Neutral Citation Number: [2023] EWHC 2215 (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

Rolls Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 September 2023

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**
-and-	
Filipe Jacinto Nyusi	**Fourth Party**

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- -

Rodney Dixon KC and Russell Hopkins (instructed by **Seladore Litigation**) for the **Fourth Party**
Sudhanshu Swaroop KC and Ben Woolgar (instructed by **Signature Litigation**) for the **Sixth-Tenth and Twelfth Defendants**

Hearing dates: 1-2 August 2023

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Judgment (No. 10)

(approved subject to editorial corrections)

This judgment was handed down remotely at 2pm on 4 September 2023 by circulation to the representatives of the parties by e-mail and by release to the National Archives

Robin Knowles J, CBE:

Introduction

1. President Nyusi is the President of the Republic of Mozambique ("the Republic"). He has been joined as a Fourth Party to claims brought by six of the Defendants, headed by Privinvest Shipbuilding SAL (Holding) ("the Privinvest Defendants").

2. These claims have been made within civil or commercial litigation, originally commenced by the Republic itself, that is of major scale. The larger part of the issues in ten sets of proceedings will reach trial in October this year.

3. The litigation concerns a number of transactions or alleged transactions, including alleged purchase and financing transactions. The claims by the Privinvest Defendants against President Nyusi are for a contribution as an alleged joint tortfeasor or a party to an alleged unlawful means conspiracy and in deceit, under Mozambican or English Law. The claims are concerned with alleged activity by President Nyusi outside the United Kingdom, at least primarily before he became President, and in any event not in his public capacity or part of his official functions.

4. On 21 May 2021 Cockerill J in this Court gave permission to the Privinvest Defendants to serve proceedings out of the jurisdiction on the President. The President accepts that he was served in Mozambique on 14 April 2023 through the Mozambique Court. The President has responded by claiming immunity from the jurisdiction of this Court as a serving Head of State.

5. The Privinvest Defendants contend that the President was first served much earlier, on 19 October 2021. The President denies that what happened then amounted to service, and he did not respond then by claiming immunity as Head of State. The Privinvest Defendants have not sought a ruling before now on whether there was service in 2021. But the point arises now and I propose to take this point first.

Service in 2021?

6. The evidence by way of certificate of service, amplified in correspondence by the solicitors to the Privinvest Defendants the accuracy of which I accept from those solicitors as officers of this Court, is that what happened on 19 October 2021 is this. The relevant documents were left with the Republic's Police officers at the security checkpoint at the Presidential Palace in Mozambique who accepted them to give to the President. Later that same afternoon another set of the relevant documents was left with an official at the security desk at the Office of the President in Mozambique to give to the President. The process server sought to serve the President personally at both addresses but was not permitted access to the President.

7. Mozambique is a Commonwealth State. It is not a party to the Hague Convention (the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters signed at the Hague on 15 November 1965). By CPR 6.40(3)(c) where a party wishes to serve a claim form or other document on a party out of the United Kingdom, it may be served by any method permitted by the law of the country in which it is to be served. By CPR 6.42(3)(a) where a party wishes the serve a claim form or other document in any Commonwealth State which is not a party to the Hague Convention "the party or the party's agent must effect service direct, unless Practice Direction 6B provides otherwise".

8. Paragraph 5.1 of Practice Direction 6B is in these terms:

> "The judicial authorities of certain Commonwealth States which are not a party to the Hague Convention require service to be in accordance with rule 6.42(1)(b)(i) and not 6.42(3). A list of such countries can be obtained from the Foreign Process Section (Room E02) at the Royal Courts of Justice."

9. CPR 6.42(1)(b)(i) (taking the wording of sub-rule (i) alone, as proper construction of the rule requires in this case) refers to service "through the judicial authorities" of the country in which a party wishes to serve. Enquiries by the parties of the Foreign Process Section have not identified a physical "list" but have shown that, once given the name Mozambique, the Foreign Process Section is able to respond by detailing a process to cause the documents to reach the judicial authorities of Mozambique. The process involves the use of agents but includes a letter of request from the Senior Master of the King's Bench Division to the competent judicial authority overseas.

10. The method used by the Privinvest Defendants in 2021 was not service through the judicial authorities of Mozambique. The Court's order on 21 May 2021, made at the request of the Privinvest Defendants, included provision for for service direct and the Privinvest Defendants say that what was done amounted to service direct. I respectfully consider that doubtful. However the decisive point is that it does not assist the Privinvest Defendants.

11. CPR 6.40(3)(c), already cited, permits service by a method permitted by the law of the country in which it is to be served. CPR 6.40(4) provides that "nothing … in any court order authorises any person to do anything which is contrary to the law of the country where the claim form or other document is to be served". The burden of proof is on the Privinvest Defendants to establish that the method used by them was not contrary to Mozambique Law. There is no evidence that the method that was used was a method permitted by, and not contrary to, that law. There is every indication, including from the response of the Foreign Process Section, that service through the Mozambique Court was required.

12. Service through the Mozambique Court was achieved by the Privinvest Defendants on 14 April 2023. The President raised a claim of immunity as Head of State in response, and to that I turn next.

Immunity as Head of State?

13. The issue that arises is that framed by Briggs LJ (as he then was) in the Court of Appeal in Apex Global Management Ltd v Fi Call Ltd and Others [2013] EWCA Civ 642; [2014] 1 WLR 493 in these terms:

> "The internationalisation of commercial activity, and the propensity for disputes about commercial activity to be justiciable in the United Kingdom without any of the relevant activities having taken place here, makes it important to know whether, thus far, Parliament has legislated so as to confer upon foreign heads of state a personal immunity from suit in the United Kingdom in respect of their personal (i.e. non-official) commercial activities worldwide, or merely commercial activities undertaken by them in the United Kingdom. …".

14. In Apex itself, before Vos J (as he then was) at first instance ([2013] EWHC 587 (Ch)) and on appeal to the Court of Appeal, the issue did not require resolution. Vos J said that it "raise[d] a point of some difficulty and importance". He went on to decide it in case he was wrong on a prior issue, and where it had been fully argued before him. On appeal, Briggs LJ also concluded that it was unnecessary to decide issue, and noted that " it was argued in this court less fully than before the judge". However he too recognised "its potentially large importance", and he was not persuaded by Vos J's analysis. In the circumstances he considered that he should "set out [his] brief reasons for reaching the opposite conclusion, although acknowledging that a binding decision on this important question must await a case where it really matters."

15. Section 20 in Part III of the Sovereign Immunity Act 1978 provides:

> "Heads of State.
>
> (1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—
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> (a) a sovereign or other head of State;
>
> (b) members of his family forming part of his household; and
>
> (c) his private servants,
>
> as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.
>
> (2) The immunities and privileges conferred by virtue of subsection (1)(a) and (b) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.
>
> (3) Subject to any direction to the contrary by the Secretary of State, a person on whom immunities and privileges are conferred by virtue of subsection (1) above shall be entitled to the exemption conferred by section 8(3) of the Immigration Act 1971.

> (4) Except as respects value added tax and duties of customs or excise, this section does not affect any question whether a person is exempt from, or immune as respects proceedings relating to, taxation.
>
> (5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity."

12. The Diplomatic Privileges Act 1964 carries the short title:

> "An Act to amend the law on diplomatic privileges and immunities by giving effect to the Vienna Convention on Diplomatic Relations; and for purposes connected therewith".

Section 2(1) of the 1964 Act is in these terms

> "Application of Vienna Convention.
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> Subject to section 3 of this Act, the Articles set out in Schedule 1 to this Act (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in the United Kingdom and shall for that purpose be construed in accordance with the following provisions of this section."

16. Articles 31 and 39 of the Vienna Convention are among the Articles set out in Schedule 1 to the Diplomatic Privileges Act 1964. They are in these terms, so far as material:

> "Article 31
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> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
>
> …
>
> Article 39
>
> 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to

> take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
>
> 2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist."

17. Although "immunity ratione materiae" (a "subject-matter immunity" as Lord Millett described it in Pinochet (No 3) (below)) is not claimed in the present case, it is relevant to refer to certain further provisions of the Sovereign Immunity Act 1978. These are found in Part I. By section 1, a State "is immune from the jurisdiction of the courts of the United Kingdom except as provided in" Part I of the Act. By section 14(1) of the Act "[t]he immunities and privileges conferred by [Part I] apply to any foreign or commonwealth State other than the United Kingdom" and "references to a State include references to – (a) the sovereign or other head of that State in his public capacity". Section 3 is in these terms:

> "Commercial transactions and contracts to be performed in United Kingdom.
>
> (1) A State is not immune as respects proceedings relating to—
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> (a) a commercial transaction entered into by the State; or
>
> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.
>
> (2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.
>
> (3) In this section "commercial transaction" means—
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> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

> but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual."

18. Regina v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147 ("Pinochet (No. 3)") was cited at both levels in Apex. Vos J emphasised (at [137]) that "Commercial activity was not involved in the Pinochet case." However he acknowledged at [84] that "Lord Phillips alluded to the restriction on personal immunity excluding commercial transactions at page 285E-F". As Vos J set out, Lord Phillips had there said in Pinochet (No 3) as follows:-

> "An acting head of state enjoyed by reason of his status absolute immunity from all legal process. This had its origin in the times when the head of state truly personified the state. It mirrored the absolute immunity from civil process in respect of civil proceedings and reflected the fact that an action against a head of state in respect of his public acts was, in effect, an action against the state itself. There were, however, other reasons for the immunity. It would have been contrary to the dignity of a head of state that he should be subjected to judicial process and this would have been likely to interfere with the exercise of his duties as a head of state. Accordingly the immunity applied to both criminal and civil proceedings and, in so far as civil proceedings were concerned, to transactions entered into by the head of state in his private as well as his public capacity. When the immunity of the state in respect of civil proceedings was restricted to exclude commercial transactions, the immunity of the head of state in respect of transactions entered into on behalf of the state in his public capacity was similarly restricted, although the remainder of his immunity remained: see sections 14(1)(*a*) and 20(5) of the Act of 1978"."

19. Vos J in Apex had first to decide whether two Princes were entitled to claim immunity under section 20(1)(b) of the State Immunity Act as "members of [King Abdullah's] family forming part of his household" (see [57(i)]). "Does the Princes' immunity (if they have it) exclude actions relating to commercial activities outside the UK?", he then asked (see heading to discussion commencing at [135]). His conclusion on the second question was that "if the Princes had personal immunity from suit under section 20(1)(b) of the SIA, such immunity would not extend to any commercial activity exercised by them outside their official functions anywhere in the world." (see [143]).

20. Vos J summarised the argument on one side as that, "when the court applied article 31.1 to the circumstances described in section 20(1) of the SIA, a "necessary modification" should be made so as to read article 31.1(c), when applied to sovereigns and families of sovereigns as opposed to diplomatic agents, as if the restrictive territorial words were excluded." (see [58]). The (two alternative) arguments on the other side he summarised as that the "proposed modification could not be said to be necessary, and would run counter to customary international law as it applied to sovereigns and, furthermore, if any "*necessary modification*" were required it would be to read article 31.1(c) as if it did not apply any commercial exception at all to sovereigns, their families, and private servants" (see [58]).

21. Vos J's analysis should be read in full, and I set out a substantial part here:

> "136. The exercise required is, again, one of statutory (and, on this point, treaty) construction, against the background of the existing law. The legislation was clearly intended to reflect an exception to the immunity of the sovereign for commercial activities; the simple question is the breadth of that exception. I bear closely in mind that if any "*modification*" is to be made to the application of article 31 to sovereigns, their families and personal servants, it must be a "*necessary*" one, and not one that is just desirable.
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> …
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> 139. In my judgment, applying the immunity granted to diplomats undertaking their mission in the UK to sovereigns and their families and personal servants outside the UK does not work. The situations of the two classes of person are entirely different. Thus, first principles are engaged. Plainly, sovereigns and their families originally had wide personal immunity under the common law and under customary international law. Trendtex [Trendtex Trading Corporation v Central Bank of Nigeria [1977] 1 QB 52] demonstrates at least that there was a respectable argument just before the enactment of the SIA that customary international law had changed by that time so as to prevent sovereign States and their emanations claiming immunity for their commercial activities. Trendtex did not however deal with the personal immunity of the sovereign, nor of course with the personal immunity of a sovereign's family members. That exercise now requires, in my judgment, that section 20(1) of the SIA and article 31 of the Vienna Convention be properly construed.
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> 140. The first point arises from the comparison between the immunity and its exceptions under sections 1, 3 and 14 of the SIA in respect of sovereigns acting in their public capacity, and the immunity under section 20(1) of the SIA and article 31 of schedule 1 to the DPA in respect of sovereigns acting in their private capacity. … There is no territorial restriction to the commercial exception under section 3. It is, therefore, hard to imagine any reason for such a territorial restriction under section 20(1) of the SIA. … [D]iplomatic agents have temporary protection to enable them to carry out their mission un-vexed by litigation during their stay in the UK, but only during that stay. … [It] seems to me to be unlikely to have been Parliament's intention [that "sovereigns, and particularly absolute monarchs, would … have absolute immunity for any professional or commercial activity worldwide"], in the light particularly of the prevailing thinking exemplified in the majority judgments in Trendtex. It would, in my judgment, be remarkable if Parliament could have intended no limitation, vis-a-vis commercial acts, on the personal immunity of the sovereign, his family and private servants. One of the big changes introduced by the SIA, even if it was a codification of existing principles, was the commercial exception – an exception of that kind was expressly applied both to states and sovereigns exercising public functions and to sovereigns acting in their private capacities. The complete abrogation of the uncertain extent of the exception to personal immunity as it existed at the

> time in 1978 seems a most improbable Parliamentary intention. Thus, I cannot accept Mr Otty's submissions as to the modification to exclude the commercial exception altogether being a necessary one."
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> 141. It seems to me that the term "*necessary modifications*" in section 20(1) of the SIA does, however, allow the section to be read as if the territorial limitation in article 31.1(c) were absent when it is applied, inaptly I am afraid, to sovereigns, their families and private servants. The decision in Trendtex was hot news in 1978 when the SIA was debated in Parliament. It would have made no sense to confine the commercial exception that was being applied to limit the immunity of foreign sovereigns to acts done in the UK, when foreign sovereigns, their families and servants would not be expected to be in the UK for anything other than occasional visits. The wind of customary international law was blowing towards the removal of immunity for States and State entities in relation to commercial activities (reflected in Trendtex and then in section 3(1)(a) of the SIA), and towards the removal of private immunity for commercial activities for sovereigns, their families and servants. In my judgment, the modification to remove the territorial restriction on the exception in article 31.1(c) is indeed necessary."
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> …
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> 142 …
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> iv) … Diplomatic agents are in the UK for their diplomatic work. That is why they have personal immunity there, except for the three exceptions including commercial activities. Sovereigns, their families and personal servants are not in the UK, so the exception makes no sense if limited to activities in the UK. …"

22. Briggs LJ's summary of Vos J's view was, in my view, very fair:

> 48. The judge's view, persuasively set out in paragraphs 135-141 of his judgment, may be summarised as follows. The restriction of the commercial exception to non-official commercial activities of the diplomat in the receiving state by Article 31 of the Vienna Convention was the natural corollary of the fact that his personal immunity was entirely confined to the period of his own presence in the receiving state, it being the judge's view that "diplomatic agents in post are unlikely to be sued whilst they are in post in the UK in respect of foreign commercial activity". By contrast, the primary effect of the section 20 personal immunity for heads of state and their households will apply while they are not in the UK, so that to limit the effect of the commercial exception to a tiny part of the ambit of their personal immunity would be anomalous. Further, the conferral upon heads of state of a personal immunity which extended to the vast bulk of their non-official commercial activity would run directly counter to the unambiguous introduction in section 3 of the SIA of an exception from state immunity (and head of state immunity *ratione materiae*) in respect of commercial activity worldwide, shortly after the recognition by the English court of a similar exception as a matter of

customary international law in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 52."

23. Briggs LJ then summarised the question:

> "49. These considerations may well be said to have made it logical, desirable and sensible for Parliament to have extended the Article 31 commercial exemption to the commercial activities of a head of state anywhere in the world. But the question is whether that modification of Article 31 satisfies the necessity test. It would do so in my opinion only if the court can be sufficiently sure that this must have been Parliament's intention, as it appears that the judge was: see paragraph 140 of his judgment. Once satisfied as to Parliament's intention, then the modification would be necessary to give effect to it."

24. As with Vos J's analysis, so too Briggs LJ's analysis should be read in full and I set out a substantial part here:

> "50 …. as the judge noted (at paragraphs 140 and 142(iv)), the extension of the commercial exception in relation to heads of state to activity anywhere in the world would leave a head of state with less immunity while visiting the UK than his ambassador. It is undeniable that Article 31.1(c) makes a diplomat immune from suit in respect of commercial activities outside the UK. Thus his arrival in the UK could not be used by persons wishing to sue him in the English court as an opportunity to invoke the court's jurisdiction by being able to serve him within it. The presence of a prospective defendant within the jurisdiction is the fundamental basis of the English court's jurisdiction to adjudicate on disputes about activities abroad, subject to the *forum conveniens* doctrine ….
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> 51. Unlike the judge, I consider it to have been an important aspect of the protection intended to be given by Article 31 to the independent conduct of an ambassador's affairs that he is given that immunity from suit in relation to commercial activities abroad while present in the jurisdiction, and therefore exposed to service of originating process. It is to my mind entirely understandable that, in adopting Article 31 as part of English law in the DPA, Parliament thought fit to provide only for the much lesser exclusion represented by commercial activity in the UK. If a diplomat chose to engage in private commercial activity while present in the UK, he might be said only to have himself to blame if he got sued in relation to it.
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> 52. I now consider the position of a head of state. The effect of the excision of the phrase **"**in the receiving state" from the Article 31.1(c) exception to immunity would be, in exactly the same way, to expose a visiting head of state to being served with originating process while in the UK in respect of his private commercial activity undertaken anywhere in the world, including in his home state, during the relevant limitation period prior to the service of proceedings. Those with disputes which they wished to litigate against him, including his own subjects, might see his temporary presence in the UK as a heaven-sent opportunity to engage in such litigation, with obviously adverse consequences for the dignity of the head

of state during his visit, and for the effective performance of his official functions while in the UK.

53. It is in my judgment no answer to that difficulty to say that, for most of his time as head of state, he will be outside the UK. The purpose of section 20 (before the amendment of the bill) was specifically to provide for personal immunity for foreign heads of state while visiting the UK, equivalent to that of their ambassadors, and that purpose was not itself removed by the amendment which extended the immunity so as to protect the head of state at all times during his holding of that office.

54. It would, of course, have been possible for Parliament to deal with this difficulty by providing for a full personal immunity subject only to commercial activity in the UK, while a head of state was visiting the UK, and a restricted immunity subject to a full commercial activity exception at all other times. But it does not follow from the fact that Parliament did not engage with these difficulties that it must be assumed to have intended to resolve them by a solution apposite to an immunity to be given to heads of state while absent from the UK, at the expense of creating, for the first time, a derogation from such immunity for visiting foreign heads of state, by comparison with that enjoyed by their ambassadors. It is furthermore not unreasonable for Parliament to have thought that, if the starting point for head of state personal immunity was to be by analogy with that afforded to ambassadors, then an exception by reference to commercial activity in the UK was at least as, if not more, appropriate for heads of state than for ambassadors, having regard to the dignity to be afforded to the office of a head of state when visiting the UK, and the potential for disruption of good relations between states which would be afforded by creating an opportunity for persons aggrieved by a head of state's private business activity abroad, to have them adjudicated upon as a result of service of process during a head of state's visit.

55. Balancing these considerations leaves me with no sufficiently clear view that Parliament must have intended one rather than the other of the two solutions contended for in these proceedings. The result is that, in my judgment, the supposed modification constituted by the excision of the words "in the receiving state" from Article 31.1(c) in its cross-application to heads of state fails the necessity test.

56. In so concluding I have not lost sight of the fact that, in the *Pinochet* case, the House of Lords concluded that the private head of state immunity conferred by section 20 had not been intended to go further than that available previously under customary international law. Counsel was unable to enlighten this court as to whether the commercial exception to personal head of state immunity had become a principle of customary international law before the enactment of the SIA. For that purpose, the *Trendtex* case provides no sure guide. That was concerned with official state immunity rather than personal (*ratione personae*) head of state immunity, as indeed was its codification into English law by section 3(1)(a) of the SIA.

> 57. Mr Howe's main submission in support of the judge's conclusion on this issue was that the necessary modification identified in the *Pinochet* case conferring an ambassadorial type of personal immunity on foreign heads of state when absent from the UK, should be applied by way of compelling analogy. In my judgment the analogy is not compelling. True it is that the House of Lords did recognise the need for a necessary modification in terms of duration, in the search for the termination point of a head of state's personal immunity, since Article 39 of the Vienna Convention could not possibly be applied to heads of state, in the light of the amendment to the SIA reflected in its preamble. But it by no means follows that the extent of the commercial exception requires necessary modification. The modification identified in the *Pinochet* case and that identified by the judge in this case are separate and distinct, and they stand or fall by reference to different considerations.
>
> 58. It follows that, had it been necessary for me to decide whether the Princes, as part of King Abdullah's household, were nonetheless excluded from personal immunity in relation to alleged commercial activity outside the UK, I would have decided that they were not. Nonetheless, a binding decision on this question should await an occasion when the necessity for its determination leads to fuller argument than was deployed on this appeal."

25. Vos J is now the Master of the Rolls and Head of Civil Justice. Briggs LJ is now a member of the Supreme Court of the United Kingdom. I am of course fortunate to have the benefit of the exchange between them. For me, the points that will decide the present case are those I set out below.

26. Parliament legislated in 1978 by section 20 (1) of the State Immunity Act that "[s]ubject to the provisions of this section and to any necessary modifications" the Diplomatic Privileges Act 1964 was to apply "to … a … head of State [and others] … as it applies to the head of a diplomatic mission [and others]".

27. In legislating, Parliament gave "statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts": Lord Hope in Pinochet (No 3) at 240H; it was "enacting customary international law and the Vienna Convention on Diplomatic Relations (1961)": Lord Millett in Pinochet (No 3) at 268H-269A. There was material focus on Article 39(2) of the Vienna Convention in the circumstances of that case.

28. There are several reasons for immunity of a Head of State. One is to leave a Head of State free to do their work without involvement in litigation before a foreign court. "It would have been contrary to the dignity of a head of state that he should be subjected to judicial process … likely to interfere with the exercise of his duties as a head of state": Lord Phillips in Pinochet (No 3) at 285D-E. As held by Lawrence Collins LJ (as he then was) in Aziz v Aziz [2007] EWCA Civ 712 at [61], the immunity is functional in the sense that it has a clear "function in international relations to protect the ability of the head of state to carry out his functions and to promote international co-operation."

29. It may well be that a foreign Head of State would not be expected to be in the United Kingdom for anything other than occasional visits, as Vos J points out; certainly not (ordinarily) for the length of time of the head of a diplomatic mission. But Pinochet (No. 3) sets out that as introduced, and before an amendment, section 20(1)(a) had read "a sovereign or other head of state "*who is in the United Kingdom at the invitation or with the consent of the Government of the United Kingdom.*" (see Lord Browne-Wilkinson at 203C-D). There was a focus on where the Head of State was and not where the alleged activity was undertaken.

30. This point is reinforced when Lord Browne-Wilkinson went on to explain (at 203D-E) that the wording of the section was changed by "a Government amendment the mover of which said that the clause as introduced "leaves an unsatisfactory doubt about the position of heads of state who are not in the United Kingdom"; he said that the amendment was to ensure that Heads of State would be treated like heads of diplomatic missions "irrespective of presence in the United Kingdom."". In his speech in Pinochet (No 3) at 209H-210A Lord Goff says: "… [W]e discover from the legislative history of the Act that it was originally intended to apply only to a sovereign or other head of state in this country at the invitation or with the consent of the government of this country, but was amended to provide also for the position of a head of state who was not in this country -- hence the form of the long title, which was amended to apply simply to heads of state."

31. It should be kept in mind that the fact that the Head of State would not be expected to be in the United Kingdom for anything other than occasional visits does not mean that his past or present professional or commercial activity in the United Kingdom (as the "receiving State") would be occasional or limited. The question of where activity is exercised is part of the focus of Article 31(1)(c) of the Vienna Convention. That refers to "an action relating to any professional or commercial activity exercised by [] … in the receiving State outside his official functions".

32. Why should modification, by deleting "in the receiving State" in the passage just quoted, be necessary where a Head of State is involved? The effect would be to remove immunity in proceedings relating to activity outside the receiving State and anywhere in the world. The amendment in Parliament to the wording of section 20(1)(a) was to ensure that Heads of State would be treated like heads of diplomatic missions "irrespective of presence in the United Kingdom." That has been achieved without it being necessary to modify Article 31(1)(c) by reducing the compass of the immunity (from the civil and administrative jurisdiction of the receiving State) where there is professional or commercial activity outside the United Kingdom.

33. The immunity of Heads of State with which we are concerned (immunity in ratione personae, a "status immunity" as Lord Millett called it in Pinochet (No 3) at 268G) lasts only while the Head of State is in office. It is legitimate to keep in mind that any immunity for a Head of State from suit in a foreign national court (here England) for alleged activity exercised outside the State of that court does not mean immunity in the courts of the State of which the person is Head

of State. Nor (if different) in the State where the alleged activity exercised was undertaken.

34. As for Trendtex, Vos J himself fairly puts it no higher than, as at 1978, the winds of customary international law were blowing "towards" the removal of immunity for States and State entities in relation to commercial activities, and "towards" the removal of private immunity for commercial activities for sovereigns, their families and servants. Importantly, that is what even section 20 does, without any modification, but not where the commercial activity was exercised by the Head of State outside the receiving State that he would visit only occasionally.

35. There are different considerations when dealing with exclusions from different immunities. Parliament made, in terms, a choice to take parts of the Vienna Convention as a foundation point in section 20 of the State Immunity Act in addressing the position of Heads of State. Parliament did not choose to take what it had legislated under section 3 of the State Immunity Act as the foundation point. The different Parliamentary history of section 3 is set out by Lord Mance in NML Capital Ltd v Republic of Argentina [2011] UKSC 31; [2011] 2 AC 495 at [87].

36. I do not disagree with Vos J when he says there " was a respectable argument just before the enactment of the [State Immunity Act in 1978] that customary international law had changed by that time so as to prevent sovereign States and their emanations claiming immunity for their commercial activities", but Apex does not undertake a full exercise to determine whether that respectable argument was right, which would have required further consideration the position in States other than our own. That would have been a considerable undertaking.

37. Vos J described the task in hand as requiring construction of section 20 (1) of the State Immunity Act and of article 31 of the Vienna Convention. Of course, as Vos J recognised, that interpretation must, so far as possible, be in a manner which accords with public international law (Lord Phillips in Pinochet (No 3) at 279H). Referring to the International Law Commission's Draft Conclusions on Identification of Customary International Law (2016), Lord Sumption said in Benkharbouche v Embassy of the Republic of Sudan [2019] AC 777 at [31]:

> "To identify a rule of customary international law, it is necessary to establish that there is widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (opinio Juris) …".

The Supreme Court has further recently addressed the interpretation of the Vienna Convention (on Diplomatic Relations) as a treaty in Basfar v Wong [2022] UKSC 20; [2023] AC 33 (passim, both majority and minority opinions, and with reference to Arycle 31(1) of the Vienna Convention on the Law of Treaties).

38. With these considerations in mind, I conclude that the modification proposed by Vos J where it alters the territorial extent of the commercial activities

exception is, with respect, not necessary. Necessity was the threshold that Parliament had set for modifications. I accept the submission of Mr Rodney Dixon KC and Russell Hopkins, appearing for President Nyusi, that to remove what is a clear territorial restriction to what are narrow exceptions for diplomatic immunity in a receiving State in Art. 31(1)(c) does not fall within the category of "necessary modifications".

39. Thus section 20 of the Sovereign Immunity Act 1978 recognises and does not exclude the immunity from the jurisdiction of this Court for which President Nyusi contends, in relation to the claims against him in these proceedings, whilst he is Head of State.

Conclusion

40. The conclusion of this Court applies only to the current civil and commercial proceedings in this jurisdiction. The conclusion of this Court is that (1) President Nyusi was served on 14 April 2023 with these proceedings before this Court, and not earlier; (2) he is entitled to raise the immunity challenge he has chosen to raise; and (3) in relation to the claims alleged against him in these proceedings he has immunity from the jurisdiction of this Court whilst he is Head of State of the Republic.

41. In the circumstances it is unnecessary to deal with other arguments raised. I record however that the arguments raised on behalf of the President that there was a failure by the Privinvest Defendants to meet their duty of full and frank disclosure on the application before Cockerill J, were arguments that had, in my judgment, no merit. The position was put responsibly before the Judge by the Privinvest Defendants and those acting for them and in full compliance with the obligations of fair presentation, enabling the Judge to make the just decision that she did at that point.