



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 240/2023

In the matter between:

ORGANI MARK (PTY) LTD

APPELLANT

and

GOOLAM NABI EBRAHIM AKOODIE

FIRST RESPONDENT

JAMEEL GOOLAM AKOODIE

SECOND RESPONDENT

Neutral citation: *Organi Mark (Pty) Ltd v Goolam Nabi Ebrahim Akoodie and Another* (240/2023) [2024] ZASCA 44 (8 April 2024)

Coram: PONNAN, SCHIPPERS and MATOJANE JJA and COPPIN and MBHELE AJJA

Heard: 29 February 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 release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 08 April 2024.

Summary: Whether a South African high court has jurisdiction to consider and determine a claim under s 361 of the Swaziland Companies Act 8 of 2009 against two directors resident within its area of jurisdiction arising from their directorship of an eSwatini company liquidated in that country.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Schyff J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Coppin AJA (Ponnan, Schippers and Matojane JJA and Mbhele AJA concurring):

[1] The appellant, Organi Mark (Pty) Ltd, is a company incorporated in accordance with the laws of South Africa with its registered address in Stellenbosch. In 2020, it instituted an action in the Gauteng Division of the High Court, Pretoria (the high court) for an order declaring that the respondents were personally liable, in terms of s 361 of the Swaziland Companies Act 8 of 2009 (the Swaziland Companies Act), for the debts allegedly owed by an eSwatini company, Spintex Swaziland (Pty) Ltd (Spintex), and related relief. Spintex has since been liquidated in eSwatini. The respondents who were directors of Spintex, are resident within the area of jurisdiction of the high court.

[2] The appellant alleges that the respondents permitted Spintex to trade 'recklessly' within the meaning of that expression as contemplated in s 361 of the Swaziland Companies Act. On that basis, the appellant sought to hold the respondents liable in terms of the provisions of that section for 'the payment of all or any of the debts of Spintex, including [the] debts [owed] to [Organi Mark (Pty) Ltd]'.

[3] The appellant accordingly sought an order in the following terms:

- '1. Declaring that the defendants are liable without limitation for the payment of the debts of Spintex.
2. Declaring that the defendants are liable to make payment to the plaintiff in the sum of R7 167 880.97 together with interest, calculated from 1 April 2019 to date of payment at the prime rate charged by the First National Bank plus 3.0%.
3. Granting judgment against the defendants jointly and severally, the one paying the other

to be absolved for payment of the sum of R7 167 880,97 together with interest, calculated from 1 April 2019 to date of payment at the prime rate charged by the First National Bank plus 3.5%.

4. Ordering the defendants to pay the plaintiff's costs of suit jointly and severally the one paying the other to be absolved.'

[4] The respondents raised the following special plea:

- '1. The plaintiff seeks declaratory relief in terms of section 361 of the Eswatini Companies Act No. 8 of 2009 ("the Swaziland Act"), to the effect that the first and second defendant be held personally liable, without limitation, for the debts of a foreign company, Spintex Swaziland (Pty) Ltd, premised on the allegation that the defendants, as directors of Spintex, permitted it to trade recklessly within the meaning of section 361 of the Swaziland Act.
2. 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.
3. This Honourable Court accordingly lacks jurisdiction to grant the declaratory and consequential relief sought in terms of the plaintiff's particulars of claim.'

[5] The matter thereafter proceeded by way of the following stated case before the high court:

- '1. The plaintiff has its registered office situated at 14 Sultan Avenue, Die Boord, Stellenbosch, Western Cape, South Africa.
2. Spintex (Swaziland) (Pty) Ltd ("Spintex") is a company incorporated in eSwatini according to the laws of that country.
3. At all material times Spintex conducted its business in eSwatini, and not in South Africa.
4. Spintex was placed under final winding up by the high court of eSwatini on 8 May 2019.
5. At all times material, the defendants:
 - 5.1. Were directors of Spintex and registered as such in eSwatini;
 - 5.2. Were resident in Johannesburg, South Africa and are subject to the jurisdiction of this Court.
 - 5.3. The eSwatini Companies Act of 2009, which forms part of the agreed bundle of documents is an Act duly promulgated in eSwatini and has at all material times been in force in eSwatini.
6. The eSwatini Constitution of 2005, which forms part of the agreed bundle of documents, is an Act duly promulgated in eSwatini and has at all material times been in force in eSwatini.

7. Section 252 (1) of the eSwatini Constitution reads as follows:
 “Subject to the provisions of this Constitution or any other written law, the principles and rules that formed, immediately before the 6th September, 1968 (Independence Day), the principles and rules of the Roman Dutch Common Law as applicable to Swaziland since 22 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. The plaintiff has sued the defendants in the Gauteng High Court. It seeks an order that the defendants are liable without limitation for the debts of Spintex pursuant to the provisions of section 361 of the eSwatini Companies Act which reads:
 “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 debts or other liabilities of the company as the court may direct.”
9. The defendants have raised a special plea in bar asserting:
 - 9.1 “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
 - 9.2 “This Honourable Court accordingly lacks jurisdiction to grant the declaratory and consequential relief sought in terms of the plaintiff’s particulars of claim.”
10. 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.
11. In particular, in order to find in favour of the plaintiff, this Court would be obliged:
 - 11.1 To apply the provisions of the eSwatini Companies Act to the dispute;
 - 11.2 To hold that the defendants are liable without limitation for the debts of Spintex pursuant to the provisions of section 361 of the eSwatini Companies Act.
12. Section 424 of the old Companies Act in South Africa, which is still in force by virtue of Item 9(1) of Schedule 5 of Act 71 of 2008, provides the same statutory relief as section 361 of the eSwatini Companies Act, however section 424 of the old Companies Act in South Africa does not apply on the facts of this matter.
13. 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 a edictal citation, alternatively, the

law of eSwatini entitled the Plaintiff to issue summons out of the courts of eSwatini and, to 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 issues for determination

- '1. Does this court have jurisdiction to determine the dispute between the parties and apply eSwatini law in so doing?
2. Would the exercise of jurisdiction to determine the dispute offend "the principle that foreign statutes, such as the Swaziland act have no extra-territorial effect"?
3. 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"?
4. If 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, does this have as a consequence that this Court does not have jurisdiction to determine the dispute between the parties?
5. Should the defendants' special plea succeed or fail?
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[6] The high court upheld the special plea with costs. This is an appeal against that order with the leave of the high court.

[7] In terms of s 21(1)¹ of the Superior Courts Act 10 of 2013, the high court has jurisdiction over all persons residing in and all causes arising within its area of jurisdiction. Our courts have for more than a century interpreted the predecessors of the current section to mean 'no more than that the jurisdiction of the high courts is to be found in the common law'.²

[8] As Nienaber JA pointed out in *Ewing Macdonald & Co Ltd v M & M Products Company and Others*:³

'This section, the latest in a line of legislative enactments broadly restating the common law, differentiates between "persons" and "causes arising". The expression "causes arising" has been

¹ The section provides that a High Court has jurisdiction 'over all persons residing or being in and in relation to all causes arising ...within its area of jurisdiction in all other matters of which it may according to law take cognizance' and that it has certain powers in respect of appeals, reviews and the making of declaratory orders. The previous section, s 19(1)(a) of the Supreme Court Act 59 of 1959 provided virtually the same.

² *Gallo Africa Ltd and others v Sting Music (Pty) Ltd and Others* [2010] ZASCA 96; 2010 (6) SA 329 (SCA); [2011] 1 All SA 449 (SCA) para 10.

³ *Ewing McDonald & Co Ltd v M&M Products Company and Others* [1990] ZASCA 115; [1991] 1 All SA 319(A); 1991 (1) SA 252 (AD) (*Ewing McDonald*) at 257E-H.

interpreted in the *Bisonboard* judgement. . . as signifying not “causes arising” but “legal proceedings duly arising”, that is to say, proceedings in which the Court has jurisdiction under the common law. . .’

[9] As pointed out by Trollip JA in *Estate Agents Board v Lek (Estate Agents Board)*,⁴ whether the high court has jurisdiction in these proceedings depends on: (a) the nature of the proceedings; (b) the nature of the relief claimed therein; or (c) in some cases, both (a) and (b). The consideration in (b) is based on the principle of effectiveness, which is the power of the court not only to grant the relief claimed, ‘but also to effectively enforce it directly within its area of jurisdiction’, i.e., without any resort to other procedural provisions that rendered the processes and judgments of a division effective beyond its area of jurisdiction.

[10] The argument advanced on behalf of the appellant is that because the respondents reside within the high court’s area of jurisdiction, that is sufficient for it to give an effective judgement against them. That, however, is to emphasize effectiveness at the expense of territoriality. Although effectiveness may be a rationale for jurisdiction, it is not necessarily the criterion for its existence, and it does not by itself confer jurisdiction on a court.⁵

[11] Having pointed out that effectiveness may be a factor to be taken into account, in conjunction with other factors, in considering whether some reason for jurisdiction exists, Trollip JA in *Estate Agents Board*, stated:⁶

‘It follows that, merely because under the SC Act of 1959 the notice of motion issued out of the court a quo in the present proceedings was effectively served on the Board in Johannesburg and any judgment or order given by it can be effectively executed (if it is executable) against it, it does not mean that the court a quo had jurisdiction to hear and determine these proceedings. Some *ratio jurisdictionis* according to the common law had also to be present before it could be held that the “cause” was one “arising” within the area of jurisdiction of the court a quo in terms of section 19 (1) of the SC Act of 1959.’

[12] Counsel for the appellant conceded that residence on its own did not determine jurisdiction in this matter. But no *ratio jurisdictionis* aside from residence was relied upon. The subject matter over which the appellant asks the high court to assume jurisdiction concerns the alleged reckless or fraudulent conduct by respondents in a foreign country,

⁴ *Estate Agents Board v Lek* 1979 (3) SA 1048 (AD) at 1063F-H.

⁵ *Ewing McDonald* at 259H-260D.

⁶ *Ibid* at 1063D-E.

in relation to a foreign company that was wound up by a foreign court in that country.⁷ There is nothing that links the high court to the statutory claim that the appellant seeks to enforce. Moreover, s 361 is a provision of an eSwatini statute that arises upon the insolvency of a company in that country. The statute has no extraterritorial effect.⁷ The reference to 'the court' in s 361 can only be a reference to the courts in eSwatini and not South Africa.

[13] It follows that the appeal must fail. In the result, it is dismissed with costs.

P COPPIN
ACTING JUDGE OF APPEAL

⁷ *Cooperativa Muratori Cementisi - CMC Di Ravenna and Others v Companies and Intellectual Property Commission* [2020] ZASCA 151; 2021 (3) SA 393 (SCA) para 31.

Appearances

For the appellant:	J P Van Der Berg SC
Instructed by:	VZLR Inc. Attorneys, Pretoria Honey Attorneys Inc, Bloemfontein
For the respondents:	J Daniels SC with T Govender
Instructed by:	J V Rensburg Kinsella Inc, Pretoria Noordmans Attorneys, Bloemfontein.