IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBERS: 2013/44462

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

In the matter between:

TURKCELL İLETIŞIM HIZMETLERI A.S.	First Plaintiff
EAST ASIAN CONSORTIUM B.V.	Second Plaintiff
and	
MTN GROUP LIMITED	First Defendant
MTN INTERNATIONAL (MAURITIUS) LTD	Second Defendant
MTN HOLDINGS (PTY) LIMITED	Third Defendant
MTN INTERNATIONAL (PTY) LIMITED	Fourth Defendant
NHLEKO, PHUTHUMA FREEDOM	Fifth Defendant
CHARNLEY, IRENE	Sixth Defendant

Coram: Wepener J

Heard: 11 to 14 August 2020

Delivered: 6 October 2020

Summary: Practice and procedure – Amendment of pleadings and discovery of documents. Amendments introducing vagueness in pleadings should not be allowed – pleading of foreign law must refer to the specific law upon which the pleader relies.

Discovery – the principle that a court will not easily go behind the affidavit of a person asserting that relevant documents have been discovered, restated. Privileged documents: The principle of joint or common interest in privileged documents accepted and applied.

JUDGMENT

Wepener, J:

[1] The plaintiffs instituted an action against the defendants during 2013 in which action they claim US$ 4 198 201 610, interest and costs, based on a claim alleging that the conduct of the defendants had unlawfully deprived the plaintiffs of economic opportunities acquired by them or one of them.

[2] The first plaintiff is Turkcell İletişim Hizmetleri A.S., a joint stock company under the laws of the Republic of Turkey with its principal place of business at Turkcell Plaza, Mesrutlyet Cadessi No: 71, 34430 Tepebasi, Istanbul, Turkey.

[3] The second plaintiff is East Asian Consortium B.V. It is described thus:

‘2.1 East Asian Consortium B.V. is a private company with limited liability incorporated under the laws of the Netherlands and with its principal place of business at Rokin 55, 1012 KK Amsterdam, The Netherlands.

2.2 At all material times set out below, until 18 June 2007, the first plaintiff owned the shares of the second plaintiff.

2.3 On 18 June 2007, the first plaintiff transferred its shares in the second plaintiff to a wholly-owned subsidiary of the first plaintiff.

2.4 During the period 2006 to 2007, the second plaintiff transferred all its assets to the first plaintiff, which is in the result, the owner of the claims set out herein.

2.5 The second plaintiff joins in this action for the interest that it has in any judgment that may be given

2A In the alternative to paragraphs 2.4 to 2.5 above, and in the event of it being held that the Second Plaintiff’s claims set out herein were not transferred to the First Plaintiff and that, as a consequence, the second Plaintiff remains the owner of the said claims, the Second Plaintiff pursues the said claims, and the First Plaintiff joins in this action for the interest that it has in any judgment that may be given.’

[4] The first defendant is MTN Group Limited, a company incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at 216 14th Avenue, Fairlands, Johannesburg.

[5] The second defendant is MTN International (Mauritius) a company 100% owned by the first defendant and incorporated in terms of the laws of the Republic of Mauritius with its principal place of business at 5th Floor, Barkley Wharf, Suite 525, Le Caudan Waterfront, Port Louis, Mauritius.

[6] The third defendant is Mobile Telephone Networks Holdings (Pty) Ltd, a company 100% owned by the first defendant and incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at 216 14th Avenue, Fairlands, Johannesburg.

[7] The fourth defendant is MTN International (Pty) Ltd, a company incorporated in terms of the company laws of the Republic of South Africa with its principal place of business at 216 14th Avenue, Fairlands, Johannesburg.

[8] The second to fourth defendants are referred to as the 'MTN defendants' and the MTN Group interchangeably, although strictly speaking, no interlocutory order can be made against the second defendant as it has disputed the jurisdiction of this court.

[9] The fifth defendant is Freedom Phuthuma Nhleko, an adult male, the chairman of the first, third and fourth defendants and at all material times a director of the first, third and fourth defendants and the Chief Executive Officer of the first defendant, with business address c/o Pembani Group, Inanda Greens Office Park, 2nd Floor, Building 3, Wierda Road West, Sandton.

[10] The sixth defendant is Irene Charnley, an adult female and at all material times a director of the first, second, third and fourth defendants with business address at Smile Communications, 12 Culross Road, Bryanston.

[11] I refer to the parties as plaintiffs and defendants as they are referred to in the pleadings, although the plaintiffs are applicants in the first two applications before me and the respondent in the third application, whilst the fifth defendant is the applicant in the third application.

[12] There are three applications before me. The first is an application by the plaintiffs to amend the particulars of claim, the second is an application by the plaintiffs to compel further and better discovery by the MTN defendants and the third application is brought by the fifth defendant to amend his plea. The argument in each application was heard for a full day. The heads of argument in each application ran into hundreds of pages. The issues that were argued are numerous. It will not be possible to deal with each and every point raised by counsel.

[13] After citing the parties the plaintiff sets out how its claim arose. In short, the government of the Islamic Republic of Iran (Iran) issued an international tender invitation for a licence for a global system for mobile communications (the GSM licence) for the operation of a GSM cellular phone public network in Iran.

[14] The plaintiffs' claim is based, generally speaking, on a relationship that existed between them and others prior to and at the time when the tenders for the GSM licence were submitted.

[15] The plaintiffs' locus standi is derived from its inter-relationship with each other and other third parties with whom one of more of them were in a joint venture. A detailed description of the plaintiffs' relationship with each other and others is furnished in the particulars of claim.

[16] The summons was issued in 2013. During 2015 the plaintiffs sought and obtained an amendment to the particulars of claim before Francis J in 2017. In terms of that amendment, which was opposed and sought by filing an affidavit setting out the reasons for the amendment, the current position regarding the plaintiffs' locus standi was established. The amendment had the effect of removing the second plaintiff as a claimant for relief.

The plaintiffs' application to amend

[17] During November 2019 the plaintiffs again sought to amend the particulars of claim. The defendants all objected to the amendment on a number of grounds. This compelled the plaintiffs to launch an application to amend the particulars of claim in terms of the Rules of Court. The amendment now sought is said to relate to a 'minor corporate transaction', which has nothing to do with the merits of the action and that it might impact on the locus standi of one of the two plaintiffs.

[18] The plaintiffs correctly contend that the particulars of claim, as they currently stand, reflect that the first plaintiff has locus standi on the basis that it acquired all of the second plaintiff's assets including the claim at issue against the defendants, in an inter-company transfer during 2004 to 2005.

[19] The first part of the plaintiffs' proposed amendment deletes the paragraphs in which a transfer to the first plaintiff of the second plaintiff's assets are alleged. The deletion means that the main claimant is now the second plaintiff. The defendants do not oppose that deletion and the plaintiffs could have filed its amended pages as of right. Whether it did so or may still do so, is not at issue in these proceedings. The

defendants do, however, object to the second part of the proposed amendment which reads:

‘14.3 Thereafter the second plaintiff became incorporated.

14.4 On or about the date of its incorporation:

14.4.1 the second plaintiff accepted and/or took up the rights and obligations under and/or adopted the Turkcell Consortium joint venture agreement and thereby became a contracting party to that agreement in the place of the ‘SPV’ defined therein; and/or

14.4.2 the other parties to the Turkcell Consortium joint venture agreement agreed to the substitution of the second plaintiff as a party thereto in the place of the “SPV”.

14.5 In the alternative to what is pleaded in paragraph 14.4 above, in the event that it is found that the second plaintiff:

14.5.1 did not accept and/or take up the rights and obligations under and/or adopt the Turkcell Consortium joint venture agreement and/or did not become a party to it; or

14.5.2 the other parties to the Turkcell Consortium joint venture agreement did not agree to the substitution of the second plaintiff as a contracting party to it, then the rights and obligations of the ‘SPV’ under the Turkcell Consortium joint venture agreement and the benefits flowing therefrom accrued to and became, alternatively remained, vested in the first plaintiff and Ericsson, and the first plaintiff and Ericsson became, alternatively remained, parties to the Turkcell Consortium joint venture agreement.

14.6 The benefits in question accrued to or became, alternatively remained, so vested in the first plaintiff and Ericsson, and the first plaintiff and Ericsson became, alternatively remained, parties to the Turkcell Consortium joint venture agreement by operation of the laws of Switzerland, which govern the Turkcell Consortium joint venture agreement and its construction to the extent that those laws do not conflict with any mandatory legal provisions in the Islamic Republic of Iran.

14.7 All the conditions precedent to the Turkcell Consortium joint venture agreement were timeously fulfilled alternatively were timeously waived, whereupon that agreement became legally binding upon its parties.

14.8 A reference hereafter in these particulars of claim to "the second plaintiff" or to "the plaintiffs", insofar as that includes a reference to the second plaintiff, must, depending upon the context, be construed as a reference to the second plaintiff as described in paragraph 2 above, alternatively to the members of the second plaintiff when the second plaintiff was still a joint venture (namely to the first plaintiff and Ericsson alternatively to the first plaintiff alone), further alternatively to the second plaintiff acting as the representative of the member(s) of the second plaintiff when it was still a joint venture.'

[20] The defendants have raised a number of objections. It is not necessary to deal with each and every objection as I am of the view that two of these objections go to the root of the matter and can be dealt with in initio.

[21] The current position is that the claim is alleged to vest in the first plaintiff to the exclusion of the second plaintiff in that the first plaintiff acquired all the assets of the second plaintiff including the instant claim. The amendment that deletes that allegations pertaining to the transfer of assets from the second plaintiff to the first plaintiff, as indicated, may have been effected by the plaintiffs without further ado. It is significant that this position was obtained due to an amendment effected by the plaintiffs, having been allowed by Francis J, after hearing an opposed application to effect an amendment.

[22] Two of the principles governing amendments of pleadings relate to an amendment not rendering a pleading vague and excipiable and when a party wishes to rely on foreign law it is a question of fact that is required to be properly and fully pleaded.

[23] All the parties relied on *Moolman v Estate Moolman*[1] where it was held[2]:

[1] 1927 CPD 27.
[2] At 29.

> '[T]he practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.'

The onus is on a party seeking the amendment to establish that the other party will not be prejudiced by it.[3]

[24] The first objection that I deal with is that the amendment introduces matter that will render the pleading vague and embarrassing and excipiable. As can be seen, para 14.8 alleges that:

> 'A reference hereafter in these particulars of claim to "the second plaintiff" or to "the plaintiffs", insofar as that includes a reference to the second plaintiff, must, depending upon the context, be construed as a reference to the second plaintiff as described in paragraph 2 above, alternatively to the members of the second plaintiff when the second plaintiff was still a joint venture (namely to the first plaintiff and Ericsson alternatively to the first plaintiff alone), further alternatively to the second plaintiff acting as the representative of the member(s) of the second plaintiff when it was still a joint venture.'

[25] It would immediately be clear that the pleading will up to para 14.8 mean one thing when the second plaintiff is referred to, ie, that which is set out in para 2 and even so in the sub-paragraphs preceding para 14.8 of the amendment. From para 14.8 or maybe excluding it, but only thereafter the defendants are required to determine the context of each use of the words 'the plaintiffs' or 'the second plaintiff according to the context in which it is used, alternatively. . .' .

[26] Counsel for the fifth defendant submitted that there are multiple permutations that can be attributed to the use of the words plaintiffs and second plaintiffs.

[27] This manner of pleading, especially where the locus standi of the plaintiffs, or either of them, forms a serious dispute, is highly undesirable. It is by no means a minor

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[3] *Union Bank of South Africa Ltd v Woolf* 1939 WLD 222 at 225; *Euro Shipping Corporation of Monrovia v Minister of Agriculture Economics and Marketing and Others* 1979 (2) SA 1072 (C) at 1090B; *Trans-Drakensburg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 640-1; *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (AD) at 565.

issue in the matter. Indeed the heads of argument for the plaintiffs refer to it as 'a vital issue that falls to be determined at the trial'.[4]

[28] The confusion introduced by this manner of pleading is self-evident. The very requirement that it must be read in its context shows that it is capable of a number of interpretations. This in itself indicates that the pleading is vague and embarrassing as stated by Davis AJA[5]:

> 'I have no doubt that, viewed in this way, this alternative plea is vague and embarrassing: the argument of respondent's counsel of itself shows this fact clearly. He puts forward three (or at least two) alternative methods on which this plea "can be supported": in other words, he gives several ways in which it may be read. … I have myself given what may be yet another construction of this pleading; the learned Judges in the Provincial Division have adopted yet another. It seems to me impossible to say that a defence is not vague and embarrassing in terms of the Rule if it can be read in any one of a number of ways, and I cannot say that the embarrassment is other than substantial. After all, we have to look at the matter from the point of view of the party who is faced with a pleading of this nature.'

[29] I am of the view that it is highly prejudicial for the defendants to determine, according to the context, what is meant by the plaintiffs. More appropriate is for the plaintiffs to say what they intend saying to allow the defendants to understand the case they have to meet. Each defendant may read the context differently and unintentionally react differently and not properly plead its case. This, in my view, is what is meant by the authorities holding that the amendment should not cause the opposing party prejudice. No order for costs or postponement can cure the prejudice that I referred to.

[30] The plaintiffs' response that a litigant is at liberty to plead alternatives, misses the gravamen of the objection that it is vague and embarrassing manner of pleading that leads to prejudice.[6]

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[4] Plaintiffs' submissions: Application for leave to amend the particulars of claim para 46.

[5] *General Commercial and Industrial Finance Corporation Limited (Appellant) v Pretoria Portland Cement Company Limited (Respondent)* 1944 AD 444 at 454.

[6] See *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (TPD) at 211: 'Thus it may be possible to plead particulars of claim which can be read in any one or number of ways by simply denying the allegations made:

[31] The introduction of para 14.8 goes to the root of the matter as the history shows that the plaintiffs' locus standi has been and remains a serious point of dispute in the matter. The introduction of the amendment would cause the defendants an embarrassment that should not be allowed.

[32] The second objection that is, in my view, well taken relates to the question of foreign law introduced in the amendment. It is common cause between the parties that proving foreign law is proving a fact and that foreign law is proven through the testimony of an expert.[7]

[33] There is a difference in approach by the plaintiffs and the defendants. The plaintiffs, in my view, miss the requirements regarding the manner of pleading or as sixth defendant's counsel argued she only requires: 'it to be identified'. That is the objection raised by the defendants, not the manner of proof by way of expert evidence as perceived by the plaintiffs. Foreign law is a question of fact, not law. Hence, a party relying on foreign law must both plead it and prove it, just as other facts are proved by appropriate evidence.[8]

[34] The pleading of a foreign law as a fact, in my view, requires some elucidation.[9] One cannot just say, as the plaintiffs do, that they rely on Swiss law to yield a particular result. The suggestion that the defendants should consult an appropriately qualified

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likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing . . . . '

[7] In *Standard Bank of South Africa Limited and Another v Ocean Commodities Incorporated and Others* 1983 (1) SA 276 (A) it was held at 294G:

'The content and effect of a foreign law is a question of fact and must be proved (*Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G). Proof is usually furnished by the evidence of properly qualified persons who have an expert knowledge of the law in question. Where the relevant foreign law is statutory in nature, then, in my opinion, it is right and duty of the Court itself to examine the statute and to determine the meaning and effect thereof in the light of the expert testimony especially where such testimony is of a conflicting nature. (Cf Cheshire and North *Private International Law* 10th ed at 129; Dicey and Morris *The Conflict of Laws* 10th ed at 1211-12; *De Beéche v South American Stores ltd and Chilian Stores Ltd* [1935] AC 148 at 158-9.) It follows that the party relying on the foreign statute should, generally speaking, place that statute before the Court.'

[8] See Joubert et la *The Law of South Africa* Vol 7(1) (3rd Ed) para 313 (Conflict of Laws, authored by M. Dendy). Also see Forsythe's *Private International Law* (5th Ed) pages 109-110:

'. . . where the judge is a passive judge – as is the case of the English and South African judge – it is to be expected that foreign law must be pleaded and possibly proved before any cognisance will be taken of it.'

[9] *Standard Bank of South Africa Limited and Others* supra at 294G.

Swiss lawyer in order to determine what case the plaintiffs wish to make, is without merit. The rhetorical question can be asked: what must they ask this Swiss lawyer?

[35] It is also not an answer to suggest that clarity will be obtained through the expert summaries in due course. It is the pleadings that determine the issues and the defendants are entitled to know and plead to the allegations made by the plaintiffs. The pleadings must set out the essential facts necessary to elucidate precisely what principle of Swiss law yields the outcome which they plead to constitute a proper cause of action. The prejudice to the defendants in having to plead to the whole of the Swiss law is, in my view, manifest.

[36] The plaintiffs plead that: 'by the operation if the laws of Switzerland. . .' the benefits accrued or vested in the first plaintiff. This is a conclusion drawn from the facts and not fact specific. A reference to the Swiss law is insufficient as

> 'where the relevant foreign law is statutory in nature then in my opinion it is the right and duty of the court itself to examine the statute and to determine the meaning and effect thereof in the light of the expert testimony'.[10]

This would equally be applicable to common law.

[37] I am persuaded that much more is required than a mere statement that by the operation of the laws of Switzerland the law of a foreign country is invoked in a case such as where the locus standi of the plaintiffs depend on the acceptance and implementation of that law, it requires of the party relying thereon to plead it's case with fairness.[11]

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[10] *Standard Bank of South Africa Limited* supra at 294G-H.

[11] See for example *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (AD) at 107 where the court says:

'... it goes without saying that a pleading ought not to be positively misleading by referring explicitly to certain clauses of the contract as identifying the cause of action when another is intended or will at some later stage . . . be relied upon. As it was put by Milne J in *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A:
"... a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another".'

[38] Surely, a responsible pleader must be able to ascertain precisely what part of the law is relied upon; it has to determine what the principles are; it has to determine if there are exceptions that may sustain a defence.

[39] The fact that foreign law is a matter of fact does not result that those facts which are relevant should be pleaded with any less particularity than would be the case in South African law.

[40] The plaintiffs relied heavily on Australian law,[12] submitting that it supports its manner of pleading. However, I am of the view that these authorities point the other way. Firstly, the second question dealt with in *Regie* namely, whether it was necessary for a plaintiff who sees a forensic advantage in the foreign law (for example, in its provision for strict liability) to plead the law. The court answered this positively by stating:

> 'It follows that the rule must be which Dicey regards has "well established" namely that "a party" who relies on a foreign lex loci delicti "must allege, and, if necessary, prove it"'[13]

The case therefore is an authority for the proposition that the foreign law must be particularly pleaded when it was stated that a party

> 'should give full particulars of the precise statute, code, rule, regulation, ordinance or case law relied on, with the material sections, clauses or provisions thereof. A mere allegation to that an instrument depending on foreign law is null and void is too vague. '[14]

According to McCormish with reference to *Regie* the following applies:

> 'So far as the technical rules of pleading are concerned foreign law is and an uneasy fit. Despite its "legal" content, foreign law is treated as a matter of fact and is thus subject to the normal rules of about pleading and particularising material facts.'[15]

with the consequences being that

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[12] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 and James McComish '*Pleading and proving foreign law in Australia*' (2007) 31 Melbourne Law Review 400, at 410. 004-1980.
[13] *Regie* para 71.
[14] *Regie* para 68.
[15] McCormish at 409-410.

> 'it will not suffice to plead merely the conclusion of foreign law upon which the parties relies. Rather the contents and substance of the foreign law are material facts that must be set out with appropriate particulars.'[16]

[41] McCormish further states:[17]

> 'Thus, even if the non-mandatory nature of Australian choice of law rules does not oblige plaintiffs to plead the applicable law, they should certainly be obliged to plead sufficient facts to allow the defendant to identify the applicable law and plead any defences that may arise thereunder.'

[42] In the English case of *University of Glasgow v The Economist; University of Edinburgh v The Economist*[18] the court reflected on the English position:

> 'It is trite law that the party who alleges must prove. . . .
>
> . . .
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> Determination of foreign law is a question of fact. The rules governing pleadings in this respect are Order 18, Rule 7: . . .
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> . . .
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> The Notes to Order 18, rule 8, which deal with 'Matters which must be specifically pleaded' under Order 18, Rule 8(7) say this: 'Where foreign law is pleaded in support of, or as a defence to an action, certain particulars should be given. Foreign law must be adequately pleaded, and to avoid surprise at the trial a party must also plead the peculiar sense and construction of words in a foreign document or of matters of substantive foreign law'.[19]

[43] In an older case, *Russell v Van Galen*[20] ('Van Galen'), the Court of Appeal of Bermuda (a British Overseas Territory) referred with approval to the following passage from Dicey & Morris on *The Conflict of Laws (9th Edn)*:

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[16] McCormish at 410.
[17] At p 412.
[18] [1990] Lexis Citation 2430.
[19] Ibid.
[20] (1985) 36 WIR 144.

'We were referred to Dicey & Morris on The Conflict of Laws (9th Edn). Rule 205 (page 1124) reads:

"(1) In any case to which, in accordance with this digest, foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case."

The editors comment on that rule as follows:

"The principle that, in an English court, foreign law is a matter of fact has long been well established. It has two important practical consequences: (i) Foreign law must be pleaded. The general rule is that if a party wishes to rely on a foreign law, he must plead it in the same way as any other fact … (ii) Foreign law must be proved. English courts take judicial notice of the law of England and of notorious facts, but not of foreign law. Consequently, foreign law must be proved in each case.'"[21]

[44] The court in *Van Galen* held, with reference to these principles:[22]

'The defendant argues that the award of damages for loss of earnings should be reduced by 30 per cent. That involves a consideration of foreign law. He relies on that law. The onus was on him to prove it as a matter of fact. He has not pleaded it; and even if he had, such evidence as emerged in one way or another was wholly inadequate. The relevant foreign law was neither pleaded nor proved; and it is for those reasons that, in my view, ground of appeal must fail and grounds 3 and 4 of the cross-appeal must succeed: in other words, there should not have been any deduction in respect of English income tax from the award of damages for loss of earnings, past or prospective.'

[45] I am of the view that the plaintiffs must plead the particularity of the Swiss law upon which they rely as those are the material facts that they need to establish in order to arrive at the legal conclusion that the plaintiffs have locus standi. This is also so in English law, referred to by LAWSA in support of its view that foreign law must be pleaded. This is all the more so because the pleading proposes the operation of the

[21] Ibid at 166-167.
[22] Ibid at 166.

laws of Switzerland to govern the Turkcell Consortium Joint Venture Agreement and its construction but only to the extent that those laws do not conflict with the mandatory legal provisions in Iran. This manner of pleading is vague in the extreme.

[46] The English case of *Ascherberg, Hopwood & Crew Ltd v Casa Musicale Sonzogno di Piero Ostali, Societa in Nome Collettivo*[23] is instructive. In that case, as in the present, the contention was that it was not necessary for one of the parties relying on Italian law to particularise its reliance.

The court rejected this[24]:

> 'Secondly, they contended that the amendment that was permitted and indeed called for by the judge's order by way of particularising their contentions as to Italian law was too detailed and too stringent. It was argued initially that, since their contentions on Italian law were by the order required to be set out in affidavit form, this amendment of the pleadings would involve unnecessary duplication by setting them out also in the defence. I think, with respect, that there is nothing in that point, because once they have their detailed affidavit of their expert's views on the various points of Italian law that they consider to be relevant, the defence can by a short amendment incorporate that document by reference.
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> Further, counsel for the composer's heirs was concerned lest, if he was required to particularise in such detail, his expert when under cross-examination on his affidavit would not be able or allowed to rebut any suggestion of error by reference to some law or authority which was not already referred to in the particulars by reference. For my part I think that this anxiety is wholly ill-founded; and this view was expressly confirmed by counsel for the plaintiffs. Accordingly I see no ground for differing from the judge as to the particularity required.'

[47] The same point was made in *Belhaj v Straw*[25] where the claimants were relying on breach of laws of various countries without pleading what those laws were or what they said. The Court of Appeal[26] stated that[27]:

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[23] [1971] 3 All ER 38 (CA) 41.
[24] At p 41.
[25] [2017] AC 964.
[26] On a point not reversed by the Supreme Court when the matter went up.
[27] At para 154.

> 'The claimants advance no authority for the proposition that the applicability of foreign law cannot be determined at the pleading stage in the absence of either party pleading a case in foreign law; and we reject the suggestion that the timely resolution of the issue by reference to the 1995 Act, which is plainly raised on the facts and in the pleadings in the way we have indicated, should yield to the (evidential) presumption of similarity, for what might be described as tactical reasons.'

[48] The Court of Appeal went further to state that:[28]

> 'The inevitable result of all this is that the claimants will have to plead their grounds for asserting that the conduct alleged is unlawful in accordance with the judge's order; and if they do not do so, or fail to prove their case on the point, their pleading will be deficient and their claims will fail—subject of course to the important public policy exception in section for which the judge's order catered. This is no more and no less than is appropriate in our view in accordance with the ordinary rules of pleading which require litigants to set out the material facts which they must prove in order to make good their claim: see CP r 16.4(1)(a).'

[49] This is in accordance with our law which requires the provisions of the statute to be expressly identified or that the material facts which bring the statute into operation must be fully set out.[29]

[50] Both the grounds of objection show that there is at least

> 'a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed . . . .'[30]

[51] Having come to this conclusion, it is unnecessary to consider the objection that the proposed amendment is lacking of bona fides and I say nothing about it as it may still have to be decided in the future.

[52] Based on the above two considerations alone, I am of the view that the proposed amendment cannot be granted and that the application to amend the particulars of claim should be dismissed.

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[28] At para 158.
[29] *Secretary for Finance v Esselmann* 1988 (1) SA 594 (SWA) at 598A-C; *Yannakou v Appollo Club* 1974 (1) SA 614 (AD) at 623-624 (A); *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726A.
[30] *Union Bank* supra at 225.

The plaintiffs' application for further and better discovery.

[53] In the second application, the plaintiffs seek an order for further and better discovery by the MTN defendants. The additional documents sought are alleged by the plaintiffs to underlie a report authored by an independent special committee appointed by the MTN Group to investigate allegations substantially the same as those which are the subject matter of this action and, which committee was chaired by Lord Hoffman.

[54] The MTN defendants resist the order sought on the basis that the documents to which the plaintiffs are entitled have been discovered and that others are either irrelevant or are privileged due to the fact that the Hoffman Committee was engaged to furnish legal advice to the MTN defendants and for purposes of litigation.

[55] Although the report itself has been discovered together with certain attachments, the plaintiffs seek access to each and every document referred to in the report and a report referred to as the KPMG report that was provided to the Hoffman Committee.

[56] The sixth defendant who is a former senior executive of some of the MTN defendants has also filed opposing papers on, inter alia, the basis of a joint or common interest in a legal privilege in certain of the documents sought by the plaintiffs. Although no formal application for leave to intervene was filed, such leave was sought in her affidavit and the plaintiffs did not object to the intervention.

[57] The two categories of documents, ie, those that are relevant or irrelevant to the issues and those that are privileged, are the issues that merits consideration in this matter.

[58] The background to the documents sought is best set out as per the affidavit filed by the MTN defendants:

> '10 On or about 26 January 2012, the United States attorneys for the plaintiffs in the US proceedings, Patton Boggs, furnished to Freshfields a draft complaint, in the United States District Court for the District of Columbia in Washington DC, against MTN Group and MTN Mauritius. The plaintiffs alleged inter alia that –

10.1 MTN Group and MTN Mauritius had conspired with Iranian officials to oust the plaintiffs from the consortium which had been awarded the licence for the second GSM network in Iran.

10.2 Four high-level executives of the MTN Group were at the centre of the defendants' actions to take the license from the plaintiffs. They included the fifth and sixth defendants in the present proceedings.

11 The allegations in the draft complaint are mirrored in the present proceedings.

12 On or about 1 February 2012, the board of directors of MTN Group resolved to appoint a special independent committee to investigate the allegations made by the plaintiffs in the draft complaint, to report to the board on the findings of its investigations and to advise and make recommendations as to any actions to be taken in connection with their findings. The committee included 2 non-executive directors of MTN Group and was chaired by an eminent international jurist and retired Law Lord, Lord Leonard Hoffmann ("the Hoffmann Committee" or "the Committee").

13 Following its investigation, the Committee produced a report dated 1 February 2013 entitled “Report of the Independent Special Committee appointed by the Board of MTN Group Ltd to investigate allegations in United States proceedings by Turkcell” (“the Hoffmann Report” or “the Report”).

14 The plaintiffs make various references to the Report in their notice of motion and founding affidavit.

15 The MTN defendants discovered the Report as item 1900 of the first schedule to their discovery affidavit dated 30 October 2018. The Report runs to about 193 pages and has 10 appendices, some of which are voluminous. A copy of the Report and its appendices will be made available to this Court at the hearing.

16 Annex "VDO5" to the plaintiffs' founding affidavit is a copy of the Charter of the Hoffman Committee. Clause 4.5 of the Charter provided as follows:

"4.5 The investigation shall be covered by a duty of confidentiality and shall be privileged (it being conducted at the instance of the Board, in contemplation of litigation). Consequently:

4.5.1 the Committee shall maintain the confidentiality of the investigation and deliberations in connection with its responsibilities under this charter;

4.5.2 disclosure to the Board, or others within the Company, or as may be necessary for the purposes of its investigation, may be made as the Committee deems appropriate;

4.5.3 any advice the Committee provides to the Board may include legal advice, including advice received from legal advisers to the Committee and/or the Company; and

4.5.4 publication of any report of the Committee's findings (including any interim report) is to be decided by the full Board, on the recommendation of the Committee".

17 The contemplated litigation referred to in clause 4.5 of the Charter was the litigation in the United States, which was threatened against MTN Group and MTN Mauritius in the draft complaint.

18 The Hoffmann Report was delivered to the board of the MTN Group on or about 1 February 2013. The only, or in any event the dominant, purpose of the Report was to provide legal advice to the MTN Group on the outcome of the Committee's investigation in response to the anticipated litigation. As is apparent from clause 4.4 of the Charter, the Chairperson, Lord Hoffmann himself, was "responsible for overseeing and validating the investigation, as well as ensuring its integrity and independence." Moreover, the Board proposed to refer the Report to the attorneys, whom it had engaged to defend MTN Group and MTN Mauritius against the allegations against them in the draft complaint, for purposes of obtaining their advice.

19 The Hoffmann Committee's covering letter, which attached the Report, ended with the following recommendation:

"We recommend that, subject to legal advice in relation to the proceedings in the United States, the Report be published".

20 The issues raised in the US litigation were substantially the same as the issues raised in the present proceedings. The Hoffmann Report conveniently summarised these issues in paragraph 8 of chapter 1 of the Report:

"The Turkcell allegations

8. We shall deal in detail with the allegations in the complaint which we have been asked to investigate, but for the moment the following summary will be sufficient. It is

alleged that commencing in about June or July 2004, MTN conspired with Sairan and the Bonyad to oust Turkcell from the Irancell consortium and take its place. It gained the support of Sairan and the Bonyad by -

(a) using its influence with the South African government to procure the illicit supply to Iran of defence equipment and in particular by procuring the South African Minister of Defence to visit Iran in August 2004 and promise to supply Iran with a list of such equipment designated by the code name 'the Fish';

(b) procuring the South African representative at the International Atomic Energy Authority ('IAEA') to support Iran's position on nuclear development and in particular to abstain from voting on a resolution on 24 November 2005 to refer the Iranian nuclear programme to the United Nations Security Council;

(c) corruptly offering Sairan and the Bonyad financial support in the form of pretended loans, never intended to be repaid, for the purpose of enabling them to fund their shares of the money required for the capitalisation of Irancell and the licence fee payable to MCIT;

(d) bribing one Javid Ghorbanoghli ('Mr Ghorbanoghli'), then a deputy secretary in the Iranian foreign office and head of the Africa desk, with a payment of US$400,000 through a sham consultancy arrangement;

(e) bribing one Yusuf Saloojee ('Ambassador Saloojee'), then the South Africa ambassador to Iran, with a payment of US$200,000."

21 Mr Kilowan is a former employee of the MTN Group and was the senior representative of the MTN Group in Iran from about August 2004 until he resigned at the end of November 2007. This was the period that was relevant to the US proceedings and is relevant to the present proceedings.

22 The allegations made by the plaintiffs in the US proceedings, and also in the present proceedings, are based almost entirely on allegations that have been conveyed to them by Mr Kilowan. But the Hoffmann Committee found that all of his allegations were "a fabric of lies, distortions and inventions." Paragraph 4 of the Executive Summary of the Report said the following:

"We have not found it necessary to decide whether to prefer the evidence of other witnesses to that of Mr Kilowan because a comparison of his evidence with contemporary

documents (mostly written by himself) is sufficient to show that all the allegations are a fabric of lies, distortions and inventions. Most of this report consists of a comparison of what he now says and what he was saying and doing at the time. It shows him to be a fantasist and a conspiracy theorist."

23 This finding is confirmed in the following statements in the body of the Report:

23.1 The first sentence of paragraph 18 of chapter 1 of the Report, which reads as follows:

"Our approach to the evidence

Our conclusions are based almost entirely upon what we consider to be authentic contemporary documents, for the most part reports and e-mails generated by Mr Kilowan himself."

23.2 The final sentence of paragraph 18 of chapter 1 of the Report, which reads as follows:

"It is only when we have rejected Mr Kilowan's evidence on the ground that it is in conflict with the contemporary documents, internally inconsistent or hopelessly implausible, that we have relied upon the evidence of other witnesses which appeared to us to be supported by the documents or the inherent probabilities of the case."

23.3 Paragraph 148 of chapter 4 of the Report which, under the heading "Assessing credibility", reads as follows:

"It was only when we came to compare his [Mr Kilowan's] evidence with the contemporary documents, and in particular with the reports which he himself was sending from Iran, that we were driven to the conclusion that Mr Kilowan actually has little regard for whether he is telling the truth or not. It became apparent that a number of the most important incidents to which Mr Kilowan deposed with a wealth of circumstantial detail and quotation of direct speech, simply could not have happened. … …. Much of his evidence is either a deliberately distorted version of some innocuous facts or made up from whole cloth. We shall give seven specific examples at this stage, before turning to the allegations in the complaint. Even if one does no more than read the chronological series of his reports from Iran set out in Chapter 3, culminating in a passionate warning against having any dealings with Dr Mahmoudzadeh and Mr Mokhber, one will find it impossible to reconcile

what he was saying and doing at the time with his evidence of the conspiracy which forms the centrepiece of his evidence".

24 In paragraphs 10 to 17 of the Report the Committee dealt with the evidence made available to it. In paragraph 10 the Committee said the following:

"All the allegations in the complaint are based upon statements made to Turkcell by Mr Christian Kilowan ('Mr Kilowan'), who visited Iran on behalf of MTN on occasions between May and July 2004 until November 2007. The Committee has had access to Mr Kilowan's evidence in the form of two witness statements made for the purposes of the BIT arbitration, and the transcript and video recording of a deposition in the United States proceedings made by Mr Kilowan on 30 April and 1 and 2 May 2012 ('Mr Kilowan's Deposition Transcript, day 1, 2 and 3')".

25 In paragraph 11 the Committee said the following:

"A number of former and current employees of MTN, and South African and Iranian officials were interviewed in relation to the allegations raised in the United States litigation, and notes of those interviews were made available to the Committee. The persons who were interviewed or from whom statements were obtained are listed in Appendix 3."

26 Appendix 3 to the Report is annex "VD08" to the plaintiffs' founding affidavit. The Committee listed the names of the 23 persons who were interviewed or from whom statements were obtained.

27 In paragraph 12 of the Report the Committee recorded that:

"Messrs Eversheds LLP, who represent the IRI in the BIT arbitration, made available to us their client's factual witness statements in that arbitration, and the IRI's counsel and solicitors had a meeting with Lord Hoffmann (who represented the Committee). The names of the persons whose witness evidence we were supplied are also listed in Appendix 3."

28 The BIT arbitration, and the issues that were dealt with therein, were covered in paragraphs 28 to 35 of the third special plea (Res Judicata) of the MTN defendants in the present proceedings. The BIT arbitration proceedings were commenced in September 2009 by the first plaintiff (“Turkcell”) instituting arbitration proceedings against the Islamic Republic of Iran under the Iran-Turkey Bilateral Investment Treaty ("BIT"). The arbitration

tribunal made its award on 15 October 2014. Accordingly, the investigation carried out by the Hoffmann Committee overlapped with the proceedings in the BIT arbitration.

29 Eversheds represented Iran in the BIT arbitration. It made its client's witness statements available to the Hoffmann Committee. It did so to enable the Hoffmann Committee to give legal advice to the MTN Group. There is a common interest between the State of Iran and all the defendants in the present proceedings in relation to the issues raised in the BIT arbitration and in the present proceedings.

30 The same witness statements were produced in the BIT arbitration and are already in the possession of the plaintiffs. They were discovered by both the MTN defendants and the plaintiffs, as appears from the following table:

Statements of Witnesses in the BIT arbitration who are referred to in Appendix 3 of the Report	**MTN's discovery items**	**Date**	**Turkcell's discovery items**
Dr Masoum Fardis - First Witness Statement	1660	2010/05/16	1265
Dr Masoum Fardis - Second Witness Statement	1665/1829	2012/05/22	1275
Dr Ebrahim Mahmoudzadeh	1873	2012/10/08	1272
Mr Abbas Vafaei	1874	2012/10/09	
Mr Hosseinali Farzad	1880	2012/10/23	1237
Dr Seyyed Almlad Motamedi	1881	2012/10/23	1278
Mrs Irene Charnley - First Witness Statement	1882	2012/10/23	1276
Mr Javid Ghorbanoghli	1886	2012/10/24	1281
Mr Charles Wheeler	1887	2012/10/25	1283
Statements of Witnesses in the BIT arbitration who are referred to in Appendix 3 of the Report	**MTN's discovery items**	**Date**	**Turkcell's discovery items**
Rear Admiral Ali Shamkhani - letter not a statement	1888	2012/10/28	
Dr Masoum Fardis - Third Witness Statement	1898	2013/01/14	1286
Mrs Irene Charnley - Second Witness Statement	1899	2013/01/15	1287

31 The evidence of Ambassador Yusuf Saloojee is referred to in appendix 3 to the Report. The MTN defendants have already discovered the handwritten (and typed)

statements that were furnished by the Ambassador to his employer, the Department of International Relations and Cooperation (“Dirco”), as part of an internal investigation carried out by Dirco (being item 1839 on the MTN defendants' discovery schedule). These documents were likewise made available to the Committee.

32 Mr Nhleko's evidence was presented to the Committee, at the request of Freshfields, acting for the MTN Group, by his attorneys, Werksmans, in the form of a draft unsigned and unsworn statement marked “Privileged and Confidential” and a supplementary unsigned and unsworn statement likewise marked "Privileged and Confidential". His attorneys made it clear to the MTN Group and the Committee that the drafts were provided on a private and confidential basis so as to enable the Committee to furnish legal advice to the MTN Group. In addition, and since the US litigation was contemplated at the time the Hoffmann Committee was appointed by the MTN Group, there was and remains a joint or common interest privilege between the MTN Group and Mr Nhleko. For both these reasons, the MTN Group thus also acquired a privilege in respect of these documents. Neither it nor Mr Nhleko has ever waived this privilege. There can be no reasonable basis for saying that the publication of the Hoffman Report created a risk that unless Mr Nhleko’s draft statements were also disclosed, the Report may be misunderstood by, or be misleading to, or result in some form of unfairness to, the plaintiffs. This is all the more so since the Committee’s opinions are irrelevant in these proceedings.

33 Mrs Charnley's attorneys, Glyn Marais, at the request of Freshfields, acting for the MTN Group, provided the Committee with a privileged and confidential “Combined Summary of Facts and Argument”. The document was shared by her attorneys with the Committee on the basis of a joint or common legal interest she shared with MTN in resisting the plaintiffs’ allegations and claims in the United States litigation. In addition, she contemplated litigation against herself. MTN Group thus also acquired a privilege in respect of this document. Annexure “X2” is a copy of the front page of this document, which reads as follows:–

“This document sets out in summary format, the likely evidence that Mrs Irene Charnley may give on matters relevant to her. This document does not represent Mrs Charnley's actual evidence, as it, together with the analysis and arguments contained herein, has been prepared by Glyn Marais Incorporate[d] and does not amount to a record of statements made by Mrs Charnley during discussions with her.

The contents of this document are confidential and are protected by legal privilege, attorney client privilege and/or the work product doctrine. This information is being provided by Glyn Marais Incorporated, as Mrs Charnley's counsel, to Freshfields and Webber Wentzel on the understanding that she shares a common legal interest with MTN in connection with the pending and threatened litigation and the information is being communicated in furtherance of that interest. The information in this document may not be communicated to any person without the prior written consent of Mrs Charnley's counsel, which permission will not be unreasonably withheld.

On the basis that the principles set out above apply to the disclosure of this document to any persons to whom permission has been given by Mrs Charnley's counsel for the disclosure of the document, it is confirmed that this document may be disclosed to MTN's directors, senior executives and personnel involved in the case, including to the Hoffmann Committee, being a committee of the MTN Board, as well as to Eversheds Attorneys, on behalf of its client in the BIT arbitration, and to Werksmans Attorneys, on behalf of its client, in this matter."

34 It is clear from these terms that Mrs Charnley did not intend to surrender control of the legal privilege that she enjoys in the document. The legal privilege in it belongs to her as much as it belongs to the MTN defendants, and even if the MTN defendants had purported to waive it (which they did not), it could not be done by them alone.

35 As to the remainder of the witnesses who are referred to in paragraph 11 of chapter 1 of the Hoffmann Report:

35.1 They were interviewed by MTN Group's US attorneys, Freshfields, and notes of the interviews were made expressly in contemplation of the US litigation, for MTN Group to receive advice in that litigation, and for information and evidence gathering purposes in that regard. I refer to what I have already stated above in relation to the joint or common interest privilege between MTN Group and others, including Mrs Charnley and Mr Nhleko, which informed the basis of their willingness to share information confidentially including by way of interviews.

35.2 These notes were made available to the Hoffmann Committee on a privileged basis and were provided in confidence to enable the Committee to carry out its investigation and provide legal advice to MTN Group. All such notes have at all times remained privileged.'

[59] The defendants set out facts why, in their view, the documents sought are privileged documents. The opening paragraphs of the notes of the interviews held by Freshfields read:

> '"The following memorandum consists of Freshfields' thoughts, conclusions, mental impressions, and opinions concerning the interview, which was undertaken in the context of Freshfields' representation of MTN. Accordingly, this memorandum has been prepared with the intention that it is protected from discovery under the attorney-client privilege, attorney work product doctrine, and other applicable privileges. This memorandum is not, nor is it intended to be, a substantially verbatim recitation of statements made by […] during the interview. This memorandum has not been furnished to […], nor has […] reviewed, adopted, or approved the contents of this memorandum.
>
> A. Introduction
>
> […] explained that Freshfields are representing MTN in connection with the claim filed by Turkcell against MTN in Washington DC. […] explained to […] that Freshfields had been retained by MTN to investigate these claims, and that Freshfields represented MTN and not […]. […] noted that the discussion was subject to attorney-client privilege, but explained that the privilege belonged to MTN, not […]. […] further noted that in order to maintain this privilege and in order to guard against any accusation of witness collusion, […] should keep the discussion confidential, and not discuss this or the contemporaneous events with any other potential witness. […] agreed and indicated that […] did not have any questions."'

[60] The affidavits state that the MTN Group only released the report itself (with its appendices) and not any of the underlying documents. They claim that they retained confidentiality and privilege of those documents, especially notes of interviews and witness statements. The further question that arises is whether the MTN defendants waived the privilege that it claims by virtue of the references to documents in the Hoffman report.

[61] Mr. Alp, a partner of the MTN Group's attorneys was involved with the claims made by the plaintiffs against the MTN Group from the outset. He states that during Freshfields' evidence collection period and review of documents and data, only a small portion were found to have any potential value. He further says:

‘57 As far as the review of the approximately 6,597 gigabytes of electronic data collected from hard drives, email repositories and other electronic data sources was concerned (as is referred to in appendix 8 to the Hoffmann Report, which deals with Evidence Collection; and which is annex "VDO7" to the founding affidavit), the following is an outline of the process that was followed:

57.1 The information was derived (collected and imaged) in the first instance from identified custodians' hard drives, email repositories and other electronic data sources without any regard to whether that data was relevant or not. The custodians were initially identified by Freshfields in consultation with MTN's then General Counsel on the basis of their involvement in the Iran bid; and the list was updated as the document collection process proceeded. The identified custodians included then current MTN employees, former employees and Board members. The information comprised all electronic data from the identified custodians, without regard to "search terms" at that stage. In other words, the search caught up within its sweep, not only potentially relevant information, but also information wholly irrelevant to Iran, the GSM license process in question or the plaintiffs' allegations. For example, the information included data relating to other operations of the MTN Group in other territories, personal data, and the like. It constituted the sum total of all electronic data on potentially relevant custodians' hard drives, email repositories and other electronic data sources.

57.2 Only thereafter date-range filters were applied to the data as well as electronic de-duplication techniques. There was significant duplication in that the same data could have been in the inboxes of 20 or more of the custodians. That process reduced the data to approximately 658 gigabytes (which in itself amounted to about 2,7 million documents, excluding email attachments).

57.3 Those documents were then filtered through the use of computer-operated searches using carefully selected and wide-ranging "search terms" as well as a manual review of file names. Those filters yielded approximately 781 000 potentially relevant documents, all of which were then manually reviewed by the legal teams for relevance through a 3 level review process.

57.4 If 658 gigabytes equated to 2.7 million documents, then 6 597 gigabytes of data would have been about 10 times that number i.e. 27 million documents. The plaintiffs have not suggested that there could be about 27 million relevant documents, or even one

> tenth of that, namely 2,7 million documents. These figures show the absurdity of the plaintiffs' contentions that not all relevant documents have been discovered. These contentions are without merit.'

Mr. Alp concludes that in most cases the documents were found to be irrelevant.

[62] In terms of Rule 35(3) the documents that are relevant must be discovered. Although it is for a court to decide the relevance of each document, it is to be done based on the case before it and the evidence before it.

[63] Mr. Alp furnished a detailed explanation of how a large amount of unstructured data initially collected and refined through search words and reviews to identify only that which was potentially relevant. It is further stated that all documents that originated from Mr. Kilowan have been discovered. I mention this because the plaintiff, applicant for discovery, refers to additional documents sought regarding Mr. Kilowan.

[64] Mr. Alp's testimony is that the MTN defendants have discovered all the relevant documents in their possession or under their control:[31]

> ''Courts are reluctant to go behind a discovery affidavit, which is generally regarded as prima facie conclusive, save where it can be shown from:
>
> (a) the discovery affidavit itself;
> (b) the documents referred to in the discovery affidavit;
> (c) the pleadings in the action; or
> (d) any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or had other relevant documents is his or her possession or under his or her control, or has misconceived the principles upon which the affidavit should be made.'

[65] The principle was further elaborated on in *Federal Wine and Brandy Co Ltd*:[32]

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[31] Joubert et al *The Law of South Africa* Vol 4 (3rd ed) para 492. See, also *Marais v Lombard* 1958 (4) SA 224 (E) at 227G:
'. . . when a party seeking discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion.'

[32] *Federal Wine & Brandy Company Limited v Kantor* 1958 (4) SA 735 (E) at 749G-H.

'. . . an affidavit of discovery is conclusive, save where it can be shown either (i) from the discovery affidavit itself or (ii) from the documents referred to in the discovery affidavit or (iii) from the pleadings in the action or (iv) from any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made.'

[66] In an analogous case to this one, the High Court explained that the[33]

'. . . plaintiff alleges that all relevant documentation in its possession has been discovered and that no other documentation is available. [The defendants have] argued that such a reply is insufficient as there is still a basement storeroom full of documentation. By implication he is suggesting that the plaintiff be ordered to go back to the storeroom and have another look for such documents which have either been discovered incompletely or not at all. In my view this is not permissible. The plaintiff is on oath as having that it, who is supposed to know the documents, has done a proper investigation of those documents in the basement storeroom and has extracted what is relevant. It alleges that there are no more relevant documents. The defendants have not been able to point to any specific and relevant documentation in existence in the storeroom which has not been discovered. In these circumstances, there is in my opinion no reason to go behind the plaintiff's oath.'

[67] The threshold to successfully impeach factual allegations supportive of privilege is high, and requires that MTN's and Mrs. Charnley's allegations are shown to be wrong to a reasonable degree of certainty. In *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd*[34] ('*United Tobacco*'), the Full Bench of the Court affirmed that:[35]

'It seems to me that the first matter to be dealt with is the right of the Court to go behind the statements of the affidavit.

In *Haisham*, supra. para. 445, it is said:

"Subject to the exceptions mentioned below, the statements in the affidavits of documents are conclusive with regard to the documents that are . . . in the possession . . . of the party

[33] *Copalcor Manufacturing (Pty) Ltd and Another v GDC Hauliers (Pty) Ltd* 2000 (3) SA 181 (W) para 30.
[34] 1953 (1) SA 66 (T).
[35] Ibid at 205. The same threshold for interference exists in the United Kingdom. See eg *West London Pipeline & Storage Ltd and Another v Total UK Ltd and Others* [2008] EWHC 1296 (Comm) para 86.

> giving the discovery, both as to their relevancy, and as to the grounds stated in support of a claim of privilege from production for inspection.
>
> So when production for inspection is sought it will only be ordered where the Court is reasonably certain from the affidavit of documents itself, or from the nature of the case, or of the documents in question, or from the admissions made by the party in his pleadings or in any other affidavit, that he has erroneously represented or misconceived their nature or effect."'

[68] Mr. Alp further confirmed that:

> '"These documents record information that was obtained by the legal representatives of the MTN Defendants in confidence in contemplation of the legal proceedings referred to in paragraph 133.1.2 above and are privileged from disclosure. The MTN Defendants do not waive their privilege."'

and that all non-privileged documents have so been discovered. I cannot reject the statement that all relevant documents have been discovered unless there is a reasonable basis for concluding that the statement is incorrect or mistaken. There is nothing before me to show that the affidavit of Mr. Alp is not conclusive of this point.

[69] The plaintiffs require documents, many of which were excluded on relevancy due to a search and review of many thousands of documents. These irrelevant documents were not submitted to the Hoffman Committee and the plaintiffs do not indicate the relevancy of these documents.

[70] It is the duty of the court to decide on relevance, but having regard to the issues between the parties, in my view, the plaintiffs have failed to show that the documents excluded by the review process of the MTN Group can be relevant to these proceedings. The onus to show that they are indeed relevant is on the plaintiffs. The plaintiffs have failed to show that there is good or any reason to go behind the affidavit of Mr. Alp, who stated that all relevant documents have been discovered for purposes of the action. It ends the matter of discovery regarding all the documents that were not discovered as being irrelevant.

[71] Although the plaintiffs insisted that the documents are not privileged, the further thrust of the argument before me on behalf of the plaintiffs was then that a waiver was indeed shown and the documents are no longer protected.

[72] The evidence of the defendants that the witness statements and notes were obtained and prepared for purposes of litigation cannot be seriously disputed. The plaintiffs' arguments to the contrary do not overcome this evidence.

[73] In my view, it can also not be seriously disputed that the Hoffman report was commissioned due to the contemplated litigation in the United States of America (USA) against the MTN defendants. This evidence stands out despite the plaintiffs' attempt to argue differently. The evidence shows that the purpose of the Hoffman report was to provide legal advice to the MTN Group for the anticipated litigation[36]. It was the intention of the MTN Group to provide the Hoffman report to its attorneys engaged to defend the MTN defendants against allegations made in the USA.

[74] The defendants further argue, and in my view convincingly show, that the issues raised in the USA litigation match those in the current proceedings. This is evidence from the report itself:

> 'The Turkcell allegations
>
> 8. We shall deal in detail with the allegations in the complaint which we have been asked to investigate, but for the moment, the following summary will be sufficient. It is alleged that commencing in about June or July 2004, MTN conspired with Sairan and the Bonyad to oust Turkcell from the Irancell Consortium and take its place. It gained the support of Sairan and the Bonyad by –
>
> (a) using its influence with the South African Government to procure the illicit supply to Iran of defence equipment and in particular by procuring the South Africa Minister of Defence to visit Iran in August 2004 and promised to supply Iran with a list of such equipment designated by the code name "the Fish";

[36] Both advice privilege and litigation privilege can consequently be claimed. *See Astral Operations Ltd t/a County Fair Foods and Others v Minister for Local Government, Environmental Affairs and Development Planning (W Cape) and Others* 2019 (3) SA 189 (WCC) paras 6 to 7.

(b) procuring the South African representative at the International Atomic Energy Authority ("IAEA") to support Iran's position on nuclear development and in particular to abstain from voting on a resolution on 24 November 2005 to refer the Iranian Nuclear Programme to the United Nations Security Council;

(c) corruptly offering Sairan and the Bonyad financial support in the form of pretended loans, never intended to be repaid, for the purpose of enabling them to fund their shares of the money required for the capitalisation of Irancell and the licence fee payable to MCIT;

(d) bribing one Javid Ghorbanoghli ("Mr Ghorbanoghli") and a Deputy Secretary in the Iranian foreign office and head of the Africa desk, with a payment of US$400 000 through a sham consultancy arrangement;

(e) bribing one Yusuf Saloojee ("Ambassador Saloojee") then the South African Ambassador to Iran, with the payment of US$200 000.'

[75] The report refers to interview notes and witness statements. These notes of interviews or witness statements were made for purposes of litigation in the USA and provided to Lord Hoffman for purposes of legal advice. In practice the evidence of five witnesses was furnished to the Hoffman Committee at the request of Freshfields acting for MTN by its attorneys, Werksmans, in the form of draft, unsigned and unsworn statement material. They were marked privileged and confidential and were accompanied by a supplementary statement, also so marked. It was made clear that those drafts were provided on a confidential basis for purposes of the Hoffman Committee to provide legal advice to the MTN Group.

[76] A similar position pertains to the statement of the sixth defendant whose 'combined summary of facts and argument' was provided by her attorneys to the Hoffman Committee. The document provided under the same circumstances as set out in para 57 above, and the evidence that litigation was contemplated when the statement was furnished, cannot be gainsaid.[37]

[37] *Contango Trading SA v Central Energy Fund SOC Ltd* 2020 (3) SA 58 (SCA) para 29; *The Competition Commission v. Arcelormittal SA Ltd* 2013 (5) SA 538 (SCA)para 21; *Bagwandeen and Others v City of Pietermaritzburg* [1977] 2 All SA 562 (N).

[77] Other witnesses were interviewed by the MTN Group attorneys and notes were made in contemplation of the USA litigation and legal advice.

[78] What occurred in reality is that the Hoffman Committee hardly relied on any of the notes or statements due to a conclusion that the evidence of, Mr Kilowan, was 'a fabric of lies and distortions and inventions. . . .' However, MTN decided to release the Hoffman report and its appendices into the public domain after it was received. It claims that it retained the confidentiality and privilege of the documents not released. At this time, the USA proceedings were still pending and, objectively speaking, it would have made no sense for the MTN Group to have waived any privilege to the statements of witnesses and notes of interviews at the time of the publication of the report.

[79] The plaintiffs seek a large number of documents. On the assumption that they properly identified those documents, the defendants have shown that several of the documents sought have indeed been discovered. Examples are:

- Email message dated 30 April 2004 from Mr. Mackinnon
- Email message that was sent to Miss Witbooi on 2 May 2004.
- Email message that Mr. Cleaver sent to MTN's Iranian lawyers on 2 May 2004 as well as a response on 4 May 2004
- Factual witness statements of the Islamic Republic in relation to the BIT arbitration.
- Statements of Mr. Kilowan.

[80] I do not quite understand why the plaintiffs continue to seek these documents in this application, save that it gives the impression that a shotgun-approach has been taken without having applied its mind properly to what it seeks when regard is had to what has already been discovered.

[81] The test whether documents are privileged is as follows:

'The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.'[38]

'See Schwikkard et al *Principles of Evidence* (2ed) (Juta, Cape Town 2002) 135-7 where the requirements are set out as follows: The legal advisor must have been acting in a professional capacity at the time; the advisor must have been consulted in confidence; the communication must have been made for the purpose of obtaining legal advice; the advice must not facilitate the commission of a crime or fraud; and the privilege must be claimed.'[39]

[82] The ambit of the privilege was described thus:[40]

'"The law came to recognise that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that this entailed immunity from disclosure of such communications between them. . .

Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice . . . The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself . . .

The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would

[38] *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) para 183.
[39] *Thint* supra at fn 124.
[40] *S v Sefatsa* 1988 (1) SA 868 (A) at 886A-G, quoting with approval the High Court of Australia decision in *Baker v Campbell* (1983) 49 ALR 385 at 442-445.

otherwise be impaired: see *Waugh v British Railways Board* [1980] AC 521 at 535, 536 . . .

The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation. . .

Speaking for myself, and with the greatest of respect, I should have thought it evident that if communications between legal advisers and their clients were subject to compulsory disclosure in litigation, civil or criminal, there would be a restriction, serious in many cases, upon the freedom with which advice or representation could be given or sought. If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part.'"

[83] The Appellate Division has summarised the rationale, absoluteness and scope of legal privilege as follows:[41]

'The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and clients should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired.'

[84] In *Three Rivers District Council and Others v Governor and Company of the Bank of England* ('*Three Rivers No 6*')[42], the House of Lords held that legal advice covers what should prudently and sensibly be done 'in a relevant legal context', which includes legal advice or assistance in the presentation of a case to an inquiry by a person whose conduct might be criticized by it.

[41] See *Waymark NO v Commercial Union Assurance Co Ltd* 1992 (3) SA 779 (Tk) at 782D-E.
[42] [2004] UKHL 48.

[85] The following excerpt from the reasoning of Lord Browne in *Three Rivers No 6* is to point:

> '120. I think it clear that legal advice privilege attaches to the communications between the Bank and its lawyers concerning the presentation of the Bank's overarching statement (the statement of its case to the Bingham inquiry). I would go so far as to state as a general principle that the process by which a client seeks and obtains his lawyer's assistance in the presentation of his case for the purposes of any formal inquiry – whether concerned with public law or private law issues, whether adversarial or inquisitorial in form, whether held in public or in private, whether or not directly affecting his rights or liabilities – attracts legal advice privilege. Such assistance to my mind clearly has the character of legal business. It is precisely the sort of professional service of which lawyers are ordinarily employed by virtue of their expertise and experience . . . It is, moreover, a service which can only be effectively be rendered if the client is candid and forthcoming as to the facts of his case – the very consideration which justifies the absolute character of legal advice privilege in the first place.
>
> 121. . . . And by the same token that legal advice privilege must in my judgment apply to someone whose reputation is at stake, so too should it apply to anyone who instructs lawyers with a view to making the best presentation of his case at an inquiry. It is simply not practicable to seek to distinguish between the different interests of those appearing. This is, after all, an area of the law where clarity and certainty are at a premium.'

[86] Having regard to the purpose of the statements and notes, I find that they were made at a time when litigation was imminent in the USA and provided to Lord Hoffman for purposes of legal advice.

[87] That results in the documents being privileged and the MTN defendants may rightfully claim that privilege and refuse to discover them as the witness statements and interview notes satisfy the requirements for legal privilege.[43]

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[43] Thint, supra para 183 and fn 124, which cited with approval the requirements as laid out in Schwikkard et al, *The Principles of Evidence* (2nd ed) Juta 135-137.

[88] Save for the facts referred to regarding the witness statements already set out, the sixth defendant provided further evidence. She understood that she was to be interviewed for the purpose of enabling MTN to refute the plaintiffs claim in the USA; the interview was conducted in anticipation of the USA litigation and possible litigation in South Africa; the interview concerned her knowledge of the plaintiffs' allegations; she was informed that she would be a witness for MTN. In addition, the heading of the interview notes contained the line '**PRIVILEGED AND CONFIDENTIAL Attorney work product**' and stated in the preface that was set out in para 59 above.

[89] The interview notes are thus protected by a legal professional privilege. They were made by MTN's lawyers for the purpose of advising MTN in the context of their retainer and in contemplation of the USA litigation and, according to the sixth defendant, litigation in South Africa. The cover page of the sixth defendant's statement reads:

> 'The contents of this document are confidential and are protected by legal privilege, attorney client privilege and/or the work product doctrine. This information is being provided by Glyn Marais Incorporated, as Mrs Charnley's counsel, to Freshfields and Webber Wentzel on the understanding that she shares a common legal interest with MTN in connection with the pending and threatened litigation and the information is being communicated in furtherance of that interest. The information in this document may not be communicated to any person without the prior written consent of Mrs Charnley's counsel, which permission will not be unreasonably withheld.'

[90] The result is that the statement is indeed protected by privilege both for litigation in the USA and South Africa. There is nothing to show that the sixth defendant may have waived her legal professional privilege. The further issue that the plaintiffs argued was that the defendants, by releasing the Hoffman report, have waived the right to confidentiality of the witness statements and notes as there are references to these documents in the Hoffman report. The plaintiffs contend that the publication of the Hoffman report itself is a waiver of any privilege that the MTN defendants enjoyed over the report if it had one and also the witness statements and notes. The plaintiffs averred that the defendants are 'cherry picking' what it will discover and what not and that this is

not permissible. The plaintiffs submitted that the confidentiality, if it existed, was destroyed by the publication of the Hoffman report.[44]

[91] The starting point is that if a document qualifies for a legal privilege, it is absolute and endures forever unless of course such privilege is waived.

[92] The mere reference to a document cannot constitute an implied waiver.[45] In *Astral Operations Limited,*[46] the court held:

> '[31] As it is, nothing in Johnson's desktop study suggests that the content of the memorandum informed the substance, rather than the ambit, of his report. Moreover, no part of the memorandum has been deployed or relied on by the respondents identifiably as part of their case in the review. Indeed, in the light of Johnson's June 2016 affidavit, it is plain that the respondents are not even deploying the desktop study itself in advancement of their defence of the review proceedings; it was included in their papers in error.
>
> [32] For all these reasons the application is dismissed with costs.'

[93] In *Peacock v SA Eagle Insurance Co Ltd*,[47] the court, in clarifying the relevant principles as to whether legal privilege in the undisclosed portion of a certain document (the disclosed portion of which contained a diagram) had been waived, said this:

> 'In my view, subject to a possible qualification I shall mention in a moment, the law on this point was correctly stated by Mustill J (as he then was) in *Nea Karteria Maritime Co Ltd v Atlantic and Great Lake Steamship Corporation; The Athanasia Comninos (2)* [1981] Com LR 138, as follows:
>
> "I believe that the principle underlying the rule of practice exemplified by *Burnell v British Transport Commission* ([1955] 2 All ER 822) is that, where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issues in question. To allow

[44] See *Astral Operations t/a County Fair Foods & Others v Minister of Local Government, Environmental Affairs and Development Planning (W. Cape) and Others* 2019 (3) SA 189 (WCC) paras 5-7.
[45] See *Governing Body of Hoërskool Fochville v Centre for Child Law [*2014] 4 All SA 204 (GJ) para 53; *Arcelormittal* supra para 34.
[46] Supra paras 31 to 32.
[47] 1991 (1) SA 589 (C) at 591G-592G.

> an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."
>
> (The Commercial Law Reports are not available to me and I have taken the above quotation from the report of the judgment of Templeman LJ in *Great Atlantic Insurance Co v Home Insurance Co and Others* [1981] 2 All ER 485 (CA) at 492e-f.)[48]
>
> . . .
>
> In the present case I think it clear that Mr Louw did not "deploy" the diagram in any way. What he did do was to offer to disclose it, in a spirit of co-operation, to Mr Binns-Ward. It was Mr Binns-Ward who caused it to be disclosed to the Court by asking for it to be put into the bundle. I do not think the disclosure of the diagram, without the accompanying statement, prejudiced defendant in any way."'

[94] To similar effect, in *Arcelormittal* the Supreme Court of Appeal confirmed the rationale for the implied waiver in partial disclosure cases as follows:[49]

> 'The reason is that Courts are loath to order disclosure of only part of a document because its meaning may be distorted. But it must also be so that it does not inevitably follow that because part of document is disclosed, privilege is lost in respect of the whole document.'

[95] The onus is on the plaintiffs to prove such a waiver and that onus is not easily discharged.[50] The answer to the above argument on behalf of the plaintiffs lies in *Contango*:[51]

> 'Although the advice received from senior counsel is legally privileged and is not, I submit, capable of discovery, given where we are now, suffice it to say that the senior advocates agreed with the outcome of the CEF legal review.'

[96] In his judgment[52], Wallis JA quoted, with approval, the following passage from the Australian case of *Mann v Carnell*:

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[48] At 591H-592A.
[49] At 592F.
[50] *Contango supra* para 61 and *Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA)* para 19.
[51] At para 39.
[52] Supra para 45.

'Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.'

[97] Wallis JA made further reference to the *Man* case in the following terms[53]:

'Lastly, while considering Antipodean authority, the Federal Court of Australia dealt with the question of when fairness, in the sense used in these judgments, requires disclosure, in Telstra v BT and Adelaide Steamship. In Telstra, after analysing a number of judgments where the privilege was held to have been waived, the majority formulated the test for unfairness leading to disclosure as being whether the litigant had raised 'as an element in the cause of action relied upon, an issue incapable of resolution without reference to the material.' In Adelaide Steamship the court said:

"In other words the cases are ones in which, in the substantive proceedings brought, the privilege holder has put in issue the very advice received. We observe in passing that it is questionable whether advice can properly said to be in issue in a proceeding merely because it may be relevant to an issue in it … save, perhaps, where the proceeding is between client and legal adviser and the advice is relevant to the adviser's defence of that proceeding."'

[98] Wallis JA sets out the ratio for his decision as follows:[54]

[53] Supra para 47.

'Drawing the threads of both local and foreign authorities together four things emerge that must be considered cumulatively. The first is that there is no difference between implied waiver and a waiver imputed by law. They are different expressions referring to the same thing. The second is that such a waiver may be inferred from the objective conduct of the party claiming the privilege in disclosing part of the content or the gist of the material. The third is whether the disclosure impacts upon the fairness of the legal process and whether the issues between the parties can be fairly determined without reference to the material. Finally, the fourth is that there is no general over-arching principle that privilege can be overridden on grounds of fairness alone. The rule is "once privileged, always privileged" and it is a fundamental condition on which the administration of justice rests. Only waiver can disturb it.'

'. . . Each case must be decided on its own facts and there is no presumption that the disclosure of the gist of legal advice will inevitably amount to conduct incompatible with asserting privilege in relation to the advice itself.[55]

'. . . The response was to claim privilege. That was a complete answer unless privilege had been waived. It was for the appellants to establish waiver. . . .'[56]

[99] Wallis JA considered the judgment in the case of *The Competition Commission v. Arcelormittal SA Ltd* 2013 (5) SA 538 (SCA):[57]

'[52] The facts in *Arcelormittal* are instructive. The Competition Commission had received information and documents from Scaw concerning alleged prohibited practices in the steel industry. Scaw made a formal leniency application in terms of the Commission's corporate leniency policy. The Commission then conducted its own investigation into pricing in the steel industry and referred a complaint of alleged prohibited practices to the Competition Tribunal for adjudication. In its referral affidavit the Commission said that Scaw had confirmed in its application for leniency "that there had been a longstanding culture of co-operation among the steel mills regarding prices to be charged and discounts to be offered." In addition there had been arrangements for market division. It referred to its own

[54] Supra para 48.
[55] Supra para 59.
[56] Supra para 61.
[57] Supra paras 52-53.

investigation and concluded that it was "as a result of information contained in the Scaw application" as well as its own investigation that it had made the referral.

[53] Against that background some of the parties against whom the complaint had been made asked for production of the Scaw leniency application. This court pointed out that reference to the information obtained from Scaw was unnecessary, as a referral could have been made simply on the basis of a "concise statement of the grounds of the complaint and the material facts or point of law relied on." By including it the Commission made it part of its cause of action to which the other parties to the referral would have to respond. Without production they could not do so. In the result this court held that there had been an implied waiver of the privilege that would otherwise have attached to the leniency application.'

[100] Wallis JA then proceeded to apply these principles to the facts in question. The following findings were made by the learned judge:[58]

'The facts in this case are entirely different. The opinions were referred to solely in the context of explaining the delay. Privilege was clearly asserted. The deponent then added the rather cryptic statement "given where we are now, suffice it to say" that the advocates agreed with the outcome of the legal review. No reliance was placed on the content of the opinions in support of the case that had been set out in some detail in the first three hundred odd paragraphs of the founding affidavit. The prefatory words 'given where we are now' referred to the fact that the respondents' case had already been set out fully in the preceding portion of the affidavit. "Suffice it to say" conveyed that nothing of substance needed to be said about the opinions and the advice received. Nothing of substance was then said, beyond an indication that counsel agreed that the disposal agreements fell to be reviewed and set aside.'

[101] Wallis JA then expanded on the relevant facts and stated inter alia:[59]

[101.1] 'The respondents referred to the opinions in setting out the timeline of the steps taken by them in investigating the disposals. They did not incorporate the contents of the opinions into their case in a way that compelled the appellants to provide a response to those contents without having had sight of them. . . .'

[58] *Contango* para 54.
[59] Supra para 60.

[101.2] 'Both propositions advanced by Mr Strachan were inconsistent with the law as summarised in para 48 of this judgment. Questions of the waiver of privilege are far more nuanced than that. The nature, extent and purpose of the disclosure is fundamental. Considerations of fairness come into play when the disclosure introduces into the claim or defence contentions that can only be responded to if there is full disclosure (is where).[60] There is no automatic waiver as a result of a partial disclosure, as the facts in both *Peacock v SA Eagle* and *Harksen* demonstrate. Nor is fairness an independent ground for holding that there has been a waiver of privilege.'[61]

[101.3] 'I am also unable to appreciate on what basis the opinions could bear upon the just and equitable relief to be granted to the respondents if the review succeeded. That outcome would merely establish that the views of counsel were legally correct. It is a mystery to me how that could influence or affect the just and equitable remedy the court might in due course award. As with any such case the court would hear submissions from the parties and craft an appropriate order. If, as was foreshadowed, the question of remedy was to be held over until the merits had been decided it is conceivable that the court might require further information to be placed before it or to have a separate hearing on remedy. The opinions of counsel would not affect any decision in that regard.'[62]

[101.4] 'I accept that the statement that counsel were of the opinion that the outcome of the legal review was correct, constituted a partial and limited disclosure of the conclusion reached in the opinions. In some small measure it may also have conveyed the gist of those opinions, insofar as the basis for the conclusions of the legal review had been set out earlier in the founding affidavit. To that extent there was conduct on the part of the respondents that could objectively speaking be viewed as inconsistent with preserving in full the confidentiality of the opinions. However, that conduct must be seen in the light of the fact that in the very same paragraph a claim that the opinions were privileged was asserted.'[63]

[101.5] 'In the face of that assertion, and applying the approach set out in *RAF v Mothupi*, there can be no question of the respondents relying on some undisclosed mental reservation in regard to their right to claim privilege. They asserted it directly and the perception of

[60] Own deletion.
[61] *Contango* para 63.
[62] *Contango* para 65.
[63] *Contango* para 66.

> a reasonable person in the shoes of the appellants would have been that they claimed privilege in respect of the opinions. I accept that the mere assertion of privilege will not in all cases preclude a finding that privilege has been waived. The extent of disclosure may be so great; the incorporation of the substance of the document in the claim or defence so apparent; the necessity in all fairness for there to be disclosure if the other party is not to be prejudiced in its conduct of the defence (so clamant)[64]; that it overrides the expression of a subjective intention not to waive the privilege. But that is not this case. The content of the opinions was not made an issue in the proceedings and there was no need for the appellants to respond to them. The relevance of their contents to the litigation was not apparent. Finally, the appellants did not attempt to show, as opposed to assert without explanatory detail, why it would be unfair for them to proceed with their opposition to the review without having seen the full opinions. For those reasons I conclude that the legal advice privilege attaching to them was not waived and the appellants were not entitled to an order for their production.'[65]

[102] The plaintiffs relied on decisions of the Court of the USA for its argument that all documents underlying the Hoffman report should be disclosed. They failed, however, to take the *Contango* decision into account. The case law of the USA is not in accordance with *Contango*.

[103] The decision to publish the Hoffman report, in my view, does not result in a waiver of the privilege that attaches to the witness statements and notes. The reference in the Hoffman report is not so much to the contents of these statements and notes but a reference to the fact that they existed and eventually not relied upon for its conclusion regarding Mr Kilowan. These documents do not form part of the Hoffman report. They are separate documents and the argument that because the report has been disclosed, privilege in other 'parts' has been waived, cannot succeed.

[104] I am not satisfied that the plaintiffs have discharged their onus to show that there has been a waiver of the privilege enjoyed over the statements that were referred to in a note or fleetingly referred to in a report but not otherwise disclosed. The defendants assert the privilege on a rational and legally sound basis. They have not disclosed the

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[64] Own deletion.
[65] *Contango* para 67.

substance of the witness statements and notes and never intended to do so. In the words of *Contango*:

> '. . . Implied waiver, as all the cases on the subject show, arises where the conduct of the person concerned is objectively inconsistent with the intention to maintain confidentiality and, if permitted, will unfairly fetter the opponent's ability to respond to the case or defence advanced in reliance on the privileged material. . . .'

But these considerations do not arise. The Hoffman report is an opinion and irrelevant to the proceedings currently underway. This is accepted by the plaintiffs. The contents of the report are not relied upon in the litigation.

[105] I am of the view that the conclusion which I reached regarding the privileged nature of the statements and notes, which privilege has not been waived, results in the plaintiffs' failing in their application.

[106] There is an additional ground on which the MTN defendants and the sixth defendant rely for refusing to produce what they have said to be privileged documents, particularly the witness statements. The argument is based on the principle of a joint and common interest privilege, which both the MTN defendants and the sixth defendant claim. That principle requires that parties who have a shared privilege in documents or statements must all waive the privilege and one party cannot do so without the consent of the other. Although a less discussed area of our law, the 'joint interest privilege' and 'common interest privilege' formed part of the English law on 30 May 1961 and, as such, forms part of the South African law by virtue of the provisions of s 42 of the Civil Proceedings Evidence Act[66] and are thus to be accepted in South African law. If this is a development of the South African common law, I am of the view that it is a wholesome development, justified for good reason.

[107] Firstly, legal privilege is grounded in public policy and encourages and promotes full and factual disclosure by clients to their legal advisors when seeking legal advice. It underlies and supports the functioning of the adversarial legal system of litigation.[67]

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[66] Act 25 of 1965.
[67] *Thint*, supra para 183.

[108] Secondly, it prevents one party from prejudicing the rights of another although it may not assist the parties to raise the privilege against one another.

[109] Joint inherent privilege may arise where two or more parties jointly retain the same lawyer, or where although there is no joint retainer, the parties have a joint interest in the subject matter of the communication at the time that it comes into existence.[68] Once a joint interest privilege is established, it follows that each party to the relationship can assert privilege in the relevant communication against the rest of the world.[69] The consequences were affirmed in *R (on the application of Ford) v Financial Services Authority (Johnson and Another, interested parties)*[70]as follows[71]:

> 'The consequences of a joint interest being established are the same as if there were a joint retainer giving rise to a joint interest. They were described by Rix J in *Hellenic Mutual War Risks Association (Bermuda) Ltd and General Contractors Importing and Services Enterprises v Harrison, The Sagheera* [1997] 1 Lloyd's Rep 160 at 165166:
>
> "Parties who grant a joint retainer to solicitors of course retain no confidence as against one another: if they subsequently fall out and sue one another, they cannot claim privilege. But against all the rest of the world, they can maintain a claim to privilege for documents otherwise within the ambit of legal professional privilege; and because their privilege is a joint one, it can only be waived jointly, and not by one party alone. These principles are, I believe, well established: see for instance *Rochefoucauld v. Boustead*, (1986) 65 L.J.Ch. 794, *Cia Barca de Panama S.A. v. George Wimpey & Co. Ltd.*, [1980] 1 Lloyed's Rep. 598, *[Re Konigsberg (a bankrupt), ex p Trustee v Konigsberg* [1989] 3 All ER 289, [1989] 1 WLR 1257]."'

[110] A common interest privilege arises between parties who share a common interest in communications shared between them. The concept was explored by Lord Denning:[72]

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[68] Carpenter, Chloe (edited by Thanki QC) *The Law of Privilege* Oxford University Press (Third Edition) (The Law of Privilege) at 6.01 – 6.02, 6.07.
[69] Ibid, at 6.08.
[70] [2011] EWHC 2583.
[71] At para 17.
[72] See *Buttes Gas and Oil Co v Hammer (No 3)* ('*Buttes*') CA ([1981] 1 QB 223.

> ‘There is a privilege which may be called a “common interest” privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigations that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the self-same points as he – but these have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel’s opinions. All collect information for the purposes of litigation. All make copies. All await the outcome with the same anxious anticipation – because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant. In all such cases I think the courts should – for the purposes of discovery – treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other’s legal advisor. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.’

[111] The authors of *The Law of Privilege* describe common interest as follows:

> ‘In short, common interest privilege arises where one party (party A) voluntarily discloses a document which is privileged in its hands to another party (party B) who has a common interest in the subject matter of the communication or in litigation in connection with the document which was brought into being. In such circumstances, provided disclosure is given in recognition that the parties share a common interest, the document will also be privileged in the hands of party B. The privilege can arise even where the common interest is subject to terms as to party B’s use of the document. Although the point has not been considered extensively, the better view is that in order for the privilege to be invoked the

> common interest must arise at the time of disclosure by party A to party B: unlike with joint interest privilege, it is not necessary for it to arise at the time the document was created.'[73]

[112] In *Cross on Evidence*[74] the distinction between the two concepts of joint and common privilege is said to be:

> 'The distinction between common interest privilege and joint privilege, though capable of being drawn analytically, is not always drawn, and in particular circumstances both types of privilege may co-exist. What, then, is the practical significance of the distinction? The only material respect thrown up by the cases is that all holders of the joint privilege must concur in waiving it, and while normally all holders with a privilege based on common interest must concur in waiving it, fairness can require that disclosure by one holder of common interest privilege can have effect as a waiver by all.'[75]

[113] In The Law of Privilege, the position is discussed in some detail. In the course of their discussion, the authors refer to the following passage from *Farrow*:[76]

> 'If in principle legal professional privilege vested in a party is not lost by dissemination of the contents of confidential documents to others with a common interest, I think that fairness, in many cases, will require that the privilege not be lost because one of those parties, be it the provider or the recipient, is minded to waive it. Once parties with a common interest have exchanged or provided one to another the contents of communications with legal advisors about the subject of their common interest, the question of whether the privilege is lost with its waiver by one must be determined by asking whether the waiver has made it unfair for the other parties with a common interest to maintain the privilege; *Attorney General for the Northern Territory v Maurice* (1986) 161 CLR 475 at 488. This requires account to be taken of such matters as the circumstances in which the privileged communication took place and came to be exchanged and provided to others,'

[114] Then the authors say this:[77]

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[73] The *Law of Privilege* at 6.20.
[74] Heydon, J D *Cross on Evidence* Field, Queensland Evidence Law 5th Edition, 2019.
[75] Ibid, at [25265].
[76] *Farrow Mortgage Services (Pty) ltd (in Liquidation) v Webb* (1996) 39 NSWLR 601 at 608 and 619-20
[77] At 6.62.

> 'Hence, it is not necessarily decisive either way that the party who has waived privilege was the original holder of the privilege, or a recipient who could claim privilege only under the common interest doctrine. Circumstances relevant to the question whether waiver by one will affect the other holders of the common interest privilege include the circumstances in which the privileged communication took place and came to be exchanged and provided to the others. . . .'

[115] In summary, the position therefore appears to be this: in cases of joint privilege, all joint privilege holders must concur in the waiver for it to be effective; in cases of common interest privilege, all in the common interest group may claim the common interest privilege, although if there is a question of waiver, a factual enquiry must take place for the purpose of determining whether fairness requires that all in the common interest group (even the primary rights holder in respect of the information, whose 'interests ought ordinarily to be paramount') should be held to have waived privilege.

[116] On the facts before me the documents, and especially statements of witnesses and interview notes, were compiled on the basis and within the knowledge that the plaintiffs had made allegations implicating both the MTN defendants and the fifth and sixth defendants. The allegations against the fifth and sixth defendants were regarding a time when the fifth and sixth defendants were executives of the MTN defendants; the documents had a direct connection to the litigation in USA which implicated all the defendants; the MTN defendants and fifth and sixth defendants took an aligned position in response to the allegations and the affidavit of the sixth defendant puts this beyond any doubt.

[117] A useful illustration of the principles at play in a common interest privilege waiver occurred in the Singaporean case of *Motorola Solutions Credit Co LLC v Kemal Uzan*,[78] where the issue was whether common interest privilege had been waived over various emails, which had been obtained by the plaintiffs pursuant to a Hong Kong court order from an alleged nominee of the defendants. The nominee did not object to the disclosure.

[78] [2015] SGHC 228.

[118] The court (per Chua JC) drew a distinction between waiver by the provider of the privileged materials and waiver by the recipient in a common interest privilege group. Common interest privilege could be waived unilaterally by the provider. By contract, waiver by a recipient would not constitute waiver by the other common interest holders, including the provider, unless they participated in the waiver. As the alleged nominee was merely a recipient of the emails, and the defendants had not participated in the waiver, the defendants could maintain privilege over the emails. Chua JC also noted that even if the fairness advocated in *Farrow* was adopted,[79] it would not be unfair for the innocent common interest holders to continue to assert privilege despite waiver by one recipient in the common interest group, unless they had themselves participated in the waiver.

[119] Applying these principles to the facts, there is nothing to show that the sixth defendant or any other witness who furnished a witness statement or granted an interview, consented to their documents being made public or that they individually waived their privilege in the documents.

[120] Based on the reasons set out herein, the application for further and better discovery cannot succeed. The 'discovery' of a few documents by attaching these to the affidavits in these proceedings is insignificant in relation to the broader ambit of the application and, in my view, does not affect the question of costs.

<u>The fifth defendant's application to amend his plea</u>

[121] Although this portion of the hearing also occupied the best part of a day, the view that I take of the matter does not justify a detailed judgment dealing with all the various intricate issues that were raised.

[122] The fifth defendant filed a plea in 2017, which plea included several issues which were pleaded as special pleas. The first special plea reads as follows:

> '1. In this action, the plaintiffs seek to advance contentions that require this court to sit in judgment on the sovereign acts of the Government of the Islamic Republic of Iran ("Iran") and Iranian-state entities.

[79] Supra para 25.

2. As appear from the allegations made in support of the plaintiffs' cause of action, in particular paragraphs 36 to 38, 47 to 51 and 60 of the particulars of claim, the plaintiff contends that –

2.1 the Ministry of Communications and Information Technology ("MCIT") representing Iran, was guilty of improper and unlawful conduct and acted mala fide in the discharge of his duties;

2.2 the Iran Electronic Development Company (IEDC"), being an Iranian state-controlled entity, was guilty of like misconduct;

2.3 Iran (including MCIT) had been induced through corrupt actions to breach its obligations and commitments.

3. Such contentions are integral to the plaintiffs' pleaded cause of action.

4. It is not in accordance with customary international law for the court to adjudicate upon the said contentions and it does not accord with section 232 of the Constitution of South Africa, 1996 and the provisions of section 2(1) of the Foreign States Immunities Act, 187 of 1981, all of which prevent the Court from adjudicating upon the legality, validity or acceptability of such acts, being the acts of a sovereign state in its area of sovereignty.

5. In the premises and by virtue of the act of state doctrine, this Court should not adjudicate upon the matter.

WHEREFORE the fifth defendant prays that this honourable court should decline to adjudicate the matter and dismiss same, or grant a perpetual stay of action, with costs.'

In issue is the common law doctrine of state immunity and that this court lacks jurisdiction to adjudicate the matter.

[123] The plaintiffs replicated to this first special plea, which plea was also raised by the other defendants. The plaintiffs replicated that they denied that the doctrine of state immunity prevents the court from adjudicating on the legality, validity or acceptability of the acts of a sovereign state in its area of sovereignty, alternately they deny that the acts in question were sovereign acts; they asserted that the acts and conduct of the

State of Iran and its Agencies were in breach of constitutional and or other enforceable rights of the plaintiffs; and in any event that the State of Iran was not integral to the cause of action and that the fifth defendant's liability did not depend upon the legality, validity or acceptability of the conduct of the Government of Iran.

[124] The issue of jurisdiction has, consequently, been canvassed in the pleadings and will form a part of the hearing in this matter when the facts are placed before the court. The amendment, in my view, introduces no new defence but it is an amplification that the fifth defendant and others had raised before. Counsel for the fifth defendant submitted that all that is done is to present the plea in greater detail as to both facts and the law and to distinguish more lucidly between the Foreign States Immunities Act[80] and the Act of State doctrine.

[125] It will be apparent that three of the objections raised by the plaintiffs relate to the competence of the jurisdiction issue, which the plaintiffs had already replicated to and which is and will be an issue at the trial. If the amendment is not allowed the very issue that the plaintiffs state is excipiable, remains on the pleadings and it will be determined at the trial. The act of state defence has been pleaded by the MTN defendants in para 7.12 in their plea. The sixth defendant introduced it by way of amendment in October 2019 without objection from the plaintiffs.

[126] As a court has a discretion to allow an amendment even if it would render the pleading excipiable, it is my view that the excipiable if it is indeed excipiable, exists even without the amendment. To embark on a preview to determine the excipiability of the amended plea would be an exercise in futility – that very issue remains alive and will have to be dealt with at the trial. Any finding by this court will not bind the trial court. In my view this is pre-eminently a matter where I should exercise my discretion and not pronounce on the issue which will inevitably serve before the trial court where all the defendants will participate and not at this interlocutory stage as between the plaintiffs

[80] Act 87 of 1981.

and the fifth defendant only. I am fortified in my view by the judgment of the full bench of the Western Cape in *Obiang v Janse van Rensburg and Another* [81] where it was said:

> '[63] The Cherry Blossom was an application for a temporary interdict restraining the removal of a cargo of minerals on board the vessel The Cherry Blossom anchored in the port of Koega pending the institution of a vindicatory action by the alleged owners (The Saharawi Arab Democratic Republic – "the SADR") of the cargo. A provisional order was granted in favour of the SADR and on the return day the matter was heard by the Full Bench in light of the importance thereof. The act of state doctrine was raised by certain of the respondents ("OCP" and "Phosboucraa") opposing the attachment who alleged that the cargo actually belonged to the Government of Morocco. Hence the court was urged to desist from confirming the rule and was requested to refrain from entertaining the application by exercising judicial restraint in accordance with the act of state doctrine in favour of Morocco.
>
> [64] The response of the SADR was that the question of judicial restraint ought not to be considered at that stage but rather by the court hearing the vindicatory action. Reliance was placed on the House of Lords decision in *Kuwait 1* in which the court held that it was preferable that reliance on the doctrine should only be considered once the issues had been properly articulated in the pleadings rather than at a preliminary stage of the matter. The reply from OCP and Phosboucraa was that the Full Bench had all the issues before it and that nothing would change by the time the vindicatory action was heard. The court was accordingly urged to apply the doctrine.
>
> [65] The Full Bench followed *Kuwait 1* and declined to apply the doctrine.
>
> "[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 remains of application, namely that a court dealing with an interlocutory proceedings, 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. . .

[81] 2019 (4) All SA 287 paras 63-65 and 70.

[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… 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 of which the court otherwise has jurisdiction. . .

[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 s34, 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.

[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."

[70] In the result, I am of the view that it would be prudent for this court to follow the route proposed by the Full Bench in *The Cherry Blossom* and decline to finally determine this

dispute through the application of the act of state doctrine at this stage, given that proceedings for attachment are essentially interlocutory in nature. Rather, the parties should be given adequate opportunity to properly articulate the defence and any response thereto in the pleadings to be filed in the proposed action whereafter the trial court, having heard all the evidence and argument, will be best placed to adjudicate thereon.'

[127] Counsel for the plaintiffs attempted to distinguish the *Obiang* matter on the basis that it was an urgent matter whilst this matter is not. I fail to see the distinction as being relevant.

[128] I agree with the reasoning of *Obiang* and it results in the objections regarding the jurisdictional issues not being upheld in this part of the proceedings. The amendment will obtain a proper ventilation of the dispute between the parties, to determine the real issues between them[82] and it will not cause such prejudice to the plaintiffs as cannot be cured by an order for costs, and, where appropriate, a postponement.[83] In my view, the correct time and place to deal with this objection is at the trial where it will feature prominently. The circumstances are such that the balance of convenience renders such a course of conduct desirable.[84]

[129] What remains is the fifth defendant's assertion that the Act should be interpreted in accordance with the United Nations Convention on Jurisdictional Immunities of States and their Property (the Convention). The new allegations are as follows:

'6. The immunity provided for in the Act should be interpreted with regard to the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property ("the Convention") which is recognised in international law as an authoritative statement on state immunity and is consistent with international law within the meaning of of the said section 233 of the Constitution,

7. In particular, the immunity conferred by section 2 of the Act must be interpreted with reference to article 6(2) of the Convention which provides:

[82] *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd.* [2004] 1 All SA 129 (SCA) (28 November 2003) para 12.
[83] *ABSA Bank Ltd v Public Protector and Several Other Matters* [2018] 2 All SA 1 (GP) (16 February 2018) para 119.
[84] *Cross v Ferreira* 1950 (3) SA 443 (C) at 450E-F.

> "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 proceedings; or
> b) is not named as a party to the proceedings but the proceedings in effect seek to affect the property, rights, interests or activities of that other State.'

[130] The plaintiffs object to this on the basis that South Africa is not a signatory to the Convention and therefore the Convention cannot be relied upon for an interpretation of s 2.

[131] However, it was recognised in the case of *Belhaj v Straw*[85]as:

> 'The most authoritative statement . . . on the current international understanding of the limits of state immunity in civil cases.'[86]

[132] In *The Cherry Blossom*, the *Belhaj* decision was endorsed and applied and it was said that it was necessary to have regard:

> 'to customary international law and, in particular, the manner in which the principle is interpreted and applied.'[87]

The approach is supported by the decision in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others.*[88] A reference to s 2 of the Act is consequently not objectionable.

[133] Having come to this conclusion, it is unnecessary to deal with the further legal arguments advanced by the parties.

[134] There can therefore, in my view, be no objection to the reliance on an interpretation aid which has been approved in *The Cherry Blossom.*

[135] In these circumstances, I am of the view that the amendment should be allowed and the objection thereto be dismissed.

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[85] [2017] UKSC 3 (17 January 2017).
[86] *Belhaj* para 25.
[87] *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV 'NM Cherry Blossom' and Others 2017 (5) SA 105 (ECP)* para 63.
[88] 2016 (3) SA 317 (SCA).

[136] I issue the following order:

1. Leave is granted to the sixth defendant to intervene in the application for further and better discovery.
2. The plaintiffs' application to amend:

   The application is dismissed with costs. These costs include the costs occasioned, in so far as the MTN defendants are concerned, the costs occasioned by the employment of three counsel and in the case of the fifth defendant, the costs of three counsel and in the case of the sixth defendant, the costs of two counsel.
3. The plaintiffs' application for further and better discovery:

   The application is dismissed with costs. These costs include the costs occasioned by the MTN defendants by the employment of three counsel and in the case of the sixth defendant, the costs of two counsel.
4. The fifth defendant's application to amend his plea:

   The amendment is allowed and the objection is dismissed with costs, such costs to include the costs of three counsel employed by the fifth defendant.

_____

W.L. Wepener

Judge of the High Court of South Africa

APPEARANCES

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