

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 10/22

Case No: 21/40441

In the matter between:

REPUBLIC OF MOZAMBIQUE

Applicant

and

FORUM DE MONITORIA DO ORCAMENTO

First Respondent

MANUEL CHANG

Second Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Third Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG, JOHANNESBURG**

Fourth Respondent

HELEN SUZMAN FOUNDATION

Fifth Respondent

**DIRECTOR GENERAL: DEPARTMENT
OF HOME AFFAIRS**

Sixth Respondent

MINISTER OF HOME AFFAIRS

Seventh Respondent

FIFTH RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

NICOLE FRITZ

make oath and state:

INTRODUCTION

- 1 I am the director of the fifth respondent, the Helen Suzman Foundation (“*HSF*”), situated at 6 Sherborne Road, Parktown, Johannesburg.
- 2 I am duly authorised to depose to this affidavit on behalf on the HSF.
- 3 The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.
- 4 In this affidavit, I refer to the applicant as “Mozambique”, the first respondent as “FMO”, the Minister of Justice and Correctional Services as the “Minister” and Manuel Chang as “Mr. Chang”.
- 5 The applicant in this Court (Mozambique) seeks leave to appeal in terms of Rule 19(2) of the Constitutional Court rules against the judgment and order of the Gauteng Local Division, Johannesburg.
- 6 In its application, Mozambique contends:
 - 6.1 That the application raises both a constitutional issue, relating to the review of an executive decision, and an arguable point of law of general public importance relating to immunity from prosecution under the SADC protocol on extradition; and on the question of concurrent extradition requests by competing states; and

- 6.2 That the application warrants the urgent attention of this Court due to the continued incarceration of Mr Chang pending his extradition (to either the United States of America or to Mozambique).
- 7 The HSF opposes Mozambique's application on the basis that there are no reasonable prospects of success and that there is a need to bring this matter to finality by the extradition of Mr Chang. It is thus not in the interests of justice to hear this application.
- 8 In this affidavit, I address the following issues:
- 8.1 The background to this matter;
 - 8.2 HSF's interest in the litigation;
 - 8.3 The High Court judgment;
 - 8.4 The issues for determination;
 - 8.5 Why leave to appeal should be refused; and why the matter has no prospects of success on appeal; and
 - 8.6 Relief to dismiss the application.

BACKGROUND

- 9 The matter has its genesis in alleged grand-scale fraud committed by Mr Chang while he was Minister of Finance of Mozambique. It is alleged that he and his co-

conspirator took part in a securities fraud scheme involving a loan of more than US\$2 billion, which Mozambique guaranteed and which was siphoned off to private companies.

- 10 Mr Chang was arrested on 29 December 2018 by members of the South African Police Services at OR Tambo International Airport while he was in transit to the United Arab Emirates.
- 11 The arrest was at the request of the US government, which had issued a warrant for his arrest.
- 12 Both countries (the United States and Mozambique) filed extradition requests in South Africa seeking the extradition of Mr Chang. The US did so under an existing US-South Africa extradition treaty and later the Mozambicans filed a competing request under the South African Development Community (SADC) protocol on extradition.
- 13 After the Additional Magistrate: Kempton Park found that Mr Chang was extraditable to both the US and Mozambique, the former Minister was faced with a decision as to which request should be honoured.
- 14 The former Minister favoured the request by Mozambique – a decision which was challenged by both the FMO and the (subsequent) Minister in an earlier review application.

- 15 In this earlier review ("*Chang I*"),¹ the Full Court reviewed and set aside the decision of the former Minister to extradite Mr Chang to Mozambique. It held that the former Minister did not have the power to extradite Mr Chang to Mozambique and held that "*it would make no sense to extradite a person to a place where he cannot be prosecuted.*" The Full Court therefore set aside the former Minister's decision and remitted it to the current Minister for redetermination.
- 16 It took nearly 2 years before a further decision was made. During that time, the Minister sought counsel. He briefed five independent lawyers to address him on the crucial question of whether Mr Chang enjoyed immunity from prosecution in Mozambique. He was advised, amongst other things, that Mr Chang still enjoyed immunity.
- 17 Inexplicably, and against the advice that he had received, the Minister decided in August 2021 to extradite Mr Chang to Mozambique – yet again – and in spite of the Full Court's earlier judgment and the evidence before the Minister.

HSF'S INTEREST IN THE LITIGATION

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

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

- 19 The HSF joined in the earlier review proceedings in *Chang I* as an *amicus* and was cited as a respondent in the High Court proceedings which are the subject of the application for leave to appeal before this Court.
- 20 HSF participated fully in the High Court. It did so for an important reason.
- 21 The scourge of corruption and organised crime undermines the rights enshrined in our Bill of Rights, endangers the stability and security of society and jeopardises sustainable development, the institutions and values of democracy and ethical government, and the rule of law. This is true both in South Africa and in our neighbours – including Mozambique.
- 22 These human rights and social and ethical values are entrenched in the South African legal system and are those which the HSF actively seeks to promote and ventilate fully before the High Court and in this Court.
- 23 The HSF has a longstanding history of promoting South Africa's domestic and international law commitments in the realm of upholding democracy and the rule of law, constitutionality and human rights. The HSF has specialised expertise and interest in national, regional and international law standards in relation to the issues, before this Court and others.
- 24 In furtherance of this mandate, HSF made submissions before the High Court in support of the FMO's relief. In its submissions before the High Court, the HSF highlighted four aspects under the rule of law which arose in this matter.

- 24.1 That all exercises of public power are subject to judicial scrutiny and that the international law implications of the Minister's decision do not mean that this decision is shielded from the Court's oversight;
- 24.2 That analysis of the record of decision and reasons reveals that the Minister's decision failed to advance the rule of law, constitutionality and human rights on the dual basis that there was no reason to believe or for the stated belief that Mr Chang would be arrested in Mozambique; and that justice would be served by extraditing him to Mozambique instead of the United States;
- 24.3 That the reasons for the Minister's decision must be located in the record and not in editorialised written reasons delivered after the record and which are not confirmed independently by the record; and
- 24.4 The Minister's decision overlooked or ignored the Department of Justice and Constitutional Development's own recommendation to extradite Mr Chang to the US, or unlawfully (and without rational basis) reversed it.
- 25 HSF contended that in assessing whether Mr Chang *will be* (or is *likely to be*) prosecuted in Mozambique if he is extradited there, the relevant factors include not only Mozambique's *bona fides* or will to prosecute Mr Chang but also whether Mr Chang would be *subject to arrest in order to stand trial*, on being extradited to Mozambique.

- 26 HSF argued that there was no evidence from the record that these considerations featured in the Minister's decision. Rather, the record of the decision, and reasons, indicated that the decision would have an effect contrary to South Africa's constitutional and international law duties to fight corruption, and to the stated reason for which the decision was taken: i.e. Mr Chang's prosecution in Mozambique.
- 27 This is because the decision would result in, or would likely result in, Mr Chang *not* being prosecuted because there was every prospect on the facts of Mr Chang freely leaving Mozambique after extradition to Mozambique. Such an outcome would, of course, undermine anti-corruption efforts in Southern Africa.

THE HIGH COURT'S JUDGMENT

- 28 The High Court granted FMO the relief it sought, which was supported by HSF. It ordered:
- 28.1 The decision by the Minister on or around 23 August 2021 to extradite Mr Chang to the Republic of Mozambique is declared to be inconsistent with the Constitution of the Republic of South Africa and invalid and is set aside;
- 28.2 The decision of the Minister is substituted with a decision that Mr Manuel Chang be surrendered and extradited to the United States of America to stand trial for his alleged offences.
- 29 The salient features of the High Court judgment are as follows:

- 29.1 The Court found that Mr Chang was immune from prosecution² and that only in *post hoc* reasons did it emerge that he may not have been immune. The Court held that, in the absence of a full and proper explanation as to this “change in stance”, the Court must conclude – based on the clear evidence – that he was so immune.
- 29.2 The evidence before the Minister – which could not be gainsaid – confirmed this. There was only Dr Paulo’s say-so to the contrary. In the light of the unresolved uncertainties regarding Mr Chang’s immunity, the Minister could not have taken a rational decision to extradite Mr Chang to Mozambique.³
- 29.3 Mr Chang and Mozambique also offer contradictory accounts of Mr Chang’s immunity. On one version, he must surrender to Mozambique to have it lifted, and on another his immunity is moot following his resignation from Parliament.⁴
- 29.4 Accordingly, the Court held that Mr Chang’s lack of immunity had not been securely proven, and there were not sufficient facts before the Minister to make the decision. There was no clear evidence regarding what the outcome of a defence of immunity would be, should Mr Chang raise it.⁵

² Para 52 of the High Court judgment.

³ Para 54.

⁴ Para 56.

⁵ Para 60.

29.5 The Court also found the Minister had failed to take account of Mr Chang's being a flight risk and systematic corruption in Mozambique, and particularly the concern that politically connected persons would not face prosecution.⁶

29.6 As to the warrant of arrest, the Court held that the international warrant of arrest was defective, as it provided for arrest outside of Mozambique. The Court held further that the 2019 warrant was invalid, based on the public prosecutor's provisional indictment to the Minister (due to failure to comply with timelines) and because it was issued during a time when Mr Chang was a member of Parliament and immune.

29.7 On 14 February 2020, another warrant for Mr Chang's arrest was issued by the Mozambican government. The Court found that the warrant was not before the Minister when he made his decision and, thus, that it could not render that decision rational. Moreover, the Court found that the warrant may well be defective and thus could not support an argument that Mr Chang would be arrested and prosecuted on arrival in Mozambique.

29.8 The Court exercised its discretion to grant substitution relief. It held that Mr Chang had been incarcerated for almost two years, the matter had been remitted in *Chang 1*, all the information was before the Court and the

⁶ Para 63.

Minister had shown an intention to extradite to Mozambique despite the clear indicators to the contrary⁷.

ISSUES FOR DETERMINATION

30 Mozambique applies for leave to appeal against the High Court judgment directly to this Court.

31 As to the first issue, the issues confronting this Court are:

31.1 Whether this matter engages the jurisdiction of this Court;

31.2 Whether it is in the interest of justice to grant leave to appeal directly to this Court and therefore permit Mozambique to leapfrog to the Constitutional Court.

32 As to the second issue, and as to the merits, the primary issue before the Court is whether the Minister's decision was constitutional. The issues involve:

32.1 Whether Mr Chang enjoys immunity from prosecution in Mozambique;

32.2 Whether there is a valid warrant of arrest for Mr Chang issued by Mozambique;

32.3 Whether the Minister's decision was consonant with South African's international law obligations;

⁷ Para 95.

32.4 Whether there was any misdirection in the High Court exercising its discretion to grant the substitution order.

THE FIRST ISSUE: LEAVE TO APPEAL – JURISDICTION AND THE INTERESTS OF JUSTICE

33 There can be no dispute that the matter raises issues which are pre-eminently constitutional matters. The issues raised in his review application and (correctly it is submitted) applied by the High Court dealt with South Africa's obligations under the Constitution as well as international law (including both UN and SADC conventions, and under the Extradition Treaty between South Africa and the United States of America). The review court's consideration of the matter is premised on the principle of legality, which is sourced in the rule of law and section 1(c) of the Constitution and the matter involves the question of extradition, and the Extradition Act. The matter therefore engages the Court's jurisdiction in terms of section 167(3)(b)(i) of the Constitution.

34 However, while the matter is one of general public importance it does not raise an arguable point of law in terms of section 167(3)(b)(ii).

35 The fact that this matter engages section 167(3)(b)(i) jurisdiction is not the end of the enquiry, however. The applicant must also establish that the interests of justice favour a direct appeal to this Court. This the applicant failed to do.

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36 Mozambique's approach to this Court would effectively "leap frog" the matter from the High Court to this Court. Presumably this is so that the matter can finally be determined. In this regard, Mozambique contends that the matter must be resolved as a matter of priority by the apex court, although the application provides very little to justify this "out of the ordinary" approach to the appeal process.

37 An application for direct appeal to this Court is an extraordinary procedure that ought to be followed only in circumstances where the interests of justice so dictate.⁸ The applicant must, in terms of Rule 19 of the Rules of the Constitutional Court, set out the grounds upon which the applicant requests this Court to entertain the application for direct appeal.⁹ Persuasive and compelling reasons are required before this Court will exercise its discretion to grant leave to appeal directly to it. Some pertinent considerations include urgency, prospects of success, and that more thorough, and therefore arguably better decisions are arrived at where many minds have considered a matter. Leapfrogging is seldom desirable.

38 Mozambique provides no grounds to argue that it would be in the interests of justice that the usual appeal process, to the High Court, to the SCA and ultimately and finally to this Court, should be foregone. In addition, there is no claim for urgency. The application should be dismissed on that basis alone.

⁸ *Mazibuko N.O. v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at paras 20 and 22; *Abore v Minister of Home Affairs and Another* [2021] ZACC 50 at paras 12 and 14; *Speaker of the National Assembly v Public Protector and Others*; *Democratic Alliance v Public Protector and Others* [2022] ZACC 1 at paras 35 and 39.

⁹ *Speaker of the National Assembly v Public Protector and Others*; *Democratic Alliance v Public Protector and Others* [2022] ZACC 1 at paras 35

39 Additionally, it is the HSF's submission, that it is also not in the interests of justice for this Court to entertain this matter, for the following reasons:

39.1 The matter has been authoritatively dealt with by the High Court in a well-reasoned judgment and adjudication before this Court would only mean yet further litigation and further delays in finality.

39.2 Mozambique enjoys no prospects of success.

39.3 It is not in the interest of justice for this Court to be approached while an application is before the High Court for leave to appeal. This is an impermissible duplication of processes and court resources.

SECOND ISSUE: GROUNDS ON WHICH THE HIGH COURT IS ALLEGED TO HAVE ERRED – NO PROSPECTS IN AN APPEAL

40 I turn now to the grounds on which the High Court is alleged to have erred.

41 Mozambique's case may be answered thematically.

All public power is subject to judicial scrutiny – including policy-laden decisions

42 As HSF submitted in the High Court, all exercises of public power, including executive action, are subject to the Constitution and review by our courts.¹⁰ The contention that the decision in question in this matter is polycentric and policy-

¹⁰ *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) ("*Pharmaceutical Manufacturers*") at para 40.

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laden, which consequently means the court must show appropriate deference to the decision, is misplaced.

- 43 There can and should be no deference to an unlawful decision.
- 44 The Court was therefore correct in its scrutiny of the Minister's decision and the exercise undertaken by the High Court was not to ask whether it liked the decision, but to scrutinise the legality of the decision, through the lens of process and substantive rationality review.
- 45 The Court rightly did not shirk away from this responsibility. It did so correctly. The Court must not hesitate to hold the government to account under the Constitution and international law, notwithstanding that the decision which is at stake is one involving the executive branch of government in its diplomatic relationship with other states, or on the international plane.
- 46 This is so particularly where the issue is one (as in this case) which relates to the lawfulness of a decision-maker's powers as judged against the standards of legality prescribed under the Constitution and under international law and particularly where the subject matter of the extradition decision involves corruption, in terms of which South Africa has duties domestically and internationally.
- 47 This is also relevant to the Court's treatment of substitution. The Court did not grant the order because it "preferred" the US. It granted it with reference to the test

in *Trencon*.¹¹ It did so with reference to the fact that there had already been a prior review in *Chang I*, in which the guidance provided by the Full Court had not been appreciated by the Minister. The result was a second unlawful decision in favour of Mozambique. As the Court observed, the decision in favour of Mozambique was in the face of multiple indications that the US's request ought to have been satisfied.

Approach to the question of immunity – international law obligations and rationality of decision

48 The Court's approach to the question of immunity was likewise correct. The Court's careful approach to the question of rationality required the Minister to have satisfied himself that Mr Chang was not immune. On the evidence in the record, no such conclusion could be reached by the Minister. The contrary conclusion was instead apparent.

49 To require this certainty from the Minister is entirely appropriate. It should be recalled that South Africa's obligations extend beyond its boundaries and must, in its international relations, ensure that it does not act contrary to its duties to ensure effective investigation and prosecution of corruption – including when making decisions to extradite those persons charged with corruption. The obligation on South Africa to ensure that persons charged with corruption do not escape prosecution is heightened.

¹¹ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) (CC).

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- 50 There was no dispute before the High Court that the Minister was obliged to take into account international law in making the decision, and purports to have done so. However, simply stating that South Africa's international law obligations were considered, and that the end of rooting out corruption was sought to be achieved is unavailing when the effect of the decision is to undermine those obligations and to achieve a contrary purpose, and where the record of decision reveals that the impugned decision will undermine these very requirements.
- 51 A key consideration as to whether the decision would achieve this purpose was whether Mr Chang would be prosecuted in Mozambique if he is extradited there. This is in turn dependent on whether Mr Chang would be immune from prosecution and whether or not Mr Chang would be subject to arrest in order to stand trial on being extradited to Mozambique.
- 52 The question of immunity, and whether there was a valid arrest warrant, and evidence that such warrant would be acted on to effect an arrest of Mr Chang on his arrival in Mozambique, is therefore critical to determining if the decision was constitutional (both in respect of South Africa's international law obligations and in order for that decision to be rational).
- 53 The Court's findings are borne out by the record and in particular the Memorandum of 27 July 2020 ("**July 2020 Memorandum**"), which was firmly in favour of acceding to the US extradition request, over Mozambique's request, including on the basis of Mr Chang's immunity or potential immunity in

Mozambique. This Memorandum was based on five legal opinions received by the Chief Directorate: International Legal Relations in the Department of Justice.

- 54 These opinions were not disclosed, but they were summarised. The consensus of the experts (including two South African counsel, and two Mozambiquan lawyers) is that Mr Chang still enjoys immunity in Mozambique. One of the opinions – received by South African counsel – warns that should the Minister grant the request of Mozambique *“it is likely that his decision will be subject to review”*.
- 55 On the basis of these five legal opinions, the July 2020 Memorandum concluded that Mr Chang in all likelihood has immunity in Mozambique from criminal prosecution, and recommends that Mr Chang is extradited to the US, and not to Mozambique.
- 56 This recommendation was in fact accepted and signed-off by both the Deputy Minister of Justice and Constitutional Development and the Minister on around 9 October 2020. The evidence before the Minister therefore indicated that the US request ought to be accepted and would more likely or certainly have achieved the stated purpose of the decision.
- 57 In the Minister’s reasons of 30 August 2021, the Minister asserted that Mr Chang *“no longer has any immunity against prosecution (or arrest)”*. But this is contradicted by the July 2020 Memorandum, which is supported by the five legal opinions.

58 The reasons document of 30 August 2021 did not deal with the issue of immunity at a sufficient level to rebut the very real concerns around Mr Chang's immunity in Mozambique, or to explain what had changed between July 2020 and August 2021 which led the Minister to being satisfied on this score.

59 There was, quite simply, no material evidence before the Minister in the record of decision on this issue for the Minister to be satisfied that the purpose of extradition – the prosecution of guilty persons – would be achieved through the extradition of Mr Chang to Mozambique. This rendered the decision irrational. The High Court correctly found as much.

60 In relation to the consideration of whether Mr Chang would be arrested in Mozambique, the record and reasons confirm that there was no such evidence and the Minister did not expressly consider the question of Mr Chang's arrest. There is no evidence that the Minister was satisfied Mr Chang would be arrested on his arrival in Mozambique. Indeed, before the High Court, the Minister adopted the stance that it did not matter whether Mr Chang would be arrested in Mozambique.

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

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

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

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

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

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

64 The decision therefore undermines the success of anti-corruption efforts in Southern Africa, would not further the objects of multiple international anti-corruption treaties to which South Africa is party, and would have an effect contrary to South Africa's constitutional and international law duties to fight corruption for two reasons: firstly, the decision was unable to advance the objective of fighting corruption through ensuring Mr Chang faced trial; and secondly, because there was another option which would better advance that option (extradition to United States).

65 This also renders the decision contrary to the stated reason for which the decision was taken (i.e. Chang's prosecution in Mozambique) and therefore irrational. A

rational decision at least requires that the decision is rationally related to the purpose for which the power was given and the decision was taken.¹²

66 Moreover, the Minister's stated reasons entirely ignore the July 2020 Memorandum and/or depart from the Recommendation without any substantiated reason.

Reasons for the decision – and the duty to explain a change in tack

67 The duty to explain the departure from the Recommendation was amplified because the Minister had signed the Recommendation already (and therefore ostensibly already accepted and approved it) before the (contrary) decision was taken.

68 This was a further ground for unlawfulness of the decision.

68.1 Either the Minister impermissibly ignored or overlooked or departed from the recommendation for no reason, which itself renders the entire decision irrational;¹³ or

68.2 The Minister sought to reverse his earlier approval of the recommended decision, which also is unlawful.¹⁴

¹² *Pharmaceutical Manufacturers* at para 85.

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

¹⁴ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

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69 The High Court correctly found that the Minister's change of tack was unexplained by him or from the record.

Mr Chang a flight risk

70 Mr Chang was also a "flight risk", as underscored by his failed bail applications. In the light of this, the Minister's decision needed carefully to ascertain whether Mr Chang would be arrested on his arrival in Mozambique and kept in safe custody while the intended trial or prosecution took place. He however did not do so and the High Court correctly pointed out how this resulted in an irrational decision.

71 The Minister has placed much store, in his reasons, on the fact that Mr Chang has been *indicted* in Mozambique. An indictment is not an arrest warrant and provides no comfort that an arrest would take place upon Mr. Chang's arrival in Mozambique.

72 Reliance could also not be placed on the "*international warrant of arrest*" which the Minister noted, as an after-thought in his reasons. He did so without stating what the implications of an international warrant of arrest are i.e. he does not say he regards or understand that the warrant of arrest is valid, or that such a warrant of arrest would result in Mr Chang's arrest on his extradition to Mozambique. He is entirely silent on this pivotal matter.

73 This matter was critical for the Minister to explain or to be satisfied of, particularly in the circumstances of Mr Chang having been intercepted and arrested in South Africa at OR Tambo International Airport where he was bound for a flight to Dubai.

There is every reason to believe that is where he would go as soon as he has an opportunity to do so and that nothing would preclude him from doing so in the absence of his arrest or continued detention.

74 Thus, while the Minister's stated purpose for the decision was to enable Mr Chang's prosecution in Mozambique, the second respondent needed to have considered the further question – namely, whether Mr Chang would be *arrested* on his arrival in Mozambique and actually face prosecution. This could only be answered in the affirmative if the second respondent was satisfied of Mr Chang's immediate arrest in Mozambique.

75 The Minister's reasons were entirely silent on this score. He was therefore clearly not so satisfied, and could not objectively have been satisfied, and as a result the premise for the second respondent's decision to extradite Mr Chang fell away, rendering the decision irrational and arbitrary.

76 As the High Court found, the reasons which were provided in the record did not stand up to scrutiny and did not disclose a rational decision by the Minister.

Substitution

77 The High Court assessed all the factors set forth by this Court in *Trencon*, found the circumstances to be exceptional and exercised its wide discretion to substitute the Minister's decision with a decision to extradite Mr Chang to the US. The High Court had all the facts before it and was as equally well-placed to make a determination as the Minister. In any event, given the facts in this case, the

Minister's prior approval of the Recommendation and all of the reasons to buttress an extradition to Mozambique having been found to be irrational, the outcome (extradition to the US) would be a foregone conclusion. There was also an extensive delay in the matter and the Minister had fettered his powers without any reason whatever.

78 In all the circumstances, the High Court plainly did not misdirect itself in ordering substitution. A court of appeal will not interfere in the exercise of a wide discretion except in cases where the court of first instance misdirected itself or based its decision on the wrong principles.

CONCLUSION

79 The central question before the High Court was whether the Minister's decision was constitutional.

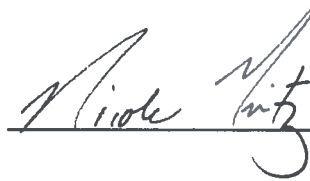
80 The Minister had obligations under the Constitution to ensure the effective arrest and prosecution of Mr Chang for corruption. The Minister was required to take necessary steps to ensure that there would be a prosecution and this included a duty to satisfy himself that Mr Chang would be arrested on his arrival in Mozambique, and would not be immune from prosecution.

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

82 The High Court correctly and appropriately set it aside for these reasons.
Mozambique's application thus lacks prospects of success.

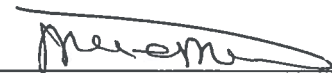
83 Moreover, it is not in the interests of justice for this Court to entertain this application for direct appeal. There is no urgency, and the delay in finality relied on by Mozambique confirms why the application should be finally dismissed.

84 In the result, HSF opposes the application on the dual basis set out in this affidavit and seeks an order that the application is dismissed with costs.



DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at Panorama on this the 03 day of February 2022 the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.



COMMISSIONER OF OATHS



Full names: Leonard Malehe

Business address: 71 dandale Ave

Designation: SPK

Capacity: Sergeant