was conferred.[9] If it is not, then the exercise of the power would be arbitrary and at odds with the Constitution.[10] This means that in exercising his power, the Minister must take into consideration all the relevant facts when weighing up a matter pertaining to extradition. The process in leading up to that decision must also be rational.

[42] In *Law Society*, Mogoeng CJ, in relevant part stated:

> "The evolution of our constitutional jurisprudence culminated in a principle that recognises that rationality applies not only to the decision, but also to the process in terms of which that decision was arrived at. . .
> In *Simelane* we reiterated its application to process in these terms:
>
> > 'We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.'
>
> . . .The latter is about testing whether, or ensuring that, there is a rational connection between the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power."[11]

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[9] *Pharmaceutical Manufacturers* above n 8 at para 85. See also *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 75 and *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) (*Masetlha*).

[10] *Masetlha* id.

[11] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) (*Law Society*) at paras 61-4.

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Rationality and ignoring relevant factors

[43] FMO submits that the Minister failed to take into account relevant facts and material and that these omissions meant that the means to achieve the object was not met. This, according to FMO, had an impact on the rationality of the entire process. These relevant facts and material included a number of factors: the reliance on the Government of Mozambique's say-so that Mr Chang would be charged in Mozambique; the unsound bases and contradiction in the warrants of arrest; although 19 people are to stand trial in Mozambique there is no definite indication that they will be convicted; lack of reasons for the length of time it has taken to charge the 19 alleged offenders; the fact that the very victims of the crimes, being the citizens of Mozambique, have, through FMO, themselves requested Mr Chang's extradition to the USA as they believe the level of systemic corruption is so deep that their interests would be better served by way of extradition to another country; the bad faith approach by Mozambique as set out in *Chang 1*; and the that recoupment of the money is not for Mozambique but for the investors to whom the money is owed. If the money is returned to the investors then the Government of Mozambique will not have to repay the money out of its own pocket.

[44] The Constitutional Court, in *Democratic Alliance,*[12] postulated a three stage enquiry when a court is faced with an Executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires the court to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is "whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational".[13]

[12] *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) (*Democratic Alliance*).

[13] Id at para 39.

[45] If the Minister does not take into account the above material factors, as well as the purpose of the Extradition statute, and if he does not have regard to both domestic and international jurisprudence pertaining to extradition, then the Minister's decision was inconsistent with the purpose for which the power was conferred. If this is so, then there can be no rational relationship between the means employed and the purpose.[14]

[46] In *Albutt*, the following was stated:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."[15]

[47] In this regard, FMO submitted that the Minister should have been on high alert because of the very high international duties that South Africa was bound to observe, in particular in this situation, in respect of transnational corruption. The standard is very high and there must be exacting and rigorous compliance with our international obligations. The Minister should pay meticulous detail to all factors when making his decision. In particular, FMO submits that the Minister should have been on notice of these cautionary aspects as he was aware of the legal provisions as established in *Chang 1*, when he supported Mr Chang's extradition to the USA. It is important to note that the Deputy Minister of Justice also signed the extradition order to the USA, and there is no word from him as to why there was a change in the decision.

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[14] Id at para 40.

[15] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) para 51.

[48] The Minister was advised by his legal advisors that his decision to extradite to Mozambique would be subject to review. This is in a memo from an advocate. The Minister therefore had a very high duty to make sure that the decision he made was not irrational and that this change of tack should have been properly explained and justified.

[49] On the facts before the Minister one of the primary considerations which illustrates that his decision was not rationally related to the purpose is that of immunity. The question of Mr Chang's immunity was an issue in Chang 1 and continues to be problematic in this matter.

Immunity

[50] In *Chang 1*, the Court found that if Mr Chang was extradited to Mozambique and was immune from prosecution, then the extradition to Mozambique was unlawful and irrational. The question of immunity is also dealt with in Article 4(e) of the SADC Protocol, which similarly maintains that if the person becomes immune from prosecution, then extradition to that State is contraindicated.[16]

[51] In *Chang 1*, the court found that the former Minister's decision was irrational because "[e]xtradition has as its purpose the prosecution of the guilty. Thus, it would make no sense to extradite a person to a place where he cannot be prosecuted."[17]

[52] The record reveals that Mr Chang is immune from prosecution in Mozambique. It is only from the *post hoc* reasons that it now emerges that Mr Chang is not immune from prosecution. In the absence of full and proper reasons from the Minister for his changed stance vis-à-vis the matter, this Court is still left with other evidence which is objective and clear, and it remains that the question of Mr Chang's immunity from prosecution is uncertain.

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[16] The protocol provides: "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".

[17] *Chang I* above n 5 at para 76.

[53] There is evidence in four documents that the Minister has not been able to gainsay except for the word of Dr Paulo and some other legal opinion. No case law has been cited to support Dr Paulo's legal stance that Mr Chang does not enjoy immunity in Mozambique. The documents relied on by FMO to support its argument include: the submission by Mr Chang on 21 February 2020 and the Government of Mozambique that a member of Parliament does enjoy immunity; Mr Chang renounced his membership of Parliament, and it was accepted by Parliament; there was a general election in 2019 after he was incarcerated; he was not voted into Parliament; and there is no written evidence to suggest that he cannot be prosecuted for crimes committed during his tenure as Minister of Finance except for Dr Paulo's say-so.

[54] In the light of the unresolved uncertainties about Mr Chang's immunity, in my view, the Minister could not have made a rational decision. These uncertainties were referred to by FMO and include the fact that Mr Chang has not claimed immunity under international law but under the domestic laws of Mozambique. If it were under international law, then the issue would have turned on whether South Africa could arrest Mr Chang because of the immunity he enjoys under international law. Instead, the issue is whether Mr Chang enjoys immunity under the domestic laws of the requesting State thereby making immunity a dispositive issue.

[55] FMO submits that it is unclear whether further processes, like parliamentary or court approval, are required to prosecute Mr Chang for conduct allegedly committed during his incumbency. FMO argues that there is a difference between personal immunity while occupying office or protection for conduct generally while in office. It may well be the case that Mr Chang is still immune from prosecution for anything done during his term of office, even though he is no longer an MP.

[56] Mr Chang and Mozambique offer contradictory accounts of Mr Chang's immunity. Mr Chang submits that he must be surrendered to Mozambique so that he can have his immunity lifted. He then, in plain contradiction of this statement, says that

his immunity is now "moot" as he has resigned from Parliament and because there is a new Parliament in Mozambique, of which he does not form part.

[57] The further concerning aspect is the supplementary submission filed by the Mozambican Government. In *Chang 1*, the Government claimed that he never enjoyed immunity. In *Chang1*, the Court found this to be incorrect. FMO submits that moving from that incorrect premise, the Government of Mozambique argues that he can now be prosecuted but whilst he was Minister of Finance Mr Chang could not be prosecuted without the consent of Parliament. This contradicts the point that he made in regard to his immunity in *Chang 1*, which found that without Parliament lifting his immunity he could not be prosecuted. Mr Chang could still raise an immunity defence. Mr Van Heerden, the Chief of the Directorate of International Legal Relations in the Department of Justice, stated in his July 2020 memorandum, that Mr Chang still enjoys immunity in Mozambique. There are five opinions of which portions are referred in Mr Van Heerden's opinion. The full opinions have not been made available to FMO. Of importance is that Mr Van Heerden bases his finding statement on those opinions.

[58] An excerpt in a third opinion obtained by the Minister shows that he should not have accepted that Mr Chang no longer enjoys immunity in Mozambique just because he was no longer a member of Parliament, even though Parliament acknowledged that renunciation. An excerpt from a fourth legal opinion procured from Mozambique, FMO asserts that it shows that Mozambique was acting in bad faith when dealing with South Africa on the question of his immunity. At the time the Mozambican opinion was given to South Africa, Mr Chang had not been charged with an offense in Mozambique, which means the request for extradition did not comply with international law.

[59] FMO points out that at the time of the arrest of Mr Chang and the request for extradition, he did not waive his immunity. Mr Chang still enjoys a right not to testify about the time he was the Minister of Finance.

[60] Accordingly, the question of Mr Chang's immunity from prosecution has not been securely proven by the Government of Mozambique, nor were there sufficient facts before the Minister to make the decision on Mr Chang's immunity. There is no incontrovertible evidence to gainsay that Mr Chang could successfully raise an immunity defence when he arrives in Mozambique and what the outcome of his defence would be.

[61] To the extent that Mr Chang's immunity is still uncertain should he return to Mozambique, this still remains a central consideration on whether the Minister's decision was rational when he changed his mind from extraditing him to the USA and then to Mozambique. I shall not belabour the point any further save to state that the Minister has not fully explained his change of heart in the face of his own decision and the legal opinions he received which showed Mr Chang could still enjoy domestic immunity.

Other concerns

[62] There remain further relevant concerns which the Minister did not take into account or failed to give sufficient weight to. These include the problems pertaining to the warrants of arrest, the indictment and ignoring the wishes of Mozambican civil society. In *Chang 1* the Full Court found:

> "The more cynical view, as suggested by the civil society litigants in this matter, is that he has the impression that in Mozambique he may be given a measure of protection due to cronyism or a largesse which harks back to his former positions in government."[18]

[63] Mr Chang remains a flight risk in Mozambique. There remain concerns according to FMO that the systemic corruption may facilitate his escape should he be returned. At this stage there is no written progress report of the current prosecutions and conviction of persons politically connected with him in Mozambique. There is a

[18] *Chang 1* above n 5 at para 36.

further concern that Mr Chang believes that Mozambique will not be able to effectively prosecute him.

[64] In my view these facts ought to have been carefully considered by the Minister in the process of reaching his decision. In the absence of a rational explanation by the Minister for ignoring or not giving sufficient weight to these undisputed concerns, the requisite threshold for rationality has not been reached. The means adopted by the Minister are not rationally related to the purpose because the procedure by which the Minister's decision was taken did not give serious consideration to these undisputed facts.

Warrants of Arrest

[65] FMO contends that at the time of the Minister's decision, the international warrant of arrest was defective, as it also provided for Mr Chang to be arrested outside the territory of Mozambique. The public prosecutor of Mozambique sent a provisional indictment to the Minister in November 2020, stating that the warrant of 19 January 2019 did not comply with timelines under Mozambican law. This resulted in the issue of a warrant of arrest for pre-trial detention issued by the Maputo City Court. The consequence is the 2019 warrant is invalid and cannot be executed on.

[66] There is a further difficulty. The warrant was issued whilst Mr Chang was a member of Parliament. He was immune from prosecution at that stage.

[67] Because of the concurrent extradition requests from Mozambique and the USA to the South African authorities, the prosecutor then tried to justify why a second warrant was necessary, in order to make sure that the pre-trial detention timeline was met.

[68] The warrant is now over two and half years old. This, to me, is concerning, since the international warrant has not been withdrawn as far as the papers placed before me show, and there is, within the Mozambican justice system an inconsistency about how

the two warrants are to be assessed. And, unfortunately, there is no proper explanation other than a brief reference as to why a second warrant was to be issued.

[69] The Minister has failed to give reasons for why the warrant is valid in the light of the inconsistencies. The Government of Mozambique issued another warrant dated 14 February 2020, by the Maputo City Judicial Court. This warrant was not before the Minister when he changed his decision. It was only filed in these proceedings when the answering affidavits were filed. It is unclear whether timelines apply to the new warrant of arrest. In the absence of this new warrant being before the Minister, his decision is irrational as it must have been clear to him at that point that Mr Chang still had immunity from prosecution in Mozambique. In the light of the new warrant being issued, one can only conclude that the government considered the original warrant invalid, yet that was the warrant on which the Minister made his decision. This fortifies the conclusion of irrationality of his decision.

[70] FMO points out that the crimes listed in the arrest warrant differ from those in the indictment. The arrest warrant refers to passive corruption for an illicit act. The warrant also mentions "unlawful participation in business", a crime which is not mentioned in the extradition request. The arrest warrant does not mention money laundering. It also does not mention the more serious crimes of embezzlement, deception, criminal association, fraud and other crimes which he could potentially be charged with.

[71] It is still unclear whether the warrant could still be enforced against Mr Chang when he is no longer a member of Parliament. This leads to the assessment as to whether this would result in functional immunity whilst he was still a Minister or whether Mr Chang himself has waived his right to immunity. He certainly has not at this stage.

[72] The third reason contended for by the applicant is that the warrant is over two and a half years old. It is unclear whether the warrant is valid as a matter of

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Mozambican law, which could prescribe timelines for the validity of such a warrant. On the contrary, even the prosecutors' reference to timelines implies that the international warrant has prescribed and, as I have already stated, it may be defective.

[73] In particular, it makes reference to Mr Chang being arrested outside of Mozambique. This would be invalid as Mr Chang first has to arrive in Mozambique before he can be arrested. He cannot be arrested in another country, outside of those extradition procedures.

[74] Against this backdrop of all the various aspects of invalidity, the Minister simply denies that the warrant is invalid, and he makes no attempt the address the discrepancy between the two warrants, the provisional indictment and the arrest warrant of 19 January 2019. He also does not explain whether the arrest warrant is valid, and simply accepts the bald allegation made by the Government of Mozambique that the 19 January 2019 warrant is valid. The Minister also does not take into account that Mozambique has not explained the discrepancies.

[75] The ease with which new warrants are issued by the Government of Mozambique, also means that the alleged crimes with which Mr Chang can be charged can be changed to much lesser crimes.

[76] Once I recognise that the that the Minister has failed to consider material factors in the process of coming to his decision, then it follows that his decision does not pass the rationality test.

Post hoc reasons for the Minister's decision

[77] The *post hoc* reasons provided by the Minister after the launch of these proceedings demonstrates that important aspects were not before him when he made his decision, thereby making the decision irrational. In addition, his own State law advisors recommended that Mr Chang be extradited to the USA.

[78] The reasons lack an evaluation of all the important aspects pertaining to immunity and the warrants of arrest. Instead, the Minister glosses over these aspects. He does not explain why he did not accept his own legal advisors' recommendations. In one phrase, he accepts that Mr Chang no longer has immunity from prosecution or arrest, yet a plethora of relevant facts were placed before him to the contrary. He gives little weight to the fact that the Government of the USA has undertaken to return Mr Chang to the Mozambican authorities when they have completed their processes. He lists the acquittal in the USA of Mr Boustani, an alleged accomplice of Mr Chang, as a further reason for not extraditing him there. He claims to have no evidence that the same will not happen to Mr Chang. The USA Government would be obliged to comply with their undertaking in that event, yet this is not factored into the Minister's decision.

[79] A decision maker is bound by the reasons it advanced for its decision and is barred from relying on additional, or *post hoc*, reasons.[19] Cachalia JA, in *National Lotteries Board,*[20]while not having to decide the point directly, stated:

> "The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards — even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide."[21]

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[19] *Freedom Under the Law (RF) NPC v National Director of Public Prosecutions* 2018 (1) SACR 436 (GP).

[20] *National Lotteries Board v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA).

[21] Id at para 27. See also *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa* (2014) 3 All SA 171 (GJ) at paras 94 and 97.

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[80] In this case new reasons were advanced, which were not stated in the record. In order for the decision to be rational, the reasons for the decision should appear in the record. The reasons cannot be justified or retrofitted after the decision has been taken.

[81] The Court of Appeal in the case of *R v Westminster City Council, ex parte Ermakov* held as follows in this regard:

> "The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should….be very cautious about doing so….Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case- which indicates that the real reasons were wholly different from the stated reasons. . .
> The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to the purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but gives rise to practical difficulties."[22]

[82] It is clear, the reason cannot be contrived *post hoc* the decision. Otherwise this would provide an opportunity to justify a decision after the event, preventing a court from scrutinising the actual reason behind the decision when it was made.

[83] In the judgment of *Motau,* Khampepe J reasoned as follows:

> "as I believe that the reasons cited by the minister in her correspondence to General Motau and Ms Mokoena were sufficient to demonstrate good cause, I do not consider it necessary to deal with the further reasons cited by the minister for her decision in her papers in this court and the high court. In any event, I have reservations about whether it would be permissible for her to rely on these reasons since they were not relied on or disclosed when she took her decision."[23]

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[22] *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302 (CA) at 315-316.

[23] *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) dictum in para 55 at footnote 85, where Khampepe J referred to Cachalia JA's judgment in *National Lotteries Board* above n 22 at paras 27-8.

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[84] Some six years later, in *NERSA*, Khampepe J, again approving the dicta in *National Lotteries Board*, stated that "it is true that reasons formulated after a decision has been made cannot be relied upon to render a decision rational, reasonable and lawful."[24]

[85] A further consideration is the principle that *post hoc* reasons amount to a moving target. The US Supreme Court came to such a conclusion in the *University of California* case, a decision of the majority led by Chief Justice Roberts, where he found that it is a foundational principle of administrative law that judicial review of agency action is limited to the ground that the agency invoked when it took the action.[25]

[86] This case involves the decision about the DACA dreamer's decision.[26] The Court had to decide whether the agency action was satisfactorily explained. The natural starting point is that the explanation must be the reason at the time that the decision was taken. In that case, Secretary Nielsen chose to elaborate, in additional memoranda, on the reasons that the initial rescission of the DACA protection was taken. The Court held that she was limited to the original reason.

[87] In order for a reason to be rational the reason must exist at the time it was taken. The Minister submits that nothing in Rule 53 requires that there have to be contemporaneous reasons. But that is not a critical aspect. The critical aspect is whether the failure to provide contemporaneous reasons goes to the rationality of the decision.

[88] FMO argued that I should not look at the Minister's reasons at all, because they were filed late. I do not accept that argument. Having looked at the reasons it is clear

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[24] *National Energy Regulator of South Africa v PG Group (Pty) Ltd* [2019] ZACC 28; 2020 (1) SA 450 (CC); 2019 (10) BCLR 1185 (CC) (*NERSA*) at para 39.

[25] *Department of Homeland Security v Regents of the University of California* 591 U.S. 13 (2020).

[26] These were children who had entered the USA illegally and who now as adults were subject to deportation from the USA

that, when properly considered, they are incongruent and lack rational support for the decision he took.

[89] The *post hoc* reasons, in my view, do not have sufficient probative value to justify a rational decision.

Separation of powers and substitution of the Minister's decision

[90] The Minster's case is that this is a separation of powers issue and therefore, the court cannot intervene or substitute his decision. Separation of powers and rationality of a decision are two separate issues. It is therefore, difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry.

[91] In *Democratic Alliance* Yacoob ADCJ, as he then was, clarified the issue as follows:

> "It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational."[27]

[92] Rationality does not have a different meaning when considering a separation of powers issue. The question remains whether the means adopted are rationally related to the ends, in executive decision-making cases. Ultimately the consideration must be

[27] *Democratic Alliance* above n 14 at para 44.

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whether the decision was rational or not. And that finding cannot depend or turn on a separation of powers issue.

Remedy

[93] The circumstances in this case are exceptional. Mr Chang has been incarcerated for almost two years. When the matter was remitted in *Chang 1*, the Minister had the opportunity to make a decision that was rational and in accordance with our international obligations, and in accordance with the material placed before him. The extradition process has now been placed and considered before the present and former Minister. The present Minister initially supported extradition to the USA and now has changed his mind on this. There are no new undisputed facts justifying the change. The law as set out in *Chang 1*, remains unchanged.

[94] When substitution of a functionary's decision is indicated, there are a number of factors that must be taken into account. In *Trencon*, the Constitutional Court held:

> "A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision. In other instances some matters may concern decisions that are judicial in nature. In those instances — if the court has all the relevant information before it — it may very well be in as good a position as the administrator to make the decision."[28]

[95] In this matter I have all the relevant information before me. It does not need repeating. The change in the Minister's decision based on the information before him should have steered him towards extraditing Mr Chang to the USA. Instead it did not.

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[28] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at para 48.

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He has unequivocally showed his hand as to his intention to accept the position of the Government of Mozambique irrespective of all the other strong indicators to the contrary. This gives rise to unique and exceptional circumstances where this Court is in as good a position to make the decision.

[96] I am alive to the fact that the Minister submits that his decision to extradite is polycentric but for this submission to succeed, his decision must nonetheless be rational. To pass constitutional muster a decision of a member of the Executive must be rational otherwise public policy will be subject to the vagaries of a whim. Important government policies such as extradition cannot be decided on a whim, they have to be carefully and rationally reasoned.

[97] FMO argues that to send the matter back to the Minister would serve no purpose as his decision is a forgone conclusion if regard be had to the manner in which he disregarded relevant facts. The Minister was alerted to the question of immunity in Chang 1 and by his own legal advisors in their written opinions. He initially accepted their advice but a year later chose to ignore it. His post hoc reasons do not engage with the important concerns raised by his advisors about Mr Chang's immunity. This of itself is manifestly irrational and sets the benchmark if I were to remit the matter back to the Minister.

Conclusion

[98] The magnitude of this grand corruption scheme allegedly perpetrated by Mr Chang during his time in office, by plundering public resources on a large scale and thereby causing untold hardship to poor communities, is particularly egregious. In considering the question of extradition, I conclude that the best approach is to ensure measures that Mr Chang is brought to justice and held accountable. Extradition to the USA poses no risks to all parties in this saga for reasons referred to.

Order

1. The decision by the second respondent on or about 23 August 2021, to extradite the first respondent to the Republic of Mozambique, is declared to be inconsistent with the Constitution of South Africa 1996, and is invalid and set aside.

2. The decision of the second respondent on 21 May 2019 is substituted with the following:
"Mr Manuel Chang is to be surrendered and extradited to the United States of America to stand trial for his alleged offences in the United States of America, as contained in the extradition request, dated 28 January 2019."

3. The second respondent is to pay the costs of this application including the costs of two counsel on a party and party scale.

Signed electronically on 7 December 2021

VICTOR, J

Judge of The High Court
Gauteng Local Division
DATE: 10 November 2021

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CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 10/22

In the matter between:

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

ORDER

CORAM: Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ.

The Constitutional Court has considered this application for leave to appeal directly to it. It has concluded that the application falls to be dismissed with costs as it is not in the interests of justice to hear it at this stage.

Order: Leave to appeal is dismissed with costs.

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

Case no. 40441/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

27 July 2022 SIGNATURE

In the application for leave to appeal between:

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

LEAVE TO APPEAL JUDGMENT

[1] The applicant seeks leave to appeal to the Supreme Court of Appeal against prayers 1 and 2 of the order given by me on 10 November 2021. The first and fifth respondents oppose the application. The first respondent abides the decision of this Court.

[2] I granted the following relief:

Order

1. The decision by the second respondent on or about 23 August 2021, to extradite the first respondent to the Republic of Mozambique, is declared to be inconsistent with the Constitution of South Africa 1996, and is invalid and set aside.

2. The decision of the second respondent on 21 May 2019 is substituted with the following:

"Mr Manuel Chang is to be surrendered and extradited to the United States of America to stand trial for his alleged offences in the United States of America, as contained in the extradition request, dated 28 January 2019.

[3] On 15 December 2021, the applicant applied for leave to appeal directly to the Constitutional Court. The application was dismissed with costs and the Constitutional Court found that it was not in the interests of justice to hear the case at that stage.

[4] The Minister did not oppose the relief or support the relief sought in the Constitutional Court. The same applies in this application for leave to appeal

[5] The applicant in its Notice of Appeal has relied upon section 17(1)(a)(i)(ii) of the Superior Courts Act 10 of 2013. Section 17(1)(a) provides:

> "Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
>
> (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;"

[6] I have considered the submissions made by all the parties. I find that the applicant has not presented any compelling reasons why the applicant should be granted leave to appeal. Furthermore the appeal does not have a reasonable prospect of success in a higher court.

[7] In the result the applicant for leave to appeal is refused.

THE ORDER

(1) Leave to appeal is refused.

(2) The applicant shall bear the costs of the application for leave to appeal in respect of the First Respondent including the costs of two counsel and the costs of the Fifith Respondent.

VICTOR, J
JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION
DATE: 27 JULY 2022

Counsel for the Applicant	Adv W Mokari SC
Attorney for the Applicant	Mabunda Incorporated govm@mabundainc.com
Counsel for the 1st Respondent	Adv M de Plessis SC Adv E Cohen
Attorney for 1st Respondent	Ian Levitt Attorneys ian@ianlevitt.co.za
Counsel for Fifth Respondent	Adv Pudifin –Jones Adv T. Palmer
Attorney for Fifth Respondent	Attorney Webber Wentzel Vlad.movshovich@webberwentzel.com

Supreme Court of Appeal, Registrar's Office • PO Box 258, Bloemfontein, 9300 • c/o Elizabeth- & President Brand Street, Bloemfontein •
Tel (051) 4127 400 • Fax (051) 4127 449 • www.supremecourtofappeal.gov.za

Enquiries: Ms C L De Wee **Date: 20 DECEMBER 2022** **Ref: 866/2022**

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BRANDHOF
9324

YOUR REF: C13788*Mr Yazbek/mn/AD243/22

Lovius Block Inc
P O Box 12196
BRANDHOF
9324

Mr/Ms

APPLICATION FOR LEAVE TO APPEAL
REPUBLIC OF MOZAMBIQUE v FORUM DE MONITORIA DO ORCAMENTO & OTHERS

With reference to the application lodged in this office on 09 SEPTEMBER 2022 this Court ordered on 08 DECEMBER 2022 that the application be dismissed as per attached order:-

Yours faithfully

E VERMEULEN (Ms)
CHIEF REGISTRAR

REGISTERED POST **(H/B/D/O)**

YOUR REF: 40441/2021 **Victor J** **(Court *a quo*)**

Registrar of the High Court
Cnr Von Brandis & Pritchard Street
JOHANNESBURG
2001

Copy for your information.

CK P.B.M

SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 866/2022
GJ CASE NO: 40441/2021

BEFORE THE HONOURABLE JUSTICES CARELSE AND GOOSEN JJA

On the 08th DECEMBER 2022

In the application between:

REPUBLIC OF MOZAMBIQUE	**Applicant**
and	
FORUM DE MONITORIA DO ORCAMENTO	**1st Respondent**
MANUEL CHANG	**2nd Respondent**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**3rd Respondent**
DIRECTOR PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	**4th Respondent**
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	**5th Respondent**
MINISTER OF HOME AFFAIRS	**6th Respondent**
HELEN SUZMAN FOUNDATION	***Amicus Curiae***

Having considered the Notice of Motion and the other documents filed.

IT IS ORDERED THAT:

1. **Condonation as applied for is granted. The applicant for condonation is to pay the costs of the application.**
2. **The application for leave to appeal is dismissed with costs on the grounds that there is no reasonable prospect of success in an appeal and there is no other compelling reason why an appeal should be heard.**

BY ORDER OF THIS COURT

CHIEF REGISTRAR
E VERMEULEN (Ms)

REGISTRAR OF THE SUPREME COURT OF APPEAL
PO Box 266, Bloemfontein 9301
2022 -12- 20
SCA-001
REGISTRAR OF THE SUPREME COURT OF APPEAL
SOUTH AFRICA

CK P.B.M

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO.: 40441/2021

In the matter between:

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

R.O

EK P.B.M

REPUBLIC OF MOZAMBIQUE Seventh Respondent

REASONS FOR DECISION - REQUESTS FOR EXTRADITION OF MR MANUEL CHANG BY THE UNITED STATES OF AMERICA AND THE REPUBLIC OF MOZAMBIQUE

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1. I wish to set out the reasons for the decision I have taken regarding the request for extradition of Mr Chang by the United States of America and the Republic of Mozambique, as follows, herein.

2. I have carefully considered the advice I have received on the applicable legal principles, and all the documentation available to me, including the record of court proceedings in the review case that unfolded in 2019; the views of the relevant officials of the department and the further submissions received from the governments of United States of America and Mozambique; the Forum De Monitoria Do Orcamento and Mr Manuel Chang pursuant on my invitation to these parties to make submission before I made a decision whether or not Mr Chang should be extradited and the country to which he must be surrendered. I have also considered other factors and the competing interests of all the parties concerned.

3. As a result of competing extradition requests from the United States of America and the Republic of Mozambique, I considered both the Extradition

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Treaty between South Africa and the United States, and the SADC Protocol on Extradition, applicable to extraditions between South Africa and Mozambique.

4. I have looked at all the factors that our law, including our international obligations and our Extradition Treaty with the United States of America and the SADC Protocol enjoin South Africa to take into account in the face of the competing requests for the extradition of Mr Chang. These factors are as follows:

4.1. the existence or non-existence of treaties applicable to the extradition;

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

4.3. the nationality of the alleged offender and victims;

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

4.5. the timing of their requests;

4.6. The interests of the respective states; and

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

5. I have concluded that these factors are in favour of Mr Chang's extradition to the Republic of Mozambique in that:

5.1 I have accepted advice provided to me (in various legal opinions) that any decision on the fate of Mr Chang must be based on the information the South African Government has at its disposal at the time of the decision. Accordingly, my decision is based on the facts as they stand now, including the fact that Mr Chang has been indicted.

5.2 All parties agree that the offences at issue are serious and have a severe impact on the public finances of the Republic of Mozambique. The offences were committed at a time when Mr Chang held a high office of trust in the Mozambican government.

5.3 The offences involved transfers of monies that went through numerous banks, based in many countries around the world, **all** of which imposed a burden on the public finances of the Republic of Mozambique. Furthermore, the direct victims of the offences that are alleged to have been committed are the people of the Republic of Mozambique, whose prospects of development are put at risk as a whole as a result of the offences committed. The possibility of recouping such monies in their interest must also be taken into account in my view.

5.4 I also took note of the following:

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5.4.1 The government of the Republic of Mozambique has been investigating this matter since 2015. This led them in 2017 to seek mutual legal assistance from a plethora of countries where banks through which relevant transactions had been made, were based. Among the countries from which they sought assistance was the United States of America.

5.4.2 From the documents provided to me it would appear that the United States of America initially seemed willing to assist the Mozambican government.

5.4.3 However, the United States seemed to delay in providing relevant assistance to the government of the Republic of Mozambique and in the end, it would appear that they used the information (shared with them to assist the government of Mozambique in its endeavours to investigate these matters) in order to pursue their own criminal processes against Mr Chang and Mr Boustani and the alleged associates of these two men.

5.4.4 The United States government, in its documents, did not make any mention of the Mozambican requests for mutual legal assistance.

5.4.5 I am informed that the result of proceedings in the United States of America do not give any assurance that a prosecution of Mr Chang there would be successful in that one of his associates pleaded guilty, while Mr Boustani was acquitted, after a 7-week trial, on the grounds that the courts in New York did not have jurisdiction to prosecute him for the relevant offences. I have no evidence before me that the same will not happen if Mr Chang were surrendered to the United States of America even though what has happened thus far with Mr Boustani does concern me in as far as taking the decision I have taken.

5.4.6 I understand that there are concerns about the good faith of Mozambique which are said to count against an extradition of Mr Chang to Mozambique. The main concern being that the Mozambican government requested Mr Chang's extradition at a time they knew he was immune from prosecution, and had not yet been indicted.

5.4.7 I have considered the United States of America's stance, and the Mozambican government's reasons for not having yet indicted him at the time he was arrested in South Africa. The reasons appear to be that it took time for them to be able to charge and indict Mr Chang and others accused with him for the relevant offences due to delays in responses to their requests for mutual assistance from various countries but, in particular by

the United States. I see no reason to criticise the government of Mozambique for this. In addition, Mr Chang is presently not immune from prosecution and has been indicted in Mozambique. Therefore, the facts that gave rise to the concerns about the Mozambican government's bad faith do not apply. He is also under an international warrant of arrest.

6. I am aware that the United States made its request for Mr Chang's extradition before the Mozambican government did so. However, this was a matter of mere days. In any event, this is not determinative of my decision.

7. I accept that, if Mr Chang is surrendered to Mozambique, he may not be sent to the United States of America to face charges there. I have noted the commitment by the United States of America to send him to Mozambique on completion of processes in the USA but this in itself is not definitive of my decision. It has not been said by any of the parties making representations that Mr Chang may not be tried by the United States of America in absentia, should the United States of America wish to do so.

8. From the information available to me, it is apparent that Mr Chang no longer has immunity against prosecution (or arrest). The prohibition contained in Article 4 of the SADC Protocol on Extradition therefore no longer applies.

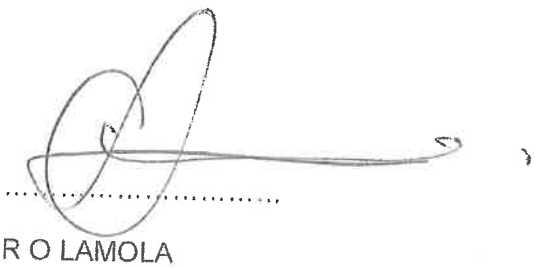
9. Lastly, the interests of the government of Mozambique in bringing to book one of their own, and in recouping funds stolen from their own coffers, for the benefit of their people and future security of their fiscus, in my view

supersedes the interests of the government of the United States of America in prosecuting persons that used their banking system, partially as far as is apparent, to commit crimes against the government of the Republic of Mozambique. I have also considered that the people of Mozambique have suffered the most loss by way of opportunities for long term development and that they must have an interest to see that their government holds those who abused their office and the trust of the public to account.

10. I have no reason to believe that the government of Mozambique is not committed to rooting out corruption. South Africa's international law obligations to support the fight against corruption, especially on the African continent, would in my view be well served by extraditing Mr Chang to the Republic of Mozambique.

11. Having conducted the assessment of all the factors, I have accordingly taken the decision, in the interests of justice, to extradite Mr Chang to Mozambique.

12. I consequently, on 17 August 2021, issued a notice in terms of section 11(a) of the Extradition Act No. 67 of 1962 that Mr Manuel Chang, a citizen of Mozambique, must be surrendered to the government of Mozambique.



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R O LAMOLA

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

DATE: 31 AUGUST 2021

CC PBM