



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF**  
**APPEAL**

**From:** The Registrar, Supreme Court of Appeal

**Date:** 29 April 2025

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal*

*East Asian Consortium B.V. v MTN Group Limited and Others (225/2023) [2025] ZASCA 50 (29 April 2025)*

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal by the appellants, East Asian Consortium BV (EAC). EAC alleged in its particulars of claim that the MTN respondents, companies forming part of the MTN group Limited (first to fourth respondents) and their then directors, Mr Nhleko and Ms Charnley (fifth and sixth respondents) (collectively, the respondents), unlawfully induced (by way of bribery and corruption) South African and Iranian officials to cause the Iranian Ministry of Post, Telegraph and Telephone (MCIT) and the Iran Electronic Development Company (IEDC) to replace EAC with MTN International (Mauritius) Ltd (MTN International) as the beneficial holder of a 49% shareholding in Irancell Telecommunications Services Company (ITSC), the operating company that was to render mobile communications under licence in Iran. EAC claimed that this conduct deprived it of the benefits of the licence, causing it to suffer damages of \$4.2 billion, together with interest.

In October 2003, MCIT issued a tender, governed by the Tender Regulations for International and National Public Calls for Competitive Bids (the Tender Regulations). EAC, a Dutch company, held a 60% interest in the Turkcell Consortium, formed to bid for Iran's first licence to provide a global system for mobile communications in Iran (the GSM licence). The Turkcell Consortium and two other consortia qualified to bid. In February 2004, the Turkcell Consortium was announced as the winner of the tender, and was appointed the provisional licence holder. EAC was replaced by MTN International as the 49% beneficial shareholder of ITSC. EAC alleges that the MTN respondents, together with Mr Nhleko and Ms Charnley, secured this outcome, for the benefit of MTN International, by unlawful means; and in particular, by engaging in bribery, and the corruption of South African and Iranian officials.

In their main plea, the respondents contended that MTN International lawfully acquired its 49% share by a letter agreement with local Iranian shareholders of what they describe as the Irancell Consortium, funded the licence fee, and that EAC's rights were invalidated by the Irancell Act, legislation that required 51% of the shares of ITSC to be held by Iranian nationals. They denied any bribery or corruption and argued that their conduct built lawful business relationships. In

special pleas, the respondents, variously, raised the following defences. First, that the Iranian courts enjoyed exclusive jurisdiction to decide the dispute, relying upon Article 29 of the Tender Regulations. These regulations required any dispute ‘relative to’ the Tender Regulations to be submitted to the competent Iranian courts (the Article 29 defence). Second, that s 2 of the Foreign States Immunities Act 87 of 1981 (the Immunities Act) precludes a South African court from adjudicating EAC’s action because the award of the tender is the exercise of a public power by Iran, affecting its property, rights, interests or activities (the Immunities Act defence). Third, that the EAC action requires a South African court to decide upon the lawfulness of the conduct of the government of Iran, within its sovereign territory, and the foreign act of state doctrine precludes this enquiry (the foreign act of state defence).

On 31 January 2022, the high court ordered that these defences, as also the choice of law question, that is, whether Iranian or South African law governed EAC’s claims, would be separated, and decided first (the separation order). The high court held that EAC, as a bidder, was bound to submit its dispute to the competent Iranian court, unless it could show that the court should exercise its discretion not to enforce a foreign jurisdiction clause. The high court found no basis to do so. The high court thus upheld the Article 29 defence. The high court found that s 2 of the Immunities Act applied to EAC’s claim and upheld the Immunities Act defence. The high also court found that EAC’s pleadings required a South African court to enquire into the unlawful conduct of the government of Iran. It declined to exercise jurisdiction, and upheld the foreign act of state defence. Regarding the choice of law issue, the high court found that the delict pleaded by EAC occurred in Iran or may be framed on the basis that the loss suffered by EAC was both caused and suffered in Iran. The high court concluded that the law of Iran applies. As a result, it granted a permanent stay and dismissed EAC’s action. EAC appealed these orders to the SCA, with the leave of the high court.

The issues central to the appeal were: (1) the scope of a foreign jurisdiction clause (Article 29 of the Tender Regulations), (2) state immunity under the Immunities Act, (3) the applicability of the foreign act of state doctrine, and (4) the proper choice of law.

In the SCA, the majority judgment held that the scope of Article 29 is confined to disputes about the exercise of public power under the Tender Regulations, namely, the regulatory process by which MCIT awarded the GSM licence. Article 29 does not extend to private law claims for damages based on the wrongful acts of the respondents that are said to have caused EAC patrimonial loss. The majority concluded that EAC’s claims thus did not fall within Article 29. Consequently, the special plea was dismissed.

The minority judgment agreed with the high court that EAC was bound by the Tender Regulations. It found that this is because EAC relied on the very Tender Regulations in its attempt to show that there were deviations from procedures and a subversion of the Tender Regulations which could only have been as a result of MTN International’s inducement and bribery. Furthermore, it found that nothing stands in the way of EAC pursuing its claim in the country it elected to be the adjudicator of the disputes pertaining to the tender. The minority judgment concluded that the high court exercised its discretion judiciously, and there was no basis for this Court to interfere with its decision to uphold the special plea of foreign jurisdiction.

The SCA reaffirmed that state immunity protects a foreign state’s legal interests, principally proprietary rights, and spares it having to defend itself in a forum to which it has not consented. The majority held that EAC’s claims in delict are not claims made against Iran’s property or other legal rights; rather, it sought damages from the MTN respondents. Even if findings were made that Iran acted unlawfully, no order would bind Iran or affect its property, rights or

liabilities. Accordingly, Iran was not indirectly impleaded under s 2(2) and the Immunities Act does not apply. The Immunities Act defence was dismissed.

The minority judgment held that Iran's entitlement to grant the licence constituted a form of property right that triggers the application of the Immunities Act. It held that any finding of wrongdoing by Iran would adversely affect those rights and impugn Iran's sovereign property interests. The minority judgment found that the high court correctly pointed out that the unlawful conduct, if found, is equally that of *all* the actors, including the Iranian government.

The majority held that the foreign act of state doctrine forms part of South African common law, but emphasised that it is not a jurisdictional bar, but a doctrine of judicial restraint rooted in comity and respect for sovereignty. Under South Africa's constitutional order, however, this restraint must be weighed against counter-vailing interests. Most notably, the courts' duty to adjudicate grave allegations of corruption by South African entities and their directors, which strike at the heart of the constitutional value of integrity and the rule of law. The majority held that the doctrine applies to sovereign acts within a foreign state's territory but is not absolute; that courts must balance reasons for abstention (comity, separation of powers) against reasons to adjudicate (upholding constitutional values, combating corruption); and that in this case, deference to Iran's sovereignty was outweighed by the imperative that South African courts address alleged bribery and corruption by South African companies and officials, given the constitutional commitment to integrity and access to justice. The majority judgment thus dismissed the foreign act of state defence.

The minority judgment agreed that the doctrine formed part of our law but considered that the high court correctly applied an exclusionary rule derived from English authority. Further, the minority judgment found no proper 'weighing' in the majority's approach and stressed that EAC's claims placed the lawfulness of Iran's sovereign acts at the core. It concluded that a court adjudicating the matter cannot find in favour of EAC without finding that the Iranian government was complicit in activities of bribery and corruption. The minority judgment held that the foreign act of state doctrine, as part of our common law, must reflect the legal order that the Constitution proclaims. Furthermore, it held that there was no basis for suspecting that the constitutionally protected right of access to justice, as enshrined in s 34 of the Constitution, will be violated if the doctrine is applied. Moreover, the minority judgment held that the high court's conclusion that the doctrine poses a bar to the adjudication of this matter, was unassailable.

With regards to the choice of law issue, the majority judgment held that the cause of action was a transnational delict. The correct approach to such delicts was found to be the *lex loci delicti*, but this may be displaced in favour of the country with a manifestly closer, significant relationship. Where there is uncertainty as to the *lex loci delicti*, the legal system with which there is a significant relationship will decide the question of the *lex causae*. The majority found that the greater part of the events or conduct making up EAC's claim in this transnational delict are alleged to have taken place in Iran. Iran had the more significant relationship, and its law should be applied. The majority judgment held that the choice of law issue was correctly decided by the high court, and EAC's appeal on this ground was dismissed with costs. The minority judgment agreed with the high court and majority on the choice of law issue.

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