**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

APPLICANTS’ NOTE ON ORAL ARGUMENT

# INTRODUCTION

1. The applicants stand by their original written submissions of 12 May 2017. The applicants have now had an opportunity to consider the heads of argument filed on behalf of the fourth and fifth respondents (referred to below as **“the respondents”**). In order to assist this Court in the presentation of our oral argument, we have prepared this written note.
2. In this note we deal with three issues in order to demonstrate that on the respondents’ own argument, the rule should be confirmed.
3. First we deal with the characterisation of the nature of this case; second the act of state doctrine; and third the interlinked state immunity proposition advanced by the respondents.
4. We emphasise that the respondents’ mischaracterisation of the case, and their misapplication (in opposition to this application) of both act of state and state immunity doctrines, suggest strongly that the relief sought by the applicants falls to be granted.
5. The ouster argument by the respondents, has echoed a refrain repeated over the last 25 years often by government respondents that the adjudication of cases should be avoided because of separation of powers concerns. The Constitutional Court and other courts have repeatedly rejected those claims.

**THE NATURE OF THIS CASE**

1. This case is a South African case dealing with South African law under the Constitution, by a South African court.
2. It is about property situate within this Court’s jurisdiction, and who owns the property. That is the heart of the case.
3. In order to determine that core issue South African law, and where applicable international law, dictate.
4. The Constitution, the supreme law, is clear on the role of international law in the South African constitutional setting.
5. International law is part of South African law, unless it is inconsistent with the Constitution or an Act of Parliament.[[1]](#footnote-1)
6. International law, and this is not in dispute, does not recognise “*the principle enshrined in Moroccan law that Morocco exercises sovereignty over the Southern Provinces of Morocco*”.[[2]](#footnote-2)
7. Therefore, neither does South African law. And that is the law which this Court is to apply in the adjudication of the dispute, which is an ownership dispute.
8. What the case does not concern, although the respondents, seek to characterise the case as such, is the validity under South African law of any conduct[[3]](#footnote-3) or law of the Moroccan state.
9. The respondents refer to the diplomatic processes which are underway. In doing so the respondents refer (improperly) to reams of evidence which did not form any part of their answering affidavits (see paras 37-41) and the applicants have accordingly been deprived of the opportunity to respond to this evidence. This This material is not helpful to this Court for this reason, but also it is irrelevant to the question of the ownership of the Cargo.
10. The legal principles upon which the applicants rely, such as Morocco having no territorial claim to Western Sahara, and the permanent sovereignty of natural resources vesting in the peoples of non-self-governing territories, are settled in law, international law and South African law.
11. The case is not about the Saharawis right to self-determination (which is settled), but rather about the proprietary rights which accompany that right to self-determination. These derivative rights are not the subject of the diplomatic processes, and are properly determined by legal processes, and not diplomatic processes.
12. The question of the ownership of the cargo on the “NM Cherry Blossom” cannot effect the peace process.
13. Even were it to be found that it could that finding is legally irrelevant.
14. In any event, the interdict sought is not comparable to the continued exploitation of the territory’s natural resources over decades. If anything, it is the latter which is an impediment to the diplomatic processes. The respondents’ suggestion that this application interferes with the peace process (see para 30) is unhelpful; indeed, such a contention may be politically relevant, not legally so.
15. In paragraph 34 of the heads the respondents challenge the ambit of the Polisario Front’s representation. There are several answers to this challenge.
	1. First, it is a point which was not raised in the answering affidavit.
	2. Second, the ownership of natural resources is a critical part of the building of an independent Saharawi state, which is one of Polisario’s constitutionally defined functions.[[4]](#footnote-4)
	3. Third, it relies upon an opinion by the Advocate General of the Court of Justice. However, the authority for the opinion does not support the view expressed,[[5]](#footnote-5) and the opinion did not form part of the judgment of the European Court of Justice.[[6]](#footnote-6)
	4. Fourth, there is no suggestion, as there could not be, that South Africa’s recognition of the Polisario Front is limited to political matters.
	5. Fifth, it is contradicted by the (incorrect) assertion that the Polisario Front is negotiating with Morocco on the same issues which arise in this application.[[7]](#footnote-7)
16. The characterisation of this case by the respondents (that this case concerns the status of Western Sahara) in paragraph 1 of their heads of argument is not something with which we agree. This case concerns the ownership of minerals.
17. The suggestion in paragraph 2 that no South African court has ever determined a claim of this type, is to be considered against the background that since the advent of the Constitution no South African court has exercised restraint and not determined the merits of any case. The ouster / restraint argument was regularly used by the Apartheid state when legislative ouster clauses were aplenty.[[8]](#footnote-8)
18. Furthermore, there is at least one notable foreign decision where a similar claim was determined, and in which the court did not defer judgment to a political body, that being the decision of the House of Lords in *Kuwait Airways*.[[9]](#footnote-9)
19. We emphasise the importance of section 34 of the Constitution (see paragraph 52 of our heads of argument).[[10]](#footnote-10) Section 34, of course, is not limited to South African citizens or individuals, it applies to everyone.
20. No attempt has been made by any of the respondents to take this Court into their confidence, and explain what transactions have been concluded in relation to the cargo.[[11]](#footnote-11)
21. The narrow circumstances in which a court would exercise judicial deference and decline to exercise jurisdiction it admittedly enjoys is also to be limited on the facts of this matter.  To do so would be inconsistent with the public stance taken by the South African executive (it recognizes the first applicant as sovereign in the Western Sahara) in relation to the very issues relevant to this application, and would interfere with the conduct of the executive in the field of nation states.

**ACT OF STATE**

1. The act of state doctrine is not a statute. So what is it?
2. For purposes of argument, it is accepted that the act of state doctrine applied in the United Kingdom and the United States is part of the common law.[[12]](#footnote-12)
3. There is a very narrow, if any, category of cases where the courts can at early stage of proceedings hold that they cannot decide the matter at all.
4. What the doctrine may well be, as a matter of principle, is akin to the issues which section 21(1)(c) of the Superior Courts Act 10 of 2013 contemplates.[[13]](#footnote-13)
5. Thus a court may decide not to hear a matter on the basis of the so-called mootness doctrine.
6. The substance of section 21(1)(c) of the Superior Courts Act and the types of considerations at stake, at its root, are that the Court decision will have no **practical effect**.
7. The respondents in this matter do not suggest that the confirmation of the rule will have no practical effect.
8. Neither do they suggest, as they could not possibly, that at the trial the vindicatory claim will have no practical effect were it to be decided in favour of the applicants.
9. The other possible foundation, other than practical effect, and allied to the practical effect notion, is this Court acting as a court established under section 165 of the Constitution would be trenching impermissibly on a foreign state’s conduct.
10. The foundation for that proposition is that this Court, as a part of the South African constitutional machinery, ought not to impugn the territorial sovereignty of another state.
11. The act of state cannot be part of the court’s “*inherent jurisdiction to regulate process*”, as stated by Joffe J in *Swissborough*.[[14]](#footnote-14)
12. The jurisdiction to regulate its own process is a power under section 173 of Constitution.
13. Section 173 does give this Court the power to develop the common law taking into account the interests of justice.
14. The real question, in developing the common law (this would be the first Court in South in South Africa to apply the doctrine), including the act of state doctrine, is what is in the interests of justice?
15. Can it be in the interests of justice to refuse an interdict pending a vindicatory claim in circumstances where the applicants aver, and it is not disputed, that they are the owners, such as it is, of the property in question.
16. The interests of justice can hardly be suggested to be served were this Court to decline to hear a vindicatory application at the instance of a party that South Africa itself recognises as a sovereign independent state.[[15]](#footnote-15)
17. By applying act of state doctrine *in casu*, this Court would effectively be acting contrary to the interests of justice inasmuch as this Court would be failing to respect the independent sovereignty of the SADR, which is recognised by South Africa.
18. The act of state doctrine is used by the respondents not against a private person or entity claiming against a state, but to non-suit a state recognised by South Africa, who seeks relief against various private individuals and corporate entities.
19. That being so, this Court is required to consider the nature of civil litigation in South Africa’s adversarial system.[[16]](#footnote-16) It is for the parties either in the pleadings or in the affidavits to set out and define the nature of their dispute, and it is for the courts to adjudicate upon those issues.
20. As this Court observed in *POPCRU*,[[17]](#footnote-17) the principles are applicable to determining whether a court’s jurisdiction has been ousted may be summarised as follows:
	1. The court retains its jurisdiction unless the statute in question ousts it.
	2. There is a presumption against such an ouster.
	3. It is not to be assumed that a statute intends to oust the High Court’s jurisdiction.
	4. An ouster of jurisdiction must be effected in the clearest of terms.
	5. The mere presence of an alternative procedure is not enough upon which to conclude that the High Court’s jurisdiction has been ousted.
21. Just like the courts should be slow to interpret a statute to contain an ouster, this Court should be slow to develop the common law, taking into account the interests of justice as requiring that this Court does not even get to the merits of the dispute.
22. As Lord Hope remarked in *Kuwait Airways (No 3)*, it would be contrary to principle for the courts to give legal effect to acts of foreign states which are in violation of international law as declared under the Charter of the United Nations. Lord Hope hold further that the maintenance of the rule of law is also an important social interest.[[18]](#footnote-18)
23. The respondents attempt to distinguish *Kuwait Airways* (see paras 93-94 of the heads). However:
	1. In doing so they incorrectly submit that the House of Lord’s decision was specifically and only based on the Security Council determination. A proper reading of the speeches reveals that the Security Council determination was but one element of the public policy consideration, which evidenced the serious breach of law. In any event, the House of Lords stated the exception in general terms.
	2. In both cases property was unlawfully misappropriated by an occupying force, and then exploited by a corporation.
	3. Just as there was international consensus regarding the illegality of Iraq’s actions, so in this matter there is international consensus regarding Morocco not being entitled to exercise sovereignty in Western Sahara, and the area being a non-self-governing territory. These settled questions of international law form the basis for the applicants’ vindicatory claim.
	4. In both matters there are diplomatic processes running at the same time as the legal proceedings. The *Kuwait Airways* case is an *a fortiori* case in that there was an alternative remedy available in the form of the compensation commission. Yet despite this the English courts allowed the action to proceed.
24. Regarding *Belhaj*, the respondents’ submission regarding a “*domestic foothold*” allowing public policy exception is based on a misreading of the judgment. The immediate source of the exception was the *Kuwait Airways* case in which there was no “*domestic foothold*”. In any event, in this case there is a domestic connection inasmuch as the property is within the jurisdiction of this Court.
25. The different facts in *Belhaj* are not of any significance. The important part of the decision is the recognition that any treatment which amounts to a breach of *jus cogens* or peremptory norms would almost always fall within the public policy exception.[[19]](#footnote-19) The precise kind of violation is not important.
26. It is suggested by the respondents (para 101.1 of the heads) that public policy appears to be relevant only when the issue is the specific recognition or non-recognition of foreign law. However, the paragraph relied upon merely provides examples of cases (without seeking to limit the general rule), and in any event this paragraph relates to the first type of act of state which the respondents accept is not of application in this matter.
27. The case pleaded by the respondents is set out in paragraph 6 of their answering affidavit. In the heads of argument a different case is made out, in which the respondents approach the matter on the basis that Western Sahara is a non-self-governing territory. For instance, at paragraph 6 of the respondents’ heads (record pg 366), and notwithstanding the repetition of paragraph 6 of the answering affidavit in the heads of argument, they state that in addressing this Court the legal arguments are framed in the terms of “*the consolidated legal framework on natural resource activities in non-self-governing territories*” (which has developed by custom, as opposed to being established by the UN). Similarly, in paragraph 99 of the heads the respondents accept that this is a case concerning “*acts committed by a foreign state abroad*”. The case in the heads is not sustainable on the facts as pleaded.
28. The respondents argue that there are no judicial and manageable standards for the six reasons set out in paragraph 102. However each of the six reasons has a complete answer:

**Ad para 102.1**

* 1. The existence of ongoing diplomatic processes is irrelevant to the question of whether there are judicial and manageable standards.

**Ad para 102.2**

* 1. Similarly, the Polisario Front’s participation in that process does not impact on the question of judicial and manageable standards.

**Ad para 102.3**

* 1. Insofar as the conduct of Morocco in Western Sahara may be relevant to the question of title, it does not follow that there are no judicial and manageable standards.

**Ad para 102.4**

* 1. Morocco’s status in Western Sahara is settled. Several courts, including the International Court of Justice and the European Court of Justice, have determined that Morocco has no territorial claim to Western Sahara. (This case is thus fundamentally different to *Buttes*) It is also long-established and settled that Western Sahara is a non-self-governing territory. The respondents have not disputed the claims in the founding affidavit in this regard, nor is it disputed in the answering affidavit that Morocco occupies Western Sahara, and this carries with it certain obligations under international humanitarian law.[[20]](#footnote-20) (It is therefore not open to the respondents to submit now, as they attempt to do, that Morocco is not an occupying power – see para 46 of the heads.)

**Ad para 102.5**

* 1. The Corell Opinion addressed the position of contracts for oil reconnaissance and evaluation which did not entail exploitation or the physical removal of the mineral resources, and in respect of which no benefits had yet accrued.[[21]](#footnote-21) These contracts were found to be illegal if further exploration and exploitation were to proceed in disregard of the interests and wishes of the people of Western Sahara. This mandatory “*two-limb test*” has been confirmed by the statement of the spokesperson for the Secretary-General which is cited by the respondents.[[22]](#footnote-22) There is thus a clear legal standard by which natural resource exploitation in non-self-governing territories is to be measured, the basis for which the respondents appear to accept in their heads of argument. Again, no difficulty is presented by the respondents factually or legally for the justiciability of the applicants’ proprietary claims.

**Ad para 102.6**

* 1. The sixth reason given by the respondents, like the fifth reason, is fatal to the proposition that there are no judicial and manageable standards. If there were no such standards, it could not be suggested in this paragraph that “*Phosboucraa’s operations and activities meet the standards…*” The undisputed evidence demonstrates that the “*two-limb test*” admitted by the respondents has not been satisfied. (All that the respondents attempt to show is some generalised benefit to the region and the “local people”. This is far short of the specific evidence of benefit to the Saharawi people, most of whom live outside the region, from the sale of phosphate. There is also a conspicuous absence of any attempt to show consultation with the Saharawi people or their representatives.) Nonetheless, this is an issue which the trial Court will be able to resolve, one way or the other, after it has heard the evidence.
1. General Assembly Resolution 71/103,[[23]](#footnote-23) relied upon by the respondents (see footnotes 66 and 74), supports the applicants. For example, it reaffirms the right of peoples of non-self-governing territories to dispose of natural resources in their best interest (para 1) and it also reaffirms the legitimate rights of the people over their natural resources (para 3) described also as an “inalienable right” (para 9). Of particular relevance to this application is the invitation to all governments and organizations of the UN system to take all possible measures to ensure that the permanent sovereignty of the peoples of the non-self-governing territories is fully respected and safeguarded (para 8). The contrived and self-serving construction suggested by the respondents in footnotes 66 and 74, and carried through to paragraph 101.14, is not supported by the text of the resolution. Even accepting the criteria described in paragraph 101.14 of the heads, the evidence shows that the exploitation of the phosphate at Bou Craa is to the detriment of the Saharawi people.
2. It is not surprising that the respondents do not meet the requirements for exploiting the natural resources of a non-self-governing territory, having regard to Morocco’s position that Western Sahara is part of its sovereign territory, and therefore is not a self-governing-territory, and therefore there is no obligation to meet the requirements.
3. At paragraphs 14 and 82 of the heads, the respondents raise a number of rhetorical questions which have no or little connection with their pleaded case. Indeed, on the pleadings, the applicants’ claim to ownership is not disputed. The call for the applicants to answer such questions in their favour rings hollow.
4. This case is certainly not so complicated that it is beyond the competence of this Court. Nor does the case raise questions which are “*political, internationalised and polycentric*” (see para 19 of the respondents’ heads).
5. In paragraphs 26-27 of the heads, it is contended that there is no doubt as to what the legal issues in dispute between the parties are. This contention is incorrect. All that this Court knows at this early stage is what the applicants’ *prima facie* case is. To the extent that the answering affidavit and the respondents’ heads shed some light on their stance, it is unfortunately contradictory, and this Court is left uncertain as to what the nature of the respondents’ defence, if any, will be. It is only once particulars of claim have been delivered, and the respondents have pleaded thereto, that the issues will be known.
6. Were this Court to uphold the act of state ouster, it would be the first court that would have done so[[24]](#footnote-24) and would be doing so without the benefit of full set of pleadings in the vindicatory claim. In any event, even if the Court decides not to apply the act of state doctrine at this stage, it would not necessarily preclude the trial court from doing so.
7. In short, the interests of justice demand that this Court adjudicate the interim interdict on the basis of the pleaded facts.

**STATE IMMUNITY**

1. We turn now to deal with the belated state immunity defence.
2. The manner in which the respondents pleaded state immunity[[25]](#footnote-25) indicates that they correctly perceived that it was part and parcel of an act of state / judicial restraint paradigm. It was not a self-standing defence in the manner contemplated by customary international law and the Foreign State Immunities Act 87 of 1981 (**“the FSIA”**). In doing so they were well-advised. The state immunity defence has no merit both for the purposes of customary international law and the FSIA.
3. The FSIA provides immunity to a foreign state. A foreign state is defined as not including any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued. The parties are *ad idem* that the respondents are precisely such entities.[[26]](#footnote-26) They are not foreign states.
4. The respondents expressly stated that they: “*are corporate entities that are legally distinct from Morocco. The rights, duties and/or liabilities of Morocco, as a State operating at the international level, can in no way be held to apply to companies like OCP and Phosboucraa who hold distinct legal personalities.*”[[27]](#footnote-27)*.*
5. That being so, it is hard to understand on what basis the FSIA can have any application.
6. Recognising this, the respondents are driven in paragraph 122 of their heads, to conclude that Morocco enjoys immunity on the basis of certain principles. The principles are those contained in article 6(2)(b) of the UN Jurisdiction Convention.
7. There are two main requirements for a customary rule: settled practice and the acceptance of an obligation to be bound.[[28]](#footnote-28)
8. It is questionable whether article 6(2)(b), which the respondents hinge their argument on, is part of customary international law. The Convention has only been ratified by 19 states, and concerns were expressed at the drafting stage by Australia and the United States about the potential width of the article in question.[[29]](#footnote-29)
9. To the extent that article 6(2)(b) is part of customary international law, the article is analysed in *Belhaj* by Lords Mance and Sumption,[[30]](#footnote-30) with whom the other judges agreed.[[31]](#footnote-31) That analysis has direct application in the case before this Court. The respondents have ignored the analysis and simply relied on the wording of article 6(2)(b). That is fatal to their claim of state immunity.
10. A proper analysis and interpretation of the words contained in article 6(2)(b) indicate that:
	1. Article 6 has its provenance in cases concerning the arrest of state-owned vessels and property in which states claim an interest (Lord Mance para 26).
	2. The purpose of the provision is to avoid a state having to choose between being deprived of property or otherwise submitting to the jurisdiction (Lord Mance para 26).
	3. “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 (Lord Mance para 26).
	4. The word “affect” is used to indicate that the provision relates to actions involving seizure or attachment of public properties or properties belonging to a foreign state or in its possession or control (Lord Sumption para 195).
	5. The article applies where a state’s legal interests are affected (Lord Sumption para 196).
11. Morocco has no legal right or interest in the cargo, and therefore issues of sovereign immunity do not arise.
12. It is also evident from the founding affidavits that the cargo was exploited and sold for commercial purposes.
13. Insofar as reliance is placed in the *East Timor* case (respondents’ heads paragraphs 130ff), it should be noted that the issue in this case the problem was the absence of a necessary party. Nobody has suggested in the matter before this Court that Morocco is a necessary party.
14. Furthermore, as appears from the speech of Lord Sumption in *Belhaj*, the *East Timor* case, like the *Monetary Gold* case, had two features which in combination accounted 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.[[32]](#footnote-32) Therefore, even if the respondents are able to show that the rights of Morocco are the subject matter of the dispute (which we submit would be overstating the position), it would still be necessary to show that the parties to the application would be bound to deal with Morocco in accordance with the judgment. This is not the case.
15. In addition, the only way the FSAI can assist the respondents is if the meaning contained in article 6(2)(b) be imported into the Act.
16. The respondents’ analysis appears to accept that if they do not succeed in relation to article 6(2)(b), the FSIA will not rescue them. We agree with this analysis.
17. The reliance placed upon *Al Bashir* (SCA) is similarly unhelpful. The indirect impleading contemplated by the Supreme Court of Appeal, as indicated at footnote 41 of the judgment, is either an *in rem* claim against a state-owned vessel, or where the wrongdoer is a state official such as a police officer or deputy-governor of a prison (as in *Jones*). These scenarios are not of assistance because the respondents have explicitly stated that they did not act on behalf of the foreign state in question *in casu*.

**ANTON KATZ SC**

**DARRYL COOKE**

**APPLICANTS’ COUNSEL**

**PORT ELIZABETH**

**18 MAY 2017**

1. The respondents correctly do not suggest that international law as reflected in principle by a key decision of the International Court of Justice (Advisory Opinion on the Status of Western Sahara, 16 October 1975) is inconsistent with the Constitution or an Act of Parliament [↑](#footnote-ref-1)
2. Answering affidavit para 6, record pg 366. [↑](#footnote-ref-2)
3. To the extent that it may be suggested that Moroccan government’s conduct is an issue, it is not different to the countless court proceedings dealing with for example refugee claims (every claim effectively involves the lawfulness of a foreign state’s conduct), extradition applications, and applications for mutual legal assistance and/or applications for diplomatic protection involving the international minimum standard. [↑](#footnote-ref-3)
4. Founding affidavit para 30, record pg 18. [↑](#footnote-ref-4)
5. See para 185 of the opinion (respondents’ bundle pg 50-51), read with the resolutions cited at footnote 84 (respondents’ bundle pg 74) which resolutions are annexed to the founding affidavit at record pg 150 (34/37) and pg 251 (35/19) and where Polisario is described as the “*representative of the people of Western Sahara*” without any limitation. [↑](#footnote-ref-5)
6. See paras 105-106 of the judgment, Applicants’ Authorities Bundle Vol 1 pg 175. Of course, to the extent that the respondents rely upon this opinion, then they should accept also the several findings in the opinion which support the applicants. For example at paras 72-73 the opinion states that Western Sahara is not a territory whose international status is undetermined, and it is not a “disputed territory” (respondents’ bundle pg 39). [↑](#footnote-ref-6)
7. See heads paras 43 and 79. [↑](#footnote-ref-7)
8. *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* [2006] 2 All SA 175 (E) at footnote 29, Applicants’ Authorities Bundle Vol 3 pg 454. *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at13-16. [↑](#footnote-ref-8)
9. *Kuwait Airways Corp v Iraqi Airways Co and others* [1995] 3 All ER (HL), Authorities Bundle Vol 1 pg 180 and *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] 3 All ER 209 (HL), Authorities Bundle Vol1 pg 195. [↑](#footnote-ref-9)
10. *Chief Lesapo supra*. [↑](#footnote-ref-10)
11. This Court is not provided with any information regarding: the manner in which mineral rights were purportedly allocated to Phosboucraa; the terms of the sale between Phosboucraa and Ballance; the incidence of risk; the chartering arrangements; the quantity of phosphate on board etc. This information is peculiarly within the knowledge of the respondents. Ultimately this failure redounds to the prejudice of the respondents, as this Court is left with an incomplete understanding of the issues which may arise at trial, and presently only one claim to the ownership in the cargo, being that of the applicants. [↑](#footnote-ref-11)
12. In relation to the common law, the Constitution states in section 173 that the courts have the inherent power to develop the common law taking into account the interests of justice. [↑](#footnote-ref-12)
13. A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power— … in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination [↑](#footnote-ref-13)
14. At 334E, Applicants’ Authorities Bundle Vol 1 pg 46. [↑](#footnote-ref-14)
15. *S v Banda* 1989 (4) SA 519 (BGD). [↑](#footnote-ref-15)
16. *Fischer and another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at [13], Applicants’ Authorities Bundle Vol 3 pg 426. [↑](#footnote-ref-16)
17. *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* [2006] 2 All SA 175 (E) at footnote 29, Applicants’ Authorities Bundle Vol 3 pg 454. [↑](#footnote-ref-17)
18. Applicants’ Authorities Bundle Vol 1 pg 214. [↑](#footnote-ref-18)
19. *Per Neuberger* [168], Applicants’ Authorities Bundle Vol 1 pg 129. [↑](#footnote-ref-19)
20. Paras 233ff, record pg 71. [↑](#footnote-ref-20)
21. See para 25, founding affidavit annexure “RSB13”, record pg 147. Para 52.4 of the respondents’ heads claims to be a quote of paras 24-25 of the Corell opinion but is in fact only para 24. [↑](#footnote-ref-21)
22. See respondents’ heads at para 53, footnote 75. Applicants’ Authorities Bundle Vol 3 pg 471. [↑](#footnote-ref-22)
23. Applicants’ Authorities Bundle Vol 3, pg 464. [↑](#footnote-ref-23)
24. The suggestion in paragraph 66 of the respondents’ heads that *Swissborough* “has been consistently referred to and approved by our Courts” is, in the context of the issues in this case, not entirely accurate. While it may be so that a Jutastat or Lexisnexis noter-up on *Swissborough* reveals that it has been cited with approval many times, only a handful of times has it been cited in this context. [↑](#footnote-ref-24)
25. Answering affidavit para 64.4, record pg 385. [↑](#footnote-ref-25)
26. Founding affidavit para 43, record pg 21. Answering affidavit para 5, record pg 366. [↑](#footnote-ref-26)
27. Answering affidavit para 21, record pg 370. [↑](#footnote-ref-27)
28. Dugard pg 26. *S v Petane* 1988 (3) SA 51 (C), Applicants’ Authorities Bundle Vol2 pg 302. [↑](#footnote-ref-28)
29. See *Belhaj per* Lord Mance at [26] and *per* Lord Neuberger at [194-195], Applicants’ Authorities Bundle Vol 1 pg 99 and 134. [↑](#footnote-ref-29)
30. *Belhaj per* Lord Mance at [26] and *per* Lord Neuberger at [195-196], Applicants’ Authorities Bundle Vol 1 pg 99 and 134-135. [↑](#footnote-ref-30)
31. See Lord Neuberger at [116], Applicants’ Authorities Bundle Vol 1 pg 123. [↑](#footnote-ref-31)
32. At [193], Applicants’ Authorities Bundle Vol 1 pg 134. See also Lord Mance at [28] Applicants’ Authorities Bundle Vol 1 pg 99. [↑](#footnote-ref-32)