IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A338/2018

In the matter between:

THEODORIN NGUEMA OBIANG	Appellant
and	
DANIEL WELMAN JANSE VAN RENSBURG	First Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Second Respondent

Coram: R. Allie, P.A.L. Gamble and N.P. Boqwana, JJ
Date of Hearing: 29 July 2019
Date of Judgment: 20 August 2019

JUDGMENT DELIVERED ON TUESDAY 20 AUGUST 2019

GAMBLE, J:

INTRODUCTION

[1] The appellant, Theodorin Nguema Obiang ("*Mr. Obiang*"), seeks to set aside an order made on 17 October 2017 by the Court *a quo* attaching certain of his immovable property situate at Clifton in Cape Town to found jurisdiction in a damages action to be instituted against him in this court by the first respondent, Daniel Welman van Rensburg ("*Mr. van Rensburg*"). Mr. van Rensburg is a South African citizen who resides within the jurisdiction of this Court near George in the Southern Cape. The second respondent is the Registrar of Deeds, Cape Town who has been cited herein only by virtue of a potential interest in the relief sought in these proceedings. The second respondent filed a notice to abide and has played no further part in these proceedings.

[2] The proposed damages action is a delictual claim in the amount of some R70m for the wrongful arrest and detention of Mr. van Rensburg during 2013-15 in the Central African country of the Republic of Equatorial Guinea ("*the REG*"), allegedly at the hands of Mr. Obiang. Mr. Obiang is described in the papers as the Second Vice President of REG and the eldest son of its President, Mr. Teodoro Obiang Nguema Mbasogo, who is said to be that country's "*President for Life*".[1]

[1] Recent media reports reflect that the REG President is Arica's longest serving head of state, having occupied that position for 40 years. It is suggested that he is grooming Mr Obiang to succeed him (Mail

[3] The application for attachment of the Clifton property (as well as a second property owned by Mr. Obiang in Bishopscourt) served initially on an *ex parte* basis before Davis J in November 2015. His Lordship granted a rule *nisi* which operated with immediate effect in respect of the attachment of both properties and, after service of the order at the Bishopscourt property, the matter was postponed from time to time to facilitate the filing of papers, interlocutory applications, heads of argument and the like. Eventually the matter was heard by the Court *a quo* on 9 and 10 May 2017 and, in terms of the judgment already referred to, the rule *nisi* was confirmed 5 months later on 17 October 2017 in respect of the Clifton property only, with the Bishopscourt property being released from further attachment.

[4] This appeal, which is with the leave of the Supreme Court of Appeal, raises a number of issues, both procedural and substantive, which will be dealt with in due course but, first, some background and historical detail is necessary.

BACKGROUND DETAIL

[5] Mr. van Rensburg is a consultant who has done business in the REG since 1999. He says that he consults on, inter alia, aviation projects and was in regular contact in that regard with a certain Gabriel Mba Bela, a citizen of the REG. Mr. Bela was referred to in the papers simply as "*Angabe*" and I shall do likewise. Mr. van Rensburg says that Angabe is the uncle of Mr. Obiang and a senator and former mayor of the REG capital, Malabo. Not only does Angabe evidently wield significant

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political influence in the REG, it is said that he and Mr. Obiang have shared business interests, including beneficial ownership of the prestigious Hilton Hotel in Malabo.

[6] Mr. van Rensburg says that in late 2012 Angabe contacted him in relation to the setting up of a local airline company to be called "*Coriscair*" in which he (Angabe) was to be the principal shareholder and financier. Mr. van Rensburg (who is fluent in Spanish, the official language of the REG) concluded a written agreement in Spanish with Angabe which was to serve as the basis for their dealings in relation to the establishment of Coriscair. Mr. van Rensburg was to attend to the administrative procedures required by the aviation authorities in the REG and also undertook to source two aircraft to be chartered from a South African company called "*Cemair*"

[7] In early October 2013 Mr. van Rensburg travelled to Malabo to meet with Angabe, to discuss the funding of the charter of the Cemair aircraft and to attend to various other administrative issues relevant to the nascent Coriscair. Upon his arrival Mr. van Rensburg was required to surrender his South African passport to Angabe, ostensibly for purposes of arranging a working visa for him. Angabe then left for Brazil for a fortnight and Mr. van Rensburg remained in Malabo to attend to business matters.

[8] Upon Angabe's return from Brazil the plans to set up Coriscair began unravelling, it seems, due to his inability to raise the necessary finance. At a meeting at Angabe's house during October 2013, Mr. van Rensburg was informed that the deal was off and a demand was made that he should immediately repay to Angabe all

monies advanced to him under their contract. Mr. van Rensburg said that he was not liable to do so due to Angabe's alleged repudiation of the agreement and matters became tense. Angabe is described as having been angry and having made several mobile phone calls, speaking in a local dialect known as "*Fang*", knowing that Mr. van Rensburg would not understand it,

[9] Shortly thereafter police officers belonging to the so-called Rapid Intervention Force ("*RIF*") arrived and whisked Mr. van Rensburg off to a local jail ominously called "*Guantanamo*". After being detained there for a day (ostensibly on a charge of theft), Mr. van Rensburg was confronted by an employee of Angabe who presented him with a document in which he confirmed receipt of certain monies from Angabe. After signing the document, Mr. van Rensburg says he was released from jail but ordered to stay in an apartment belonging to Angabe who then left for Dubai.

[10] On 7 November 2013 Angabe summonsed Mr. van Rensburg to his home where he was met by two local lawyers who told Mr. van Rensburg (in Angabe's presence) that he was immediately required to repay to Angabe the monies advanced to him or face incarceration. Mr. van Rensburg says that he told the lawyers that he was not liable to repay the advance and that he was in any event not in a position to do so, having disbursed the money in terms of their contractual arrangement. The lawyers were said not to be interested in viewing the contract which Mr. van Rensburg offered to them.

[11] It is said that Angabe's response to this was, once again, to make several cellphone calls in Fang which resulted in the reappearance of the RIF who took Mr. Van Rensburg back to Guantanamo. On his arrival there, says Mr. van Rensburg, he was manhandled and later informed by an apologetic head of the facility that he was unable to control "*the chiefs".* Mr. van Rensburg was detained overnight in a cell and late in the afternoon of the following day taken before a certain Judge Anatolio to whom the he related his version of events. The judge ordered Angabe's lawyers to appear the next morning and at that hearing the contract was placed before the court. After the judge told Angabe's lawyers that they had no case against him, Mr. van Rensburg was released from custody and returned to the Angabe apartment.

[12] The response of Angabe to this development was to lay a new charge of fraud against Mr. van Rensburg, who was then ordered to appear again before Judge Anatolio. On that occasion Mr. van Rensburg was represented by a local lawyer, but not for long. He says that Angabe arrived at court and after speaking privately with the lawyer, she promptly left the premises and Mr. van Rensburg was left to represent himself yet again.

[13] Mr. van Rensburg says that there were then two or three further appearances before Judge Anatolio at which Angabe appeared in person and made submissions to the court. He says that the judge was adamant that there was no case to meet and eventually, after the judge had furnished him with documents authorizing his departure, Mr. van Rensburg was told he was free to leave REG and return home.

However, Mr. van Rensburg had reason to believe that Angabe's cohorts were on the lookout for him and so he made his way to the South African Embassy in Malabo on foot where he managed to slip in undetected.

[14] The Embassy staff offered Mr. van Rensburg diplomatic protection and he was put up in an Embassy apartment for about a fortnight. On 18 December 2013 the Embassy staff were evidently told by the REG's Ministers of Foreign Affairs and Security that Mr. van Rensburg was free to leave and he made his way to the Malabo Airport in the company of Embassy staff. As Mr. van Rensburg was about to board his flight home Angabe arrived at the airport and instructed the police to arrest him. They reluctantly did so and when the South African Consul attempted to intercede he was pushed away by Angabe and told that that there was no way that Mr. van Rensburg would leave the country alive.

[15] A short while later the RIF arrived and took Mr. van Rensburg, first to Guantanamo and later to the judges' chambers where he was taken before a certain Judge Christian. The latter did not speak to Mr. van Rensburg but filled out a document before he was taken away and locked up in a small cell. Later, Mr. van Rensburg was transported to a correctional facility known as "*Black Beach Prison*" where he was detained until 28 February 2014 in appalling conditions which can only be described as sub-human – there were no beds or washing facilities, only pit toilets and the place was infested with vermin, cockroaches and a variety of tropical insects. Food was of little nutritional value and often stale or rotten and infested with insects.

[16] On 28 February 2014 Mr. van Rensburg was taken from Black Beach back to the judges' chambers where he appeared before a different judge. Evidently, a new South African ambassador who had recently been appointed to the REG demanded Mr. van Rensburg's release from Black Beach. The judge agreed but directed that Mr. van Rensburg should not leave the country while he (the judge) attended to the "*mediation*" of the dispute. For about a month Mr. van Rensburg was accommodated at the Embassy and thereafter put up in a cheap hotel in Malabo.

[17] On 3 July 2014 Mr. van Rensburg was told to report to the judges' chambers and he did so in the company of a South African consular official. There he was told that he was being re-arrested and was taken back to Black Beach where he was kept for more than a year. Towards the end of August 2015 Mr. van Rensburg was able to secure his release through the payment of a bribe to the head of the prison and a local judge. He was once again accommodated at the South African Embassy.

[18] Shortly after his release Mr. van Rensburg was afforded an audience by the Chief Justice of the REG who, firstly, informed him that there was no record of his detention but then went on to say that available documentation suggested that he had been released in January 2015. In any event, Mr. van Rensburg was given the assurance that he was free to leave and he (and the Embassy staff) were given documentation to that effect by the Chief Justice.

[19] On 24 September 2015 Mr. van Rensburg went to the airport to return home. There he was apprehended by what are described as "*Angabe's henchmen"* who attempted to prevent him from boarding the aircraft. Mr. van Rensburg says he managed to break free and get into an Embassy vehicle which took him back to the Embassy where he stayed for a further two days. The Embassy apparently then obtained an assurance from the REG "*Minister of Security*" that he was entitled to leave and eventually on 26 September 2015, nearly two years after he arrived in Malabo to do business with Angabe, Mr. van Rensburg successfully boarded an aircraft for Addis Ababa en route to Johannesburg

[20] I shall deal with the import of some of this detail in due course. It is not necessary, however, for purposes of this judgment to delve into the conditions under which Mr. van Rensburg was kept at Black Beach other than to say that they were horrific and, if accepted, would found the basis for a substantial claim for damages. In addition to the sub-human conditions already alluded to under which Mr. van Rensburg was incarcerated, he suffered untreated illnesses (including typhoid and 4 bouts of malaria), skin diseases and organ failure which may have affected his longevity. Finally, Mr. van Rensburg has been diagnosed with post-traumatic stress syndrome and has suffered significant psychological injury. I deal with facts related to Mr Obiang later in the judgment.

THE ISSUES ON APPEAL

[21] Certain of the issues raised before the Court *a quo* (and which are dealt with in its judgment) have been abandoned on appeal and will therefore not be dealt with. Counsel for the parties field a joint practice note on appeal and we are indebted to Mr. P-S. Bothma (for Mr. Obiang) and Mr. M.J.Osborne, who appeared with Mr. Z.F.Joubert jnr for Mr. van Rensburg[2], for their assistance in this regard. The issues may be distilled as follows.

- Is an order for attachment to found jurisdiction *pendente lite* final in effect and therefore appealable? Mr. van Rensburg argues that it is not appealable and that that is the end of the matter, whilst Mr. Obiang is of the view that, once determined, the trial court assumes jurisdiction and the issue cannot be re-visited.

- Was there a failure by Mr. van Rensburg to disclose relevant facts when the matter served before Davis J on an *ex parte* basis? Mr. Obiang argues that there was such a failure and that had Davis J been alerted to those facts he would, in all likelihood, not have granted the rule *nisi.*

- Did Mr. van Rensburg make out a *prima facie* case in the action entitling him to delictual damages against Mr. Obiang, personally

[2] The heads of argument on behalf of Mr van Rensburg were drafted by Mr Z.F.Joubert SC and Mr Z.F.Joubert Jnr

(as opposed, for example, to Angabe or the Government of the REG)?

- Even if a *prima facie* case is made out, does the "*act of state*" doctrine apply and is Mr. Obiang's personal property in South Africa immune from attachment?

What is not in issue on appeal is that, if the attachment is confirmed, this court otherwise has the requisite jurisdiction to hear the action.

PRINCIPLES RELEVANT TO AN APPLICATION FOR ATTACHMENT *AD FUNDANDAM JURISDICTIONEM*

[22] Mr. Obiang is a foreign litigant (a *peregrinus*) of this court who has not consented to its jurisdiction. In the circumstances the attachment of his property (whether movable or immovable) which is within the jurisdiction is necessary before this court can exercise jurisdiction to entertain Mr. van Rensburg's claim against him.[3]

[23] As the judgment of Potgieter JA in *Thermo Radiant* illustrates, the original approach of the Roman law was a strict one.

> "*It is clear that an arrest to found jurisdiction was unknown to the Roman Law. The rigid rule in that system was actor seguitur forum rei - in other*

[3] Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A)

words an incola was compelled to institute action against a peregrinus in the latter's country of domicile".[4]

[24] However, the principle of attachment to found jurisdiction which our courts have applied for more than a century, is derived from the Roman Dutch law which was originally intended to serve multiple purposes.

(i) "*The reason for the arrest ad fundandam jurisdictionem was to avoid the costs which citizens would have to incur if they had to pursue the foreigner to the court of his domicile and was conceived primarily for the benefit of the incola."*[5]

(ii) *"Originally the purpose of the arrest or attachment was a kind of compulsion to which the foreigner was subjected so that he could be induced to pay his creditor rather than endure the worry of arrest or retention of his property."*[6]

(iii) "*(I)n the law of Holland… one of the purposes of the attachment of property to found jurisdiction was to enable the incola to execute on that property after judgment. In other words, the attachment of property served to found jurisdiction and thereby*

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[4] At 305C-D

[5] At 305 F- G

[6] *Ibid*

> *enable the Court to pronounce a not altogether ineffective judgment."*[7]

[25] The approach at common law has remained largely undisturbed but, as Potgieter JA observed, its primary focus now is to ensure the effectiveness of the judgment ultimately pronounced by the court.

> "*It appears to me that the only reason why our Courts still require an attachment to found jurisdiction is to enable the Court to give a judgment which has some effect even though ultimately the judgment may in many cases only be partially satisfied and the 'effectiveness' of the judgment fictional to the extent that it is not satisfied."*[8]

[26] And in the constitutional dispensation, Howie P affirmed the approach in *Thermo Radiant* in the judgment of the Supreme Court of Appeal in *Bid Industrial*[9], a case involving the arrest of 2 persons in South Africa in an endeavor to found jurisdiction here in a claim against an Australian company. The Court found that an arrest of the person was unconstitutional but confirmed that the attachment of property of a *peregrinus* to found jurisdiction passed constitutional muster. In so doing

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[7] At 306H - 307A

[8] At 310B

[9] Bid Industrial Holdings (Pty) Ltd v Strang and another (Minister of Justice and Constitutional Development, Third Party) 2008 (3) SA 355 (SCA) at [47] – [48]

the learned President of the Court expressly approved of the approach of Watermeyer J in *Halse* [10] and held as follows –

> *"[48] … On the other hand it is important, in my view, to remember that the practice of arrest and attachment came about in order to aid resident plaintiffs who would otherwise have to sue abroad. There is no reason why the rationale should not still apply. It represents, in my view, a rational and legitimate governmental purpose."*

[27] Finally, and for the sake of completeness, it must be stressed that it matters not that Mr. van Rensburg's cause of action arose exclusively in the REG. In circumstances such as the present, where the plaintiff is an *incola* and the defendant a *peregrinus*, the court will exercise jurisdiction locally provided only that there has been an attachment of the latter's property. In *Ewing Mc Donald*[11] Nienaber AJA summarized the position as follows.

> "*(A)n incola can pursue his claim where it is most convenient for him to do so, namely within his own locality, even if his cause of action has no connection with that area other than the arrest or attachment."*

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[10] Halse v Warwick 1931 CPD 233 at 239 – "*(W)hy should South African courts not come to the assistance of South African subjects and enable them to litigate at home just as the Dutch Courts came to the assistance of Dutch subjects?"*

[11] Ewing McDonald & Co Ltd v M&M Products Co 1991 (1) SA 252 (A) at 258F

[28] An application for attachment will generally be brought *ex parte* and without notice to the *peregrinus*, primarily, because the latter is not yet before the court. It is also launched *ex parte* so as to ensure that the property which is the subject of the intended attachment is not disposed of or encumbered before the court makes its provisional order.[12]

[29] In such an application the prospective resident plaintiff (an *incola*) is required to establish, on a *prima facie* basis, a cause of action. Just what constitutes such a *prima facie* case has been the subject of much forensic debate. It seems to me that the approach proposed by Howie J (as he then was) in *Great River Shipping*[13] is a useful point of departure.

> " *[Counsel] also relied on the statement in Cochran v Miller 1965 (1) SA 162 (D) at 163C that in an application for arrest to found jurisdiction the test for a prima facie case is whether there is evidence which, if believed, might persuade a reasonable man to draw the inference that the wrong complained of had been committed. That seems to me, with respect, to be the same as a prima facie case in the absolution context in a trial. In that context, to put it slightly differently from the statement in Cochran's case, a prima facie case is established by circumstances where the inference the plaintiff seeks to have drawn is as 'more or less equally open' on all the available evidence as the inference favouring*

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[12] Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa 5th ed Vol 1 at 120-1

[13] Great River Shipping Inc. v Sunnyface Marine Ltd 1994 (1) SA 65 (C) at 75I – 76C

the defendant: see, in Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A), the statements at 37 in fine and at 39A-B. These tests, however, are more favourable to an arrest applicant than the Bradbury Gretorex[14] test approved in the Thalassini[15]. For example, on the premise that credibility is not in issue, merely the weight of evidence which one postulates will be believed, one asks, in the absolution context, 'is the evidence such that a reasonable man might find for the plaintiff'? In the present context one asks: 'is the evidence such that the Court would find for the arrest applicant?'

[30] Further, the judgment of Margo J for the Full Bench in *Inter-Science Research*[16] is to the following effect.

"*The applicant's case on that score may not appear at this stage to be a strong one, but, for the limited purposes of an attachment to found or confirm jurisdiction, that is not the criterion. As Steyn J (later CJ) said in Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W) at 533C-E, after an examination of the earlier authorities, the requirement of a prima facie cause of action, in relation to an attachment to found jurisdiction, is satisfied where there is evidence which, if accepted, will show a cause of action. The mere fact*

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[14] Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd 1953 (3) SA 529 (W)

[15] Cargo Laden and Lately Laden on Board the MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (A)

[16] Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique 1980 (2) SA 111 (T) at 118H

that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against the applicant, the requirement would still be satisfied. It is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused or discharged. This approach was approved by the Full Court in Tick v Broude and another 1973 (1) SA 462 (T) at 467E-F. See also Italtrafo SPA v Electricity Supply Commission 1978 (2) SA 705 (W) at 709C-F and Butler v Banimar Shipping Co SA 1978 (4) SA 753 (SE) at 757C-F."

[31] Finally, on this point, it is established law that once the applicant in such an *ex parte* application establishes a *prima facie* cause of action, the court does not have a discretion to refuse to order an attachment. The position was put thus by Nicholas AJA in *Longman Distillers*[17]:

"*In our law, once an incola applicant (plaintiff) establishes that prima facie he has a good cause of action against the peregrine respondent (defendant), the Court must, if other requirements are satisfied, grant an order for the attachment ad fundandam of the property of the peregrine respondent (defendant). It has no discretion (Pollak, The South African Law of Jurisdiction at 64, citing Le Comte v W and B Syndicate of Madagascar 1905 TS 696 at 702). The Court will not enquire into the*

[17] Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd 1990 (2) SA 906 (A) at 914E-F

merits or whether the Court is a convenient forum in which to bring the action (Pollak (ibid)). Nor, it is conceived, will the Court enquire whether it is 'fair' in the circumstances for an attachment order to be granted"

APPEALABILITY OF THE ORDER OF THE COURT *A QUO*

[32] Mr. Osborne, relying on *Zweni*[18], argued that the order of the Court *a quo* was not appealable as it was not final in effect. The test was set out in that matter by Harms AJA who listed some 9 considerations to be taken into account in that regard. I consider the following to be sufficient for purposes of this case.

"*7. In determining the nature and effect of a judicial pronouncement, 'not merely the form of the order must be considered but also, and predominantly, its effect" (South African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980 (3) SA 91 (A) at 96H).*

8. A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) at586I-587B; Marsay v Dilley 1992 (3) SA 944 (A) at 962C-F).The second is

[18] Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532H.

the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue 1992 (4) SA 202 (A) at 214D-G.

[33] The decision of the Court *a quo,* in confirming the attachment order granted in terms of the rule *nisi* issued earlier, has the effect that Mr. van Rensburg is now permitted to litigate against Mr. Obiang in the domestic court of his choice. And, jurisdiction having vested through the attachment of the Clifton property, it will continue until the case has finally been determined[19]. That certainly disposes of any argument in the main case regarding lack of jurisdiction, which undoubtedly would otherwise be an important part of Mr. Obiang's case. Finally, the confirmation of the rule *nisi* was not capable of being set aside by the Court *a quo* – that could only be done by a court of appeal

[34] In the result, I am satisfied that the order of the Court *a quo* is appealable and that the point *in limine* falls to be dismissed.

NON-DISCLOSURE OF MATERIAL FACTS IN THE *EX PARTE* APPLICATION

[35] It is trite that a party which approaches the court *ex parte* is duty bound to observe the utmost good faith ("*uberrima fides*") and that if material facts are withheld at that stage the court may, on the return day, dismiss the application on that

[19] Thermo Radiant at 310C – H.

basis alone.[20] Furthermore, such non-disclosure need not be willful or *mala fide* before the court will discharge the rule *nisi.* However, it is not a given that the *ex parte* order will necessarily be set aside in the event of material non-disclosure – the court hearing the matter on the return day will always be entitled to exercise a discretion as to whether to confirm the rule or not.[21]

[36] In *Phillips*[22] the Supreme Court of Appeal set out the considerations which come into play in deciding whether to discharge an order obtained *ex parte* in circumstances where there has been a failure to observe the *uberrima fides* rule. These are –

(i) The extent of the non-disclosure;

(ii) Whether the first court might have been influenced in the event that there was proper disclosure;

(iii) The reason for the non-disclosure; and

(iv) The consequences of setting aside the order granted *ex parte.*

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[20] Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions 2009 (1) SA 1 (CC) at 115B-E.

[21] MV *Rizcun Trader* v Manley Appledore Shipping Ltd 2000 (3) SA 776 (C) at 794E

[22] Phillips v National Director of Public Prosecutions 2003 (6) SA 447 (SCA) at 455B. See also Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs 2019 (3) SA 251 (SCA) at [45] – [52]

[37] In this case the founding affidavit before Davis J was fairly limited as to background detail. In that affidavit Mr. van Rensburg alluded to the fact that the South African Department of International Affairs and Co-Operation ("*DIRCO*") had been actively involved in monitoring his incarceration and assisting him with consular services where possible. He went on to say that –

> "*…The South African embassy has a thick file about me, which I have seen. Its contents will bear out the allegations made in this affidavit. I hope to obtain a copy of it in proceedings against the first respondent…*"

[38] A copy of that file (referred to by the parties as "*the DIRCO dossier"*) was eventually made available to Mr. van Rensburg and was included in his supplementary replying affidavit deposed to on 26 March 2016. It was not suggested that the dossier should have formed part of the founding papers. And, given that Mr. Obiang was permitted to file a reply to the supplementary answering affidavit, there was no prejudice occasioned to him by the late introduction of the DIRCO dossier. Initially, Mr. Obiang resisted reference by Mr. van Rensburg to the contents of the DIRCO dossier on the basis of inadmissible hearsay but later, rather paradoxically, was content to rely thereon for an attack on Mr. van Rensburg's failure to observe the *uberrima fides* rule. At the hearing before us Mr. Bothma limited the attack on this point to just two issues.

[39] Firstly, Mr. Bothma referred to an email written in 2014 by an unnamed South African Embassy official in Malabo to the DIRCO head-office in Pretoria giving

background details regarding a process of mediation allegedly pursued between Angabe and Mr. van Rensburg through the court in Malabo. The name of the judge involved does not appear from the lengthy email. The email records that both parties had agreed that Mr. van Rensburg was indebted to Angabe and that payment of the indebtedness would be made in two tranches by 5 March 2014. Mr. van Rensburg would be entitled to submit a claim for remuneration and recovery of his expenses and once payment had been made in full he would be free to leave the REG. The fact of this mediation outcome was said to have been material in the context of Mr. van Rensburg's incarceration and that had Davis J been alerted thereto, he might have been disinclined to grant *ex parte* relief.

[40] In paragraphs 39 and 40 of the founding affidavit Mr. van Rensburg did in fact refer to a mediation process "*apparently*" being conducted by a judge after 28 February 2014. As pointed out above, he went on to say that he had subsequently been released from Black Beach, had stayed at the Embassy for about a month in March 2014 and had then put up in a cheap hotel. Those facts are consistent with the gist of the Embassy's report to its head office. But they are, as far as I can make out, incompatible with the subsequent detention of Mr. van Rensburg at Black Beach for more than a year with effect from 3 July 2014. The point is really this: if there was a failure by Mr. van Rensburg to meet his obligations under the mediated dispute, on what basis was he then summarily detained against his will in the most appalling conditions and without trial? And, how would disclosure thereof possibly have persuaded Davis J to refuse to grant a provisional order of attachment?

[41] Furthermore, the purported mediation does not address (or legitimize) Mr. van Rensburg's incarceration and restriction of movement prior to the end of February 2014 and in that regard it is irrelevant to a damages claim for the period between December 2013 and February 2014. Moreover, the absence of any meaningful link between the failure to meet his obligations post mediation and his second period of incarceration at Black Beach render the alleged non-disclosure lacking in materiality. In the result, I am not persuaded that Davis J would have come to a different view had he known of these allegations - they were fairly insignificant in the overall scheme of things.

[42] In any event, Mr. van Rensburg explained in a later affidavit that he had been severely traumatized by his detention and that his memory of the finer detail thereof had been compromised. It is not surprising therefore that he did not recall and relate the events around the alleged mediation and I would not consider that the failure to make mention thereof in the founding papers would warrant the censure of the court and the dismissal of the application on that ground alone. In such circumstances I would be inclined to exercise my discretion in favour of Mr van Rensburg and allow the matter to be determined on the papers as they stand.

[43] The second non-disclosure point emanating from the DIRCO dossier was said to arise from the record of an interrogation of Mr. van Rensburg by a judge in Malabo. The document (once again an uncertified translation into English) purports to record an admission by Mr. van Rensburg that he had received money from Angabe which he had not repaid to him. It was said in argument before us that Mr.

van Rensburg's alleged claim that "*I made use of the money transferred to me as payment for my services"* suggested that he had committed fraud. When Mr. Bothma was asked to explain how this constituted fraud he was hard-pressed to do so and abandoned the point there and then.

[44] In the result, I am of the view that there is no merit in the argument that the appeal should succeed on the basis of any non-disclosure in the *ex parte* application.

A *PRIMA FACIE* CASE AGAINST MR OBIANG?

[45] As I have said, the claim brought by Mr. van Rensburg is delictual in nature and is directed against Mr. Obiang in his personal capacity. It was therefore incumbent on him to make out a *prima facie* case (in the sense referred to earlier) to show that Mr. Obiang, whether through a wrongful act or omission on his part, had caused Mr. van Rensburg to suffer a loss of his patrimony. In argument Mr. Bothma accepted that a *prima facie* case had been made out establishing damages and causation. What was in issue, however, was whether a case had been made out against Mr. Obiang personally and, further, whether his alleged conduct (or his alleged failure to act) was wrongful.

[46] In considering whether the *prima facie* hurdle had been cleared it was common cause that the Court was entitled to have regard to all the evidential material that was before the Court *a quo* and that the enquiry was not limited to that which was before Davis J. This is important because there is a significant volume of such

material which was filed after the answering affidavit. This included the DIRCO dossier, affidavits from other persons who had been detained in the REG and reports from international human rights bodies detailing a litany of alleged human rights abuses in that country over the years. There is no prejudice to Mr. Obiang in this court considering all of that material in light of the fact that he was given ample opportunity to deal with it.

ALLEGATIONS REGARDING PERSONAL LIABILITY ON THE PART OF MR. OBIANG

[47] The thrust of Mr. van Rensburg's case is that he was repeatedly detained by the RIF and incarcerated in jail by that unit. It is said that the RIF is under the direct command and control of Mr. Obiang and that the only reasonable inference to be drawn is that Angabe asked Mr. Obiang to facilitate that incarceration of Mr. van Rensburg to enable him (Angabe) to settle his business dispute with Mr. van Rensburg through torture and coercion.

[48] The allegations made by Mr. van Rensburg in the founding affidavit implicating Mr. Obiang are as follows.

> "*4…. At all times relevant to this application, and at present, the first respondent [i.e. Mr. Obiang]:*
>
> *4.1 has been the Second Vice-President of Equatorial Guinea for (sic) defence and security;*

4.2 is the political head and in charge of the armed forces, police, prisons and detention facilities in Equatorial Guinea;

4.3 is the de facto head of state of Equatorial Guinea. His father, the President for Life, is elderly and ill;

4.4 is anticipated to succeed his father as president….

7. I was incarcerated for 423 days at the notorious Black Beach prison in Malabo, Equatorial Guinea: I was also kept at a house in Malabo, Equatorial Guinea for 126 days. I was detained after a judge in Equatorial Guinea had ordered that I was free to leave Equatorial Guinea. I was not detained on account of any charges, trial or conviction. I was detained on the order of the first respondent. The first respondent refused to order my release…

10. The first respondent ordered my incarceration, and refused requests for my release. He did so pursuant to the requests made to him by his uncle, Gabriel Mba Bela (also known as 'Angabe'). Angabe is not only the uncle of the first respondent. Angabe and the first respondent are also business partners in many business ventures. For example, they are the individuals who are effective partners and co-owners of the Hilton Hotel in Malabo. Angabe has served as mayor of Malabo, and a senator. Angabe is among the handful of powerful people who control Equatorial Guinea for

their own benefit. All are loyal to, and are owed loyalty by, the first respondent and his father…

15…(M)atters came to a head at a meeting Angabe convened with me at his house. Angabe told me that he was not going to go ahead with the plan to set up the airline. He said he was cancelling the contract, and that I had to immediately repay him the money (which he already had paid me) and which I had used to meet expenses incurred in setting up the business). I refused to accept the cancellation. I explained to Angabe that I was not liable to repay the money he demanded, and that I could not do so.

16. *Angabe became angry with me. He called a number of people on his mobile phone. He spoke a language I recognised as Fang (a local language) …. I did not understand very much of what he said. I, however, understood that one of his calls was to someone very important. I heard that he spoke to the first respondent.*

17. *The reason that I infer that Angabe spoke to the first respondent was that soon after he finished making the calls the Rapid Intervention Force, a division of the Equatorial Guinea police, arrived at Angabe's house. Angabe cannot by himself order the*

Rapid Intervention Force to appear. The first respondent can do so.

18. *The members of the Rapid Intervention Force took me to a the (sic) city gaol, known as Guantanamo…*

20. *Angabe went away, to Dubai…. When he returned and on about 7 November 2013, he called me to his house. There were two lawyers present, a lady and a man. They told me that I was required to pay Angabe the same sum as he had advanced for the aviation business, and that I was required do so immediately. They told me that if I could not pay as required, I would go to gaol……*

21. *Once more, Angabe made several calls on his cellphone. I inferred that one of the calls was to the first respondent. Again, the Rapid and Intervention Force arrived. I was manhandled and treated roughly by the Rapid Intervention Force. They took me to Guantanamo. Angabe followed…*

30. *On the 18 December 2013 the Minister of Foreign Affairs and the Minister of Security of Equatorial Guinea confirmed to the embassy that I could leave Equatorial Guinea… I went with the embassy staff in a diplomatic vehicle to the airport.*

31. *As my flight was about to board, Angabe arrived at the airport. He told me that I was not leaving…. He said that there was no way that I was going to leave Equatorial Guinea alive.*

32. *The Rapid Intervention Force arrived on the scene at the airport…. (and)… took me away…*

41. *One 3 July 2014 I was telephoned, and told to report to the judges' chambers… (where)… I was arrested… (and)… sent back to Black Beach.*

42. *…When… (the embassy staff) … visited me… the Charge d' Affaires told me that the first respondent was behind my incarceration. I also learned that the first respondent assisted his family and friends. There was no way in which I could have been incarcerated as I was, except upon the order of the first respondent. Many of the other prisoners at Black Beach were there for a similar reason to me. They had opposed, or were on the wrong side of, the first respondent and his network of patronage…*

57. *The constitutional and international law obligations to which Equatorial Guinea is subject disclose the obvious proposition that the first respondent's conduct in incarcerating me in Black Beach*

and at Guantanamo, and holding me under effective house arrest as well as failing to order my release, was unlawful.

58. *The constitutional and international law obligations to which Equatorial Guinea is subject underscore my experience: that the formal state machinery in Equatorial Guinea seeks to apply norms which entail that an accused is charged and tried, and not subject to arbitrary imprisonment. I was initially charged, and brought before a judge who ordered my release.*

59. *Plainly, however, the first respondent subverts the norms that the state seeks to apply, when he wishes to do so. By his command, people who offend him and his associates (like Angabe) are arbitrarily imprisoned and tortured. My imprisonment, and the failure to release me, disclose conduct of the first respondent, and not merely of the state…*

61. *The allegations that I have made concerning the manner in which the first respondent and a handful of his cohorts supplement the constitutional and international law norms to which Equatorial Guinea is subject are borne out by the reports of the United States State Department, and respected international non-governmental organisations….*

> *63. Not only was I incarcerated on the instruction of the first respondent, as I have set out. He also failed to order my release….*
>
> *65. Even were the first respondent uninvolved in my incarceration (he was not), he will have become aware of my incarceration. It was within his power to order my release. He never did so…*
>
> *73. The first respondent ordered my detention. He failed to order my release. His conduct has caused the damages for which he is liable. To recover my damages, I am left no alternative but to proceed against the first respondent in South Africa. In order to do so, I request that the two properties be attached to found jurisdiction."*

[49] The supplementary answering papers filed on behalf of Mr. van Rensburg incorporate, inter alia, reports by reputable international human rights organizations such as Human Rights Watch, Amnesty International, Freedom Watch and Genocide Watch. These documents are relied on to bolster Mr. van Rensburg's claim that Mr. Obiang behaves in an autocratic manner without regard for the due process of law and for the advancement of self-interest.

[50] The supplementary answering affidavit also incorporates separate affidavits by two individuals who claim to have an intimate knowledge of the inner workings of the Obiang family within the structures of state in the REG. The first

affidavit is deposed to by a certain Tutu Alicante Leon, who is a citizen of Florida in the United States. He is the executive director of EG Justice, an American NGO which specializes in the investigation of human rights abuses and transgressions of the rule of law in the REG. Mr. Leon claims that he is widely regarded as an international expert on "*the brutal dictatorship of the Obiang family in Equatorial Guinea and in particular the brutal regime of the dictatorial triad consisting of Teodoro (father and sitting President), Teodorin (son) and Constancia (mother).*"

[51] With reference to Mr. van Rensburg's version of his incarceration in the REG, Mr. Leon says the following of Angabe:

> "*3.2 ... He is a business partner of the First Respondent, but he has no power of his own. All his influence comes solely from his association, access and the family relationship he has with the ruling triad, in general, but with the First Respondent, in particular, as it pertains to this case.*
>
> > *3.2.1. It is indeed unthinkable and even impossible that Angabi (sic) could have picked up the phone and called the 'Rapid Intervention Squad' to his home to arrest the applicant.*
> >
> > *3.2.2. The Rapid Intervention Squad is the 'private' army of the First Respondent and only he would have the authority to call them.*

3.2.3. If Angabi had had the audacity to have called the Rapid Intervention Squad himself and given them orders, he would have found himself in deep trouble. It is absolutely unthinkable that he could have done so.

3.2.4. The Applicant's version that it was his impression that Angabi called the First Respondent (although they were speaking in Fang) is not the only probable explanation for the call, but it is entirely in keeping with my assessment of the facts…

3.4. The only person who has the authority to order the imprisonment of a person, especially a foreign citizen and business entrepreneur, is the First Respondent. Nobody else has that authority or would even seek to do so…"

[52] The second affidavit was deposed to by Mr. Roberto Berardi, an Italian businessman who says that he met Mr. Obiang for the first time in 2007. Subsequent thereto he and Mr. Obiang went into the construction business together. Matters came to a head in 2012 when Mr. Berardi says he discovered that Mr. Obiang was using their company to launder money in the United States and he agreed to testify in a criminal trial there against Mr. Obiang. Mr. Berardi describes how he was arrested at his home in Malabo in January 2013 by the RIF on the instructions of Mr. Obiang. After a sham trial he says he was incarcerated in the REG for two and a half years

and was only released when the case against Mr. Obiang was settled in the United States.

[53] In argument, Mr. Osborne suggested that testimony of the events deposed to by Messers Leon and Berardi would be admissible in a South African court on the basis of similar facts, an approach which is sanctioned in civil proceedings as well as criminal trials provided there is a sufficient degree of relevance.[23]

[54] In the supplementary answering papers, Mr. Obiang denies that he had anything to do with the arrest and detention of Mr. van Rensburg. In fact, he goes so far as to allege that he knew nothing at all about Mr. van Rensburg's plight in the REG. While he is entitled to adopt that stance at this stage, it is neither here nor there. The fact that evidence put up by an applicant is contradicted at this stage, or is perhaps not particularly persuasive (and I must not be understood to say that this is so), will not result in the attachment being set aside.[24] The test now is rather whether the facts put up by Mr. van Rensburg are sufficient to show that he has a cause of action against Mr. Obiang personally and that there is evidence which, if accepted,

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[23] Schwikkard and Van der Merwe Principles of Evidence, 3 ed, at 71; Delew v Town Council of Springs 1945 TPD 128; Laubscher v National Food Ltd 1986 (1) SA 553 at 554B-F (ZS); Rofdo (Pty) Ltd t/a Castle Crane Hire v B & E Quarries (Pty) Ltd 2002 (1) SA 632 (E) at 639E.

[24] Inter-Science at119A

might persuade a reasonable person "*to draw the inference that the wrong complained of had been committed."*[25]

[55] Mr. Bothma argued that the facts put up by Mr. van Rensburg failed to establish direct evidence of either an act or omission on the part of Mr. Obiang which caused him damage and that all the evidence at this stage was circumstantial. That may be so, but there is no reason to find that Mr. van Rensburg had not put up a *prima facie* cause of action just because he relied on inferential reasoning. As *Schwikkard and Van der Merwe*[26] point out, the threshold in civil proceedings is lower than in criminal proceedings in light of the lesser burden of proof and that

> "*a plaintiff who relies on circumstantial evidence does not have to prove that the inference which he asks the court to draw is the only reasonable inference: he will discharge his burden of proof if he can convince the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences."*[27]

[56] In the event that this court was, however, of the view that there was sufficient evidence implicating Mr. Obiang in either the incarceration of Mr. van Rensburg or the failure to release him, Mr. Bothma went on to argue that at best Mr. Obiang was vicariously liable for the acts of those under his command and that the

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[25] Great River Shipping at 75J

[26] *Op cit* at 538

[27] See AA Onderlinge Assuransie Bpk v De Beer 1982 (2) SA 603 (A)

defendant in such circumstances would be the Government of the REG. Accordingly, it was submitted, Mr. Obiang's conduct might be held to be lacking in wrongfulness.

[57] In summary, the evidence adduced by Mr. van Rensburg in these proceedings amounts to the following. He was lawfully in the REG doing business with Angabe. When there was a disagreement regarding their deal he was incarcerated in the most appalling conditions. That incarceration was effected, not by an order of court or in terms of some legitimate statutory provision, but by the acts of the RIF. The RIF is a division of the security services in the REG falling under the direct control of Mr. Obiang. In ordering the RIF to arrest and detain Mr. van Rensburg, Mr. Obiang was advancing private interests and not the security of the State. In the circumstances, the RIF was no more than Mr. Obiang's "private army" and, as such, was subject to his direct control to be exercised by him at will and according to his personal interests and whims. His order to the RIF to detain Mr. van Rensburg constituted a wrongful act on his part which attracted personal liability in delict. His failure to secure the release of Mr. van Rensburg in such circumstances constituted a wrongful omission for which he is similarly personally liable in delict.

[58] In my considered view, therefore, Mr. van Rensburg has put up enough evidence at this stage to clear the relatively low hurdle required to entitle him to an order for attachment to found jurisdiction. That evidence *prima facie* contains sufficient allegations to establish both acts and omissions on the part of Mr. Obiang for which, if proved, he might ultimately be held personally liable to Mr. van Rensburg for the payment of damages. Such evidence, admittedly untested by cross-

examination, seems to suggest that Angabe enlisted the assistance of Mr. Obiang to secure the detention of a business partner who had refused to pay what was claimed of him by Angabe. Through the use of the RIF Mr. van Rensburg was held in appalling conditions for a protracted period of time in an endeavour to induce him to settle a private debt. All of this appears at this stage to have been facilitated by the intercession of Mr. Obiang rather than a court of law.

[59] The wrongfulness of the conduct attributed to Mr. Obiang in those circumstances is self-evident, and, in any event, he has not sought to assert any grounds of justification. He is of course entitled to do so if the matters continues, but for the present, I am satisfied that Mr. van Rensburg has put up enough evidential material to establish, on the requisite *prima facie* basis, both the commission and omission of the alleged delict by Mr. Obiang.

THE ACT OF STATE DOCTRINE

[60] The last leg of Mr. Bothma's argument relies on the so-called "*act of state doctrine.*" The approach was described thus by the Full Bench of the Eastern Cape Local Division, Port Elizabeth in "*The Cherry Blossom"*[28]*.*

> *[86] Unlike state immunity, which is a rule of public international law, the doctrine of a foreign act of state is a municipal law rule which derives from common law principles as developed in Anglo-American courts. It*

[28] The Saharawi Arab Democratic Republic and another v The Owner and Charterers of the MV 'NM Cherry Blossom' and others 2017 (5) SA 108 (ECP)

is founded upon the principle of mutual respect for equality of sovereign states, the principle of comity.

[87] In Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa[29] *it was held:*

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

[88] This was approved in Van Zyl v Government of the Republic of South Africa[30] *where it was stated that '* [c]ourts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign states.' "

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[29] 1999 (2) SA 279 (T) at 334D-F

[30] 2008 (3) SA 294 (SCA) at [5]

[61] Mr. Osborne pointed out in argument that the respected international law scholar, Prof John Dugard, in his authoritative work *International Law, A South African Perspective* suggests that the decision in *Swissborough* may be open to attack given that application of the doctrine might offend the provisions of s34 of the Constitution, 1996 in restricting a litigant's access to justice. In the most recent 5th edition of that work it is observed that the doctrine is derived from the English and American courts and that until the judgment in *Swissborough* (in which Prof. Dugard candidly discloses that he represented one of the plaintiffs), there were no reported cases in South African law on the point.

[62] After a discussion regarding the approaches in the United States and England, which are noted to be based on differing considerations, the following is suggested at p118.

> "*Neither the United States act of state doctrine nor the English doctrine of judicial restraint are rules of international law. They are principles of domestic law which limit justiciability in foreign relations in accordance with their own constitutional rules. Consequently they are not binding on South African courts in terms of s232*[31] *of the Constitution.*
>
> *A South African court may decide to follow the judicial policies of the United States or England in respect of non-justiciability but it can only do*

[31] "*232. Customary International Law.*

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

so within the framework of its own constitutional rules in general, and ss 34[32] and 232 in particular. A court cannot fashion a principle of judicial restraint or non-justiciability for South Africa which takes no account of this framework, particularly when it differs so fundamentally from that of the United States or the United Kingdom."

[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

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[32] "*34. Access to courts.*

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

action. Reliance was placed on the House of Lords decision in *Kuwait 1*[33] 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…*
>
> *[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*

[33] Kuwait Airways Corporation v Iraqi Airways Company and others [1995] 3 All ER 694 (HL) at 715d

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[34], 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."

[66] In the 5th edition of the work Prof Dugard comments extensively on *The Cherry Blossom*, noting that the Full Bench, in following[35] the *dictum* of the Supreme Court of Appeal in *Van Zyl*, accepted that the doctrine was applicable in our municipal law. I should add that, while the court in *Van Zyl* was dealing with an application for diplomatic protection and not the application of the act of state doctrine *per se,* and while the remark by Harms ADP is fairly terse -

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[34] It was contended that the SADR was such a territory.

[35] At [88]

> "*[5] Courts should act with restraint when dealing with allegations of unlawful conduct ascribed to foreign States…"*

the Supreme Court of Appeal nevertheless cited *Swissborough* and *Kuwait 1* as authority for the proposition. I am accordingly persuaded that this Court should follow the approach adopted in *The Cherry Blossom* and determine this appeal on the basis that the act of state doctrine is applicable in our law.

[67] Applying that approach to the facts of this case the critical aspect to be considered is that Mr. van Rensburg has expressly sought to issue summons against Mr. Obiang in his personal capacity: he has not suggested that his detention was at the behest of an agent of the Government of the REG or that Mr. Obiang is vicariously liable for his damages. Rather, and as I have pointed out above, the argument on behalf of Mr. van Rensburg is that the services of the RIF were enlisted as the "private army" of Mr. Obiang to advance the interests of his business partner, Angabe. If that argument is successful then it may well be that the trial court is persuaded that the act of state doctrine is not applicable because there was no such act on the part of the Government of the REG.

[68] One has to bear in mind, too, that the evidence advanced in this case is intended by Mr. van Rensburg to be adjudicated upon the basis that it establishes no more than a prima facie case for attachment. There is a substantial body of evidence that has to be adduced and tested by way of cross-examination on both sides before a court can be satisfied that Mr. Obiang is personally liable and it cannot be said at

this stage that there is nothing more to be said, as was suggested in *The Cherry Blossom*.

[69] A further point for consideration is that the parties have formulated their respective cases in a number of affidavits and, consequently, the act of state doctrine has not been pleaded or delineated with the accuracy that one would expect in a pleading. And, once Mr. Obiang has sought to rely on the doctrine, (if so advised) it would be open to Mr. van Rensburg to respond thereto by way of replication and, for instance, raise the constitutional challenge foreshadowed by Mr. Osborne in argument.

[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.

CONCLUSION

[71] In the result, I am satisfied that Mr. van Rensburg established a case for the attachment of Mr. Obiang's property to found jurisdiction and that the rule *nisi* was

correctly confirmed by the Court *a quo.* In the circumstances I would dismiss the appeal with costs, such costs to include the costs of two counsel where so employed.

_____

GAMBLE, J

I AGREE.

IT IS SO ORDERED.

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ALLIE, J

I AGREE.

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BOQWANA, J