

Neutral Citation Number: [2022] EWHC 429 (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: 28/02/2022
(to be handed down formally on 02/03/22)

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

Between :

THE REPUBLIC OF MOZAMBIQUE

- and -

CREDIT SUISSE INTERNATIONAL AND OTHERS

Jonathan Adkin QC, Charlotte Tan, Ryan Ferro and Akash Sonecha (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 Prinvest 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: 31 January 2022

Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Robin Knowles CBE J:

Introduction

1.

On 31 January 2022 I heard further argument from the parties regarding the obligations of the Republic of Mozambique ("the Republic") in stating (pleading) certain parts of its case.

The Judgment of 23 November 2021

2.

In the course of an ex tempore judgment, on 23 November 2021 I said:

"...

3. At this point I am concerned with what VTB and the Credit Suisse parties term "bribes". Within that description are elements of payment, or action, knowledge and attribution, and surrounding circumstances, amongst others. At times, in the present case, the use of the term "bribe" can have the effect of attracting a compendious answer rather than an answer that is broken down into the different relevant elements. I intend to concentrate on the elements essential for understanding in this particular litigation.

4. I have regard in doing so to the specific provisions of the CPR, to which reference has been made, and also to the Commercial Court Guide. Fundamentally the overriding objective, and the case management demands of this major grouping of litigation, are very high in my mind. It is particularly important to the huge task confronting the parties and the court that there is transparency of case, or allegation, between the parties and that that transparency is achieved at an early point wherever possible. The need to define and refine common ground and issues will be with all concerned throughout.

5. [This] is not litigation in which there should be easily countenanced any possibility that a matter not addressed now would be saved up for argument about amendments at a later point in the progression of the matters to trial, or at trial itself. Nor are we, at this point, still within what Henderson LJ described as "the short period of filing a defence," in the Court of Appeal decision in *SPI North Ltd v. Swiss Post International (UK) Ltd* [2019] 1 WLR 2865.

...

7. The Republic's concern is that it be entitled to preserve a part of its case which is important to it. This is that whatever else may be the position, the knowledge of the President [in relation to alleged payments alleged to be bribes], whatever that is, is not to be attributed to the Republic.

8. That case is not a case that I can or would wish to resolve at this point, and it is a case or position that the Republic is entitled to maintain so that it can be resolved at the appropriate point. But the important thing about a non-admission is that it is available only, and to the extent, that there is an inability on the part of the party pleading the non-admission, to make an admission or to advance a denial.

...

12. In the present case there is no sign from the Republic as to whether the non-admissions are based on the results of the efforts, or exercises there described, to consult its own knowledge or ascertain the position from documents or other sources of information.

13. So far as the element of denial is concerned I cannot, from the Republic's pleadings, be clear that where it uses a denial in connection with the bribes it has set out all of - "all of," and I emphasise those words - its positive cases, and it should.

14. In these circumstances I do wish to see from the Republic chapter and verse that underpins matters that it does not admit, or its positive cases where it makes a denial. These, I think, are best addressed element by element, i.e. in relation to the payment, or action, or knowledge, and so forth. None of this takes away its case on attribution.

...

16. I do not propose to [set out more] about the content of the Republic's amendments or further information, save to indicate that I expect those to deal properly and fully, and in line with the indications I have given, with each of the requests that Credit Suisse and VTB have made in their requests for information. ..."

The Order of 23 November 2021

3.

By Order of 23 November 2021 I required the Republic to provide a full and proper response to the matters addressed in certain of Credit Suisse and VTB's requests for further information.

4.

The specific requests for further information were 12 to 14 and 19 of VTB's Request for Further Information under CPR Part 18 dated 30 September 2021; and Credit Suisse's Request for Further Information under CPR Part 18 dated 13 October 2021. The response was to be "... without prejudice to any contention the Republic may advance regarding any question of whether President Nyusi's knowledge or conduct is attributable to the Republic".

5.

The Order of 23 November 2021 required this of the responses:

"a. In any case where the Republic denies an allegation, state the reasons for that denial and any different version of events or positive case that the Republic intends to put forward, in each case pursuant to CPR 16.5(2).

b. If the Republic maintains after taking the steps envisaged by the Judgment (and in light of the enquiries made by the Republic and/or the documents in its possession) that it is unable to admit or deny any of the allegations pursuant to CPR 16.5(1)(b), set out a full and proper explanation of the basis and reasons for so contending."

6.

I also ordered that:

"The admission(s), denial(s) or non-admission(s) shall:

a. In relation to the allegations of bribery and corruption against President Nyusi in connection with the Transactions ... respond to each element of the allegations made against the Republic. This includes (to the extent the Republic has not already done so) pleading the Republic's case as to:

i.

whether the payment(s) in question were made and for whose benefit they were paid;

ii.

whether any such payment(s) were received and who benefited from the same;

iii.

whether any such payment(s) were bribe(s) or corrupt payment(s); and

iv.

whether any such payment(s) were part of a conspiracy as alleged.

b. In relation to the other allegations concerning President Nyusi's knowledge ... respond to each allegation of knowledge made and plead the Republic's case as to whether any such knowledge is attributable to the Republic."

The Republic's response as at 31 January 2022

7.

By the hearing of 31 January 2022, the Republic had developed its response.

8.

For reasons that will appear below, I focus on its response in the context of Credit Suisse's allegations. Even then I shall not set out its response in full, because it is not necessary to do so. Instead, I will focus on the parts material to the decision I have to make at this stage. But in doing so I do not wish to convey the impression (which would be a wrong impression) that what I summarise below is all the Republic has done in what Mr Jonathan Adkin QC described as its endeavour to comply with "the letter and spirit of the 23 November Order".

9.

In relation to an alleged bribe of US\$1 million paid by Logistics International SAL (Offshore) ("the Ninth Defendant") to Sunflower International Corp FZE ("Sunflower"), the Republic admits the fact of the payment, but does not admit or deny that it was a bribe or that it was a payment for the benefit of President Nyusi.

10.

The Republic maintains that Sunflower's documents are not in its control. The Republic states:

"...

3.5 Sunflower is not a representative, agent or emanation of the Republic in any way. The Republic does not have control of Sunflower's documents, including in particular its bank statements and accounts, save for ... material ... obtained from the EDNY Criminal Proceedings. Further, the Republic does not have any control of any documents showing the use to which any payment to Sunflower was put. Insofar as any person was involved in the receipt of monies by Sunflower, including the alleged payment of USD 1 million, they were not so acting as representative or agent of the Republic.

3.6. Further, if and insofar as President Nyusi received payment of a bribe, such knowledge as he has thereof is not attributable to the Republic

3.7 Accordingly, the Republic does not know and is therefore unable to admit or deny:

3.7.1. The purpose for which the admitted payment of USD 1 million by Logistics Offshore to Sunflower was made;

3.7.2. Whether such payment was for the benefit of President Nyusi; and

3.7.3. Whether such payment represented a bribe to President Nyusi.”

11.

The Republic contends that it is unable to admit or deny an alleged bribe of US\$6 million.

12.

It admits that the Ninth Defendant made payments to an account in the name of the Central Committee of FRELIMO, which is President Nyusi’s political party. However, the Republic says that it has no documents in its control concerning those payments beyond those disclosed in US criminal proceedings. It makes no admission as to whether those payments were received, or their purpose.

13.

The Republic states that those involved in President Nyusi’s election campaign were not, in conducting such activities, acting as representatives of the Republic, with the result that any knowledge gained by them in connection with the campaign is not attributable to the Republic. Further, the Republic repeats that if President Nyusi received a bribe, his knowledge is not attributable to the Republic.

14.

Most recently in advance of the hearing on 31 January 2022, the Republic added:

“The Republic (acting by its Attorney General) has made enquiries of President Nyusi concerning the matters set out in the CS RFI. Enquiries had been made of President Nyusi concerning a number of those matters before the receipt of the CS RFI and further enquiries were made of President Nyusi concerning all of the matters set out in the CS RFI after the Order of Knowles J dated 23 November 2021 and prior to the service of the Republic’s Response on 24 December 2021. No representation whatever is intended to be made or implied as to (a) the specific content of those enquiries (b) the content of any response to them, or (c) whether any such response was received.”

The position of the Credit Suisse and of VTB as regards the Republic’s response

15.

Credit Suisse, whose oral argument was forcefully and ably advanced by Mr Sharif Shivji QC, say the response remains an inadequate response. They argue it does not comply with the Order of 23 November 2021 and the Republic is not entitled to plead non-admissions. In any event, argue Credit Suisse, the Republic was required under paragraph 3(b) of the Order of 23 November 2021 to set out a “full and proper explanation of the basis and reasons” for its non-admissions and it has not done that.

16.

Through Mr David Railton QC, VTB’s position at the hearing was that it would value the further information for which Mr Shivji QC pressed. The point was made that the area was one that might require future debate.

17.

For the Republic, Mr Adkin QC emphasised that the Republic had endeavoured properly to comply with the Order of 23 November 2021. Mr Adkin QC also welcomed generally the presence of constructive engagement between the parties, especially with VTB, so that each was better informed and able to progress the litigation.

Privilege and attribution

18.

The legal professional privilege that the Republic enjoys, as do other litigants, is not prejudiced. The parties have already confirmed to the Republic that they will not argue that the Republic has waived privilege if the Republic discloses the fact or timing of any communication with President Nyusi.

19.

As regards the Republic's position that if President Nyusi has certain knowledge that knowledge is not be attributed to the Republic, I have dealt with this previously and made clear that this should not prevent the Republic from finding out information and pleading its factual position. Its case on attribution is fully reserved and protected.

20.

From the written argument of Mr Adkin QC (with Mr Ferro and Mr Sonecha) the position seems to be understood and accepted. It is helpfully stated at paragraph 12 that:

"... the Republic is not pleading a non-admission in reliance upon an attribution argument: it is pleading a non-admission because the truth or falsity of the allegation is not within its actual knowledge and its enquiries and documents do not presently enable it to plead a positive case."

Particular features of the Republic's response

21.

There are five particular features of the Republic's response.

22.

First, the Republic has not said whether it has received any response from President Nyusi in relation to the allegations. Credit Suisse say it is to be inferred that the Republic has not received any response (or at least any substantive response).

23.

Second, the Republic has not said whether three other people have been approached by the Republic for information. These are Prime Minister Carlos Agostinho do Rosário, Minister Jaime Basílio Monteiro, and Minister Agostinho Salvador Mondlane. Although these were said to be serving members of the Republic's government who were also members of the Central Committee when any relevant payment received, it transpired it was not common ground that the Prime Minister was on the Committee at the time or that Mr Monteiro or Mr Mondlane are Ministers. Credit Suisse say it is to be inferred that the Republic has not received any response (and certainly not a substantive one) from any of these individuals.

24.

Third, the Republic's position is that it does not control Sunflower's documents.

25.

Fourth, the response asserts that it is made "on the basis of the Attorney General's present knowledge and belief based on reasonable enquiries made by her and on her behalf". Credit Suisse point out that this does not appear to include knowledge and belief derived from material contained in documents "held within the criminal file of an ongoing criminal investigation or proceeding" and any documents which the Republic contends are subject to "State Secrecy".

26.

Fifth, the Republic takes the position that it knows nothing of alleged campaign contributions because of a separation between the Republic and those involved in conducting the campaign that led to President Nyusi's election. Credit Suisse describe this position as artificial and contend that there will inevitably be a significant overlap between those that were involved in the campaign and those that currently serve in President Nyusi's government. The Republic argues that the Republic cannot choose to ignore knowledge held by its own officials - or decline to ask those officials the relevant questions - merely because it contends that the knowledge is held in the wrong capacity.

Assessment and conclusion

27.

It is of the utmost importance that there is clarity and transparency, from all parties. This is especially so in a case of this complexity and where allegations are made that are very serious. Successful case management to a fair trial for all depends on it.

28.

For the moment I put the features going to documents (features three and four) to one side, but may return to them at a later stage in the case management of this litigation.

29.

Specifically, the Republic's position on control of Sunflower documents is clear, and if it is to be tested is best tested as part of the disclosure stage. And as regards the position in relation to documents in or information derived from documents in criminal files, this is the subject of a separate stream in the course of the case management of these proceedings. I have already given one separate decision on the subject of criminal files and the parties will be considering this. As regards the "State Secrecy" issue the Attorney General of Mozambique has stated through correspondence with the parties her "personal determination to ensure that a solution is found which satisfied all parties and the English Court as to the integrity and appropriateness of the approach and which complies with Mozambican law", and I wish to allow time for this effort, which is in line with liaison contemplated by case management directions given in November 2021, to succeed.

30.

However, as regards the first and fifth features, and generally¹, I have reached the view that I cannot be satisfied that the Order of 23 November 2021 has been complied with. What is needed is greater clarity and transparency about what has been done and what has resulted. To that end I will require the Republic to do the following:

1.

To state whether it has had substantive replies from President Nyusi and whether its response to the relevant allegations made by Credit Suisse or VTB takes account of these substantive replies.

2.

Specifically, if and to the extent that it has had substantive replies from President Nyusi, to confirm that it has not used its argument that knowledge of President Nyusi is not to be attributed as a reason for leaving the replies out of account when stating that it does not know and is therefore unable to admit or deny the relevant allegations made by Credit Suisse or VTB.

3.

If and to the extent that it has not had substantive replies from President Nyusi, to state what it intends to do to obtain replies so that its response to the relevant allegations made by Credit Suisse and VTB is further informed.

These statements are to be verified by a statement of truth

31.

As regards feature two, at this stage and on balance I do not consider I should require a similar procedure as for President Nyusi in relation to Prime Minister do Rosário, Minister Monteiro, and Minister Mondlane. The case will proceed on the basis that the Republic has (and has had) the opportunity to consider, with its legal advisers, whether to deal with them now in the same way as it has and has been required to deal with President Nyusi. The presence of that opportunity now may be relevant at later stages in the litigation. Specifically, it may affect a question whether the Republic will be allowed to amend its case at a later point so as to introduce a positive case or for any other reason.

32.

More generally, I propose to keep, and invite the parties to keep, this area of the case under continuing review on the path to trial. I welcome continuation of the constructive engagement between the parties, to which Mr Adkin QC made reference; it is what I would expect from parties guided by the highly experienced legal teams involved in this litigation.

33.

It is plain from the position that Mr Railton QC adopted on behalf of VTB at the hearing and in his written argument (and that of Mr Howe QC, Mr Sher and Mr Bergson) that VTB (or the Republic) may need recourse to the Court if the continuing process of seeking confirmations and clarifications that is underway between VTB and the Republic is not successful. All parties will have liberty to apply.