

Neutral Citation Number: [2023] EWHC 1148 (Comm)

Case No: CL-2019-000127 and Others

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 April 2023

Before :

Mr Justice Robin Knowles CBE

Between :

The Republic of Mozambique (acting through its Attorney General) **Claimant**

- and -

Credit Suisse International and others **Defendant**

Jonathan Adkin KC, Jeremy Brier KC, Richard Blakeley, Ryan Ferro and Akesh Sonecha
(instructed by Peters & Peters Solicitors LLP) for the Republic of Mozambique

Andrew Hunter KC, Sharif Shivji KC, Andrew Scott KC, Tom Gentleman and Emma
Horner (instructed by Slaughter and May) for Credit Suisse International and Others

Timothy Howe KC, Rupert Allen, Daniel Edmonds and Orestis Sherman (instructed by
Weil Gotshal & Manges LLP) for the VTB Capital and VTB Bank

Ian Smith, Rupert Butler and Daniel Goldblatt (instructed by Leverets Advocacy Limited)
for the 3rd, 4th and 5th Defendants

The 6th to 10th and 12th Defendants did not appear but did provide draft written submissions
of Frederick Wilmot-Smith, instructed by Signature Litigation LLP

Steohen Midwinter KC and Tom Wood (instructed by Enyo Law) for the Banco Comercial
Portugues, Banco Internacional de Mocambique and United Bank for Africa

Katherine Ratcliffe (instructed by Howard Kennedy LLP) for Ms Isaltina Lucas (9th third
party)

James MacDonald KC and Timothy Lau (instructed by Pallas Partners LLP) for
Beauregarde Holdings LLP, Orobica Holdings and VR Capital Partners LP

Richard Hill KC and Gregory Denton-Cox (instructed by Macfarlanes) for the VTB Bank
(Europe) SE

Hearing dates: 26 and 27 April 2023

JUDGMENT (No. 8)

Mr Justice Robin Knowles CBE
(14:44pm)

Thursday, 27 April 2023

Judgment by **MR JUSTICE ROBIN KNOWLES CBE**

1. First of all, I record my thanks to all parties who have had an involvement on this application for their written and oral submissions, and to the experts for their written contribution.
2. This judgment should be read together with my judgments previously given in this litigation, including in particular Judgment 4 ([2022] EWHC 3054 (Comm)) (the Personal Email Accounts and Devices Judgment as it has become known), Judgment 6 ([2023] EWHC 91 (Comm)) (the Designation Judgment as it has become known), and Judgment 7 ([2023] EWHC 514 (Comm)).
3. On 3 March 2023, in the context of disclosure in this litigation, I ordered the determination of the issue of the Republic's control of former and current office holders', state agents' or employees' work-related communications and other documents held on their personal email accounts or devices, and the steps that the Republic ought to take as a result. The determination was specifically to include ministers, prime ministers and presidents of the Republic.
4. In summary, the Republic adopted a practice whereby it was common for its officials and office holders at all levels to use their own e-mail accounts and devices for the Republic's communications. This has been described and amplified in various materials.
5. It is clear that in the context of disclosure, within legal proceedings in this jurisdiction, "control" of documents may take various forms. One of those forms is practical control, as it may be conveniently termed.

6. Mr Jonathan Adkin KC, for the Republic, correctly emphasises that the search for an answer to the question whether there is or is not practical control is a search that needs to be approached with reference to principle.
7. As in my Judgment 4, I have regard in particular to the decision of Males J (as he then was) in *Ardila Investments v ENRC* [2015] EWHC 3761 (Comm) and to the Court of Appeal's decision in *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11. These decisions have been cited in other more recent cases before this court, the Commercial Court.
8. In my judgment, practical control in the present case accompanies the very practice that, as I have summarised, was adopted. It did so unless there was a law preventing the presence of practical control, or there was compelling evidence to the contrary. It is only with the presence of an arrangement or understanding whereby access to documents to which the practice applied would be granted to the Republic that the practice could work.
9. There is no law of Mozambique to which I have been referred that prevents the conclusion just mentioned. There is no compelling evidence to the contrary.
10. The conclusion is far more than simply a conclusion as to close legal or commercial relationship. It even goes well beyond the relationship simply between employer and employee, official and government, or office holder and government. It is the practice itself that holds the key.
11. I have taken account, in addition, the insight that evidence from Ms Lucas, a former official, has given to the matter. I do not lose sight of Mr Adkin KC's point, on behalf of the Republic, that we are dealing here with a range of different people in different positions. However the practice is one

that, doing the best one can with the evidence, was relevant to all, and the conclusion is, I think, as a result, relevant to all.

12. I hope it may be of assistance in this context if I refer back to a specific passage in Judgment 4.

Paragraph [68] was in these terms:

"Although they may not be described in the same way where the jurisdiction is not a common law jurisdiction, employees of foreign companies will have duties which are materially of the same content as those found in English law. For all sorts of reasons, from tax to contract and recordkeeping, from sustainability to training and succession planning, and from regulation to governance and more, where personal email accounts or devices are used to undertake work in employment then the employer will need access to the documents and data and that will be well understood and agreed by employer and employee. Business could be unworkable otherwise. More still where the working method used by the employee is a principal method. This is "control". The more so when account is taken of the fact that control in the *North Shore* sense of "sufficient practical control" (to use Males J's term) is sufficient."

13. That passage, framed in terms of companies as employers and their employees, has obvious translation across when one is dealing, as here, with the government of a state, its officials and office holders.

14. The conclusion that there is here practical control is supported further by, but not does depend upon, the availability of disciplinary procedures against current officials who have a person who is senior to them within a hierarchy. The expert evidence of Mozambican Law refers to this.

15. For all officials and office holders, not only those within a hierarchy, the conclusion is also supported by the legal requirements under Mozambican Law that the documents be archived and categorised. Again however, it does not depend on that. I am here grateful for Professor Duarte's analysis of the legislation relating to archiving.
16. As Mr Andrew Scott KC argued, for the Credit Suisse parties, Professor Duarte is well placed to give expert evidence in public law, but save in relation to enforcement, on this point Professor Pinto, called by the Republic, did not materially disagree or engage. On the material I have, I consider archiving is better seen as a factor pointing to practical control, rather than as a complete answer in favour of the form of control that is termed "legal control".
17. In these circumstances, it is not necessary to reach a conclusion on the question of legal control under Mozambican law. Even then, the search for the conclusion would not have been confined to a search for a property right, as in part the Republic argued.
18. As to that, the question, whether electronic documents or electronic data held on personal accounts or devices can be property under Mozambican Law, is an important one for Mozambican Law generally.
19. The Republic argued, through Mr Adkin KC, that the answer is, no, they cannot. Article 1302 of the Mozambican Civil Code relied on by the Credit Suisse parties applies only, Mr Adkin KC emphasises, to what are termed "tangible" assets. The Republic says those do not include electronic assets.

20. If that answer is right, then Mozambican Law may find itself ill prepared for this age of crypto assets and block chain technology. The present case is not the place to reach a conclusion with the possible adverse consequences for Mozambican law of such a conclusion, unless it was really necessary to do so.
21. Other laws, that have been cited, do refer expressly to electronic documents. Other scholars instance the complexity of the issue. See in particular the text that was shown to the court from Mr Rui Pinto Duarte in the book "Rights in Rem", 4th edition, page 35.
22. In fact, the Republic has now approached the officials and the office holders. The process included the provision by Peters & Peters, in early January this year, of draft letters which were commented on by, or the opportunity to comment was given to, other parties.
23. Of 59 individuals (the number is slightly different by one reference), the large majority have given a response to the letters from the Republic requesting documents that indicates a preparedness to comply. I make clear, in light of the submissions that have been made, that I do not draw additional forensic inferences from that percentage of initial indication of preparedness to comply, but that is the factual current position.
24. Disclosure has, however, not yet been given, as I understand it, by those who have indicated that preparedness. The quality of production is therefore yet to be known.
25. Of the others, there are, as I understand it, eight where, to use the Republic's terminology, dialogue is ongoing, but it is only fair to indicate that within the eight are at least two potentially significant

figures (in the eyes of one or more of the parties) that were added only relatively recently to the list of names.

26. Four, or perhaps three are in the position of no response yet, or declining to comply with the request to search for documents. The court was informed by Mr Adkin KC that the current President of the Republic, Mr Nyusi, has engaged. The detail of that I do not know, but the potential is there to begin to treat the President as responsive, rather than not.
27. I comment briefly in relation to the remaining three. Mr Chang has not responded. He is in prison in South Africa, as the court has been informed, and faces extradition proceedings to both the United States and Mozambique. Mr do Rosario has said he will not comply. He is serving a 12-year sentence in Mozambique for embezzlement and abuse of power, so the court has been informed. Then there is Mr Carlos Pessane, a former adviser to a former President of the Republic. He asserts no involvement although there is evidence that suggests involvement.
28. The presence of control - practical control as I have held - does not answer the question what must the Republic do. It does mean that the whole subject area is within the compass of the Republic's disclosure obligations. It does, however, leave the question always present of what is reasonable and proportionate. It does not, to take an example that was canvassed in argument, necessarily mean that the Republic, in the case of each of those who do not respond or do not respond to a sufficient quality, must bring proceedings against them as office holders or officials.
29. What is important is for the Republic to strive to complete reasonable and proportionate steps. Certainly at this stage of the case, with trial near, there is a particular importance and value in the

Republic explaining what it is doing and what it is not doing and why. The context is, as has been emphasised, that documents are important in a case of this nature and the case itself is important.

30. Obviously, within the 59, some of the names will be more important than others. But high in the list of importance, no doubt, are those who have been emphasised by one or more of the parties, and those include the President.

31. The argument of the Republic also includes reference to the constitutional protection within the Republic for privacy and communication and correspondence. It is a matter of note that it does not appear that that has been raised as an objection by those many individuals that have given an initial response of preparedness to comply. I do not find its absence at all surprising. The draft letter - and I will assume that the letters as sent were in broadly its terms - drew a clear difference between what is in effect personal correspondence, which is not sought, and official correspondence.

32. There are many ways of approaching a search for documents that can respect satisfactorily the personal from the official. On any realistic approach, the reference to constitutional protection is not, in my view, an answer to the need for reasonable and proportionate steps.

33. The presence of a discretion that is said to lie in the Mozambican court, were it to be approached to make orders, is not a matter that in my view need be seen to be in the way of either the finding of practical control that I have made or the reasonable and proportionate steps that are necessary as a result.

34. In the circumstances, I do propose to make a declaration as to control. However, I decline today to make a further declaration that the Republic is in what has been described as further breach. The

judgment that I have reached, with the assistance of all parties, now makes the control position clear.

35. What matters next is the course taken by the Republic and by the 59 individuals. At this stage in the exchange, it will be necessary, or soon necessary, to look at them one by one in order to reach a reasonable and proportionate view about what is sensibly required next. As Mr Timothy Howe KC (for VTB Capital and VTB Bank) has correctly emphasised, the quality of searches, where they are appropriate, will matter as well.
36. I would expect, with the clarity as to control that is now available, the Republic to respond on its own initiative, recognising its own disclosure obligations, in a way that sought vigorously to meet the standard of reasonable and proportionate next steps. All that has happened at the moment is a letter out and a set of responses in.
37. The court expects, and the rules require, a party to be able to take matters forward from that point and not to need, as Mr Adkin KC suggested was necessary, applications from the parties saying, "Do this" or "Do that." I emphasise, this is already within the obligations of the Republic and the court expects reasonable and proportionate behaviour.
38. There will be decisions to be made about chasing, following answers and following up and looking at the quality of any production and these will need to happen at pace, because we are now close to the trial.
39. It is in this regard that once again that Peters & Peters, the Republic's solicitors, play such an important part. Mr Howe KC used at one point the phrase of their "guiding", and that seems to me

an appropriate phrasing for the experience, expertise and objectivity that that firm can offer the Republic about the next step to take in relation to each person on the list and prioritisation between people on the list of 59.

40. It will not be the same here, I am sure, across the board. I do emphasise, and there has been a degree of this in the cut and thrust between the parties, that it is open to the other parties to assist with suggestions about where the priorities are between the 59 individuals. That is in their interests as much as the Republic's, to make an exercise that is overall reasonable and proportionate, including manageable.

41. In this case I do not see it as a reasonable and proportionate proposition that Peters & Peters undertake a search themselves in relation to each of the 59 individuals, or anything like that. But their role is to guide the process, and sometimes that will mean they are managing it more closely and sometimes less closely. The court has to trust its officers.

42. Clearly, the Republic's disclosure certificate is going to require revision in due course as well.

43. I hope it will be clear, with respect, I reject Mr Adkin KC's submission, if I have understood it rightly, that a failure by an individual to comply - a failure to respond positively to the request - is a sign that there is no practical control. What is crucial to be understood in this case is there is control and the question is then, what needs to be done that is reasonable and proportionate.

44. I have no doubt that that exercise should start with the obviously most important, and the President is one of those. There was a passage in the Republic's skeleton argument, paragraph 56, that read as follows, under the cross heading, "Proportionality, Discretion and the Way Forward":

"The answer is that no Order should be made. There are no proportionate steps with any utility that the Republic could (and so should) take. It is obviously not proportionate and sensible to order the Republic to undertake speculative, and in all likelihood, pointless litigation in the Mozambican Courts. Yet that must be what Credit Suisse is suggesting."

45. I agree respectfully with Mr Howe KC that it is right to treat what is in that paragraph as extremely unattractive. It is not right that litigation is the only option. It is absolutely not right that there are no proportionate steps that the Republic could and should take. This is clear on the face of an exchange of correspondence that has really just started, and that indicates there is a lot to be done and a lot to be done at pace.

46. There will no doubt be further discussion on this in the case management conference that will follow now and across tomorrow. I am happy for that discussion, especially once the parties have reflected on this judgment overnight, to include, if it is helpful, further specificity in relation to reasonable and proportionate next steps, but I shall be looking to everyone to try and identify them between themselves. I shall be looking to the Republic to be on the front foot with proposals now or in very short order.

47. That, doing the best I can, is my decision.