THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 225/2023

In the matter between:

EAST ASIAN CONSORTIUM B.V.	**APPELLANT**
and	
MTN GROUP LIMITED	**FIRST RESPONDENT**
MTN INTERNATIONAL (MAURITIUS) LIMITED	**SECOND RESPONDENT**
MOBILE TELEPHONE NETWORKS HOLDINGS (PTY) LTD	**THIRD RESPONDENT**
MTN INTERNATIONAL (PTY) LTD	**FOURTH RESPONDENT**
NHLEKO, PHUTHUMA FREEDOM	**FIFTH RESPONDENT**
CHARNLEY, IRENE	**SIXTH RESPONDENT**

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

Coram: MOLEMELA P and MOCUMIE, MABINDLA-BOQWANA and UNTERHALTER JJA and KOEN AJA

Judgments: Unterhalter JA (majority): [01] to [113]

Molemela P (dissenting): [114] to [144]

Heard: 26 and 27 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 29 April 2025

Summary: Delict – unlawful inducement – unlawful competition – conflict of law – transnational delicts – *lex loci delicti* – significant relationship test – jurisdiction – agreement to the exclusive jurisdiction of a foreign court – state immunity – s 2 Foreign States Immunities Act 87 of 1981 – the United Nations Convention of Jurisdictional Immunities of States and their Property (2004) – foreign act of state doctrine – customary international law – ss 7 and 8 of the Constitution.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wepener J sitting as court of first instance):

(a) On the issue identified in paragraph 1.1 of the court order dated 31 January 2022 (the separation order) and the order made by the high court in paragraphs 1.2 and 3 in respect thereof, the appeal is dismissed with costs, including the costs of two counsel.

(b) On the issue identified in paragraph 1.8 of the separation order concerning the special plea of the exclusive jurisdiction of the Iranian courts and the order made by the high court in paragraphs 4, 5 and 6 in respect thereof:

(i) The appeal is upheld, with costs, including the costs of two counsel;

(ii) Paragraphs 4, 5 and 6 of the order of the high court are set aside and replaced with the following order: 'the special plea is dismissed with costs, including the costs of two counsel';

(c) On the issue identified in paragraph 1.8 of the separation order concerning the special plea of state immunity and the order made by the high court in paragraphs 7, 8 and 9 in respect thereof:

(i) The appeal is upheld, with costs, including the costs of two counsel;

(ii) Paragraphs 7, 8 and 9 of the order of the high court are set aside and replaced with the following order: 'the special plea is dismissed with costs, including the costs of two counsel';

(d) On the issue identified in paragraph 1.8 of the separation order concerning the special plea of the foreign act of state doctrine and the order made by the high court in paragraphs 10, 11 and 12 in respect thereof:

(i) The appeal is upheld, with costs, including the costs of two counsel;

(ii) Paragraphs 10, 11 and 12 of the order of the high court are set aside and replaced with the following order: 'the special plea is dismissed with costs, including the costs of two counsel'.

JUDGMENT

Unterhalter JA (Mabindla-Boqwana JA and Koen AJA concurring):

Introduction

[1] The appellant, East Asian Consortium BV (EAC), is a private company incorporated in the Netherlands. Upon its incorporation, EAC came to hold a 60% interest in a consortium, the Turkcell Consortium, which was constituted to bid for Iran's first licence to provide a global system for mobile communications (the GSM licence). In October 2003, the Ministry of Post, Telegraph and Telephone (MCIT) of the Islamic Republic of Iran (Iran) issued a tender for the GSM licence. The Turkcell Consortium qualified to bid for the GSM licence, as did two other consortia. In February 2004, the outcome of the tender was announced. The Turkcell Consortium was the winning bidder, and MCIT notified the Turkcell Consortium that it was the provisional licensee.

[2] The first to fourth respondents are companies forming part of the MTN group of companies. The second, third and fourth respondents are wholly-owned subsidiaries of the first respondent, MTN Group Limited. I will refer to these companies collectively as the MTN companies. The fifth and sixth respondents (Mr Nhleko and Ms Charnley) were directors of the MTN companies. Mr Nhleko was also the chairman of MTN Group Limited. I will refer to the respondents as the defendants.

[3] EAC instituted a claim against the defendants. In its amended particulars of claim, EAC complains that the MTN defendants, upon the direction of Mr Nhleko and Ms Charnley, took various steps to induce MCIT to replace EAC with the second respondent, MTN International (Mauritius) Ltd (MTN International), as the beneficial holder of a 49% share in the ultimate license holder of the GSM licence, the Irancell Telecommunications Services Company (ITSC). EAC alleges that the defendants deliberately acted to secure this result; that they did so with knowledge of the award of the tender to the Turkcell Consortium; that their actions were intended to induce the government of Iran (including MCIT) to replace EAC with MTN International as a shareholder of ITSC; and the government of Iran was so induced, in breach of EAC's rights, alternatively to prevent the final conclusion of an agreement with the Turkcell Consortium, including EAC, to provide the services under the GSM licence.

[4] The conduct by recourse to which the defendants are alleged to have unlawfully induced the government of Iran to replace EAC as a shareholder of the ultimate licence holder is wide-ranging. EAC's claim sets out a course of conduct that it describes as corrupt, and it avers that this conduct was orchestrated by the defendants so as to secure their objective: to deprive EAC of the benefits it would otherwise have enjoyed as a member of the winning consortium for the GSM licence. EAC avers that the GSM licence was granted to ITSC, which established and operates a cellular network in Iran. The exclusion of EAC from this business opportunity, by reason of the wrongful conduct of the defendants, is alleged to have caused EAC to suffer damages in the amount of $4.2 billion, together with interest.

[5] The defendants set out their defences in their pleas. In their main plea, the MTN companies explain that one or more MTN companies were members of a consortium that submitted a bid for the GSM licence. The outcome of the bid was that its

consortium was the runner up. However, the Irancell Act came into force on 2 June 2005. It required that at least 51% of the shares of the operating company that was to be granted the GSM licence had to be held by Iranians. The Irancell Act rendered invalid or unenforceable any rights that EAC might have acquired. The MTN companies allege that in August 2005, local partners of what they describe as the Irancell Consortium incorporated a company, Irancell Communication Services Company (Irancell). The Iranian local shareholders of Irancell concluded a letter agreement with MTN International in terms of which MTN International would acquire 49% of the shares of Irancell, and fund the licence fee for the GSM licence. In sum, MTN International acquired its shareholding in Irancell, which was granted the GSM licence, by lawful means.

[6] The defendants deny that they had recourse to bribery and corruption to secure the position of MTN International as a shareholder of Irancell. Their engagements with members of the governments of Iran and South Africa were to build lawful business relationships with Iran. There was no unlawful inducement of officials in the government of Iran to supplant EAC and replace it with MTN International.

[7] The defendants also rely upon a number of special pleas. Those relevant to this case are the following. First, Mr Nhleko pleads that Article 29 of the Tender Regulations, pursuant to which EAC claims to have acquired the rights upon which it relies, requires any dispute or litigation ‘relative to’ these regulations or the call for competitive bids to be submitted to the competent Iranian court. EAC’s claim, it is pleaded, relates to the Tender Regulations. Hence, Mr Nhleko pleads, EAC was required to submit its claims to the competent Iranian court. EAC has not complied, and on this basis, the South African courts should decline to adjudicate EAC’s action. I shall refer to this special plea as the Article 29 defence.

[8] Both Mr Nhleko and Ms Charnley rely upon state immunity, and in particular, the Foreign States Immunities Act 87 of 1981 (the Immunities Act). Section 2 of the Immunities Act, they contend, should be interpreted consistently with Article 6(2) of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (the Immunities Convention). Article 6(2) in relevant part provides that:

'A proceeding before a court of a State shall be considered to have been instituted against another State if that other State: . . .

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.'

EAC's claim, it is pleaded, relates to the exercise of sovereign authority by the government of Iran because the rights that EAC claims derive from the award of the GSM licence, pursuant to the tender, and its consequences. These are matters that engage the public powers of the government of Iran, and affect the property, rights, interests or activities of Iran. Once that is so, s 2 of the Immunities Act precludes a South African court from adjudicating EAC's action. The action should therefore be dismissed or made subject to a permanent stay. I shall refer to this special plea as the state immunity defence.

[9] The defendants all rely upon the foreign act of state doctrine. They plead that EAC's claim is based upon allegations that the government of Iran unlawfully excluded EAC from the consortium that was granted the GSM licence either in breach of EAC's rights or simply because it was bribed to do so. EAC's claim requires a South African court to decide whether the conduct of the government of Iran, taken within its territory, was lawful under Iranian law. The foreign act of state doctrine precludes this enquiry, and consequently EAC's claim should be dismissed, alternatively a perpetual stay of EAC's action should issue. I shall refer to this special plea as the foreign act of state defence.

[10] On 31 January 2022, Wepener J in the high court made an order, at the instance of the parties, that certain issues arising from the pleadings would be decided without leading any evidence and in advance of the remaining issues in the action (the separation order). The separation order is framed in a somewhat complex way. In essence, the issues that were separated for determination were the following. First, whether Iranian or South African law should apply to decide the essential elements of the cause of action pleaded by EAC. I shall refer to this as the choice of law issue. Second, the special pleas raised by the defendants which I have styled the Article 29 defence, the state immunity defence, and the foreign act of state defence.

[11] These issues came before Wepener J in the high court. In a carefully reasoned judgment, he made the following orders in respect of the issues he considered he was in a position to decide. First, that the law of Iran applies to the delict alleged in paragraphs 30-60 and paragraph 66 of EAC's particulars of claim. Second, in relation to the Article 29 defence, that the Iranian courts have jurisdiction to hear the dispute. Third, in relation to the state immunity defence, that the South African courts lack jurisdiction, and EAC's action must be dismissed. Fourth, in relation to the foreign act of state defence, the court declined to exercise jurisdiction 'due to the involvement of the State of Iran', and EAC's action was dismissed. EAC appeals these orders with the leave of the high court.

[12] I will consider the issues that arise on appeal in the following order. I will first consider the special plea that raises the Article 29 defence; next, the state immunity defence; thereafter, the foreign act of state defence; and finally, the choice of law issue. Before doing so, there are a number of preliminary issues that require consideration.

Preliminary issues

[13] There was no dispute between the parties as to how EAC's cause of action is to be characterised under South African law. In *Country Cloud*,[1] the Constitutional Court recognised two species of delict that render actionable an unlawful interference with contractual relations. First, a party to a contract enjoys a remedy in delict where a third party to the contract intentionally, and without justification, induces another party to the contract to breach the contract. I shall refer to this delict as interference by inducement. Second, a third party that interferes with the contractual right of another by usurping that right will be liable for such conduct, even absent inducement.

[14] There can be little doubt that EAC's particulars of claim set out a cause of action that relies upon the delict of interference by inducement. What matters for the purposes of deciding the special pleas is to analyse what essential allegations are made by EAC in its particulars of claim. First, EAC alleges that it secured contractual rights through the Turkcell Consortium that were enforceable against MCIT. It claims that the conclusion of the final GSM licence agreement, alternatively that the certificate issued to the Turkcell Consortium confirming that it had been selected as the provisional licensee, read with the draft license agreement, gave rise to 'binding and enforceable rights in favour of the Turkcell Consortium, alternatively the Turkcell Consortium, acting on its own behalf and for the benefit of the Operating Company to be formed, against MCIT, with which the defendants were precluded from unlawfully interfering'.

[15] Second, EAC pleads that the defendants engaged in a course of conduct with the intention of inducing the government of Iran (including MCIT) to replace EAC

[1] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (*Country Cloud*) paras 30-31.

with MTN International as a shareholder of the operating company that would hold the GSM license. The Iranian government was induced to do so. This constituted a wrongful and unlawful interference in 'the trading and contractual rights of the plaintiff [EAC]' as a result of which EAC was prevented from receiving the benefits to which it was entitled pursuant to the conclusion of the licence agreement and the granting of the GSM licence. ITSC, the operating company that was incorporated to hold the GSM licence, it is averred, established and operates a cellar network in Iran. But for the unlawful interference of the defendants, EAC claims that it would have had a 49% share of the revenue and business opportunities that ITSC has enjoyed. And, as a result, EAC has suffered damages in the amount of $4.2 billion (plus interest) by reason of 'the loss of business opportunities, turnover and profits associated with the GSM licence'. This then is a claim framed on the basis of interference by inducement, and I shall reference it as the inducement claim.

[16] It is not the only cause of action upon which EAC relies. EAC's particulars of claim also contemplate that it may not establish that the government of Iran (including MCIT) owed any 'binding obligations' to the Turkcell Consortium or EAC. In that event, EAC avers that the defendants' conduct, by way of bribery and corruption, was designed to prevent the conclusion of 'finally binding contractual obligations between the Iranian government (including MCIT) and the Turkcell Consortium, including the plaintiff [EAC], that would lead to the implementation and operation of the GSM cellular phone system public network'. EAC then alleges that the government of Iran (including MCIT) was induced, through such bribery and corruption, to replace EAC with MTN International as the shareholder of ITSC. The defendants' conduct was an unlawful interference that prevented EAC from acquiring the enforceable rights from the government of Iran (including MCIT) that 'it was destined to acquire following the selection of the Turkcell Consortium as the winning bidder in the tender for the

GSM licence and the conclusion, by the Turkcell Consortium, of the Final Licence Agreement'. But for this unlawful conduct, EAC, as a member of the Turkcell Consortium, would have been entitled to a share of the benefit arising from the grant of the GSM license. As a result it has suffered damages as alleged in the inducement claim. I shall refer to this as the prevention claim.

[17] The prevention claim cannot be understood to constitute either of the species of unlawful interference delicts identified in *Country Cloud*. This is so because the prevention claim is predicated upon the proposition that EAC did not acquire any contractual rights, but was prevented from doing so by reason of the unlawful interference of the defendants. It follows that, upon the predicate of the prevention claim, the conduct of the defendants could neither have induced the government Iran to commit a breach of contract, nor could the defendants have acted to usurp the contractual rights of EAC. If EAC acquired no contractual rights, there was no contract to breach and no contractual rights to usurp.

[18] What then is the basis of the prevention claim? There was rather less attention devoted to this enquiry by the parties. However, I did not understand the defendants to demur from the submission that the prevention claim could fall within the capacious remit of the *boni mores* that determines the wrongfulness enquiry in the law of delict. In *Atlas Organic*,[2] it was emphasised that the general criterion of wrongfulness in our law, when applied to the delict of unlawful competition, would require the consideration of the morals of the marketplace. And the usurpation by way of bribery and corruption of a business opportunity that had been won by way of competition on the merits may be said to offend against the morality of the marketplace. However,

[2] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) (*Atlas Organic*) at 188-189.

what signifies, as with the inducement claim, are the allegations made in support of this claim. It is by reference to these allegations that the special pleas must be decided.

[19] I have set out my understanding of the claims advanced by EAC in its particulars of claim for two reasons. First, counsel for EAC acknowledged the scope of these claims, and did not seek to qualify their amplitude. Second, in developing their submissions, counsel have placed emphasis upon different aspects of the cause of action pleaded by EAC. It is important to read the particulars of claim in their totality.

[20] There was some debate before us as to what we might have regard to in deciding the special pleas. In *Gcaba*,[3] the Constitutional Court observed that jurisdiction is determined on the basis of the pleadings, and not on the basis of the merits of the substantive case. In order to decide the special pleas, summarised above, that raise the Article 29 defence, the state immunity defence and the foreign act of state defence, I take a strict view as what constitutes the pleadings that we should consider. A challenge to jurisdiction or a defence that the court should decline to adjudicate a matter, taken as a special plea, seeks to determine at the outset whether the court can or should hear the case. That is ordinarily decided by reference to the plaintiff's particulars of claim, read with the averments made in the special plea that give rise to the challenge. The particulars of claim set out the basis upon which the plaintiff invokes the competence of the court to hear the matter. If they do not permit the court to do so, that is the end of the matter. The plaintiff's particulars of claim may also rest upon allegations that incline a court not to entertain the claim. That is also a function of the allegations of fact advanced by the plaintiff in its particulars of claim, and may result in the stay of such a claim. These issues arise for decision as a preliminary

[3] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ 296 (CC); [2009] 12 BLLR 1145 (CC) (*Gcaba*) para 75.

question. The plaintiff should only be non-suited on the basis of what it has claimed, and not by recourse to a substantive defence advanced by the defendants in their plea on the merits, much less the documentary yield of discovery.

[21] The corollary of this strict view is that the allegations set out in a plaintiff's particulars of claim must be taken to be true for the purposes of deciding these special pleas. That is so because a court, in fairness to the plaintiff, must decide whether it can or should hear a case, at the outset, on the premise that the plaintiff will ultimately prove what its pleadings allege. But that premise does not mean that any of the allegations pleaded in the plaintiff's particulars of claim are or will be proven. That will only be decided if the court decides that it can or should entertain the case. This distinction is of great importance in the case before us. Wide-ranging and damaging allegations of bribery and corruption are made by EAC in their particulars of claim. We must decide the special pleas *as if* these allegations will be proven. That does not mean that they are true. This Court, at this stage of the proceedings, can form no view as to their veracity, and does not do so.

The Article 29 defence

[22] Mr Nhleko raised in his second special plea the Article 29 defence. Article 29 of the Tender Regulations read as follows:

'**Article 29 APPLICABLE LAWS AND COMPETENT JURISDICTION**

These Regulations and the call for competitive bids to which they relate are regulated by Iranian law, notably as regards their validity, interpretation, performance and termination.

Any dispute or litigation relative to these present Regulations, or to the call for competitive bids to which they relate, will be submitted to the competent Iranian courts.'

Mr Nhleko pleads that: 'The present litigation relates to the said Tender Regulations and/or to a call for competitive bids and was required to be submitted to the competent Iranian court. The plaintiff [EAC] is bound thereby and the present proceedings

infringe the provisions of Article 29'. On this basis, Mr Nhleko sought an order that the Court should decline to adjudicate the matter, dismiss the action or grant a permanent stay.

[23] The high court found that EAC, as a bidder, was bound by the Tender Regulations. In EAC's claim, the conduct of the government of Iran 'looms large'. Findings against the conduct of the government of Iran would have to be made to sustain EAC's claim in delict. The Tender Regulations were of application beyond the announcement of the winning bid. The language of Article 29 is widely framed. EAC, the high court held, was thus enjoined 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.

[24] Counsel for Mr Nhleko, in their written and oral submissions, have undertaken a detailed analysis of EAC's particulars of claim, the averments there made, and their connection to the Tender Regulations. I have summarised the inducement claim. Of this claim, the following may be said. First, there can be no doubt that the inducement claim rests upon allegations that the Turkcell Consortium acquired enforceable rights as against the government of Iran, and in particular MCIT, pursuant to its successful participation in the tender, governed by the Tender Regulations. Second, EAC alleges that MCIT and the Iran Electronic Development Company (IEDC) breached the award of the tender to the Turkcell Consortium, alternatively breached 'the rights arising from the award of the tender' by replacing EAC's interest in the licensee with the interest of the MTN defendants. These are breaches of the competitive bidding process regulated by the Tender Regulations. Third, the conduct by way of unlawful inducement attributed to the defendants was to induce the government of Iran to replace the members of the Turkcell Consortium as the shareholders of the operating

company, and hence as the 'ultimate license holder'. Of this, EAC pleads as follows: 'the defendants therefore engaged in a second, secret tender bidding process after the tender had been awarded to the Turkcell Consortium'. This secret tender is the unlawful process by which the rights flowing from the lawful award of the tender were undone. Here too, what should have resulted from the lawful outcome of a competitive bidding process is determined by reference to the Tender Regulations.

[25] The prevention claim, as I have explained, does not rest upon the acquisition of rights by EAC. Rather, the conduct of the defendants prevented the conclusion of a binding agreement between the Turkcell Consortium and the government of Iran, through which EAC would have acquired rights. The rights that the Turkcell Consortium would have acquired, but for the wrongful conduct of the defendants, rest upon the outcome that would have resulted from a competitive bidding process. That process is governed by the Tender Regulations. The Tender Regulations constitute the normative benchmark of competitive bidding against which the wrongful interference of the defendants is to be measured. Their conduct prevented the Turkcell Consortium, and ultimately EAC, from acquiring the rights that the tender process would otherwise have yielded. The counterfactual contemplated by the prevention claim is thus bound up with what an application of the Tender Regulations would have produced.

[26] There can be no doubt therefore that the Tender Regulations will be relevant to a number of the central issues that arise from EAC's particulars of claim, which will form part of the trial. Mr Nhleko's special plea, setting out the Article 29 defence, is pleaded without elaboration. It states that EAC claims to have acquired rights pursuant to the Tender Regulations; it reproduces the text of Article 29; it contends that 'the present litigation relates to the said Tender Regulations and/or to a call for competitive bids . . .'; and concludes that EAC is bound by Article 29 and 'the present proceedings

infringe the provisions of Article 29 . . .'. The special plea does not rely on any background facts to assist the interpretation of Article 29. More especially, how a clause of this kind fits within the scheme of the regulation of procurement and its legal consequences within Iran. Once that is so, we must apply the entrenched triad of text, context and purpose to interpret Article 29 on the basis of the Tender Regulations that form part of the pleadings.

[27] That the present litigation relates to the Tender Regulations and the call for competitive bids, as the special plea alleges, is plain. It is not however all that the present litigation relates to. The wrongful conduct that the defendants are alleged to have engaged to induce a breach of contract or prevent the acquisition of rights by EAC does not fall within the remit of the Tender Regulations. But the subversion of the Tender Regulations is claimed to be the object of that conduct, and hence, as I have sought to explain, provides the normative and causal comparator for EAC's claims.

[28] Nor can it reasonably be contested that EAC is bound by Article 29. EAC formed part of the Turkcell Consortium that bid for the tender under the discipline of the Tender Regulations, and if the claims now advanced by EAC in its suit before the South African courts is one 'relative to these present Regulations', to recall the text of Article 29, then EAC must comply with its obligation to submit these claims to the competent Iranian courts, as Article 29 requires, save for any question of the court's discretionary competence to relieve EAC of this obligation.

[29] The special plea concludes that, if the present litigation relates to the Tender Regulations and EAC is bound by Article 29, then 'the present proceedings infringe the provisions of Article 29'. EAC is only bound to submit a dispute to the Iranian

courts, if the dispute is one 'relative to these present Regulations or to the call for competitive bids to which they relate'. I will reference this provision as the provision of relativity. And it is to its interpretation that I now turn.

[30] I begin with the text of the provision, read in the context of Article 29 and the Tender Regulations as a whole, and in light of their purpose, following the well-established principles of interpretation.[4] Article 29 commences with the following words: 'These Regulations and the call for competitive bids *to which they relate* are regulated by Iranian law, notably as regards their validity, interpretation, performance and termination'. (My emphasis.) This language forges the link between the Tender Regulations and the call for competitive bids. That is entirely unsurprising. The Tender Regulations are properly titled in full the 'Regulations for International and National Public Calls for Competitive Bids', with the following description on the title page, 'Terms for the competitive call for bids for the grant of a license for the implementation and operation of a GSM-type cellular phone system public network in the Islamic Republic of Iran'.

[31] The introduction to the Tender Regulations explains why the Tender Regulations were promulgated by the government of Iran and their purpose. The government of Iran had a policy to liberalise the post, telegraph and telephone sectors. It stated that it was 'putting forward' the Tender Regulations in relation to a tender for the grant of a licence for the implementation and operation of a GSM-type cellular system public network. The award of the licence was, *inter alia*, to develop competition in the Iranian telecommunications sector and improve the quality of the telephone services. The purpose of the Tender Regulations is stated in the introduction to be 'to define the applicable rules and procedures for competitive bidding for the

[4] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 50.

grant of a license'. And in Article 1, under the heading 'Purpose of the Tender', the following is said: 'The tender organised by the Regulations has as its purpose the selection of an operating company (the Operating Company) to which the license will be granted (the licensee)'.

[32] These provisions make it plain that the Tender Regulations regulate a competitive bidding process to select a bidder to which a licence will be granted. The Tender Regulations were issued by the government of Iran to govern the selection and licensing of an operator of a GSM-type cellular network so as to enhance competition and improve telecommunications. The Tender Regulations evidently constitute an act of public regulation to secure a public good.

[33] The regulatory scope of the Tender Regulations may readily be discerned from their contents. The Tender Regulations determine who may participate in the tender; the qualification requirements to bid; the review and evaluation of qualifications; the bidding process; the validity of bids; the opening of bids and the evaluation of technical and financial proposals; the selection of the winner and the notification of the provisional licensee; the finalising of the License Agreement and the payment of the license fee. These provisions give effect to the purpose of the Tender Regulations that I have identified.

[34] Any dispute or litigation 'relative to these present Regulations' means relative to what the Tender Regulations are there to do, and their purpose. The Tender Regulations constitute an exercise of public power by the government of Iran. We would call this administrative action. Disputes as the exercise of public power are required to be submitted to the court of Iran. This makes good sense. A party that bids in a public tender process and wishes to dispute some aspect of the rules governing

that process or the decisions taken must do so before the courts of Iran that discipline the exercise by the authorities of public powers. Disputes as to the validity, interpretation, performance and termination of the Tender Regulations, instanced in Article 29, are typical of disputes that may arise concerning the exercise of public power.

[35] What the Tender Regulations do not regulate are the private law obligations that one bidder may owe another. The contents of the Tender Regulations have nothing to say about such liability. Nor are such obligations relevant to the purpose served by the Tender Regulations. The Tender Regulations regulate how a competitive tender is to be run by means of the exercise of public powers. They do not regulate what is to be done if one bidder has recourse to bribery and corruption to suborn the government of Iran to subvert the competitive bidding process that the Tender Regulations serve to entrench. Nor do the Tender Regulations seek to determine what liability one bidder may bear to another as a matter of private obligation should a bidder have recourse to such subversion. The Tender Regulations are concerned with the exercise of public powers to secure a public object; they are not concerned to regulate the private law rights of one person that may arise from the wrongful conduct of another.

[36] Accordingly, the text of Article 29 that requires any dispute or litigation *relative to these present Regulations* to be submitted to the competent Iranian courts does not include the claims made by EAC.[5] They are claims that neither challenge nor seek remedies in respect of the exercise of public powers which constitute the essential content of the Tender Regulations. They are claims that assert a private law right for the wrongful acts of the defendants that are said to have caused EAC patrimonial loss.

[5] Emphasis added.

Rights and obligations of this kind are matters the Tender Regulations do not reach. They are beyond its remit. And hence disputes concerning these matters are not 'relative to these present Regulations'. Once that is so, no duty rests upon EAC to submit the dispute arising from its particulars of claim to the competent Iranian courts.

[37] Accordingly, the appeal must succeed in respect of the Article 29 defence. The order made by the high court upholding the special plea that raised this defence and staying the proceedings must be set aside. In its stead, this special plea must be dismissed, with costs.

The state immunity defence

[38] Both Mr Nhleko and Ms Charnley advance the contention in their special pleas that EAC's action cannot be adjudicated by a South African court by reason of the application of s 2 of the Immunities Act. They allege that EAC's claims relate to the exercise of sovereign authority by the government of Iran. The action that EAC seeks to bring before the South African courts affects the property, rights, interests and/or activities of the government of Iran (and Iran-state entities) and contravenes the sovereign immunity of Iran. The immunity conferred by s 2 of the Immunities Act thus precludes a South African court from adjudicating upon EAC's action.

[39] The high court upheld this contention. It found that EAC's action will require the high court 'to make adverse findings regarding the unlawful acts of Iran as a finding will affect the interests or activities of Iran. In my view the provisions of the Immunities Act result in this Court having no jurisdiction to entertain the matter as pleaded by EAC and the special plea is to be upheld.'

[40] State immunity from the jurisdiction of another State is a rule of customary international law. The rule is predicated upon the sovereign equality of states. As this Court has held, it is a rule of application in South African law:[6] immunity is available when it is sought to implead a foreign state, whether directly or indirectly, before domestic courts. A state is directly impleaded by legal proceedings taken against it, without its consent. Where a state is not a party to the proceedings, it may nevertheless be indirectly impleaded, and enjoy immunity. Whether that is so lies at the heart of the issues raised by the state immunity defence.

[41] State immunity enjoys statutory expression in s 2 of the Immunities Act. It reads as follows:

'**2 General Immunity from jurisdiction**

(1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.

(2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question.

(3) The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic.'

Section 2(1) of the Immunities Act recognises that state immunity may be of application in situations where the state is directly impleaded; and s 2(2) does so where the state is indirectly impleaded.

[42] As was the case in *Cherry Blossom*,[7] counsel for Mr Nhleko and Ms Charnley sought to have us interpret s 2(2) of the Immunities Act in a manner consistent with the United Nations Convention on Jurisdictional Immunities of States and their Property (2004) (the Immunities Convention). Article 6(2)(b) of the Immunities

[6] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) para 66.
[7] *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV 'NM Cherry Blossom' and Others* [2017] ZAECPEHC 31; 2017 (5) SA 105 (ECP); [2018] 1 All SA 593 (ECP) (*Cherry Blossom*) para 76.

Convention provides that: 'A proceeding before a court of a State shall be considered to have been instituted against another State if that other State: . . . is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State'. This provision, it was argued, is a codification of customary international law. And s 233 of the Constitution requires of us, when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law, over any alternative interpretation that is inconsistent with international law.

[43] The Immunities Convention is not in force. It was adopted by the General Assembly of the United Nations, but it has not secured, thus far, a sufficient number of ratifications to enter into force. While certain courts have considered the Immunities Convention to reflect an international consensus as to the existing rules of customary international law on immunity, greater caution has been expressed by other courts as to whether all of its provisions, including Article 6(2)(b), are an authoritative statement of customary international law. In *Belhaj*,[8] Lord Sumption found it unnecessary to decide whether Article 6(2)(b) represented 'the current consensus of nations', but observed that the drafting history suggested that some states considered the wording 'to affect the property, rights, interests or activities of that State' too broad. Lord Mance's speech in *Belhaj* describes Article 6(2)(b) as 'the use in a Convention with no binding international status of ambiguous terminology'.[9] Lord Mance also references academic commentary that the uncertainty as to the scope of the concluding wording of Article 6(2)(b) should be 'limited to a claim for which there is some legal foundation'.[10] Nor do I read *Cherry Blossom* to have reached any

[8] *Belhaj and Another v Straw and Others* [2017] 2 WLR 456; [2017] HRLR 4; [2017] WLR(D) 51; [2017] UKSC 3 (*Belhaj*) paras 194-195.
[9] Ibid para 25.
[10] Ibid para 26.

conclusion different to those arrived at by Lords Mance and Sumption in *Belhaj*, whose speeches on the point are extensively reproduced in *Cherry Blossom*.

[44] While there may well be circumstances in which an unratified treaty (or certain provisions thereof) may evidence the rules of customary international law,[11] I cannot find that this is so of Article 6(2)(b) of the Immunities Convention, on the basis of what has been placed before us. The drafting history reflects the concern of certain States as to the overbreadth of Article 6(2)(b). An insufficient number of States have ratified the Immunities Convention for it to enter into force. There appears to be no evidence of the subsequent practice of States, including non-parties, that would indicate that Article 6(2)(b) is a rule of customary international law. Nor is there evidence of States acquiescing in its precepts. I am not therefore required to interpret s 2(2) of the Immunities Act on the basis that I should prefer any reasonable interpretation of that provision that is consistent with Article 6(2)(b) of the Immunities Convention.

[45] The plain language of s 2(2) of the Immunities Act requires a court to give effect to the immunity conferred by s 2, even though the foreign state does not appear in the proceedings. When, as here, the foreign state is not a party to the proceedings, nor does it appear before a South African court, what does it mean to give effect to the immunity conferred by s 2? Can it mean that the foreign state enjoys immunity unless it falls within one of the exceptions that the Immunities Act provides for? Counsel for Mr Nhleko and Ms Charnley do not contend for so broad an interpretation. And rightly so. They have submitted that s 2(2) should be read, in essence, to mean that a foreign state is indirectly impleaded when, as Article 6(2)(b) stipulates, the proceedings in effect seek to affect the property, rights, interests or activities of that

[11] *North Sea Continental Shelf, Judgment,* ICJ Reports 1969 p 3, 32-41, 86-87.

state. On this construction, Article 6(2)(b) defines what it is that the proceedings must affect before a foreign state is rendered immune from the jurisdiction of the South African courts. And broad as that class may be, even on counsel's interpretation of Article 6(2)(b), it is a finite class.

[46] The question that then arises is this: since s 2(2) incorporates the concept of a foreign state indirectly impleaded, what interests of the foreign state are recognised by s 2(2) so as require its immunity from the jurisdiction of the South African courts? The immunity with which s 2 of the Immunities Act is concerned is the personal immunity of states in respect of their sovereign activities. The proceedings before the South African courts must affect those activities in such a way as to require immunity.

[47] *Belhaj*, was required to interpret the provisions of the United Kingdom's State Immunity Act, 1978, upon which the Immunity Act is modelled, and the common law that preceded it. Section 1 of the 1978 Act is identical to s 2 of the Immunities Act. *Belhaj* was thus concerned with the same problem that confronts us: what interests of the foreign state signify to render a state indirectly impleaded. Lord Mance found that the indirect impleading of a state arises principally in cases that might affect a sovereign's interest in property. Article 6 of the Immunities Convention, following the Report of the International Law Commission (Yearbook 1991), has as its focus, he found, 'avoiding the exercise of State jurisdiction in a way which would put any foreign sovereign in the position of having to choose between being deprived of property or otherwise submitting to the jurisdiction'.[12] Lord Mance was reluctant to extend immunity in cases of a state indirectly impleaded beyond issues of proprietary or possessory title.

[12] *Belhaj* fn 8 above para 26.

[48] Lord Sumption's speech in *Belhaj* also recognised that a state is indirectly impleaded by proceedings against its interest in property. The question was whether a state is to be treated as indirectly impleaded in cases beyond the state's interest in property, and in particular, where the court is required to adjudicate on the state's legal rights or liabilities. Lord Sumption was not willing to 'rule out the possibility that litigation between other parties might directly affect interests of a foreign state other than interests in property'.[13] But, as I have observed, it is not easy to imagine such a case. At the very least, he found, the foreign state must have a legal interest to defend.

[49] *Belhaj* thus holds as follows. First, the paradigm case of a state indirectly impleaded are proceedings in which the foreign state's interests in property are affected. Second, the outer reaches of the concept of a state indirectly impleaded require that the legal interests of the state are affected. Third, the concept does not extend to the social, economic, political or moral effects of the proceedings upon the foreign state.

[50] I consider that the careful framing of the interests of a foreign state that signify to determine whether that state is indirectly impleaded were correctly set out in *Belhaj*, and even there, there is considerable caution expressed as to whether, and if so in what circumstances, the class of interests may extend beyond a legal interest in property. I take this position for the following reasons.

[51] First, as both Lord Sumption and Lord Mance observed in *Belhaj*, the species of immunity accorded a foreign state, with which we are concerned, is a personal immunity (*ratione personae*). The foreign state is indirectly impleaded because the proceedings affect the existence or exercise of the foreign state's legal rights (putting

[13] Ibid para 196.

aside the question of which rights), and hence the performance by the foreign state of its functions. The immunity is given to avoid such performance being made subject to the adjudicative jurisdiction of foreign domestic courts. The immunity is not subject matter immunity (*ratione materiae*). It does not limit the subject matter that a domestic court may entertain in proceedings to which the foreign state is not a party. The immunity is concerned with the relationship between a foreign state and its legal rights. If the proceedings to which the foreign state is not a party do not affect the rights of the foreign state, then there is no basis to give effect to any immunity for the benefit of that state, at the instance of a litigant that is a party to the proceedings.

[52] Second, as the English cases traversed in *Belhaj* make plain, the concept of a foreign state being indirectly impleaded was predicated on the position that a claim upon the property of the state is a claim against the state. The foreign state is indirectly impleaded because the domestic court would be required to adjudicate upon its rights (or liabilities), even in proceedings to which it is not a party. As it has been framed, the immunity is granted to the foreign state to spare it the choice of having 'to sacrifice either his property or his independence'.[14] The foreign state is indirectly impleaded because it should not have to submit to the jurisdiction of the court to defend itself.

[53] If immunity spares the foreign government the choice of submission or the risk of prejudice to its rights, the immunity then rests on the proceedings posing that risk. If it has no such interest, then there is nothing to spare it from. It follows that a foreign state cannot be indirectly impleaded, if the proceedings do not concern the rights of the foreign state and could not result in any order that affects those rights.

[14] Per Brett LJ in *The Parlement Belge* (1880) (1878. O. 60.) 5 PD 197 at 218-219.

[54] Section 2(2) of the Immunities Act is to be interpreted as follows. The proceedings in question must affect the legal interest of the foreign state, even though it is not a party to the proceedings. The foreign state has such an interest if the proceedings might affect the legal rights (or liabilities) of the foreign state. Other interests, such as political, moral or diplomatic interests, do not register as relevant interests because courts of law do not give judgments or issue orders that redeem these interests. The foreign state's rights in property fall within the class of legal rights that may indirectly implead the foreign state. That is so because the parties to the proceedings may claim property rights that, if recognised by a court and reflected in its orders, may thereby diminish the bundle of rights in property to which the foreign state claims an entitlement.

[55] With Lord Sumption, I do not hold that the class of rights of the foreign state that may give rise to a foreign state being indirectly implead is confined to rights in property. However, the rights of the foreign state that might qualify for inclusion in the class must have the attributes that the property cases exemplify. In particular, the proceedings must be such that the legal rights of the foreign state would be affected because the judgment and order of the court may diminish or otherwise adversely affect the foreign states' entitlement to these rights, or their exercise.

[56] The issue that then arises for consideration is whether the action instituted by EAC concerns the legal rights of Iran, and whether any judgment and order that may issue from a South African court seized of the matter may adversely affect Iran, in the sense that I have described. The claims of EAC in delict are not made against Iran. That alone does not mean that Iran is not indirectly impleaded. EAC's particulars of claim, as I have explained, allege that EAC acquired contractual rights against the government of Iran and that Iran was induced to breach those rights. The government

of Iran is also alleged to have acted unlawfully, in concert with the defendants, to deprive EAC of the fruits of the GSM license that it would otherwise have enjoyed as a shareholder of the operating company. Ultimately, EAC seeks an order for the payment of damages by the defendants for the loss sustained by it as a result of being deprived of this opportunity.

[57] What rights or liabilities of Iran might be adversely affected should the claims of EAC proceed to trial? No claim is made against the government of Iran as a joint tortfeasor. No property rights of the government of Iran are exposed to jeopardy. EAC does not seek to set aside what it alleges to be the subversion of a competitive tender. The outcome of the tender remains in place. The claims of EAC would not undo the actions of the government of Iran. EAC's claims, if they were to be proven at trial, would establish that EAC acquired rights as against the government of Iran which were breached by that government. But no liability attaches to any such finding. Nor would a finding that the government of Iran may be found to be responsible for the substitution of EAC for MTN International have any adverse entailment upon the legal rights or liabilities of Iran. The liability that would accrue from any award of damages would be borne by the defendants, not Iran. It will suffer no detriment to any of its rights, nor accrue any liability from such a judgment.

[58] Once that is so, Iran is not indirectly impleaded. Section 2(2) of the Immunities Act did not require that the high court to decline jurisdiction. It was in error in doing so. And in the result, the state immunity defence must fail. The appeal succeeds on this aspect of the matter and the special plea raising the state immunity defence must be dismissed, with costs.

The foreign act of state defence

[59] The defendants all rely upon the foreign act of state doctrine. The MTN defendants contend that EAC's claims will require a South African court to decide whether the government of Iran unlawfully excluded EAC from the consortium that was awarded the GSM licence. It acted either in breach of EAC's contractual rights or simply because it was induced to do so. The MTN defendants contend in their special pleas that under the foreign act of state doctrine, it is not permissible or appropriate for a South African court to determine the conduct of a foreign state acting within its own territory. The MTN defendants seek, on this basis, the dismissal of EAC's action.

[60] Mr Nhleko also invokes the foreign act of state doctrine across a somewhat wider canvass in his special plea. He pleads that the GSM tender was a public project for a public purpose; under the control of the Iranian Parliament, subject to the authority of the relevant Ministry of the government of Iran, MCIT, and the binding terms and conditions of the tender Regulations. These are matters that relate to the sovereign authority of the government of Iran. Integral to the claims of EAC are allegations of the unlawful conduct of the government of Iran which a South African court will be required to determine. The award of the tender took place under the executive authority of MCIT, implementing the applicable legislation of the Iranian parliament. This warranted the application of the foreign act of state doctrine by the high court to decline to adjudicate the matter and dismiss it, alternatively to grant a perpetual stay of action.

[61] Ms Charnley pleads that foreign acts of state are implicated in the issues arising in the action, and such acts are not justiciable, alternatively their lawfulness and validity must be accepted, and cannot be impugned. Issues in the action, she alleges,

necessarily require findings to the effect that the government of Iran had made 'unlawful laws' and/or had acted unlawfully under Iranian law. These issues are not justiciable, and such findings are precluded, under the foreign act of state doctrine. The special plea sets out the unlawful acts and breaches that EAC's particulars of claim allege against the government of Iran. On this basis, Ms Charnley prayed that EAC's action be dismissed.

[62] The high court provided a detailed account of the acceptance of the foreign act of state doctrine in South African law, and its exposition in English law. Ultimately, the high court upheld the defendants' reliance on the doctrine. Wepener J found that the pleadings of EAC required a South African court to enquire into the unlawful conduct of the government of Iran. Those allegations form the basis of EAC's claim, and would be 'scrutinised and judged'. The high court thus declined to exercise jurisdiction, and dismissed EAC's claims.

[63] The foreign act of state doctrine was recognised to form part of our law in *Swissborough Diamond Mines*,[15] and since then has been affirmed in this Court in *Van Zyl*,[16] and more recently in *Cherry Blossom*[17] and *Obiang*.[18] It is of importance to be clear as to what this doctrine is, and what it is not. First, it is not a doctrine located in the application of choice of law rules in private international law. Second, though it shares a justificatory premise with state immunity, that is to say the mutual respect that is due to the equality of sovereign states, it is a distinct doctrine. The doctrine, unlike state immunity, is not based upon personal immunity. It is not a doctrine required by customary international law (though it may be permitted by it)

[15] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) (*Swissborough*) at 334.
[16] *Van Zyl and Others v Government of Republic of South Africa and Others* [2007] ZASCA 109; [2007] SCA 109 (RSA); [2008] 1 All SA 102 (SCA); 2008 (3) SA 294 (SCA) (*Van Zyl*) para 5.
[17] *Cherry Blossom* fn 7 above paras 86-88.
[18] *Obiang v Janse van Rensburg and Another* [2019] ZAWCHC 105; [2019] 4 All SA 287 (WCC) para 66.

because that body of law does not limit the subject matter jurisdiction of a domestic court to which a foreign state is neither a party, nor indirectly impleaded. Third, the doctrine is part of our common law, although its recognition as such is of relatively recent pedigree.

[64] The recognition of the doctrine by our courts has lent heavily upon English law and, in some measure, the expression of the doctrine that has taken root in the American cases. And while we owe much to the English common law, and have much to learn from it, our common law is not a supplicant species. Many of the submissions we heard pressed us to adopt one or other passage from the English cases. But this selective comparativism is not altogether helpful. In part this is so because there are disagreements, some in kind and some in degree, that are to be found in these cases. More importantly, the question for us is how persuasive is the exposition of the doctrine that has been adopted in English law (and indeed, in other relevant comparative law).

[65] As I shall explain, in English law, the content of the doctrine, its limitations, and the exceptions to it, have been the subject of much judicial consideration, and no small measure of disagreement. Nor have all common law jurisdictions, embraced the doctrine with unalloyed enthusiasm. In *Moti*,[19] the Australian high court considered an appeal in which the question was whether an indictment should be stayed as an abuse of process. The appellant had been brought from the Solomon Islands without his consent. The officials of the Solomon Islands who deported the appellant lacked the power to do so. The appellant contended that he had been unlawfully deported from the Solomon Islands. The primary judge in the court below had held that it was

[19] *Moti v The Queen* [2011] HCA 50; 245 CLR 456; 86 ALJR 117; 283 ALR 393; 218 A Crim R 204 (*Moti*) paras 50-52.

not for an Australian court to express an opinion on decisions made by the Solomon Islands government, relying upon the dictum of Fuller CJ in *Underhill v Hernandez*[20] in the US Supreme Court that 'the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory'. Of this case, the high court stated that it should not be understood, 'as establishing as a general and universally applicable rule that the Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law'. The high court considered that rather than adopting a general rule, the application of the rules governing the choice of law may provide a satisfactory basis to resolve issues of the kind that arise in cases where the foreign act of state doctrine is invoked. Ultimately, it favoured the position taken by FA Mann that 'the courts are free to consider and pronounce an opinion upon the exercise of sovereign power by a foreign Government, if the consideration of those acts only constitutes a preliminary to the decision of a question . . . which in itself is subject to the competency of the Court of Law'.[21]

[66] In *Nevsun*,[22] three Eritrean workers alleged that they were required to work in a mine in Eritrea where they were subjected to cruel and inhuman treatment. The mine was owned by *Nevsun*, the appellant. The workers sued *Nevsun* in the Canadian courts for breaches of customary international law and domestic torts. *Nevsun*, invoked the foreign act of state doctrine to bar the proceedings against it, contending that the doctrine precluded domestic courts from assessing the sovereign acts of a foreign government. The majority of the Supreme Court of Canada, while acknowledging that its common law has grown from the same roots as the English common law, held that

[20] *Underhill v Hernandez* 168 US 250 (1897) at 252.
[21] *Moti* fn 19 above para 52 citing FA Mann 'The Sacrosanctity of the Foreign Act of State' *Studies in International Law* (1973) 420 at 433-434, quoting von Bar, *Das Internationale Privat- und Strafrecht*, (1889), vol 2 at 685, translated by Gillespie as *Private International Law*, (1892) at 1121.
[22] *Nevsun Resources Ltd v Araya and Others* 2020 SCC 5; [2020] 1 SCR 166.

Canadian law had developed its own approach based on conflict of laws and judicial restraint, rather than 'an all-encompassing "foreign act of state doctrine"'.[23] Of the exercise of judicial restraint when considering foreign law questions, the court had this to say: 'This restraint means that courts will refrain from making findings which purport to be legally binding on foreign states. But our courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court'.[24]

[67] I turn next to the English law, to which we were invited by counsel to give our close attention, and deservedly so. In *Belhaj*, the foreign act of state doctrine was conceptualised as a set of rules, subject to limitations and exceptions. Lord Neuberger considered that the doctrine could be framed as four possible rules, while Lord Mance proposed a tripartite classification. Lord Sumption distinguished 'municipal law act of state' and 'international law act of state'.[25] The former captures the principle that the English courts will not adjudicate on the lawfulness or validity of a foreign state's sovereign acts under its own law. The latter holds that the English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states. While there is some intersection in these rule-based formulations, there are also important differences. Lord Mance considered that his formulation that approximates the municipal law foreign act of state should be limited to acts relating to property within the jurisdiction of the foreign state. Lord Neuberger, under his articulation of the rules, had further difficulty with the notion that an executive act of a foreign state, unlawful under the laws of that state, should be given effect to by an English court. Lord Sumption's speech in *Belhaj* does not support either of these qualifications.

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[23] Ibid para 44.
[24] Ibid para 47.
[25] *Belhaj* fn 8 above para 227.

[68] In the most recent treatment of the foreign act of state doctrine in English law by the Supreme Court, in *Deutche Bank*,[26] the formulation of Lord Sumption has prevailed. Lord Lloyd-Jones articulates the foreign act of state doctrine as an exclusionary rule, 'limiting the power of the courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings'.[27] The rule, he considered, is of application to legislative acts and executive acts. But the rule is subject to limitations and exceptions. These were framed as follows:

'(1) [T]he foreign act of state must, generally speaking, take place within the territory of the foreign state itself. This limitation may not always apply to Rule 3 (*Yukos Capital (No 2),* para 68).

(2) [T]he doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights (*Oppenheimer v Cattermole* [1976] AC 249, 277-278, per Lord Cross of Chelsea; *Kuwait Airways (Nos 4 and 5)* [2002] 2 AC 883 and *Yukos Capital (No 2),* paras 69-72).

(3) Judicial acts will not be regarded as acts of state for the purposes of the foreign act of state doctrine (*Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 and *Yukos Capital (No 2),* paras 73-91).

(4) The doctrine does not apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character (*Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171; *Korea National Insurance Corpn v Allianz Global Corporate & Specialty AG* [2008] 2 CLC 837 and *Yukos Capital (No 2),* paras 92-94).

(5) The doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to inquire into them for the purpose of adjudicating on their legal effectiveness (*Kirkpatrick* (1990) 493 US 400 and *Yukos Capital (No 2),* paras 95-104).

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[26] *Maduro Board of the Central Bank of Venezuela v Guaido Board of the Central Bank of Venezuela* [2022] 1 CLC 391, [2021] WLR(D) 638, [2022] 2 WLR 167, [2023] AC 156, [2022] 2 All ER 703, [2021] UKSC 57 (*Deutsche Bank*).
[27] Ibid para 135.

(6) For the doctrine to apply, challenges to foreign acts of state must arise directly "and not be a matter of merely ancillary or collateral aspersion" (*Yukos Capital (No 2)*, para 109).

(7) The foreign act of state doctrine should not be an impediment to an action for infringement of foreign intellectual property rights, even if validity of a grant is in issue, simply because the action calls into question the decision of a foreign official (*Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208, para 86 per Lord Collins of Mapesbury and Lord Walker of Gestingthorpe JSC and *Yukos Capital (No 2)*, paras 63-64).'[28]

[69] I turn to consider whether we should adopt this formulation of the foreign act of state doctrine as the best expression of our common law. I make three preliminary observations. First, the foreign act of state doctrine is a doctrine of our domestic common law. It is not required by treaty or customary international law. Second, it is a doctrine that provides reasons for a domestic court to decline to decide certain matters, even though the court's jurisdiction has been established. Third, while our courts have recognised the doctrine, they have given considerably less attention to its contents than is the case in other jurisdictions, as we have observed.

[70] Of the English case law, the first issue that requires consideration is conceptual. Generally, a clearly formulated rule that gives expression to the rationale for the rule provides certainty, and thus fosters the rule of law. The English cases, however, demonstrate that it has proved difficult to formulate the doctrine as a body of rules. Even the most recent formulation in *Deutsche Bank* is a lattice of rules, exceptions and limitations. This has occasioned academic commentary to describe the doctrine as 'shot through with indeterminacy'.[29] The difficulty is that the reasons that count in favour of limiting the power of a court to adjudicate upon the validity or lawfulness of a foreign state's sovereign acts, carried out within its own territory, must be

[28] Ibid para 136.
[29] Teo, M. 2021. Narrowing Foreign Affairs Non-Justiciability. *International and Comparative Law Quarterly*, 70(2), pp 505-527.

reckoned against countervailing reasons that pull against such limitation. But it is apparent that the English courts have struggled to fit the doctrine into this framework. *Deutsche Bank* references what it calls 'limitations and exceptions' to the rule. They combine conditions for the application of the rule and exceptions to the rule. This appears to muddle requirements of the rule, with grounds upon which the rule should not be followed. And this grounds the critique that the doctrine is principally comprehended by what it is not.

[71] No doubt efforts could be made to formulate the rule on the basis of its limitations and demarcate more clearly the grounds of exception that exclude the duty to follow the rule. There is however a larger issue at play, beyond legal architecture. The doctrine must capture the reasons for a court to decline to adjudicate the conduct of a foreign state and must also allow for reasons that favour such adjudication. It is difficult to formulate this weighing of reasons as a rule, with exceptions. There may be reasons that incline a court to abstain from adjudicating certain issues or weigh with the court to adjudicate these issues, notwithstanding the reasons to abstain. This balancing of reasons is not the same things as a want of jurisdiction, which a court either enjoys or lacks. The doctrine frames what a court ought to do, having considered the reasons for and against abstention. I do not think that the doctrine is correctly conceptualised as an exclusionary rule, subject to limitations and exceptions, because the weight of reasons is not readily susceptible of expression as a rule or an exception of invariable application.

[72] I turn to a consideration of the basis of the doctrine in English common law, and its fit with our common law. The foreign act of state doctrine is often said to be based on comity. Lord Sumption in *Belhaj* elaborated upon the constitutional dimensions of comity: the United Kingdom is 'a unitary body' and '[l]ike any other

organ of the United Kingdom, the courts must respect the sovereignty and autonomy of other states'.[30] This is the same foundation that supports the doctrine of state immunity. In addition, Lord Sumption considered the foreign act of state doctrine to rest upon the constitutional principle of the separation of powers.[31] It is for the executive to conduct the foreign affairs of the country, and the courts should not trespass upon this competence. Lord Neuberger and Lord Mance referenced a possible rule, derived from *Yukos*,[32] that would preclude the courts of the United Kingdom from investigating acts of a foreign state 'when and if the Foreign Office communicated the Government's view that such investigation would "embarrass" the United Kingdom in its international relations'.[33] Of this possible rule, both Law Lords doubted its exclusionary remit, and Lord Mance said of this: 'I see little attraction in, and no basis for, giving the Government so blanket a power over court proceedings, although I accept and recognise that the consequences for foreign relations can well be an element feeding into the question of justiciability'.

[73] How do these twin pillars, upon which the doctrine is constructed in English law, stand within our common law? Our common law, unlike English common law, is shaped and controlled by the Constitution. *Pharmaceutical*[34] made the monist structure of our law clear: 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'. What this has required of the courts is that the common law must be developed to fulfil the purposes of the Constitution and 'the legal order that it proclaims'.[35] Section 39(2) of

[30] *Belhaj* fn 8 para 225.
[31] *Belhaj* fn 8 para 225.
[32] *Yukos Capital SARL v OJSC Rosneft Oil Co* (No 2) [2014] QB 458; [2013] 3 WLR 1329, [2013] 1 All ER 223, [2012] WLR(D) (*Yukos*) 186 para 65.
[33] *Belhaj* fn 8 para 41.
[34] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674; 2000 (3) BCLR 241 (*Pharmaceutical*) para 44.
[35] Ibid para 49.

the Constitution requires that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.

[74] If the foreign act of state doctrine rests upon the constitutional principle of the separation of powers, then it is a principle, in this context, that does not render the decisions of government, in their dealings with foreign governments, immune from constitutional control. The government enjoys a large measure of discretion in conducting its foreign affairs, however, the Constitutional Court has recognised that, even in this sphere, a court may intervene in the face of abuse of power or the use of foreign policy contrary to the provisions of the Constitution.[36] In *Kaunda*,[37] the Constitutional Court again recognised the particular expertise of government, and its wide discretion, to deal with foreign affairs. Yet decisions made by government on these matters may be subject to constitutional review. The act of foreign state doctrine thus cannot rest on the absolute and exclusive authority of the executive to decide upon how to conduct its relationships with other sovereign states. If, as the cases establish, our courts may bring under constitutional review the conduct of foreign policy by the executive, then, the foreign act of state doctrine cannot rest upon the separation of powers as the basis for an exclusionary rule because the executive does not enjoy a constitutionally unbounded power to decide upon how the country's foreign policy is to be conducted.

[75] The reach of the Constitution has consequences also for the variety of the doctrine, to which I have referred, styled in *Belhaj* as international law act of state. To recall, a court will not adjudicate on the lawfulness of the extraterritorial acts of

[36] *Geuking v President of the Republic of South Africa and Others* 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC); 2003 (1) SACR 404 (CC) para 27.
[37] *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC); 2005 (1) SACR 111 (CC) *(Kaunda*).

foreign states in their dealings with other states. In *Buttes Gas*,[38] a claim was made that the United Kingdom had intervened politically with the Ruler of Umm al-Qywain, to forbid drilling by an oil company, Occidental, thereby defrauding it of the benefits of oil-bearing deposits. In a widely cited speech, Lord Wilberforce concluded that the claim was not justiciable, as it concerned acts 'operating in the area of transactions between states',[39] that would require adjudication without 'judicial or manageable standards'.[40]

[76] Yet it is precisely into this realm that the Constitutional Court has ventured. In *Law Society*,[41] the Constitutional Court declared the President's participation in support of a resolution by the Southern African Development Community (SADC) Summit to suspend the operation of the SADC Tribunal to be unconstitutional, unlawful and irrational. SADC was established by treaty and the Summit comprises heads of government of its member states. By agreeing to amend the treaty, at the behest of Zimbabwe, the President had failed to comply with his obligations under the Constitution. Mogoeng CJ, writing on this point for the Court, had this to say: 'Comity and sound diplomatic relations ought never to be a product of illegal or unconstitutional compromises that could, rightly or wrongly, be viewed as capitulating to the desires of others to exercise unchecked power to the potential prejudice of the rights of citizens'.[42] The Constitutional Court demonstrated no inhibition adjudicating upon the actions of the Government in its dealings with other states, within the framework of the SADC treaty. Litigants, following this decision, then sought damages from the Government on the basis that the wrongful and

[38] *Buttes Gas and Oil Co. and Another Respondents v Hammer and Another Appellants Buttes Gas and Oil Co. and Another Appellants v Hammer and Another Respondents* [1982] A.C. 888 (1981); [1981] 3 W.L.R. 787 (*Buttes Gas*).
[39] Ibid at 931
[40] Ibid at 938.
[41] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (*Law Society*).
[42] Ibid para 90.

unconstitutional conduct of the President precluded access to the SADC Tribunal, causing them to suffer damages. Though their claims were found to have prescribed,[43] the cause of action was not excluded by reason of its trespass upon diplomatic relations.

[77] What the *Law Society* case illustrates is that a claim against the Government, on constitutional grounds, implicating actions taken with other states in the realm of international law, is not beyond the adjudication of our courts. The foreign state doctrine was not raised in this matter. But what signifies is how far claims based on constitutional rights may implicate the actions of foreign states without presumptive exclusion.

[78] The other pillar upon which the foreign act of state doctrine rests, that is, that the courts, as part of the South African state, must respect the sovereignty and autonomy of other states, runs into similar difficulties. The constitution may require that our courts consider the legality of the legislative or executive actions of another sovereign state. In *Mohamed*,[44] the Constitutional Court had to consider whether to grant relief to an applicant who had been handed over by the South African authorities to agents of the Federal Bureau of Investigation in Cape Town for interrogation. Mr Mohamed was then removed to New York to stand trial on serious charges which carried the death penalty. No assurances were obtained by the South African authorities from the United States that Mr Mohamed would not be sentenced to death. The Constitutional Court held that the South African government had co-operated with a foreign government to secure the removal of a fugitive to be put on trial for his

[43] *President of the Republic of South Africa and Another v Tembani and Others* [2024] ZACC 5; 2024 (9) BCLR 1152 (CC).
[44] *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) (*Mohamed*).

life. This was inconsistent with the government's obligations to protect the constitutional right to life of everyone because it may not make itself party to the imposition of cruel, inhuman or degrading punishment.[45]

[79] While the offending conduct of the South African government in *Mohamed* took place in South Africa, the infringement of Mr Mohamed's rights to life and not to suffer cruel punishment came about because of our constitutional repugnance for the laws and executive actions of the United States in exacting the death penalty for crimes of the kind with which Mr Mohamed was to be charged. If the extraterritorial actions of the United States to impose and execute the death penalty under its laws were beyond the remit of our courts because of the respect that our courts owe to the sovereignty and autonomy of the United States, then it is not apparent how Mr Mohamed's constitutional rights were adversely affected. *Mohamed* was reaffirmed in *Tsebe*.[46]

[80] The foreign act of state doctrine, as part of our common law, must reflect the legal order that the Constitution proclaims. That legal order asserts the primacy of the Constitution and the Bill of Rights. This entails that there is no hard separation of powers that immunises government's diplomatic engagements from any constitutional review. Nor is the principle of respect for the autonomy and sovereignty of the laws and executive actions of a foreign state presumptively controlling when constitutional rights are at stake. The foreign act of state doctrine in our common law must reflect this constitutional primacy.

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[45] Ibid para 58.
[46] *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (*Tsebe*).

[81] What does this mean for a proper understanding of the foreign act of state doctrine, as a doctrine of our common law? First, the doctrine is not one of jurisdiction. The premise of the doctrine is this: even though the court enjoys jurisdictional competence, should the court nevertheless decline to adjudicate the matter? Second, it is uncontroversial that the doctrine is based on the principle of comity. Comity here stands for two principles: (i) that sovereign states recognise each other's sovereign power to act within their own territory whether by legislative or executive action or both; and (ii) sovereign states have the power to engage in dealings with one another, and that this is the terrain of state power and international law. These principles are owed respect when the acts of a foreign state are pleaded in a proceeding before our courts.

[82] Third, to show respect for these principles does not entail that our common law requires that these principles must be expressed as exclusionary rules. Some of the conceptual difficulties of doing so have been referenced above in my exposition of the English law. The heart of the problem is this. The principles afford reasons to decline to adjudicate certain issues. But there are reasons that count and pull in the opposite direction. In English law these reasons are treated as exceptions. But for us, the claims of constitutional conformity are not matters of exception, but foundational. They provide counter-veiling reasons for a court to abjure abstention. And the invocation of constitutional rights and the value of adjudication in the service of upholding the constitution are not the only reasons that may signify in this way. Breaches of international law and questions of remedial efficacy may also be availing. All of which points to the adoption of a doctrine that invites a court to weigh reasons, for and against, a decision to decline to adjudicate upon foreign acts of state.

[83] To conceptualise the doctrine in this way recognises that comity is a matter of deference to interests that require respect from the courts. These interests may be weighty. But to defer is not to abdicate. Other interests also warrant recognition and may move a court to decide the issues before it. As we have observed, our courts have been willing to subject to constitutional review conduct that might otherwise qualify for abstention on grounds of comity because the infringement of constitutional rights or international law is the more compelling value. It might be thought that a doctrine framed as a realm of reasons is to favour imprecision at the cost of rule-bound certainty. That is not, I apprehend, the real choice. It is a choice between a doctrine framed as rules that must yield to exceptions and limitations which, under our constitution, are of considerable and necessary amplitude, or a doctrine which weighs the reasons that are relevant to a decision as to whether the court should or should not adjudicate upon issues concerning foreign acts of state. The weight of reasons appears to me to be more congruent with the recognition that the principle of comity can command in our common law, a law that is required to give expression to the values of the Constitution.

[84] In *Swissborough*, the court was content to adopt a formulation of the foreign act of state doctrine from English law, but did not examine the doctrine within the framework of the Constitution. *Cherry Blossom* was not required to decide the ambit of the doctrine, and *Van Zyl* simply enunciated a principle of restraint. I find that the foreign act of state doctrine forms part of our common law. It is a doctrine composed not of rules but of reasons that count for and against the court's adjudication of a foreign state's acts. The weighing of reasons will take account of the restraint that is warranted by considerations of comity and the counter-veiling reasons that count in favour of entertaining the claim and adjudicating the acts of a foreign state.

The weighing of reasons in this case

[85] I turn to the application of the foreign act of state doctrine, as I have sought to conceptualise it, in the appeal before us. Unsurprisingly, the parties placed their emphasis on different components of EAC's pleaded cause of action. EAC submitted that their case is to hold the defendants liable for their wrongful conduct in depriving EAC of the economic benefits of the GSM license. The defendants drew attention to the allegations in the particulars of claim that attribute unlawful conduct to the government of Iran, as integral to EAC's cause of action.

[86] I recall that EAC did not seek to curtail their reliance on any averments comprising their claims. EAC contended in its written argument that its cause of action does not depend upon a finding that the government of Iran acted unlawfully. That contention cannot be accepted. The inducement claim requires a finding that the government of Iran was induced to replace EAC as a shareholder of the operating company that would hold the GSM license, and did so in breach of EAC's contractual rights. *Atlas Organic*[47] makes it plain that the delict of inducement rests upon a third party inducing a party to the contract to commit a breach thereof. If the inducement fails to bring about a breach of contract, the plaintiff suffers no harm because it continues to enjoy the performance due to it under the contract. The inducement claim thus depends upon the government of Iran having breached the contractual rights of EAC. Put differently, if the government of Iran was at liberty to replace EAC as a shareholder of the consortium that would hold the GSM license, without legal constraint, EAC would have no claim against the defendants. Hence, the legality of the actions of the government of Iran is integral to the inducement claim.

[47] *Atlas Organic* fn 2 at 202G-H.

[87] The prevention claim, as I have explained, stands on a different footing. It is premised on a finding that the government of Iran did not owe 'binding obligations' to EAC, as the inducement claim posits. However, the prevention claim alleges that the defendants engaged in bribery and corruption to induce the government of Iran not to conclude a binding contract with the Turkcell Consortium (including EAC) that would otherwise have led to the consortium implementing and operating the GSM cellular phone system in Iran. The pleadings identify the individuals in the government of Iran with whom the defendants engaged 'in corrupt acts with these individuals'. These representatives of the government of Iran are alleged to have been parties to acts of corruption as a result of which the government of Iran did not conclude the contract with the Turkcell Consortium that would otherwise have materialised. Although the government of Iran is not sued as a joint tortfeasor with the defendants, the complicity of its representatives in the corrupt scheme planned by the defendants is a necessary causal link in the liability that is sought to be established by recourse to the prevention claim. If the government of Iran had acted free of any complicity in the alleged corruption, the corruption alleged against the defendants would have visited no harm on EAC. The prevention claim thus depends upon the complicity of representatives of the government of Iran in acts of corruption that induced the government to deprive EAC of the benefits of the GSM license which it would otherwise have enjoyed. The unlawful conduct of the government of Iran is a necessary allegation in this cause of action.

[88] The lawfulness of the acts of the government of Iran cannot, thus, be said to be incidental to the cause of action upon which EAC relies. The foreign act of state doctrine is not of application if the pleading incidentally references the unlawful acts of a foreign state. But that is not the position here: the allegations of unlawful conduct on the part of the government of Iran are necessary for EAC to sustain its case. EAC

placed some emphasis on the decision of the US Supreme Court in *Kirkpatrick*.[48] But I do not consider that it assists EAC. In *Kirkpatrick*, the legality of the contract that was secured in Nigeria, by reason of the corrupt payments made to foreign government officials, was not a question that the US courts had to decide. The fact of such payments sufficed. EAC's claims, by contrast, require a court to decide upon the legality of the acts of the government of Iran.

[89] It follows from this analysis that the lawfulness of the executive acts of the government of Iran, taken within its territory, will have to be adjudicated upon by a South African court in order to decide EAC's claims. That triggers the deference that our courts accord to the autonomy of the sovereign power of another state to legislate and act within the bounds of its own territory. That deference means that courts in this jurisdiction have reason to proceed with caution as to whether to adjudicate the lawfulness or validity of an executive act of a foreign state performed within the territory of that state.

[90] The other dimension of the doctrine that requires consideration is whether there is some issue of the legality of the extra-territorial acts of foreign states in their dealings with each other that warrants deference by a South African court. EAC's particulars of claim make wide ranging allegations as to how the defendants acted to influence the South African government to provide diplomatic assistance for Iran's nuclear programme and to secure defence cooperation between the South African government and the Iranian Ministry of Defence. However, it does not appear that EAC's claims require any finding that the diplomatic cooperation that is alleged to have taken place between Iran and South Africa was itself unlawful, even if it came about as a result of what are said to be corrupt interventions. Nor is there any evidence

[48] *Kirkpatrick & Co Inc v Environmental Tectronics Corp Int* 493 US 400 (1990).

offered by the South African government to suggest that the airing of these matters in court would damage some specific aspect of the diplomatic relationship between South Africa and Iran, or indeed South Africa's relationship with another state. The evidence that may be led on these issues may be a source of some embarrassment, but that is not a consideration of much weight. The currency of our courts is justice not discomfort. I can find little, on this dimension of judgment, to weigh in the scales in favour the invocation of the doctrine to decline adjudication in a South African court of the diplomatic engagements between South Africa and Iran.

[91] I turn next to consider what considerations weigh in favour of our courts adjudicating EAC's claims. First among these is to ascertain whether the claims involve matters that tranche upon the Bill of Rights or other foundational constitutional principles. Section 8 of the Constitution states that the Bill of Rights applies to all law, and binds the legislature, executive and the judiciary. And s 7 of the Constitution requires the State, which includes the courts, to respect, protect and fulfil the Bill of Rights. The Constitution is the supreme law, and hence a common law doctrine that we are here concerned with must be applied in conformity with the Constitution.

[92] EAC, a *peregrinus*, has brought its case in the forum in which all of the defendants, save for MTN International, reside. It has observed the general rule, of considerable pedigree, *actor sequitur forum rei*.[49] EAC has, in consequence, the right conferred by s 34 of the Constitution to have any dispute that can be resolved by the application of law decided before a court. This right has both a formal and a substantive content. Formally, EAC has enjoyed access to the courts and the only question is whether our courts should adjudicate its claims. Substantively, EAC has

[49] *Sciacero & Co v Central South African Railways* 1910 TPD 119 at 121.

made claims against the defendants, all but one of whom are resident within the court's jurisdiction, and all of whom are alleged to have committed acts of some gravity. The wrongful conduct levelled against the defendants concerns a conspiracy of bribery and corruption, involving officials of the governments of South Africa and Iran. EAC comes to a South African court and seeks access to have its claims decided. It thus seeks the substantive enjoyment of its constitutional right of access to the courts. This too must be weighed in the balance. In addition, the constitutional significance of EAC's claims warrants consideration, and it is to this matter that I now turn.

[93] In *Glenister*,[50] the majority of the Constitutional Court held that the Constitution imposes an obligation on the State to establish and maintain an independent body to combat corruption and organised crime. In the course of their judgment, Moseneke DCJ and Cameron J, set out the basis upon which corruption 'threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order'.[51] The judgment recounts the international agreements on combating corruption that bind South Africa; the extensive domestic legislation that seeks to prevent and punish corruption; and the repeated admonitions of our courts, including this Court, that corruption offends against the rule of law and threatens our constitutional order.[52] In a passage of importance, the following is said: 'Section 7(2) casts an especial duty upon the State. It requires the State to "respect, protect, promote and fulfil the rights in the Bill of Rights". It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response'.[53]

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[50] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister*).
[51] Ibid para 166.
[52] Ibid paras 167-173.
[53] Ibid para 177.

[94] These pronouncements by the Constitutional Court are salient for the weighing that must be done to decide whether the South African courts should adjudicate upon the claims of EAC. EAC brings a private law claim for damages. But it seeks to hold to account defendants, two of whom are South Africans acting in positions of substantial corporate responsibility, in respect of a powerful group of South African companies, which are alleged to have corrupted the government of South Africa for private commercial gain. Alleged conduct of this kind cannot be relegated to the realm of private interest alone because it concerns the corruption of the South African government, and hence traverse allegations that go to the heart of the integrity of our constitutional order. As *Glenister* affirmed, the state, including the courts, have a duty to act against corruption. When a court has before it a case in which defendants are alleged to have committed serious acts of corruption involving high officials of the South African and Iranian governments, which, if proven, are deeply inimical to our constitutional order, it must consider the importance of adjudicating such a case in the interests of affirming the rule of law and upholding constitutional supremacy, as its primary duty. That the opportunity to do so arises from litigation brought by a litigant in a civil suit for damages can make no difference to the observance of this duty. As *Glenister* has made clear, what is required is a comprehensive and integrated response, and the courts are not exempt from playing their part. The allegations of corruption of high officials and the improper influence brought to bear upon decisions of government, of great importance, allegedly taken at the bidding of powerful corporate interests are matters our courts will not lightly retreat from adjudicating upon. That is so because conduct of this kind, if proven, is corrosive of our constitutional order. A civil suit which requires the adjudication of these issues allows the courts, should the case be proven, to remedy wrongful conduct of grave consequence both for the private interests of EAC, and the wider public interests that require corruption to be

confronted. There are thus strong reasons to favour adjudication over abstention when a litigant seeks access to the courts to adjudicate a case of this kind.

[95] Let me be quite clear as to this conclusion. First, the reasons that weigh in favour of adjudicating EAC's claim is not an invocation of international law on the combatting of corruption as a peremptory norm of international law, that is, as *jus cogens.* I do not consider the treaties to which South Africa is bound to enjoy that status. Nor do I rely upon some narrow public policy exception of the kind that prevailed in *Belhaj*. For reasons I have explained, the foreign act of state doctrine that I favour, rests upon a broader weighing test. And hence, I do not need to engage the exercise that much preoccupied the parties as to whether corruption can be compared to torture for the purposes of applying the doctrine. Third, what counts in favour of adjudication is whether there are rights or issues raised by the litigation that the court should decide because they engage matters of constitutional importance, of which the courts are the principal guardians. South African courts should not lightly side-step that responsibility.

[96] What then does the weighing exercise yield? Deference is due to the autonomy of Iran as a sovereign state that has acted to put in place a GSM licensee to provide cell phone services in Iran. And if it acted unlawfully in doing so, within its own territory, even as a result of the corruption of Iranian officials, there are reasons to say that this remains a matter for Iran, and not adjudication before the South African courts. As against this, a South African court is asked to adjudicate upon the alleged corruption by South African companies and their directors of high officials of the South African and Iranian governments for private gain. Corruption of this kind, if proven, is a grave threat to our constitutional order, and the South African courts have a duty to preserve that order. The primary way courts can do so is to adjudicate cases

of this kind. It would engender no small measure of surprise, given everything our courts have said about the dangers of corruption in South Africa, that a South African court, faced with a case of corruption of this alleged magnitude, considered, for reasons of deference, that it should decline to adjudicate the matter, and thought it preferable for the courts of Iran to do so.

[97] The balancing exercise, must also have regard to the component parts of the cause of action. The conspiracy pleaded by EAC is alleged to have been planned and developed by the defendants in Johannesburg. The bribery and corruption are said to have ensnared both South African and Iranian officials, and have influenced the policy of both government in dimensions of global significance. Ultimately, the actions of the defendants were intended to affect the ultimate award of the GSM licence in Iran, and allegedly did so. The cause of action is thus not bounded by one sovereign territory, nor confined to the gratification extended by South African companies to South African officials. The parties were at odds as to where the centre of gravity of the case lay. I take account of the fact that EAC's claims traverse wide-ranging allegations of illegality not only by officials of the South African government but also officials of the government of Iran. The particulars of claim also rest upon the unlawful usurpation of EAC's commercial opportunity by the government of Iran in Iran and the harm thereby caused to EAC. In sum, the illegality of the conduct of the government of Iran looms large in the formulation of EAC's claims. In the end, what weighs more heavily in the balance is the strength of the South African courts' duty to adjudicate cases which allege that South Africans have used bribery and corruption to suborn highly placed officials of the South African government for commercial gain. These allegations are not incidental or peripheral to the case. They implicate grave constitutional interests. For these reasons deference must yield to the court's greater duty to uphold the South African constitutional order.

[98] For these reasons the appeal must succeed on this issue. The high court adopted an exclusionary rule as the basis of the foreign act of state doctrine. It did so by adopting the English law. That was not warranted. The better conception of the doctrine, congruent with our constitution, is to allow for a broader weighing of reasons. The high court thus proceeded to decline to adjudicate EAC's claims on an incorrect understanding of the foreign act of state doctrine in our law. Once that is so, whatever species of discretion the high court may have exercised, it is open to appellate revision. On the application of the correct standard, the weighing yields an answer that requires the court to adjudicate EAC's cause of action. The special plea, on this score, thus falls to be dismissed with costs.

Choice of Law

[99] I recall that in terms of the separation order, the following issue fell to be decided: 'Does Iranian or South African law (or any other legal system) determine whether the allegations made in paragraphs 36 to 60 and 66 of the particulars of claim, both individually and collectively, (read with the corresponding pleas of the defendants thereto) found a claim for damages as the plaintiff contends'? The high court answered this question in the following way. 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. Whether the test of the *lex loci delicti commissi* is applied or the test of the country with the most significant relationship, the result is the same: the law of Iran is the operative legal system to decide whether the specified allegations in the particulars of claim found a claim for damages.

[100] EAC complains that the high court did not correctly formulate the conflict of law rules of application to the cause of action pleaded by EAC; nor did it properly

apply the rules it did comprehend. And consequently, the high court arrived at the wrong answer to the question that it was required to decide. The answer the high court should have given, so EAC contended, was that the law of South Africa is the *lex causae.* The defendants submit that the high court's judgment on this issue cannot be faulted.

[101] The parties were agreed on the starting point of the analysis. In order to decide the law that should be applied to the case before the court, the first step is one of characterisation.[54] The issue raised by the allegations in EAC's particulars of claim is one of substance. The claims are framed in delict. This was common ground between the parties. It was also the finding of the high court, and correctly so. The next step in the analysis is then to determine the conflict of law rules applicable to a delict of this kind. After some rather fragmentary judicial treatment of the question, the leading case in our law on this point is *Burchell*.[55] There is some doubt as to the precise *ratio* of the case. Ultimately, Crouse AJ, after a scholarly treatment of the comparative law, came to the following conclusion: 'After considering the *lex loci delicti* as a possible test, I ultimately decided that the *lex loci* was only to be used as a factor in a balancing test to decide which jurisdiction would have the most real or significant relationship with the defamation and the parties'. She thus appears to have adopted the position that the applicable law is the law of the jurisdiction which has the most significant relationship with the delict and the parties.

[102] There has been a fair measure of scholarly debate in the wake of *Burchell* as to precisely how the choice of law rule should be formulated.[56] Various permutations of

[54] *Society of Lloyds v Price; Society of Lloyd's v Lee'* [2006] ZASCA 88; 2006 (5) SA 393 (SCA).
[55] *Burchell v Anglin* 2010 (3) SA 48 (ECG) (*Burchell*).
[56] The debate is usefully summarised in *Lawsa* 3 ed vol 7(1) para 366.

the application of the proper law have been suggested in order to frame a rule that will be, as Professor Forsyth has observed, 'clear, certain and appropriate to the resolution of the dispute before the court'.[57] I am persuaded, along the lines that Professor Forsyth has suggested, that the rule that best satisfies these criteria may be formulated as follows. The law applicable to a delict shall be the *lex loci delicti,* but the *lex loci delicti* may be displaced in favour of the law of the country with a manifestly closer, significant relationship to the occurrence and the parties. In cases where there is uncertainty as to the *lex loci delict,* the legal system with which there is a significant relationship will decide the question of the *lex causae*. So formulated, the choice of law rule of general application is the *lex loci delicti*. That is a clear rule that has been widely adopted. The displacement of the rule requires a manifestly closer connection. This ensures that the rule is not supplanted, unless there is a clear showing that the law of another jurisdiction is plainly more appropriate. Flexibility of course yields some measure of uncertainty, strongly mitigated by the gravitational pull of the general rule. Since this formulation of the choice of law rule is at some variance with the conclusory framing in *Burchell*, *Burchell* is, in this respect, no longer to be followed.

[103] There remains a conceptual puzzle. Where, as in this case, the delict is transnational, that is to say, the conduct or events constituting the delict do not take place in one country, how is the *lex loci delicti* to be determined? There are three broad answers. First, the courts may adopt subsidiary rules that specify for particular delicts that the *lex loci delicti* is the place where the central element of the delict took place, and identify what should be taken to be the central element of the delict. I shall call this the essentialist approach. In some measure this was the approach taken in *Burchell*. The court reasoned as follows. At issue was a defamation. The essential

[57] Forsyth, C F. 2012. *Private International Law: The Modern Roman Dutch Law including the jurisdiction of the High Courts*. Cape Town: Juta. 5th ed, at 364.

element of a defamation is publication. Publication took place in Nebraska in the United States. That is then the *lex loci delicti*.[58] Second, the courts may hold that in a transnational delict the *lex loci delicti* is the country in which the greater part of the events or conduct making up the elements of the delict took place. I shall call this the plurality approach. The third approach is this. Where events constituting the delict take place in different countries, there is no *lex loci delicti*. The object of the enquiry is illusory. Better then to accept that the *lex causae* shall be determined on the basis of the significant relationship test. I shall call this the sceptical approach.

[104] The essentialist approach may give rise to some uncertainty as to what should be taken to be the central element of a particular delict. It is also predicated upon the doctrinal heresy that we have a law of *delicts*. The plurality approach may shade into the significant relationship test. And the third approach abandons the notion that a transnational delict can have a *lex loci delicti*.

[105] EAC and the defendants have adopted opposed positions as to the place of the commission of the delict. EAC contends that the focal point of the delicts that it relies upon is the intentional conduct of the defendants to induce a breach of contract or wrongfully to interfere with the commercial opportunity EAC would have enjoyed as a result of the Turkcell Consortium winning the tender. EAC argues that this intentional conduct issued from a conspiracy planned in South Africa by the defendants who comprise South African companies and citizens, save for MTN International. That the execution of that conspiracy took place only in part in South Africa, and its harmful consequences were felt in Iran, does not detract from the fact that the heart of what renders the conduct of the defendants wrongful took place in

[58] *Burchell* fn 55 above para 118.

South Africa. This qualitative judgment of wrongfulness should be determining as to where the delicts took place.

[106] The defendants' analysis is different. They contend that the greater part of the averments comprising EAC's cause of action is conduct tied to Iran. The tender was initiated by the government of Iran, under its laws, pursuant to which EAC claims to have secured rights that were breached by that government in Iran. Much of the influence that was brought to bear, constituting what is said to be an unlawful inducement, took place in Iran. And the ultimate harm visited upon EAC, being the usurpation of its participation in the business that the GSM licence enabled, also took place in Iran. Counsel for the MTN defendants provided us with a copy of EAC's particulars of claim marked up according to those averments that reference events in Iran, events in South Africa and those in both countries. That mark-up is an accounting that shows that a significant plurality of the pleaded case concerns conduct that is alleged to have taken place in Iran.

[107] EAC thus, in effect, follows the essentialist approach, while the defendants proceed along the lines of the plurality approach. I am disinclined to follow the sceptical approach. Many transnational delicts will have a centre of gravity which reflects a common-sense understanding of where the delicts took place. Nor do I consider that the essentialist approach should ordinarily prevail over the plurality approach. Unlike English law, we do not have a law of torts. The *lex aquilia* is a unified scheme of liability in which it is not apparent that one requirement of liability (or some combination) has centrality. Each requirement is necessary. There is no *a priori* reason to say that the place where the wrongful conduct was initiated is more salient than where the harm was done. In my view, the plurality approach best captures the sense of place in the case of a transnational delict.

[108] Once that is so, the *lex causae* in this case is the law of Iran because the greater part of the events or conduct making up the elements of the claims pleaded by EAC took place in Iran. If however, there is any uncertainty on this score, which I don't consider to be so, Iran is in any event the country with the closer, significant connection to the delict.

[109] I note parenthetically that what the application of the law of Iran will entail for the pleaded claims of EAC forms no part of the separation order. It may indeed have a bearing on what acts of state of the government of Iran, and their legality, can or must be pleaded. And this in turn could have a bearing on the subject matter of the other special pleas that form part of this appeal. This however is a function of how the parties have chosen to litigate this matter.

[110] It follows that on the issue of the choice of law, EAC's appeal must be dismissed with costs.

Conclusion

[111] EAC has prevailed in its appeal in respect of the Article 29 defence, the state immunity defence, and the foreign act of state defence. Its appeal fails on the choice of law issue. These are discrete issues identified for determination in the separation order. The costs, including the costs of two counsel, must follow the outcome of the appeal in respect of each of these issues.

[112] In the result the following order is made:

(a) On the issue identified in paragraph 1.1 of the court order dated 31 January 2022 (the separation order) and the order made by the high court in paragraphs 1.2

and 3 in respect thereof, the appeal is dismissed with costs, including the costs of two counsel.

(b) On the issue identified in paragraph 1.8 of the separation order concerning the special plea of the exclusive jurisdiction of the Iranian courts and the order made by the high court in paragraphs 4, 5 and 6 in respect thereof:

(i) The appeal is upheld, with costs, including the costs of two counsel;

(iii) Paragraphs 4, 5 and 6 of the order of the high court are set aside and replaced with the following order: 'the special plea is dismissed with costs, including the costs of two counsel';

(c) On the issue identified in paragraph 1.8 of the separation order concerning the special plea of state immunity and the order made by the high court in paragraphs 7, 8 and 9 in respect thereof:

(i) The appeal is upheld, with costs, including the costs of two counsel;

(iii) Paragraphs 7, 8 and 9 of the order of the high court are set aside and replaced with the following order: 'the special plea is dismissed with costs, including the costs of two counsel';

(d) On the issue identified in paragraph 1.8 of the separation order concerning the special plea of the foreign act of state doctrine and the order made by the high court in paragraphs 10, 11 and 12 in respect thereof:

(i) The appeal is upheld, with costs, including the costs of two counsel;

(iii) Paragraphs 10, 11 and 12 of the order of the high court are set aside and replaced with the following order: 'the special plea is dismissed with costs, including the costs of two counsel'.

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D N UNTERHALTER

JUDGE OF APPEAL

Molemela P (Mocumie JA concurring)

[113] I have read the judgment of my colleague, Unterhalter JA (the first judgment), and am in agreement with the order granted in paragraph 112(a) of the judgment in respect of the choice of law issue. I, however, respectfully disagree with the rest of the orders as well as the underlying reasoning. The relevant facts of this case have been correctly set out in the first judgment. I will, in this dissenting judgment, focus mostly on the areas of disagreement in respect of the law that should, in my respectful view, be applied to the facts.

[114] Like the high court, I hold the view that (i) EAC, as a bidder, was bound by the Tender Regulations; (ii) the conduct of the Iranian government is integral to the case; (iii) a finding regarding unlawful actions on the part of the Iranian government is a sine qua non to establish the delictual claim instituted by EAC; (iv) the Iranian government's allegedly unlawful conduct is central to EAC's claim; (v) the Tender Regulations were of application beyond the announcement of the winning bid; (vi) the language of Article 29 is widely framed; (vii) EAC was enjoined 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. Like the high court, I, too, find that there is no basis to do so. My reasons for this conclusion are set out in the succeeding paragraphs.

[115] I must state from the outset that I agree that what matters for the purposes of deciding the special pleas is to analyse what essential allegations are made by EAC in its particulars of claim. The particulars of claim state that the intended effect of the actions of MTN International was to induce the Iranian government to breach its

contractual obligations to EAC and have it replaced, and that the Iranian government was induced through bribery and corruption to replace EAC.

[116] The well-established maxim of Lord Denning in *Lazarus Estates Ltd v Beasley*[59] comes to mind. This maxim recognises that fraud is a fundamental flaw that can undermine the validity of any legal arrangement. The principle is essentially aimed at protecting the victim of fraud. Obviously, this is the reason why EAC is determined to seek redress in the courts, almost two decades after the commission of the alleged breach. To my mind, allegations of unlawful conduct directed at the government of Iran, predicated on collusion, bribery and corruption, entail putting the entire tender process to scrutiny.

Article 29 (foreign jurisdiction clause)

[117] MTN International invoked the foreign jurisdiction clause as contained in Article 29 of the Tender Regulations. Article 29 stipulates that the Regulations and the call for competitive bids to which they relate are regulated by Iranian law as regards their 'validity, interpretation, performance and termination'. It is well-established that where a party seeks to invoke the protection of a foreign jurisdiction clause, it should, as was done in this case, file a special plea seeking a stay of the proceedings pending the outcome of foreign proceedings. Once a special plea of that nature has been filed, the court will then be called upon to exercise its discretion whether to enforce the clause in question. The discretion to be exercised is fact-specific as each case must be considered on its own discrete facts.[60] A decision not to

[59] *Lazarus Estates Ltd v Beasley* [1956] 1 Q.B. 702; [1956] 2 W.L.R. 502; [1956] EWCA Civ 6 at 712. In *ABSA Bank Ltd v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC) para 39, this maxim was qualified as follows: '[The maxim] is not a flamethrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.'

[60] *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* [2012] ZASCA 123; [2012] 4 All SA 387 (SCA); 2013 (3) SA 91 para 29.

enforce a foreign jurisdiction clause in an agreement should only be made when there is a strong case for it.[61]

[118] As correctly recorded by the high court, MTN International contended that the reference to 'any dispute relative to these present regulations or the call for competitive bids to which they relate . . .' is wide and encompasses the present litigation, while EAC submitted that its action falls outside the ambit of the Regulations as the regulations in question provided for the competition phase only. EAC formed part of the Turkcell Consortium that bid for the tender under the discipline of the Tender Regulations. MTN International contended that if the claims now advanced by EAC in its suit before the South African courts is one 'relative to these present Regulations', as stated in the text of Article 29, then EAC must comply with its obligation to submit these claims to the competent Iranian courts, as Article 29 requires unless the South African court, in its discretion, finds that it should not do so. The question is whether the high court properly exercised its discretion to uphold the foreign jurisdiction clause. I can do no better than agree with the following apt summation of the high court:

'Although the tender document provides for two distinct trajectories for the award of the tender, it was not in dispute that in this matter the bidder or EAC was a consortium to which a specific trajectory applied. That trajectory allowed for the successful bidding consortium an opportunity to create an operating company which would be the recipient of the licence. *This provision, and the provisions in general, show that the article 29 provision remained operative beyond the allocation of the tender to a bidder as part of an extended process involving a provisional licence*. It is EAC's case that the cause of action is grounded in MTN's conduct and not that of the government of Iran. Although this may be so, the summary of facts shows that the conduct of the government of Iran looms large in the matter and *findings of untoward conduct by it will have to be made to sustain the delictual claim*. The thrust of MTN's argument was that EAC, as a bidder, is bound by the provisions

[61] *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd and Another; Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (W) at 656D-E; *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 333H-334A.

of art 29 and is thus forced to make its claim in the courts of Iran. *This is so due to the fact that the regulations remain binding also beyond the time of the allocation of the bid*. This is no doubt so as counsel for MTN demonstrated, one cannot compartmentalise the bid and its consequences. *Much was still to happen subsequent to the award of the tender, resulting from the provisions of the tender, including art 29, which had a reach and application far beyond the acceptance of the bid*. It is the acceptance by EAC of the terms of art 29 that binds it to the terms, also beyond the award of the bid. EAC's contrary argument cannot be sustained and is in conflict with its pleaded case.'[62] (Emphasis added.)

[119] Having provided the above context, the high court then gave no less than 13 reasons for having decided to exercise its discretion in favour of upholding the special plea relating to the foreign jurisdiction clause as set out in Article 29. Among weighty considerations were the following: (a) save for the preparatory actions, assertions made in support of alleged bribery, collusion and corruption relate to incidents which happened in Iran; (b) the central involvement of the government of Iran; (c) some of the documents EAC relied on were in the vernacular language of Iran; (d) EAC indicated that it could claim damages under Iranian law; (e) Iranian courts would not require expert testimony on Iranian law, including the justification for regulatory processes that were followed in the tender . . .; (f) it appeared that the claim could be decided within a single action, and a multiplicity of actions was not foreseen by any party. In my view, these are weighty considerations that, collectively, warranted the exercise of the discretion in favour of upholding the special plea relating to the application of the foreign jurisdiction clause.

[120] EAC has instituted an action that, by its nature, necessitates attributing unlawful conduct to both the Iranian Government and MTN International. For EAC to be awarded the billions of rands sought as damages, it must show that its replacement by

[62] *East Asian Consortium, B. V. v MTN Group Limited and Others* [2022] ZAGPJHC 969; [2023] 1 All SA 632 (GJ); 2023 (3) SA 77 (GJ) para 36.

MTN International as a service provider was motivated by MTN International's inducement and the bribes received by Iranian government officials, among other things. The high court correctly observed that the Tender Regulations constitute the exercise of public power by the government of Iran.[63] Indeed, disputes as to the validity, interpretation, performance and termination of the Tender Regulations, as specified in Article 29 thereof, are typical of disputes that may arise concerning the exercise of public power.

[121] There is no denying that the Tender Regulations stand front and centre in the litigation instituted by EAC. Compartmentalising the bid and its consequences by arguing that the Tender Regulations were applicable only until the appointment of the winner and that the wrongful conduct attributed to the Iranian government and MTN International does not fall within the remit of the Tender Regulations does not advance EAC's cause. This is because EAC is standing on the very Tender Regulations in its attempt to show that there were deviations from procedures and a subversion of the Tender Regulations which, according to EAC, could only have been as a result of MTN International's inducement and bribery. The fundamental relevance of the Tender Regulations (in which the foreign jurisdiction clause is set out in Article 29) to this case cannot be downplayed.

[122] Tritely, every case can only be proven by evidence. It is plain that in the determination of whether MTN International's replacement of EAC as the winning bidder was motivated by nothing else but corruption, it would be far easier for an Iranian court to subpoena the officials who were part of the tender process as witnesses than a South African court. It would therefore be ideal for such disputes to be submitted to the courts of Iran, which, as demonstrated by the annexures to EAC's

[63] Paras 34-35 of the first judgment.

particulars of claim, has an array of legislative measures directed at curbing bribery and corruption.

[123] 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. EAC has failed to demonstrate a compelling reason for the exercise of the court's discretion against enforcing the foreign jurisdiction clause as set out in Article 29. As I see it, the high court correctly exercised its discretion in favour of upholding the invocation of the foreign jurisdiction clause. Since the high court exercised its discretion judicially, there is no basis for this Court to interfere with its decision to uphold the special plea of foreign jurisdiction. EAC should not be allowed to escape the consequence of its own election.

The Foreign Act of State (FAOS) Doctrine

[124] I am of the view that a compelling case has been made for the application of the foreign act of state doctrine. As a point of departure, I am of the respectful view that the distinction made in the first judgment between what is termed an inducement claim and a prevention claim is tenuous. In effect, it is a distinction without a difference. A perusal of the particulars of claim reveals that the central plank of EAC's case was the delict of interference by inducement. According to the Shorter Oxford Dictionary 6th edition, the ordinary grammatical meaning of the word 'induce' is 'to succeed in persuading or leading someone *to do something*'.[64] In *Country Cloud*, the Constitutional Court, in the course of adjudicating a claim of pure economic loss, considered the role of inducement as follows:

'The cases where conduct may arguably be prima facie wrongful are limited. They involve a situation where a third party, A, the defendant, intentionally *induces* a contracting party, B, to breach

[64] Emphasis added.

his contract with the claimant, C, without lawful justification for doing so. But the Department did not induce iLima's breach in the relevant sense. In these circumstances this would require an act of persuasion directed at iLima with the intent that it *dishonour its agreement* with Country Cloud. The defendant wrongdoer thereby becomes an accessory to the *primary wrong: the breach of contract*. The act of persuasion, paired with intent, establishes this accessory liability.'[65]
This is a binding finding.

[125] I am of the view that by parity of reasoning, the passage above applies with equal force in the present case. This is because EAC unequivocally asserts that not only was the Iranian government, inclusive of MCIT, induced to replace it (EAC) with MTN International as a shareholder of the operating company that would hold the GSM licence, but that this constituted a wrongful and unlawful interference in its 'trading and contractual rights'. EAC's imputation of wrongdoing to the Iranian government is self-evident. The fact that wrongdoing is also imputed to the respondents does not change EAC's pleaded case in terms of which wrongdoing is attributed to the Iranian government. Inducing a party to agree to what is prohibited under the law taints the agreement and renders it unlawful. EAC pleads that unlawful interference is what prevented it from receiving the benefits to which it was entitled pursuant to the conclusion of the licence agreement and the granting of the GSM licence.

[126] EAC asserts further that *but for* the unlawful interference of the respondents, it would have received a 49% share of the revenue. It goes on to claim that as a result of that unlawful interference, it suffered damages in the amount of $4.2 billion (plus interest) by reason of 'the loss of business opportunities, turnover and profits associated with the GSM licence'. Shorn of all the surplusage, EAC avers that it is the inducement, to which the Iranian government was a party, which resulted in it

[65] *Country Cloud* fn 1 above para 30.

suffering damages. Thus, if the case as pleaded by EAC is to be accepted as a true reflection of the facts, the court adjudicating the matter would obviously find both the Iranian government and the respondents to be complicit in the inducement. But more than that, it would have to find that the Iranian government committed the primary wrong, namely the breach of contract, for nefarious considerations. I am fortified in this belief by the dictum in *Country Cloud*, alluded to in the preceding paragraph. The fact that the same conduct is separately considered under the rubric of *boni mores* and/or public policy considerations does not make a difference, in my view.

[127] The above conclusion is equally applicable to EAC's allegation that the government of Iran (including MCIT) was induced through bribery and collusion, to replace EAC with MTN International as the shareholder of ITSC. Here too, serious wrongdoing is being imputed to the government of Iran in the form of it having been complicit in bribery and corruption, which allegedly led to EAC suffering damages. As was the case in respect of inducement, here too, not only the allegations but a finding of unlawful conduct on the part of the government of Iran are necessary for EAC to succeed with its claim. Expressed differently, the outcome of the case turns upon a finding of inducement leading to unlawful conduct on the part of the Iranian government. In the language of the high court, they are a sine qua non to establish a delict. I therefore have no difficulty in concluding 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.

[128] Given MTN International's defence as raised in its plea, the processes leading up to and the impact of the promulgation of the Irancell Act, which required that 51% of the shareholding be held by Iranians, will be key aspects in the consideration of whether the Iranian government acted unlawfully. It follows that the validity of the

legal arrangements that saw EAC being replaced by MTN International will be among the key factors that warrant consideration in the legal proceedings. The fact that a pronouncement might have to be made in relation to internal regulatory processes of another sovereign country (the passing of the Irancell Act), as is the case in the present case, is a weighty consideration that should urge our courts to decline to adjudicate a case on account of the FAOS doctrine. As correctly pointed out in *Belhaj*, 'there is no more fundamental competence than the power to make laws'.[66]

[129] I find no basis for EAC's contention that the doctrine does not find application on the facts of the present case. In my view, a court should not ignore the applicability of the FAOS doctrine merely because the foreign state has not been cited, or relief has not specifically been sought against that state. To accept that as a reason not to apply the doctrine would be to depart from a body of authorities that recognise this doctrine as part of our law and would constitute expediency, in my view. In the present case, although no relief is sought against the Iranian government and MCIT, a finding of the Iranian government being complicit in corrupt activities through the acts of its officials is serious enough to tarnish its reputation. Moreover, bribery also triggers criminal sanctions for the implicated individuals. All of this, in proceedings in which neither the Iranian government nor the implicated officials have been cited, in circumstances where the parties expressly chose Iranian law as the law applicable to their dispute and where it is clear that, substantively, the *lex causae* is the law of Iran.

[66] See *Belhaj* para 135, where Lord Neuberger said: 'There is no doubt but the first rule exists and is good law in relation to property (whether immovable, movable, or intellectual) situated within the territory of that state concerned. Sovereignty, which founds the basis of the Doctrine, "denotes the legal competence which a state enjoys in respect of its territory" (Brownlie's Principles of Public International Law, 8th ed, (2012), p 211), and there is no more fundamental competence than the power to make laws. There is no doubt, however, that the first rule only applies to acts which take effect within the territory of the state concerned . . . I find aspects of the second rule in relation to property and property rights more problematical. In so far as the executive act of a state confiscating or transferring property, or controlling or confiscating property rights, within its territory is lawful, or (which may amount to the same thing) not unlawful, according to the law of that territory, I accept that the rule is valid and well-established.' (Emphasis added).

[130] I disagree with EAC's contention that the facts of this case resemble those in the US Supreme Court decision of *Kirkpatrick*.[67] An important distinguishing factor on the facts is that in that case, the foreign officials accused of corrupting the tender had already pleaded guilty, and a letter to that effect was sent by the legal advisor of the State Department to the district court before the hearing of the matter. Thus, the court proceeded on the basis that, on the strength of the plea of guilty, it was unnecessary for it to enquire into the legality of the primary contract. In the present matter, the adjudicating court will have to make that determination.

[131] An important observation in *Kirkpatrick* is that the Supreme Court of the United States made a distinction between the validity of a foreign act and the motivation behind the act. It considered the FAOS doctrine to be applicable in the former scenario but not in the latter. Having considered several cases as a way of illustrating that its decisions on FAOS had consistently adhered to the validity-motive distinction, it stated that '[i]n every case in which we have held the act of state doctrine applicable, the relief sought or the defence interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory'. It concluded that the FAOS doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires 'that in the process of deciding, the acts of foreign sovereigns taken within their jurisdictions shall be deemed valid'.[68]

[132] That the FAOS doctrine is part of our domestic common law was settled more than a decade ago in *Swissborough*.[69] When deciding *Swissborough*, Joffe J was already au fait with the two US judgments of *Underhill v Hernandez* and *Kirkpatrick*.

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[67] *Kirkpatrick* fn 48 above.
[68] *Kirkpatrick* fn 48 above at 707.
[69] *Swissborough* fn 15 above at 334D-E.

The dictum in *Swissborough* was approved by Harms ADP in *Van Zyl*, where he also referred to the House of Lords judgment of *Kuwait v Iraqi Airways* (*Kuwait*) with approval.[70] In concluding that the FAOS doctrine is part of our common law, the high court referred to *Swissborough*, *Van Zyl* and *Kuwait*. The specific paragraphs referred to by Harms ADP in *Kuwait* accord with a human rights-based approach that is consonant with the provisions of ss 7, 34 and 39(2) of our Constitution. I am therefore unable to agree that the high court adopted an exclusionary rule and adopted English law as the basis of the FAOS doctrine. Similarly, I disagree with the suggestion that the high court declined to adjudicate EAC's claims on an incorrect understanding of the FAOS doctrine in our law. Indeed, there are instances where courts will decline to apply the doctrine. However, on the facts of this case, I am unable to find any plausible reason why the respondents cannot successfully invoke the act of state doctrine.

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[70] *Van Zyl* fn 16 above para 5 referring to *Kuwait v Iraqi Airways Co and Anor* [2002] UKHL 19; [2002] 3 All ER 209 paras 24-26 which read as follows: '[24] On behalf of IAC Mr Donaldson submitted that the public policy exception to the recognition of provisions of foreign law is limited to infringements of human rights. The allegation in the present action is breach of international law by Iraq. But breach of international law by a state is not, and should not be, a ground for refusing to recognise a foreign decree. An English court will not sit in judgment on the sovereign acts of a foreign government or state. It will not adjudicate upon the legality, validity or acceptability of such acts, either under domestic law or international law. For a court to do so would offend against the principle that the courts will not adjudicate upon the transactions of foreign sovereign states. This principle is not discretionary. It is inherent in the very nature of the judicial process: see *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 932. KAC's argument, this submission by IAC continued, invites the court to determine whether the invasion of Kuwait by Iraq, followed by the removal of the ten aircraft from Kuwait to Iraq and their transfer to IAC, was unlawful under international law. The courts below were wrong to accede to this invitation.

[25] My Lords, this submission seeks to press the non-justiciability principle too far. Undoubtedly there may be cases, of which the Buttes case is an illustration, where the issues are such that the court has, in the words of Lord Wilberforce at page 938, 'no judicial or manageable standards by which to judge [the] issues': 'the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force and to say that at least part of these were "unlawful" under international law.' This was Lord Wilberforce's conclusion regarding the important inter-state and other issues arising in that case: see his summary at page 937.

[26] This is not to say an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognise a foreign law. Lord Wilberforce himself accepted this in the Buttes case, at page 931D. Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the Buttes litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome not in doubt. That is the present case.'

[133] Having considered all the judgments alluded to earlier (including the judgment of *Banco Nacional de Cuba v Sabbatino*,[71] which was considered in *Kirkpatrick*), as well as the various separate judgments authored in *Belhaj*), which traversed complex questions of law, it seems to me that all the available authorities figuratively swim in the same channel that accepts that the FAOS doctrine is not absolute, and every case must be judged on its own facts. It is for that reason that Lord Sumption stated that he would not altogether rule out the possibility that litigation between other parties might directly affect interests of a foreign state other than interests in property. Furthermore, *Belhaj* illustrates that the FAOS is applicable subject to public policy exceptions. The *Belhaj* type of public policy considerations are not applicable in the present case. The facts, too, are distinguishable, as the defendants in the *Belhaj* matter were alleged to have committed human rights violations, including unlawful detention, rendition and torture. In the present matter, the dispute pertains to an alleged breach of contractual rights, and no violations of human rights are attributed to the implicated Iranian government officials.

[134] As regards the constitutional context, I readily agree that the FAOS doctrine, as part of our common law, must reflect the legal order that the Constitution proclaims. It is evident from the provisions of s 39(2) of the Constitution, that South African courts must, when developing the common law, promote the spirit, purport and objects of the Bill of Rights. It follows that even when following policies of non-justiciability fashioned from other jurisdictions, as was done in *Swissborough* and *Van Zyl*, courts must do so within the framework of the Constitution of South Africa. It follows that the principles of respect for the autonomy and sovereignty of the laws and executive actions of a foreign state should not supersede the imperatives of the Constitution when constitutionally protected human rights are at stake. In endorsing

[71] *Banco Nacional de Cuba v Sabbatino* 376 U.S. 398, 401-06 (1964).

a proposition enunciated by the authors in *International Law, A South African Perspective*,[72] which was approved in *Obiang,* I agree that a court cannot fashion a principle of judicial restraint or non-justiciability for South Africa without taking South Africa's own constitutional framework into account. The FAOS doctrine in our common law must yield to this constitutional primacy. Indeed, a court may intervene in the face of abuse of power or the use of foreign policy if it is inconsistent with the provisions of the Constitution. This approach largely accords with the one followed by the Canadian court in *Nevsun*, even though *Nevsun* is distinguishable from the present case, on the facts. In applying all these constitutional principles to this case, it bears mentioning that EAC has not alleged any fear of abuse of power or a violation of human rights in Iran.[73]

[135] The fact that EAC was prepared to spend a substantial amount of money and obtain funding to do business in that country speaks volumes. It is significant that in para 66 of its amended particulars of claim, EAC pleaded that it 'relies for its assertions concerning the unlawfulness of the [MTN International] conduct and the manner of calculation of damages, in the alternative to its reliance on South African law' on several provisions of Iranian Law. It not only referenced those provisions but quoted liberally from them. Various Iranian statutes and articles thereon were attached to EAC's particulars of claim. These include articles of Iranian Civil Code; article 1 of the Civil Responsibility Code of Iran; articles of the law promoting the Health of Administrative System and Countering Corruption in Iran; articles of the Act on Aggravated Penalties for Offender of Bribery, Embezzlement and Fraud; articles of the Law on Punishment of Disrupters in the Economic System of the State; articles of

[72] Dugard J, Du Plessis M, Maluwa T and Tladi D. *Dugard's International Law: A South African Perspective* 5 ed (2019) at page 118.

[73] The high court stated as follows on this aspect at para 8: 'A further aspect relied upon by counsel for EAC is the submission that, in the event of a finding that a foreign law applies, it must be determined if that law passes constitutional muster in this country. However, nothing has been pleaded to show that the Iranian law of delict, or any other foreign law, if applicable, would be repugnant to our constitutional dispensation and I need say no more about that argument.'

the Islamic Criminal Code; articles of the Law on Punishment of Exerting Undue Influence; an article on the Law on Punishment of Collusion in Government Transactions; an article of the Governmental Transactions Regulations; articles of the Law on Prohibition of Intervention by Ministers, Members of Parliament and Government Personnel in Government and Civil Transactions; an article on the Transfer of Property of Others Punishment Act; and an article of the Registration of Deeds and Real Properties Act.

[136] Based on EAC's reliance on an array of legislative measures available to it in Iran, including those directed at addressing bribery and corruption, which include criminal sanctions,[74] it is reasonable to accept that Iran, too, has an integrated and comprehensive response to corruption as envisaged in the *Glenister* judgment.[75] This militates against any suggestion of practices that are inconsistent with our Constitution. As mentioned earlier, no such assertions were made in EAC's pleadings. Under the circumstances, there is 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 FAOS doctrine is applied. This is a weighty consideration that accords with the high court's reasoning and conclusion.

[137] Insofar as the first judgment states that the better conception of the doctrine, congruent with our constitution, is to allow for a broader weighing of reasons, there is nothing to suggest that the approach of the high court did not include a weighing of reasons. In my view, a balancing of all relevant considerations in the present matter does not suggest that the reasons for applying the doctrine were outweighed by those

[74] At para 66.6 of the amended particulars of claim, EAC pleaded as follows:
'The Iranian parliament has passed various Acts prohibiting bribery either as part of general criminal codes or particular laws since 1925'. At para 66.7 of the amended particulars of claim, EAC stated that a codification of various laws existing at the relevant times renders illegal conduct that falls within a collective definition of corruption.
[75] *Glenister* fn 50 above para 177.

opposed to it. The high court's conclusion that the FAOS doctrine poses a bar to the adjudication of this matter, is unassailable, in my view.

State Immunities Act

[138] Section 2(2) of the Foreign States Immunities Act 87 of 1981 states, in peremptory terms, that 'a court shall give effect to the immunity conferred by this section even though the foreign state does not appear in person'. A plain reading of this text suggests that immunity ought to be extended to the officials of a foreign government that is implicated. This interpretation accords with the interpretation attached to a similarly worded clause by the House of Lords judgment in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening*,[76] which held that state immunity can be extended to foreign officials acting in that capacity. Since the unlawful conduct bemoaned by EAC is equally that 'of all the actors'[77], including the Iranian government, the invocation of the Immunities Act in this matter is appropriate.

[139] The first judgment correctly points out that in *Belhaj*, Lord Sumption was not willing to rule out a possibility that litigation between other parties might directly affect interests of a foreign state other than property interests, and found that, at the very least the foreign state must have a legal interest to defend. My inclination, too, is that the class of rights of the foreign state that may give rise to a foreign state being indirectly impleaded should not be confined to rights in property and should be extended to a protectable legal interest. In my opinion, it suffices if the pleaded case is of such a nature that the legal rights of the foreign state would be affected because

[76] See *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)*; [2006] UKHL 26 [2007] 1 AC 270 paras 31 and 69. The court held that insofar as the agents of a state act in their public capacities, they are identified with the state in international law, so that references in the Act to a state 'must be construed to include any individual representative of the state acting in that capacity.'

[77] At para 31 of its judgment, the high court held that 'The unlawful conduct is equally that of all the actors, including the Iranian government.'

the judgment and/or order of the court might implicate the foreign state's entitlement to those rights, or the exercise thereof. Under such circumstances, the foreign government (and in the circumstances of this case, the Iranian government and / or MTN International) can seek intervention by way of state immunity on the basis that they have a legal interest to defend themselves against the imputation of delictual liability.[78] I therefore disagree that the rights of the foreign state that qualify for inclusion in the class *must* have the attributes that the property cases exemplify.

[140] Notwithstanding what is stated in the preceding paragraph, it seems to me that EAC's case is, in any event, predicated on interests in property, which would bring this case within the protectable rights envisaged in *Belhaj*. EAC specifically pleaded that for its assertions of unlawfulness and the manner of calculation of damages, it relies inter alia on various provisions of Iranian law.[79] In para 66.3 of the amended particulars of claim, EAC pleaded that 'under Articles 308 and 310 of the Iranian Civil Code, the transfer of property rights of one person without their express consent may be considered as usurpation . . .; according to Iranian law, the usurper [MTN International] is liable to the owner [EAC] not only for the return of the subject matter of the transaction, but also to damages, including consequential damages . . .'. It can therefore be inferred that EAC's reliance on these statutes is because it considers the granting of the license to be a form of property rights.

[141] It must be borne in mind that the license was awarded to MTN International by MCIT.[80] Notably, EAC considers the awarding of this license to have impinged on its

[78] See paras 20 – 21 of *Country Cloud*. The *lex aquilia* is a unified scheme of liability and all the key elements thereof, including wrongfulness and causation, are necessary for a delictual claim to succeed.
[79] Several statutes relied upon by EAC have provisions making specific reference to property. One of the provisions relied upon, Art 259 provides that where an unauthorised party has handed over the subject matter of a transaction to another party and the owner of the property does not authorise that transaction, then the party who has taken possession of that property 'is liable for the property and its usufruct'.
[80] Para 44 of EAC's amended particulars of claim.

property rights (the *Belhaj* type of rights). MTN International pleads that the passing of the Irancell Act by the Iranian government justified MCIT's decision to replace EAC with it (MTN International). Logic dictates that the imputation of wrongfulness to the government of Iran in a court finding would be tantamount to negating the Iranian government's entitlement to grant property rights in the form of awarding a license to MTN International. The corollary is that MCIT, together with the Iranian government, are indirectly impleaded in a case premised on a breach of property rights. It is this form of indirect impleading of a foreign sovereign state that triggers the application of the Immunities Act.

[142] I am unable to agree with the proposition that a finding that the government of Iran was responsible for the substitution of EAC for MTN International will not have any adverse entailment upon the legal rights or liabilities of Iran because the liability that would accrue from any award of damages would be borne by the defendants, not Iran. Neither do I agree with the proposition that Iran will suffer no detriment to any of its rights, nor accrue any liability from a judgment that finds it to have been complicit in acts of bribery, corruption and unlawful interference. As correctly pointed out by the high court, the unlawful conduct, if found, is equally that of *all* the actors, including the Iranian government.[81] It bears emphasising that imputing wrongfulness to the Iranian government will not merely be an obiter dictum in which the South African court remarks that the Iranian government was 'responsible' for the substitution of EAC by MTN International'. Based on the principles laid down in *Country Cloud*, I agree with the contention that EAC's delictual claim against MTN International cannot succeed in a South African court unless that court makes a specific *finding*, as a matter of law, that the government of Iran acted wrongfully and that it is such unlawful conduct that led to MTN International replacing EAC as the

[81] Para 31 of the judgment of the high court. Emphasis added.

successful bidder and being awarded the GSM license. Without such a finding, the element of causation cannot be proven, and the claim cannot succeed.

[143] From my point of view, it is not inconceivable that indeterminable reputational damage may ensue for the government of Iran in the marketplace[82] because of evidence denouncing the executive actions of its officials relating to the award of a license,[83] adduced in a forum in which it, as an implicated party, has been denied an opportunity to give its side of the story to refute EAC's claims. That the first judgment opines that the usurpation of a business opportunity by way of bribery and corruption on the merits may be said to offend against the morality of the marketplace[84] only serves to bolster my view regarding the negative impact of this litigation on a foreign state which purports to have acted in accordance with its laws.

[144] For all the reasons set out above, I would dismiss the appeal with costs, including the costs occasioned by the employment of more than one counsel.

M B MOLEMELA
PRESIDENT

[82] See para 18 of the first judgment, where it is stated that:
'And the usurpation by way of bribery and corruption of a business opportunity that had been won by way of competition on the merits may be said to offend against the morality of the marketplace.'
[83] The implicated officials are named in EAC's response to the request for further particulars.
[84] See para 18 of the first judgment, where it is stated that:
'And the usurpation by way of bribery and corruption of a business opportunity that had been won by way of competition on the merits may be said to offend against the morality of the marketplace.'

Appearances

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For the first to fourth respondents:	W Trengove SC (with him S Symon SC and P Ngcongo)
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For the fifth respondent:	J Cane SC (with her L Sisilana)
Instructed by:	Werksmans Attorneys, Johannesburg
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For the sixth respondent:	K Hopkins SC (with him A Coutsoudis and D Mokale)
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