

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

CASE NO.: 19/22157

In the matter between:

MANUEL CHANG

Applicant

and

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Respondent

**FORUM DE MONITORIA
DO ORÇAMENTO**

Intervening Party

AND

CASE NO.: 19/24217

**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

**ADDITIONAL MAGISTRATE, EKURHULENI
NORTH: KEMPTON PARK**

Fourth Respondent

RESPONDENT'S FILING SHEET

TAKE NOTICE THAT the Minister of Justice and Correctional Services, cited as the respondent in case no 19/22157, and as the second respondent in case no 19/24217, files herewith:

1. Respondent's Consolidated Answering Affidavit: Mr Vusi Madonsela
2. Respondent's notice of motion in the counter application to the urgent application under case number 19/22157

DATED AT JOHANNESBURG ON THIS THE 12 DAY OF JULY 2019.



RESPONDENT'S ATTORNEY
THE STATE ATTORNEY
10th Floor, North State Building
99 Albertina Sisulu Street
Cor Kruis Street
Private Bag X9, Docex 688
JOHANNESBURG, 2000
Refer to: Mr J van Schalkwyk
Ref: 3242/19/P45/kp
Tel No: (011) 330 7655
Fax: (011) 337 6200

**TO: THE REGISTRAR, HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL
DIVISION, JOHANNESBURG**

AND TO: BDK ATTORNEYS
Attorneys for the Applicant
Ground Floor, Oxford Terrace
3 9th Street
Houghton Estate
JOHANNESBURG
Tel: 011 838 1214/082 572 4550
Fax: 011 836 8740
Email: rudi@bdk.co.za
Ref: Mr C G Krause/Chang/Urgent

AND TO: IAN LEVITT ATTORNEYS
Attorneys for the Intervening Party
19th Floor, Sandton Office Towers
Sandton City
5th Street
Sandton
Tel: 011 784 3310
Ref: I LEVITT/NVD
Email: ian@ianlevitt.co.za

RECEIVED
this 12 day July 2019
at Sandton
IAN LEVITT

Received without prejudice to clients rights
Ontvang sonder benadeling van klient se regte
19th Floor, Sandton City Office Towers
Cnr. Rivonia & 5th Str, Sandton
P.O. Box 783244, Sandton 2146
Dx No: 54 Nelson Mandela Square
Tel: 011 784 3310 Fax: 011 784 3309

IAN LEVITT ATTORNEYS
TIME: 15h 05
SIGNATURE: [Signature]

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Fourth Respondent

NOTICE OF MOTION: RESPONDENT'S COUNTER-APPLICATION

TAKE NOTICE THAT the Minister of Justice and Correctional Services, cited as the respondent in case no 19/22157, and as the second respondent in case no 19/24217 (hereafter referred to simply as the Minister) intends to make application on either 16 July 2019, or 23 August 2019, or at a date for the hearing of the applications under these case numbers as may be determine by the Court, for an order in the following terms:

1. Condoning the Minister's non-compliance with the forms, time period and service provisions provided for in the Uniform Rules of Court and ordering that the matter be determined as one of urgency in accordance with Rule 6(12) of the Uniform Rules of Court.

2. Reviewing and setting aside the decision of then Minister Masutha dated 21 May 2019, to purportedly extradite the applicant in case no 19/22157 (Mr Chang) and to cause him to be surrendered to the authorities of the Republic of Mozambique, on the basis that the decision is irrational, and inconsistent with the Constitution of the Republic of South Africa, 1996, and also its domestic, regional and international treaties to which the government of the RSA is a party and bound thereby.

3. The decision regarding the extradition and surrender of Mr Chang under section 11(a) of the Extradition Act, 67 of 1962 is remitted to the Minister for reconsideration and determination within a period of 10 days after the judgment and order of this Court, or such other period as may be imposed by the Court.
4. The Minister does not seek an order of costs, save in the event any party who chooses to oppose the relief sought, in which event costs are sought on a joint and several basis against the opposing party(ies).
5. Further and/or alternative relief as this Honourable Court may consider appropriate or necessary.


TAKE NOTICE THAT, the timeframes within which the parties are required to file their requisite notice have been abridged in the following manner:

- (a) Notice of intention to oppose, if any, to be filed by Friday, 12 July 2019 at 17:00.
- (b) Answering affidavits, if any, to be filed by Monday, 15 July 2019 at 12:00.
- (c) The respondent undertakes to file its replying affidavit by Tuesday, 16 July 2019 at 09:00.

TAKE NOTICE FURTHER THAT the respondent will use the consolidated affidavit of **VUSI MADONSELA** annexed hereto in support of the relief sought in the notice of motion.

TAKE NOTICE FURTHER THAT the respondent has nominated the State Attorney as its attorney of record at the address set out below, including the email address johvanschalkwyk@justice.gov.za at which it will receive and accept all notices and processes filed in these proceedings.

DATED AT JOHANNESBURG ON THIS THE 12 DAY OF JULY 2019.



RESPONDENT'S ATTORNEY
THE STATE ATTORNEY
10th Floor, North State Building
99 Albertina Sisulu Street
Cor Kruis Street
Private Bag X9, Docex 688
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Refer to: Mr J van Schalkwyk
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Tel No: (011) 330 7655
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DIVISION, JOHANNESBURG**

AND TO: BDK ATTORNEYS
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3 9th Street
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Tel: 011 838 1214/082 572 4550
Fax: 011 836 8740
Email: rudi@bdk.co.za
Ref: Mr C G Krause/Chang/Urgent

AND TO: IAN LEVITT ATTORNEYS
Attorneys for the Intervening Party
19th Floor, Sandton Office Towers
Sandton City
5th Street
Sandton
Tel: 011 784 3310
Ref: I LEVITT/NVD
Email: ian@ianlevitt.co.za

RECEIVED
this 12 day JULY 2019
at Sandton
IAN LEVITT
Received without prejudice to clients rights
Ontvang sonder benadeling van klient se regte
19th Floor, Sandton City Office Towers
Cnr Rivonia & 5th St, Sandton
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Dx No: 54 Nelson Mandela Square
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IAN LEVITT ATTORNEYS
TIME: 15h 05
SIGNATURE: [Signature]

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CONSOLIDATED ANSWERING AFFIDAVIT

I, the undersigned,

VUSI MADONSELA

do hereby make oath and say the following:

1.

1.1. I am the Director-General for the Department of Justice and Correctional Services. The facts I make in this affidavit fall within my personal knowledge unless I state otherwise or the context of what I say makes it obvious that they do not. Where that is the case, and to the extent necessary, I shall reference confirmatory affidavits of persons who have knowledge of facts that do not fall within my knowledge and to which I refer and who confirm correctness of those facts.

1.2. I make this affidavit, as a consolidated answer to both the application for interdict brought by Mr Chang in case number 19/22157, and in the application for intervention pending the outcome of a review brought by the Forum, under case number

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19/24217. I have been authorised by the current Minister of Justice and Correctional Services, Mr Ronald Lamola, to make this affidavit on his behalf. He has decided to oppose the interdict by Mr Chang. He has resolved not to oppose the intervention application of the Forum.

- 1.3. The Minister has also resolved not to oppose the review relief sought by the Forum instituted under case number 24127/2019. In turn he will seek a review of his own to set aside the decision previously taken by his predecessor on or about 21 May 2019 to extradite and surrender Mr Chang to authorities in the Republic of Mozambique. That decision is unlawful and reviewable on the grounds I shall set out more fully below.
- 1.4. The Minister has received a well-considered legal advice to that effect and believes that the release of Mr Chang will not only be inconsistent with his obligations under the Extradition Act, 67 of 1962, as amended ("the Extradition Act"), but also in violation of the SADC Protocol (Protocol on Extradition adopted at Luanda on 3 October 2002 by the Member States of the Southern African Development Community), and published in Government Notice 405 of 25 May 2012.
- 1.5. All of the above facts are confirmed by the Minister in his confirmatory affidavit annexed hereto and marked "VM1".

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2. Before I respond to averments in the individual paragraphs of Mr Chang's founding affidavit and also the Forum's founding affidavit, I refer to the following background facts as they are relevant to the explanation of the stance adopted by the Minister in both instances. It will be recalled that the decision relied upon by Mr Chang in his founding papers was taken by the Minister's predecessor on 21 May 2019, which was his last day of his official duties.
3. Other than a press statement issued by the then Minister on 21 May 2019, a copy whereof is annexed as "VM2" and published on government's website, the then Minister did not officially communicate his decision to Mr Chang or authorities in Mozambique who would be required to receive him into custody in accordance with the provisions of section 16(1) of the Extradition Act. At all material time, I have always been the Director-General of the Department. Had there been any formal communication in terms of section 16(1) of the Extradition Act, I would have known about it as I would have taken part in its preparation and submission to the then Minister for his authorisation and signature.
4. The absence of formal communication by the authorities of the RSA to the authorities in Mozambique in terms of section 16(1) of the Extradition Act is that the decision of the then Minister has not yet been implemented. The implementation or otherwise of that decision now falls upon the authority of the current Minister, as the relevant executive authority who took office on 29 May 2019.

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5. Immediately after the publication of the media statement referred to in annexure "VM2", there were widespread concerns made in the media by several parties about the lawfulness of the decision to extradite and surrender Mr Chang to the authorities in Mozambique. Those concerns emanated from, amongst others, the government of the United States of America by letter addressed to the Minister on 27 May 2019, through its attorneys, ENS. A copy of that letter is annexed as "MC11" to Mr Chang's affidavit but a clearer copy thereof is annexed hereto and marked "VM3".
6. As I explain more fully below Mr Chang was arrested by members of the South African Police Service on 29 December 2018 at OR Tambo International Airport at the request of the government of the USA, which had issued a warrant of his arrest authorised by the District Court for the Eastern District of New York. Thereafter, on 27 December 2018, the Magistrates Court Pretoria issued a warrant of arrest in terms of section 5(1)(a) of the Extradition Act.
7. Mr Chang was arrested at the request of the government of the USA because he was indicted in the District Court together with other individuals on several criminal charges including conspiracy to commit wire fraud, securities fraud and money laundering in contravention of the United States Criminal Code.
8. The government of the USA formally submitted a request for the extradition of Mr Chang to face criminal prosecution in the District Court.

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That request was submitted to the government of the RSA in late January 2019. The request for extradition and other relevant documents appear as "IL9" of the Forum's founding affidavit to the review application. On or about 24 January 2019 the unit in the Department that is designated as the Central Authority in terms of the Extradition Act, which is responsible for dealing with requests for extradition prepared a memorandum to the then Minister informing him of the requests for extradition of Mr Chang by the government of the USA. A copy of that memorandum is annexed hereto and marked "VM4".

9. In that memorandum the Central Authority drew the attention of the Minister to section 5(1)(a) of the Extradition Act requesting him to sign a notification under that section directed to the Kempton Park Magistrate informing him of the request for extradition by the government of the USA and to authorise a warrant and requesting him to conduct a formal extradition inquiry in terms of section 10 of the Extradition Act. The Minister signed the notification pursuant to the memorandum in "VM4" on 15 February 2019. A copy of that notification is annexed hereto and marked "VM5".
10. I point out that the request for Mr Chang's extradition was based on an extradition treaty concluded by the governments of the RSA and the USA on 16 September 1999. A copy of that extradition treaty is annexed hereto and marked "VM6".

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11. The effect of the above facts is that Mr Chang was arrested at the instance of the government of the USA, which had already instituted criminal proceedings against him by that time. Mr Chang was then committed to imprisonment pending the outcome of the extradition inquiry in terms of section 10 of the Extradition Act following upon a request for extradition by the government of the USA. The government of the RSA was therefore obliged to lawfully consider, and if necessary, give effect to the request by the government of the USA to extradite Mr Chang, both in terms of its obligations under the extradition treaty (annex "VM6") and the Extradition Act.
12. Matters took a different turn when the government of Mozambique submitted a formal request of its own to extradite Mr Chang to Mozambique to face 7 criminal charges in that country, including fraud by deception, embezzlement, passive corruption, money laundering and criminal association in contravention of several provisions of the Criminal Code of that country.
13. The request for extradition by the government of Mozambique was forwarded to the Department of International Relations and Corporations via a Note Verbale on 11 February 2019. By that time Mr Chang had already been committed to imprisonment at Modderbee Correctional Facility in accordance with the 27 December 2018 warrant of arrest. A copy of the Note Verbale including the relevant extradition documents

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from the government of Mozambique appear on annexure "IL10" of the Forum's founding affidavit.

14. The Central Authority of the Department submitted a memorandum to the then Minister notifying him of the request for extradition by the government of Mozambique and asking him to sign the notification directed to the Kempton Park Magistrate in terms of section 5 of the Extradition Act. A copy of that memorandum is annexed hereto and marked "VM7". On 15 February 2019 the Minister approved the memorandum and signed the relevant notification, a copy whereof is annexed hereto and marked "VM8".

15. I emphasise that it is common cause that Mr Chang is the former Minister of Finance of the government of Mozambique from 2005 to 2015. He was a member of the National Assembly of Mozambique at the time when the alleged offences in respect of which he faces criminal charges both in the USA and Mozambique were committed. By Article 174 of the Mozambican Constitution and Articles 13 and 17 of the Act Governing Members of Parliament, No. 32 of 2014, he would enjoy immunity from arrest, detention and prosecution unless that immunity has been suspended or revoked by the National Assembly through its relevant committee. Annexed hereto and marked "VM9" to "VM10" are copies of the relevant translation of Article 174 of the Mozambican Constitution, and Articles 13 of Act 32 of 2014. A translation of Article 17 of Act 32 of

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2014 will be submitted to Court at the hearing of the application and marked as "VM11".


16. Under case number D2689/18 the Kempton Park Magistrate initiated the extradition inquiry in terms of section 10 of the Extradition Act. He commenced the inquiry relating to the request for extradition by the USA government on 7 March 2019. Mr Chang opposed the USA request for extradition. Instead, he filed a notice of motion requesting that both the USA's and Mozambique's requests for extradition be placed before the Minister to be dealt by him concurrently. The Magistrate considered and ultimately dismissed Mr Chang's contention on 26 March 2019. In consequence the magistrate proceeded to deal first with the USA's request for extradition. All of the above facts are confirmed by Mr J du Toit who is a member of the National Prosecuting Authority and attended to the extradition proceedings. His confirmatory affidavit is annexed hereto and marked "VM12".

17. On 20 February 2019 Mr Herman van Heerden, the Principal State Law Advisor: International Relations in the Central Authority of the Department directed a formal letter to the Office of the Attorney-General of Mozambique requesting clarification on aspects of the request for extradition by the government of Mozambique. In essence, he called upon that Office to confirm whether Mr Chang's extradition was sought for pre-trial detention for purposes of further investigation, or it was sought for his prosecution upon an indictment, and in the event of the latter, he

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sought the Office concerned to furnish a copy of the indictment. A copy of that letter is annexed hereto and marked "VM13".

18. In response to annexure "VM13" the Office of the Mozambican Attorney-General addressed a letter dated 21 February 2019. A clearer copy of that letter is annexed hereto and marked "VM14". In it the Office of the Attorney-General indicated that the objective of the extradition sought is for criminal, administrative and civil liability of Mr Chang. It did not include or furnish any indictment against Mr Chang in that response. It made it clear, though, that no formal indictment had been issued against Mr Chang, and that further investigations and information or evidence were being gathered against him and co-defendants as part of a trial audience of the Supreme Court.
19. The response of the Office of the Mozambican Attorney-General also makes it clear that criminal investigations against Mr Chang were initiated as early as 2015. It refers to a letter dated 28 January 2019 in which it is recorded that Mr Chang received bribes from an entity that appears to be a Brazilian company which were paid into bank accounts abroad. A copy of that letter appears on paginated page 383 of the review papers of the Forum.
20. I conclude my reference to the response by the Mozambican Attorney-General by indicating that nowhere in that response is there a reference to Article 174 of the Mozambican Constitution and Articles 13 and 17 of

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Act 32 of 2014, relating to the immunity conferred upon Mr Chang and its revocation, if any by the National Assembly of Mozambique.

21. The question of the immunity of Mr Chang in Mozambique in terms of the above Articles was raised by Mr van Heerden in his letter of 6 February 2019 addressed to the Office of the Attorney-General in Mozambique. A copy of that letter is annexed hereto and marked "VM15". In it Mr van Heerden referred to Article 211 of the Mozambican Constitution which provides (on his reading of that article) that no member of Mozambican government may be prosecuted without the permission of the President. Mr van Heerden did not refer to Article 174 of the Mozambican Constitution, and Articles 13 and 17 of Act 32 of 2014 at that stage.
22. In response to that letter the Office of the Attorney-General directed a letter dated 7 February 2019 in which they confirmed that warrants of arrest included in the request for extradition by Mozambican government were authentic warrants signed by a Judge, and duly notarialised. It was also pointed out that the immunity referred to in Article 211 ceased to apply to Mr Chang because he was no longer a Minister in the Mozambican government when charges against him were initiated in 2015.
23. Furthermore, the response indicated that although Mr Chang was a member of National Parliament of Mozambique, Article 174 of the

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Mozambican Constitution required consent of Parliament for him to be detained. It referred to a request for Mr Chang's formal extradition issued by the National Parliament of Mozambique as an expression of its consent under Article 174. A copy of the Attorney-General's response is annexed hereto and marked "VM16".

24. The expression of consent referred to in annexure "VM16" appears to be a resolution adopted by the Standing Committee of the National Parliament of Mozambique dated 29 January 2019. A copy of that resolution accompanied by a letter from its Speaker to the Supreme Court are annexed hereto and marked "VM17" and "VM18", respectively. However, annexure "VM17" merely provides that the National Parliament "*Approves the enforcement of maximum coercion measure against Mr Chang*".
25. In possession of the above documents the Central Authority of the Department assumed that the above resolution meant that the immunity conferred upon Mr Chang was revoked and that he would be liable to criminal prosecution in Mozambique, should he ultimately be extradited and surrendered to relevant authorities in that country. As appears later that assumption was mistaken and that mistake was publicly pointed out by the government of the USA in subsequent correspondence with the Central Authority of the Department, and also publicly questioned by Professor Andre Thomashausen, Professor Emeritus of International Law in UNISA, in an opinion piece published by him on 20 May 2019.

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26. On 8 April 2019 the Kempton Park Magistrate concluded his statutory inquiry under section 10 and rendered a formal judgment and order in which he concluded that Mr Chang was extraditable to the USA to face criminal charges set out in the request for extradition by that country. A copy of his judgment and order appears on annexure "IL13" of the Forum's review papers. It will be noted that the concluding part of that judgment commits Mr Chang to a further detention at Modderbee Correctional Facility pending the outcome of a decision to be made by the Minister for his surrender to the USA in terms of section 11 of the Extradition Act.
27. On the same day, the Learned Magistrate issued an order in which he concluded that Mr Chang was also extraditable to Mozambique on charges set out in the request for extradition by the government of that country. He similarly ordered that Mr Chang should be committed to Modderbee Correctional Facility for further detention pending the outcome of the Minister's decision under section 11 of the Extradition Act. A copy of that order is annexure "IL2" of the Forum's review application.
28. I point out at this stage that the request for extradition by the government of Mozambique was based on the SADC Protocol because the governments of the RSA and Mozambique have not concluded a bilateral extradition treaty. Nevertheless the SADC Protocol constitutes an extradition agreement pursuant to the definition in section 1 of the Extradition Act. On this premise I accept, as does Mr Chang, that the

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provisions of the SADC Protocol do apply to the request for his extradition. For the reasons I develop more fully below, the decision of the then Minister to extradite and surrender Mr Chang to the authorities of Mozambique is manifestly inconsistent with the mandatory provisions of the SADC Protocol.

29. After his judgment and orders to which I have referred the Kempton Park Magistrate submitted to the Minister his reports on the extraditability of Mr Chang in terms of section 10(4) of the Extradition Act. A copy of those reports appears in annexure "IL15" of the Forum's application.

30. After receipt of the reports the Central Authority of the Department prepared a detailed memorandum to the then Minister in which it outlined the background to the requests for extradition of Mr Chang by the governments of the USA and Mozambique, his arrest and committal to Modderbee Correctional Facility, the inquiry conducted by the Kempton Park Magistrate and his judgment and orders thereafter and the extraditability of Mr Chang to both the USA and Mozambique. A copy of that memorandum signed by Mr van Heerden on 16 May 2019 and Adv Elisabeth Picarra, the Chief Director of International Legal Relations of the Department, and also Ms Kalay Pillay, the Acting Deputy Director-General: Constitutional Development on 20 May 2019, is annexed hereto and marked "VM19".

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31. The memorandum concluded by making an express recommendation to the then Minister to the following effect –

“In light of the above, and taking all relevant factors into consideration, it is recommended that the Minister issue an order in terms of section 11(a) of the Act for the surrender of Mr Manuel Chang to persons authorised by the authorities of the United States to receive him. It is however still for the Minister to decide to which state Mr Manuel Chang should be extradited to.”

32. It will be noted that the memorandum also refers to my name as the relevant Director-General of the Department. I am aware of the contents of the memorandum upon the receipt of an electronic copy thereof from Mr van Heerden and considered them before it was sent to the then Minister for his consideration. Although I did not formally sign the memorandum I fully supported the recommendation contained therein.

33. By that time, the government of the USA had addressed additional submissions to the then Minister relating to its request for extradition. Because of the importance of these submissions, I annex a copy thereof hereto and mark them as “VM20”. What emerges from those submissions are the following critical observations:

- 33.1. First, the government of the USA drew the attention of the then Minister to the fact that its request for extradition was made

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ahead of that of the government of Mozambique on charges that have been formulated in an indictment authorised by the Eastern District Court of New York, and that a trial date for the prosecution of Mr Chang and his co-conspirators has already been set down for 7 October 2019.

33.2. Secondly, that the trial of Mr Chang and his co-conspirators in the USA was ready to proceed as from 7 October 2019. Yet, the possible prosecution and the state of readiness of any prosecution of Mr Chang by Mozambican authorities was not yet clear and appear to depend on further investigations which at that time appear not to have been completed.

33.3. Thirdly, that the government of the USA was willing to undertake that Mr Chang would be deported to Mozambique to face any remaining charges against him in that country after his prosecution in the USA. The government of the USA was willing to make that undertaking because there was no bilateral extradition treaty between the governments of the USA and Mozambique, and for that reason, Mr Chang would not likely be transferred to the USA to face criminal charges in that country.

34. On 20 May 2019 Mr J du Toit to whom I have earlier referred came across an article written by Professor Thomashausen. A copy of Mr du Toit's email addressed to Mr van Heerden as well as the article of Professor

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Thomashaussen are annexed hereto and marked "VM21" and "VM22". In the latter annexure, Professor Thomashaussen questions the assumptions made by Mr van Heerden concerning the scope of the revocation of the immunity against prosecution purportedly made by the National Parliament of Mozambique.

35. Professor Thomashaussen expressed the opinion that the revocation of immunity was not sufficient to render Mr Chang prosecutable in Mozambique on the charges investigated by the authorities in that country. He argued that the revocation of immunity merely related to detention and questioning of Mr Chang and did not extend to revocation of immunity against his prosecution. He argued that the revocation of the former was made in terms of Article 13 of Act 32 of 2014, and that the latter had to be made in terms of Article 17 of Act 32 of 2014 and that such had not taken place.
36. The above article and the views expressed by Professor Thomashaussen were not communicated to the then Minister, nor were they canvassed in the memorandum submitted to him on 20 May 2019. It is not clear to me why this did not happen because those views were vitally important to the then Minister's proper consideration of the decision he was required to make in terms of section 11 of the Extradition Act.
37. Nevertheless, the then Minister considered the record of the Kempton Park Magistrate submitted to him in terms of section 10(4) of the

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Extradition Act and the contents of the memorandum referred to in annexure "VM19", including the recommendation that Mr Chang should be extradited to the USA. On the next day, 21 May 2019, the then Minister decided not to accept that recommendation. Instead, he decided that Mr Chang should be extradited and surrendered to the authorities in Mozambique. He scripted reasons for his decision at the bottom of the memorandum. As I piece them together, those considerations are:

- 37.1. Mr Chang is a citizen of Mozambique;
- 37.2. The offences alleged against Mr Chang were committed whilst he was a Minister in Mozambique;
- 37.3. The onerous debt for Mozambique as a result of the alleged fraud by Mr Chang;
- 37.4. The submission made by Mr Chang that he should be extradited to Mozambique. I assume in this regard that the then Minister had in mind the submission made to him by legal representatives of Mr Chang on 23 April 2019 mistakenly addressed to the President. A copy of those submissions is annexed hereto and marked "VM23";

- 37.5. The interest of the government of Mozambique. It will be noted that the then Minister did not indicate what those interests are;
- 37.6. The fact that the request for extradition by the government of the USA was made a few weeks prior to that of the government of Mozambique, and having considered the matter in its full context, and taking into account the criterion contained in both the extradition treaty with the government of the USA, and also the SADC Protocol, presumably relating to concurrent requests, the interest of justice will best be served by acceding to the Mozambican request for extradition.
38. Based on the above considerations, the then Minister signed an order in terms of section 11, on the same day, 21 May 2019, it being his last day in office, in which he directed that Mr Chang be extradited and surrendered to authorities in Mozambique. A copy of that order is annexed hereto and marked "VM24".
39. As I have already indicated the above order has not yet been officially communicated to Mr Chang or the authorities in Mozambique in terms of section 16(1) of the Extradition Act, although the decision of the then Minister was published in the government website and widely in the local media and the media in New York.

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40. Following upon the publication of the then Minister's decision, the government of Mozambique directed a formal inquiry to the government of the RSA on 1 July 2019 in which it sought clarification about the implementation of the decision of the then Minister as was published in the media and the government website. A copy of that request is annexed hereto and marked "VM25".
41. The duty to consider and respond to that request fell upon the Minister. He called for and was furnished all the background information relating to the requests for extradition by the governments of the USA and Mozambique, as well as the decision of his predecessor, in the light of the new information that emerged relating to immunities under Articles 13 and 17 of Act 34 of 2014. The Minister was concerned about the issues of legality and validity relating to the decision by his predecessor.
42. The Minister immediately sought legal advice concerning those issues. The advice he received was clear, and concluded that the surrender of Mr Chang to the authorities in Mozambique would be unlawful as it would be in contravention of the obligations of the government of the RSA, both in terms of the SADC Protocol and the Extradition Act, and also the obligation of the government of the RSA to take effective measures to combat corruption.
43. On the strength of the information placed before him, and the legal advice he received, the Minister has now resolved to oppose the interdict relief

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sought by Mr Chang and accordingly instructed his legal representatives to prepare opposing papers. In the meantime the Minister received the Forum's intervention and review applications. Here too the Minister sought and received legal advice. On the strength of that legal advice the Minister has resolved not to oppose the Forum's application for intervention, and the application for review. The Minister was advised to seek a review of his own, having regard to the decisions of the Constitutional Court on the need to bring such a review.

44. In what follows, I set out the grounds on which the Minister contends that the decision of this predecessor was unlawful and upon which he seeks not only a declaratory order to that effect but also an order for review as are expressly described in the notice of counter application filed herewith. Thereafter, I shall proceed to provide the Minister's response to averments in the individual paragraphs of Mr Chang's founding affidavit and the Forum's founding affidavit. As I do so, and to the extent that I make legal submissions, I rely on the advice received from the legal representatives of the Minister obtained during consultation and preparation of this affidavit. I accept that advice to be well-founded.

Grounds of review

45. The decision of the then Minister was purportedly made pursuant to the provisions of the SADC Protocol. That is clear from the notes he made on page 20 of the memorandum referred to in annexure "VM19". Certainly,

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those notes expressly refer to the contents of the SADC Protocol as part of the considerations the then Minister had in mind when he made his decision. I emphasise this point because Mr Chang too accepts that the provisions of the SADC Protocol were applicable to his consent for extradition to the authorities in Mozambique.

46. However, it is clear that Article 4 of the SADC Protocol provides for mandatory refusal by a requested State (in this case the government of the RSA) to extradite a subject to the requesting State (in this case the government of Mozambique) where one of the conditions set out in paragraphs (a) to (g) of that Article is present. Paragraph (e) provides for a refusal of extradition in circumstances where –

“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;”

47. By virtue of what I have set out above, there is a clear concern that the immunity enjoyed by Mr Chang in terms of Article 174 of the Mozambican Constitution and Article 17 of Act 32 of 2014 has not yet been successfully revoked. It is therefore not clear that Mr Chang would therefore be liable to a lawful prosecution should he be surrendered to the authorities in Mozambique.

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48. The lack of clarity in this regard was raised before the then Minister made his decision, by amongst others, Professor Thomashausen in the article referred to in annexure "VM22" hereto. I am not suggesting at all that the opinions expressed by the Learned Professor are correct and should be accepted without more. The point I make at this stage is that the opinions so expressed required a proper consideration in the light of the mandatory obligations imposed upon the government of the RSA in Article 4(e) of the SADC Protocol.

49. There was therefore a duty on the then Minister and those who advised him at the time to properly consider those opinions, and if necessary, call for further clarification as well as an undertaking from the government of Mozambique that Mr Chang will, as a fact, face prosecution in Mozambique because the immunity conferred upon by Article 174 of the Mozambican Constitution and Article 17 of Act 32 of 2014. The obligation of the then Minister and those who advised him was heightened by the following considerations:

49.1. First, the government of the RSA is party to the United Nations Convention Against Corruption adopted by the United Nations on 21 October 2003 and ratified on 22 November 2004. I have been advised that the obligation of the government of the RSA in this regard was extensively discussed and confirmed by the

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Constitutional Court in its judgment in *Glenister II*.¹ The government's obligation is also set out in the SADC Protocol on Corruption adopted on 14 August 2001 and ratified on 15 May 2003. A copy of this Protocol is annexed hereto and marked "VM26".

- 49.2. The above obligation of the government of the RSA means that the role and efforts required from the government must mean effective prosecution of persons accused of corruption. Having regard to the provisions of Article 4(e) of the SADC Protocol, the Minister was required to make sure that the surrender of Mr Chang to the authorities in Mozambique would lead to effective prosecution on, amongst others, charges of corruption. On the facts of the present case, the Minister did not and could not have arrived at that conclusion because there was no clear evidence that Mr Chang's immunity was revoked.
- 49.3. The absence of the requisite evidence is confirmed by the fact that all confirmation from correspondence directed by the Office of the Attorney-General to the Central Authority of the Department, especially Mr van Heerden, related to continuing

¹ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

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investigation against Mr Chang without the production of a formal indictment by that office against Mr Chang.

49.4. That conclusion is also corroborated by the fact that Mr Chang went about his normal life in Mozambique without facing a charge of fraud or corruption, without facing any arrest or detention, or interrogation by the government of Mozambique since 2015, and up to the time when he was arrested by members of SAPS at OR Tambo International Airport on 29 December 2018.

49.5. Moreover, he was allowed by authorities in that country to proceed on holiday to the United Arab Emirates and thereby continue with his life as normal. One wonders what would have been the case, had the government of the USA not requested his arrest by the authorities in the RSA and his extradition to the USA to face charges already instituted against him and his co-conspirators in that country, and for which a trial date has already been set for 7 October 2019.

50. I therefore submit that the decision of the then Minister without regard to the above considerations was unlawful and is open to review on the following grounds:

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- 50.1. First, giving effect to the decision of the then Minister, in the light of the facts that have come to the attention of the Minister and what I have set out above, would result in a violation of the regional obligations of the government of RSA as are set out in Article 4(e) of the SADC Protocol. That Protocol constitutes an extradition agreement referred to in section 1 and contemplated in section 3(1) of the Extradition Act. It follows therefore that the breach of the SADC Protocol by the then Minister's decision violates the principle of legality and the rule of law.
- 50.2. Giving effect to the decision of the then Minister would also be inconsistent with the overarching purpose of the Extradition Act, as are reflected in the preamble of that Act, section 3(1), section 10(1), section 11(b)(iii) and section 16(1) of the Extradition Act. These sections reveal that the overarching purpose of extradition is to ensure that a person sought to be extradited will face criminal prosecution or sentencing in the jurisdiction of the requesting State. I have been advised and respectfully submit that the Constitutional Court has emphasised these requirements and purpose of extradition as follows –

“Extradition is the surrender by one state, at the request of another, of a person within its jurisdiction who is accused or has been convicted of a crime committed within the jurisdiction of the other state. It involves

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three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting state.”²

50.3. In this case the then Minister, unwittingly or otherwise, did not satisfy himself that the above overarching purpose and requirements of extradition will be served by his order to direct the surrender of Mr Chang to the government of Mozambique. On this ground too the decision of the then Minister is subject to review in that it is inconsistent with the Constitution, the principle of legality and the rule of law.

50.4. The second ground of review relied upon by the Minister is that all information placed before his predecessor shows that the government of Mozambique had not yet completed its investigation against Mr Chang. That fact was manifest from the correspondence exchanged between Mr van Heerden and the Office of the Attorney-General of Mozambique to which I have referred. That fact was squarely brought to the attention of the

² *President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others* 2009 (2) SA 466 (CC), para 1.

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then Minister by the government of the USA in the letter of 22 April 2019 to which I have referred.

50.5. It is clear from the considerations enumerated by the then Minister in his motivation to reject the recommendation of the Central Authority of the Department that he was unaware and did not consider the fact that Mr Chang was under investigation and had not yet been indicted by the government of Mozambique. On this basis the decision of the then Minister and the reasons given by him are not rationally related to the overarching purpose of the power conferred upon him in terms of the Extradition Act. His decision is therefore subject to review on the clear constitutional review ground of irrationality.

50.6. The third ground of review is based the following consideration. There was placed before the then Minister a well-motivated recommendation that Mr Chang should be extradited to the USA, in the face of concurrent requests by the governments of the USA and Mozambique. The recommendation was based on the following considerations, which the then Minister did not reject or question as unfounded:

50.6.1. First, Mr Chang was already charged and an indictment was already issued against him and his co-conspirators in the Eastern District Court of New

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York. No such or similar indictment had been issued against Mr Chang in the criminal courts of Mozambique. That fact was communicated to the then Minister.

50.6.2. Mr Chang's trial date has already been set for 7 October 2019 and the criminal prosecution against him in New York is ready to proceed. No date of prosecution has been set for the trial of Mr Chang in the courts of Mozambique against Mr Chang. The state of readiness of the government of Mozambique to prosecute Mr Chang is unclear.

51. Having regard to the above considerations, I respectfully submit that giving effect to the decision to surrender Mr Chang would not be lawful as there is no justifiable basis provided for the rejection of the recommendation made by the Central Authority of the Department. In any event, even if it can be shown that the request of Mozambican government would not be hit by the prohibition in Article 4(e), I submit that the considerations enumerated by the then Minister on page 20 of the memorandum in annexure "VM19" do not militate against this ground of review:

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- 51.1. The then Minister merely enumeration facts without indicating why there were important and what role they played in the decision made by him.
- 51.2. Secondly, those facts did not fully consider the legal requirements set out in Article 11 of the SADC Protocol as well as Article 15 of the extradition treaty between the governments of the RSA and the USA.
- 51.3. Thirdly, the then Minister did not consider the fact that the government of the USA was willing to make an undertaking that it would deport Mr Chang to Mozambique to face charges there after his trial was concluded in the USA, and that the same cannot be said about the government of Mozambique. The prospects of Mr Chang evading justice are real in the absence of any possible transfer to the USA after his surrender to Mozambique.
- 51.4. The fourth ground of review concerns the ramifications of the government of the RSA surrendering Mr Chang to the government of Mozambique. The consequences include:
- 51.4.1. South Africa would have acted in contravention of SADC Protocol, specifically Article 4(e);

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51.4.2. South Africa would have failed to give effect to its extradition agreement concluded between it and the government of the USA;

51.4.3. The breach of its obligations set out in the preamble of the Constitution in relation to the sovereignty and comity between States;

51.4.4. The breach of its obligations under the UN Convention Against Corruption and the SADC Protocol on corruption.

52. In the light of the above, I respectfully submit that the Minister is entitled not to give effect to the decision of the then Minister sought to be relied by Mr Chang in his interdict. I want to make it clear that the Minister does not raise these grounds of review in order to delay the determination of the fate of Mr Chang. The Minister does so because it is of paramount importance for him and the government of the RSA to ensure that the obligations it has assumed under the relevant treaties and under the Extradition Act are properly fulfilled both as a matter of law and the spirit and purport thereof.

53. The Minister therefore wants a clear opportunity to consider the extraditability of Mr Chang to the USA and to face criminal charges there, and thereafter to face criminal charges in Mozambique in line with the

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undertaking the government of the USA is willing to make. The Minister assures the Court that the decision he is required to make in terms of section 11(a) of the Extradition Act will be swift and expeditious, should his counter-application for review, or the review application of the Forum be upheld.

54. In the light of the above, I now proceed to respond to averments in the individual paragraphs of Mr Chang's founding affidavit.

Responses to the founding affidavit of Mr Chang

55. **Ad Paragraph 1**

55.1. I do not dispute averments in this paragraph.

55.2. I emphasise that the custody of Mr Chang at Modderbee Correctional Facility is lawful and he has not sought to challenge it before or after the then Minister had made his decision on 21 May 2019.

56. **Ad Paragraph 2**

56.1. I do not admit that all of the averments in the founding affidavit fall within the knowledge of Mr Chang.

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56.2. I also do not admit that all of those averments are true and correct.

57. **Ad Paragraphs 3 to 5**

57.1. I admit the averments in these paragraphs to the extent that they are not in conflict with what I have set out herein.

57.2. I emphasise that the mere fact that the then Minister had made a decision relied upon by Mr Chang in these proceedings does not automatically give rise to the obligation there and then to give effect to that decision.

57.3. Where, as here, the decision concerned is manifestly illegal and unconstitutional, and also cannot be justified on the grounds of rationality, the current Minister is not obliged to give effect to the decision made by his predecessor. It is for that reason that the Minister has been advised to immediately, and without delay, institute the counter-review application for the relief sought out in the notice of counter-application. For that purpose the contents of this affidavit should be regarded as the supporting affidavit for that relief.

58. **Ad Paragraph 6**

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- 58.1. I do not dispute the fact that Mr Chang gained knowledge of the decision by the Minister's predecessor in the media article referred to in this paragraph.
- 58.2. I confirm that the Minister has not issued any formal notification of his predecessor's decision to Mr Chang or the Mozambican authorities pursuant to the discretion conferred upon him in terms of sections 11 and 16 of the Extradition Act.
- 58.3. Save as aforesaid, I do not dispute the rest of the averments in this paragraph except insofar as they are in conflict with what I say herein.

59. **Ad Paragraph 7**

I agree with the averments in this paragraph.

60. **Ad Paragraph 8**

- 60.1. I take note of the purpose of Mr Chang's application as described in this paragraph.

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60.2. I deny that Mr Chang has shown any factual or legal basis for his contention that the Minister has failed to comply with the provisions of Article 13 of the SADC Protocol.

60.3. As I have pointed out, the Minister is not required to give effect to the provisions of Article 13 of the SADC Protocol by reason of the mandatory provisions of Article 4(e) of the same Protocol.

60.4. As I indicate later, Mr Chang's contention of undue delay arises for the first time in this application. He has not complained at all to the Minister about this fact. It is not surprising that he has not done so, because it is always open to him to redress any effects of the alleged delay by applying for release on bail, as he has attempted to do so in the past.

60.5. I deny that there has been an undue delay in the release or surrender of Mr Chang to the Mozambican authorities.

61. **Ad Paragraph 9**

61.1. I do not dispute the averments in this paragraph.

61.2. I emphasise that the length of Mr Chang's custody should be considered in the light of the obligations of government of the

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RSA not to perpetuate any illegality or breach of its domestic and multilateral obligations which I have explained above.

62. **Ad Paragraph 10**

62.1. I accept that Mr Chang consented to his extradition to Mozambique. It is not surprising it is so because he has not been arrested for a period of more than four years since investigation against him in that country was instituted. I am also not surprised that Mr Chang has consented to his extradition to Mozambique because he is not currently facing any indictment in that country.

62.2. Neither the government of Mozambique nor Mr Chang have produced any indictment for the charges investigated against him in Mozambique. It is therefore odd for him to claim that he wants to face charges in Mozambique. The logical way to test his commitment to face charges is for him to consent to his extradition to the USA, because the authorities of that country are willing to make an undertaking that he would be deported to Mozambique to face charges in due course.

62.3. Save as aforesaid, I deny the averments in this paragraph.

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63. **Ad Paragraph 11**

I deny the averments in this paragraph.

64. **Ad Paragraph 12**

I take note of the averments in this paragraph.

65. **Ad Paragraph 13**

65.1. I do not dispute the averments in this paragraph.

65.2. I point out that the government of Mozambique has pointed out that after his resignation as the Minister of Finance in 2014 Mr Chang became a member of the National Assembly of Mozambique and he remained in that capacity until his arrest by members of SAPS in December 2018 at OR Tambo International Airport.

66. **Ad Paragraph 14**

66.1. I take note of the averments in this paragraph.

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66.2. I have cross-referenced the request for indictment by the government of Mozambique, which sets out the criminal charges investigated against Mr Chang.

67. **Ad Paragraphs 15 and 16**

67.1. I do not dispute the averments in these paragraphs.

67.2. I take note of Mr Chang's denial of the charges set out in the indictment by the Eastern District Court of New York and protestation of his innocence of those charges. As a former Minister of Finance, and a public representative in Mozambique he should co-operate with legal steps to prove his innocence where he is facing charges and not tactically seek to avoid them.

68. **Ad Paragraphs 17 to 24**

68.1. I admit the averments in these paragraphs only to the extent that they do not conflict with what I say herein.

68.2. I have been advised that the Minister's legal representatives will immediately prepare the record of proceedings and deliver it to the parties in accordance with the requirements of Rule 53 of the Rules of this Court.

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68.3. I point out that the Magistrate's two orders of 8 April 2019 pertain to the two distinct requests for extradition and consequently, there is no contradiction in the fact that both the orders refer to Mr Chang's committal to the Modderbee Correctional Facility pending the then Minister's decision regarding his surrender in accordance with the Extradition Act. The Court orders do no more than conclude the inquiry under section 10 of the Extradition Act and do not purport to dictate to which jurisdiction Mr Chang must be surrendered.

69. **Ad Paragraph 25**

69.1. I admit that the Magistrate's order of 8 April 2019 included reference to Article 11 of the SADC Protocol.

69.2. I deny that Article 11 is relevant to the determination of the then Minister for the reasons set out above.

70. **Ad Paragraph 26**

I admit averments in this paragraph insofar as they correctly reflect the contents of the Articles in this paragraph.

71. **Ad Paragraph 27**

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