



Neutral Citation Number: [2024] EWHC 3188 (Comm)

Case No: CL-2019-000127 and 11 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
Strand, London, WC2A 2LL

Date: 10/12/2024

Before:

THE HON MR JUSTICE ROBIN KNOWLES CBE

Between:

THE REPUBLIC OF MOZAMBIQUE
(acting through its Attorney General)

Claimant

- and -

CREDIT SUISSE INTERNATIONAL and Others

Defendants

Joe Smouha KC, Ciaran Keller, Ryan Ferro and Akash Sonecha (instructed by **Peters & Peters Solicitors LLP**) for the **Republic of Mozambique**

Duncan Matthews KC and Frederick Wilmot-Smith (instructed by **Signature Litigation LLP**) for the **Prinvest Companies (the Sixth to Tenth Defendants in CL-2019-000127)**

Hearing dates: 18 September 2024

JUDGMENT 13: Application by the Prinvest Companies for Permission to Appeal against the Judgment at Trial

Robin Knowles J, CBE:

Introduction

1. On 29 July 2024 the Court gave Judgment on the trial of these proceedings. Consequential matters as between Mozambique (the Claimant) and the Prinvest Companies (the Sixth to Tenth Defendants) were heard on 18 September 2024. These included an application by the Prinvest Companies for permission to appeal to the Court of Appeal.
2. The Court has decided to refuse permission to appeal. Having examined the materials and argument on the application for permission to appeal, the Court has reached the conclusion that none of the six Grounds of Appeal proposed by the Prinvest Companies has a real prospect of success. The six proposed Grounds are addressed in turn below, and as concisely as possible.

Abuse of process: Mozambique’s disclosure (Proposed Ground of Appeal 1)

3. The Court concluded that there were failings in Mozambique’s compliance with its disclosure obligations (Judgment [402]-[408]). This was a serious matter and it featured in the extensive case management stages before trial, and at trial itself.
4. The Prinvest Companies propose to argue that Mozambique received no sanction, or that “no weight” was given to ensuring compliance with rules and orders, or that the Court’s response was “insufficient” and should have been to strike Mozambique’s case out. However, the Court’s evaluation was that a fair trial had been possible and that rather than striking out Mozambique’s case (as the Prinvest Companies sought) a calibrated response was called for (Judgment [408]-[410]).
5. That calibrated response involved the Court (a) drawing certain adverse inferences of fact against Mozambique (Judgment [411]-[412]), (b) making further allowance in favour of the Prinvest Companies (Judgment [413], [432]-[436], [600]) and (c) keeping in mind, throughout its assessment of whether Mozambique had met with convincing evidence the standard of proof required of it at trial, the possibility that there were further documents that the Court had not seen (Judgment [107], [414], [484]-[486], and note also [48]).
6. To dispute the Court’s evaluation that a fair trial was possible the Prinvest Companies refer in written submissions to the issue “whether the payments [by the Prinvest Companies to Minister Chang, Mozambique’s Minister of Finance] were secret from” Mozambique. The Court specifically considered and found that there was no likelihood of there being disclosable documents held by Mozambique on this (Judgment [566]).
7. It was the Prinvest Companies’ contention at trial that some of the payments that the Court found to be bribes from them to Minister Chang were initially made for the purpose of joint investments in a sovereign wealth fund or bank (Judgment [476]). The Prinvest Companies suggest that “the Republic’s disclosure failures mean that the trail ran cold, and could not be investigated further”. However here the Court noted that the Prinvest Companies’ contention was unsupported by the documentary record “on all sides”

(Judgment [477], [474]). The Court had the direct oral evidence of Mr Boustani, of the Privinvest Companies, on the subject, and which he was able to detail, and the Court found that evidence to be untrue (Judgment [476]-[477], and noting also [481]).

8. As for inferences, the Privinvest Companies say that the inferences that the Court drew against Mozambique were “immaterial to the outcome of the litigation”. The position in fact is that the inferences were material to the litigation (which had many parties), and they were adverse to the case Mozambique was advancing at trial. It is correct that, in the event, the adverse inferences did not decide the litigation against Mozambique (i.e. they did not amount to a strike out by another means). But that does not give an arguable basis for appeal.
9. The Privinvest Companies add in their Grounds of Appeal that “unsubstantiated factual assumptions were made” against them. They do not identify these assumptions. In fact, the Judgment contains no assumptions against them.
10. The Privinvest Companies also refer to disclosure on “the extent of the Republic’s recoverable losses”. The topics of causation and quantum are addressed further below. The trial made clear that the important point on loss was the sum Mozambique was caused to pay because the Guarantees had been signed by Minister Chang. Those figures (as figures) were not materially in issue.
11. The Court accepted that there should then be a credit against that loss for recoveries from other persons. This was in the specific amount identified by the Privinvest Companies, unless on an application by Mozambique the Court was persuaded there should be an enquiry to reduce that figure (Judgment [598]-[600]).

Mozambican Law (Proposed Grounds of Appeal 2 and 3)

12. Article 483(1) of the Mozambican Civil Code imposes civil liability to pay damages on “whoever intentionally or negligently violates another person’s right or any statutory provision intended to protect the interest of others” (Judgment [502]).
13. Article 321 of the 1886 Penal Code in Mozambique sets out what “active corruption” involves (Judgment [504]) and provides for its punishment as a crime. The Court found that the elements of active corruption were satisfied by the Privinvest Companies as by Mr Safa (Judgment [506]).
14. Under proposed Ground of Appeal 2, the Privinvest Companies propose to rely on the point that, at the time under Mozambican law, legal persons could not commit crimes (and thus, while Mr Safa could be held criminally liable, as companies they could not). However, there is no requirement under Article 483 of the Mozambique Civil Code that a party would be held criminally liable for what it did; that what a legal person did constituted a crime by that legal person. The question is rather what the person did; that is, whether there was active corruption.
15. In their written argument seeking permission to appeal the Privinvest Companies also suggest that Mozambique’s pleading was narrower than would allow for the liability that was found. In the Court’s view the Re-Re-Re-Re-Amended Consolidated Particulars of

Claim, when read as a whole, is sufficiently pleaded. But most importantly, the Prinvest Companies fully understood that liability for active corruption was alleged against them.

16. A clear example that liability for active corruption was alleged against the Prinvest Companies was the reliance by Mozambique on Article 500 of the Mozambique Civil Code (which provides for liability of a principal for the harmful conduct of an agent). The Court recorded its view (Judgment [503]) that Mozambique was not materially assisted by the Article. But to avoid misunderstanding, if a conclusion on Article 500 is in fact necessary or useful, the Court confirms that liability of the Prinvest Companies (as principals) for the active corruption of Mr Safa (as their agent) was made out on the facts found at trial. The applicable principles were common ground, a possible argument that the Article did not apply to criminal conduct was not made out, and sufficient findings of fact were made in the Judgment (in particular Judgment [20], [22], [25]-[31], [450]-[452], [459], [461], [463], [467]-[479] and [489]-[492]).
17. A further point proposed to be made by the Prinvest Companies is that the payments to Minister Chang were made by two of the Prinvest Companies. The Court's finding at Judgment [489] makes clear that that was operational convenience on the part of these Defendants and Mr Safa; the promises and payments to Minister Chang were made on behalf of (all) the Prinvest Companies, for whom Mr Safa acted throughout.
18. Proposed Ground of Appeal 3 would challenge the Court's finding against the argument of the Prinvest Companies that the proscription of "proper active corruption" by Article 321 had been repealed under Mozambican law in 2004. However, from its review of the relevant provisions of Mozambican law the Court made and was entitled to make the finding that there had been no repeal (Judgment [507]-[512]). The Court read and listened to expert opinion to the contrary and explained why it did not consider that opinion persuasive (Judgment [510]-[511]).

Causation (Proposed Ground of Appeal 4)

19. The Prinvest Companies point to the fact that the Projects were supported by others in Government (described by them as Minister Chang's "political leaders and colleagues") against whom the Court did not make findings of corruption. (Indeed, that the Projects were at all material times known about and supported by a number of individual officials and office holders of Mozambique was one of the inferences the Court drew against Mozambique given the poverty of its disclosure of documents: Judgment [412].)
20. Mr Matthews KC for the Prinvest Companies argues orally that "it is difficult to see in what circumstances it can be said that Minister Chang could realistically, against that background, have resisted" signing the Guarantees. But the Court's finding on the facts was that the Budget Laws, and the budgets, stood in the way of signing the Guarantees. The Court found on the facts there was no reason, other than the promises and payments, sufficient to explain why the person who was Minister of Finance should have signed Guarantees (Judgment [478]-[482]). These findings were for the Court to make.
21. Prinvest's written submissions on the application for permission to appeal further propose to argue that the Court was wrong to find on the facts that the first of the payments to Minister Chang was made at a time that associated it with the time of signing

the first of the Guarantees (Judgment [471]). But this finding was amply open to the Court: the Court inferred that promises of the payments were made in advance of the payments; the first of the Guarantees was signed on 28 February 2013; the first payments to Minister Chang were on 4 August 2013 and 4 September 2013. In any event, the association between the payment and the Guarantee was also based on records (Judgment [474]-[475]) and the background of agreement by Mr Boustani, Mr Safa and the Prinvest Companies ([Judgment [471]-[473]).

Limitation (Proposed Ground of Appeal 5)

22. Under Mozambican law the limitation period commences from the date when the claimant was “aware of its rights”. This was not in issue.
23. Article 498(3) of the Mozambican Civil Code would provide a limitation period of five years (from “awareness of rights”) rather than the three years (from “awareness of rights”) under Article 498(1). The Prinvest Companies propose to argue that there was “an error of principle ... to allow the Republic to rely upon Article 498(3)” because the Republic did not plead reliance on it. This has no merit where the parties agreed, as they did, that Article 498(3) was in issue in the List of Common Ground and Issues. But in any event, as the Court held, “even on arguments by Mr Safa and the Prinvest Companies that Mozambique cannot contend for [a] limitation period greater than three years after it became “aware of its rights” it is within the limitation period” (Judgment [529]).
24. As for the date when Mozambique became “aware of its rights”, the Court found that the fact that Mr Chang was being bribed over the Guarantees by the Prinvest Companies and Mr Safa was secret from Mozambique (Judgment [484]-[486], [529], [564]-[565]). The Court found that this corruption of Minister Chang was not discovered by Mozambique until 2018 (Judgment [387]-[394], [529], [565]), with corruption allegations being levelled against Minister Chang by the end of 2018. The first of the claims in these proceedings were issued in 2019, which is in time.
25. These were findings of fact the Court was entitled to make. The Prinvest Companies refer to the disclosure failings by Mozambique. These are referred to above. But more specifically, the Court found on the facts that there was no likelihood of there being disclosable documents held by Mozambique before 2018 on the point of bribery by Minister Chang (Judgment [566]).

Quantum (Proposed Ground of Appeal 6)

(1) The EMATUM Exchange

26. Minister Chang, Minister of Finance, signed the EMATUM Guarantee as the Prinvest Companies had bribed him to do. To manage the exposure that resulted Mozambique entered into the EMATUM Exchange.
27. The proposed Ground of Appeal would challenge the Court’s conclusion that “the EMATUM Exchange, and its subsequent restructuring and refinancing to Eurobonds is to be treated as ... a reasonable step mitigating Mozambique’s loss” (Judgment [563]). But the conclusion was an evaluation for the Court to make. The Court explained that

Mozambique's alternative was "default at that point on that Guarantee" and "to risk the success of an allegation that [it] would not honour its sovereign, international, obligations" (Judgment [562]-[563]).

28. The Prinvest Companies refer to Mozambique's case that the Guarantees, including the EMATUM Guarantee, were invalid. However, as the Court held, that "was an argument, no more" and one with which the banks, against whom it was directed, "firmly disagreed" (Judgment [560]). The loss caused by bribing the Minister of Finance to sign the Guarantees in favour of the banks was "suffered by reason of these documents existing" and not by reason of a final determination of their validity or enforceability (Judgment [561]).
29. Here too the Prinvest Companies seek to return to disclosure failings on the part of Mozambique. Again, these are referred to above. However, the points central to the Court's evaluation on this part of the case were clear enough.

(2) The Settlement Sums

30. The Court took into account, to reduce the sums it would award against the Prinvest Companies, the fact that the alleged liabilities under the Guarantees were reduced by settlement with the banks in whose favour Mozambique had given the Guarantees (Judgment [567]).
31. The Prinvest Companies propose to argue that Mozambique "did not act reasonably in entering into the settlement agreements" first with Credit Suisse and others, and then with other banks. Again, they refer to Mozambique's case that the Guarantees were invalid, but this is addressed at paragraph 28 above. (Given the way the Prinvest Companies propose to put things, it is relevant to keep in mind that even if an argument that Mozambique law was not complied with in relation to the Guarantees might ultimately succeed, the argument whether the Guarantees were invalid as a result is another question.)
32. The settlement with banks other than Credit Suisse was after trial but before judgment. The Prinvest Companies propose to argue that because these settlement sums "were not pleaded ... the Corporate Defendants were therefore never afforded any opportunity to address arguments on the topic". But again the Court took account of them to reduce not increase the amount for which the Prinvest Companies were liable. And the Court also said that it would "hear any argument that, for any reason, [the Court] should hear more about [the settlement] and its effect" (Judgment [568]-[569]). There was no request from the Prinvest Companies that the Court should hear more.

(3) and (4) "Compensating benefits"

33. The Prinvest Companies propose to argue that the Court held, and was wrong to hold, that "there was no duty to mitigate where the claim brought under Article 483 [of the Mozambican Civil Code] was founded upon "*bribery*" (paragraph 16 of the proposed Grounds of Appeal; the italics are those of the Prinvest Companies).
34. In fact, the Court did not so hold. What it did was to reject an argument of the Prinvest Companies that a burden or obligation "to realise value" from or to "mitigate through

proper use of” assets and services was placed on a victim of bribery in respect of assets and services received by that victim (Judgment [592] and see [595]).

35. The point is in any event an academic point. The Court had explained that no assets and services were received by Mozambique (Judgment [580]-[585]). The assets and services were supplied under the Supply Contracts and those contracts were made by the Prinvest Companies with the SPVs/SOEs (Proindicus, EMATUM and MAM), and not with Mozambique (which had provided Guarantees of lending as a result of the bribery of its Minister of Finance) (Judgment [580]).
36. To attempt to meet that fact, the Prinvest Companies propose to argue (paragraph 17 of the proposed Grounds of Appeal) that Mozambique benefited “indirectly, since the SPVs/[SOEs] were wholly owned by” Mozambique. But as to that, any benefit would be in the form of any increase in value of Mozambique’s ownership of the SPVs/SOEs (Judgment [581], recording the Prinvest Companies’ own argument to the same effect, and [585]). The Court found, on the facts, that even “at the time of and by reason of the supply of assets and services” there was no increase in the value of shares in the SPVs/SOEs because the value of the supply to them did not exceed the price paid by them (Judgment [582]). The Prinvest Companies put the position no higher (Judgment [586], and see Judgment [586]-[594]).
37. The Prinvest Companies also propose to argue (paragraph 17 of the proposed Grounds of Appeal) that Mozambique benefited “from performance [rendered under the Supply Contracts] directly through actual use of the assets”. But as to that, where the SPVs/SOEs allowed Mozambique to make actual use of assets that the SPVs/SOEs had purchased under the Supply Contracts (Judgment [455]-[457] describes the use) that was a matter between the SPVs/SOEs and Mozambique.
38. The Prinvest Companies say (Skeleton Argument on Consequentials para 181) that “the SPVs were provided with the full value under the Supply Contracts without ultimately incurring the burden of the contract price”. This is incorrect. In fact, the SPVs/SOEs incurred the full burden of the contract price under the Supply Contracts, paying that contract price to the Prinvest Companies at the point of contracting.
39. The Prinvest Companies say (ibid. para 181) that “the Judge has ordered everything the Republic paid for what was supplied under the Supply Contracts to be repaid by” them. In fact, the Court has not ordered the repayment of anything paid for what was supplied under the Supply Contracts. Rather, the Court has ordered that Mozambique be compensated for what it paid as a result of the signing of Guarantees of lending by the banks to the SPVs/SOEs.
40. The Prinvest Companies add that “the SPVs are in liquidation” and that “sale of the assets is bound to take place pursuant to that process”. As to that, the Court accepted that Mozambique’s loss would reduce “if and when Mozambique receives any payment in its capacity as creditor (including as a dividend as an unsecured creditor in a liquidation)” of the SPVs/SOEs (Judgment [583]).
41. The Prinvest Companies say that adverse inferences should be drawn “against the Republic on the quantum of the benefit accruing to the Republic”. Given the analysis on benefit (summarised above), the Court was correct to decline to do so (Judgment [584]-

[585]). The Court did, in favour of the Prinvest Companies, make provision in relation to recoveries from other persons, as summarised at paragraph 11 above.

Application for a stay

42. The Court having refused permission to appeal, the Prinvest Companies apply for a stay of enforcement pending the determination of a renewed application to the Court of Appeal itself for permission to appeal.
43. The principles are not in issue. The evidence of the Prinvest Companies is that they cannot pay the sums that the Judgment has found them liable to pay. They provide information about their financial position and business position but do not say what they can pay.
44. Mozambique pointed out in its evidence that the Prinvest Companies received substantial sums from the SPVs/SOEs under the Supply Contracts. The Prinvest Companies have not shown in their evidence in support of the application for a stay what became of a material part of those sums.
45. On balance, the Court has concluded that there should be a stay pending the determination of an application (if made) by the Prinvest Companies to the Court of Appeal itself for permission to appeal. However, the stay is conditional on payment by the Prinvest Companies of the sum the Court has ordered to be paid to Mozambique on account of costs (i.e. of £20 million).
46. Further, for the avoidance of doubt the stay is not to postpone or affect any applications that Mozambique may make in the meantime for the provision of information, including relevant historic information, about the financial and business position of the Prinvest Companies.
47. There will be a liberty to apply to the Court.