

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

**Case no. 1487/17  
Date heard: 18/5/17  
Date delivered: 15/6/17  
Reportable**

**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 COOPERATION** **Sixth Respondent**

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## JUDGMENT

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### **MBENENGE ADJP, PLASKET and GOOSEN JJ:**

[1] The territory of Western Sahara is said to be the only African territory still subject to colonial rule. This application has its genesis in that far off land. On 1 May 2017, the MV ‘NM Cherry Blossom’ entered the port of Coega on the outskirts of Port Elizabeth to take on bunkers. Aboard the vessel was a cargo of phosphate that had been mined in the Boucraa mine in the northern part of Western Sahara and loaded at the port of El Aauin. The cargo, it transpired, was en route to the port of Tauranga in New Zealand, having been sold to Ballance Agri-Nutrients Ltd (Ballance), a company that manufactures fertiliser.

[2] On that day, an ex parte application was brought before Revelas J by the applicants, the Saharawi Arab Democratic Republic (the SADR) and the Polisario Front (the PF). She granted an order which in part provided:

‘1 That a rule nisi issue calling on all interested parties to show cause on **18 MAY 2017** at 09h30 or as soon thereafter as the matter may be heard, why an order should not be made in the following terms, that:

- 1.1 The first to fifth respondents be interdicted and restrained from taking the cargo of phosphate presently on board the ‘NM Cherry Blossom’ (“**the cargo**”) from the jurisdiction of the Court in Algoa Bay, pending the determination of the applicants’ action for, *inter alia*, delivery of the cargo (“**the action**”), save in the event of suitable security being furnished to the applicants in terms of paragraph 1.4 below.
- 1.2 The sheriff is directed and authorised to attach the cargo pending the determination of the action.
- 1.3 The sheriff is directed and authorised to remove the ship’s registration documents and trading certificates.
- 1.4 The first to fifth respondents shall be released from the above interdict, and the sheriff shall release the cargo from attachment and return the registration documents and trading certificates, in the event that suitable security is furnished to the applicants for their claim, which is from a first-class South African bank or other

equivalent financial or insurance institution, and contains at least the following provisions:

- 1.4.1 a submission from the first to fifth respondents to the jurisdiction of the South African courts for the purposes of the action; and
- 1.4.2 in the event that the applicants obtain a final order for the delivery and/or possession of the cargo, the guarantor shall pay to the applicants the market value of the cargo in Port Elizabeth as of the date of this order.
- 1.5 In the event that the parties are not able to agree on the terms of the security, including the market value of the cargo, they are given leave to apply to this Court for directions.
- 1.6 In the event that security is given to obtain the release of the cargo from the attachment, then that security and the proceeds thereof shall, for all purposes, be deemed to be the cargo, and the cargo shall be deemed to be under attachment in the jurisdiction of this Court at the instance of the applicants.

[3] Paragraph 2 of the order stated that paragraphs 1.1 to 1.6 'shall operate as an interim order with immediate effect pending the return date of the rule nisi'. The remainder of the order concerned service of both the rule nisi and the summons in the vindicatory action to be instituted in due course, access to certain information held by the master of the ship and the setting of time periods for the filing of papers and heads of argument prior to the return day.

[4] Because of both the novelty of the matter and the complexity of the international law issues that arise, the Acting Judge President constituted a full bench to hear the matter on the return day.

### The parties and the issues

[5] The second applicant, the PF, is a national liberation movement. It was established in 1973 with the aims of ending Spanish colonial rule of Western Sahara (then known as Spanish Sahara) and of representing the people of Western Sahara. One of its fundamental objectives is to seek self-determination for the people of Western Sahara.

[6] The PF was recognised by the United Nations (the UN) as representative of the people of Western Sahara in relation to their right to self-determination. It was also a signatory to tripartite agreements with the UN and the Kingdom of Morocco (Morocco) in relation to the holding of a referendum concerning self-determination. That process continues in fits and starts.

[7] On 27 February 1976, the PF proclaimed the SADR as a sovereign state. The SADR is not a member of the UN but it is a member of the African Union (AU). It is recognised by 45 members of the UN, including South Africa.

[8] The Constitution of the Saharawi Arab Democratic Republic was adopted by the 14<sup>th</sup> Congress of the PF held from 16 to 20 December 2015. Article 17 provides that public property belongs to the people. Public property, the article continues, includes 'the mineral wealth, energy resources, underground wealth, territorial waters and other resources defined by the law'.

[9] Only two of the respondents opposed the confirmation of the rule nisi. They are the fourth respondent, OCP SA (OCP) and the fifth respondent, Phosphates de Boucraa SA (Phosboucraa). The other respondents, it would appear, abide our decision.

[10] OCP is a company registered in accordance with the laws of Morocco. It is the largest exporter of phosphate rock and phosphoric acid, and producer of fertiliser extracts, in the world. The Moroccan government is its 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.

[11] Phosboucraa is also a Moroccan company. It is a wholly owned subsidiary of OCP. It operates the phosphate mine at Boucraa in Western Sahara. It is common cause that the phosphate that is the subject of this case was mined by Phosboucraa from its Boucraa mine and sold to Ballance.

[12] Mr Otmane Bennani Smires, the Executive Vice-President and General Counsel of the OCP Group, stated in the answering affidavit that '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' and that both companies 'conduct their operations and activities in compliance with Moroccan law'.

[13] The essence of the case for the SADR and the PF is that the phosphate aboard the MV 'NM Cherry Blossom' is part of the national resources of Western Sahara and belongs to its people; and that OCP and Phosboucraa misappropriated the phosphate and sold it, having no right to do so. The SADR and the PF intend to institute a vindicatory action in respect of the cargo and the purpose of these proceedings is to ensure that it remains within the jurisdiction of this court (except if suitable security is furnished) until the vindicatory action is finalised.

[14] They therefore claim an entitlement to an interim interdict pending the final determination of their right of ownership of the cargo. We shall consider the elements of an interim interdict pending a vindicatory action below.

[15] OCP and Phosboucraa, on the other hand, state that Phosboucraa was entitled to mine the phosphate and to sell it. Its rights to do both are derived from the law of Morocco. It also claimed to have mined and sold the phosphate in accordance with international law. Two further defences were raised. They are that in terms of the common law act of state doctrine, the dispute before us is not justiciable and secondly, that in terms of the Foreign State Immunity Act 87 of 1981, this court is precluded from deciding the matter because the laws of a sovereign state, Morocco, are implicated.

[16] In this judgment we shall set out the relevant historical background, consider the international law that applies in relation to the ownership of and exploitation of the natural resources of Western Sahara, decide on whether the SADR and the PF have established the requirements of an interim interdict and, if so, consider the application of the act of state doctrine and state immunity, and their consequences.

#### The background

[17] Western Sahara lies on the north-western coast of Africa. It is bordered by Morocco to the north, Algeria to the north-east and Mauritania to the east and south. It is a sparsely populated desert region. The indigenous population, the Sahawari people, were largely nomadic peoples who were organised socially and politically in tribes under the rule of chiefs. As a result of the conflict that we shall describe in due course, many now live in refugee camps in Algeria.

[18] The Sahawari people are a distinct people. They have their own culture and customs. They speak Hassaniya Arabic, which is closer to the Arabic spoken in Mauritania than to the Arabic spoken in Morocco.

[19] Western Sahara was a Spanish colony – and later a province of Spain – from 1884 (at the height of the so-called European scramble for Africa) until 1976 when Spain, in effect, abandoned Western Sahara and offered it to Morocco and Mauritania. (Prior to the formal withdrawal of Spain, in October 1975, Moroccan troops had already entered Western Sahara.)

[20] Prior to this turn of events, it had been expected that a referendum would be held to determine the future of the territory on decolonisation. The UN General Assembly had, in 1966, adopted resolution 2229 (XXI) in which it had ‘re-affirmed’ the right to self-determination of the people of Spanish Sahara and requested Spain to hold a referendum under UN auspices in order to enable ‘the indigenous population of the Territory to exercise freely its right to self-determination’.

[21] This request was made annually thereafter for a number of years. In August 1974, Spain announced that it would hold a referendum under UN auspices during the first six months of 1975 so as to enable the indigenous people of the territory to exercise their right to self-determination. Morocco and Mauritania then asked the UN to postpone the referendum while their claims to Western Sahara were considered. The UN agreed to the postponement of the referendum. It is yet to be held.

[22] When Spain agreed to give Western Sahara to Morocco and Mauritania, the PF took up arms. Thus began a war that was to last 16 years. Although Mauritania

withdrew from Western Sahara in 1979, the war fought by the PF and Morocco continued until a cease-fire was agreed to in 1991.

[23] During the course of the war, Morocco built a wall, or berm, that ran for 2 700 kilometres through the middle of Western Sahara and into the south-eastern part of Morocco. About 80 per cent of Western Sahara is controlled by Morocco. It does not control what has been referred to in the founding affidavit as a 'liberated zone' to the east of the berm. Morocco exerts its control through the deployment of about 100 000 troops. It has also engaged in a substantial program of settlement of Moroccans in Western Sahara.

[24] In 1988, the PF and Morocco agreed in principle to a UN settlement proposal which postulated a cease-fire and the holding of a referendum to enable the indigenous people of Western Sahara to choose between independence and integration into Morocco.

[25] The settlement plan was refined over the following years. In April 1991, the UN Security Council approved the settlement plan, established the UN Mission to the Referendum in Western Sahara (MINURSO) and established a time-table for the transitional period preceding the referendum.

[26] The first MINURSO observers arrived in El Aauin in September 1991. On 6 September 1991, the cease-fire was announced and military operations by both sides were stopped.

[27] The process of identifying who would vote in the referendum was painfully slow, stalling completely from time to time. It was only completed in December 1999. Eventually, the entire process ground to a halt. Morocco then said that it was unwilling to proceed with a referendum that offered the choice of independence, proposing instead that Western Sahara be integrated into Morocco as an autonomous zone.

[28] Various alternatives to the agreed settlement plan have been proposed over the years but not accepted by one or the other of the protagonists. Nearly 16 years

after the cease-fire, no referendum has been held. A new round of negotiations is set to commence soon.

### The applicable international law

[29] The historical process of the colonisation of Western Sahara, its abandonment by Spain and its occupation by Morocco has been outlined above. In this section of the judgment, we shall consider the international law that applies in respect of the right to self-determination of the people of Western Sahara, the position of Morocco in respect of Western Sahara and the position in respect of its natural resources and their exploitation.

[30] Before doing so, it is necessary to comment on the law applicable in this case and the place of international law in South African law.

[31] At its core, this is a case that concerns the ownership of the cargo aboard the MV 'NM Cherry Blossom', albeit that at this stage, the central enquiry is whether the SADR and the PF have established a prima facie right to the cargo, which may even be open to some doubt.

[32] In order to engage with that issue, it is necessary to consider international law because rules of international law (as well as judicial decisions) have determined the status of Western Sahara, the status of Morocco in relation to Western Sahara, the ownership of Western Sahara's natural resources and the conditions under which they may be exploited.

[33] Section 232 of our Constitution provides:

'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

### *Western Sahara: the right to self-determination*

[34] In terms of article 73 of the UN Charter, colonial powers undertook to develop self-government in the territories they administered. The Charter also affirmed the principle of self-determination of peoples.<sup>1</sup> In 1963, the UN added Western Sahara to its list of non-self-governing territories. The effect of this designation was to ‘confer’ the right of self-determination on its people. Dugard, writing in 1994, stated that while the International Covenant on Civil and Political Rights affirms that all people have this right, ‘it appears that customary international law recognises such a right only in respect of territorial units that have been designated as non-self-governing territories by the United Nations’.<sup>2</sup>

[35] On 14 December 1960, the UN General Assembly adopted resolution 1514 (XV) titled the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>3</sup> The effect of the resolution was to outlaw colonialism.<sup>4</sup> It proclaimed ‘the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations’.<sup>5</sup> To this end, it provided:<sup>6</sup>

‘Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, colour or creed, in order to enable them to enjoy complete independence and freedom.’

[35] In 1965, the UN General Assembly called upon Spain to decolonise Western Sahara and to enter into negotiations in order to do so. Spain declared itself willing to do so and to apply ‘the principle of self-determination’. UN General Assembly resolution 2229 (XXI) of 20 December 1966 re-affirmed the ‘inalienable right of the

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<sup>1</sup> UN Charter, articles 1(2) and 55. See too article 1(1) of the International Covenant on Civil and Political Rights.

<sup>2</sup> Dugard *International Law: A South African Perspective* at 76. This statement does not appear in the fourth edition of Dugard’s book. If anything, in the years between the first and fourth editions, the right to self-determination appears to have been more firmly and broadly entrenched as a right recognised by customary international law and not only in the context of decolonisation. See generally, Dugard *International Law: A South African Perspective* (4 ed) at 99-103. We shall refer to this work as ‘Dugard (4 ed)’.

<sup>3</sup> Of the nine countries who abstained in the adoption of the resolution, Spain was one. (Another was South Africa.) See Dugard (4 ed) at 94 (note 83).

<sup>4</sup> Dugard (4 ed) at 94.

<sup>5</sup> Preamble.

<sup>6</sup> Article 5.

peoples of . . . Spanish Sahara to self-determination in accordance with General Assembly resolution 1514 (XV).<sup>7</sup>

[36] As Spain got closer to departing from Western Sahara, Morocco and Mauritania asked the UN to consider their claims to the territory. By resolution 3292 (XXIX) of 13 December 1974, the General Assembly requested an advisory opinion from the International Court of Justice (the ICJ) on whether Western Sahara was, at the time of colonisation, a territory that belonged to no-one – *terra nullius* – and, if it was not, what were the legal ties between the territory and Morocco and Mauritania.

[37] The ICJ's advisory opinion was handed down on 16 October 1975.<sup>8</sup> It found that at the time of colonisation Western Sahara was not *terra nullius*. As to the second question, it found that while certain ties existed between the territory and Morocco and Mauritania respectively, they fell short of territorial sovereignty. It concluded:

'Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.'

[38] Morocco's occupation of Western Sahara has not affected the status of the territory: Hans Corell, the UN Under-Secretary-General for Legal Affairs, gave an opinion to the President of the UN Security Council in which he stated that Spain was not able to transfer sovereignty over the territory to Morocco and Mauritania in 1975 and that its transfer of administrative authority 'did not affect the international status of Western Sahara as a Non-Self-Governing Territory'.

[38] Resolution 34/37 (1979) of the UN General Assembly recognised the PF as the representative of the Saharawi people and confirmed their 'inalienable right' to self-determination and independence.

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<sup>7</sup> Article 1.

<sup>8</sup> *Western Sahara Advisory Opinion* [1975] ICJ 12.

[39] Dugard states '[t]hat the right to self-determination is a legal right under international law is no longer seriously challenged'.<sup>9</sup> It is apparent from what we have set out above that apart from Western Sahara having been recognised as a non-self-governing territory in terms of article 73 of the UN Charter, with the concomitant recognition of the right of its people to self-determination, over a period in excess of 50 years resolution after resolution of the UN General Assembly has recognised, affirmed and re-affirmed that the people of Western Sahara indeed enjoy this right.

#### *The position of Morocco*

[40] The ICJ's judgment is clear: Morocco has no claim to sovereignty over Western Sahara. Its claim to sovereignty as a result of its occupation of the territory is incompatible with the status of Western Sahara as a non-self-governing territory. Furthermore, it acquired control of the territory by force. This, as a means of acquiring sovereignty, is contrary to customary international law.<sup>10</sup>

[41] That Morocco has no legitimate claim to sovereignty over Western Sahara was recognised in *R (on application of Western Sahara Campaign UK) v Revenue and Customs Commissioners & another*,<sup>11</sup> a case concerned with the validity of preferential trade tariffs in respect of goods classified as being of Moroccan origin that in fact emanated from Western Sahara, and a European Union and Moroccan fisheries agreement insofar as it related to the waters of Western Sahara. In considering the position of Morocco in relation to Western Sahara, Blake J held:<sup>12</sup>

'The present position is different. Morocco may claim Western Sahara to be part of its sovereign territory but the international community generally and the European Union, in particular, does not recognise that claim. Indeed, the Western Sahara is one of the few pieces of disputed territory where a claim by a neighbouring state to sovereignty has been examined by the International Court of Justice. In my judgment, Morocco's claim to the territory must be based on:

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<sup>9</sup> Dugard (4 ed) at 100.

<sup>10</sup> Dugard (4 ed) at 97.

<sup>11</sup> *R (on application of Western Sahara Campaign UK) V Revenue and Customs Commissioners & another* [2015] EWHC 2898 (Admin).

<sup>12</sup> Para 40.

- i) the pre-existing links before 1975 that it relied on its submissions to the International Court; or
- ii) the November 1975 agreement with the former colonial power; or
- iii) its military occupation in December 1975; or
- iv) a free act of self-determination by the people of Western Sahara.

However, the first basis of claim was considered and rejected by the Court in its Advisory Opinion of 16 October 1975 (*Western Sahara Advisory Opinion* ICJ Reports 1975 p.12 at [162]). The second and third bases would unambiguously conflict with the principles of the UN Charter. A colonial power cannot gift an occupied territory to a neighbouring state for some reason of diplomatic advantage, particularly where it has been directed by the UN to supervise the process whereby the 72,000 odd people of the Western Sahara should express their right to self-determination. Equally, unauthorised military occupation cannot found the basis for legitimate territorial claims. The fourth potential basis of sovereignty has not come to pass; despite long engagement by the UN no free expression of the will of the Saharawi people has yet been undertaken.’

[42] The European Court of Justice reached much the same conclusion in *Council of European Union v Polisario Front*,<sup>13</sup> a matter also concerned with an agricultural goods and fisheries agreement between the EU and Morocco that impacted on the natural resources of Western Sahara. The court held:<sup>14</sup>

‘ In view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State, including the Kingdom of Morocco, the words “territory of the Kingdom of Morocco” set out in Article 94 of the Association Agreement cannot, as the Commission maintains and as the Advocate General essentially pointed out in points 71 and 75 of his Opinion, be interpreted in such a way that Western Sahara is included within the territorial scope of that agreement.’

[43] From the above, we conclude that howsoever Morocco’s presence in Western Sahara may be described, it does not exercise sovereignty over the territory.

#### *Ownership and exploitation of natural resources*

[44] UN General Assembly resolution 1514 (XV) of 14 December 1960 had, in its preamble, affirmed that ‘peoples may, for their own ends, freely dispose of their

<sup>13</sup> *Council of European Union v Polisario Front* C-104/16 (21 December 2016).

<sup>14</sup> Para 92.

natural wealth and resources . . .'. Resolution A/1803 (XVII) of 14 December 1962, concerning Permanent Sovereignty over Natural Resources, recognised in article 1 the 'right of peoples and nations to permanent sovereignty over their natural wealth and resources' and that this right should be exercised 'in the interest of their national development and of the well-being of the people of the State concerned'. Article 7 provided:

'Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.'

[45] Hans Corell's opinion has been mentioned above in relation to the right to self-determination. He had been asked for an opinion by the President of the UN Security Council on the legality of contracts entered into by Morocco and foreign companies to permit the companies to explore for oil off the Western Saharan coast. His opinion focused not only on the legality of these exploration contracts in terms of international law but also considered the conditions under which the exploitation of natural resources in Western Sahara would be lawful. In doing so, he considered the UN Charter, UN General Assembly resolutions, the case law of the ICJ and the practice of states. Having done so, he concluded his opinion thus:

'24 The recent State practice, though limited, is illustrative of an *opinio juris* on the part of both administering Powers and third States: where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those Territories, on their behalf or in consultation with their representatives, they are considered compatible with the Charter obligation of the administering Power and in conformity with the General Assembly resolutions and the principle of "permanent sovereignty over natural resources" enshrined therein.

25 The foregoing legal principles established in the practice of States and the United Nations pertain to economic activities in Non-Self-Governing Territories, in general, and mineral resource exploitation, in particular. It must be recognised, however, that in the present case, the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as yet accrued. The conclusion is, therefore, that, while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western

Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.’

[46] By resolution 61/123 of 14 December 2006, the General Assembly re-affirmed the ‘right of peoples of Non-Self-Governing Territories to self-determination’ and ‘their right to the enjoyment of their natural resources and their right to dispose of those resources in their best interest’. Article 8 recognised the ‘permanent sovereignty of the peoples of the Non-Self-Governing Territories over their natural resources’ and article 9 urged administering powers to ‘take effective measures to safeguard and guarantee the inalienable right of the peoples of Non-Self-Governing Territories to their natural resources and to establish and maintain control over the future development of those resources’.<sup>15</sup>

[47] Flowing from the resolutions that have consistently recognised the right of peoples of non-self-governing territories to sovereignty over the natural resources of their territories, the UN has developed a legal framework setting conditions in terms of which natural resources may lawfully be exploited. In essence, following the Corell opinion, administering powers may only allow the exploitation of natural resources on behalf of the peoples of a territory if to do so will be for the benefit of the peoples of that territory or in consultation with their representatives.

[48] OCP and Phosboucraa do not claim to have mined the phosphate in Western Sahara with the consent of the people of the territory. They do not and cannot claim to do so on behalf of its people. Their claim to mine phosphate for the benefit of the people is disputed by the SADR and the PF: as most of the Sahrawi people live to the east of the berm or in refugee camps in Algeria, those who may benefit from the mining of phosphate are not the ‘people of the territory’ but, more likely, Moroccan settlers.

Have the requirements of an interim interdict been established?

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<sup>15</sup> See too UN General Assembly resolution 71/103 of 6 December 2016, entitled Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories.

[49] An applicant for an interim interdict is, generally speaking, required to establish four elements. They are: (a) a prima facie right, which may even be open to some doubt; (b) an apprehension of irreparable harm if the interdict is not granted; (c) a balance of convenience in favour of the grant of the interdict; and (d) the absence of any other satisfactory remedy.<sup>16</sup> As the SADR and the PF apply for an interim interdict pending a vindicatory action, they ‘need not allege irreparable loss inasmuch as there is a presumption, which may be rebutted by the respondent, that the injury is irreparable’ and nor need they show that they have no other satisfactory remedy.<sup>17</sup>

[50] The proper approach to determining whether an applicant for an interim interdict has crossed the threshold by establishing a prima facie right which may be open to some doubt was set out by Clayden J in *Webster v Mitchell*<sup>18</sup> as follows: ‘The use of the phrase “prima facie established though open to some doubt” indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to “some doubt”. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.’

[51] The SADR and the PR have established on a prima facie basis that, to use the terminology of UN General Assembly resolutions, sovereignty over the cargo of

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<sup>16</sup> *Tshwane City v Afriforum & another* 2016 (6) SA 279 (CC) para 49. See too *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1186-1187; *Spur Steak Ranches Ltd & others v Saddles Steak Ranch, Claremont & another* 1996 (3) SA 706 (C) at 714B-C.

<sup>17</sup> *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd & others* 2003 (3) SA 268 (W) para 28; *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 813B-C; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 384F-G; *Tshwane City v Afriforum* (note 16) paras 146-147 (Froneman and Cameron JJ). See too Van Loggerenburg *Erasmus: Superior Court Practice* (2 ed) (Vol 2) at D620-21.

<sup>18</sup> Note 16 at 1189. See too *Spur Steak Ranches Ltd & others v Saddles Steak Ranch, Claremont & another* (note 16) at 714E-H.

phosphate is vested in the people of Western Sahara. In other words, the people of Western Sahara own the cargo. The defence on the merits that OCP and Phosboucraa have raised is that they mined and sold the phosphate in accordance with the UN framework for the lawful exploitation of the natural resources of a non-self-governing territory. But this averment does not stand undisputed: the SADR and the PF state that the phosphate was exploited without consultation with the people of Western Sahara, without their consent and that they do not and will not benefit from its exploitation. On the test set out in *Mitchell v Webster*, it seems to us, the threshold has indeed been crossed – a prima facie right to ownership of the phosphate, which may be open to some doubt, has been established by the SADR and the PF.

[52] We turn now to the balance of convenience. By this is meant ‘the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted’.<sup>19</sup> It is no doubt so that great inconvenience and cost will be occasioned for the respondents by the interdict being granted. That can, however, be allayed to an extent by the furnishing of security. On the other hand, if the MV ‘NM Cherry Blossom’ sails from Algoa Bay, that will, for all practical purposes, spell the end of the proposed vindicatory action. In these circumstances, it seems to us, the balance of convenience favours the SADR and the PF.

#### The non-justiciability defences raised by OCP and Phosboucraa

[53] OCP and Phosboucraa found their opposition to the confirmation of the rule *nisi* upon two separate but interrelated grounds. On the basis of each of these grounds it is contended that the applicants’ proposed vindicatory action is non-justiciable by a domestic South African court. It is submitted that the issue of justiciability of the envisaged vindicatory action must be determined at this stage of the proceedings and that the court ought to discharge the rule.

[54] The two grounds pleaded are, first, the act of state doctrine which is a common law ground of non-justiciability and, secondly, the principle of state

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<sup>19</sup> *Olympic Passenger Service (Pty) Ltd v Ramlagan* (note 17) at 383F-G.

immunity, which is a customary international law rule incorporated in our statutory law by virtue of s 2 of the Foreign State Immunities Act.

[55] The two grounds are, to a limited extent, interrelated. Thus, both have as foundation the principle of the sovereign independence and equality of states. That principle finds its expression in the concept of comity of nations, a foundational concept in the conduct of South Africa's international relations.

[56] The act of state doctrine and state immunity are, nonetheless, distinct grounds upon which the justiciability of a suit is to be determined. In essence, a claim to state immunity, if successful, has the effect that a domestic court does not have jurisdiction to adjudicate the matter before it, whereas reliance upon the act of state doctrine concerns the justiciability of the suit before the domestic forum notwithstanding its jurisdiction to adjudicate on the matter before it. For this reason we consider it appropriate to first deal with the claim to state immunity before addressing the defence founded upon the act of state doctrine. Before turning to consideration of the relevant legal principles it is appropriate to outline briefly those facts which are common cause between the parties or at least not in dispute and which are relevant to the non-justiciability defences.

[57] The first is that the phosphate cargo at issue in this matter was mined at the Boucraa mine situated in Western Sahara and outside of the international borders of Morocco. The SADR claims sovereignty over territory where the mine is situated and in respect of which the Saharawi people, represented by the PF, claim a right of self-determination. The SADR and Morocco are both recognised as states by South Africa.

[58] Morocco exercises *de facto* administrative control over that portion of the 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 to the portion of the territory of Western Sahara under Moroccan control is the subject of dispute and, as the historical outline set out above indicates, is at the heart of the dispute as to the exercise of the right to self-determination by the Saharawi people.

[59] OCP and Phosboucraa are corporate bodies with separate legal existence from the state of Morocco. They operate the Boucraa mine in accordance with Moroccan law, having been granted rights to do so in accordance with Moroccan law. Both claim that the exploitation of the mineral accords with the UN framework governing the exploitation of resources in a non-self-governing territory.

### *State immunity*

[60] State immunity is a rule of international law which serves to preclude a state or its representatives from being sued or prosecuted in foreign courts. It accordingly precludes a domestic court from exercising adjudicative and enforcement jurisdiction in matters in which a foreign state is a party.<sup>20</sup>

[61] In *Minister of Justice and Constitutional Development & others v Southern Africa Litigation Centre & others*<sup>21</sup> (the *Al Bashir* judgment) the Supreme Court of Appeal set out the principle as it applies in South African law as follows:

‘This immunity is available when it is sought to implead a foreign state, whether directly or indirectly, before domestic courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent. This is known as immunity *ratione materiae* (immunity attaching to official acts). In addition, heads of state and certain other high officials of state enjoy immunity *ratione personae* (immunity by virtue of status or office held at any particular time). This form of immunity terminates when the individual demits or is removed from office. The country concerned may waive either form of immunity.’

[62] This rule of customary international law finds expression in s 2 of the Foreign State Immunities Act which provides as follows:

‘(1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this act or in any proclamation issued thereunder.

<sup>20</sup> Crawford *Brownlie’s Principles of Public International Law* (8 ed) at 487-8.

<sup>21</sup> *Minister of Justice and Constitutional Development & others v Southern African Litigation Centre & others* 2016 (3) SA 317 (SCA) para 66.

(2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question.’

[63] Sub-section 2 recognises the concept of indirect impleading as articulated in the *Al-Bashir* judgment. As to what constitutes indirect impleading there is no direct South African authority on the point. In order to determine what constitutes indirect impleading for the purposes of application of the principle, regard must be had to customary international law and, in particular, the manner in which the principle is interpreted and applied.

[64] In terms of s 232 of the Constitution customary international law is automatically incorporated into South African law unless it is inconsistent with the Constitution or an Act of Parliament. Section 233 of the Constitution further provides: ‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’

[65] Reference to customary international law does not however involve a development of that law. As was stated in *Al-Bashir*<sup>22</sup>, ‘Development of customary international law occurs in international courts and tribunals, in the contents of international agreements and treaties and by general acceptance by the international community of nations in their relations with one another as to the laws that govern that community. However tempting it may be to a domestic court to seek to expand the boundaries of customary international law by domestic judicial decision, it is not in my view permissible for it to do so.’

[66] In *Belhaj & others v Straw & others; Rahmatullah v Minister of Defence & others*<sup>23</sup> (*Belhaj*) the Supreme Court of the United Kingdom was called upon to consider defences based on a claim to state immunity and the doctrine of a foreign act of state. The defences were raised in two cases in which the claimants sought to establish liability in tort for the alleged complicity of officials of the government of the United Kingdom in procuring the claimants’ detention by Malaysian officials in Kuala

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<sup>22</sup> Note 21 para 74.

<sup>23</sup> *Belhaj & others v Straw & others; Rahmatullah v Minister of Defence & others* [2017] UKSC 3 (17 January 2017).

Lumpur, by Thai and United States agents in Bangkok and their unlawful rendition to Libya where the claimants were subjected to treatment amounting to torture.

[67] The Supreme Court dismissed the plea of state immunity on the basis that the foreign states (Malaysia, Thailand, the United States and Libya) were not impleaded and their legal position was not affected either directly or indirectly by the claims in tort advanced against officials of the government of the United Kingdom. In arriving at this conclusion, the court considered what is meant by indirect impleading. Lord Sumption noted:<sup>24</sup>

‘The second case comprises actions in which a state, without being a party, is said to be “indirectly impleaded” because some relevant interest of that state is directly engaged. In England, the only cases in which a foreign state has been held to be indirectly impleaded in this way are those involving the assertion of some right over property of that state situated within the jurisdiction of the English courts.’

[68] The rationale for this is that both English and international law treat a claim against a state’s property as being tantamount to a claim against the state.<sup>25</sup> The court was however called upon to address an argument supporting an extension of the ambit of state immunity. The appellants there argued that a state is to be treated as being indirectly impleaded in ‘any case where the issues would require the court to adjudicate on its legal rights or liabilities, albeit as between other parties’.<sup>26</sup>

[69] In support of this argument reliance was placed on an analogous approach in matters which served before the ICJ in two cases, namely *Monetary Gold Removed From Rome*<sup>27</sup> (*Monetary Gold*) and *East Timor (Portugal v Australia)*<sup>28</sup> (*East Timor*). Reliance was also placed on the terms of the UN Convention on Jurisdictional Immunities of States and their Property (2004).

[70] In the present matter similar arguments were advanced in support of a finding that the rights and interests of Morocco are indirectly impleaded in the envisaged

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<sup>24</sup> *Belhaj* (note 23) para 186.

<sup>25</sup> *Belhaj* (note 23) para 191.

<sup>26</sup> *Belhaj* (note 23) para 191.

<sup>27</sup> *Monetary Gold Removed from Rome* [1954] ICJ Rep 19.

<sup>28</sup> *East Timor (Portugal v Australia)* [1995] ICJ Rep 90.

vindictory action to be brought by the applicants. It is accordingly instructive to consider the reasoning adopted in *Belhaj* in relation to these arguments.

[71] Neither *Monetary Gold* nor *East Timor* concerned questions of state immunity. In *Monetary Gold* the ICJ was concerned with a claim brought by the United Kingdom to apply Albanian gold stored at the Bank of England towards satisfying a judgment which it had obtained against Albania before the ICJ. Italy prosecuted a competing claim to apply the same gold in satisfaction of its claims against Albania although it did not have a judgment in its favour. The ICJ declined to adjudicate the dispute as between the United Kingdom and Italy because it could not do so without deciding that Italy's claims against Albania were well-founded. This it could not do in litigation to which Albania was not a party, in circumstances in which Albania's legal interests formed the subject matter of the dispute to be determined. The court stated:<sup>29</sup>

'Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third state, the court cannot, without the consent of that third state, give a decision on that issue binding upon any state, either the third state, or any of the parties before it.'

[72] The *East Timor* case concerned a claim by Portugal, the administering authority of the territory then under Indonesian occupation, that Australia, by entering into a treaty with Indonesia regarding the exploitation of minerals in the territory of East Timor, had acted unlawfully and in violation of the obligation to respect Portugal's administering authority and in violation of the right of the people of East Timor to self-determination.

[73] The ICJ declined to resolve the claim on the basis that Indonesia was not a party to the proceedings. The court held:<sup>30</sup>

'Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right erga omnes.'

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<sup>29</sup> *Monetary Gold* (note 27) at 33.

<sup>30</sup> *East Timor* (note 28) para 29.

[74] In *Belhaj* Lord Sumption found that the principle to which expression was given in these two cases did not, in the context of the claim to state immunity, found a basis for finding that a foreign state was impleaded merely because that state's rights and liabilities were in issue. He said:<sup>31</sup>

'Both cases had two features which in combination account for the outcome. First, the rights or liabilities of the non-party state were the very subject matter of the dispute between the parties. Secondly, although the judgment would have bound only the parties, each of the parties would have been bound to deal with the non-party in accordance with it. Even on the assumption (and it is a large one) that the principle applied in these cases can readily be transposed to the domestic law plane, the mere fact that the rights or liabilities of the non-party were in issue would not be enough.'

[75] In this matter the SADR and the PF seek by way of a vindicatory action to assert title to property as against OCP and Phosboucraa. The latter in turn assert title on the basis that the phosphate was lawfully mined at Boucraa in accordance with Moroccan law which applies and by reason of their compliance with the UN framework which regulates the exploitation of minerals in non-self-governing territories. No legal right or interest in the phosphate cargo is asserted on behalf of the state of Morocco. Indeed it is common cause that Morocco has no legal right in and to the cargo. The basis upon which it is asserted that the legal rights and interests of Morocco are impleaded is that the court hearing the action will be required to determine whether the Moroccan law under which OCP and Phosboucraa claim a right to title is valid.

[76] It is in this context that OCP and Phosboucraa rely upon the 2004 Convention on Jurisdictional Immunities as establishing a broad basis upon which state immunity may be invoked.

[77] As already indicated a similar argument was considered in the *Belhaj* case. The court accepted, per Lord Sumption<sup>32</sup>, that the Convention although not binding by reason of the fact that it has yet to be ratified by the required number of states,

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<sup>31</sup> *Belhaj* (note 23) para 193.

<sup>32</sup> *Belhaj* (note 23) para 194. But see Lord Mance at para 25.

represents an ‘authoritative statement . . . on the current understanding of the limits of state immunity in civil cases’.<sup>33</sup>

[78] It was, however, noted that the Convention, by virtue of article 1, ‘applies to the immunity of a state and its property from the jurisdiction of the courts of another state’.<sup>34</sup> Article 6 (2) provides:

‘A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.’

[79] Lord Sumption considered that the words ‘interests or activities’ in article 6(2) (b) are limited by their context and that the article is concerned only with proceedings which seek to ‘affect’ the rights, interests or activities of another state. He expressed the view that it would be difficult to envisage a case where this did not relate to property within the jurisdiction of the domestic court.<sup>35</sup> He accordingly considered that the language of article 6(2) (b) ought to be construed in the context of the assertion of the immunity of the state *eo nomine* and in its property.

[80] Lord Mance adopted a similar restrictive interpretation of the language of the Convention, with reference to its drafting history:<sup>36</sup>

‘The drafting history locates article 6 firmly in the context of the case law concerning the arrest of vessels, such as *The Parlement Belge*, and property in which states claim an interest, such as *Dollfus Mieg* : see eg the Report of the International Law Commission (Yearbook 1991, Vol II, (2), pp 23- 25). The Report also explains the focus of article 6 as avoiding the exercise of State jurisdiction in a way which would put any foreign sovereign in the position of having to choose between being deprived of property or otherwise submitting to the jurisdiction; and it explains the words “to affect” as having been introduced to replace the prior draft wording “to bear the consequences of a determination by the court which may affect”, in order to avoid “unduly broad interpretations” of article 6(2)(b). Even so, concerns

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<sup>33</sup> He cited Lord Bingham in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2007] 1 AC 270 para 8.

<sup>34</sup> *Belhaj* (note 23) para 194.

<sup>35</sup> *Belhaj* (note 23) para 194.

<sup>36</sup> *Belhaj* (note 23) para 26.

were expressed at the drafting stage by both Australia and the United States about the potential width of article 6(2) (b): see the Report of the Secretary General of the United Nations A/47/326 of 4 August 1992. But academic commentators have concluded that any uncertainty in its scope should be addressed by recognizing that “‘interests’ should be limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings”: Fox and Webb, *The Law of State Immunity*, 3<sup>rd</sup> ed (2015 revision), p 307; and O’Keefe, Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (2013), pp 110-111, indicating that some specifically legal effect should be required as distinct from social, economic or political effect.’

[81] In *Belhaj* no such legal effect was found to flow from the suit pursued by the claimants and accordingly the claim to state immunity was dismissed.<sup>37</sup> Lord Sumption nevertheless left open the question as to whether litigation between parties might directly affect interests of another state other than interests in property. In summarizing his assessment of the limits of a claim to state immunity, he commented as follows:<sup>38</sup>

‘The essential point about the property cases is that they have the potential directly to affect the legal interests of states notwithstanding that they are not formally parties. In the case of an action in rem, this is obvious. The court’s decision binds all the world. But although perhaps less obvious it is equally true of an action in personam, where the court is asked to recognise an adverse title to property in someone else or award possession of property as of right to another. As Lord Porter and Lord Radcliffe put it in *Dollfus Mieg* (pp 613, 616) the law cannot consistently with immunity of states require a state to appear before a domestic court as the price of defending its legal interests. None of this reasoning, however, applies in a case where the foreign state has no legal interest to defend because the court’s decision in its absence cannot directly affect its legal interests. I would not altogether rule out the possibility that litigation between other parties might directly affect interests of a foreign state other than interests in property. But, as I have observed, it is not easy to imagine such a case. The appellant’s argument is in reality an attempt to transform a personal immunity of states into a broader subject immunity, ie, one which bars the judicial resolution of certain issues even where they cannot affect the existence or the exercise of a state’s legal rights.’

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<sup>37</sup> See the judgment of Lord Mance at para 31 and that of Lord Sumption at para 197.

<sup>38</sup> *Belhaj* (note 23) para 196.

[82] It is to this possibility that we must now turn. As already indicated OCP and Phosboucraa would have it that the determination by a South African domestic court that title in the phosphate cargo vests in the SADR necessarily implies that the title conferred upon OCP and Phosboucraa by Morocco is invalid, and therefore that the legal rights of Morocco are thereby affected.

[83] It is not altogether clear on what basis this is asserted. Morocco is not a party to the proceedings. It is accordingly not bound by any finding or judgment to be made in relation to the issues between the parties. It has no proprietary interest in the matter which the SADR and the PF seek to prosecute by way of the vindicatory action. 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. They furthermore assert that the exploitation of minerals within a non-self-governing territory is not *per se* illegal provided it complies with conditions determined by the UN framework governing the issue.

[84] A finding on these issues by a South African court applying South African law, which includes customary international law by virtue of s 232 of the Constitution, cannot in any legal sense affect the rights of Morocco at international law. If that were so then in every instance in which a South African court made a determination as to whether or not to accept and therefore apply foreign law in relation to a matter before it, it would thereby be affecting the rights of the relevant foreign state. In *Van Zyl & others v Government of the Republic of South Africa*<sup>39</sup> Patel J approved a dictum by Lord Nichols in *Kuwait Airways Corporation v Iraqi Airways Company*<sup>40</sup> where he stated that '[i]n appropriate circumstances it is legitimate for an English Court to have regard to the content of international law in deciding whether to recognize a foreign law'. A finding by a domestic forum that OCP's and Phosboucraa's exploitation of minerals in Western Sahara does not comply with the UN framework and is illegal also can have no effect upon the legal rights of Morocco. It is after all OCP's and Phosboucraa's case that they conduct their activities as incorporated legal entities wholly separate from the state of Morocco.

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<sup>39</sup> *Van Zyl & others v Government of the Republic of South Africa* [2005] 4 All SA 96 (T) para 74.

<sup>40</sup> *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19; [2002] 2 WLR 1353 para 26.

[85] It may well be so that such a determination carries with it an affect upon the interests of Morocco but such affect falls within the realm of political or moral interests and cannot have legal affect. It follows therefore that the claim to state immunity cannot be upheld.

*The act of state doctrine*

[86] Unlike state immunity, which is a rule of public international law, the doctrine of a foreign act of state is a municipal law rule which derives from common law principles as developed in Anglo-American courts. It is founded upon the principle of mutual respect for equality of sovereign states<sup>41</sup>, the principle of comity.

[87] In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa*<sup>42</sup> it was held:

‘The basis of the application of the act of State doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA and England. The comity of nations is just as applicable to South Africa as it is to other sovereign States. The judicial branch of government ought to be astute in not venturing into areas where it would be in a judicial no-man’s land. It would appear that in an appropriate case, as an exercise of the Court’s inherent jurisdiction to regulate its own procedure, the Court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it having jurisdiction to do so, in view of the involvement of foreign states therein.’

[88] This was approved in *Van Zyl v Government of the Republic of South Africa*<sup>43</sup> where it was stated that ‘[c]ourts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign states’.

[89] The ambit of the doctrine and its application in this matter elicited thorough and detailed submissions from counsel for the parties. For reasons which will

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<sup>41</sup> See *Belhaj* (note 23) para 199.

<sup>42</sup> *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 334D-F.

<sup>43</sup> *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) para 5.

become apparent we find ourselves constrained not to address these matters, however tempting it is to engage with them.

[90] The applicant argued that a decision regarding the justiciability of the dispute at this interlocutory stage would be premature. It was argued that circumstances are similar to those that applied at the stage of the first judgment in *Kuwait Airways Corporation v Iraqi Airways Company & others*<sup>44</sup> (*Kuwait 1*) where Lord Goff held that it would be more appropriate that an invocation of that principle should be considered only after the issues in the action had been properly defined on the pleadings, rather than at a preliminary stage. The case was remitted to the Commercial Court with directions as to service so that the trial judge could decide the issue of justiciability, once the particular issues had been precisely determined on the pleadings.

[91] Counsel for OCP and Phosboucraa argued that the circumstances of *Kuwait 1* are not similar to the present. In that matter the issue had come before the House of Lords in circumstances where a default judgment had been obtained on a writ and where the claims to both state immunity and the application of the act of state doctrine had not been adumbrated on the pleadings. It was also argued that in any event, in the present matter, the parties had filed extensive affidavits in which the basis of the SADR's claim to ownership to be prosecuted in the envisaged vindicatory action is fully set out. OCP and Phosboucraa had filed a detailed answer thereto, in which the issues of state immunity and the application of the act of state doctrine are set out. The submission was that the issues as presently defined would not change between now and the envisaged trial and that, at best, the relevant evidence may differ. It was therefore submitted that this court, constituted as it is, would be in precisely the same position to determine the legal issues at stake and would, given its composition as a full court, have a decided advantage over a presiding trial judge who will hear the matter in due course.

[92] It is indeed so that the issues have been set out in considerably more detail than in *Kuwait 1*. Nevertheless, the salutary principle articulated in that matter

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<sup>44</sup> *Kuwait Airways Corporation v Iraqi Airways Company & others* [1995] 3 All ER 754 (HL) at 715d.

remains of application, namely that a court dealing with an interlocutory proceeding, particularly one such as the present which involves significant issues of considerable complexity, will only decide such issues where it is strictly necessary to do so and where the issues upon which the decision is required have been fully and precisely determined in the pleadings between the parties.

[93] As to the first aspect, the submission was advanced on behalf of OCP and Phosboucraa, relying on a dictum in *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser*<sup>45</sup> that, to quote that judgment, ‘a legal issue should only be decided at the interlocutory stage of the proceedings if it would result in the final disposal of either the matter as a whole or a particular aspect thereof’. It was submitted the present is such a case.

[94] There is no doubt that a decision in relation to the justiciability of the matter may finally dispose of the entire matter if it is decided that the case is not justiciable, or an important part of the proceedings if the converse is decided. However, that issue can only be decided in circumstances where the issues between the parties are clearly and fully ventilated on the pleadings.

[95] OCP and Phosboucraa assert that the broad definition of the issues in the papers is sufficient to engage the question of a foreign act of state. In our view that is not so. A court which is called upon to exercise restraint or to refrain from adjudicating a matter in respect of which it otherwise has jurisdiction will do so with caution and then only in circumstances where it is necessary to determine the particular issue engaged by a foreign act of state.<sup>46</sup> The scope and application of the principle of restraint is a matter for determination at domestic law. There is no public international law principle which obliges a domestic court to refrain to adjudicate a matter involving a foreign act of state in respect of the subject matter over which the court otherwise has jurisdiction.<sup>47</sup>

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<sup>45</sup> *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) para 9.

<sup>46</sup> *WS Kirkpatrick & Co Inc v Environmental Tectonics Corporation International* (1990) 493 US 400 (cited in *Belhaj* (note 23) para 54) where the US Supreme Court stated that ‘Act of state issues only arise when a court *must decide* – that is, when the outcome of the case turns upon the effect of official action by a foreign sovereign’.

<sup>47</sup> *Belhaj* (note 23) para 200.

[96] This court, bound as it is to apply the Constitution as supreme law and to give effect to the spirit, purport and objects of the Constitution, will be mindful of the fundamental rights contained therein, particularly the right of access to the courts enshrined in s 34, in determining the circumstances in which and the ambit of the exercise of its discretion to decline adjudication in circumstances where an act of a foreign sovereign is engaged.<sup>48</sup>

[97] A court will accordingly require precision in definition of the particular issues to be determined. In the present matter it is not entirely clear precisely what the act of a foreign state is that OCP and Phosboucraa rely upon which may render the matter non-justiciable. It is certainly not clear at this stage precisely what issue the trial court may be called upon to adjudicate. OCP and Phosboucraa contend for title upon the basis that Moroccan law applies in the territory and that their mining operations are lawful in accordance with that law. That may perhaps be the necessary issue to determine. Equally, the question of compliance with the UN framework regulating the exploitation of mineral resources in a non-self-governing territory, upon which OCP and Phosboucraa also rely, may prove to be the central issue for adjudication. Whether that is so will depend upon the full and proper ventilation of the issues on the pleadings in the vindicatory action. If indeed the latter issue is the central dispute to be determined, then it is difficult to conceive on what basis it could be contended that the dispute is non-justiciable before this court.

[98] It follows from this that the question of the justiciability of the dispute ought not now to be decided. In these circumstances it would be imprudent to express any view in regard to either the nature or ambit of the doctrine of a foreign act of state as it applies in our law.

[99] OCP and Phosboucraa also argued that the particular context, namely the ongoing UN Security Council process in relation to the resolution of the international law status of Western Sahara serves as a further reason why the matter ought now to be determined. That context, however, does not in and of itself demand determination of a matter that the court can otherwise not decide at this stage.

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<sup>48</sup> See Dugard (4 ed) at 79.

[100] We are mindful of the complexity of the issues raised in this matter and the obvious fact that the issues to be addressed in achieving a resolution of the international disputes in relation to the territory of Western Sahara are matters that concern the international community at the highest level. Nevertheless, this court is faced not with the broader political question but with the rather more prosaic question as to the regulation of its procedure to enable litigating parties access to a judicial forum in which they can resolve a legal dispute. There is no reason of high policy engaged in this matter which would preclude the court from doing so.

### Conclusion

[101] It follows from what is set out above that the claim as to non-justiciability on the basis of an act of foreign state is to be determined by the forum hearing the vindicatory action in due course. As already indicated the claim as to state immunity cannot succeed. In these circumstances, and having found that the SADR and the PF have made out a case for an interim interdict there is no basis not to confirm the rule.

[102] In paragraph 3 of the Order issued by Revelas J on 3 May 2017 the second respondent was directed to provide the sheriff with copies of certain documents, including all extant charterparties, the mate's receipt(s) in respect of the cargo and the bill(s) of lading in respect of the cargo. That order is not subject to confirmation. However, the rule nisi provided for the delivery of said documents by the sheriff to the applicants. It is therefore necessary to consider whether that order should be confirmed.

[103] The information is sought in terms of the common law right of access to information. In *Stuart v Ismail*<sup>49</sup> it was held that a court has the power to order the general secretary of a trade union to provide to a member the names and addresses of the members of the executive committee to enable legal proceedings to be

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<sup>49</sup> *Stuart v Ismail* 1942 AD 327.

instituted against the union. In *Ex parte Matshini & others*<sup>50</sup> a full bench of this court held (in the context of an application for an Anton Piller order to secure electric-shock equipment in two police stations) that there was no reason why ‘the procedure should be limited to the disclosure of names’, pointing out that in *Hart v Stone*<sup>51</sup> the disclosure of facts had been ordered.<sup>52</sup>

[104] The basis of this power is the court’s inherent jurisdiction ‘to prevent a denial of justice because of a procedural difficulty facing the applicant’.<sup>53</sup> An applicant is required to show that, prima facie, he or she has a right of action against the respondent, that the action cannot properly be brought without the information and that it is within the power of the respondent to supply the information.<sup>54</sup>

[105] We are of the view that these three requirements have been met by the SADR and the PF.

[106] We were provided with a draft order, discussed between the parties, in which provision is made for certain forms of service in the vindicatory action and it is accordingly appropriate that an order be made in the terms proposed.

[107] In the result we make the following order:

1. The first to fifth respondents be interdicted and restrained from taking the cargo of phosphate presently on board the “NM Cherry Blossom” (“**the cargo**”) from the jurisdiction of the Court in Algoa Bay, pending the determination of the applicants’ action for, *inter alia*, delivery of the cargo (“**the action**”), save in the event of suitable security being furnished to the applicants in terms of paragraph 4 below.

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<sup>50</sup> *Ex parte Matshini & others* 1986 (3) SA 605 (E).

<sup>51</sup> *Hart v Stone* (1883) 1 BAC 309.

<sup>52</sup> At 611F-G. See too *Van Zyl v Wilson & another* ECG 4 December 2015 (case no. 5772/15) unreported.

<sup>53</sup> *Ex parte Matshini & others* (note 48) at 610I-J.

<sup>54</sup> *Colonial Government v WH Tatham* (1902) 23 NLR 153 at 159; *Ex parte Matshini & others* (note 48) at 610B-D, 611C-D.

2. The sheriff is directed and authorised to attach the cargo pending the determination of the action.
3. The sheriff is directed and authorised to remove the ship's registration documents and trading certificates.
4. The first to fifth respondents shall be released from the above interdict, and the sheriff shall release the cargo from attachment and return the registration documents and trading certificates, in the event that suitable security is furnished to the applicants for their claim, which is from a first-class South African bank or other equivalent financial or insurance institution, and contains at least the following provisions:
  - 4.1 a submission from the first to fifth respondents to the jurisdiction of the South African courts for the purposes of the action; and
  - 4.2 in the event that the applicants obtain a final order for the delivery and/or possession of the cargo, the guarantor shall pay to the applicants the market value of the cargo in Port Elizabeth as of the date of this order.
5. In the event that the parties are not able to agree on the terms of the security, including the market value of the cargo, they are given leave to apply to this Court for directions.
6. In the event that security is given to obtain the release of the cargo from the attachment, then that security and the proceeds thereof shall, for all purposes, be deemed to be the cargo, and the cargo shall be deemed to be under attachment in the jurisdiction of this Court at the instance of the applicants.
7. The sheriff shall provide the applicants' attorneys with copies of all the documents obtained in terms of paragraph 3 of the order dated 1 May 2017.
8. Leave be and is hereby given to the applicants to sue the first to fifth respondents for delivery of the cargo and further relief.
9. Summons shall be served on the respondents as follows:
  - 9.1 On the owner of the "NM Cherry Blossom" and the second respondent, by service on Edward Nathan Sonnenbergs Inc, 1 Richefond Circle, Ridgeside Office Park, Umhlanga, Durban (attention K Pitman);
  - 9.2 On the time charterer of the "NM Cherry Blossom", Furness Withy (Australia) Pty Ltd, by service by a legal practitioner practising in

Australia, at 12<sup>th</sup> Floor, 484 St Kilda Road, Melbourne, 3004, Victoria, Australia, alternatively, if agreement is reached in this regard, on Shepstone & Wylie, 18<sup>th</sup> Floor, 2 Long Street, Cape Town (attention E Greiner);

- 9.3 On the third respondent, by service by a legal practitioner practising in New Zealand, on Ballance Agri-Nutrients Ltd at Hewletts Road, Mount Maunganui, Tauranga, New Zealand, alternatively, and if agreement is reached in this regard, on Edward Nathan Sonnenbergs Inc, 1 North Wharf Square, Loop Street, Foreshore, Cape Town (attention M Tucker);
  - 9.4 On the fourth and fifth respondents, by service on Werksmans Attorneys, 18th Floor, 1 Thibault Square, Cape Town (attention R Driman); and
  - 9.5 On the sixth respondent, by service on the State Attorney, 29 Western Road, Central, Port Elizabeth.
10. The applicants shall issue the summons within one month of the date of this order, failing which the order shall lapse.
  11. It is recorded that insofar as the respondents agree to accept service of the summons at the South African addresses listed in paragraph 9 above, this is without prejudice to any defences they may wish to raise, including in relation to the jurisdiction of this Court (subject to any undertaking given in terms of paragraph 4.1 above).
  12. The respondents shall be given one month after service of the summons within which to enter an appearance to defend.
  13. The costs of this application, including the costs of two counsel, shall be paid by the fourth and fifth respondents.

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SM Mbenenge

Acting Deputy Judge President

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C Plasket

Judge of the High Court

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GG Goosen

Judge of the High Court

#### APPEARANCES

For the applicants: A Katz SC and D Cooke instructed by Webber Wentzel, Cape Town and Van Wyk Attorneys, Port Elizabeth

For the fourth and fifth respondents: M Du Plessis, A Coutsooudis and D Simonsz instructed by Werksmans Attorneys, Cape Town and Greyvensteins Attorneys, Port Elizabeth