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

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**
REPUBLIC OF MOZAMBIQUE	**Seventh Respondent**

JUDGMENT

Extradition – USA and Mozambique seeking to extradite Mr Manual Chang to their countries and who allegedly committed grand corruption of more than $2bn million. Minister of Justice agreed to extradite Mr Chang to the USA and then changed his decision about extraditing Mr Chang to the USA but rather to Mozambique. Mr Chang still enjoys immunity from prosecution in Mozambique. The Mozambican indictment and warrants for his arrest in Mozambique are uncertain. The Minister's change of his decision to extradite Mr Chang to Mozambique is irrational and his decision to extradite Mr Chang to Mozambique is set aside.

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 are competing demands to either Mozambique or the USA.

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

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

[2] ibid.

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 were derived from American investors. The Vice Attorney General of Mozambique describes this amount as constituting 12 percent of the country's GDP.

[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 Orcamento, 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.

[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 which they to halt his extradition to Mozambique and

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

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.

[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.

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 about extraditing Mr Chang from 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 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 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

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

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.

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.

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

[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 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

[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.

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

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.

[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.

[8] Extradition Act 67 of 1962.

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 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

[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.

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]

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

[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.

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]

[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

[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.

[14] Id at para 40.

> 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.

[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.

[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.

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.

[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.

[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.

[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 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 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 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.

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

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 upon.

[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 from Mozambique 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 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 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 thé 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]

[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. . .

[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.

> 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]

[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

[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.

[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.

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 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.

[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

[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 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.

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

[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. 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

[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.

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.

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Signed electronically on 7 December 2021

VICTOR, J

Judge of The High Court

Gauteng Local Division

DATE: 10 November 2021

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