Neutral Citation Number: [2023] EWHC 514 (Comm)

Case No: **CL-2019-000127**

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: 03/03/2023

Before :

Mr Justice Robin Knowles CBE

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Between :

The Republic of Mozambique (acting through its Attorney General)	**Claimant**
- and -	
Credit Suisse International and others	**Respondent**

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Jonathan Adkin KC, Jeremy Brier KC, Edward Gilmore and Akash Sonesha (instructed by **Peters & Peters Solicitors LLP**) for the **Republic**
Andrew Hunter KC, Sharif Shivji KC, Andrew Scott KC, Tom Gentleman and Emma Horner (instructed by **Slaughter and May**) for **Credit Suisse**
Timothy Howe KC and Natasha Bennett (instructed by **Rosenblatt**) for the **VTB Capital and VTB Bank**
Richard Hill KC and Gregory Denton-Cox (instructed by **Macfarlanes LLP**) for the **VTB Bank (Europe) SE**
Peter Knox KC, Ian Smith and Rupert Butler (instructed by **Leverets Group**) for the **3rd, 4th and 5th Defendants (the CS Deal Team)**
Duncan Matthews KC, Ben Woolgar and Matthew Chan (instructed by **Signature Litigation LLP**) for the **6th to 10th and 12th Defendant (Privinvest and Mr Safa)**
Stephen Midwinter KC and Tom Wood (instructed by **Enyo Law LLP**) for the **Banco Comercial Portugues (BCP), Banco Internacional de Mocambique (BIM), United Bank for Africa (UBA)**
James MacDonald KC and Timothy Lau (instructed by **Pallas Partners LLP**) for **Beauregarde Holdings LLP, Orobica Holdings LLC and VR Global Partners LP**
Sophia Hurst and Duncan Bagshaw (instructed by **Howard Kennedy LLP**) for **Ms Isaltina Lucas**

Hearing dates: **28th February; 1st, 2nd March 2023**

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JUDGMENT 7

Mr Justice Robin Knowles CBE **Friday, 3 March 2023**
(**10:49** am)

Judgment by **Mr Justice Robin Knowles CBE**

Introduction

1. This is my judgment on applications that have centred on the Republic's disclosure of documents. The applications seek a range of orders. The application by Credit Suisse includes a request for "unless" orders, with the sanction of striking out where there is a failure to comply. It also includes requests for declarations that there have been defaults.
2. The parties who have made applications criticise the Republic's disclosure generally. However, and sensibly, there has been focus at this hearing on what the parties contend to be the most important and significant areas.

The trial

3. The trial of this multi-party litigation will commence in October with 12 weeks allowed.
4. The trial date is variously in the interests of all parties, as many recognise for differing reasons. Mr Lau, for the Pallas Parties, puts any adjournment of the trial in terms of unfairness; and I understand that characterisation. That the trial will commence in October and not later is also in the interests of the overriding objective, including the court's consideration of the position of other litigants in other cases.
5. The litigation is of enormous importance to all parties. It is complex, high value litigation, with issues that ask not just what happened and why but who knew what when and also where there was honesty and where there was not. The exercise of all parties giving disclosure of relevant documents was always going to be vast. The deadline for disclosure has now passed after earlier extensions. Witness statements and expert reports are under preparation. Each team of solicitors and counsel is working hard, none more than the Republic's.

Disclosure

6. The deadline for disclosure has been an important discipline, but the complexity of the case and some of its international aspects has meant that disclosure has had to be taken in stages.
7. This has involved addressing some challenges as they have arisen and where they were not expected. It is one of the aspects of the case that has required more time to case management than in many cases. I wish to acknowledge the professionalism of all firms of solicitors who have been involved.
8. More disclosure may yet be required from any party; and the fact that the duties to give disclosure are continuing duties, continuing up to and through trial, is of particular relevance in this case.
9. The Court's concern, front and centre, is that any trial is a fair trial. This is what the parties and the public are entitled to; and it is what the rule of law requires.
10. The Court is pleased to be trusted with the resolution of important international disputes such as the present. These disputes can involve States, companies and individuals. Trust in the Court is earned and, in every case, the Court must continue to earn it. It is a trust based on the delivery of a fair, independent hearing and decision. And one of the things that the Court insists on to achieve a fair decision is disclosure of relevant documents.

Disclosure by the Republic

11. The Republic of Mozambique, as a State, has a structure of Ministries, Offices and Councils. These have been termed State entities for convenience. The issues in this litigation touch or are alleged to touch a large number of those State entities. Individual officials and office holders were involved at material times and some are the subject of allegations. The current

President, President Nyusi, is also a party to this litigation personally. Some of the individuals, including the current President held different relevant positions at different times.

12. Among the State entities within the Republic are these five: the Office of the President, the Office of the Prime Minister, SISE (which deals with State security), the Council of State, and the Ministry of the Interior.

13. Credit Suisse accepts that the Ministry of the Interior is not as central to the issues in the litigation as others. By contrast, SISE is alleged to have a central role. Ms Sophia Hurst illustrated, for Ms Lucas (a former senior Treasury official at the Republic and a party to the litigation), that there is material to show connection of relevant payments with SISE. Mr do Rosario and Mr Leao (the latter a former Director General of SISE) are names that feature prominently in the litigation. The litigation includes allegations of bribery and five officials or office holders that are alleged to have been bribed are from SISE or from the Office of the President. In addition to the current President, the actions and knowledge of the former President are relevant as are those of holders of the office of Prime Minister.

14. The five State entities that I have mentioned were among those expected to hold relevant documents. The Republic itself said as much in its disclosure review document at section 2. So too the Navy and PGR (the Republic's internal legal function) could be expected to hold relevant documents. All are required to archive documents under Mozambican law and, in that process, to decide a classification of documents from a list of four levels of classification described in Republic of Mozambique v Credit Suisse and Others (Judgment 6) [2023] EWHC 91 (Comm).

15. Most of the searches for relevant documents required of the Republic were searches at Model D under the rules governing disclosure.

Peters & Peters and PGR

16. The solicitors to the Republic are Peters & Peters. They, as with other solicitors for other parties, have been working as best they can. There have been times when I have wondered if the leadership at the Republic fully realises quite how valuable the experience and expertise of Peters & Peters is and the importance of heeding that experience and expertise.
17. A word about PGR. As Mr Tim Howe KC pointed out, PGR, unlike Peters & Peters, are not solicitors owing obligations to this Court as its officers. It may owe obligations to the President in his official capacity for the Republic. However, as a party to this litigation the Republic does owe duties to this Court, in particular in relation to disclosure, and PGR has a professional function within this. It has also been involved in aspects of the history of the matter, including relevant asset confiscation.

Results and current position

18. I have been provided with extensive information, in a number of witness statements, but, in particular, a witness statement of Mr Keith Oliver of Peters & Peters, his nineteenth. Mr Jonathan Adkin KC for the Republic has added to that information in the course of this hearing on instructions and that has been helpful.
19. The exercise to date has clearly been one of scale and challenge. I take close account of the differences there will be between the systems available to the Republic for the purposes of public administration, including information retention and record keeping and retrieval, and those available in other States enjoying the good fortune of greater resources or more developed arrangements.
20. Peters & Peters has been permitted to participate in or undertake searches at some State entities for relevant documents; and this has led to disclosure of relevant documents. Important searches have been undertaken, for example at the Ministry of Finance and Economy.

21. It is, as this Court has found (see Judgment 6), lawful under Mozambican law to designate individual lawyers at Peters & Peters "need to know", so as to allow their participation in searches for relevant documents at State entities. However the Republic refuses to exercise that lawful power at any of the five State entities that I have particularly identified. That refusal has been in relation to any level or grade of classification from the four levels or grades available (these range from “state secret” to “restricted”). Those with relevant authority to designate “need to know” at these entities include (as the case may be) the President or the Prime Minister.

22. Whilst it is also lawful under Mozambican law to designate PGR "need to know", and PGR has been so designated at the Ministry of the Interior and the Office of the Prime Minister, the Republic has not exercised that power at the other three of the five State entities; and, again, in relation to any level or grade of classification.

23. The results of the current position are striking. Almost no documents have been disclosed from the Office of the President and SISE. Missing even are documents recently referred to in a related criminal trial in Mozambique.

24. There are examples of documents that are known to exist, are disclosable, but have not been provided by the relevant State entities. Focussing on SISE, Mr Duncan Matthews KC, for Privinvest and others, points out a document from June 2017 showing SISE involvement in relevant matters that has not been disclosed from SISE. A May 2017 document has been disclosed but not any related materials that it obviously suggests existed. There is, moreover, no clear and detailed and specific evidence to this Court that the points I have just mentioned have been used to challenge SISE vigorously on its disclosure.

25. Elsewhere, the institutional account of Mr Chang, former Finance Minister of the Republic, was said to be empty because it had not been used. It transpires, however, that it was operational and that what has happened is that its contents appear to have been deleted. Mr

Stephen Midwinter KC, for the Enyo Parties, and other counsel, were right to press in the area of disclosure of electronic documents. This institutional account of Mr Chang is potentially really important; and I shall watch closely the efforts that the Republic makes here to get at underlying data notwithstanding the deletion. It has already been reported to this Court that other electronic message reserves across the Government known as INAGE have been lost as a result of damage. This makes another potential source, like this institutional account, more important still.

26. To the matters I have just mentioned should be added the following. The required disclosure from the Navy has not yet been completed, and there is no clarity over why that is the position and when there will be completion; this area of disclosure is one that has been specifically highlighted by Mr Matthews KC at various points in the case management of the litigation. Then, a decision was communicated by the Republic to the other parties in this litigation for the first time on 31 January 2023 that six out of seven sections of the Ministry of the Interior would not be searched; this was a sudden shift that does nothing for confidence in the disclosure exercise as a whole. And other copy documents, apparently, are still held by Kroll, the agency used by the Republic with the support of another Government to investigate at an earlier stage; although it seems here a solution is now close at hand and I welcome the cooperation between parties that has allowed hat point to be reached.

Assessment

27. The Court will be guided in relation to disclosure by the requirements of reasonableness and proportionality. I also keep well in mind, as Mr Adkin KC invites me to, the exact terms of paragraph 3.1(4) and 3.2(2) of the relevant Practice Direction (PD51U and PD 57AD).
28. Mr Adkin KC also undertook, understandably and helpfully, a forensic review of the examples of issues for disclosure that had been highlighted by other parties. His objective was to test the

question of the importance of disclosure from the State entities discussed above. However no such review of what were simply examples of issues for disclosure can, in my judgment, gainsay the fundamental point, which all parties have, frankly, been working on, and rightly so, which is that the State entities are of real relevance across the piece.

29. Mr Howe KC and Mr Richard Hill KC further point out how the importance of the issues for disclosure extends across the current litigation and specifically to what have been termed the immunity proceedings. As Mr Howe KC summarised, the immunity proceedings include a wider alleged fraudulent conspiracy, with a different object and purpose. Again, there can be no question of the place of State entities within the disclosure exercise.

30. Of course the Republic is concerned about security, particularly where these State entities are involved. The security of a foreign friendly State is a matter of great importance. In the evidence of the Republic, particularly at paragraphs 333 and following of Mr Oliver's witness statement, this is emphasised, and understandably emphasised with particular relevance to the Office of the President and SISE.

31. The Republic has invited observations from an expert in matters of State security. I have read the resulting report with respect but find that the expert, in terms, is addressing a question of permission to allow unrestricted access to all documents and data across the whole of a relevant Government department. It is unsurprising that the expert should say that that type of wide ranging permission would be extremely rare. He goes on to point out that one of the consequences of it, as he understands the question he is addressing, is that it would involve access to documents that were clearly outside the "need to know" of those given this broad permission.

32. The report is not on point. This is no criticism of the expert. Rather, it has never been the type of exercise that he addresses that has needed to be asked of the State entities. Searches are necessary but precisely how the necessary searches were to be undertaken would be a matter

for sensible and careful discussion between the entity, PGR and the solicitors in question. What cannot happen is to leave the entity "off limits" in a case of this nature and seriousness and involving the issues that it does. The reason for this is obvious. If a document holds the answer to a case and is only held in a safe at the office of the head of Government or security then of course a fair trial requires that document.

33. In the present case, at an earlier point it was anticipated that Peters & Peters would have a close involvement; and no doubt the same would be true for PGR. If that was not to happen then by whom has the search now been done? The results do not, on the face of it, withstand the simplest challenge; and the Court is not told that those who have undertaken the search have faced that challenge.

34. To the parties and to others who have followed the course of these proceedings to date, I hope it is clear that the Court has sought to do what it can to assist. It remains ready to assist further. It has explained the disclosure process and what the solicitors' firms bring to that process. It has emphasised time and again its readiness to consider arrangements for confidentiality of the most rigorous type. It has offered to provide disclosure guidance in the particular and difficult circumstances of the case. When the Republic raised the issue of the lawfulness of "need to know" designation the Court arranged to examine that closely to arrive at a decision on the issue so that the parties knew where they stood.

35. Mr Hunter KC for Credit Suisse advanced the proposition that where, as here, extended disclosure requires reasonable searches that means by a party's solicitors. There is no doubt at all that that is the expectation; but I do consider there will be exceptions. Where a litigant self represents is one necessary example. But even where there are solicitors I cannot rule out that, in a particular case, a party will be able to show that its disclosure duties were met in one or other particular, by a means other than by the solicitors undertaking the searching. Similarly, the solicitors in a particular case may be able to show that their own disclosure duties are met

even when they did not do the searching itself. This might involve searches undertaken by others and might involve the solicitors making a different contribution, by way of oversight, supervision, training, checking, challenge and the like. This might especially be the case where the situation involves acute considerations of proportionality and reasonableness. But the more the departure or adjustment from the expectation that searches will be undertaken by a party's solicitors, the more the Court needs to be told about it, and in some detail so that alternatives can be considered. But that has not happened, at least to the standard the Court needs and against the poor results that have been achieved.

36. What matters is the integrity of the exercise and confidence in the result. The result involves not simply what is produced but what is not missed; and so transparency will be important. Late changes, especially departures from what was proposed in section 2 of the DRD, may need more explanation. It may be appropriate to discuss proposed arrangements in advance with other parties, in line with the cooperation that the Court expects. It may be sensible to ask the Court in advance of implementing arrangements, whether through a short disclosure guidance hearing or in the course of a case management conference.

37. But all this said, I must keep a focus on disclosure as a means to an end. The end is a fair trial. I must have regard to what has been disclosed, and to the trial and of the issues in it. I must not allow a contest over a piece or area of disclosure to be viewed as though that was the dispute between the parties. And the overall requirement is always informed by what is reasonable and proportionate.

Striking out; drawing adverse inferences

38. Non-compliance with the court's orders or with the disclosure process is an important matter in its own right. Here of course the importance is, again, in the context of fairness of trial. Each case must be considered on its own facts and circumstances.

39. I have mentioned that the President is a party to this litigation. He also is the person with, as it appears, ultimate authority for access to the most important State documents, at the most important State entities. It may be that it is his individual stance that puts the Republic's position at risk. The responsibility is, nonetheless, that of the Republic, even where its President refuses to assist for what may be self-interested reasons. This is not necessarily the end of the matter. The opportunity is always there for the Republic, in the interests of its people, to explain the problem to the Court though I fully appreciate how difficult that can be.

40. There was a helpful discussion across the courtroom of the availability of the sanction, not of strike out but of adverse inferences being drawn. The discussion included, amongst others, Mr Hunter KC for Credit Suisse, Mr Adkin KC for the Republic, Mr Midwinter KC for the Enyo Parties and Mr Lau for the Pallas Parties.

41. It is clear from that discussion that it may be difficult and sometimes, perhaps, impossible to rely on the sanction of adverse inferences given the matrix of allegation and cross-allegation between the many parties to this litigation. Mr Midwinter KC and Mr Timothy Lau would not rule the possibility out and I do not. Mr Adkin KC, indeed, does not seek to shut it out as a possibility at trial.

42. Further, sight must not be lost of the point raised by Mr Peter Knox KC, for the Credit Suisse Deal Team, who emphasises that the withholding of positive supportive evidence may not be addressed by drawing adverse inferences. Mr Howe KC draws an analogy in this area with the way in which inferences are drawn once documents are destroyed, where the fact of destruction is known but the consequences are not. Of course documents may be disclosable but may not be of the highest degree of relevance; but it is here important to appreciate that an unknown number have not reached Peters & Peters to decide the question of relevance.

43. It follows that the potential for striking out to be the final remedy for non-compliance where the fairness of trial is threatened is very real in a case of this nature. As Mr Hunter KC put it

in reply, courts must be prepared to use jeopardy where appropriate to achieve compliance and fairness. I was taken to valuable decisions by Fancourt J in the course of the Byers v Samba litigation where on the facts and in the circumstances of that litigation there was a strike out of part. In some cases the trial itself, rather than a point before trial, will be the point at which there is greatest clarity and where precision is possible, whether over the use of adverse inference or in striking out allegations of fact.

Conclusions

44. Against this, what is it I need to do now towards a fair trial? I have, in the present case, reached the following conclusions. These will sit alongside further case management in the period between now and trial.

45. First, I should declare that the Republic is not complying with its disclosure duties, specifically in relation to documents held at the Office of the President, SISE and the Council of State.

46. Second, I should require the Republic, by Peters & Peters as its solicitors and as officers of this Court, to prepare and submit a plan addressed to this Court, and provided within a period to be discussed, for giving disclosure of relevant documents from those three State entities.

47. This is to be a fresh exercise as if one was starting from the beginning. The plan may include any request to this Court to preserve the confidentiality of any disclosable document or even for this Court to consider exempting a document from disclosure where, for example, it is not of central relevance but is classified at the level or grade of "state secret". I shall discuss with the parties how to determine such a request if it is made. This is an area where, in some circumstances, full visibility may not be something that can be provided to all parties and, at times, subject to discussion with the parties, the Court may need to consider the matter in a narrower frame.

48. Third, I should require the Republic, by Peters & Peters as its solicitors and as officers of this Court, to review the documents that are held electronically by PGR to identify any relevant disclosable documents. This review may involve PGR, but it is to be supervised by Peters & Peters. It is not to extend to documents on the Main Criminal File or the Copy File (as those have been defined in earlier decisions) in the sense of taking documents from those files. That respects the current rulings of the Mozambique Court. However, where it is proposed to exclude any relevant document that is not taken from the Main Criminal File or the Copy File but is simply a further copy of a document believed also to be on the Main Criminal File or the Copy File, then that document is to be identified and is to be the subject of an application for directions to me.

49. Fourth, I should require the Republic, by Peters & Peters, to undertake a full forensic investigation of Mr Chang's institutional e-mail account in conjunction with PGR and IT experts in order to identify whether deleted material may be retrieved or reconstructed. A report on this exercise is to be provided to all parties and to me, detailing the conclusions reached and any proposals.

50. Fifth, the criminal trial recently before the Mozambican Court having been completed, in the event that any document read from by the Mozambican Judge in his judgment or read from in open court at the trial is not otherwise available to a party to this litigation in London and is considered by that party to be of real importance then there is to be liaison between solicitors with a view to obtaining a copy of that document, including, if necessary, by specific application in relation to that specific document made by the Republic to the Judge of the Mozambican Court. The matter should be referred to me if there is any uncertainty or if it is thought useful that I should consider a request from this Court to the Mozambican Court for that document.

51. Sixth, I have concluded that I should not, at this stage, make an order to strike out all or part of the Republic's statements of case. However, I should treat this as a matter of continuing review throughout the period between now and the end of trial. To that end, I will allow a liberty to apply to all parties; but, in addition, I reserve the right to raise the matter on my own initiative. The liberty to apply is not to allow second challenges on the same facts and circumstances; it is specifically to allow flexibility in the light of developments or materially increased perspective.

52. Seventh, I have concluded I should not, at this point, require a schedule in the form proposed by Mr Midwinter KC for the Enyo Parties, or in the style of Woodland 4 as proposed by Mr Matthews KC. One or other of those documents may, however, be a useful document for trial. I propose, therefore, to consider at the July case management conference whether to direct the preparation of a schedule to be lodged at or around the time of the Republic's trial opening written argument.

53. Eighth, on particular points, I will allow an extension of time for disclosure of relevant documents from the Navy; in light of current activity resulting from liaison between some of the parties, I need say nothing about the documents still held by Kroll but I am prepared to support that activity with an appropriate order; and I shall expect the correspondence exercise that is currently underway in relation to e-mails on personal devices to continue (see Republic of Mozambique v Credit Suisse and Others (Judgment 4) [2022] EWHC 3054 (Comm)). If Credit Suisse or any other party requires, I will set a timetable to determine the matter of "control" with expert evidence; I shall not make a ruling on any aspect of control separately and in advance of that exercise.

54. Ninth, I should require PGR to take advice or further advice from Peters & Peters in relation to the question of disclosable documents from devices that have been seized in Mozambique.

55. Those nine matters will of course be recorded in an order in due course.

56. I should formally remind all parties that their disclosure duties are continuing. I may, at any point, call on any party for an account in this regard. An example is in relation to the Republic's efforts to secure rulings from the Mozambican Court that may improve the disclosure it has given of relevant documents.

57. As I mentioned earlier, I am acutely conscious of the demands of time and resource. I have deliberately not set deadlines in most of the treatment just given of the nine points. My intention is to consider reasonable proposals for time periods that will get that work done well, allowing time for follow-on activity on some of the points and without risk to the trial date and proper preparation for trial. I have striven not to set requirements that will simply lead to failure. I have striven to apply the standards of proportionality and reasonableness at each point.

58. I have not said more on "need to know". There is a power to designate and all concerned know the reasons why. The problem is the failure to exercise that power even at low levels or grades of classification. I am not convinced by what I have heard about proceedings before the Mozambican Court for recognition. I have taken the matters just mentioned into account in reaching my decisions on what must be done at this stage. I will continue to keep under consideration the position in relation to "need to know" at future stages.

Closing remarks

59. Mr Adkin KC has spoken for the Republic, if I may say, with ability and responsibility. It is not an easy thing to marshal response to challenges from so many quarters. The Court is grateful to him and to the legal team that he leads, as it is, I emphasise again, to all other legal teams who have assisted this week.

60. In the course of the hearing Mr Adkin KC said that the Republic had tried really hard to provide "an awful lot of information in really a quite truncated period of time". I agree with

that. Mr Adkin KC said that the applications "should be about the way forward and should be about assessing the serious complaints that are being made about the Republic's disclosure". I agree with that too. And that is what I have done; although I do not and cannot overlook failings to date.

61. Mr Hunter KC for Credit Suisse canvassed in his oral argument in reply, as one part of an approach, my taking the opportunity of this hearing to make very clear to the Republic and its President that the likely sanction for failure to comply is strike out of all or part of its case; and that I should direct the Republic to make that clear to its President.

62. I cannot say at present whether the President is set on helping these proceedings in the interests of the Republic and its people, or hindering them in self-interest. What can be said is that to date he has not done what he could to respond in relation to his personal involvement as a party and in relation to allegations made against him personally. He has also, on the face of things, not assisted in his position at the helm of relevant State entities when it comes to access to documentation for the purpose of the Republic's duties of disclosure.

63. I shall not take up Mr Hunter's suggestion to direct remarks to the President. In the circumstances, that is still first a matter between the Republic and him. However the Republic on behalf of the people of Mozambique is always free, as I have mentioned, to make it clear to me if part of the difficulty is the President, so that I can take that into account where and to the extent appropriate, alongside all other considerations.

64. However, Mr Adkin KC has kindly informed me that the Deputy Attorney General for the Republic is present in the courtroom and has been during the hearings this week. I acknowledge his presence with respect as I do the presence of all other parties or senior representatives attending in person or by remote link.

65. I take the opportunity to say to him the Deputy Attorney General, in his capacity on behalf of the Republic, that the declaration that I have had to make as the first of the nine items is a

really serious matter. I have set out across the nine items the basic, essential steps that are now required. I shall assess not just the fact but the quality of compliance hereafter; and that will extend in some of the cases to what more is to be done in the light of the outturn of the step in question.

66. My concern is for a fair determination of the matters that the parties have entrusted to the Court. If I need to exercise my powers of strike out to ensure compliance with the Republic's duties and the obligations on the Republic in this litigation, I will. And I will because that is my duty and because the fairness of the trial that I wish to deliver to the Republic and all parties is at stake.