

South Africa grapples with the act of state doctrine and choice of law in delict

By Jason Mitchell

The Supreme Court of Appeal delivered judgment today in *East Asian Consortium v MTN Group*. The judgment is available here: <https://www.saflii.org/za/cases/ZASCA/2025/50.pdf>

East Asian Consortium, a Dutch company, was part of the Turkcell consortium. The consortium bid on an Iranian telecommunications licence. The consortium won the bid. East Asian Consortium alleged that it was later ousted as a shareholder of the ultimate license holder, the Irancell Telecommunications Services Company. East Asian Consortium sued, amongst others, several subsidiaries of the MTN Group, a South African telecommunications company, in South Africa. East Asian Consortium alleged that the defendants unlawfully induced the Iranian government to replace East Asian Consortium with one of the MTN subsidiaries.

In 2022, the South African High Court held that Iranian law applies to East Asian Consortium's claims. But the Court declined to exercise jurisdiction based on, amongst other things, state immunity and the act of state doctrine. East Asian Consortium appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal reversed the High Court on state immunity and on the act of state doctrine. It reached the same conclusion as the High Court on the applicability of Iranian law, but for different reasons—and clarified that South African law uses the *lex loci delicti* as its general rule for choice of law in delict (or tort).

There are two immediate takeaways from the judgment:

South Africa's act of state doctrine differs from the doctrine in English law (“...while we owe much to the English common law, and have much to learn from it, our common law is not a supplicant species.”).

- English law (*Belhaj, Deutsche Bank*) articulates the act of state doctrine as an exclusionary rule with limits and exceptions. The Supreme Court of Appeal rejects that approach, critiquing it as a doctrine “*principally comprehended by what it is not.*”

- Instead, the Supreme Court of Appeal adopts a broader balancing of interests: a “*doctrine composed not of rules but of reasons that count for and against the court's adjudication of a foreign state's acts.*”
- This interest-balancing version of the doctrine applies even when the lawfulness of the executive acts of a foreign country, taken within its territory, will have to be adjudicated by the South African court.
- The act of state doctrine is a common law doctrine, and the common law is subject to the Constitution. This means that the basis for the doctrine cannot be the separation of powers because, under the Constitution, foreign policy decisions are not beyond judicial scrutiny.
- Comity justifies the doctrine, but comity requires judicial pause not judicial abdication.
- Interest balancing considers, for example, the plaintiff's constitutional rights (and, in particular, its right to have its dispute resolved in court), and the constitutional nature and implications of the claim (here, allegations of public corruption).

South Africa uses the *lex loci delicti*, but it can be displaced

- In 2010, the High Court in *Burchell* held that South Africa's choice of law rule for delict is the legal system that has the most real or significant relationship to the dispute, with the *lex loci delicti* merely being one factor in that analysis.
- The Supreme Court of Appeal held that *Burchell* is wrong: the general rule is *lex loci delicti*. The *lex loci delicti* can be displaced if another legal system has a “*manifestly closer connection*”.
- The Supreme Court of Appeal also held that for transnational delicts (that is, when the relevant conduct or events do not happen in one country), a plurality approach should be taken to determine the *lex loci delicti*: the country in which the greater part of the events or conduct making up the elements of the delict took place.

- The Supreme Court of Appeal rejected an approach of subsidiary rules for particular delicts. This approach causes uncertainty about which elements should be given primacy for certain delicts. More fundamentally, it is based on the “*doctrinal heresy*” that South Africa has a law of *delicts* (like the English law of torts); South Africa instead has a “*unified scheme of liability*”. Subsidiary rules for each type of delict does not rhyme with that unified scheme.

The judgment was a relatively rare 3-2 split. A further appeal to the Constitutional Court is possible.

Jason Mitchell is a dual qualified barrister practising in England at Maitland Chambers in London and in South Africa at Group 621 in Johannesburg.