

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Oded Besserglik v. Republic of Mozambique
(ICSID Case No. ARB (AF)/14/2)

PROCEDURAL ORDER NO. 6

Mr. Makhdoom Ali Khan, President of the Tribunal
Hon. L. Yves Fortier PC, CC, OQ, QC, Arbitrator
Mr. Claus von Wobeser, Arbitrator

Secretary of the Tribunal
Ms. Celeste Mowatt

I. PROCEDURAL HISTORY

1. On January 27, 2017 the Respondent requested the Tribunal to admit the third witness statement of Quintus van der Merwe. It also requested that it may be given the time to obtain and submit the witness statement of Antonio Barradas.
2. On January 27, 2017 the Claimant requested to file an additional witness statement of Oded Besserglik, which had been inadvertently omitted from the Claimant's Reply Memorial, and to submit a surrejoinder on "*certain issues raised by the Respondent.*"¹
3. On February 3 and 10, 2017 each Party objected to the other's request to file additional witness testimony.²
4. On March 14, 2017, ICSID wrote to the Parties stating that the Tribunal will admit the third witness statement of Quintus van der Merwe. The letter also stated that "*The Tribunal will [also] allow both Parties to file additional witness testimony, as requested, by Friday, March 31, 2017. Each Party will then have the opportunity to simultaneously file rebuttal witness evidence within two weeks...* (emphasis supplied)".³ The Parties were requested to refrain from making any further submissions on the issues canvassed in the recent correspondence, other than on the response invited by that letter.
5. On April 4, 2017 the Tribunal issued its Procedural Order No. 5, which confirmed that a hearing on jurisdiction and liability would be held from August 7-11, 2017 (with Saturday August 12 held in reserve). The amended procedural calendar set out in that Order also extended the deadline for the filing of the additional witness testimony, further to the above-referenced letter of March 14, 2017, until April 28, 2017.
6. On April 28 and 29, 2017 the Parties exchanged the following emails:

¹ Claimant's Response to Respondent's letter dated January 26, 2017 at Page 2.

² Emails to the Tribunal dated February 3 and 10, 2017.

³ ICSID Letter dated March 14, 2017 at Page 2.

- (i) On April 28, 2017, the Claimant informed the Respondent that its timely filing of the “*relevant witness statements*” had been compromised due to “*computer problems*”.⁴ The Claimant proposed to file the relevant witness statements by May 2, 2017.
- (ii) On April 29, 2017, in a reply email to the Claimant, the Respondent stated that the “*Tribunal did not give the Claimant leave to file ‘relevant witness statements’ on 28 April 2017.*” It stated that the Tribunal adjusted deadlines through Procedural Order No. 5 “*so that the Claimant may file the inadvertently omitted witness statement of Oded Besserglik, and the Respondent may file a witness statement by Antonio Barradas, by April 28, 2017.*” The Respondent stated that the letter from the Tribunal dated March 14, 2017 only permitted the Parties to file the above requested additional witness testimony “*No other witness statements [we]re to be filed by April 28, 2017.*” The Respondent submitted that it did not consent to the filing of any witness statement other than the “*allegedly omitted*” witness statement of Oded Besserglik. It opposed the belated filing of the omitted witness statement, stating that an inadvertent omission could have been cured by the Claimant reattaching the statement with the email.
7. On May 1 and 2, 2017 the Tribunal received, from the Claimant, a document titled “*Claimant’s Additional Witness Statements*”. The Claimant submitted in paragraph 1.1 of this document that by its letter dated 27 January 2017 it had indicated that it “*wished to deliver a Surrejoinder*”. The Claimant submitted that it wished to respond to the Additional Statement delivered by Quintus van der Merwe. This five-page long document is referred to in this order as the surrejoinder. The Claimant also submitted five witness statements, Exhibits C-159 to C-166 and Legal Authorities CL-088 to CL-091. The Claimant submitted that it relied on Procedural Order No. 5 and the Tribunal’s response to the parties on January 27, 2017 to file such additional witness statements.

⁴ Email from the Claimant dated April 28, 2017.

8. On May 3, 2017 the Claimant sent a letter in response to the Respondent's email of April 29, 2017, which was addressed to the Respondent. The Claimant asked ICSID to transmit this letter to the Tribunal. In this letter the Claimant requested the Tribunal to condone the delay in submitting the Claimant's witness statements which were due on April 28, 2017.⁵
9. On May 3, 2017 the Respondent requested that ICSID transmit to the Tribunal its email of April 29, 2017 addressed to the Claimant (referenced above at paragraph 6). On the same date, the Respondent wrote to the Tribunal, stating that the "*Claimant's submittals [of 1 and 2 May 2017] go well beyond the omitted Oded Besserglik witness statement that the Tribunal allowed*" and that Respondent would "*provide a rebuttal to the Claimant's submittals as allowed by Procedural Order No. 5.*" The Respondent requested that the deadline for such rebuttal be extended by one week, *i.e.* until June 2, 2017, given the late filing of the Claimant's submission and the fact that the submission had gone beyond the scope mandated by the Tribunal.⁶
10. On May 4, 2017 the Claimant confirmed that it had no objection to the one-week extension sought by the Respondent to submit its rebuttal witness evidence.⁷
11. On May 12, 2017 ICSID wrote to the Parties, stating that the Tribunal had approved the extension of the deadline for filing rebuttal evidence until June 2, 2017. The Tribunal also noted that the Respondent had not raised any objection to the new witness evidence submitted by the Claimant on May 1 and 2, 2017.⁸
12. On June 2, 2017 the Tribunal received the Respondent's rebuttal witness evidence. At the same time, after a delay of almost a month, the Respondent objected to the new witness statements submitted by the Claimant. The Respondent submitted that through ICSID's

⁵ Claimant's letter to the Tribunal dated May 2, 2017 at Page 3.

⁶ Respondent's email dated May 3, 2017.

⁷ Claimant's email to the Respondent dated May 4, 2017.

⁸ ICSID Letter dated May 12, 2017 at Page 1 and 2.

letter dated March 14, 2017, the Tribunal had permitted the Claimant to file only the omitted witness statement of Oded Besserglik. It submitted that at the same time, the Tribunal had also permitted the Respondent to file the witness statement of Antonio Barradas and the third witness statement of Quintus van der Merwe. The Respondent submitted that the Claimant's submittals "*go well beyond*" what the Tribunal had allowed to be filed.⁹ The Respondent, therefore, requested that the Tribunal "*strike the witness statement of Dr. Everard S Polakow, Zuco Mack Nonxuba, and Dror Besserglik on the grounds that the Tribunal never gave the Claimant leave to file these additional witness statements.*"¹⁰ The Respondent in its rebuttal evidence also responded to the Claimant's additional witness statements filed on May 1 and 2, 2017. The Respondent further submitted that Dr. Polakow had violated physician-patient privilege in disclosing his patients' records in his witness statements. It requested that Dr. Polakow's testimony should, therefore, be excluded from the proceedings.

13. The Respondent further submitted that the Tribunal by its Procedural Order No. 5 and subsequent correspondence had not allowed the Claimant to make submissions. It, therefore, requested that the Tribunal "*strike the cover memorandum¹¹ drafted by Claimant's counsel*" as this was "*mere argument*".¹²
14. The Respondent did not object to the statement filed by Helder Matlaba as this substituted the testimony of the Claimant's expert, Justino Muhlana, who had passed away.
15. The Respondent also stated that it had attempted to obtain the witness statement of Antonio Barradas but he was unwilling to participate in these proceedings.
16. On June 5, 2017, the Tribunal invited the Claimant to respond to the Respondent's letter by June 12, 2017.

⁹ Respondent's letter to the Tribunal dated June 2, 2017.

¹⁰ *Ibid.*

¹¹ This cover memorandum has been referred to by the Tribunal as surrejoinder.

¹² Respondent's letter to the Tribunal dated June 2, 2017.

17. On June 12, 2017 the Claimant replied to the Respondent's letter. The Claimant's email, however, contained no attachments or a substantive response to the submissions of the Respondent.
18. Later, on June 13, 2017 the Tribunal received the Claimant's response to the Respondent's letter. In its response, the Claimant justified its filing of new witness statements by stating that the "*Tribunal noted that the Respondent had not raised any objection to the 'new' witness evidence submitted by the Claimant on May 1 and May 2, 2017.*"¹³ The Claimant submitted that the Respondent had on the one hand responded to the new evidence and on the other had requested that it be struck down. It submitted that "[o]ne cannot request the striking out of matter, yet respond to it. One is faced with an election." Once the Respondent had elected to deal with the matter, it could not now "*simply erase(d)*" its response.
19. The Claimant also attached three additional witness statements, replying to the Respondent's rebuttal evidence. It submitted that it had filed response statements, replying to the "*new averments*" made by the Respondent in its rebuttal evidence. It requested the Tribunal to "*either strike out the fresh statements made by the Respondent or admit the Claimants response thereto.*" It finally submitted that all documentation should be admitted to avoid further delays.

II. TRIBUNAL'S ANALYSIS

20. The Tribunal has carefully considered the respective submissions of both Parties.
21. The Parties made requests to file new witness statements on January 27, 2017. These requests pertained only to the filing of a surrejoinder, the additional witness statement of Oded Besserglik and the statements of Quintus van der Merwe and Antonio Barradas. On

¹³ Claimant's letter to the Tribunal on June 13, 2017.

March 14, 2017 the Tribunal allowed the Parties to file the aforementioned witness testimony. By this letter the Tribunal did not give permission to the Claimant to file a surrejoinder. Procedural Order No.1 which provided for the rounds of pleadings to be submitted by the Parties did not include a surrejoinder.¹⁴ If the Tribunal were to now admit the surrejoinder it will have to amend its procedural directions and allow the Respondent time to submit a response. The procedural timetable will have to be amended and proceedings further delayed.

22. The Tribunal notes that the Respondent generally objected to the filing of the new witness statements on two occasions, *i.e.* on April 29, 2017 and May 3, 2017. Subsequently, on June 2, 2017 the Respondent specifically submitted that the Tribunal strike out the witness statements filed by the Claimant. Through the third witness statement of Silvestre Silindane and the third witness statement of Helder Pateguana, the Respondent objected to the witness statement of Dr. Polakow, filed by the Claimant. The Respondent also submitted that Dr. Polakow violated physician-patient privilege in disclosing his patients' records in his witness statements and this testimony be excluded on that ground alone.
23. The Tribunal provided the Claimant with an opportunity to respond to the Respondent's request to strike out these witness statements. The Claimant, however, failed to offer any explanation why these new statements were not filed earlier and why these were essential to its case. The Claimant has simply relied on the Tribunal's remark of May 12, 2017 that the Respondent had not raised an objection to the new witness statements submitted by the Claimant. The Claimant also took this opportunity to file additional witness statements again without leave of the Tribunal.
24. In paragraph 17 of Procedural Order No. 1 the Tribunal ruled that witness statements and expert reports be filed with the Parties' pleadings. It was stated that the Tribunal shall not admit any testimony not filed with the written statements save in exceptional circumstances. Paragraph 17 is reproduced below:

¹⁴ Procedural Order No.1 is dated December 15, 2015.

17. *Witness Statements and Expert Reports*
Arbitration (AF) Rules, Articles 32, 40-41 and 43

17.1. *Witness statements and expert reports shall be filed together with the parties' pleadings.*

17.2. *The Tribunal shall not admit any testimony that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist.*

17.3. Each witness statement and expert report shall be signed and dated by the witness. (emphasis supplied).

25. The new witness statements filed by the Claimant on May 1 and 2, 2017 and June 13, 2017, were not appended to its pleadings. These were filed without the leave of the Tribunal. The Claimant did not plead any exceptional circumstances. The Tribunal gave the Claimant an opportunity to explain the causes of such late submission of witness statements. Not only did the Claimant not plead any exceptional circumstances but it also failed to offer any explanation at all. Instead it used this opportunity to submit additional witness statements once again without the leave of the Tribunal.

26. The Tribunal had indeed on May 12, 2017 drawn the Respondent's attention to its failure to object to the new witness statements of the Claimant. The Respondent on June 2, 2017 specifically objected to these new witness statements. The Respondent's failure to object to these new witness statements immediately or to the remark of the Tribunal inviting the attention of the Respondent does not by itself give the Claimant the right to insist that such evidence be admitted. To have this evidence admitted the Claimant ought to have sought the leave of the Tribunal which could have been granted only in exceptional circumstances. The Tribunal gave the Claimant an opportunity to explain the circumstances which led to

- the submission of the new witness statements. The Claimant did not provide any explanation.
27. The Tribunal is of the view that paragraph 17 of Procedural Order No. 1 clearly provides when additional witness statements are to be admitted. The first requirement is the leave of the Tribunal. In granting such leave the Tribunal does not have a free hand. It can grant leave only in exceptional circumstances. No such leave was granted. The Claimant has, in any event, not pleaded any exceptional circumstances relying on which the Tribunal can grant leave.
28. The witness statements of Zuco Mack Nonxuba and Dror Besserglik, were filed by the Claimant, on May 1 and 2, 2017, without the leave of the Tribunal. The Claimant has failed to plead any exceptional circumstances which may persuade the Tribunal to grant such leave now. These witness statements are, therefore, excluded.
29. The Respondent has also submitted that the witness statement of Dr. Polakow should be excluded as it violates physician-patient privilege. The Claimant has not made any submission why the Tribunal should not exclude this witness statement on grounds of privilege. The Tribunal is, therefore, of the view that the witness statement of Dr. Polakow be excluded on grounds of physician-patient privilege.
30. The Tribunal notes, however, that the death of Justino Muhlenga is an exceptional circumstance. The Claimant must be allowed to substitute the testimony of the deceased with another credible witness of its choice. The Tribunal, therefore, in exercise of its authority under paragraph 17 of Procedural Order No.1 admits Helder Matlaba's witness statement filed on May 1, 2017 in substitution of Justino Muhlenga's witness statement.
31. On June 2, 2017 the Respondent through the witness statements of Quintus van der Merwe (paragraphs 28-32) and Teresa Filomena Muenda (paragraphs 43-45) responded to the witness statement of Zuco Mack Nonxuba. As the Tribunal has excluded the witness

statement of Zuco Mack Nonxuba the above mentioned paragraphs of the witness statements of Quintus van der Merwe and Teresa Filomena Muenda are also to be struck out.

32. The Tribunal also notes that the Claimant without the leave of the Tribunal has filed rebuttal witness statements on June 13, 2017. No exceptional circumstances have been pleaded to admit these rebuttal witness statements either. These are accordingly excluded.
33. There is yet another reason for excluding all the witness statements and the surrejoinder referred to above. If the Tribunal, at this stage, admits these witness statements and the surrejoinder it must, to satisfy the requirements of due process, also afford the Respondent an opportunity to submit witness statements in rebuttal and a response to the surrejoinder. This will further delay the proceedings and derail the procedural timetable, yet again. It will risk making these proceedings open ended. The hearing on jurisdiction and liability scheduled for August 7-11, 2017 (with August 12 held in reserve), which has already been delayed once, will be delayed yet again. The Tribunal cannot continue to countenance such disruptions.
34. This Tribunal has the inherent powers required to preserve the integrity of its process. Admitting witness statements filed by Parties without pleading any exceptional circumstances and without the leave of the Tribunal will derogate from its duty to efficiently conduct these proceedings. It will undermine the integrity of these arbitral proceedings and abuse its process. Accordingly, the Tribunal excludes the above witness statements and surrejoinder.

III. TRIBUNAL'S DECISION

35. The Tribunal, therefore, orders that:

(i) The surrejoinder filed by the Claimant on May 1, 2017 be struck out.

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- (ii) The witness statement of Dr. Polakow filed on May 1, 2017 be excluded.
- (iii) The witness statements of Zuco Mack Nonxuba and Dror Besserglik filed on May 1 and May 2, 2017 be excluded.
- (iv) The witness statement of Helder Matlaba filed on May 1, 2017, to substitute the testimony of Justino Muhlanga's is admitted.
- (v) Paragraphs 28-32 of Quintus Van de Merwe's witness statement filed on June 2, 2017 be struck out.
- (vi) Paragraphs 43-45 of Teresa Filomena Muenda's witness statement be struck out.
- (vii) The witness statements filed by the Claimant on June 13, 2017 be excluded.
- (viii) That no further witness statements be submitted by either Party without first obtaining the leave of the Tribunal which is to be granted in exceptional circumstances only.
- (ix) Any further evidence submitted without the leave of the Tribunal will be excluded without any further orders by the Tribunal.

[signed]

On behalf of the Tribunal
Makhdoom Ali Khan
President of the Tribunal
Date: June 19, 2017