

Neutral Citation Number: [2022] EWHC 157 (Comm)

Case No: CL-2019-000127 and others

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2022
(to be handed down formally on 31/01/22)

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

Between :

THE REPUBLIC OF MOZAMBIQUE

- and -

CREDIT SUISSE INTERNATIONAL and OTHERS

Jonathan Adkin QC, Charlotte Tan and Ryan Ferro (instructed by Peters & Peters LLP) for the
Republic of Mozambique

Andrew Hunter QC, Sharif Shivji QC, Andrew Scott and Tom Gentleman (instructed by
Slaughter & May) for Credit Suisse

Rupert Butler and Natasha Jackson (instructed by Leverets Group) for the CS Deal Team

Duncan Matthews QC (instructed by Signature Litigation LLP) for the Privinvest Defendants and Mr
Iskandar Safa

Duncan Bagshaw and Luke Barden Delacroix (instructed by Howard Kennedy LLP) for Ms Maria
Isaltina Lucas

David Railton QC, Timothy Howe QC, Adam Sher and Ian Bergson (instructed by Freshfields
Bruckhaus Deringer LLP) for VTB Capital Plc and VTB Bank (Europe) SE

Laura Newton (instructed by Enyo Law LLP) for BCP, UBA and BIM

Timothy Lau (instructed by Boies Schiller Flexner) for Beauregarde Holdings LLP and Orobica
Holdings LLP

Hearing dates: 10 January 2022

JUDGMENT

Robin Knowles J, CBE :

Introduction

1.

This is substantial litigation of major consequence to the parties and beyond. On 10 January 2022 and in the course of the case management of the litigation in London (“the London Litigation”), I heard argument from the parties regarding the disclosure obligations of the Republic of Mozambique (“the Republic”) in relation to relevant documents that are on the main file (“the Main Criminal File”) in criminal proceedings (“the Mozambique Criminal Proceedings”) before the Judicial Court of the City of Maputo 6th Criminal Section (“the Mozambique Court”).

2.

Through its Attorney General the Republic has informed this Court that it wishes to disclose and produce all relevant documents that are on the Main Criminal File if it lawful for it to do so under the Law of Mozambique. All other parties to the London Litigation (to whom I shall refer collectively as “the Other Parties” for convenience) are also concerned that the Republic should disclose and produce the documents.

The Order of the Mozambique Court

3.

Shortly before the hearing on 10 January 2022, this Court and the parties had the benefit of a reasoned Order (“the Order”) of The Honourable Dr Baptista, Judge, of the Mozambique Court. The Order is dated 30 December 2011 and certified by the Clerk to the Mozambique Court on 7 January 2022. Judge Baptista has the conduct of the Mozambique Criminal Proceedings. I express my gratitude to Judge Baptista for the fact that his Order was available at a time that enabled it to be considered at the hearing on 10 January 2022.

4.

The Order records that it was made on a request (“the Request”) to Judge Baptista by the Republic, represented by its Public Prosecution Authority. The Request was (so far as material) for permission “to consult and extract a full copy” of the Main Criminal File for use of its content in the London Litigation. The Request was made by the Republic on its own initiative.

5.

On its face, and without the assistance at this stage of expert opinion on the Law of Mozambique towards its interpretation, the Order reveals two key reasons. Judge Baptista focussed on the rights under the laws of Mozambique of defendants “and other procedural subjects” “to intimacy and private and family life ...[,] to non-violability of correspondence and ... to telecommunications secrecy”.

6.

First, (at IX) Judge Baptista expressed the view that it was unfeasible to reconcile personal rights of this nature with the right of the Public Prosecution Authority on behalf of the State to extract a full copy or parts of the Main Criminal File and use its contents in the London Litigation, and where that was the case then, in principle, the personal rights prevailed. Second (at (X)), Judge Baptista expressed the view that granting the Request would result in persons “foreign to” the Mozambique Criminal Proceedings “obtaining banking information and emails from the defendants and other procedural subjects [that had been] obtained through judicial authorisation in [the Mozambique Criminal Proceedings]” whereas “such activities are constitutionally prohibited, as they contend with fundamental rights of the defendants”, namely the personal rights just summarised.

Evidence of expert opinion on the Law of Mozambique currently before this Court

7.

Before the Order, the parties in the London Litigation had filed evidence of expert opinion on the Law of Mozambique. Some of that evidence has now been overtaken by the Order, and the reasons in the Order and their consequences are not fully addressed in that evidence. Time did not allow for further evidence of expert opinion to be prepared with the benefit of the Order before the hearing on 10 January 2022.

Approach

8.

Mr Andrew Hunter QC does not overstate the position when he says that the reasons in the Order have the potential to be extremely far reaching. In the circumstances I accept that this Court cannot itself at this point fairly or safely make detailed findings one way or the other on the Law of Mozambique.

9.

My intention in this judgment is nonetheless to try to make some progress with the questions that arise, recognising that some points may need to be revisited in due course. I am also willing to discuss any of the points further where that is appropriate and useful to the effective case management of the London Litigation. My purpose is to try to assist the parties now rather than later to make further overall progress in their preparation towards trial in the London Litigation.

The Republic's obligations as a party to the London Litigation

10.

The Main Criminal File was assembled over time by Mozambique's Public Prosecution Authority. In due course, in accordance with the procedure under the Law of Mozambique, it was formally provided to the Mozambique Court which has added to it since. Since its provision to the Mozambique Court the Main Criminal File has been used by Judge Baptista, and with his permission it has been consulted by the Public Prosecution Authority and others for the purposes of the Mozambique Criminal Proceedings. The Mozambique Criminal Proceedings are presently at the trial stage.

11.

The first argument made by the Other Parties is that because the Republic is a State, and the Mozambique Court is part of that State, so the Main Criminal File is within the control of the Republic and relevant documents must be disclosed and produced.

12.

I am not prepared to accept this argument. The points against it go to the rule of law, to judicial comity and to practicality, but may be stated briefly.

13.

I do not consider that a Court that has control of documents for the purpose of conducting a judicial proceeding is to be treated as part of the State. The relevant reference point is the Judge of the Court: it is the Judge who has control of the documents and she or he is independent of the State. If it is necessary to go further, I would also decline as a Judge of a Court of this jurisdiction to make an order the effect of which would be to direct a Judge of the Court of another jurisdiction to take particular action by treating that Judge as part of the State that was litigating here.

The risk of prosecution of the Republic or its officers under the Law of Mozambique

14.

Mr Jonathan Adkin QC's position for the Republic is that the Order heightens what the Republic contends is a risk of prosecution under the Law of Mozambique if relevant documents from the Main Criminal File are disclosed and produced. The second argument made by the Other Parties is that because the disclosing party is the Republic, there is no risk of prosecution if, despite the Order, relevant documents on the Main Criminal File are disclosed and produced: the Republic is not going to prosecute itself or its officials.

15.

I am not able to accept this argument, at least at this stage. The Order has been made, and its effect at present appears to be to refuse to allow the Main Criminal File to be used in the way requested. The evidence of expert opinion is not complete in this area. But were the Republic to proceed regardless and in the face of the Order, the first question would not be the question of the Republic prosecuting, but the question of the Judge's powers in light of what the Republic had done. As this stage, I am not prepared to assume there is no material risk of the Judge taking steps against the Republic or its officers. The parallel in this jurisdiction would be contempt of court.

Discretion and a balancing exercise

16.

After a very helpful review of authorities that repays close reading (as do the authorities themselves), Gross LJ in *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [63] "pull[ed] the threads together for present purposes" with these propositions:

"i) In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.

ii) Orders for production and inspection are matters of procedural law, governed by the *lex fori*, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law.

iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind (discussed in Dicey, Morris and Collins, *op cit*, at paras. 1-008 and following). This Court is not, however, in any sense precluded from doing so.

iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.

v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways.”

17.

If there is a balance to be struck by this Court in the present case, then the Other Parties reluctantly accept that, given the reasons in the Order, now is not the time to strike it. As Mr Hunter QC put it, proper visibility is needed on how far the Order extends and what its impact is. I agree with this. There is more to explore (including other sources and including confidentiality arrangements: see below).

18.

I add that I am concerned in the present case to maximise the prospects of effective means of disclosure and production of relevant documents being found. To move precipitately towards possible confrontation between orders of the different Courts involved is not desirable or helpful, whether the vantage point is the interests of the parties or wider considerations of comity, fairness and the administration of justice.

19.

In this, the parties need their experts on Mozambique Law to help them find solutions. There is common cause for the parties: the Republic and the Other Parties all want the disclosure and production in question. This Court would also appreciate that assistance from experts whose duties include that of assisting it.

The Copy File

20.

In the present case the Public Prosecution Authority took a copy (“the Copy File”) for itself of the Main Criminal File at the point of providing the Main Criminal File to the Mozambique Court. The Copy File is not of course a complete copy of the Main Criminal File as the latter has been added to since the Public Prosecution Authority handed it to the Mozambique Court.

21.

The permission of the Mozambique Criminal Court to take this copy does not seem to have been required when the copy was taken. The Copy File is not in the control of the Mozambique Court.

22.

Mr David Railton QC led argument that it should be disclosed and produced, and I am prepared to say that, in principle, and as at present informed and leaving aside for the moment documents discussed in the next section of this judgment, relevant documents on the Copy File should be disclosed and produced.

23.

However, I have to recognise that, in the way that matters have unfolded, there may be more to say at least on some of the documents on the Copy File. The Order does not extend to the copy File, but that is because the Request did not ask Judge Baptista to deal with it. In these circumstances I cannot appropriately take my “in principle” view to a conclusion by making an order at this stage. I must allow an opportunity for more to be said, including by evidence of expert opinion on the Law of Mozambique.

24.

At least visibility has increased to the point it has, even if incomplete. That is better than the difficulties coming at a later stage and bears out the value of taking the opportunities to move case management matters forward wherever possible.

Documents on the Main Criminal File or the Copy File, “obtained through judicial authorisation in [the Mozambique Criminal Proceedings]”

25.

The reference to documents on the Main Criminal File, “obtained through judicial authorisation in [the Mozambique Criminal Proceedings]” may have a parallel with the experience in this jurisdiction of documents obtained subject to an undertaking, express or implied, to this Court not to use them, without the further leave of the Court, for a purpose other than the purpose for which judicial authorisation was sought and given.

26.

If there are particular documents on the Copy File that were obtained in this or similar way, they will require separate consideration. This is of course not unusual, especially in multi-party litigation that has an international compass.

The possibilities for disclosure by other routes

27.

In the course of argument, Mr Adkin QC said and accepted for the Republic:

“To the extent that the documents on the criminal file are copies of material obtained from the parties to the English proceedings, including departments of the Republic, then that material will of course be subject to disclosure in any event, it doesn’t need to come from the criminal file, and there would therefore be no prejudice in that material not being sourced from the [Main Criminal File]; it can come from the parties anyway.”

28.

In light of the Order, I raise for consideration the point that it may be desirable to identify this material now, with the active assistance of the Republic. This course may allow a useful early disclosure stage not dependent on access to the Main Criminal File. Even leaving aside the Copy File as an item, the Republic (whether in the form of the Public Prosecution Authority or otherwise) will likely have gathered much of this material. If for some reason (for example, other copies have been lost) the only copy of an individual document that would otherwise be part of this material is on the Main Criminal File, there is the possibility of a focussed request to Judge Baptista based on consents to the release of that document.

29.

More generally it does seem important, in light of developments, to focus on where copies of relevant documents on the Main Criminal File can be found by other means, with a concerted effort by all parties. It is obviously sensible to narrow the number of documents that may need to be involved in a judicial decision weighing the importance of particular documents to the London Litigation against the rights described in the Order.

30.

Where the Main Criminal File is the only location of a relevant document, the weighing to which I refer may well be for Judge Baptista. But I will expect the Republic to give all parties to this London Litigation the opportunity to contribute towards the process, noting that (however well intentioned)

the Request can be viewed as less satisfactory because it was a unilateral initiative. If it is considered useful, and where appropriate because it will serve the interests of justice and be of assistance to Judge Baptista, I will be prepared to consider contributing myself to an explanation of the importance of a relevant document to the London Litigation.

31.

In addition, as the Other Parties observed at the hearing before me on 10 January 2022, the Order does not consider whether confidentiality arrangements may assist. I expect the parties to work together to see where these can help achieve or assist towards a sensible and just resolution of the difficulties identified in the Order.

Final points

32.

Mr Duncan Matthews QC described the Main Criminal File as a vital resource that the Republic needs to be forced to share. I have no doubt that the Republic will have been advised by its highly experienced legal team of the disclosure duties that arise and that it is in fact in its own interest as a party to the London Litigation that it strive to ensure that disclosure is complete.

33.

In litigation such as the present with wide-ranging international dimensions there will be challenges (the Main Criminal File is but an example) that require collaborative work by the parties to maximise the prospect of success in achieving disclosure that is complete.

34.

That collaborative work may not be easy for the parties, but it is more than possible with the calibre and experience of the legal teams involved here. At an earlier case management discussion, the parties responded well to a suggestion I made that they might consider appointing an independent neutral to assist them in reaching agreement over procedural disputes; such an appointee may assist here.

35.

Where, in the result, relevant documents are not produced, I will of course consider the consequences for the London Litigation. This will include at trial, when I consider whether matters are or are not proved, and whether inferences should or should not be drawn from the absence of relevant documents.

Conclusion

36.

The parties will have been considering their positions since the 10 January hearing. I will consider the terms of appropriate directions in light of that consideration and this judgment at the next convenient case management opportunity.