

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 11435/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 19 December 2022 E van der Schyff

In the matter between:

ORGANI MARK (PTY) LTD

PLAINTIFF

and

G N E AKOODIE

1ST DEFENDANT

J G AKOODIE

2ND DEFENDANT

Judgment

Van der Schyff J

Introduction

[1] In this stated case, the main question the court is required to answer is whether this court has jurisdiction to determine the dispute between the parties, set out below,

and apply eSwatini law in doing so. The parties formulated four secondary but related questions that, in my view, essentially form part of the central question:

- i. Would the exercise of jurisdiction to determine the dispute offend the principle that foreign statutes, such as the eSwatini Companies Act of 2009 [the Swaziland Act], have no extra-territorial effect?
- ii. Is the reference to 'court' in section 361 of the Swaziland Act a reference to the High Court of Swaziland and not the High Court of South Africa?
- iii. If the reference to "court" in section 361 of the Swaziland Act is a reference to the High Court of Swaziland, does this have as a consequence that this Court does not have jurisdiction to determine the dispute between the parties?
- iv. Should the defendant's special plea succeed or fail?

Background and relevant facts

- [2] The plaintiff, a company, has its registered office at 14 Sultan Avenue, Die Boord, Stellenbosch, Western Cape, South Africa.
- [3] Spintex (Swaziland) (Pty) Ltd (Spintex) is a company incorporated in eSwatini according to the laws of eSwatini. The eSwatini Companies Act of 2009,¹ is an Act duly promulgated in eSwatini and has at all material times been in force in eSwatini. At all material times, Spintex conducted its business exclusively in eSwatini. Spintex was placed under final winding up by the High Court of eSwatini on 8 May 2019.
- [4] The eSwatini Constitution of 2005,² is duly promulgated in eSwatini and has at all material times been in force in eSwatini.³

¹ The Act forms part of the agreed bundle of documents.

² The Constitution forms part of the agreed bundle of documents.

³ Section 252(1) of the Constitution provides as follows: "Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the

[5] The defendants, who reside in Johannesburg, South Africa, were directors of Spintex and registered as such in eSwatini. Because the defendants reside within this court's area of jurisdiction, they are subject to the jurisdiction of this court.

[6] The plaintiff sued the defendants in the Gauteng High Court. It seeks an order that the defendants are liable without limitation for the debts of Spintex under the provisions of section 361 of the eSwatini Companies Act, which provides as follows:

'If it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may on the application of the Master, the liquidator, the judicial manager, any creditor or member of the company, declare that any person who knowingly was a party to the carrying on of the business in such manner, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.'

[7] The defendants have raised a special plea in bar, asserting:

- i. 'The plaintiff's cause of action offends the principle that foreign statutes, such as the Swaziland Act, have no extra-territorial effect. In addition, the reference to "court" in section 361 of the Swaziland Act is a reference to the High Court of Swaziland and not the High Court of South Africa;' and
- ii. 'This Honourable Court accordingly lacks jurisdiction to grant the declaratory and consequential relief sought in terms of the plaintiff's particulars of claim.'

6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22nd February 1907 are confirmed and shall be applied and enforced as the common law of Swaziland except where and to the extent that those principles or rules are inconsistent with this Constitution or a statute."

[8] In order to determine the merits of the claim, this court would be obliged to apply the law of eSwatini, including its Companies Act, to the dispute between the parties. To find in favour of the plaintiff, this court would be obliged to:

- i. apply the provisions of the eSwatini Companies Act; and
- ii. hold that the defendants are liable without limitation for Spintex's debt pursuant to the provision of section 361 of the eSwatini Companies Act.

[9] Although section 424 of the Companies Act 61 of 1973, which is still in force by virtue of Item 9(1) of Schedule 5 of Act 71 of 2008, provides similar statutory relief, the South African Act does not find application.

[10] Subject to the plaintiff establishing a basis upon which the jurisdiction of the eSwatini court could be founded, the law of eSwatini entitled the plaintiff to issue summons out of the courts of eSwatini and to sue the defendants by way of edictal citation, alternatively issue summons out of the courts of eSwatini and establish jurisdiction over the defendants in one or more of the recognised methods at common law, 'in the event that a basis existed upon which the jurisdiction of the eSwatini court could be founded.'

The parties' submissions

(i) Plaintiff

[11] The plaintiff submitted that it is well-established that our courts will entertain jurisdiction and, if necessary, apply foreign law in circumstances where a defendant whose person is subject to its jurisdiction is sued locally. If this was not the case, a plaintiff might be left in a situation where it has a good claim but is unable to sue. Because the plaintiff and the defendants are *peregrini* of Eswatini, the plaintiff would not be able to sue in Eswatini unless the plaintiff can identify assets of the defendants situated in Eswatini capable of attachment.

- [12] The plaintiff relied on *Minister of Transport, Transkei v Abdul*⁴ to substantiate its contention that this court has the necessary jurisdiction to adjudicate the present matter. In *Abdul*, the Minister of Transkei (Minister) sued Abdul in the Durban and Coast Local Division, claiming damages arising from a motor vehicle collision between a car driven by Abdul and one driven by an employee of the Minister. It was alleged that Abdul was negligent. Abdul pleaded, denying negligence, and counterclaimed, alleging that the Minister's employee was negligent. In a special plea to the counterclaim, the Minister alleged that the counterclaim had prescribed under the provisions of two Transkei Acts. In replication, Abdul asserted that because the Minister elected to sue in a court outside the territorial limits of the Republic of Transkei while being able to sue from a court within the territorial limits of Transkei, the Minister cannot place reliance on the said statutes.
- [13] On appeal, the court considered the matter on the basis that what had to be decided was whether the provisions of the two Transkei Acts were substantive or procedural in nature: if substantive, the *lex causae* would apply, if procedural, the *lex fori*. The court held that the sections of the respective Acts were procedural in nature, and dismissed the special plea. Counsel submitted that it is clear from the judgment that if it were found that the provisions were substantive in nature, the special plea would have succeeded despite it being founded on a Transkei statute.
- [14] Counsel submitted that the *Abdul* case resonates with the current matter before the court. In both matters, the defendant had been sued in its home jurisdiction, the court was called upon to apply a foreign statute, and the dispute arose in a foreign jurisdiction. In both, the special plea was raised that a foreign statute does not apply extra-territorially. For the special plea raised in this matter, counsel contended that the two cases could not be distinguished.

⁴ 1995 (1) SA 366 (N).

- [15] Counsel referred the court to *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc. and Others*,⁵ *Bell v Bell*,⁶ *Esterhuizen v Esterhuizen*⁷ and *Caterhan Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another*⁸ to substantiate the submission that if the proper law applicable to any dispute is foreign, the court will apply that law, including any relevant statutes, in determining the matter.
- [16] Counsel emphasised that the defendants' assertion that the plaintiff seeks to enforce section 361 of the eSwatini Companies Act extra-territorially is fundamentally flawed. The plaintiff seeks to obtain relief against two *incolae* in their home jurisdiction, asserting that by their conduct in eSwatini, they have infringed the provisions of an eSwatini statute and are liable for the consequences of that infringement. It seeks to have an eSwatini dispute adjudicated in this court according to the *lex causae* – eSwatini law.

(ii) *Defendants*

- [17] The defendants submitted that a court can only hear a matter if it has jurisdiction. The defendants asserted that the plaintiff is wrong to rely on principles concerning private international law without there being any conflict of laws. The issue at hand is the ambit of the court's jurisdiction and not the principles of private international law. Counsel submitted that when the issue of jurisdiction is considered without the 'muddying effect of private international law,' it is clear that in our law, the residence of a defendant, on its own, is not sufficient to bestow jurisdiction on a court.
- [18] Counsel submitted that, as set out in the stated case, the plaintiff first and foremost seeks a declaratory order in terms of section 361 of the eSwatini Companies Act. The ensuing monetary claims flow from, and have no independent standing outside, the declaratory order sought in terms of the foreign statute. The source of the

⁵ 1983 (1) SA 276 (A).

⁶ 1991 (4) 195 (W).

⁷ 1999(1) SA 492 (C).

⁸ 1998 (3) SA 938 (SCA).

plaintiff's cause of action against the defendants is not founded in contract, delict, or unjust enrichment but solely based on section 361 of the eSwatini Act.

[19] The defendants contend that:

- i. This court lacks the jurisdiction to grant the declaratory relief sought by the plaintiff because it offends the principle that foreign statutes governing matters such as company law and insolvency have no extra-territorial effect. Counsel referred the court to *Cooperative Muratori & Cementisti v Companies and Intellectual Property Commission*;⁹
- ii. The reference to 'the court' in the eSwatini Companies Act refers to the High Court of eSwatini and not the High Court of South Africa. The power to grant declaratory relief is conferred, by statute, on the eSwatini High Court.

[20] Counsel contended that the power of every court in South Africa could only be exercised within its recognised territorial boundaries.¹⁰ He submitted that section 21 of the Superior Courts Act 10 of 2013 indicates that the residence of the defendant on its own, is not sufficient to establish the jurisdiction of the High Court – 'The conjunction used [in section 21] is 'and' and not 'or', and so it is necessary for the cause to have arisen within the area of jurisdiction of this Honourable Court.' The defendants submitted that the 'facts of this matter, the nature of the proceedings as well as the nature of the relief claimed, militate against this Honourable Court assuming jurisdiction in the matter.' Relying on *Bid Industrial Holdings (Pty) Ltd v Strang and Another*,¹¹ counsel submitted that there must be a sufficient connection between the suit and the area of jurisdiction of the court concerned before the court will dispose of a matter.

[21] *In casu*, counsel contended, the cause of action advanced by the plaintiff has no connection with the area of this court's jurisdiction, and the plaintiff relies solely on

⁹ 2021 (3) SA 393 (SCA) at par [31].

¹⁰ *Schlimmer v Executrix in Estate of Rising* 1904 TH 108 at 111.

¹¹ 2008 (3) SA 355 (SCA).

the place of the defendant's residence. In this case, residence on its own is insufficient to establish jurisdiction.

[22] The defendants' counsel submitted that the plaintiff's reliance on the principles of private international law is misplaced because private international law 'is the body of law that determines which legal system must be applied to resolve a dispute where the application of the court's own law, also known as the *lex fori*, would be inappropriate and unjust.' Counsel further contended that private international law proceeds from the premise that two independent legal systems can apply to the resolution of a dispute and is then concerned with ascertaining which legal system should be applied to a given set of facts. Because there are no competing systems of law at play in this matter, private international law does not apply. Counsel highlighted that statutes of the nature of the eSwatini Companies Act do not have any extra-territorial effect – *Cooperative Muratori & Cementisti v Companies and Intellectual Property Commission (CMC v CIPC)*.¹²

[23] The defendants submitted that the plaintiff's contention that it will be left without any legal recourse against the defendants unless it can identify assets of the defendants in eSwatini and proceed to attach those assets to establish the jurisdiction of the eSwatini High Court is misplaced. This is so because s 361 of the eSwatini Act empowers the eSwatini High Court to deal with the matter.

Discussion

[24] The crisp question to answer is whether this court has the necessary jurisdiction to grant a declaratory order to the effect that the defendants are personally liable without limitation for the debts of Spintex (Swaziland)(Pty) Ltd (Spintex) pursuant to the provisions of s 361 of the eSwatini Companies Act, merely because they are resident in the area of the court's jurisdiction.

[25] In considering this issue, it is imperative to keep in mind that there is no indication in the stated case that there is any connection or link between Spintex and South

¹² 2021 (3) SA 393 (SCA) at para [31].

Africa. Neither is it stated that Spintex conducted any business in South Africa or was registered as an 'external company' in South Africa.

(i) *Private International Law*

[26] Private international law is often referred to as 'conflict of laws.' It, however, refers to the law regulating private relationships across national borders, or to put it differently, private relationships involving a foreign element. Private international law deals with three main issues: the jurisdiction of a court to deal with a case, the law applicable to the case, and the recognition and enforcement of foreign judgments.¹³ *In casu*, the plaintiff is correct when contending that the principles of private international law apply. Although the parties are both *incolae* of this court, the cause of action arose in a foreign jurisdiction in terms of a foreign statute, and the dispute includes a civil element.¹⁴ The dispute involves foreign elements. In the current matter, there is no conflict of laws. The parties agree that the plaintiff's cause of action is founded in s 361 of the eSwatini Companies Act. Since the question of whether a court has jurisdiction to decide a dispute is separate from the question of which law the court will apply to that dispute, the mere fact that the parties are in agreement as to the law applicable to the dispute does not render principles of private international law nugatory.

[27] The question is thus whether this court has judicial competence over the dispute. A court can only adjudicate a dispute over which it has jurisdiction. Bennett and Granata¹⁵ explain that where a court is not bound by international or regional private international law instruments, the national legal principles will determine which court is competent to decide the matter at stake. As indicated in the following paragraphs, this principle is confirmed by South African caselaw.

¹³ C. F. Forsyth. *Private International Law*. 5th ed. JUTA, 3.

¹⁴ A. Bennett and S Granata. *When Private International Law Meets Intellectual Property Law A Guide for Judges*. 2019. WIPO and the HCCH, 1, 2.

¹⁵ Bennet and Granata, *supra*, 31.

[28] The word 'jurisdiction' has many meanings in South African jurisprudence.¹⁶ The Constitutional Court in *Gcaba v Minister for Safety and Security*,¹⁷ confirmed the meaning of the term as follows:

'Jurisdiction means the power or competence of a Court to hear and determine an issue between parties.'

[29] In *Ewing McDonald & co Ltd v M & M Products*,¹⁸ the Appellate Division, as it was referred to at the time, stated that:

'Such power is purely territorial; it does not extend beyond the boundaries of, or over subjects **or subject-matters** not associated with, the Court's ordained territory.'

[30] In an earlier decision, *Estate Agents Board v Lek*,¹⁹ the court stated that whether the court *a quo* had jurisdiction:

'depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein [i.e., effectiveness], or in some cases (a) and (b).'

[31] In determining whether the court has the requisite jurisdiction to determine a matter, it is necessary to consider the 'distinction between cases where there is a lack of power in the court to deal with the cause and cases where the only disability arises from the fact that the defendant is not in its territorial sphere of influence.'²⁰

¹⁶ D.E. Van Loggerenberg. Pollak – The South African Law of Jurisdiction. 3rd ed. JUTA, original service -2019, p1.

¹⁷ 2010 (1) SA 238 (CC) at 263B.

¹⁸ 1991 (1) SA 252 (A) at 256G-H.

¹⁹ 1979 (3) SA 1048 (A) at 1063-8.

²⁰ *Towers v Paisley* 1963 (1) SA 92 (E) at 93E.

[32] With the defendants residing in the court's area of jurisdiction, there is little doubt that any order that this court may grant, if it is a competent order, can effectively be enforced by this court. Thus, the main question is whether this court can grant a competent order due to the nature of the order sought and the source of the relief sought. The issue of subject-matter jurisdiction lies at the heart of the issue put forward in the stated case.

[33] 'Subject matter jurisdiction' refers to the power of a court to decide a matter depending on the nature of the claim or controversy brought before the court.²¹ It requires that the court has jurisdiction over the legal issues in dispute. A comparative perspective provided by Bennet and Granata²² indicates that a common approach is that the court of the State in which the defendant is domiciled will have jurisdiction over that defendant, even in relation to facts occurring outside that State. However, Harms DP, held in *Gallo Africa Ltd v Sting Music (Pty) Ltd*:²³

'[O]ur courts have for more than a century interpreted it to mean no more than that the jurisdiction of the High Court is to be found in the common law. For the purposes of effectiveness, the defendant must be or reside within the area of jurisdiction of the court... Although effectiveness "lies at the root of jurisdiction" and is the rationale for jurisdiction, "it is not necessarily the criterion for its existence". What is further required is a *ratio jurisdictionis*. The *ratio*, in turn, may, for instance, be domicile, contract, delict, and, relevant for present purposes, *ratione rei sitae*. It depends on the nature of the right, or claim, whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough.'

[34] *In casu*, the only connecting factor between the dispute and this court is that both parties are *incolae* of South Africa, with the defendants residing in the jurisdictional area of this court. The proceedings **are not based:**

²¹ Bennett and Granata, *supra*, 32.

²² *Supra*, 33.

²³ 2010 (6) SA 329 (SCA) at 333A-C (para [10]).

- i. on a cause of action that arose in South Africa,
- ii. on a choice of court agreement; or on
- iii. liability that arises in terms of a South African statute'.

The proceedings **do not involve** a contravention of South African legislation, property in South Africa, or a delict committed in South Africa.

[35] In *CMC v CICP* the court dealt with the issue of whether a company incorporated in a country other than South Africa is entitled to take advantage of the business rescue provisions of the Companies Act 71 of 2008. In the alternative, the applicant asked for an order that the order issued by the Court of Ravenna in Italy be recognised in the Republic of South Africa. The Supreme Court of Appeal explained:²⁴

'Judgments that determine a party's rights or status are capable of giving rise to a cause of action in South Africa and *Jones v Krok* was concerned with that type of case. It was not concerned with the enforcement in this country of the statutes of other countries governing matters such as company law or insolvency. There the principle that foreign statutes have no extra-territorial effect comes into play.'

[36] The plaintiff effectively seeks this court to enforce the provisions of s 361 of the eSwatini Companies Act, not only in South Africa, but also after the company was placed in final winding up by the High Court of eSwatini.²⁵

[37] In *Kanyhm Estates (Pty) Ltd and Others v Swaziland Industrial Development Co. Ltd and Others*,²⁶ the High Court of Eswatini, in a matter where the question of liability or otherwise of directors of a company was to be determined under s 361 of the Eswatini Companies Act, stated the following:

²⁴ *CMC v CICP*, *supra*, at para [31].

²⁵ It is stated in the stated case that Spintex was placed under final winding up on 8 May 2019.

²⁶ (1217 of 2014) [2019] SZHC 45 (11 March 2019).

'[8] It is trite that a company is a legal entity that is separate from its shareholders and/or directors, with its own rights and duties. On this basis shareholders, directors and/or anyone entrusted with managing the business affairs of the company is ordinarily not liable for its debts. This position is so well-entrenched that there is no need to make reference to any legal authority. I do, nonetheless, refer to the landmark case of SALOMON V SALOMON AND CO, which has been followed by all common law jurisdictions. In this country, and in many other jurisdictions, it has been recognized that the acts or omissions of those who are in control of the business affairs of the company may be responsible for bringing the company to its knees, through acts of recklessness or fraud. In such event it is perfectly rational that those entrusted with conducting the business affairs of the company may be held to be personally liable for the debts of the company which are occasioned by their recklessness or fraud. In this country this is provided for in Section 361 of the Companies Act 2009.

[9] It is under this Act, and this Act **only**, that the court may, upon the application of any interested party, "declare that any person who knowingly was a party to the carrying on of the business in such manner, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct." For the avoidance of doubt I repeat, that it is only the court that may make such declaration, and in terms of the interpretation section court means the "High Court" and under certain circumstances may refer to the Magistrates' Court. It follows that unless and until such officer of the company has been competently declared to be personally liable he/she may not be held so liable. This, in the main is the basis for the application for separation of the issues that the Supreme Court has directed to be adjudicated upon by this court.' (Footnotes omitted).

- [38] A director's liability to third parties in terms of the eSwatini Companies Act, although provided for '*ex lege*,' can only arise after it has competently been declared that the director may be held so liable. The application for a declaratory order arises out of a

winding-up process already underway under eSwatini legislation in eSwatini. The order is a subordinate process that forms part of the liquidation process. The eSwatini Companies Act empowers the 'High Court' with the jurisdiction to grant such a declaratory order. In the context of this Act, and also considering other provisions wherein 'the court' is empowered to exercise a discretion relating to aspects dealt with in the respective sections of the Act, the reference to the 'High Court' exclusively reserves the power to make the declaratory order to the High Court of eSwatini. The reference to the 'High Court' cannot be interpreted to refer, for example, to the High Court of South Africa, just as a reference to the 'Minister' cannot be interpreted to include the 'Minister of Justice' of South Africa, or reference to the 'Master' be interpreted to refer to the Master of the High court of South Africa.

- [39] The plaintiff based the relief it seeks exclusively on provisions of the eSwatini Companies Act. In my view, the only connecting factor between this court and the defendants is their residence, and them at most being domiciled, in the court's area of jurisdiction. Before the plaintiff can claim monetary relief, a declaratory order must be obtained in s 361 of the eSwatini Companies Act. Such declaratory order can, in my view, only competently be granted by the eSwatini High Court as this court lacks jurisdiction to grant the declaratory relief sought in terms of the plaintiff's particulars of claim. Even if it was found that the principle *actor sequitur forum rei* applies the question would have remained whether the High Court of Swaziland is not the more appropriate court to hear the matter. Eiselen,²⁷ explains that the *forum non conveniens* doctrine exists in many, mostly common law, legal systems, but not in civil law systems. It allows a court of competent jurisdiction to decline to adjudicate the matter on the ground that there is a more appropriate court to hear the matter.²⁸

Order

In the result the following order is granted:

²⁷ S. Eiselen. 'Goodbye arrest *ad fundandam*. Hello *forum non conveniens*?' 2008 TSAR 794 – 800, at 797.

²⁸ See *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA) and also *Agri Wire (Pty) Ltd v The Commissioner of the Competition Commission* 2013 (5) 484 (SCA).

- 1. The defendants' special plea that** this court lacks jurisdiction to grant the declaratory relief sought in terms of the plaintiff's particulars of claim, is upheld with costs.



E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 19 December 2022.

Counsel for the plaintiff:	Adv. G. I. Hoffman S.C.
Instructed by:	VZLR INC.
Counsel for the defendants:	Adv. C.J. McAslin S.C.
With:	Adv. T. Govendor
Instructed by:	AM THERON INC.
Date of the hearing:	7 October 2022
Date of judgment:	19 December 2022