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

CASE NO: 1487 / 17

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 OF THE REPUBLIC OF SOUTH AFRICA	Sixth Respondent

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APPLICANTS' HEADS OF ARGUMENT: THE RETURN DAY

INTRODUCTION

1. On 14 December 1960, the United Nations General Assembly (**"the General Assembly"**) adopted resolution 1514 (XV) entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples", in terms of which the General Assembly affirmed that peoples may, for their own ends, freely dispose of their natural wealth and resources, and declared that all people have the right to self-determination and to this end immediate steps shall be taken in non-self-governing territories to transfer all powers to the people of those territories.[1] In adopting this resolution, the General Assembly effectively outlawed colonialism.[2]

2. Two years later, on 14 December 1962, the General Assembly passed resolution 1803 (XVII) which confirmed that the permanent sovereignty over natural wealth and resources was a basic constituent of the right to self-determination.[3]

3. Shortly thereafter, in 1963, the Special Committee on Decolonisation declared Western Sahara a non-self-governing territory to be decolonised.[4]

4. Since then, all African countries have been liberated from the shackles of colonialism. All that is, but one.

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[1] Founding affidavit annexure "RSB8", record pg 130.
[2] John Dugard SC with contributions by Max du Plessis, Anton Katz SC and Arnold Pronto International Law: A South African Perspective 4th ed 2011 pg 31, Authorities Bundle Vol 1 pg 80.
[3] Founding affidavit annexure "RSB9", record pg 132.
[4] *R. (on the application of Western Sahara Campaign UK) v Revenue and Customs Commissioners* [2015] EWHC 2898 (Admin) at [13], Authorities Bundle Vol 1 pg 254. According to Dugard, domestic courts charged with international law matters do not hesitate to invoke previous decisions on international law from both international and domestic tribunals (*supra* pg 35, Authorities Bundle Vol 1 pg 80B).

5. More than half a century after the epochal events described above, power has still to be transferred to the people of Western Sahara (referred to in these heads as **"the Saharawi people"**), and they remain unlawfully deprived of access to their birthright, the natural wealth and resources of Western Sahara.

6. For this reason, Western Sahara is properly regarded as "Africa's last colony".[5] However, unlike most colonies, Western Sahara has, since 1975, been colonised not by a foreign European power, but by its northern neighbour, the Kingdom of Morocco (**"Morocco"**). In this regard, there are strong parallels between the experience of Western Sahara, and that of Namibia (occupied by South Africa) and Timor-Leste[6] (East Timore) (occupied by Indonesia).

7. The applicants have detailed some of the human rights abuses which have taken place in occupied Western Sahara.[7] For example, the UN Special Rapporteur on Torture (**"the Rapporteur"**) reported credible testimonies relating to torture and ill-treatment in the El Aauin prison, including rape, severe beating and isolation up to several weeks, particularly of inmates accused of participating in pro-independence activities.[8]

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[5] Stephen Zunes 'Western Sahara, resources, and international accountability' Global Change, Peace & Security Vol 27 No 3, 285-299, at pg 296, Authorities Bundle Vol 2 pg 374. See also founding affidavit para 74, record pg 27.

[6] See in this regard Pedro Pinto Leite 'Independence by *fiat*: a way out of the impasse – the self-determination of Western Sahara, with lessons from Timor-Leste' Global Change, Peace & Security Vol 27 No. 3, 361-376, Authorities Bundle Vol 2 pg 374.

[7] Founding affidavit paras 181-186, record pg 59-61. See also the Robert F Kennedy Alternative Report, founding affidavit annexure "RSB20", record pg 200. As to the evidential status of such reports, see *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at [123], Authorities Bundle Vol 2 pg 295, and *Tantoush v Refugees Appeal Board and Others* 2008 (1) SA 232 (TPD) at [19] and [74], where Murphy J found that it is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable agencies concerned with the protection and promotion of human rights. Authorities Bundle Vol 2, pg 314 and 315.

[8] Founding affidavit para 183, record pg 60.

8. These allegations have not been disputed by the respondents. To the contrary, OCP and Phosboucraa have put up, in answer, the recent report of the UN Secretary-General on the situation concerning Western Sahara,[9] which *inter alia* highlights the refusal of Morocco to allow the Rapporteur to return,[10] notes the Human Rights Committee's concerns about continued reports of torture and cruel, inhuman or degrading treatment perpetrated by agents of the State in Morocco and Western Sahara,[11] and records various credible sources reporting that the Moroccan authorities continued routinely to prevent or disperse gatherings in Western Sahara west of the berm, and in several instances protesters and activists were allegedly subjected to arbitrary arrest, unfair trial and imprisonment on trumped-up charges.[12]

9. In these heads of argument, we deal with the following matters:

9.1 These proceedings;

9.2 The requirements for an interdict pending a vindicatory action;

9.3 Sovereignty in Western Sahara;

9.4 The act of state doctrine;

9.5 State immunity; and

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[9] Answering affidavit annexure "OBS3", record pg 400.
[10] See para 68, record pg 411.
[11] See para 69, record pg 411.
[12] See para 73, record pg 412.

9.6 Documents on board the ship.

THESE PROCEEDINGS

10. On the morning of 1 May 2017, a small part of the natural resources of Western Sahara arrived within the jurisdiction of this Court. To wit, a cargo of phosphate extracted at the Bou Craa mine (**"the cargo"**), *en route* to Ballance Agri-Nutrients Ltd in New Zealand (**"Ballance"**), and carried on board the "NM Cherry Blossom" (**"the ship"**).

11. On the same day, the honourable Ms Justice Revelas issued a rule *nisi*, obtained on an urgent *ex parte* basis, in terms of which the respondents were restrained from removing the cargo from the jurisdiction of the court pending the return day, save in the event of suitable security being established.[13]

12. The first applicant in these proceedings is the Saharawi Arab Democratic Republic ("**SADR**"), a sovereign state, proclaimed by the second applicant (the Polisario Front) on 27 February 1976. The SADR currently controls the strip of land in the Western Sahara region, east of the berm, but claims sovereignty over the entire territory of Western Sahara.[14] (A map of Western Sahara may be found at pg 129 of the record.)

13. The Polisario Front is a national liberation movement and political organisation representing the Saharawi people.[15] This organisation has advocated for the independence of Western Sahara since the original Spanish occupation of the

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[13] Record pg 293.1-293.7.
[14] Founding affidavit para 9, record pg 13.
[15] Founding affidavit paras 22 and 84, record pg 17 and 30.

territory, and throughout its occupation by Morocco, and was recognised by the UN as representative of the people of Western Sahara in 1979 in relation to their right to self-determination under international law.[16]

14. The South African government recognises the Polisario Front as the representative of the people of Western Sahara.[17] In this regard, the courts extend a margin of appreciation to the executive in matters such as the recognition of states and governments in which it is undesirable that the state should "speak with two voices".[18]

15. The respondents have elected not to put up security, and the cargo remains on board the ship in Algoa Bay.

16. On the return day, the applicants seek confirmation of the rule *nisi*. In essence, the applicants ask that the interim interdict persist, pending the determination of an action for, *inter alia*, delivery of the cargo (**"the action"**), accompanied with certain directives regarding the conduct of the action.

17. This application is, on its face, an interlocutory application protecting property pending a vindicatory claim. Underlying the application are also issues concerning sovereignty, human rights and the rule of law, both international law and domestic law.

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[16] Founding affidavit paras 24, 117-118 and annexure "RSB15", record pg 17, 41 and 151.
[17] Founding affidavit para 27, record pg 18.
[18] Dugard *supra* pg 69-71, Authorities Bundle Vol 1 pg 83-84.

18. Confirmation of the rule is not opposed by any of the respondents (all of whom are represented by South African attorneys), save for the fourth and fifth respondents (**"OCP"** and **"Phosboucraa"**).

19. OCP and Phosboucraa, for their part, do not dispute that this Court would, in the ordinary course, have jurisdiction to determine the matter on account of the presence of the cargo within this Court's area.[19] They also do not take issue with the factual matrix which underlies the applicants' claim.

20. Instead they raise only a single narrow ground of opposition. They contend that this Court should not confirm the rule as the matter is "*not justiciable before this Court*".[20] To this end they invoke principally the act of state doctrine.[21] It is suggested that having regard to the nature of the matter, this Court should oust its own jurisdiction.

21. The question which falls for consideration in this matter therefore, is whether this Court should decline altogether to entertain the application for confirmation of the rule *nisi*.

22. For the reasons set out below, we submit that the act of state doctrine has no application in this matter, and certainly not at this interlocutory stage. This Court should accordingly exercise its jurisdiction to hear the matter.

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[19] See in this regard founding affidavit paras 57-59, record pg 23; *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) at 334B, Authorities Bundle pg 26; and The Civil Practice of the High Courts of South Africa 5th ed Vol 1 pg 80 and 107, Authorities Bundle pg 77-78.
[20] Answering affidavit para 13, record pg 367.
[21] Answering affidavit paras 63-66, record pg 384-386.

23. Before setting out the reasons for this submission, we address the requirements for an interim interdict pending a vindicatory claim, and the applicants' satisfaction of these requirements.

REQUIREMENTS FOR AN INTERDICT PENDING A VINDICATORY CLAIM

24. Generally speaking, an applicant for an interlocutory interdict must show: (a) a *prima facie* right; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) a balance of convenience in favour of the granting of the interim relief; and (d) the absence of any other satisfactory remedy.[22]

25. However, applicants for an interdict pending a vindicatory action to recover what they allege is their own property need not show that they will suffer irreparable loss if the interdict is not granted (ie requirement b). Nor need the applicants show that they have no other satisfactory remedy (ie requirement d): a person who is entitled to vindicate property in the hands of another cannot be forced by the action of that person to accept merely the value of the property.[23]

26. It follows that at this stage the applicants only need to prove (a) a *prima facie* right to delivery of the cargo and (c) a balance of convenience in their favour.

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[22] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 (W), Authorities Bundle Vol 1 pg 61-64.

[23] DE Van Loggerenberg Erasmus Superior Court Practice D6-21-22, Authorities Bundle Vol 1 pg 87-88. See also *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) at [146], Authorities Bundle Vol 1 pg 51.

A *prima facie* right to delivery of the cargo

27. As regards the vindicatory action, an owner is entitled to reclaim possession of his or her property with the *rei vindicatio*.

28. A plaintiff must allege and prove: (a) ownership of the thing; (b) that the defendant was in possession of the property when the action was instituted; and (c) the property in question is still in existence and is clearly identifiable. The plaintiff may seek return of the possession of the property or, in lieu thereof, payment of its value calculated on the day of the trial.[24]

29. It follows that, for the purposes of this interlocutory application, the applicants need to show, on a *prima facie* basis, that the SADR is the owner of the cargo, that the first and second respondents are in possession of the cargo, and that the cargo is still in existence and is clearly identifiable.

30. The applicants have demonstrated that the cargo was taken from the Bou Craa mine in Western Sahara and loaded at the port of El Aauin onto the ship, whereafter the ship sailed to Port Elizabeth. The first and second respondents are presently in possession of the cargo, and the cargo is still in existence and is clearly identifiable.

31. As regards the question of ownership, the applicants' case may be summarised as follows:

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[24] *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) at [22], Authorities Bundle Vol 1 pg 55. LTC Harms Amler's Precedents of Pleadings 8th ed pg 379.

31.1 Under customary international law, sovereignty in the natural resources of Western Sahara vests in the Saharawi people. This is a function of their right to self-determination in the territory, a basic constituent of which is the permanent sovereignty over natural resources,[25] supported by international humanitarian law[26] which prohibits the commercial exploitation of Western Sahara's resources except to meet the immediate needs of the original Saharawi people.[27] These principles are widely accepted.[28]

31.2 The cargo was mined, purportedly sold and exported, without the "*prior, free and informed*"[29] consent, and not for the benefit of, the Saharawi people, as such.[30]

31.3 OCP and Phosboucraa have attempted to show that substantial sums of money have been spent by them in Western Sahara.[31] However, in circumstances where the Saharawi people are a minority in their own territory,[32] and most Saharawis live east of the berm or in the refugee camps in Algeria, this expenditure is of no legal consequence.

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[25] According to Dugard *supra* the Declaration on the Granting of Independence to Colonial Countries and People of 1960 (GA Res 1514 (XV)), which outlaws colonialism, has been accepted as evidence of a customary rule (pg 31, Authorities Bundle Vol 1 pg 80).
[26] Sachs J held in in *S v Basson* that the rules of humanitarian law constitute an important ingredient of customary international law (2005 (1) SA 171 (CC) at [125], Authorities Bundle Vol 2 pg 301).
[27] Jeffrey J Smith 'The taking of Sahara: the role of natural resources in the continuing occupation of Western Sahara' Global Change, Peace & Security Vol 27 No 3, 263-284 at pg 273, Authorities Bundle Vol 2 pg 362. See also Zunes *supra* pg 316-317: "*The occupant cannot appropriate, acquire title to, or sell such public assets*" and "*Any transfers or dealings with property, rights and interests not justified by IHL are invalid*", Authorities Bundle Vol 2 pg 384.
[28] *S v Petane* 1988 (3) SA 51 (C) at 57I, Authorities Bundle Vol 2 pg 305.
[29] See in this regard the most recent report of the Human Rights Committee, dated 1 December 2016, founding affidavit annexure "RSB19", record pg 196, which proposed that Morocco should "*enhance meaningful consultations with the people of Western Sahara with a view to securing their prior, free and informed consent for development projects and resource extraction operations.*" (emphasis added)
[30] Founding affidavit paras 181 and 261, record pg 59 and 76.
[31] Answering affidavit paras 38-50, record pg 376-381.
[32] Founding affidavit para 167, record pg 56.

Furthermore, it is not suggested by OCP and Phosboucraa that their activities in the territory are with the consent of the Saharawi people.

31.4 In terms of article 21.2 of the African Charter on Human and People's Rights dispossessed people (like the Saharawi) have the right to the lawful recovery of their property as well as to adequate compensation. If this right is not to be rendered nugatory, the courts must give content to it.[33]

31.5 In terms of section 232 of the Constitution, customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. Furthermore, in interpreting the bill of rights courts must consider international law.

31.6 The relevant principles of customary international law are not inconsistent with the Constitution or any Act of Parliament.

31.7 It follows that, under South African domestic law also, ownership in the natural resources of Western Sahara vested in the Saharawi people.

31.8 In terms of article 17 of the SADR Constitution the territory's mineral wealth belongs to the Saharawi people.[34] According to the National Mining Law, all mineral resources located in public or private lands

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[33] *DE v RH* 2015 (5) SA 83 (CC) at [49], Authorities Bundle Vol 1 pg 21. See also article 1 of the African Charter which obliges member states to recognise the rights, duties and freedoms enshrined in the Charter to give effect to them.

[34] Founding affidavit para 19.3, record pg 16.

within the SADR and its exclusive economic zone are property of the state (ie the SADR).[35]

31.9 The cargo is a mineral resource unlawfully removed from Western Sahara.

31.10 In the result, the cargo belongs to the SADR, and the SADR is entitled to recover it from the possessors.

31.11 No party to these proceedings, other than the SDADR, has asserted title in the cargo.

32. We accordingly submit that the applicants have shown, at the very least on a *prima facie* basis, that the SADR is the owner of the cargo, that the first and second respondents are in possession of the cargo and that the cargo is in existence and is clearly identifiable.

Balance of convenience

33. It is a well settled principle that the stronger the case which the applicant makes out, the less balance of convenience in favour of the applicant there needs to be, for interim relief to be granted. Conversely, the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.[36]

34. In the event that the ship is permitted to continue its voyage with the cargo on board, the applicants will probably not be able to recover the cargo. In this regard,

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[35] Founding affidavit para 20, record pg 16.
[36] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E–F, Authorities Bundle Vol 1 pg 33-34.

the applicants have been advised that their prospects of procuring an order for the delivery of the cargo to them in New Zealand are slim.[37] The applicants will thus be severely prejudiced if they do not interdict the cargo while it is present in this jurisdiction.[38]

35. If the cargo is not recovered, the Saharawi people and the SADR will suffer substantial financial loss. The present value of the cargo is estimated at US$5.5 – US$6.6 million.[39]

36. Besides the patrimonial loss, the continued emasculation of the natural resources of Western Sahara has adverse political consequences for the Saharawi people and the applicants.[40] For example:

36.1 These natural resources will be critical to the viability of an eventually independent Saharawi nation. The cornerstone of Saharawi government policy is to ensure availability of the natural resources as one basis for economic development, including through creation of employment, secondary market and services activities, and taxation revenues. As the Legal Opinion prepared by the Office of the Legal Counsel and Directorate for Legal Affairs of the African Union Commission pointed out, the exploitation and plundering of the natural resources of non-self-

[37] Founding affidavit para 327, record pg 91, read with supplementary founding affidavit of Bowley para 28, record pg 302.
[38] Founding affidavit para 327, record pg 91.
[39] Founding affidavit paras 317-320, record pg 89.
[40] See generally in this regard Fadel Kamal 'The role of natural resources in the building of an independent Western Sahara' Global Change, Peace & Security 2015 Vol 23 No. 3 pg 345-359, Authorities Bundle Vol 2 pg 398-405.

governing territories constitutes a threat to the integrity and prosperity of non-self-governing territories.[41]

36.2 Furthermore, the exploitation of natural resources perpetuates the occupation of Western Sahara and thereby delays its people's self-determination. This was the experience of other non-self-governing territories such as Namibia and Timor-Leste.[42]

37. On the other hand, if the relief sought is granted the prejudice to the respondents, in the event of the vindicatory action being unsuccessful, will probably be minimal. The draft order sought by the applicants provides for security being established for the applicants' claims. The applicants do not envisage that the respondents and their insurers will have any difficulty arranging the provision of security, and certainly none has been suggested by the respondents. Once the security has been put up the ship may continue with its voyage with the cargo on board.[43]

38. Furthermore, it appears from a radio interview given by Ballance's chief executive officer that the interdict and attachment of the cargo is not having a prejudicial impact on Ballance.[44]

39. We therefore submit that the requirements for an interim interdict have been satisfied, and we turn to assess the only ground of opposition, namely the act of state doctrine. In relation to this ground of opposition, it must be stressed that the

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[41] Founding affidavit, para 330.1, record pg 91.
[42] Founding affidavit para 330.2, record pg 92.
[43] Founding affidavit para 331, record pg 92.
[44] Bowley para 19, record pg 300.

application is for interim relief pending the finalisation of the action. The *prima facie* case established by the applicants, and discussed above, is to be taken into account when considering the question of justiciability.

40. As a precursor, we address an underlying logical fallacy in the case presented by OCP and Phosboucraa, namely the reliance upon "... *the principle enshrined in Moroccan law... (that) Morocco exercises sovereignty over the Southern Provinces of Morocco* (ie Western Sahara)".[45] It matters not what Moroccan law provides. The real issue is whether Morocco is entitled to exercise sovereignty over Western Sahara.

SOVEREIGNTY IN WESTERN SAHARA

41. Western Sahara does not form part of Moroccan territory. This much has been determined in several court judgments:

41.1 In September and October 1974, and against the backdrop of the referendum planned by Spain, Morocco and Mauritania asked the General Assembly to consider their alleged claims of territorial sovereignty over Western Sahara.[46]

By way of a letter dated 17 December 1974 addressed by the Secretary-General of the United Nations to the President of the International Court of Justice (**"the ICJ"**), the ICJ was asked to provide an advisory opinion on the following questions: (1) was Western Sahara at the time of

[45] Answering affidavit para 6, record pg 366.
[46] Founding affidavit para 86, record pg 31.

colonization by Spain a territory belonging to no one (*terra nullius*) and if the answer to the first question was negative, (2) what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?[47]

On 16 October 1975, the ICJ gave its advisory opinion, answering the first question in the negative, and in respect of the second question finding that:

> "*... the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization 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...*"[48]

41.2 More recently, in 2015, and after a thorough analysis of the relevant considerations, the English High Court (Blake J) rejected Morocco's claims to sovereignty in Western Sahara.[49]

41.3 Then, on 21 December 2016, the European Court of Justice found, in a landmark judgment relating to a trade agreement between the EU and Morocco, that:

> *"In view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-*

[47] See Authorities Bundle Vol 1 pg 272.
[48] Advisory Opinion of the International Court of Justice dated 16 October 1975, particularly at [162], Authorities Bundle Vol 1 pg 273.
[49] *Western Sahara Campaign UK supra* at [40], Authorities Bundle Vol 1 pg 262-263.

> *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... be interpreted in such a way that Western Sahara is included within the territorial scope of that agreement."*[50]

42. In their founding affidavit, the applicants noted that no other state explicitly recognises Moroccan sovereignty over Western Sahara, and the General Assembly and the AU have both recognised that Morocco cannot exercise legal sovereignty over Western Sahara.[51] These allegations have not been disputed by any of the respondents.

43. Furthermore, Western Sahara is a non-self-governing territory within the meaning of article 73 of the UN Charter. It is evident from the documents produced by OCP and Ballance (or by their representatives), and in particular the reference to the views expressed in the 2002 Corell opinion,[52] that these parties accept that Western Sahara is a non-self-governing territory.[53] As a non-self-governing territory Western Sahara cannot, by definition, be the territory of Morocco.[54]

44. Lastly, the position adopted by the South African government regarding the territorial limits of a foreign state may be conclusive as far as the courts are concerned.[55] The South African government is of the view that Moroccan

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[50] *Council of the European Union v Polisario Front* C-104/16 P (21 December 2016) at [92], Authorities Bundle Vol 1pg 173.
[51] Founding affidavit paras 151 and 220-221, record pg 51 and 68.
[52] Founding affidavit annexure "RSB13", record pg 142.
[53] Replying affidavit paras 28-30, record pg 436-437.
[54] Founding affidavit paras 222-223, record pg 68-69.
[55] *Belhaj* (*infra*) per Lord Neuberger at [148], Authorities Bundle Vol 1 pg 127.

sovereignty does not extend to Western Sahara, and we submit that this Court should follow the government's lead in this regard.

45. Morocco may not, by its own domestic law, conceive for itself sovereign authority in a separate territory. In the result, Morocco cannot, and does not, exercise sovereignty in Western Sahara, irrespective of any Moroccan law in this regard.

46. Against this backdrop, we now turn to examine the applicability of the act of state doctrine.

THE ACT OF STATE DOCTRINE

47. The act of state doctrine[56] was acknowledged and accepted into South African law in the matter of *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[57] and confirmed by the Supreme Court of Appeal in *Van Zyl and Others v Government of the Republic of South Africa and Others*.[58]

48. According to Joffe J in *Swissborough*: "*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*".[59]

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[56] Insofar as it relates to the justiciability of acts of foreign governments, see Dugard *supra* pg 78-79, Authorities Bundle Vol 1 pg 84A.
[57] 1999 (2) SA 279 (TPD) at 334-335, Authorities Bundle Vol 1 pg 46.
[58] 2008 (3) SA 294 (SCA), Authorities Bundle Vol 1 pg 56-60.
[59] At 334E, Authorities Bundle Vol 1 pg 46.

49. In *Van Zyl*, Harms ADP held that: "*Courts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign States.*"[60]

50. The act of state doctrine has very recently been comprehensively considered in detail by the UK Supreme Court in *Belhaj and another v Straw and others and Rahmatullah (No 1) v Ministry of Defence and another.*[61]

51. The act of state doctrine is a domestic law doctrine.[62] This means that its ambit in this case is to be determined by South African law. In particular, this Court's delineation of the doctrine must promote the spirit, purport and objects of the Bill of Right.[63]

52. According to Dugard:[64]

> "*... a South African court may decide to follow the judicial policies of the United States or England in respect of non-justiciability but it can only do so within the framework of its own constitutional rules in general, and ss 34 and 232 in particular...*"

53. Many of the authorities which relate to the act of state doctrine concerned events which took place within the territory of the aggrieved state. This may be illustrated by reference to the summary of the foreign law in *Swissborough*:

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[60] At [5], Authorities Bundle Vol 1 pg 58.
[61] [2017] UKSC 3, Authorities Bundle Vol 1 pg 90-157.
[62] *Belhaj* at [98], Authorities Bundle Vol 1 pg 119.
[63] Section 39(2) of the Constitution.
[64] *Supra* pg 79, Authorities Bundle Vol 1 pg 84A.

53.1 In *Underhill v Hernandez* Fuller CJ held that the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[65]

53.2 In *Sabbatino* it was decided that the judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government.[66]

53.3 In *Kirkpatrick*, Justice Scalia concluded that the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid.[67]

54. The misappropriation of the cargo did not take place within the sovereign territory of Morocco, and the act of state authorities which pertain to acts within the territory of the state concerned must be viewed with some caution.

55. The interim relief sought by the applicants will therefore not constitute interference in the "*domestic affairs*" of Morocco, as alleged by OCP and Phosboucraa.[68]

56. There are, nonetheless, some authorities which indicate that the act of state doctrine may be applied to certain categories of sovereign act by a foreign state abroad, even if they occur outside the foreign state's jurisdiction.[69]

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[65] At 330H, Authorities Bundle Vol 1 pg 44.
[66] At 331F, Authorities Bundle Vol 1 pg 44.
[67] At 332F, Authorities Bundle Vol 1 pg 45.
[68] Answering affidavit para 18, record pg 369.
[69] This is the third type of foreign act of state described by Lord Mance in *Belhaj* at [11], Authorities Bundle Vol 1 at 93-94.

57. Different considerations apply to acts outside of the jurisdiction of a state. With regard to such acts the courts have given various reasons for declining to entertain the matter, including (a) the lack of judicial or manageable standards and (b) that it is not the proper function of the local courts to resolve the issue.[70]

58. For the reasons which follow, we submit that the act of state doctrine is inapplicable in this matter.

1. Invocation of act of state doctrine is premature

59. It is not appropriate that the act of state doctrine be considered before the issues in the action have been properly defined in the pleadings.

60. This is especially so as the respondents have not indicated to this Court what defences will be raised in the action, if any.

61. For example, Mr Smires asserts at paragraph 13 of his answering affidavit that this Court is not suited to hearing the applicants' claim.[71] However, at this stage it is not apparent what issues will arise. Until the claim has been fully pleaded, this Court is not in a position to assess whether it is or is not suited to hear the claim.

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[70] See the discussion in Lord Sumption's speech in *Belhaj* at [239], Authorities Bundle Vol 1 pg 147.
[71] Record pg 367.

62. In *Kuwait Airways (No 1)*,[72] a case analogous in several respects to this matter,[73] the issue of justiciability was also raised before the claims had been pleaded. Lord Goff held that:[74]

> "*... particularly in cases of some complexity, it may be more appropriate that an invocation of this principle should be considered only after the issues in the action have been properly defined on the pleadings.*"

63. Lord Goff proceeded to find that the action should be remitted to the Commercial Court, and he noted furthermore that after the matter had been fully pleaded it will be for the judge to decide how he should deal with the justiciability point (which then occurred in *Kuwait Airways (No 3)*).

64. We accordingly submit, in the first instance, that the ouster defence should be addressed as part of the action, and not as part of these proceedings.

65. In any event, for the reasons which follow, even if this Court does allow the ventilation of the defence at this early stage of proceedings, it should not be a bar to the interim relief sought on the return day.

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[72] *Kuwait Airways Corp v Iraqi Airways Co and others* [1995] 3 All ER (HL), Authorities Bundle Vol 1 pg 180).

[73] This was a claim by Kuwait Airways Corp for delivery of ten aircraft, alternatively payment of the value of the aircraft. The aircraft had been misappropriated by the Iraqi Airways Co pursuant to a directive by the Iraqi Minister of Transport, and retained in terms of a resolution of the Revolutionary Command Council of Iraq which purported to dissolve Kuwait Airways Corp and transfer all its assets to Iraqi Airways Co (see *Kuwait Airways (No 1)* headnote, Authorities Bundle Vol 1 pg 180).

[74] At 715d-g, Authorities Bundle Vol 1 pg 190. See also at 713c-d, Authorities Bundle Vol 1 pg 189.

2. Judicial and manageable standards

66. There are "*judicial and manageable standards*" by which the misappropriation of natural resources in Western Sahara may be determined, and this Court is therefore not in the proverbial judicial no-man's land.

67. First, the applicants rely upon principles of international law, such as the right to self-determination, which are well-established, and which, as customary international law, form part of South African law in terms of section 232 of the Constitution. These principles provide the standards necessary for judicial determination.[75]

68. Second, the breaches of the established principles of international law are plain.[76]

69. Third, for the purposes of the interdict, the merits of the applicants' claim are not disputed in any meaningful way. In particular, no other party asserts a right to ownership in the cargo.

3. The proper function of the courts

70. In *Belhaj* Lord Neuberger found that there is force in the argument that, bearing in mind the importance which both the common law and the European Human Rights Convention attach to the right of access to the courts, judges should not be enthusiastic in declining to determine a claim.[77]

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[75] Compare *Habib v Commonwealth of Australia* [2010] FCAFC 12 at [110], Authorities Bundle Vol 2 pg 342.
[76] Compare *Kuwait Airways (No 3)* [2002] 3 All ER 209 (HL) at 218h-j, Authorities Bundle Vol 1 pg 200.
[77] Supra at [144], Authorities Bundle Vol 1pg 126.

71. This argument resonates in South Africa, having regard to the rights accorded by section 34 of the Constitution, as well as the primacy of the rule of law.

72. During the Apartheid era ousters were relied upon particularly heavily by the authors of security legislation, and also in other contexts. On a number of occasions (but not always) the Appellate Division held that ouster clauses were effective in preventing judicial review.[78] Under the constitutional dispensation, however, our courts have shied away from the ouster of their jurisdiction.[79]

73. This Court should therefore be slow in ousting its own jurisdiction in this matter. This is especially so as the applicants seek only interim relief on undisputed facts. The court's determination of this relief will not be a final determination of who owns the cargo.

74. There is also no question of the determination of the interdict embarrassing the South African executive. The relief sought by the applicants is consistent with the public stance adopted by the sixth respondent (the Minister), who recently called for the end to the illegal exploitation of resources in Western Sahara.[80] The Minister has elected to abide the decision of this Court.

75. It is also relevant that the applicants' claims in respect of the cargo rest on international law obligations of an *erga omnes* character.[81]

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[78] Cora Hoexter Administrative Law in South Africa 2nd ed (2012) pg 588.
[79] See for instance *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) and *Mohamed v President of the RSA (Society for the Abolition of the Death Penalty in SA intervening)* 2001 (3) SA 893 (CC).
[80] Founding affidavit annexure "RSB3", record pg 120.
[81] Smith *supra* pg 276, Authorities Bundle Vol 2 pg 364.

76. According to Dugard, obligations *erga omnes* are obligations which a state owes to the international community as a whole.[82]

77. In the ICJ Advisory Opinion entitled *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ found that all states are under an obligation not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory.[83] In reaching this conclusion, the ICJ held that the obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.[84]

78. In support for this view, the ICJ relied upon its earlier finding in the *East Timor* case, where it described as "*irreproachable*" the assertion that "*the right of people to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character.*"[85]

79. Furthermore, and in the specific context of Western Sahara, the European Court of Justice held in *Council of the European Union v Polisario Front* that the "*customary principle of self-determination*" is a legally enforceable right *erga omnes* and one of the essential principles of international law.[86]

80. There is thus a duty on all states to uphold the right to self-determination, including the permanent sovereignty over natural resources.

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[82] *Supra* pg 38, Authorities Bundle Vol 1 pg 81.
[83] 2004 ICJ Reports 136 at [159], Authorities Bundle Vol 1 pg 230.
[84] *Supra* at [156], Authorities Bundle Vol 1 pg 229. See also Dugard *supra* pg 40 and 99ff, Authorities Bundle Vol 1 pg 82 and 84Bff.
[85] *Supra* at [156], Authorities Bundle Vol 1 pg 229.
[86] *Supra* at [88], Authorities Bundle Vol 1 pg 173.

81. This point may be linked to the so-called "*no harm rule*" established in the *Corfu Channel* case, where the ICJ referred to every state's obligation not knowingly to allow its territory to be used for acts contrary to the rights of other states.[87] Were this Court to allow the ship to sail through this jurisdiction, taking bunkers in Algoa Bay, and then sailing on to New Zealand, it would permit South Africa to be used by Phosboucraa and Ballance to violate the legal rights of the Saharawi people and the SADR.

82. Finally, in circumstances where there is no other forum in which the applicants are able to vindicate their rights,[88] it is necessary that this Court not shy away from exercising its jurisdiction.

83. OCP and Phosboucraa contend that this Court should not hear the application as there are diplomatic processes underway.[89] However –

83.1 The applicants explained in their replying affidavit that these processes do not relate to the claims advanced in these proceedings.[90]

83.2 In any event, the UN has been attempting to resolve the disputes concerning Western Sahara for decades, without substantial progress being made.[91]

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[87] ICJ Reports, 1949, pg 22, Authorities Bundle Vol 2 pg 349.
[88] Founding affidavit para 328, record pg 91.
[89] Answering affidavit para 64.3, record pg 385.
[90] Para 18.4.1, record pg 433; para 103, record pg 452.
[91] Replying affidavit para 18.4.3, record pg 433. See also founding affidavit para 158, record pg 53.

83.3 If anything, it is the ongoing misappropriation of the territory's natural resources which impedes *bona fide* negotiations.[92]

83.4 In the *Kuwait Airways* case, it was held that the existence of a compensation commission established pursuant to UN Security Council Resolution 687 did not create an impediment to the English courts hearing the claim for delivery of aircraft, alternatively payment of the value of the aircraft.[93] This is an *a fortiori* case.

83.5 There are numerous other legal cases which have been heard despite the existence of diplomatic processes.[94] The matters before the European Court of Justice in relation to Western Sahara are examples of these cases.

83.6 The existence of diplomatic processes cannot be a bar to the simultaneous exercise of established and clear rights under law.

84. We therefore submit that it is the proper function of this Court to decide the applicants' application for an interim interdict.

4. Fundamental principles of public policy

85. The courts have recognised that there is a "public policy exception" to the act of state doctrine.

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[92] Founding affidavit para 212, record pg 67 and annexure "RSB18" (the AU opinion) para 58, record pg 191. See also para 7 of resolution 1803 (XVII), record pg 133.
[93] *Kuwait Airways (No 1)* at 700, Authorities Bundle Vol 1 pg 183; see also *Kuwait Airways (No 3)* at 215c, Authorities Bundle Vol 1 pg 198.
[94] See replying affidavit para 100, record pg 451.

86. The public policy exception applies even in respect of acts by a sovereign state outside of its territory.[95]

87. In *Kuwait Airways (No 3)* the public policy exception was extended beyond human rights violations to include also flagrant breaches of public international law.[96] In this case, Lord Hope held that the courts are entitled on grounds of public policy to decline to give effect to clearly established breaches of international law when considering rights in or to property which is located in England. Lord Hope held further that a state lacks international jurisdiction to take property outside its territory, so acts of that kind are necessarily ineffective.[97]

88. The relevant public policy is that of South Africa, although international law norms are also capable of playing a decisive role.[98]

89. South African public policy is anchored in the founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms.[99] These values are central to the principle of decolonisation.

90. The misappropriation of the natural resources of a non-self-governing territory (such as Western Sahara) is destructive of the decolonisation project and inimical to the values which animate the South African Constitution.

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[95] *Belhaj per* Lord Neuberger at [157], Authorities Bundle Vol 1 pg 128, and *per* Lord Sumption at [238], Authorities Bundle Vol 1 pg 147.
[96] At 239e-f, Authorities Bundle Vol 1 pg 210; see also at 245j, Authorities Bundle Vol 1 pg 213.
[97] At 246g, Authorities Bundle Vol 1 pg 214.
[98] *Belhaj per* Lord Neuberger at [154], Authorities Bundle Vol 1 pg 128.
[99] *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA) at [11], Authorities Bundle Vol 2 pg 284.

91. In the same way that the UK House of Lords found that the seizure of the Kuwaiti aircraft was "*simply not acceptable today*",[100] and the UK Supreme Court in *Belhaj* found torture to be abhorrent, and thus in both cases the courts chose not to apply the act of state doctrine,[101] so we submit this Court ought to find the systematic oppression of the people of a non-self-governing territory abhorrent and unacceptable.

92. As with torture, the international community has spoken with one voice against colonialism.[102]

93. The conduct of Phosboucraa and Ballance, in trading in phosphate from occupied Western Sahara, is wholly repugnant to South African public policy.

94. In addition, and insofar as international norms are also relevant, we submit that the misappropriation of the cargo constituted a flagrant violation of international law, akin to the actions of Iraq in Kuwait in 1990,[103] and the confiscatory decrees of the Nazi government.[104]

95. The applicants' claim to the natural resources of Western Sahara is based upon the right of self-determination (including permanent sovereignty of natural resources) and the obligations of occupying powers not to exploit the natural resources of the occupied territory. These principles are of fundamental importance to the international community.

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[100] *Kuwait Airways (No 3)* at 219a-g, Authorities Bundle Vol 1 pg 200.
[101] See for instance Lord Mance at [98], Authorities Bundle Vol 1 pg 119.
[102] Compare *Habib supra* at [117], Authorities Bundle Vol 2 pg 343.
[103] *Kuwait Airways (No 3)* at [26-29], Authorities Bundle Vol 1 pg 200.
[104] *Oppenheimer v Cattermole* (*Inspector of Taxes*) [1975] 1 All ER 538 (HL), Authorities Bundle Vol 1 pg 232-249.

96. Moreover, international law recognises *jus cogens*, which are peremptory norms from which no derogation is permitted.[105]

97. According to Dugard, there is widespread support for the view that the prohibition against the denial of self-determination qualifies for the status of a peremptory norm.[106]

98. In *Democratic Republic of the Congo v Rwanda* (2006) Dugard, sitting as a judge *ad hoc* of the ICJ, found that:

> "*Norms of jus cogens are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order – such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community – the prohibition on aggression, genocide, torture and slavery and the advancement of self-determination...*"[107] (emphasis added)

99. Dugard is of the view that it is inconceivable that a state committed to compliance with international law, respect for human rights and the promotion of the rule of law under its own constitutional order (like South Africa) would tolerate the violation of a norm of *jus cogens*.[108]

100. It would be contrary to the international obligations of South Africa were its courts to adopt an approach at odds with such peremptory norms.[109]

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[105] Dugard *supra* pg 38, Authorities Bundle Vol 1 pg 81.
[106] Dugard *supra* pg 38, Authorities Bundle Vol 1 pg 81.
[107] Cited in Dugard *supra* pg 39, Authorities Bundle Vol 1 pg 81.
[108] *Supra* pg 38-41, Authorities Bundle Vol 1 pg 81-82.
[109] See in this regard *Kuwait Airways (No 3)* at 239j-240c, Authorities Bundle Vol 1 pg 210-211.

101. In *Doe I v Unocal Corp*,[110] the acts alleged on the part of the Myanmar military and a corporation (murder, torture, rape and slavery) were all described by the US Court of Appeals for the Ninth Circuit as *jus cogens* violations. The Court of Appeals found that there was a high degree of international consensus about the illegality of the acts alleged, and this consensus undermined any application of the act of state doctrine.

102. By the same token, in this matter, there is a high degree of international consensus that exploiting the natural resources of a non-self-governing territory is illegal when it is without the consent and not for the benefit of the people of that territory.

103. We accordingly submit that public policy demands that this Court should not refrain from hearing the application.

Summary on Act of State

104. The stance adopted by OCP and Phosboucraa may be summarised as follows:

Notwithstanding the fact that permanent sovereignty in the natural resources of Western Sahara vests in the Saharawi people, and notwithstanding the further fact that the exploitation of the phosphate at Bou Craa is not with the consent of the Saharawi people, and it is also not for their benefit, and notwithstanding the further fact that the cargo has thus been unlawfully misappropriated by Phosboucraa and Ballance, and notwithstanding the pernicious effect of such shipments for the realisation of self-determination by the Saharawi people, and even though the misappropriation amounts to a flagrant breach of established

[110] 395 F. 3d 932 (9th Cir. 2002), discussed in *Habib* at [95], Authorities Bundle Vol 2 pg 339.

principles of international law, of which Ballance and Phosboucraa are fully aware - this Court should nonetheless turn a blind eye, discharge the rule, and allow the SADR's cargo to be shipped to Ballance.

105. This proposition only needs to be stated to be upset by the manifest injustice of their stance.

106. As shown above, not only is the invocation of the act of state doctrine premature, but in any event (i) there are judicial and manageable standards by which the matter may be determined, (ii) it is the proper constitutional function of this Court to entertain the application for interim relief and (iii) public policy demands that this Court decide the matter.

107. We therefore submit that this Court has jurisdiction in relation to this application and there is no reason for the Court to decline to exercise such jurisdiction.

STATE IMMUNITY

108. Insofar as the applicants rely upon Morocco's state immunity,[111] we submit, in accordance with the findings of Lord Sumption in *Belhaj*,[112] that:

108.1 The interdict sought will not affect any rights or liabilities of Morocco.

108.2 Morocco is not a party to the application.

108.3 Morocco's property is not at risk.

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[111] Answering affidavit para 64.4, record pg 385.
[112] At [197], Authorities Bundle Vol 1 pg 135.

108.4 This Court's decision on the issues will not bind Morocco.

108.5 The relief sought will have no impact on Morocco's legal rights, whether in form or substance.

109. In *Kuwait Airways (No 1)* Lord Goff found that Iraqi Airways Corporation's retention and use of the Kuwaiti aircraft did not constitute acts done in the exercise of sovereign authority. Rather, they were acts done by it in consequence of the vesting or purported vesting of the aircraft in it by legislative decree.[113]

110. Lord Goff remarked further that a separate entity of state which receives nationalised property from the state cannot *ipso facto* claim sovereign immunity in respect of a claim by the former owner (though it may be able to plead by way of defence that its actions were not unlawful).[114]

111. Similarly, in this matter, Phosboucraa's continued exploitation of the mine at Bou Craa does not constitute an act done in the exercise of sovereign authority, the mining is carried out for commercial purposes, and Phosboucraa may not rely upon sovereign immunity to defeat a claim by the true owner of the phosphate.

112. We accordingly submit that state immunity does not support the contentions of OCP and Phosboucraa.

113. For these reasons this Court should entertain the application, and should grant the interim interdict.

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[113] At 711b, Authorities Bundle Vol 1 pg 188.
[114] At 711c, Authorities Bundle Vol 1 pg 188.

DOCUMENTS ON BOARD

114. Paragraph 3 of the order of 1 May 2017 directed the master of the ship to provide the sheriff with a copy of: (i) all extant charterparties; (ii) the mate's receipt(s) in respect of the cargo; and (iii) the bill(s) of lading in respect of the cargo, insofar as such documents may be on board the ship.

115. In paragraph 1.7 of the rule *nisi*, the applicants seek an order that the sheriff provide the applicants' attorneys with copies of all the documents obtained in terms of paragraph 3 of the order.[115]

116. Certain relevant facts are peculiarly within the knowledge of the respondents. For instance, the respondents will know whether the ship is under charter, and if so what kind of charters, and the identity of the charterers (it appears there is at least a time charter and probably also a voyage charter). Furthermore, the respondents will also know exactly what quantity of phosphate was loaded on board the ship.[116]

117. This information will be evident from certain documents which typically would be on board a vessel. For instance, the relevant charterparties should be on board. These documents will reveal the nature of the charters and the identity of the charterers. In addition, the mate's receipt(s) and a copy of the bill of lading(s) should also be on board. These documents will evidence the quantity, and possibly also the specifications, of the phosphate on board.[117]

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[115] Record pg 293.3.
[116] Founding affidavit para 339, record pg 94.
[117] Founding affidavit para 340, record pg 94.

118. We submit that it is appropriate that this Court order this very limited disclosure so that the applicants, and the Court, may be apprised of the pertinent information which will be recorded in these documents.[118]

CONCLUSION

119. Having regard to the way that the application has been pleaded, and in particular the absence of any meaningful dispute regarding the question of ownership, nor any denial that the balance of convenience strongly favours the granting of an interim interdict, we submit that this Court has a limited discretion.[119]

120. In approaching this Court for assistance, the applicants seek to ensure that the Saharawi people, long deprived of the right to self-determination, may at last have access to their natural resources, if only a small part. In doing so this Court will have avoided upholding the last vestiges of colonialism in Africa.

121. We therefore submit that the applicants have made out a proper case for the confirmation of the rule *nisi*.

ANTON KATZ SC
DARRYL COOKE

APPLICANTS' COUNSEL
CHAMBERS, CAPE TOWN
15 MAY 2017

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[118] See *Stuart v Ismail* 1942 AD 327, Authorities Bundle Vol 1 pg 35-38, and *Durban and District African Football Association v Dhludhla and Others* 1961 (3) SA 892 (D), Authorities Bundle Vol 1 pg 22.

[119] *Hotz and Others v University of Cape Town* [2016] 4 All SA 723 (SCA) at [29], Authorities Bundle Vol 2 pg 288.