THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between	Case No: 16884/2013
ARNOLD MAURICE BENGIS	**1st APPLICANT**
DAVID BENGIS	**2nd APPLICANT**
JEFFREY NOLL	**3rd APPLICANT**
And	
THE GOVERNMENT OF SOUTH AFRICA	**1st RESPONDENT**
THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	**2nd RESPONDENT**
THE DIRECTOR-GENERAL: THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	**3rd RESPONDENT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS: THE NATIONAL PROSECUTING AUTHORITY	**4th RESPONDENT**
THE MINISTER OF AGRICULTURE, FORESTRY & FISHERIES	**5th RESPONDENT**
THE MINISTER OF ENVIRONMENTAL AFFAIRS & TOURISM	**6th RESPONDENT**
HORST GERHARD HERMANN KLEINSCHMIDT	**7th RESPONDENT**
MARIUS DIEMONT	**8th RESPONDENT**

And in the matter between Case No: 2199/2014

ARNOLD MAURICE BENGIS	**1st APPLICANT**
DAVID BENGIS	**2nd APPLICANT**
JEFFREY NOLL	**3rd APPLICANT**

And

THE GOVERNMENT OF SOUTH AFRICA	**1st RESPONDENT**
THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	**2nd RESPONDENT**
THE DIRECTOR-GENERAL: THE DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT	**3rd RESPONDENT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS: THE NATIONAL PROSECUTING AUTHORITY	**4th RESPONDENT**
THE MINISTER OF AGRICULTURE, FORESTRY & FISHERIES	**5th RESPONDENT**
THE MINISTER OF ENVIRONMENTAL AFFAIRS & TOURISM	**6th RESPONDENT**
BRUCE GAYE MORRISON	**7th RESPONDENT**
JOHANNES D KOTZE	**8th RESPONDENT**
MARIUS DIEMONT	**9th RESPONDENT**

Coram: ROGERS J

Heard: **2 & 3 FEBRUARY 2016**

Delivered: **24 FEBRUARY 2016**

JUDGMENT

ROGERS J:

Introduction

[1] The issue in these consolidated applications, very broadly, is whether the South African government and other state agencies and officials, in alleged violation of arrangements reached with the applicants when they concluded a plea bargain[1] in South Africa, unlawfully assisted the United States authorities to prosecute them in America for related crimes and to obtain restitution orders. Prayers for declaratory orders and review are accompanied by prayers for consequential relief that any restitution obtained by the United States authorities be repaid by the respondents to the applicants (such restitution has been ordered in the amount of $22 446 720) and that the South African government and three former officials pay the applicants damages in the amount of $11 351 703.

[2] I shall refer to Case 16884/13 as the first application and Case 2199/14 as the second application.

[3] The same three persons feature as applicants in both cases. I shall refer to the first and third applicants as Bengis and Noll. The second applicant is Bengis' son. To avoid confusion, and meaning no disrespect, I shall refer to him by his first name David.

[4] The same persons feature as the first to sixth respondents in both cases: the Government of South Africa; the Minister of Justice and Constitutional Development; the Director-General of the Department of Justice and Constitutional Development ('DOJ'); the National Director of Public Prosecutions ('the NDPP'); the Minister of

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[1] I use this expression to denote a plea and sentence agreement as contemplated in s 105A of the Criminal Procedure Act 51 of 1977.

Agriculture, Forestry and Fisheries; and the Minister of Environmental Affairs and Tourism ('EAT'). The ministry at the time relevant to this case was called the Department of Environmental Affairs and Tourism ('DEAT'). Within the DEAT was a unit called Marine and Coastal Management ('MCM'). The relevant executive functions (including MCM) now reside within the Department of Agriculture, Forestry and Fisheries ('DAFF'). For convenience I shall refer throughout to the DEAT.

[5] The seventh respondent in the first application is Mr Horst Kleinschmidt ('Kleinschmidt'). He was the Deputy Director of MCM until his resignation in April 2005.

[6] The eighth respondent in the first application is Mr Marius Diemont ('Diemont'), an attorney. Until early 2007 he was an employed legal adviser within MCM. He resigned from the DEAT at the end of December 2007 and entered private practice. Diemont is also the ninth respondent in the second application.

[7] The seventh respondent in the second application is Mr Bruce Morrison ('Morrison'), an advocate. At the relevant time he was a Deputy Director of Public Prosecutions attached to the Directorate of Special Operations ('DSO') in Cape Town. The DSO, also known as the Scorpions, no longer exists. Morrison is now in private practice.

[8] The eighth respondent in the second application is Mr Johannes Kotze ('Kotze'), formerly a Senior Special Investigator with the Scorpions.

[9] The applicants were represented before me in the first application by Mr Marcus SC leading Mr Watson and in the second application by Mr Katz SC leading Mr Quixley. All the respondents were represented before me by Mr Duminy SC leading Ms Dzai and Ms Cronje.

Factual background

Resolution of disputes of fact

[10] The applicants seek final relief on motion. Bona fide factual disputes must thus be determined on the respondents' version. A purported factual dispute will lack bona fides if the respondent's version is a bald or uncreditworthy denial or is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting it on the papers.[2]

Hout Bay Fishing Industries and its illegal conduct

[11] Hout Bay Fishing Industries (Pty) Ltd ('HBFI') conducted fishing operations in South African waters for about four decades before ceasing operations towards the end of 2002. Bengis was a director of the company and its chief executive officer. Noll was a senior executive. David joined the company in 1999. By 2001 the applicants resided abroad (Bengis and his son in the United Kingdom, Noll in the United States). Colin van Schalkwyk ('Van Schalkwyk'), now deceased, was the director in charge of operations, based in Cape Town. The Cape Town-based executive in charge of finance was Kerry Spooner ('Spooner').

[12] HBFI had quotas for various marine products including Hake, South Coast Rock Lobster and West Coast Rock Lobster. (For brevity's sake I refer to these species collectively as 'fish'.)

[13] According to facts subsequently admitted in a South African plea bargain, the South African lobster industry was virtually paralysed in 1986 by punitive anti-apartheid sanctions imposed by the United States. HBFI, with the knowledge of the apartheid government, was able to circumvent these sanctions. However enhanced regulation and transformation in the fishing industry in the 1990s and the resultant drastic reduction of HBFI's quotas had the result that by 1999 the company could no longer support its extensive infrastructure and operating costs. HBFI's solution was

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[2] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *National Director Of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

to harvest fish in excess of its quotas and to buy illegally harvested fish from other catchers. This conduct violated inter alia the Marine Living Resources Act 18 of 1998 ('the Marine Act'). The illegally harvested fish was exported to the United States, the Far East and Europe. In the course of these illegal activities Van Schalkwyk paid bribes to fishery control officers with cash supplied to him by Spooner.

[14] In the present proceedings Bengis has admitted (though he did not do so at the time of the South African plea bargain) that this course of illegal conduct emanated from a decision made by him as HBFI's chief executive officer.

The South African criminal investigation

[15] In early June 2001 a container of fish exported to the United States under false export declarations was detained in New Jersey. Shortly thereafter the DEAT asked the DSO to assist in an investigation into illegal harvesting and exporting by HBFI. Authority for this investigation in terms of s 28(1)(a) of the National Prosecuting Act 32 of 1998 ('the NPA Act') was issued on 20 June 2001 covering the seasons 1999/2000 and 2000/2001. The investigation was later expanded to include two earlier seasons. Documents and other exhibits were seized by the DSO during a search at HBFI's premises in June 2001.

[16] In July 2001 the National Prosecuting Authority ('the NPA') submitted a request for assistance to the United States government under the Mutual Legal Assistance Treaty ('MLAT') subsisting between the two countries.[3] Morrison's involvement began at this time. He was appointed to lead the DSO investigation with Kotze as the principal investigator. There was henceforth close cooperation between the South African and United States authorities. The United States subsequently made MLAT requests to South Africa in regard to related criminal investigations in America.

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[3] The MLAT is an agreement as contemplated in s 27 of the International Cooperation in Criminal Matters Act 75 of 1996. See also s 231 of the Constitution. It appears that the MLAT and a related Extradition Agreement entered into force on 25 June 2001 (this date of entry into force is reflected in the copy of the MLAT included in the applicants' bundle of authorities; see also *President of the Republic of South Africa & Others v Quagliani & Related Cases* 2009 (4) BCLR 345 (CC) para 16).

[17] On 6 December 2001 the DSO caused warrants of arrest to be issued for Bengis, Noll and David. On the following day various South African-based employees, including Van Schalkwyk, were arrested and released on bail.

Plea bargain and related discussions

[18] By November 2001 Bengis had engaged an Adv A Bezuidenhout ('Bezuidenhout') of the Johannesburg Bar to assist him and HBFI in relation to the South African investigation. On 28 November 2001 Bezuidenhout met with the then Regional Head of the DSO, Mr TD Prins, at a Cape Town hotel to explore a possible deal. Bezuidenhout conveyed that Bengis was anxious that his son should not be convicted. Bezuidenhout met with Prins and Morrison on the following day. Morrison gave an indication of the range of charges under consideration and the persons who might be charged. Bezuidenhout argued that the matter should be kept simple, that charges should be confined to the Marine Act and that only HBFI should feature as an accused.

[19] There were a number of meetings and telephonic discussions between Bezuidenhout and Morrison regarding a plea bargain in terms of s 105A of the Criminal Procedure Act (a provision which came into operation during December 2001). According to Morrison, he told Bezuidenhout that the US authorities intended to prosecute Bengis for offences under American law (these concerned the importing into the United States of fish illegally harvested in South Africa) but that if Bengis were to face the full brunt of the case against himself and HBFI in South Africa and plead guilty here personally, it might count in his favour in the United States. Bezuidenhout's instructions were that Bengis would not do so, that he would take his chances in the United States, and that he would at most come to South Africa on strict conditions of indemnity against personal prosecution.

[20] In January 2002 Prins wrote to Bezuidenhout confirming that the warrants of arrest for Bengis, Noll, David and a fourth executive, Mr G Berman ('Berman') who was based in the United States, had not been circulated via Interpol, that they had not been red-flagged internationally and that, while the process of negotiation was

ongoing, the warrants would not be circulated and no attempt would be made to effect the arrests.

[21] On 6 March 2002 there was a meeting in Pretoria attended by Bezuidenhout and Bengis' UK solicitor, Mr Kevin Gold ('Gold'), representatives of the NPA and the Asset Forfeiture Unit ('AFU'), and Kleinschmidt. Since Bengis was not present and since neither Bezuidenhout nor Gold has filed affidavits, what Bengis says about the meeting is hearsay. Morrison confirms he was at the meeting and recalls that other attendees included Adv P Sonn (the DSO Head), Adv L McCarthy (Investigating Director of the DSO in Pretoria), Adv Hofmeyr of the AFU and Kleinschmidt. Bengis asserted that Prins was also present.

[22] Bengis claims that at the time of this meeting he and his representatives knew that the United States authorities were conducting a criminal investigation. He claims that Morrison said that the South African authorities had already sent documents to the United States investigators but that they had no interest in the United States proceedings and that, subject to the conclusion of a plea bargain in South Africa, no cooperation would be given beyond that which was 'required by law'.

[23] As noted, Bengis' evidence about the meeting is hearsay. Morrison denies Bengis' version. He says this was one of the occasions on which he told Bezuidenhout of the close and extensive ongoing cooperation between South Africa and the United States. Bezuidenhout wanted the meeting to agree that the South African plea bargain would be the 'final word'. Morrison responded that, if a plea bargain was concluded, the NPA's intention would not be to prosecute HBFI and its controllers further in South Africa for offences known at the time. However, South Africa could not bind the United States, which was intent on prosecuting Bengis and others. The South African authorities had assisted and would continue to assist the United States in its investigation. Morrison adds that he only ever spoke on behalf of the NPA. He did not represent the AFU or MCM. Morrison's evidence to this effect cannot be rejected on the papers and is indeed not contradicted by admissible evidence.

The South African plea bargain, convictions and sentences

[24] By late April 2002 the terms of the South African plea bargain had been settled. An appearance in the criminal case against HBFI and Van Schalkwyk was scheduled for 30 April 2002. On 29 April 2002 Kotze drove Morrison and Bezuidenhout to the presiding magistrate to inform him of the plea bargain. By this stage Bengis and David had arrived in Cape Town with Gold to attend the hearing. Bengis was to represent HBFI in the plea bargain proceedings.

[25] On 30 April 2002 in the Wynberg Regional Court HBFI (represented by Bengis) and Van Schalkwyk pleaded guilty to various counts in accordance with the signed plea bargain. Morrison appeared for the prosecution and Bezuidenhout for the accused. In accordance with the plea bargain HBFI was sentenced to fines totalling R7,45 million. An amount of R19 million was to be confiscated in terms of s 18(1) of the Prevention of Organised Crime Act 121 of 1998 ('POCA') as a benefit derived from the commission of the offences. In addition, one of HBFI's vessels and the contents of a specified container were to be forfeited to the State in terms of s 68(1) of the Marine Act. Van Schalkwyk was sentenced to a fine of R1 million failing payment of which imprisonment of five years and to a further five years' suspended imprisonment.

[26] The plea agreement recorded that the DEAT was the de facto complainant in the criminal case and that it had been given the opportunity to make representations to the NDPP and DSO regarding the content of the agreement and the forfeitures. The plea agreement stipulated, further, that HBFI was to pay R750 000 to the DEAT as further compensation for legal costs incurred by the DEAT in various civil applications initiated by HBFI.

[27] HBFI and Van Schalkwyk met their commitments under the plea bargain.

The Ngcuka letter

[28] On the same day, 30 April 2002, Mr B Ngcuka ('Ngcuka'), at that time the NDPP, addressed a letter to Bezuidenhout ('the Ngcuka letter'). This letter, which

was drafted by Bezuidenhout, is of considerable importance to the applicants' case. The heading listed HBFI and various individuals, including the applicants, defining them collectively as 'the entities'. Para 1 recorded the investigation which had been initiated in June 2001 and listed the possible offences which were the initial focus of the investigation. Paras 2 and 3 confirmed that a plea bargain had been concluded between the State (the DSO) and HBFI and Van Schalkwyk and that HBFI and Van Schalkwyk would appear in the Wynberg Regional Court on 30 April 2002 where they would be convicted on charges of contravening the Marine Act and (in Van Schalkwyk's case) corruption.

[29] Paras 4, 5 and 6 continued thus:

'4. It is confirmed that subsequent to this conviction and sentence the entities will not be prosecuted for any of the offences related to the subject matter of the investigation referred to above.

5. The DSO undertakes that no information pertaining to the investigation outlined above will be released to any state department unless it is requested, no law prohibits such disclosure and the National Director of Public Prosecutions has exercised his discretion in terms of section 41(6) of the National Prosecuting Authority Act, No 32 of 1998, as amended.

6. The Government of the United States of America will be informed of the finalisation of the investigation in as much as it pertains to the investigation against the entities, the result of the trial, the sentence and orders made.'

The alleged composite settlement agreement

[30] The applicants allege in the first application that the plea bargain and the Ngcuka letter formed part of a 'composite settlement agreement' which had been concluded some time before 29 April 2002. The terms of the composite settlement were alleged to be the following: (i) that plea and sentence agreements would be entered into between HBFI and Van Schalkwyk on the one hand and the State on the other; (ii) that these plea agreements would address not only confiscations pursuant to POCA but also forfeiture in terms of s 68(1) of the Marine Act; (iii) that, in order to achieve this, the arrest warrants against the applicants would be cancelled so that Bengis could travel to South Africa to enter the plea on behalf of

HBFI; (iv) that, in exchange for the foregoing, the State would drop all prosecutions against the applicants as well as other entities and that this would be in respect of all offences committed prior to the agreement relating to the harvesting and exportation of South Coast Rock Lobster, West Coast Rock Lobster and Hake; (v) that any and all other civil and criminal proceedings as between the applicants, the State and the MCM arising from the facts investigated pursuant to the initial investigation authorized on 31 May 2001 (actually 20 June 2001) would be finally concluded; (vi) that the State's obligations in terms of the composite agreement would be reflected in a letter to be issued by the NDPP after conclusion of the plea bargain.

[31] The main complaint in the first application is that the conduct of the South African government after 30 April 2002 in connection with restitution proceedings in the United States (restitution, like sentencing, being a post-conviction phase of the United States criminal proceedings) was in breach of the alleged composite settlement agreement or a violation of the Ngcuka letter or in bad faith (since it was allegedly contrary to representations made by the State during negotiations or an intentional circumvention of the composite settlement).

[32] In the second application the applicants make the more ambitious allegation that, as part of the settlement discussions, the applicants were 'explicitly assured' that, subject to the satisfactory conclusion of the South African settlement arrangements, the South African government 'would not provide any cooperation or assistance to the relevant authorities in the [United States] beyond that which was required by law'.

[33] The main complaint in the second application is that the conduct of South African officials after 30 April 2002 in connection with the prosecution in the United States (and not merely the post-conviction restitution phase) was in breach of the explicit assurance because the South African officials provided assistance beyond that which was 'required by law'.

Respondents' version on composite agreement and the Ngcuka letter

[34] Morrison, Kotze and Prins deny the existence of a composite settlement agreement or the giving of an assurance that no assistance would be given to the United States beyond that which was 'required by law'. They also deny being party to any discussions that a letter would be issued such as that signed by Ngcuka on 30 April 2002. Indeed, they say they had no knowledge of the existence of the Ngcuka letter until a later time.

[35] In Morrison's case, he saw the Ngcuka letter for the first time as an attachment to a letter written to him on 31 May 2002 by the applicants' South African attorney, Mr B de Sousa of Abrahams & Gross ('De Sousa'). Morrison adds that Bezuidenhout told him on several occasions that he (Bezuidenhout) drafted the letter, something not denied in reply.

[36] Kotze says he only learnt of the existence of the letter when De Sousa emailed it to him years later (on 16 October 2012).

[37] Prins initially alleged that he only learnt of the Ngcuka letter by way of the present proceedings. In reply the applicants attached a document showing that at 13h21 on 30 April 2002 the Ngcuka letter was faxed to Bezuidenhout (c/o Abrahams & Gross) under cover of a DSO cover sheet signed by Prins with the message 'Attached please find the letter as discussed'. In a supplementary affidavit Prins acknowledges his signature and writing but says he has no recollection of it. He believes he may simply have been acting as a conduit. His version remains that he was not party to discussions about providing such a letter.

[38] Insofar as the MCM is concerned, Kleinschmidt denies knowledge of a composite settlement agreement. He says that neither the DSO nor the NPA had any mandate to represent the MCM or DEAT. The DEAT was consulted about the plea bargain. The MCM took this opportunity to resolve the various civil applications brought against it by HBFI. This led to the inclusion in the plea bargain of the term requiring HBFI to pay MCM an amount of R750 000 in respect of costs. In this respect MCM's interests were represented by Ms Mugkenkar of the State Attorney's

office. The applicants themselves were anxious that all pending civil matters should be resolved. This is reflected in letters written by Abrahams & Gross to Ms Mugkenkar on 10 and 17 April 2002 in which De Sousa said that in negotiations with Morrison and Prins it had been made clear that the 'overall settlement' would be inclusive of all matters involving HBFI, civil and criminal. It is apparent, particularly from the second of these letters, that MCM through the State Attorney did not share this view. Ultimately, though, the negotiated solution was that HBFI would make the costs contribution of R750 000. (Presumably this was to be accompanied by the withdrawal by HBFI of any civil applications which had not already been dismissed. Kleinschmidt says that the pending civil applications were indeed withdrawn after acceptance of the plea bargain.)

[39] Kleinschmidt likewise denies having known of the Ngcuka letter before the present proceedings were launched. If he had been consulted about it in advance, he would have sought advice within the DEAT and from the State Attorney. He doubts that anyone within the DEAT would have approved anything beyond the plea bargain. Even the terms of the plea bargain were accepted by him with reluctance because he believed that HBFI and its controllers had personally benefited in far greater amounts than the agreed forfeitures and had caused immense damage to South Africa's marine resources.

[40] Diemont did not participate in any of the negotiations. His involvement in the HBFI matter started in July 2004. He was aware of the South African plea bargain but only learnt of the existence of the Ngcuka letter when the present proceedings were instituted.

[41] In his replying affidavit Bengis claims that agreement was reached on a first draft of the Ngcuka letter on or about 24 April 2002. He says that he required the draft to be supplemented by the inclusion of a paragraph to the effect that the United States would be informed of the finalisation of the investigation (this became para 6 of the Ngcuka letter). Since Bengis was not personally involved in the negotiations, I cannot treat this as admissible evidence of the negotiations. I accept, though, that Bengis asked his counsel to include in his draft a provision along the lines of para 6.

[42] Bengis alleges in his replying affidavit that he, David and Gold arrived in Cape Town on the morning of 29 April 2002 with a view to Bengis' appearing in the criminal case as HBFI's representative. This was under immunity from personal arrest. He says that on that day the three of them, Van Schalkwyk and Bezuidenhout met at the DSO's offices in the Reserve Bank Building with Morrison, Prins and Kotze. Bengis says that a signed version of the Ngcuka letter dated 29 April 2002 was presented to Bezuidenhout. The latter added by hand the following words in para 5: '… and the NDPP has exercised his discretion ito Sec 41(6) of the National Prosecution Act'. Bengis says that this was an amendment of a formal nature. He attaches a copy of the letter with Bezuidenhout's handwritten insertion. He alleges that by the end of this meeting he was satisfied that a composite agreement had been reached involving all the entities referred to in the Ngcuka letter and that it was on this basis that he and Van Schalkwyk signed the plea agreement. Morrison and Bezuidenhout then left to see the magistrate.

[43] This is the one meeting (if it happened) about which Bengis can testify from personal knowledge. However Morrison, Kotze and Prins all deny that there was any such meeting. Morrison says Bengis' version is a fabrication. To the best of his recollection he was not on that day at Prins' office or in the Reserve Bank Building at all. Morrison's office at that time was in Plein Street. His version is that on 29 April 2002 he was putting the final touches to the plea agreement. He spoke with Bezuidenhout on the phone and told him he wanted to give a copy to the magistrate in advance of the next day's hearing. This is how it came about that they drove to Wynberg.

[44] Kotze, who drove Bezuidenhout and Morrison to the magistrate on 29 April 2002, says that before the court appearance on 30 April 2002 he had not set eyes on Bengis and that he has never in his life met Gold. He records that Morrison and Bezuidenhout arrived at his office in Adderley Street wanting him to take them to court.

[45] Prins also denies knowledge of any such meeting. He discloses a subsequent medical event which has affected aspects of his memory but considers that he is still able to recall people he has met. He has no recollection of ever having

met Gold, Van Schalkwyk, Bengis or David. Bengis claimed that Prins was at the meeting of March 2002, which if true would mean that Prins had at least met Gold. Morrison, however, does not mention Prins as one of the attendees. Prins himself says that subsequent to the meeting with Bezuidenhout in November 2001 he attended one further meeting in Pretoria where Bezuidenhout was present. That may have been the meeting of 6 March 2002, in which case Prins would have met Gold there.[4] The emergence of Prins' fax of 30 April 2002 might be a further consideration casting doubt on the reliability of his version.

[46] However, the fact that Prins' version may not be accurate in all respects does not mean that his denial of the meeting of 29 April 2002 can be rejected on the papers as false. His denial does not stand alone. There is the evidence of Morrison and Kotze. Bengis does not claim that he and his legal team met with Prins alone nor would that have been a plausible scenario (unless there was something underhand about the meeting) in view of the fact that Morrison was the prosecutor and the one finalising the plea agreement from the State's side. It may also be mentioned that Bengis' allegation of a meeting of 29 April 2002 is not supported by affidavit from Bezuidenhout or Gold.

[47] In regard, more generally, to the absence of an affidavit from Bezuidenhout confirming Bengis' allegations, it was suggested in argument that there are ethical obstacles in the way of an advocate's furnishing an affidavit. However, an advocate may make an affidavit with the permission of his bar council, a permission which is hardly likely to have been refused, given that Bezuidenhout was not acting as counsel in the current litigation and that his South African attorney (De Sousa) was absent from most of the oral discussions (including the alleged meeting of 29 April 2002).

[48] On the papers, therefore, I must find that there was no such meeting as alleged by Bengis on 29 April 2002. With that finding goes one of the main grounds

[4] In fairness to Prins I should add that the only person who says Prins was present at a meeting in March 2002 attended by Gold is Bengis who was not himself there and thus does not have personal knowledge of the matter. I should also mention that there is a conflict between Morrison and Bengis as to whether the meeting took place on 6 or 8 March 2002. If there were two meetings, it is possible that Prins was only present at a meeting with Bezuidenhout.

on which I was asked to reject as untenable the evidence of Morrison and Kotze to the effect that they had no knowledge of the Ngcuka letter until well after 30 April 2002.

[49] This does not entail a rejection of the existence of an earlier version of the Ngcuka letter dated 29 April 2002 on which Bezuidenhout made the handwritten annotation. But it does entail a rejection of the version that Morrison, Kotze and Prins were present at a meeting where that version of the letter was discussed.

[50] There is a further circumstance tending to support Morrison's evidence that he had no knowledge of the Ngcuka letter as at 30 April 2002. No reference to it was made in the proceedings before the magistrate on 30 April 2002 (a transcript of which forms part of the papers). Morrison says that he was aware of the duty to inform the court of all circumstances relevant to a consideration of the plea agreement, that the Ngcuka letter would have been a relevant circumstance, and that had he been aware of the letter he would have disclosed it to the magistrate. I have no doubt that a duty of disclosure would have applied to the Ngcuka letter. Section 105A(2)(b) requires a plea agreement to state fully the terms of the agreement, the substantial facts of the matter and all other facts relevant to the sentence agreement. On the applicants' version, the Ngcuka letter was an undertaking inter alia in favour of HBFI and Van Schalkwyk and thus part of the agreement between the State and those two accused. The undertakings purportedly given in favour of other suspects, including the applicants, that no one else would be prosecuted, was also something the magistrate was entitled to know. Morrison would have had no reason to conceal the letter from the magistrate.

[51] This leaves, as something of a mystery, the circumstances in which Ngcuka came to issue the letter. Morrison says in his supplementary affidavit that in hindsight he believes it was deliberately concealed from him. Ngcuka has refused to consult with or provide an affidavit to the respondents. There is no evidence from Bezuidenhout on the matter. Whether the applicants have approached Ngcuka for evidence does not appear.

[52] As a fact the Ngcuka letter was issued. On the assumption that it contains valid undertakings, it supplements the terms of the plea bargain. There is in my view no satisfactory and admissible evidence of terms or assurances going beyond the plea bargain and the Ngcuka letter. In truth, the composite settlement agreement alleged in the founding affidavit in the first application[5] does not appear to entail much more, if anything, than is recorded in these two documents.

[53] The applicants assert that it was a term of the composite settlement that all civil and criminal proceedings as between the applicants, the State and MCM arising from the South African investigation would be finally concluded. I accept that this was the combined effect of the plea bargain and Ngcuka letter in relation to South African criminal proceedings and in relation to the pending civil litigation between HBFI and MCM. However, and as I shall presently explain, the plea bargain and Ngcuka letter cannot be construed as prohibiting the rendering of assistance by the South African prosecuting authorities to American prosecutors or as precluding South Africa from participating in and benefiting from the restitution phase of American criminal proceedings. On the papers no agreement to this effect *dehors* the plea bargain and Ngcuka letter can be found to have existed.

[54] The same applies to Bengis' repeated assertion that the applicants believed that the plea and sentence agreement would bring an end to any further endeavours by the law enforcement agencies in South Africa to investigate or prosecute the applicants. To the extent that this is intended to convey that there was an agreement (*dehors* the plea bargain and Ngcuka letter) that the South African authorities would not assist in the American prosecution or participate in restitution proceedings, such a finding cannot be made on the papers.

Disclosure of assistance to the United States

[55] Morrison says that on more than one occasion he made it clear to Bezuidenhout that the South African authorities had already assisted the United States in its investigations and would continue to do so even if a plea bargain was

[5] Para 37 record 21-22, summarised in para 30 above.

reached in South Africa. Kotze alleges that he told Bengis' South African legal team that there was an independent investigation underway in the United States which entailed potential prosecutions in terms of the Lacey Act (more of this below) and that evidence gathered by Kotze would be made available to the United States authorities. Morrison says, and Kotze confirms, that in the car on the way to the magistrate on 29 April 2002 Morrison told Bezuidenhout that South African assistance to the US prosecutors would continue. Bezuidenhout did not respond that this was against the spirit or terms of anything understood or agreed.

[56] I cannot reject this evidence as untenable on the papers. If Bengis had a contrary perception, it was not engendered by those representing the State in the plea bargain discussions.

The United States investigation

[57] HBFI, as already mentioned, exported illegally harvested fish from South Africa to the United States. This was in violation of the Lacey Act contained in 16 USC §3372.[6] That Act makes it a federal crime to import into the United States wildlife or fish harvested in violation of foreign law. The charges which the United States authorities investigated included multiple violations of the Lacey Act by HBFI and its senior management. There was also an investigation into the separate offence of conspiracy to violate the Lacey Act, the crime of conspiracy being in violation of 18 USC §371.

[58] There had been cooperation between South African and United States authorities prior to the plea bargain in South Africa. Following the plea bargain the US Department of Justice on 11 June 2002 directed to the Director-General of the DOJ[7] a formal request for assistance pursuant to the MLAT. The South African authorities were asked to furnish a range of specified documentation and computer records to the United States authorities, including all information, materials and the hard drive seized during the search of HBFI's premises as well as the South African

[6] USC stands for United States Code which is an official compilation of federal statutes. '16' is a Title in the USC. §3372 is a section in that Title.
[7] In his capacity as the 'Central Authority' for South Africa as contemplated in Article 2 of the MLAT.

plea bargain. The United States also requested the presence in that country of Kotze and another Scorpions investigator, one Lazarus, to assist the American investigators in their examination and analysis of documents. The United States would meet the travel costs.

[59] On 20 June 2002 Prins notified the United States authorities that the request had been approved. In July 2002 Adv Sonn (Head of the DSO) directed a request to Ngcuka (still NDPP), Ms Sparg (the DOJ's Chief Financial Officer) and the then Minister of Justice Dr PM Maduna for the approval of subsistence expenditure which Kotze and Lazarus would require while in the United States. All three recipients noted their approval. (One must infer that Ngcuka did not regard the assistance to be furnished by Kotze and Lazarus as inconsistent with his letter of 30 April 2002.)

[60] In July 2002 the DSO dispatched documents to the United States. Kotze and Lazarus went there to provide the requested assistance.

[61] On 11 April 2003 the United States made a second MLAT request for Kotze and Lazarus to travel once again to the United States. The respondents' attorney says that due to the lapse of time it has been difficult to locate documents. The copy of the letter containing the second request as attached to the attorney's affidavit is incomplete[8] but its ambit appears from an internal memorandum dated 17 April 2003 addressed by McCarthy (who had succeeded Sonn as Head of the DSO) to Sparg, Ngcuka and Minister Maduna. The request was for Kotze and Lazarus (i) to assist United States investigators in debriefing a person who might be a witness in the prosecution of Bengis, Noll, Berman and other US entities; (ii) to testify in grand jury proceedings to enable the US Attorney to indict these persons. The MLAT request was described as a continuation of the previous request. It can be inferred from the internal memorandum that the Director-General of the DOJ had formally approved the MLAT request. As before, the purpose of the internal memorandum was to obtain approval for subsistence costs supplementary to those which would be covered by the United States. The request was approved by Sparg, Ngcuka and

[8] Record 1504-1505 (one can see from the fax page numbering that the second page of the letter of 11 April 2003 is missing).

Dr Maduna. (Once again, one can infer that Ngcuka did not regard this as contrary to his letter of 30 April 2002.)

[62] Kotze and presumably Lazarus then went again to the United States. The grand jury returned an indictment on 3 August 2003. On 6 August 2003 Bengis, Noll and David were arrested in the United States.

The United States plea bargains and convictions

[63] Each of the applicants signed plea bargain agreements in the form of letters addressed to their respective American attorneys by the lead prosecutor Mr Marcus Asner ('Asner'). Bengis and Noll signed theirs on 2 March 2004 and David signed his on 2 April 2004. They appeared on those respective dates in the Southern District Court of New York ('the District Court') where they were convicted in accordance with the plea bargains.

[64] The convictions were one count of conspiracy to violate the Lacey Act and three further counts of violations of that Act. In the case of Bengis and Noll, the period of their admitted involvement in the conspiracy was 1987 to August 2001. In David's case, his admitted involvement was from 1999 to August 2001. (This indicates that HBFI was engaged in the illegal harvesting of fish in South Africa over a far longer period than was admitted in the South African plea bargain.)

[65] The United States plea bargains stipulated sentencing ranges (in the case of Bengis, for example, imprisonment of 46-57 months and fines of $10 000-$100 000). The imposition of fines in addition to imprisonment was, on my understanding, in the discretion of the court. In terms of the plea bargains the applicants were permitted to argue, by way of departure motion, that sentences below the low-end should be imposed but on the sole basis that the circumstances of the case took it 'outside of the heartland of the Lacey Act because matters at issue in this case previously were investigated and prosecuted by the Republic of South Africa'. It was recorded that the United States would oppose any such departure. The applicants agreed that forfeiture would be ordered in an amount to be determined which would be not less than $5 million. They also acknowledged that the court was obliged to order

restitution in accordance with 18 USC §§3363, 3363A and 3664 which would be paid according to a plan established by the court.

[66] During the plea bargain proceedings in court, the judge asked each applicant whether he understood (i) that mandatory restitution was required under the statute; (ii) that the forfeiture to which they had agreed would not be treated as satisfaction of any fine or restitution. Each applicant answered affirmatively.

The United States sentencing and forfeiture proceedings

[67] The sentencing and forfeiture proceedings began in the District Court on 28 May 2004. Among the documents filed in respect of that hearing were (i) a statement by Kleinschmidt dated 12 May 2004, described by Asner as a victim statement; (ii) an affidavit by Morrison dated 26 May 2004.

[68] Kleinschmidt used his official title in the victim statement. He says he prepared the statement in his capacity as Deputy Director-General of the MCM and did not need any separate or special authorization. He did so pursuant to a request, communicated to him via Morrison, to prepare a report on the effects of HBFI's over-fishing in South Africa. According to his recollection there had been an MLAT request for this assistance. If there was, documentary evidence of it has not been adduced. The only MLAT requests in the record are those of June 2002 and April 2003. This does not necessarily mean that there were not others. The first application was only issued in October 2013 and the respondents' attorney has explained the difficulty in locating documents. On the other hand, Asner says that some requests for assistance 'may have been made without following all the treaty protocols, because they were acceded to'.

[69] Kleinschmidt prepared his report with the assistance of a Dr JC Groeneveld, MCM's expert on South Coast Rock Lobster. Kleinschmidt's report was in essence a summary of a paper published by Groeneveld in the *African Journal of Marine Science* in 2003[9] in which the author assessed the implications of under-reporting of catches of South Coast Rock Lobster with reference to a forensic investigation into a

[9] Record 128-132.

fishing company styled ‘Company A’ (ie HBFI). With reference to data in Groeneveld’s paper (which he attached), Kleinschmidt said in his report that it was clear, in retrospect, that all attempts by the authorities to stabilise the South Coast Rock Lobster resource over the period 1987 to 2001 by reducing the total allowable catch had been negated by continued over-fishing by HBFI until 2001. Its exit from the fishing industry in 2001 had resulted in an immediate stabilisation of the resource.

[70] The applicants filed a departure motion on 21 May 2004. As foreshadowed in the plea bargains, the motion was based on the fact that the illegal harvesting had happened in South Africa and that following a full and vigorous investigation South Africa had prosecuted and punished the crimes which were the basis for the American charges. The South African prosecution was said to have vindicated South Africa’s interests, so much so

> ‘… that in exchange for the guilty plea in that case, [Bengis, David and Noll], targets of the South African investigation and subjects of arrest warrants, were promised immunity from future prosecution by South Africa’s National Director Of Public Prosecutions.’

These extraordinary circumstances were said to take the case well outside the heartland of Lacey Act prosecutions and to provide a compelling basis for a substantial downward departure. The South African investigation, the South African plea bargain and the Ngcuka letter were fully described. The circumstances of the case were said to reveal that the purposes of sentencing had been fully or partially fulfilled (ie by way of the South African prosecution and plea bargain) prior to the imposition of sentence in the United States. The fact that South Africa had decided not to include the applicants in the formal charges was said to be ‘a meaningless distinction and of no significance’, the point being that the crime underlying the Lacey Act case ‘was prosecuted vigourously by the victim sovereign, and was prosecuted to its satisfaction’.

[71] Morrison’s affidavit was filed as part of the United States prosecutor’s opposition to the departure motion. The affidavit’s primary purpose seems to have been to deal with the applicants’ contention that South Africa’s interests had been fully vindicated by the South African plea bargain and the Ngcuka letter. Morrison

said that the Scorpions had considered prosecuting Bengis, Noll and David by seeking their extradition. For two reasons the Scorpions decided not to pursue that course: (i) A main practical concern was the time and expense in 'investigating, hunting down and prosecuting' the US-based defendants, particularly Bengis who had substantial financial resources and was known to frequent the United Kingdom and Israel. Practically these defendants 'simply were beyond the reach of South African authorities'. (ii) Another important factor was that the applicants' crimes would probably not go unpunished in view of the United States investigation of which the Scorpions were aware. For these reasons the Scorpions focused their resources on SA-based entities, the targets including HBFI, Van Schalkwyk, a number of other fishermen and 14 fisheries inspectors. Consistent with the Scorpions' conclusion that the US-based defendants deserved to be prosecuted and punished, the Scorpions continued actively to assist the US authorities.

[72] Morrison pointed out that HBFI had not been charged in South Africa with over-harvesting prior to 1999 or with the sale or exportation of over-harvested fish.

[73] He referred to the South African plea agreement and the Ngcuka letter (of which by then he obviously was aware). Morrison said that nothing in the Ngcuka letter even remotely suggested that South Africa sought to bind, or could bind, the United States. This had been explained to the applicants' counsel (ie Bezuidenhout) on various occasions. There had also been no indication or suggestion that South Africa would cease its active cooperation with the United States. He confirmed that such active cooperation had continued.

[74] In his opposing memorandum Asner described the United States prosecution as the 'culmination of a three-year, joint United States/South Africa investigation'. The United States and South Africa had a 'settled on a double-barrel approach to dismantling the Bengis organisation', the South African authorities focusing on the SA-based entities and United States focusing on the US-based entities.

[75] Asner advanced three main contentions in opposition to the departure motion: (i) The fact that matters in issue in the United States were also investigated and prosecuted in South Africa was not, as a matter of law, an appropriate basis for

a departure. (ii) In any event, and as a matter of fact, the applicants had not been prosecuted in South Africa for the same conduct: the prosecutions concerned different crimes, different time-frames, different species of fish and different defendants. (iii) Even if an American court had authority in law to depart from the sentencing range in the light of the South African prosecution, the court should decline to do so in view of the seriousness of the crimes, their duration, the 'sheer greed involved', the need for punishment and general deterrence and 'the remarkable disdain for authority displayed by the co-conspirators both during the course of the criminal scheme and during the investigation'.

[76] Asner's opposing memorandum made reference not only to the statements of Kleinschmidt and Morrison but also to Kotze's earlier affidavits and to victim statements from two rival fishing companies.

[77] After hearing the applicants' counsel, and without calling on Asner, Judge Kaplan dismissed the departure motion. He was unpersuaded that in law he had a discretion to grant a departure on the basis of the South African prosecution, expressing the view that the South African decision to grant immunity in exchange for HBFI's plea bargain was not legally relevant material in the United States. He added that even if such material were legally relevant he would not in his discretion depart from the sentencing range.

[78] Each of the applicants was thereupon sentenced to a period of imprisonment: Bengis 46 months, Noll 30 months and David 12 months. Bengis and Noll were ordered jointly and severally to pay $5,9 million as forfeiture. David was ordered to forfeit the proceeds of the sale of his United States fish processing factory in the sum of $1,5 million.

[79] It was agreed that the question of restitution would stand over for later determination.

The restitution phase

[80] The ordering of restitution is a function of the court convicting and sentencing a defendant. Depending on the type of offence, restitution is either discretionary (18 USC §3663 – the Victim and Witness Protection Act of 1982) or mandatory (18 USC §3663A – the Mandatory Victims Restitution Act of 1996). The procedure for the issuance and enforcement of restitution orders is contained in 18 USC §3664.

[81] Whether the applicants were subject to discretionary or mandatory restitution was contentious. The mandatory restitution provisions applied if the applicants could be said to have been convicted of an 'offense against property' under Title 18 USC in which 'an identifiable victim' had suffered 'pecuniary loss'. The conspiracy conviction was an offence under Title 18 USC. The key issues were thus whether the conspiracy to harvest fish illegally in South Africa and import it into the United States constituted an offence 'against property' and whether there was an 'identifiable victim' which had suffered 'pecuniary loss'. For purposes of both mandatory and discretionary restitution, 'victim' is defined as meaning 'a person directly and proximately harmed as a result of the commission of the offence in question'.

[82] Asner on behalf of the United States contended that the illegally harvested fish had belonged to the South African government or that the South African government under the Marine Act had had a sufficient interest in the fish to qualify the conspiracy offence, in American law, as one 'against property' and in respect of which the South African government was an 'identifiable victim' that had suffered 'pecuniary loss'. The applicants' lawyers contested these propositions.

[83] Diemont became involved at this stage. He was asked to furnish a legal opinion as to whether the South African government was entitled to claim ownership of the illegally harvested fish. He recalled the approach as having come from Morrison who said an opinion was sought pursuant to a request for mutual legal assistance. Once again, there is no documentary evidence of a formal MLAT request at this stage.

[84] Diemont furnished the opinion in his capacity as an MCM official. He says he did so in the ordinary course of his functions as an employed legal adviser within MCM.

[85] Diemont's first opinion was dated 26 July 2004. He submitted that the DEAT/MCM was entitled to claim ownership of the illegally harvested fish on behalf of the South African government. The opinion canvassed the common law in regard to *occupatio*, the status of wild animals as *res nullius* and the regulatory regime imposed by the Marine Act. Although the germ of the reasoning ultimately adopted by the American court is discernible in this opinion, it was not stated with particular clarity.

[86] Diemont and Kleinschmidt liaised with a Cape Town-based consultancy firm, Ocean and Land Resources Assessment Consultants ('OLRAC'), which was to prepare a report on the quantification of the South African government's pecuniary loss.

[87] During September and October 2004 the applicants' American lawyers submitted legal opinions and expert reports on the restitution issue. These included legal opinions by South African counsel (Mr Marcus SC and Mr Chaskalson), in which they commented on Diemont's opinion, and reports by Prof Baird of South Africa and Dr Bjorndal of the United Kingdom. The reports of Prof Baird and Dr Bjorndal apparently criticised OLRAC's methodology but did not offer an alternative theory of how damages should be calculated.[10] (None of these and the later opinions and reports filed on behalf of the applicants has been attached in the present proceedings.)

[88] Diemont arranged for the reports of Prof Baird and Dr Bjorndal to be furnished to OLRAC which gave a further report.

[89] OLRAC propose two alternative quantification methods: (i) what it would cost South Africa to restore the rock lobster fishery to the level at which it would have

[10] See Asner's subsequent appeal brief at 1022.

been but for the defendants' over-harvesting; (ii) the market value of the over-harvested fish.

[90] In December 2004 the United States submitted its recommendation on restitution, proposing that the court adopt method 1 which, after deducting the fines and forfeitures already paid in South Africa, came to $39,7 million. In the alternative the court was asked to adopt method 1 which yielded $54,9 million. In addition to the OLRAC reports and Diemont opinion, the United States had also obtained opinions from Ads Goldblatt and Steyn and a report by Prof Glaszewski, all from South Africa, regarding the ownership of illegally harvested fish.

[91] On 21 January 2005 Judge Kaplan requested clarification on what fish had actually been forfeited to the South African government. In a supplementary opinion dated 11 April 2005 (and corrected on 18 April 2005) Diemont explained that the only fish of which the South Africa government had actually obtained ownership pursuant to forfeiture was the fish in one specified container. Although none of the other fish illegally caught by HBFI over the years had been forfeited, this was because it had been illegally exported in secretive operations before the South African government could exercise its rights of seizure and forfeiture in terms of ss 51(3)(c)(ii) and 68(1) of the Marine Act. Had South Africa been able to seize the fish before it was exported, HBFI would have had no defence to conviction and resultant forfeiture.

[92] The applicants thereupon filed a further opinion and memorandum by Messrs Marcus SC and Chaskalson.

[93] Diemont subsequently provided a note dated 18 May 2005 setting out 'general principles of forfeiture' in South African law. This note made reference to provisions of the Criminal Procedure Act, the Marine Act and POCA. Diemont noted that the Sea Fisheries Act 12 of 1988, which was repealed by the Marine Act,[11] had contained similar provisions to the Marine Act.

[11] The Marine Act came into force on 1 September 1998.

[94] Judge Kaplan encouraged the parties to reach settlement on restitution. In the latter part of 2005 and in 2006 there were negotiations to this end. Diemont travelled to the United States and attended a meeting in New York with Asner and one of the applicants' American lawyers. Several draft settlement agreements were prepared. It appears from one such draft that any settlement would need to be signed by Asner, the applicants, their attorneys and by Diemont on behalf of the DEAT/MCM. The United States and Diemont, so it seems, were willing to accept a settlement in terms whereof Bengis would pay $1 million in cash and an 'in-kind' payment consisting of 'certain truthful information and cooperation' to be provided by Bengis. If the District Court determined that Bengis had failed to meet these obligations, he would pay, as restitution to South Africa, $10 million (less any part of the $1 million cash already paid). The information and cooperation related to documents, information and evidence in a South African criminal investigation against another large fishing company and a named individual.

[95] Bengis in the event declined to settle on these terms and the restitution phase proceeded. As permitted by §3664, Judge Kaplan referred the question of restitution to a 'magistrate judge' for investigation and recommendation. The magistrate judge issued a first report recommending a finding that mandatory restitution under §3663A was not payable because the illegally harvested fish was not 'property' owned by anyone. The magistrate judge subsequently issued a second report recommending that no discretionary restitution be ordered under §3663 because there was no 'victim' as defined.

[96] On 13 August 2007 the United States made a further MLAT request to South Africa. It has not been attached to the papers and its scope is unclear though it apparently did not relate to the restitution proceedings.[12]

[97] On 12 September 2007 Judge Kaplan accepted the magistrate judge's recommendations and declined to make a restitution order.[13]

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[12] See para 84.1 at record 1174 read with para 33 of Manuel's affidavit in the interlocutory record B/66.

[13] The magistrate judge's reports and Judge Kaplan's ruling are not in the record. Information about them appears from the appeal court's decision and Asner's appeal briefs.

[98] The United States appealed this decision. Asner's opening brief, the defendants' opposing brief and Asner's replying brief were filed over the period May-October 2008. The matter was heard by the United States Court of Appeals for the Second Circuit in December 2008. Diemont, who had by this stage resigned from the DEAT, travelled to America to assist Asner in the appeal hearing. During the appeal hearing the court asked Asner what the South African government's view was on the restitution proceedings. Asner replied that South Africa had supported restitution, that Diemont had come to America to assist, that the South African government had been extremely helpful and 'had been behind this 100%' because it was an 'important issue for environmental law worldwide and also for the cooperation between governments in an effort to police these types of cases'.

[99] Diemont had by this stage left the DEAT and was in private practice. In advance of the appeal hearing he wrote to the Minister of EAT motivating his proposed attendance at the appeal hearing and requesting that the DEAT bear the costs. Diemont's request was recommended by the Director-General and approved by the Minister on 21 November 2008.

[100] In his letter of motivation Diemont said that he had prepared a restitution claim against the applicants on behalf the South African government. It was extremely rare for criminal cases to be appealed, indicating the importance of the case to the United States. If the appeal succeeded, the restitution would be paid to the Marine Living Resources Fund. Since leaving the DEAT he had spent considerable time and effort in advising the United States Attorney's Office on the appeal (reviewing the appeal and writing opinions on South African legal aspects). The case was of considerable importance from both a South African and an international perspective.

[101] On 4 January 2011 the Second Circuit upheld the appeal, holding that mandatory restitution in terms of §3664 was applicable. The Second Circuit remitted the matter to the District Court to quantify the restitution. The Second Circuit's reasoning was in essence this:

(i) Under the Marine Act illegally harvested fish does not become the property of the possessor but is subject to seizure and forfeiture by the South African government. The right to seize fish is a property right vested in the South African government. Evading seizure deprives South Africa of the opportunity to sell the illegally harvested fish at market prices and retain the proceeds. This goes beyond a merely regulatory interest in the administration of fishing. The applicants' participation in a conspiracy to harvest fish illegally in South Africa and export it to the United States thus constituted an 'offense against property' under Title 18 of the USC.

(ii) The South African government was a 'victim' of the said offence because the conspiracy had deprived South Africa of its right to seize and sell the illegally harvested fish. (This conclusion, if I may say, appears to follow almost axiomatically from the finding on the first point.)

[102] On 14 June 2013 Judge Kaplan determined the restitution in an amount of $22 446 720, payable by the applicants jointly and severally.[14]

[103] The applicants filed an appeal against Judge Kaplan's determination. This appeal was pending at the time the first application was issued on 14 October 2013 and was still pending when the second application was issued on 10 February 2014.

[104] On 16 April 2015 the Second Circuit dismissed the appeals of Bengis and Noll but remitted David's case to the District Court to determine, in the light of the fact that he only joined the conspiracy in 1999, whether he should have known the scope and impact of all the past activities of the conspiracy so as to hold him jointly and severally for the full amount. According to the respondents' heads of argument, the District Court made a final restitution order against David in November 2015.[15]

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[14] The method of computation does not appear from the record. However, in the publicly available judgment of the Second Circuit in a further appeal (handed down on 16 April 2015) it is stated that Judge Kaplan had referred the computation to a magistrate judge. The latter recommended that restitution be ordered in accordance with OLRAC's Method 2 in an amount of $54 883 550, being the market value of the illegally harvested West Coast and South Coast Rock Lobster after deducting the financial penalties already paid by the applicants in South Africa. Judge Kaplan reduced the restitution to $22 446 720, which related to West Coast Rock Lobster only, because in his view the United States had not proved that the illegally harvested South Coast Rock Lobster was intended for export to the United States.

[15] Particulars of this do not appear from the record.

[105] It is my understanding from the papers and from what was said during argument that Bengis and Noll have not yet paid the amount of restitution owed by them jointly and severally though various assets of theirs have been frozen. David, I gather, has paid the lesser amount of restitution ordered against him.

Legality of respondents' conduct

The South African plea bargain

[106] A plea bargain in terms of s 105A of the Criminal Procedure Act is by its nature an agreement between the NPA and the accused persons who are party to the agreement. That such an agreement is binding on the NPA I do not doubt. The applicants' counsel referred in that regard inter alia to *Van Eeden v Director Of Public Prosecutions, Cape of Good Hope* 2005 (2) SACR 22 (C).[16] The ambit of the agreement is a matter of interpretation of the plea bargain. In *Van Eeden* it was said that this might include terms derived from the doctrine of quasi-mutual assent. It was common cause in that case that there was a plea bargain between the State and the applicant's co-accused in a drug case. The question was whether the plea bargain included a term that charges against the applicant would be withdrawn. The court found that even if there was not actual agreement to that effect such a term should be found to exist on the basis of quasi-mutual assent (para 18).

[107] I was also referred to *S v EA* 2014 (1) SACR 183 (NC). That case did not deal with a plea bargain. A juvenile offender had been diverted from the criminal justice system. The charges against him were later reinstated and he was convicted. The High Court set aside the conviction on the basis that the decision to reinstate the charges was susceptible to review because it was in violation of a legitimate expectation, created by the prosecution in the accused's mind, that he would not be prosecuted if he completed the diversion program successfully.

[108] If the NPA were seeking to prosecute HBFI or Van Schalkwyk for further offences, questions might arise as to the extent of any implied undertakings of non-

[16] See also *North Western Dense Concrete CC & Another v Director of Public Prosecutions (Western Cape)* 2000 (2) SA 78 (C) at 92B-D; *S v Armugga & Others* 2005 (2) SACR 259 (N).

prosecution or reasonable expectations created in that regard. However, the NPA has not sought to prosecute HBFI or Van Schalkwyk for further offences. Van Schalkwyk is now deceased. HBFI has probably ceased to exist. At any rate, they are not parties to the present proceedings and no relief in their favour has been claimed.

[109] The plea bargain records no agreement between the NPA and the applicants. The plea bargain cannot be interpreted as meaning that the NPA would not prosecute the applicants in South Africa. Unlike the *Van Eeden* case, there is no factual foundation for finding that the applicants were parties to the plea bargain, either by actual agreement or quasi-mutual assent. The applicant in *Van Eeden* had been charged as a co-accused. Pursuant to a plea bargain his co-accused was convicted while charges against the applicant were withdrawn. The applicants in the present case, by contrast, had not been charged in South Africa and the plea bargain did not involve any withdrawal of charges against them. But the question is academic because the NPA has not sought to prosecute them. To the extent that any of the declaratory relief claimed by the applicants is in such general terms as to extend to future South African prosecution, it does not (as Mr Marcus conceded) present a live issue calling for decision.

[110] Even if the applicants did by implication acquire rights from the plea bargain, there is no justification for interpreting the plea bargain as containing an implied undertaking by the NPA that it would not assist the United States in prosecuting the applicants for offences under American law. On the respondents' evidence Morrison told Bezuidenhout on several occasions that South Africa would continue to provide assistance to the American prosecutors. For the same reason it cannot be said that the respondents created in the applicants' minds a legitimate expectation that the NPA would not assist in the United States prosecution.

[111] The plea bargain required HBFI to pay MCM R750 000 in respect of pending civil litigation. This was not properly within the ambit of a s 105A agreement but the DEAT/MCM does not dispute that such an agreement was reached. The fact that it was recorded, perhaps inappropriately, in the plea bargain is of no moment.

[112] The agreement between HBFI and MCM as recorded in the plea bargain does not, however, extend beyond the settlement of the civil litigation which was pending in the Cape court as at April 2002. I note two points in this regard:

(i) MCM's agreement was with HBFI only. There is no evidence that anyone else was a party to the civil litigation. No agreement was recorded in the plea bargain between MCM and any of the applicants.

(ii) It is impossible to imply, from the plea bargain, a waiver by MCM of any financial restitution which might flow to it or the South African government under American law pursuant to the United States prosecution of the applicants. The applicants, on whom the onus rests, do not in terms allege waiver. It is a burden not easily discharged, particularly where it is said to have been tacit. Furthermore it must be clearly proved that the person who is said to have waived his rights knew what those rights were (*National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd & Others* 2015 (2) BCLR 182 (CC) para 60; Christie *Law of Contract in South Africa* 6th Ed at 457-459). The applicants have not alleged that Kleinschmidt was aware of the restitution provisions in American law as at April 2002. Indeed, the applicants do not say that they themselves were aware of those provisions.

[113] The plea bargain incorporated the forfeiture of a vessel and a container of fish by HBFI to the State in terms of s 68(1) of the Marine Act. This was properly a matter for the plea bargain because forfeiture is part of the criminal jurisdiction of the convicting court. In terms of s 69 the disposal of forfeited assets is determined by the Minister of EAT. The government, through the DEAT, may be regarded in a sense as the beneficiary of forfeiture. The DEAT/MCM was consulted, inter alia about forfeiture, in its capacity as de facto complainant. This does not mean that the stipulated forfeiture represented an agreement between HBFI and DEAT/MCM. In any event, and as I have observed, the applicants were not party to any such agreement and no waiver by DEAT/MCM in respect of the American restitution has been established.

[114] It follows that the applicants cannot, on the strength of the South African plea bargain, impugn the validity of anything the South African government or the NPA did in relation to the American proceedings.

The Ngcuka letter

[115] On the facts as I must find them, the Ngcuka letter did not form part of any agreement negotiated by Morrison and those involved in the plea bargain. The Ngcuka letter nevertheless embodies an undertaking given by the NDPP to Bezuidenhout representing the applicants and other identified persons.

[116] The respondents, in their opposing papers and in argument, have contended that the State is not bound by the Ngcuka letter. They say Ngcuka did not have the authority to issue it and that its terms are impermissibly wide and open-ended. However Ngcuka's decision as embodied in the letter stands until set aside on review (*MEC For Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) paras 87-102).[17] As I understand the authorities, this is so even if the decision were bad on its face. The respondents have known of the letter's existence for some years.

[117] This does not, however, take the applicants very far. Ngcuka as NDPP could not bind any agency other than the NPA. His letter cannot be interpreted as purporting to bind the executive government. It merely embodies an undertaking by the NPA that it will not prosecute the defined entities for offences related to the subject of the HBFI investigation and that it will not pass on information to any state department unless so requested. In regard to the second of these undertakings, the meaning of the qualifications in para 5 of the letter is somewhat obscure but it is unnecessary to go into that question because I am satisfied that the 'state departments' contemplated in para 5 are South African state departments. I did not understand the applicants' counsel to argue otherwise.

[118] As in the case of the plea bargain, the Ngcuka letter does not present any live issue insofar as prosecution of the identified entities in South Africa is concerned. Nearly 14 years have passed and the NPA has not sought to prosecute the applicants or the other entities in South Africa. There is also no complaint that the NPA has shared information with departments of state in violation of the letter.

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[17] See also *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2015] ZASCA 85 paras 15-17; *Tasima (Pty) Ltd v Department of Transport* [2016] 1 All SA 465 (SCA) paras 26-27.

[119] The Ngcuka letter did not preclude the NPA/DSO from providing information to the United States in respect of a prosecution in that country. The Ngcuka letter did not purport to waive any benefit which the South African government might derive from restitution ordered pursuant to an American prosecution. No such waiver can be implied. Apart from the fact that Ngcuka could not speak for the South African government (a relevant factor in considering what he could reasonably have been understood to be undertaking), there is no evidence that he was aware of the restitution provisions of American law.

[120] In oral argument Mr Katz submitted that, although the NPA for purposes of our domestic law is not part of the executive, it is different in international law. He cited Dugard *International Law: A South African Perspective* 4th Ed p 71 where the learned author observes that it is 'undesirable for the State to speak with two voices'. In similar vein, Mr Marcus referred me to the statement in *Reuters* supra that it was untenable to have two State officials adopting conflicting standpoints (528i-j). Neither of these authorities provides a foundation for an argument that the Ngcuka letter reflects the single voice by which the State, including the executive government, is bound:

(i) Prof Dugard, in the passage referred to, is dealing with the extent to which executive certificates are conclusive on questions of high state, for example the recognition of foreign states and leaders, whether particular territory forms part of the constituent state, whether a person is entitled to diplomatic status and so forth. As a matter of policy, it is regarded as undesirable for the executive and judiciary to speak with different voices on such matters, hence judicial deference to the executive. Prof Dugard briefly considers whether and to what extent executive certificates should still be conclusive in our new constitutional order. None of this has any application to the Ngcuka letter.

(ii) The statement in *Reuters* was made with reference to conflicting standpoints by two senior prosecutors, each with ostensible authority to speak on the subject. Ngcuka was not an official in executive government, did not have ostensible authority to speak for it and did not purport to do so. Ngcuka only purported to speak on behalf of the NPA. Although I must find that Morrison and Kotze were unaware of the Ngcuka letter at the time the South African plea bargain was finalised, they did not purport to repudiate the Ngcuka letter in the American proceedings.

The applicants' understanding of the South African deal

[121] On the facts as I must find them, Morrison made it clear to Bezuidenhout that, despite the proposed South African plea bargain, South Africa's active cooperation with the United States would continue. If Bezuidenhout told his clients this, the applicants could not have understood that, with the conclusion of the plea bargain and the issuing of the Ngcuka letter, such cooperation would cease. If the applicants were under a misapprehension because Bezuidenhout failed to tell them what Morrison had said, that cannot be laid at the respondents' door and the applicants' misapprehension cannot affect the legality of the respondents' conduct. The applicants cannot be said to have had any legitimate expectation that assistance to the United States would cease.

[122] If there was no understanding or legitimate expectation that the respondents would refrain from cooperating with the American prosecutors, there is no rational basis for distinguishing between degrees of cooperation. The fact that the cooperation subsequently given might have been more extensive than the applicants anticipated cannot make the cooperation unlawful.

[123] Kotze said that he was not aware of the mandatory restitution provisions of American law. If he had known of the possibility of restitution pursuant to prosecution, he would have told Bengis and his lawyers, just as he had disclosed the extent of his assistance to the United States investigators. Not to have done so would, he believes, have been underhand.

[124] Although the applicants have placed some emphasis on this evidence, I do not think it assists them. As a fact (so the respondents allege), Kotze and Morrison did not know of the restitution provisions of American law. There was thus no non-disclosure or anything 'underhand' on their part in relation to the conclusion of the South African plea bargain.

[125] Bengis says that HBFI would not have entered into the South African plea bargain had he and his co-applicants been aware that South Africa would subsequently cooperate in, and benefit from, restitution proceedings in the United States. The respondents deny this. They say that the evidence for the South African prosecution was strong. Bengis would still have accepted the South African deal and taken his chances in the United States, where he believed (mistakenly in the event) that the prosecutors had little interest in pursuing him.

[126] Even if Bengis' attitude to the South African plea bargain would have been materially influenced by the prospect of American restitution proceedings, the applicants were (at best for them) unaware of that prospect, as were the respondents. One cannot say that, if the prospect of American restitution had been explained to the parties by an officious bystander, there would have been prompt unanimity that South Africa naturally could not participate in and benefit from such restitution proceedings. On the respondents' evidence it seems unlikely that the DSO or the DEAT/MCM would have agreed to such a term. It is unnecessary to consider what effect a shared over-looking of the prospect of American restitution might have had on the South African plea bargain if HBFI were seeking to escape its terms and set aside its South African conviction (in regard to unilateral and common erroneous assumptions/mistakes of motive, see *Van Reenen Steel (Pty) Ltd v Smith NO & Another* 2002 (4) SA 264 (SCA) paras 7-13[18]). The important point is that the shared ignorance (if such it be) of the prospect of American restitution, a mistake going to motive, does not create a deemed undertaking from the respondents in accordance with what the applicants would have wanted if the issue had been raised prior to the conclusion of the plea bargain.

[127] Mr Marcus referred me to *R (on the application of Quintavalle) v Secretary of State for Health* [2003] 2 All ER 113 (HL) as authority for the proposition that, although statutory language retains the meaning it had when the lawmaker used it, the statute is nevertheless 'always speaking', so that it might be construed as applying to matters which could not have been in the lawmaker's mind at the time of enactment. In *Quintavalle* certain provisions of the Human Fertilisation and

[18] See also *Transnet Ltd v Rubinstein* [2005] 3 All SA 425 (SCA) para 29; *Legator McKenna Inc & Another v Shea & Others* 2010 (1) SA 35 (SCA) para 24.

Embryology Act of 1990 were held to apply to the creation of live human embryos by cell nuclear replacement even though that procedure was not known to science as at 1990. (In *Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) there was cautious acceptance of this principle (para 11) and it played some part in the conclusion in that case that the meaning of the word 'minor' in s 13(1)(a) of the Prescription Act 68 of 1969 had been altered by the change in the age of majority brought about by s 17 of the Children's Act 38 of 2005.)

[128] Mr Marcus sought to deploy the *Quintavalle* principle in support of the proposition that the deal struck in South Africa could be interpreted as precluding South Africa from participating in the restitution proceedings in the United States and from retaining any restitution paid to it, even though the parties may not have been aware as at April 2002 of the restitution procedure. In my view the *Quintavalle* principle has no relevance to the present case. On the assumption that the principle applies also to the interpretation of contracts and other instruments, as may well be the case,[19] there is no language in the plea bargain or Ngcuka letter which can be interpreted as covering American criminal proceedings and restitution. We are concerned here with an existing state of affairs (the American law on restitution) that was simply not dealt with at all in the plea bargain or Ngcuka letter, perhaps because the parties were ignorant of it. *Quintavalle* says (though one does not need foreign authority for this proposition) that one cannot fill gaps by guessing at what Parliament would have done in particular circumstances; one can only interpret the terms of the legislation itself (see the passage from *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] 1 All ER 545 quoted in *Quintavalle* at 119 and125). If we were dealing in this case with legislation, the question would be whether a particular term was a necessary implication.[20] In the

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[19] Such an approach is to be discerned in a contractual case to which Mr Marcus referred me, *Motorcraft (Pty) Ltd v Sonaref (South Africa) (Pty) Ltd* 1980 (3) SA 493 (D), a judgment reported only in digest form. For the full bench appeal in the same case, see 1981 (1) 889 (N).

[20] In *Rennie NO v Gordon & Another NNO* 1988 (1) SA 1 (A) Corbett JA said, with reference to a plethora of earlier cases, that our courts have consistently adopted the position that words cannot be read into a statute by implication 'unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands' (at 22E-H).

contractual setting, the test would be that applicable to inferring tacit terms.[21] A tacit term in favour of the applicants fails on all levels.

[129] The respondents' conduct can thus not be impugned with reference to the applicants' supposed understanding at the time the plea bargain and the Ngcuka letter came into existence.

Bona fides in contract

[130] The applicants submitted that bona fides is a fundamental feature of our law of contracts. The respondents' conduct was said to have breached the duty of good faith owed pursuant to the composite settlement agreement.

[131] I have rejected the existence of the supposed composite settlement agreement. The plea bargain and Ngcuka letter may be viewed from a contractual perspective. Leaving aside, however, the obstacles I have already identified in the way of the applicants' asserting rights under these arrangements, good faith is not an independent substantive rule that courts can employ to intervene in contractual relationships. Abstract values such as good faith, reasonableness and fairness 'perform creative, informative and controlling functions through established rules of the law of contract' but 'cannot be acted upon by the courts directly' (*Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 21-25; *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA) paras 31-32; *SA Forestry Co Ltd v York Timbers Ltd* [2004] 4 All SA 168 (SCA) paras 26-31; *Maphango (Mgidlana) & Others v Aengus Lifestyle Properties (Pty) Ltd* [2011] 3 All SA 535 (SCA) paras 22-25). Good faith might, for example, be relevant in determining whether as a matter of law a particular term should be recognised as an implied term of contracts generally or contracts of a certain class (*SA Forestry* para 28))

[132] Mr Marcus referred me to *Botha v Rich NO* 2014 (4) SA 124 (CC) para 45 as the most recent and authoritative statement of the law. I do not read the passage in

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[21] See Christie *The Law of Contract in South Africa* 6th Ed at 175—179: Is the term necessary in the business sense to give efficacy to the contract? Or can it confidently be said that, if an officious bystander had raised the circumstances which subsequently arose, the parties would both have given a prompt and unanimous assertion of the term which was to apply?

question as saying something different from the authorities just cited. Nkabinde J did not suggest that good faith could be invoked as an independent substantive rule of contract. What she said was that the principles of reciprocity and the exception *non adimpleti contractus* give expression to good faith, in that bilateral contracts – being cooperative ventures involving performances by each to benefit both – cannot be a matter of each side pursuing self-interest without regard to the other party's interests (see para 46).

[133] We are not concerned in this case with whether the law should recognise an implied term in contracts of a certain class. In so far as good faith may affect the interpretation of ambiguous contractual provisions (*SA Forestry* para 32), I was not directed to any terms of the plea bargain or Ngcuka letter whose interpretation might be influenced by the assumption that parties negotiated with one another in good faith.

[134] I simply add that, even if bona fides could be directly invoked by the applicants, I do not think that the respondents violated any such duty.

Bona fides in exercise of public powers

[135] I naturally accept, as the applicants submitted, that public functionaries must exercise their powers in accordance with the principle of legality, in good faith and for proper purposes (*President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC) para 148). Associated with these principles is the proposition that a public power may not lawfully be exercised to achieve indirectly and piecemeal that which cannot lawfully be attained directly (*Collins v Minister of the Interior & Another* 1957 (1) SA 552 (A) at 574D-577C per Schreiner JA; cf 570E-H per Centlivres CJ).

[136] In the present case, however, I cannot see on what basis the conduct of any of the respondents could be branded as mala fide (for public law purposes) except as supposedly being at odds with the South African plea bargain and Ngcuka letter. I have found that the respondents' conduct was not inconsistent with those documents.

[137] I also do not see how it can be said that the respondents have attempted to achieve indirectly what they could not achieve directly. Either the South African plea bargain and Ngcuka letter prohibited participation in the American criminal proceedings and the restitution phase or they did not. The conviction of the applicants in the United States at the instance of United States prosecutors for Lacey Act contraventions, and the resultant ordering of restitution by the American court, cannot be said to have achieved, by piecemeal action on the part of the respondents, the applicants' impermissible conviction and punishment on matters in respect of which they had been indemnified against prosecution under the South African plea bargain and Ngcuka letter. The South African plea bargain and Ngcuka letter did not purport to protect the applicants against these American outcomes.

Other complaints regarding respondents' conduct in the US proceedings

[138] For all the reasons stated above, I reject the central complaints in the first and second applications that the assistance provided by the South African government and/or its officials to the United States prosecutors violated any agreements, undertakings, assurances or representations.

[139] I must now consider other grounds on which the respondents' conduct in the United States proceedings is said to have been unlawful.

[140] In the first application the applicants allege (i) that Diemont and Kleinschmidt were not authorized to participate in the restitution proceedings; (ii) or, if they were so authorized, that any decision of Minister Van Schalkwyk so to authorise them was unlawful. The second of these complaints does not seem to be founded on anything more than that the giving of authorization would have violated the composite settlement agreement. I thus need not give it further consideration. The first complaint, by contrast, is freestanding: even if Diemont and Kleinschmidt could lawfully have received authority to participate, they allegedly did not in fact receive it.

[141] In the second application the applicants seek declarations that the conduct of the South African government and of Morrison, Kotze and Diemont in assisting the United States prosecutors was in bad faith, actuated by improper motive and

contrary to the standards of professional ethics demanded by s 195 of the Constitution; and that such conduct violated the applicants' rights of dignity guaranteed by s 10 of the Constitution and their right to have disputes between the applicants and respondents decided in a fair public hearing in accordance with s 34 of the Constitution. I have found it difficult to discern how any of these complaints could have traction if the applicants' version of the composite settlement were rejected and the respondents' version of disclosures made to Bezuidenhout accepted. In oral argument Mr Katz said that in the second application the applicants stood or fell on the contention that the conduct of Morrison and Kotze in the United States prosecution was contrary to standards of prosecutorial conduct laid down in the cases to which I shall presently refer.

[142] I shall consider these further complaints with reference to the three phases of the United States criminal proceedings.

The US conviction phase

[143] I start with the conviction phase which concluded with the American plea bargains of March/April 2004.

[144] In the second application the applicants say that the respondents were not entitled to assist in the American prosecution beyond that which was 'required by law'. Since this contention is inextricably tied up with the South African plea bargain, the Ngcuka letter, and the undertakings allegedly given or representations allegedly made when those documents came into existence, I cannot find that the respondents' permissible assistance was confined to that which was 'required by law'.

[145] The South African official most involved in assisting United States prosecutors in the conviction phase was Kotze. Some of this assistance was furnished prior to April 2002 and thus outside the scope of the applicants' criticism. Kotze's assistance in this early phase started with a telephonic conference in May/June 2001 and included affidavits made in December 2001 and January 2002.

[146] Subsequent to April 2002 Kotze's assistance involved sending documents to the United States and travelling on two occasions to that country to assist the United States prosecutors in understanding the documents. This assistance was given pursuant to duly approved MLAT requests of June 2002 and April 2003. I understood the applicants' counsel to accept that assistance given pursuant to an MLAT request was assistance 'required by law' within the meaning of their cause of action in the second application.

[147] It is not possible from the record to know the full ambit of the evidence available to the United States prosecutors during their plea bargain discussions with the applicants' lawyers. The affidavits, documents and explanations given by Kotze would have been part of that material. I am willing to assume that Kotze's input was a sufficiently material part of the prosecution's case to have influenced the attitude of the applicants and their lawyers in the plea bargain discussions. However, such assistance was not contrary to agreements reached in South Africa and was consistent with Morrison's disclosures to Bezuidenhout. Even on the applicants' case the assistance met the 'required by law' qualification for which they contend.

[148] Bengis alleges in his founding affidavit that the South African plea bargain would have served as evidence to secure a conviction in the United States and that the applicants therefore 'had no option' but to plead guilty. Even if that were true, the MLAT request of June 2002 included the South African plea bargain. Kotze was entitled to make it available to the United States prosecutors. But Bengis' assertion is in any event inaccurate. In the South African plea bargain HBFI admitted illegal fishing over the period 1999 to 2001. Although there was an admission in general terms that HBFI 'largely exported' its fish products to the Far East, Europe and the United States, there was no admission of the quantities of illegally harvested fish exported to the United States over the period 1999 to 2001 (this being an important element of the Lacey Act contraventions). There were no admissions whatsoever in regard to illegal fishing over the period 1987 to 1998 (part of the period covered by the alleged Lacey Act conspiracy). And the South African plea bargain did not implicate the applicants individually in any conspiracy. Asner was thus right when he said, in his affidavit in the present proceedings, that the information in the South

African plea bargain would have been insufficient to support the applicants' convictions in the United States.

[149] The applicants' counsel referred me to a passage in *S v Jija & Others* 1991 (2) SA 52 (E) at 67J-68B, quoted with approval in *Reuters Group Plc & Others v Viljoen NO & Others* 2001 (2) SACR 519 (C) para 45, to the effect that a prosecutor 'stands in a special relation to the court' and that his 'paramount duty is not to procure a conviction but to assist the court in ascertaining the truth'. A similar view was expressed in *S v Shaik & Others* 2008 (2) SA 208 (CC) para 67 where the court quoted with approval the proposition that the role of a prosecutor 'excludes any notion of winning or losing' and that his function 'is a matter of public duty' which must be 'efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings'.

[150] The applicants' counsel in the second application sought to deploy these general propositions, as well as the fair-trial rights in s 34 of the Constitution and the values and principles of public administration laid down in s 195 of the Constitution, in support of an argument that the DSO's conduct, Morrison's in particular, in relation to the South African plea bargain and the parallel prosecution in the United States was unlawful and in violation of the high constitutional standards of impartiality, good faith, honesty, accountability and transparency.

[151] Morrison says in general terms that the South African prosecution team worked closely with the United States authorities, meeting with them several times in South Africa and in the United States and communicating by telephone and email. Some of this occurred before April 2002. There is nothing to indicate that Morrison personally provided any material assistance after April 2002.

[152] More importantly, I can discern no prosecutorial misconduct on Morrison's part nor any violation by him or Kotze of the constitutional rights and values invoked by the applicants. The applicants are aggrieved by what they regard as overly enthusiastic support by the DSO for the United States prosecution. They also view as objectionable the 'double-barrel' approach which Asner described in relation to the South African and United States prosecutions. However, the DSO was not

precluded by law from assisting its American counterparts. The plea bargain and the Ngcuka letter did not prevent assistance, and the fact that it would continue to be provided was, on the evidence as I must find it, disclosed to Bengis and his legal team. The most material assistance – that provided by Kotze – was furnished pursuant to MLAT requests. Compliance with prosecutorial standards of conduct did not oblige Morrison and Kotze to assist in a desultory fashion rather than thoroughly. It has not been suggested that they provided false or inaccurate information to their American counterparts or goaded them into pursuing the applicants.

[153] The relief sought in respect of the later phases of the American proceedings must thus be assessed on the footing that the respondents were not guilty of any unlawful conduct in relation to the applicants' conviction in the United States.

Respondents' conduct in sentencing/forfeiture phase of US proceedings

[154] In regard to sentencing, I remind myself that a sentencing range for imprisonment and fines had already been agreed as part of the American plea bargain. The imprisonment imposed by the District Court was, for each applicant, the lowest sentence within the agreed sentencing range. The District Court did not impose fines. It follows that nothing done by any of the respondents caused the applicants to suffer imprisonment in excess of the lowest level to which the applicants had already agreed in their plea bargains.

[155] The applicants were permitted by the plea bargains to argue that a sentence below the low-end of the agreed range should be imposed but only on the basis that the South African investigation and prosecution took the case outside the 'heartland of the Lacey Act'. Judge Kaplan rejected the departure motion on the primary basis that the South African prosecution was, as a matter of American law, an irrelevant consideration when assessing whether to depart from the applicable sentencing range.

[156] It follows, insofar as incarceration is concerned, that the statements filed by Kleinschmidt and Morrison did not influence the outcome.

[157] I shall nevertheless briefly address the question whether they acted unlawfully by making their statements. The applicants have argued that Kleinschmidt and Morrison (and later Diemont) lacked delegated authority to represent South Africa in the American proceedings.

[158] In advancing this contention, the applicants did not identify what power the officials in question had purported to exercise and in whom that power primarily resided as a matter of law (ie who could have delegated the power to the officials). I assume the argument's premise is that the Minister of EAT had the primary authority to speak for the South African government on matters affecting fishing resources and that the Minister of Justice or perhaps the NDPP had the primary authority to speak for South Africa in regard to the scope of the South African prosecution.

[159] This, in my view, misconceives what Kleinschmidt and Morrison did. They did not purport to represent the South African government or the NPA/DSO in American proceedings. They were witnesses. In South African law, and I have no reason to think American law is different, a witness speaks for himself, even though he is an employee or agent and his evidence concerns matters in which his employer or principal may be concerned.[22] It was appropriate for Kleinschmidt and Morrison to state their official positions because that accounted for their knowledge of the matters in question. Asner, one may safely assume, wanted to place evidence before the court of the harm caused to South Africa's fishing resources by the HBFI conspiracy and in response to the central thrust of the applicants' departure motion, namely that South Africa's interests had been fully vindicated by the South African prosecution. Whom better to seek this evidence from than Kleinschmidt and Morrison respectively? If they had been in America, they could notionally have been subpoenaed to give the evidence they did. In Kleinschmidt's case, I may add, all he really did was to summarise and attach Dr Groeneveld's scientific paper which seems to have been prepared independently of the American proceedings.

[160] In regard to forfeiture, it appears from the transcript that the amounts ordered ($5,9 million jointly and severally by Bengis and Noll and $1,5 million by David) were

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[22] See *Simmons NO v Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N) at 913A-D; *O'Shea NO v Van Zyl NO & Others* 2012 (1) SA 90 (SCA) para 19.

agreed after the plea bargains were concluded but before sentencing.[23] There is nothing to indicate that anything done by Kleinschmidt or Morrison during the sentencing phase affected the amount of forfeiture.

Respondents' conduct in restitution phase of US proceedings

[161] I have already concluded that the South African plea bargain and Ngcuka letter did not preclude the South African government from participating in and benefiting from the restitution phase of the American proceedings and that no undertakings were given beyond the scope of those documents. What I must now address is the self-standing contention advanced by the applicants that Diemont and Kleinschmidt lacked authority to participate in or represent the South African government in the restitution phase.

[162] A person's status as a 'victim' for purposes of restitution is one of objective fact: was the person directly or proximately harmed as a result of the commission of the offence? The victim may but is not required to participate in the restitution proceedings (§3664(g)). If the victim does participate, he is not a claimant. If he does not participate but the offence calls for mandatory restitution (§3663A), restitution must still be ordered.[24] The measure of restitution is fixed: in the case of loss of property, the greater of the value of the property at date of loss or date of sentencing, minus the value of any part of the property returned (§3663A(b)).

[163] I was not addressed on the question whether a victim may waive restitution. Section 3363A read with §3364 does not say that this is possible. My own brief research indicates that restitution cannot be waived because it is a criminal penalty having deterrent and rehabilitative effects beyond the goal of compensating the victim. The most pertinent statement to this effect for present purposes is in *United States v Johnson* 378F 3d 230 at 244-245, which was decided by the Second Circuit, the appellate court with jurisdiction in the present case. The court (i) rejected

[23] See record 969. There was no argument regarding the amount of forfeiture.
[24] There is, in the case of offences against property, an exception to this rule where determining complex issues of fact relating to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process – §3663A(c)(3).

an argument that restitution should not have been ordered in respect of one of the victims because he had waived the right and (ii) rejected a further argument that restitution should be refunded if the other victim declined to accept it. Restitution was obligatory in terms of §3663A even if the victim declined restitution. To hold otherwise would be inconsistent with the statutory scheme and would undermine the power of the criminal justice system to punish defendants through orders of restitution. It appears from the court's decision that a refusal by a victim to receive restitution would probably constitute an assignment to the Crime Victims Fund in the Treasury in terms of §3664(g)(2), an assignment which does not impair the obligation of the defendant to pay the restitution.[25]

[164] I take this to be in accordance with Asner's statement in the present proceedings that restitution was mandatory and that the South African government was not a claimant. At any rate, the applicants have not shown that the legal position in America was otherwise. It is true that there were settlement discussions in which Diemont represented the MCM. The proposed terms of settlement suggest that de facto an American court might accept agreed terms of restitution without insisting on an investigation into the actual loss suffered by the victim. To that extent, the attitude of the victim might have de facto significance. In the event, though, there was no settlement and the American court was not called upon to consider terms of settlement. What the applicants complain of is the respondents' conduct in the legal proceedings which led to the restitution order. That must be assessed in accordance with the legal position as I have attempted to summarise it.

[165] This has important implications for the applicants' case. Prayer 4 in the notice of motion in the first application seeks a declaratory order that the South African government is and was precluded from seeking restitution via the United States in

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[25] See also *US v Savoie* 985F 2d 612 (1993) para 25 [restitution is not a civil affair; it is a criminal penalty meant to have deterrent and rehabilitative effects; private parties cannot simply agree to waive the application of a criminal statute]; *US v Parsons* 141F 3d 386 (1998) [a civil settlement with the victim and a general release granted by the latter does not preclude or cap discretionary restitution as part of criminal sentencing in a case where there is no double recovery]; *US v Scheinbaum* 136 F3d 443 (1998); Goodman *Imposition and Enforcement of Restitution* June 2000 *Federal Probation*. Cases in support of this view generally quote *Kelly v Robinson* 479 US 36 (1986) which dealt with another restitution statute. See also *Pasquantino v US* 544 US 349 (2005) where it was said that the object of mandatory restitution (in that case, the harm was a loss of tax by a foreign government) was 'not to collect a foreign tax but to mete out appropriate criminal punishment' (at 365).

terms of §3663 and/or §3663A. Prayer 5 seeks a consequential order that any restitution received by the South African government be repaid to the applicants. The premise is that the South African government was a claimant in the restitution proceedings. That is incorrect. To the extent that Diemont may have loosely suggested otherwise in his letter to the Minister of 19 November 2008, he erred (and has corrected himself by affidavit in the present proceedings).

[166] It is so that Asner, during the course of the restitution proceedings, made written and oral statements suggestive of the South African government's status as a claimant but these cannot determine the question whether in law the South African government was a party or claimant in the restitution proceedings. Asner also made statements to the effect that the South African government supported the United States' position on restitution. I have no doubt that Asner held that belief, one that was probably justified (see below). But that was not ultimately the decisive question in the restitution proceedings.

[167] Even if the applicants' American offences triggered discretionary rather than mandatory restitution, the South African government would not have been a claimant. The American court would not have been precluded from ordering discretionary restitution even if the South African government's attitude was that it did not seek it. I am willing to assume, however, that an American court might, in assessing discretionary restitution, have taken the South African government's attitude into account. However, the Second Circuit held that the applicants' offences triggered mandatory restitution. Restitution thus had to be ordered in accordance with the measure prescribed by §3663A, regardless of the South African government's attitude. That is what the District Court did on remittal and its quantification was upheld by the Second Circuit.

[168] The applicants complain that Diemont's opinions were decisive in moving the Second Circuit court to find that the applicants' offences fell within the mandatory restitution provisions of §3663A. There are three criticisms of Diemont: (i) If he represented the South African government, the latter was precluded by the South African settlement from claiming restitution. (ii) If he did not have authority to represent the South African government (and this seems to be the applicants'

primary factual assertion), he acted unlawfully by purporting to give opinions on behalf of the South African government. (iii) His opinions, to the effect that the South African government owned or had a proprietary interest in the illegally harvested fish, and was thus entitled to restitution as a victim, were wrong.

[169] It is convenient to start with the third point. The criticism of Diemont's opinions is twofold. (i) Firstly, the applicants contend that in terms of South African law the government does not own or have a proprietary interest in illegally harvested fish, save to the extent that it has actually been seized and declared forfeit to the government in terms of s 68(1) of the Marine Act. The fish illegally harvested and exported to the United States had not been seized or declared forfeit to the South African government. (ii) Second, even if the provisions of the Marine Act gave the South African government a proprietary interest in illegally harvested fish, that proposition did not apply in the particular circumstances of the present case. That is for the reason that the South African plea bargain and Ngcuka letter precluded any further prosecution of HBFI and the applicants. There was thus no scope, even potentially, for forfeiture of the fish which were the subject of the American convictions.

[170] Both criticism are misconceived. The question whether §3663A applied to the applicants' American offences was a question of American law. The content of South African law, in particular the provisions of the Marine Act, were – from the perspective of an American court – questions of fact forming part of the material upon which the American court would decide the §3663A issues. Nobody suggests or can suggest that the Marine Act did not contain the provisions for seizure and forfeiture which Diemont identified or that he misquoted them or that he failed to disclose other relevant statutory provisions. The applicants' American lawyers, with the assistance of South African counsel, knew about the Marine Act. The case seems to have been argued both in the District Court and in the Second Circuit on the common (and correct) understanding that the Marine Act contained the provisions in question.

[171] Whether those provisions led to the conclusion that the applicants' American crimes were offences 'against property' in respect of which the South African

government was a ‘victim’ were questions strictly of American law. The legal authorities debated by the American lawyers in the District Court and Second Circuit were for obvious reasons American cases. Diemont had no expertise on American law. To the extent that he ventured any view in that regard, his opinion was irrelevant and could not conceivably have been influential.

[172] Accordingly, on the matters of South African law on which the Second Circuit relied (not common law ownership but statutory rights of seizure and forfeiture), Diemont’s ‘opinions’ were right and uncontroversial. Although an American lawyer, Mr Creizman (David’s lead counsel in the more recent restitution phase), has filed an affidavit stating that Diemont’s ‘analysis’ was decisive in the restitution appeal, that cannot be correct except in the limited sense that the provisions of the Marine Act uncontroversially identified by Diemont were central to the much more controversial questions of American law which divided the District Court and Second Circuit.

[173] The other criticism of Diemont’s opinions is that because of the South African plea bargain and the Ngcuka letter seizure and forfeiture in terms of the Marine Act had ceased to be a possibility, given that HBFI could not be further prosecuted in South Africa. Whether that criticism is sound is again a question of American law. The existence of the South African plea bargain and the Ngcuka letter was common cause in the American courts but they appear to have been regarded by the American lawyers on both sides as irrelevant to mandatory restitution. The applicants’ appeal brief is not part of our record but it seems from Asner’s replying appeal brief that the applicants’ lawyers did not even argue that the foreclosure of future forfeiture by the South African plea bargain and Ngcuka letter meant that there had been no offence ‘against property’ or that the South African government was not a ‘victim’ of such offence.

[174] Although not so explained in the present papers, it seems likely that the relevant question in American law was whether, at the time of the Lacey Act conspiracy and its implementation (1987 to August 2001), the South African government had a proprietary interest in the illegally harvested fish and was a victim as and when the conspiracy was implemented. In answering that question the

events of April 2002 were irrelevant. When I invited Mr Marcus, who was not unacquainted with the American proceedings, to say whether this was a fair inference, he was inclined to agree.

[175] I now return to the first and second points mentioned earlier, namely Diemont's authority to represent the South African government. Once it is recognised that the case was one for mandatory restitution, the attitude of the South African government, even if Diemont purported to convey it, seems to have been legally irrelevant as a matter of American law.

[176] In any event, the debate about Diemont's authority is again misconceived. Although he identified himself in his opinions as an MCM official, he was in truth an expert witness on matters of South African law. It was also in that capacity that he later travelled to the United States to assist Asner in preparation for the appeal hearing. My earlier observations regarding the capacity in which witnesses testify apply to Diemont, just as they apply to any opinions by South African counsel furnished to the courts on behalf of the applicants. I do not think Diemont purported to assert a claim to restitution on behalf of the South African government. What he did was to express an opinion that in law the DEAT/MCM was entitled to claim ownership either in the strict sense or in the broader regulatory sense. Because he identified himself as an MCM official, a reader might have inferred that the DEAT/MCM as an executive agency supported his view but that was not his assertion nor so it seems would it have been a relevant assertion.

[177] In quantifying the restitution upon remittal, the District Court had regard to the OLRAC reports. Kleinschmidt and Diemont played some role in procuring these. The reports themselves are not part of the record. There is nothing to indicate that Kleinschmidt and Diemont performed more than a liaison function. OLRAC was providing expert evidence on quantum to the United States prosecuting team. There is no evidence that Kleinschmidt or Diemont purported to present the OLRAC reports as representing an official South African government position. There is also no evidence that the South African government paid OLRAC for services rendered.

[178] Although Kleinschmidt and Diemont did not purport to represent the South African government in any legally relevant sense, I do not wish to leave the impression that they were acting as loose cannons. Kleinschmidt says that, although he and Diemont did not require any specific authorization to testify in the American proceedings by way of statements or opinions, successive Ministers of EAT (Ministers Moosa and Van Schalkwyk) were very interested in the HBFI matter. He reported to them regularly. They were both fully aware of progress and supported the assistance given to the United States prosecutors.

[179] Apart from the fact that this evidence cannot be rejected on the papers, it is borne out by objective evidence. It is unlikely that Diemont would have been permitted to travel to the United States for settlement discussions without ministerial approval. One knows that in November 2008, by which time he was in private practice, Diemont wrote a letter to Minister van Schalkwyk motivating his proposed attendance at the appeal hearing at the DEAT's expense. The letter starts, 'You will recall …', and proceeds to give a summary of the restitution proceedings to date. The Minister approved the request. In a letter dated 26 April 2013, in response to a complaint from Abrahams & Gross dated 22 November 2012 concerning the conduct of Kleinschmidt and Diemont,[26] the Director-General of the DOJ said that the DAFF had informed the DOJ that it supported and still supported the restitution proceedings in favour of the South African government and that Diemont and Kleinschmidt were duly mandated.[27] And, of course, all the respondents, including the current Minister of EAT/DAFF, oppose the applications with no hint that Kotze, Morrison, Kleinschmidt or Diemont were on frolics of their own.

[180] Since Kleinschmidt and Diemont regarded their contributions in the American proceedings as having been made in the ordinary course of their duties within the MCM, there seems to have been no formal process of seeking authority from the Minister. However, the above evidence points strongly to a conclusion that if authority was needed it was given. Particularly given the delay in the institution of proceedings, the respondents cannot really be criticised for having failed to give more specific evidence about the occasions on which Kleinschmidt reported to

[26] Record 183-199.
[27] Record 202-203.

successive Ministers and received their support and about the precise content of the communications. It has not been argued that, if the Minister's authority was in law needed, the giving of authority had to be attended by any particular formalities.

[181] The present case is distinguishable from *Chairman, Board on Tariffs and Trade & Others v Teltron (Pty) Ltd* 1997 (2) SA 25 (A), to which Mr Marcus referred me on the question of onus. In that case there was a bald but unsubstantiated allegation that a specific statutory power, vested in a board comprising 17 members, had been delegated to a committee. In the event the court's decision was not based on a factual finding that delegation had not been proved (32B-C) but on a legal finding that the statutory power could not be delegated (35C).

[182] During argument I raised with Mr Marcus whether the evidence to which I have referred, and the respondents' conduct in opposing the applications, did not at least establish ratification (again assuming authority was needed). His response was twofold: (i) The onus was on the respondents to allege and prove ratification. (ii) Ratification is not possible in public law.

[183] I accept the first of these propositions. However, in the circumstances of the present case, the rather general nature of Kleinschmidt's evidence is understandable as I have already indicated.

[184] As to the second proposition, it is rather broadly stated. Mr Marcus referred me to *Mathipa v Vista University & Others* 2000 (1) SA 396 (T) at 401-402, a passage cited with approval by Langa CJ in his dissenting judgment in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another* 2007 (1) SA 343 (CC) para 91. The precise scope of the proposition that an invalid administrative act cannot be ratified may require further attention from our higher courts. The cases cited by Mr Marcus concerned specific statutory powers which had been purportedly exercised not by the designated body but by someone else. The true principle to be derived from these cases and from the authorities mentioned in *Mathipa* may be that the question whether an unauthorized exercise of a power may be ratified by the true repository of the power is a matter of statutory interpretation. This is the position, for example, where private parties conclude a transaction in violation of a

statute (an example being another case mentioned by Mr Marcus, *Neugarten & Others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A) – it is a matter of statutory interpretation whether the prohibition renders the transaction void ab initio in the sense that it is to be regarded as never having been concluded and thus incapable of ratification (808F-809E)).

[185] These questions, however, do not seem to me to call for decision in this case. I have previously observed that the applicants did not identify any statutory power of the Minister which Kleinschmidt or Diemont purported to exercise. It has been held that the launching of legal proceedings, even on behalf of a public body, is not an administrative act but a procedural one. As with private parties,[28] the unauthorized institution of proceedings in the name of a public body may be ratified (*Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) paras 9-10).[29] The proposition that the institution of legal proceedings by a public body is not administrative action has been academically questioned.[30] But apart from the fact that *Smith* is binding on me, the administrative act/private act distinction may not ultimately be the decisive point. Even if a public body's decision to institute legal proceedings is an administrative act, it appears to be an act of a kind where ratification is permissible.

[186] If the Minister could ratify the unauthorized institution of legal proceedings by one of his officials in the name of the DEAT/MCM, I do not see why he could not also ratify the making of a restitution claim in the American courts (which is how the applicants erroneously typify what happened) or the giving of evidence by his officials. Both of these seem to me to be a fortiori cases.

[187] I make one final observation on this aspect. If the applicants and their American lawyers thought that the South African government needed to be a party to the restitution proceedings, the appropriate time and place to have challenged the authority of Kleinschmidt and Diemont was in the American courts during the restitution phase. The applicants and their lawyers do not seem to have known

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[28] See *Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd & Another* 1994 (1) SA 659 (C) and cases there discussed.

[29] See also *Uitenhage Municipality v Uys* 1974 (3) SA 800 (E) at 806H-807H; *Moosa & Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 180H-181C); *Damane v Central Energy Fund* [2013] ZASPJHC 71 paras 32-36.

[30] Hoexter *Administrative Law* 2nd Ed at 193.

anything more on this issue when the current applications were launched than during the American restitution phase.

Conclusion

[188] Since I have concluded that the applications must be dismissed on their merits it is unnecessary to address the respondents' defence that the applications should in any event be dismissed for unreasonable delay.

[189] The applicants submitted that, if the applications were dismissed, the parties should be ordered to bear their own costs in accordance with *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) 232 (CC) paras 23-24. The approach laid down in that case is that if a private person fails in constitutional litigation against the State the parties should ordinarily bear their own costs. The court may depart from this approach if the application is frivolous or vexatious or in any other way manifestly inappropriate. A court should not, however, lightly turn its back on the general approach where matters of genuine constitutional import arise.

[190] The respondents argued that the applications were indeed frivolous or vexatious or manifestly inappropriate. They also argued that the supposed constitutional aspects were contrived. They submitted that the true causes of action for the main relief sought (refunds and damages) were, though ill-pleaded, contractual or delictual or enrichment claims.

[191] I do not think I can find that the applicants dragged in specious reference to the Constitution in order to dress up a common law case as a constitutional matter (cf *Biowatch* para 25). Compliance by the State with arrangements such as those reflected in the plea bargain and Ngcuka letter has a distinctly constitutional dimension relating inter alia to the rule of law, fair-trial rights and so forth. The same is true of issues such as whether particular functionaries were authorized to represent the State.

[192] The American prosecution had very significant adverse impacts on the applicants. They have failed in the present case in part because of their failure to

adduce direct (rather than hearsay) evidence of the alleged broader settlement, in part because factual disputes have to be resolved in the respondents’ favour in accordance with the *Plascon-Evans* rule, and in part because of my view on the legal issues which arise. I do not think I can typify their conduct in bringing the first application, with its ultimate focus on the restitution orders, as frivolous or vexatious or manifestly inappropriate.

[193] The second application stands on a different footing. Its focus was alleged unlawful conduct by the respondents in relation to the American prosecution as a whole. The basis for reliance on ss 10 and 34 of the Constitution was extremely vague. The consequential relief sought was damages, comprising expenses of $11 351 703 allegedly incurred by them in defending themselves in the American proceedings. The claim for damages was asserted not only against the South African government but also against Morrison, Kotze and Diemont personally. The applicants’ case that Kotze and Morrison provided unlawful assistance in the American proceedings in the conviction and sentencing phases was decidedly weak. To the extent that there was anything in that case, it could and should have been dealt with in the first application. The bringing of a second application involved a large amount of duplication and the inconvenience for the respondents (and the court) of distinguishing between what was repetitious and what was new. There was also the inevitable need for an application for consolidation.

[194] Apart from the fact that the cause of action in the second application was weak, the consequential relief for damages (even if one calls it constitutional damages) was hopeless on the papers. Even where properly pleaded, damages can very rarely be determined in motion proceedings. Here the damages were not properly pleaded. They were baldly alleged with reference to a schedule. No particulars or substantiating vouchers were provided. Some of the expenses pre-dated April 2002. No attempt was made to identify those expenses which the applicants would in any event have incurred in defending themselves in America as distinct from those specifically caused by the respondents’ allegedly unlawful meddling. The applicants, who had separate representation in the American proceedings, did not identify which of them incurred any particular expenses (their claims, if any, would be individual). There was also no attempt to explain why

Morrison, Kotze and Diemont, who made separate contributions in separate phases of the American proceedings, should be jointly and severally liable for the whole of the damages. In argument Mr Katz for the applicants wisely declined to elaborate on the damages claim.

[195] I thus consider that the second application, if not vexatious or frivolous, was at least 'manifestly inappropriate'. The applicants should therefore pay the respondents' costs of the second application.

[196] Since the respondents filed consolidated opposing papers and since the hearing itself was consolidated, the extent to which the second application increased the respondents' costs cannot be determined with precision. By my estimate about 30% of Morrison's and Diemont's main affidavits dealt with new allegations in the second application (where they were personally sued for damages). Given that Kotze was not cited in the first application and filed an opposing affidavit as a respondent in the second application, the whole of his affidavit would be attributable to the second application. There was also the inconvenience, when drafting the opposing papers, of identifying the paragraphs in the second application which matched those in the first application.

[197] I did not keep an exact note of how much court time was occupied with matters concerning the second application. Mr Duminy subjected the notices of motion in both cases to analysis. The respondents' counsel would have needed to study the heads of argument in the second application. The applicants' heads in the second application were slightly longer than those in the first. In oral argument, though, Mr Katz's submissions probably occupied not more than 10% of court time.

[198] Taking all things into account, I think my conclusion that the applicants should pay the respondents' costs in the second application would be fairly reflected if the applicants were ordered to pay 30% of the respondents' total costs in the consolidated applications. Since I was not addressed on how costs should be allocated if I granted a costs order in only one of the applications, I will make a provisional order to this effect with leave to the parties to make submissions for revision.

[199] There were various interlocutory proceedings in which costs were reserved. Mr Marcus informed me that the parties were in agreement that reserved costs should follow the result. I think what was meant is that whatever costs order I made in the main cases should apply to the reserved costs. Since I intend to make differing costs orders in the main cases, the costs orders in the interlocutory matters may vary. As far as I can see, the costs reserved in relation to the application to compel the production of a rule 53 record related to the first case. The same is true of the application to compel the delivery of answering papers. In respect of all costs reserved in those two interlocutory applications, the parties should thus bear their own costs. In the consolidation application the order was that cost should be 'costs in the cause', ie in the main cases. I thus consider that the applicants must pay 30% of the respondents' costs in the consolidation application. This allocation, as in the main cases, will be provisional.

[200] The respondents employed three counsel. This was a reasonable precaution in view of the volume of the papers, the issues raised and the magnitude of the relief claimed. (The applicants employed four counsel across the two applications.)

[201] I make the following order:

(a) Both applications are dismissed.

(b) The parties shall bear their own costs in Case 16884/13.

(c) The applicants must pay the respondents' costs in Case 2199/14, including those attendant on the employment of three counsel.

(d) Effect is to be given to the orders in paras (b) and (c) by requiring the applicants jointly and severally to pay 30% of the respondents' total costs in the consolidated cases, including those attendant on the employment of three counsel.

(e) The applicants must jointly and severally pay 30% of the respondents' costs in the interlocutory application to consolidate the two cases, including those attendant on the employment of two and/or three counsel where more than one counsel was employed.

(f) In respect of all other reserved costs in interlocutory proceedings, the parties shall bear their own costs.

(g) The 30% allocation reflected in paras (d) and (e) is provisional. Within two weeks' of this order any of the parties may file written submissions requesting the court to revise the allocation. If no written submissions are received, the allocation will become final. If written submissions are received, further directions if necessary will be given regarding the final determination of the allocation.

ROGERS J

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