

Court recognises territory of Western Sahara's *prima facie* right in cargo dispute



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On May 1 2017 the Saharawi Arab Democratic Republic (SADR) and the Polisario Front successfully applied to the Eastern Cape Local Division of the High Court for an order restraining and prohibiting the owners, master and charterers of the Cherry Blossom vessel, among other parties, from taking a cargo of phosphate out of the court's jurisdiction, pending the determination of the applicants' claim to ownership and delivery of the cargo.

Background

The phosphate had been mined by Phosphates de Boucraa and sold by its parent company, OCP SA, to Balance Agr-Nutrients Ltd in New Zealand. OCP is said to be the largest exporter of phosphate rock and phosphoric acid in the world. Phosphates de Boucraa and OCP are Moroccan companies. The Moroccan government is OCP's largest shareholder.

The cargo had been mined in Boucraa's mine in Western Sahara, a territory under dispute by Morocco and the people of Western Sahara, who are represented by the Polisario Front. The mine is bordered by Morocco to the north, Algeria to the north-east and Mauritania to the east and south. Western Sahara was a Spanish colony until 1976, when it was effectively abandoned to Morocco and Mauritania. At this point, the Polisario Front proclaimed the region to be a sovereign state (the SADR) and took up arms against Morocco and Mauritania, seeking to exercise rights of self-determination. A protracted war followed, until a ceasefire was agreed in 1991.

The question of the territory's sovereignty is a matter which has yet to be resolved. Morocco is said to control approximately 80% of Western Sahara through a military presence and although various attempts have been made by the international community, under the auspices of the United Nations, to agree a settlement plan or a referendum of some kind, none have succeeded.

The SADR is not a member of the United Nations. However, it is a member of the African Union and is recognised by 45 members of the United Nations, including South Africa.

Facts

It is against this background that the SADR and the Polisario Front obtained an order restraining and prohibiting the removal of the cargo of phosphate from the Eastern Cape Local Division of the High Court's jurisdiction. Central to their argument was that the cargo had been mined and exported from the SADR in contravention of its Constitution, which provides that all public property belongs to the people, including mineral wealth and energy resources (Article 17). In other words, it was argued that, *prima facie*, the cargo had been misappropriated and sold by the respondents without the right to do so. In response, Phosphates de Boucraa and OCP argued that they had:

- acted under the principles of Moroccan law, as Morocco exercises sovereignty over the region where the mining activities had been conducted; and
- conducted their operations and activities in compliance with Moroccan law.

The matter was argued before the High Court on May 18 2017, at which point the court had to determine whether to confirm the original order. In the present case, the test to be applied for an interim interdict (pending an action based on ownership) under South African law was whether the applicants had established:

- a *prima facie* right, which may be open to doubt; and
- a balance of convenience in favour of granting them the interdict.

Decision

On the question of the *prima facie* right to the interdict, the court analysed the international law principles applicable to the matter and the place of international law in South African law.

As a point of departure, the Constitution of South Africa recognises that customary international law is recognised in South Africa unless it is inconsistent with the Constitution or a parliamentary act. Further, the court endorsed the proposition that customary international law recognises the right of self-determination in respect of territorial units that the United Nations has designated as non-self-governing territories.

Western Sahara is one such territory. In 1963 the United Nations added Western Sahara to the list of non-self-governing territories pursuant to the UN Charter under which colonial powers undertook to develop self-government in the territories that they administered. Thereafter, in 1974 – as Spain got closer to departing from the territory – the UN General Assembly took an advisory opinion from the International Court of Justice on the status of Western Sahara. The opinion concluded that it was a *terra nullius* (ie, a territory that belonged to no one) and that while certain ties existed between the territory and Morocco and Mauritania, they fell short of territorial sovereignty. The court concluded that, as a matter of customary international – and thus, South African – law, the people of Western Sahara enjoyed a right to self-determination which was still to be exercised.

As regards Morocco's claim to sovereignty over the territory, the court considered the English decision in *R (on application of Western Sahara Campaign UK) v Revenue and Customs Commissioners & another* and the European Court of Justice's decision in *Council of the European Union v Polisario Front*. Both cases had found that Morocco has no legitimate claim to sovereignty over Western Sahara.

Against this background, the court applied the *prima facie* test to the facts of the case. As such, it considered the facts set out by the applicant, together with the facts set out by the respondent which the applicant could not dispute, and considered whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. It concluded that:

"The SADR and the PR have established on a prima facie basis that, to use the terminology of the UN General Assembly Resolutions, sovereignty over the cargo of phosphate is vested in the people of Western Sahara. In other words, the people of Western Sahara own the cargo. The defence on the merits that OCP and Phosboucraa have raised is that they mined and sold the phosphate in accordance with the UN framework for lawful exploitation of the natural resources of a non-self-governing territory. But this averment does not stand undisputed: the SADR and the [Polisario Front] state that the phosphate was exploited without consultation of

the people of Western Sahara, without their consent and that they do not and will not benefit from its exploitation. On the test set out in Mitchell v Webster, it seems to us, the threshold has indeed been crossed – a prima facie right of ownership of the phosphate, which may be open to some doubt, has been established by the SADR and the [Polisario Front]."

As regards the balance of convenience, the court was satisfied that the prejudice which would be suffered by the respondent could be reduced by furnishing security as against a situation in which the release of the cargo from the jurisdiction would, for all practical purposes, spell the end of the vindicatory action commenced by the applicants. The balance of convenience favoured the SADR and the Polisario Front.

The respondents' two other defences, which were based on the non-justiciability of the South African court's action (ie, based on principles of state immunity and the act of state doctrine) were both dismissed by the court as grounds to refuse the interdict.

Comment

It will be interesting to see how the proceedings at trial unfold, assuming that the case is litigated to finality.

For further information on this topic please contact Jeremy Prain at Bowmans by telephone (+27 21 480 7800) or email (j.prain@bowman.co.za). The Bowmans website can be accessed at www.bowman.co.za.

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