IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case Number : 1487/2017

In the matter between –

THE SAHARAWI ARAB DEMOCRATIC REPUBLIC	First Applicant
THE POLISARIO FRONT	Second Applicant

and

THE OWNER AND CHARTERERS OF THE MV "NM CHERRY BLOSSOM"	First Respondent
THE MASTER OF THE MV "NM CHERRY BLOSSOM"	Second Respondent
THE PURCHASER OF THE CARGO LADEN ON BOARD THE MV "NM CHERRY BLOSSOM"	Third Respondent
OCP SA	Fourth Respondent
PHOSPHATES DE BOUCRAA SA	Fifth Respondent
THE MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	Sixth Respondent

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FILING SHEET

To : The Registrar of the High Court
PORT ELIZABETH

Presented for filing by OCP SA and Phosphates de Boucraa SA on this 13th day of July 2017.

13 July 2017

Mr. N Ndlebe
The Registrar of the High Court
2 Bird Street
Port Elizabeth

Mr. Registrar,

We refer to the judgment dated 15 June 2017 in the above-captioned matter (the "*Judgment*") in respect of the cargo on *NM Cherry Blossom*.

OCP SA and Phosphates de Boucraa SA are profoundly disappointed that the Port Elizabeth court was used by the Polisario and the so-called "SADR" (the "*Applicants*") to make baseless and biased political allegations targeting Morocco. The Applicants came before the court "without clean hands", pursuing an agenda to bypass a political dispute resolution process that is properly being convened by the United Nations Security Council and Secretary-General. Looking for advantage, the Applicants have sought to circumvent the internationally sanctioned process. They appear to have found a convenient forum in the Port Elizabeth court.

This case is not and never has been about the ownership of phosphate cargo. The essence of the Applicants' claim presupposes that questions regarding the governance of the region have already been resolved in their favor. They have not. Indeed, these very questions are the subject of the ongoing negotiations under the auspices of the United Nations Security Council. The Applicants' primary motivation is not ownership or possession, but subversion. Their aim is political, and it has been made even clearer by the order sought in their summons: they crave a broader declaration by a domestic South African court asserting their right to sovereignty over a foreign region and control of the foreign territory's phosphate resources.

As such, Applicant's case is nothing more than an act of political piracy.

The case thus constitutes an obvious attempt by the Applicants to hijack the courts of South Africa, seeking their intervention in a foreign territorial dispute resolution process already being administered by the only appropriate international forum, the United Nations. Sadly, the Port Elizabeth court did not acknowledge this reality.

It is relevant to recall the context in which this case has been brought. When African Union member states overwhelmingly backed Morocco's readmission in January 2017, South Africa was in the minority of dissenting voters. Commenting on that decision, the African National Congress issued a press release hailing its "*longstanding fraternal ties*" with the Applicants, and describing Morocco's readmission as "*tacitly endorsing the longstanding occupation of the Western Sahara*".[1] That inflammatory statement came soon after the publication of an article by South Africa's Minister of International Relations and Cooperation, Maite Nkoana-Mashabane, calling for an "*end to the illegal exploitation of resources in the Western Sahara*

[1] Statement by the African National Congress on the Readmission of Morocco to the African Union, 31 January 2017, available at: http://www.anc.org.za/content/statement-african-national-congress-readmission-kingdom-morocco-african-union-au.

occupied territories and human rights abuses against the Saharawi people".[2] These words further a political agenda rather than acknowledge and support an internationally-mandated peace process.

OCP and Phosphates de Boucraa are astounded that the court has seen fit to substitute its own judgment for that of the UN Security Council and Secretary-General. They expected, in good faith, due consideration of the law and consequently a rejection of this attempt to undermine the internationally supported peace process organized under the auspices of the UN Security Council and Secretary-General. Our good faith has been misplaced, as this process has played into the political strategy pursued by the Polisario and the so-called "SADR".

The Port Elizabeth court's decision to proceed to trial is all the more surprising given that the Applicants have been so recently rebuffed for attempting the same ruse in Panama. In early June 2017, the first Applicant similarly sought (upon filing substantially the same political manifesto in a Panamanian court) to arrest a vessel on the purported basis that the vessel was shipping "*phosphate rock cargo in prejudice of* [the first Applicant] *and without proper authorization*".[3] The judge in Panama was not so easily hoodwinked, and immediately spotted the real crux of the complaint, holding that "*what plaintiff's submissions require is for this court to rule on a political/diplomatic dispute concerning the extraction of materials from a territory that two nations claim belong to them* [...]".[4] The Port Elizabeth court should have applied the same principles of comity and deference to international law, and similarly dismissed the Applicants' efforts with prejudice.

As a threshold matter, it is difficult to perceive from the Judgment how the court has fulfilled its constitutional obligation to apply the law "*impartially and without fear, favour or prejudice*"[5] in the present case. From the opening sentence of the Judgment, the court uses historical hearsay to paint a one-sided and conclusory view of matters currently before the United Nations.

The Judgment and the assertion by a South African court of authority to determine the sovereignty of a foreign land by referring the matter to trial leaves no alternative conclusion: OCP and Phosphates de Boucraa will not participate further in this process which affronts the principles of international law. This letter explains the reasons why we are withdrawing.

Nothing in this correspondence should be considered as consent to further participation in the above-captioned proceedings, or as a procedural action taken for purposes of those proceedings.

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[2] Maite Nkoana-Mashabane, *Op-Ed: Independence of Western Sahara is an inalienable right*, 4 January 2017, available at: https://www.dailymaverick.co.za/article/2017-01-04-op-ed-independence-of-western-sahara-is-an-inalienable-right/

[3] *Sahrawi Arab Democratic Republic v. (1) La Darién Navegación, S.A. (2) Marugame Kisen Kaisha, Ltd.*, Judgment of Maritime Court of Panama No. 1, 5 June 2017.

[4] Ibid.

[5] Constitution of the Republic of South Africa, Article 165(2): "*The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*"

I. The Applicants' lack of clean hands and abuse of the court process

The fact pattern of this case raises many questions. The *Cherry Blossom* was ordered out of its filed sailing route less than two days before docking. And yet, upon arrival, the vessel was met with a complaint and affidavits consisting of close to 300 pages of materials seeking interlocutory relief. These papers were not prepared in two days. And yet the implications of forum shopping that are transparent from the timing of the order to dock in Port Elizabeth and the preparation of the filing were ignored.

But that is not the only example of the Applicants abusing the South African court system; the Applicants committed a material non-disclosure of critical information to the court and yet received a free pass.

By its own admission, the South African court considered this case to be "*novel*" and acknowledged the complexity of the question and the involvement of the "*international community at the highest level*". However, the Applicants in the course of their 300-page submission providing historical and factual background in painstaking detail failed to draw to the attention of the court a material matter of core relevance: the status of the UN Security Council-authorized process re-launched by the Secretary-General just one month before the *ex parte* application.

Ordinarily — and without more — such a material non-disclosure would disqualify the Applicants from seeking injunctive relief in any jurisdiction around the globe. It is widely accepted in court systems that a party who seeks the court's assistance for injunctive relief *ex parte* is under a duty to let the court know *all* relevant information when seeking the order. That did not take place in this case; the Applicants hid this key fact from the Port Elizabeth court when they applied for the interdict. It was left to OCP and Phosphates de Boucraa to draw this to the court's attention, which they duly did on the return date. That material non-disclosure should have been fatal to Applicants. Not so in this case; the court granted the Applicants a free pass, waving them through and upholding the interdict obtained *ex parte* based on material non-disclosure.

II. Mischaracterization of the status of the Applicants and reliance on an inaccurate, politically biased description of the history of the region

Among other things the Judgment relies on an inaccurate, incomplete and politically-biased description of the history and status of the two Applicants and Western Sahara.[6]

The Judgment states that the first Applicant has been "*recognized by 45 members of the UN, including South Africa*", and that the second Applicant has been "*recognized by the United*

[6] As averred in my affidavit dated 11 May 2017, OCP and Phosboucraa support and act fully under the principle enshrined in Moroccan law that Morocco exercises sovereignty over the Southern Provinces of Morocco where Phosboucraa carries out its operations. OCP and Phosboucraa conduct their operations and activities in compliance with Moroccan law and international law. For ease of reference, I will refer to the Southern Provinces of Morocco in accordance with their United Nations designation, Western Sahara.

Nations [...] *as representative of the people of Western Sahara in relation to their right to self-determination*".[7] Neither statement accurately reflects the Applicants' true status.

With respect to the first Applicant, an overwhelming majority of states do not recognize the so-called "SADR" nor its purported claims to sovereignty over the region. The first Applicant has neither member nor observer status at the United Nations. Moreover, no permanent member of the United Nations Security Council has ever recognized the first Applicant's declarations of sovereignty, and many other states that previously recognized the first Applicant have since withdrawn or suspended recognition, including more than a dozen African Union member states.

That South Africa is one of the minority of states that have recognized and actively support, including most recently at the African Union Summit, the first Applicant is telling. What is not expected, and not acceptable to OCP and Phosphates de Boucraa, is that the South African courts should enter into a highly politically charged situation. It is a basic tenet of rule of law systems that this does not take place.

With respect to the second Applicant, the Polisario is not recognized as a United Nations member state or permanent observer, and has never possessed the necessary authority to have validly "*proclaimed the* [so-called] *SADR as a sovereign state*".[8] United Nations recognition extends only to the second Applicant's participation in the ongoing diplomatic process. This limitation on the role permitted to be played by the second Applicant was expressly addressed by the Advocate General in the European Court of Justice matter cited in the Judgment, yet the Port Elizabeth court has utterly bypassed this fundamental limitation, and self-evidently chosen to cherry-pick from those parts of the ECJ case that most support its predetermined conclusion.[9] As highlighted in OCP and Phosphates de Boucraa's submissions, both the Applicants possess extremely limited personality for purposes of international law.

These basic but fundamental mischaracterizations of the standing of the Applicants are forerunners to the Judgment adopting, without hesitation, the Applicants' own obviously jaundiced description of the regional history of the Western Sahara region. For example, the Judgment states that "[t]*he territory of Western Sahara is said to be the only African territory still subject to colonial rule*",[10] and refers to the region's "*occupation by Morocco*".[11] In yet another revealing passage from its interlocutory decision, the court restates unsubstantiated information drawn from the Applicants' brief, treating as fact Applicants' spurious claim that "*most of the Sahrawi people live to the east of the berm or in refugee camps in Algeria*" and concluding, as a consequence, that "*those who may benefit from the mining of the phosphate are not the 'people of the territory', but more likely, Moroccan settlers.*" These statements by the court contradict even the narrowest publicly available UN

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[7] Judgment, paragraphs 6 to 7.
[8] Judgment, paragraph 7.
[9] Opinion of Advocate General Wachelet, *Council of the European Union v. Front Populaire pour la libération de la saguia-el-hamra et rio de oro (Front Polisario)* (Case C-104/16P), 13 September 2016, paragraph 185: "[...] [T]*he Front Polisario is recognised by the UN as the representative of the people of Western Sahara only in the political process for the resolution of the question of the self-determination of the people of that territory.*" (Emphasis in original.)
[10] Judgment, paragraph 1.
[11] Judgment, paragraph 29.

census data. It is difficult to match the language of the Judgment with the court's mandate as a neutral dispute resolution body.

III. Trampling of recognized principles of international and South African law

While the Judgment is merely an interlocutory order and has no continuing precedential value, OCP and Phosphates de Boucraa are nonetheless profoundly disappointed that a South African court could have issued a preliminary ruling that falls so obviously far from well traversed principles of international and South African law.

There are widely recognized principles of international and South African law that have been trampled upon by the Applicants. As a matter of law, OCP and Phosphates de Boucraa would be bound to succeed on appeal at this preliminary stage, or on the merits at trial, in any neutral forum. That we choose not to do so has everything to do with not giving further credit to a process that lacks legal legitimacy, and nothing to do with the law.

It is universally accepted that the domestic courts of one jurisdiction do not seek to interfere with the laws and rights of foreign states. The whole point of State immunity is that a state's rights are protected and its laws shown appropriate respect by foreign courts, without the state having to submit itself or its laws to scrutiny by courts of a foreign land. That is the position as a matter of international customary law. It is also the position as a matter of South African domestic law (under the South African State Immunities Act 87 of 1981). In practice, however, these points hold no sway before the Port Elizabeth court.

The court purported to accept that if the outcome of the Judgment would have an effect on Morocco's legal rights and interests, then State immunity would preclude the Applicants' claim. And yet the court (1) sought to argue that any effect on Morocco would be merely in the realm of *"political or moral interests"* as opposed to legal rights and interest, while (2) simultaneously accepting that *"Morocco exercises de facto control over that portion of territory of Western Sahara in which the mine is situated. Moroccan law is applied there by Morocco. The exercise of administrative control and the application of Moroccan law .... is at the heart of the dispute...."*

As a matter of simple logic, it is not possible for the court to declare that the status, rights and powers of Morocco under international law are *"necessary to consider"* in order to engage with the key issues in the case (and thus acknowledge that the *"application of Moroccan law is ... at the heart of this dispute"*), but to then state that Morocco's interests are somehow not legal in nature and are not engaged.

By engaging with the Applicants, the court did precisely what it ought not to have done; it sought to determine the legal rights of Morocco, a sovereign (and thus immune) State, in respect of the region of Western Sahara.

The result is unconscionable: the Judgment apparently expects Morocco — as a sovereign State — to be willing to subject itself and its laws to the judgment of the domestic courts of South Africa. That result would be perverse even if there was a South African party involved in the case. But that excuse is not available here; there is no connection whatsoever between this entire case and the parties to this case and South Africa. Again, the Applicants have used

the Port Elizabeth court as a tool. In this respect alone, the court's trespassing over international law and the concept of comity between nations is staggering.

Further, the Act of State doctrine holds that sovereign states are bound to respect the independence of other sovereign states, and the courts of one state will not sit in judgment of another state's acts done within its own territory. After paying lip service to the Act of State doctrine the court then ignores it.

Instead of demonstrating the legal restraint required of a court respecting international law, (i) by not being willing to stand in judgment on the acts of a foreign state, (ii) concerning territory that has no connection to South Africa, and (iii) which is under the sovereign authority of a foreign state, (iv) at a time when the territorial issues in dispute are before the UN Security Council for resolution, the Port Elizabeth court moved in.

It stepped into a political arena in which there are no *"judicial or manageable standards"*, to quote a South African judgment in *Kolbatschenko*.[12] Indeed, the *Kolbatschenko* case, one of the very few South African cases relevant to the issues, did not even warrant a mention in the Judgment.

The court could also have looked to the judgment of Supreme Court of Appeal of South Africa in *MV Snow Delta Serva Ship Ltd*, where it said that *"Courts should not easily assume jurisdiction in favour of peregeni against peregeni in relation to litigation which has no connection to this country ... There is also no reason why our limited public and judicial resources should be expended in respect of disputes which are unconnected to and between persons who have no relationship with our country"*.[13] However, the Port Elizabeth court chose not to do so.

In bringing this claim, the Applicants asked the court to stand in judgment of the acts of a foreign state (Morocco), related to a territory that has no connection to South Africa, and which the court itself accepts is under Moroccan administrative control, all while there is an ongoing political process before the United Nations Security Council. Making such a judgment directly conflicts with the Act of State doctrine. And yet, rather than addressing this fundamental defect with the matter, the court decided to skirt the question by declaring it premature to consider the doctrine, even while acknowledging the complexity of the question and the involvement of the "*international community at the highest level*".

IV. Blatant disregard of the international community's efforts to address governance disputes in Western Sahara.

The United Nations remains actively involved in efforts to resolve peacefully the situation in Western Sahara. In April of this year, current United Nations Secretary-General Antonio Guterres called for the resumption of negotiations between the parties.[14] And the instant action was itself brought just a few days after the UN Security Council called on the parties to

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[12] *Kolbatschenko v. King NO and Another* 2001 (4) SA 336 (C) at 356H-357C.
[13] *MV Snow Delta Serva Ship Ltd v. Discount Tonnage Ltd* 2000 (4) SA 746 (SCA), paragraph 14.
[14] Reuters, *U.N. chief calls for Western Sahara talks, parties wary*, 11 April 2017, available from: http://www.reuters.com/article/us-westernsahara-un-idUSKBN17D0L6.

approach the political process without preconditions and in good faith.[15] The Applicants failed to disclose any of these material elements in their *ex parte* submission. Remarkably, the court, in a 33-page Judgment, makes not even a single mention of this material non-disclosure.

Instead, and despite obliquely acknowledging the existence of an agreed diplomatic process for the resolution of the Western Sahara question, the Port Elizabeth court implicitly endorsed the Applicants' forum-shopping exercise with the effect of usurping the functions of the United Nations Security Council and other international actors fostering complex political negotiations aimed at a final resolution of the Western Sahara issue. Far from supporting or facilitating this international process, the Judgment will exacerbate the dispute and hinder the reaching of a peaceful compromise. OCP and Phosphates de Boucraa find the disregard for the relevant international bodies both offensive and inappropriate, and sorely deficient under the law.

V. Flawed attempt to ignore the interests of Morocco

Finally, the Judgment concludes that a finding with respect to the Applicants' claims "*cannot in any legal sense affect the rights of Morocco at international law*",[16] and that a finding against OCP and Phosphates de Boucraa "*can have no effect upon the legal rights of Morocco*".[17] In a flawed Judgment, that conclusion stands out as particularly contradictory and cannot possibly be reconciled with the court's acknowledgment that OCP and Phosphates de Boucraa operate under Moroccan law and a specific legal regime granting them a monopoly over the exploration and exploitation of resources in Morocco, including Western Sahara.[18]

It is abundantly clear that the Judgment downplays the significance of Morocco's interest in this matter and in so doing avoids applying fundamental principles of international law, including principles of sovereignty and comity. The fact remains: following the Judgment, any South African court hearing the matter on the merits will necessarily have to evaluate the validity and application of Moroccan law in the territory. The entire point of the State immunity doctrine is that the authority to make this judgment is not the privilege of the courts of South Africa. Instead, the doctrine requires that a foreign State's rights are protected and its laws are given due respect without the foreign State having to submit itself or its laws to scrutiny by the courts of a third country.

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[15] United Nations, *Security Council Extends Mandate of United Nations Mission for Referendum in Western Sahara, Unanimously Adopting Resolution 2351 (2017)*, 28 April 2017, available from: https://www.un.org/press/en/2017/sc12807.doc.htm.

[16] Judgment, paragraph 84.

[17] Judgment, paragraph 84.

[18] Judgment, paragraph 10 ("*The Moroccan government is* [OCP's] *major shareholder. It owns 94.12 per cent of OCP's shares. OCP mines phosphate in three areas of Morocco and enjoys a monopoly over phosphate reserves in that country.*"); paragraph 12 (citing the affidavit of the Executive Vice-President and General Counsel of OCP Group, which acknowledges that the relevant entities operate in accordance with "*the principle enshrined in Moroccan law that Morocco exercises sovereignty over the Southern Provinces of Morocco*"); and paragraph 83 ("*OCP and Phosboucraa assert that their mining operations are authorised in accordance with Moroccan law which applies to the territory over which Morocco exercises authority.*").

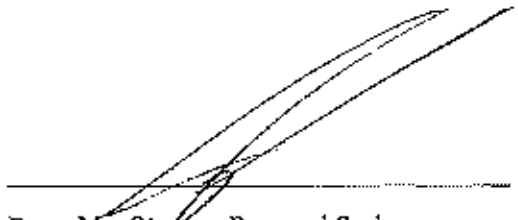
Our decision to withdraw from this flawed process and to not formally appeal the Judgment should not be construed as acquiescence to the factual or legal conclusions expressed in the Judgment. To the contrary, the decision reflects our assessment that, despite our good faith legitimate expectations that South African courts would follow the basic tenets of international law, those courts do not constitute an appropriate forum.

To be absolutely clear: OCP and Phosphates de Boucraa have not the slightest doubt of their capacity to prevail on the merits of the facts, the rule of law, and the principle of comity amongst nations in a forum that places those considerations before political ones. But OCP and Phosphates de Boucraa have reluctantly come to the conclusion that participating in any trial before this forum would give further credit to a process without legal legitimacy.

This is a decision that undermines international rules of comity and deference. It is a decision that voluntarily ignores the ongoing political negotiations before the United Nations Security Council. It is also a decision that attacks the foundations of international freedom of commerce. The abuse of domestic jurisdictions to pursue political matters properly dealt with elsewhere paralyzes the gears of trade. This is just such a case and the decision to allow this matter to go to trial will be taken note of internationally.

OCP SA and Phosphates de Boucraa are responsible companies. We conduct our operations in compliance with the highest standards of international law, and in particular the guidelines established by the United Nations. In so doing, these activities benefit the territory and its inhabitants while reinforcing the local communities' right to development. OCP SA and Phosphates de Boucraa came to the Port Elizabeth court in good faith, to vindicate their responsible and lawful operations, and to head off a dangerous attempt to derail the ongoing UN peace process. But we were met at Port Elizabeth by a tribunal that has been used for political means. Given this, OCP SA and Phosboucraa have no other responsible choice but to withdraw from the proceedings and expose them as fatally flawed.

For OCP SA and Phosphates de Boucraa SA:



By: Mr. Otmane Bennani Smires
Title: Executive Vice-President / General Counsel