

**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

REPUBLIC OF MOZAMBIQUE

Seventh Respondent

SECOND RESPONDENT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION.....	3
SUMMARY OF RELEVANT FACTS	4
THE RELEVANT LAW	6
THE DEPONENT'S LACK OF AUTHORITY	8
REQUIREMENTS FOR AN INTERIM INTERDICT	10
CONCLUSION	14

INTRODUCTION

1. The applicant seeks urgent relief in two parts¹. In Part A, the applicant seeks an interdict to prevent Mr Chang from leaving South Africa pending review of the decision of the Minister of Justice and Correctional Services (“the Minister”) to extradite him to Mozambique in Part B. The applicant also seeks in Part B that the court substitute the decision of the Minister with an order that Mr Chang be extradited to the United States of America.
2. The second respondent opposes the application and seeks that the application is dismissed on the grounds that a case has not been made out for an interdict and that the prospects of success in the review application are poor.
3. Notwithstanding that the application lacks merit, the second respondent notes and accepts that the position adopted by the seventh respondent, the party with immediate interest in the surrender of Mr Chang, that Mr Chang should not be surrendered pending the hearing of Part B on an urgent basis must be determinative of the issue of the position adopted by the second respondent. Accordingly, as the Requesting State, the seventh respondent’s willingness to delay the surrender of Mr Chang must enjoy priority over the second respondent’s intended date for his surrender, the Minister having fully complied with his obligations to consider and decide the request. The second respondent will accordingly abide the order of the court as sought by the

¹ NOM: p01-1 to 01-6.

seventh respondent.

4. In the event that the court does not grant the order sought by the seventh respondent, we make the following submissions.
5. We submit that the application and relief claimed must fail. We do so on the following grounds²:
 - 5.1. The applicant is non-suited for lack of evidence that the deponent to the founding affidavit is duly authorized to institute the application and to depose to the founding affidavit on behalf of the applicant.
 - 5.2. The applicant has failed to satisfy all the requirements for an interim interdict.
 - 5.3. The prospects of success in Part B are poor.
6. To the extent necessary, we will at the hearing of this matter, apply for condonation from the bar for the late filing of the answering affidavit.

SUMMARY OF RELEVANT FACTS

7. Mr Chang is a Mozambican national presently in custody in South Africa since December 2018 and is presently awaiting extradition to Mozambique. Mr Chang is in custody following arrest on a warrant of arrest obtained by the USA in the Pretoria Magistrates' Court, in terms of section 5(1) of the

² AA: p06-23 para 7.

Extradition Act, 67 of 1962 (“the Extradition Act”), where he is charged in that country with serious criminal acts involving financial fraud. He is also indicted in his home country Mozambique on related charges and there is an international warrant of arrest issued by his country for his arrest³.

8. Following Mr Chang’s arrest, the USA and Mozambique submitted requests for his extradition to the respective countries, with Mozambique’s request having been submitted a few days after the USA submitted its request. The USA request was made under the SA/USA Treaty⁴ and the Mozambique request under the SADC Protocol⁵.
9. On 8 April 2019, the Magistrate, Kempton Park Magistrates’ Court, found that there was sufficient evidence to hold that Mr Chang was extraditable to the USA and Mozambique and committed him to custody under section 10 of the Extradition Act, pending the decision of the Minister of Justice and Correctional Services, Advocate Masutha, on whether to extradite Mr Chang to the USA or to Mozambique.
10. On 21 May 2019, the then Minister of Justice and Correctional Service, Advocate Masutha, took the decision under section 11 of the Extradition Act to surrender Mr Chang to Mozambique. This decision was set aside by the court on the ground that Mr Chang enjoyed immunity from prosecution under Mozambican law and was therefore not extraditable⁶. The court found that

³ AA: p06-150 to 06-51 paras 108 and 116; AA: Annexure DM4 p06-71 to 06-73.

⁴ AA: p06-32 to 06-33 paras 38 – 40.

⁵ AA: p06-29 to 06-32 paras 28 – 37.

⁶ FA: p02-5 para 19; FA: Annexure NVD4 p02-37.

Advocate Masutha was not aware of these facts or the implications thereof at the time of making his decision⁷. The matter was remitted to the current Minister for reconstruction.

11. Following the judgment, the Minister invited interested parties to make submissions before he made the Decision. The applicant, government of Mozambique and USA made submissions⁸. On 17 August 2021, the Minister, in terms of section 11(a) of the Extradition Act read with the SADC Protocol, ordered that Mr Chang be surrendered to Mozambique. It is this decision which precipitated the present application⁹.

THE RELEVANT LAW

12. The requests for the extradition of Mr Chang are regulated by the Extradition Act, the SADC Protocol; the US Treaty and the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The following are of relevance to the determination of the request for the extradition of Mr Chang and the relief claimed in Part A – the Extradition Act¹⁰; the SADC Protocol¹¹; the US Treaty¹²; the Constitution¹³.

⁷ FA: Annexure NDV4 p02-59 para 80; AA: p06-25 para 15.

⁸ AA: p02-26 para 18.

⁹ AA: p06-27 paras 22 – 23.

¹⁰ AA: p06-28 paras 25 – 27.

¹¹ AA: p06-28 to 06-32 paras 28 – 37.

¹² AA: p06-32 to 06-33 paras 38 – 40.

¹³ AA: p06-34 paras 41 – 43.

13. The following provisions are of immediate relevance to the relief claimed by the applicant.
14. Section 11 of the Extradition Act gives the Minister the discretion to order or refuse extradition requests. It authorises the Minister to refuse to surrender a person, *inter alia*, if he is satisfied that the request is not made in good faith¹⁴.
15. Article 4 of the SADC Protocol prescribes mandatory grounds for refusal to extradite. Subsection (e) is of particular importance and makes provision for the refusal of an extradition in circumstances where the person whose extradition is requested has, under the law of either state party, become immune from prosecution or punishment for any reason, including the lapse of time or amnesty.
16. Article 6 sets out the requirements for an extradition request¹⁵.
17. Article 11 is of particular relevance. It deals with concurrent requests and provides that where requests are received from two or more states for the extradition of the same person either for the same offence or for different offences, the requested state shall determine to which of those states the person is to be extradited and shall notify those states of its decision. Article 11 lists the factors which the Requested State must have regard to in particular¹⁶.

¹⁴ Section 11(b)(3) of the Extradition Act.

¹⁵ AA: p06-29 to 06-30 para 32.

¹⁶ AA: p06-31 to 06-32 para 34.

18. Article 15 of the US Treaty deals with multiple requests and sets out the factors that the Requested State must take into account¹⁷. The factors set out in Article 15 are mirrored in Article 11 of the SADC Protocol.
19. Plainly, neither the US Treaty nor the SADC Protocol require or prescribe that the request that was submitted first enjoys temporal priority.
20. In addition to the above instruments, South Africa is enjoined by the Constitution to give effect to international law, especially that which is binding on it. It is bound by various international instruments that require it to assist in the tackling of corruption abroad. These include,
 - 20.1. the UN Convention Against Corruption, which requires members to take steps to prevent corruption and to cooperate with other countries in the fight against corruption; and
 - 20.2. the SADC Protocol Against Corruption which enjoins member states to cooperate to deal effectively with corruption.
21. We submit that above legal instruments are relevant to the determination of the relief claimed in Part A.

THE DEPONENT'S LACK OF AUTHORITY

¹⁷ AA: p06-32 to 06-33 para 39.

22. Uniform Rule 7(1) provides that *'the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgement, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application'*¹⁸.
23. Rule 7(1) therefore requires the court to be satisfied that the party whose authority is disputed is authorised to act. It is imperative in its terms. We submit that the requirement is not merely a matter of formality. In the present matter, it is determinative of whether the applicant is in fact before the court.
24. Ms van Deventer, the deponent to the founding affidavit, alleges that she is *"authorised to depose to [the founding] affidavit on [the applicant's] behalf."*¹⁹ She has not provided any explanation why proof of such authority is not provided. We submit that there is no evidence before the court to satisfy the court that she is in fact authorised to bring the application on behalf of the applicant.

¹⁸ Uniform Rule 7.

¹⁹ FA: p02-1 para 1.

25. The Minister has challenged Ms van Deventer's authority²⁰. If no evidence of authority to act is provided, we submit that the application must be dismissed, alternatively struck off the roll²¹.

REQUIREMENTS FOR INTERIM INTERDICT

26. The applicant seeks an interdict pending the review of the decision to extradite Mr Chang to Mozambique. We submit that it has not made out a case for an interdict for the following reasons.

27. Where the interdict sought is directly linked with a pending review of administrative action, as in this case, the assessment of the relative strengths and weaknesses of the applicant's case in the interdict application must entail a consideration of the merits and prospects of success of the contemplated review proceedings.²² This was confirmed in *South African Informal Traders Forum and Others v City of Johannesburg and Others*²³.

28. We submit that the prospects of the applicant succeeding with its review application are poor.

28.1. First, the applicant apprehends that Mr Chang will flee Mozambique because there is no warrant for his arrest²⁴. There is no basis for this

²⁰ AA: p06-34 to 06-36 paras 44 – 46.

²¹ Gainsford and Others NNO v Haib AB 2000 (3) 635 (WLD) at [640A].

²² Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd 2001 3 SA 344 (N).

²³ South African National Traders Retail Association v City of Johannesburg and Others 2014 (4) SA 371 (CC) para [25].

²⁴ FA: p02-12 to 02-13 paras 51 – 53.

fear because an international warrant of arrest has been issued by Mozambique, and therefore Mr Chang will not be at liberty to flee the country, as alleged by the applicant. The warrant is valid, as recognised by the court in *Chang* ²⁵.

28.2. Second, the applicant asserts that the Minister failed to consider or consider appropriately the fact that the USA was the first country to request the extradition of Mr Chang²⁶. We have shown that there is no requirement in the legal instruments that apply to the competing requests for Mr Chang's extradition that give precedence to the USA request²⁷.

28.3. Third, the applicant asserts that the Minister failed to consider that the Mozambique request was made in bad faith²⁸. We submit that there is no evidence that the request of Mozambique is not in good faith. The applicant is presently indicted, and his co-accused are reportedly presently on trial. He is also the subject of an international arrest warrant.

28.4. In terms of section 11(b)(iii) of the Extradition Act, the Minister may refuse to surrender a person if he is satisfied that the request is not

²⁵ *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), paras [44] & [55]; FA: Annexure NVD4 p02-48 & 02-51.

²⁶ FA: p02-13 para 54.

²⁷ SADC Protocol, Article 11; US Treaty, Article 15.

²⁸ FA: p02-13 para 55.

in good faith. There is no evidence that the Minister was not so satisfied.

28.5. Fourth, the applicant alleges that the Minister failed to consider South Africa's international duties to combat corruption and ensure accountability for corruption. Mr Chang is under indictment in Mozambique and there is no reason to believe that he will not stand trial. He is also under an international warrant of arrest. There is therefore no reasonable basis to believe that he will successfully evade trial by fleeing Mozambique. He is also no longer clothed with immunity, no longer being a member of Parliament²⁹. These factors are matters which were before the Minister when he made his decision. There is therefore no valid basis for the applicant's contention.

28.6. Last, the applicant alleges that Minister failed to consider the interest of justice when deciding to extradite Mr Chang to Mozambique. In making the decision whether or not to approve or refuse a request, the Minister is required to take into account and weigh multiple factors. This includes the factors set out in section 11 of the Extradition Act, Article 11 of the SADC Protocol, Article 15 of the US Treaty and the Constitution. Nothing in the decision of the Minister indicates that the Minister did not have regard to these factors. On the contrary, the facts we list in the preceding paragraph are

²⁹ AA: p06-52 para 119.

evidence that Mr Chang will be caused to answer the allegations against him. These are factors that were before the Magistrate when he made his decision.

29. For all the above reasons, the applicant must fail in Part A in the light of the poor prospect of success in Part B. An interdict in the circumstances will not serve any purpose and will serve only to unjustifiably perpetuate the continued detention of Mr Chang in South Africa and delay the commencement of his trial in Mozambique. This is not in the interest of justice.
30. A further reason that the application must fail is that the applicant has not satisfied the requirements for an interdict³⁰. We submit that the court must, in the light of the poor prospects for success and balance of convenience, exercise its discretion and refuse the interdict.
31. Finally, we submit that even if the court should find that the applicant has established the requirements for an interdict, the facts and circumstances commend the court to refuse the interdict. It is simply not in the interest of justice that an interdict should be granted³¹.

³⁰ LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) 267A-F. The Constitutional Court restated the requirements for an interim interdict in National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) ("OUTA").

³¹ Camps Bay Residents Ratepayers Association and Others v Augoustides and Others (2005/2009) [2009] ZAWCHC 30; 2009 (6) SA 190 (WCC) (24 March 2009) para [8].

CONCLUSION

32. For the reasons set out above, we respectfully submit that the applicant has not made out a case for the relief claimed in Part A. The application must accordingly fail.
33. In the premises, we pray that the application is dismissed with costs, including costs of two counsel.

MS BALOYI SC

PJ DANIELL

Second Respondent's Counsel

Chambers

27 August 2021

LIST OF AUTHORITIES

1. Camps Bay Residents Ratepayers Association and Others v Augoustides and Others (2005/2009) [2009] ZAWCHC 30; 2009 (6) SA 190 (WCC) (24 March 2009)
2. 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)
3. Gainsford and Others NNO v Haib AB 2000 (3) 635 (WLD)
4. Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd 2001 3 SA 344 (N)
5. LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)
6. National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC)
7. South African National Traders Retail Association v City of Johannesburg and Others 2014 (4) SA 371 (CC)