Conflict of laws in the South African courts: a recent missed opportunity

Posted on behalf of Jason Mitchell, barrister at Maitland Chambers in London and at Group 621 in Johannesburg.

It's rare for conflict of laws to come up in South African courts (with the notable exception of the Turkcell litigation from earlier this year; see the summary on this site at https://conflictoflaws.net/2025/south-africa-grapples-with-the-act-of-state-doctrine-and-choice-of-law-in-delict/).

A recent High Court judgement, *Placement International Group Limited v Pretorius*, is an opportunity missed. A Hong Kong company is in the business of recruiting South Africans and placing them with international companies. It employed two South Africans to do the recruitment. They worked for the company for several years and, so the company alleged, acquired confidential information about the company's customers, methods, and the rest. The two employees resigned and started their own competing company. The employment contracts were governed by Hong Kong and had restraints of trade (the judgement does not say if there were dispute resolution/jurisdiction clauses). The company applied for an interdict against the two employees and the competing company in South Africa.

The company chose not to sue on the restraints of trade in the employment contracts (or on any contractual rights to confidentiality that are usually included in restraints). Instead, the company based its cause of action on delict (in general, the use of trade secrets and confidential information is a species of unlawful competition under South African law). The company seems to have made that

choice because, so it thought, it had no cause of action under Hong Kong law.

The court dismissed the application, but its reasons are unclear. According to one interpretation of the judgement, the primary reason for dismissing the application was that the main harm, a specific job fair where the company conducts most of its recruitment, had already occurred, making an interdict no longer necessary. On another reading, the court seems to doubt that the company even made out the necessary prima facie right, partly because there was nothing confidential to protect but also, importantly, because of the effect of Hong Kong law governing the contracts.

Throughout the judgement, there is an unexpressed concern regarding forum shopping. The premise of this concern is that, at least according to the judgement, the restraints of trade are void under Hong Kong law (and that, presumably, there is no equivalent protection for confidential information under Hong Kong law). The parties did not present any evidence regarding Hong Kong law on this issue.

From that premise, the judge concluded that the company jettisoned a doomed (Hong Kong-governed) contractual claim for a viable (South African-governed) delictual claim.

It is regrettable that there was no engagement with characterisation and choice of law. The judge is alive (and concerned about) the link between the employment relationship and confidentiality duties. Under South African choice of law rules, the choice of law rule for delict is the lex loci delicti, but it may be displaced by the law of the country with a manifestly closer, significant relationship to the occurrence and the parties. The court should have at least gone through the conflicts process to determine whether Hong Kong law had a manifestly closer relationship, considering that it governed the employment relationship.

The judgment is available here: https://www.saflii.org/za/cases/ZAGPPHC/2025/1252.html