

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 11435/20

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

Date: 4 October 2021

E van der Schyff

In the matter between:

G N E AKOODIE

1<sup>ST</sup> APPLICANT

J G AKOODIE

2<sup>ND</sup> APPLICANT

and

ORGANI MARK (PTY) LTD

RESPONDENT

*In re:*

ORGANI MARK (PTY) LTD

PLAINTIFF

and

G N E AKOODIE

1<sup>ST</sup> DEFENDANT

J G AKOODIE

2<sup>ND</sup> DEFENDANT

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Judgment

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Van der Schyff J

- [1] The respondent (plaintiff) issued a summons on 12 February 2020 against the applicants (defendants) in their capacities as directors of the company Spintex Swaziland (Proprietary) Limited (Spintex). The defendants reside in Johannesburg. Spintex is a company incorporated in accordance with the laws of Eswatini. Spintex was finally liquidated on 8 May 2019 by order of the High Court of Eswatini. The plaintiff is a company incorporated in terms of the laws of South Africa with its registered address in Stellenbosh.
- [2] The plaintiff pleads in its particulars of claim that Spintex applied on 30 January 2017 to open an account with the plaintiff pursuant to which credit facilities would be extended to it for the purposes of facilitating the provision of services and the supply of goods by the plaintiff to Spintex. During May 2017, the plaintiff and Spintex entered into a written Integrated Supply Chain Agreement (the ISCA). The ISCA was signed by both parties in Johannesburg. In terms of this agreement, the plaintiff undertook to sell cotton fibre to Spintex. Spintex would spin such fibre into cotton yarn to supply yarn to the Mr. Price Group Ltd Integrated Supply Chain Programme. In July 2017, the plaintiff and Spintex entered into two additional further agreements. From January 2017 – November 2017, the plaintiff rendered services to Spintex and sold cotton to Spintex pursuant to the ISCA and the further credit agreements. On 30 November 2017, Spintex was indebted to the plaintiff in the aggregate amount of R6 352 523.34. This amount, which is not in dispute, was due and payable. The amount continued to attract interest, and as of 31 March 2019, Spintex was indebted to the plaintiff in the sum of R7 167 880.97.
- [3] The plaintiff pleads in its particulars of claim that since 28 February 2014, Spintex was trading in insolvent circumstances to the knowledge of the defendants. As directors of Spintex, the defendants recorded in each of its financial statements for the years ended 28 February 2014 to 28 February 2017 that such statements *'have been prepared on the basis of accounting policies applicable to a going concern. This basis presumes that funds will be available to finance future obligations....'* The audited financial statement of Spintex for the year ended 28 February 2017, in



particular, reflects that *'the ability of the company to continue as a going concern is dependent on a number of factors. The most significant of these is that the members continue to procure funding for the ongoing operations for the company'* and that the *'ability of the company to continue as a going concern depends upon the continued support of its stakeholders.'*

[4] The plaintiff pleads that Spintex, to the knowledge of its directors, thus applied for and obtained credit from the plaintiff in circumstances where the payment of its indebtedness to the plaintiff was dependent upon the procuring of funding and the continued support of its shareholders. The defendants were under a positive obligation to ensure that Spintex did not incur credit unless adequate funding and adequate financial support from Spintex's shareholders were in place to ensure that creditors and the plaintiff, in particular, would be paid in full. The defendants recklessly permitted Spintex to incur credit with the plaintiff and to become indebted to the plaintiff. In these circumstances, the plaintiff pleads that:

- a. The defendants are declared liable, without limitation of liability, in terms of s 361 of the Eswatini Companies Act of 2009 for the payment of all or any of the debts of Spintex, including its debt to the plaintiff;
- b. The plaintiff is entitled to an order declaring that the defendants are liable to make payment to it in the sum of R7 167 880.97, together with interest;
- c. The plaintiff is entitled to judgment against the defendants jointly and severally the one to pay the other to be absolved.

[5] In their plea, the defendants denied that they acted recklessly or that Spintex traded in insolvent circumstances and pleaded that the plaintiff was provided with, amongst others, the contact details of their auditors and three credit references. They also pleaded that payments in the amount of R5 291 955,37 were made to the plaintiff, which payments are not reflected or accounted for by the plaintiff. They pleaded that a portion of Spintex's factory burnt down during December 2017, and as a result of the damages occasioned by the fire, Spintex was forced to shut down permanently.

- [6] The defendants subsequently filed a notice of intention to amend their plea to include a special plea. The defendants plead that the plaintiff's cause of action offends the principle that foreign statutes, such as the Eswatini Companies Act No 8 of 2009, have no extra-territorial effect. They contend that the reference to 'court' in s 361 of the Eswatini Companies Act is a reference to the High Court of Swaziland and not the High Court of South Africa. As a result, they plead that this court lacks jurisdiction to grant the declaratory and consequential relief sought in terms of the plaintiff's particulars of claim.
- [7] The plaintiff gave notice of its intention to oppose the proposed amendment of the defendants' plea. The basis of the objection is that the special plea is exipiable in that it does not disclose a defence to the plaintiff's claim nor raise a triable issue. The plaintiff submits that the court is clothed with jurisdiction over the persons of the defendants because they reside in the court's area of jurisdiction. As a result, the court has the jurisdiction to determine a dispute concerned with conduct in Eswatini.
- [8] The defendants subsequently filed a notice of motion seeking an order to the effect that they are given leave to amend their particulars of claim by incorporating the special plea. The defendants submit that the court should consider this application for what it is, an application to amend a plea to introduce a triable issue by objecting to the court's jurisdiction to hear the matter. They maintain that the court cannot deal with this application to amend on the basis of an exception. The defendants contend that the plaintiff wants this court to apply foreign law to enforce rights that accrued in Eswatini in circumstances where there is no evidence before the court as to what the law of Eswatini, or Swaziland, entails. They hold that the deponent to the plaintiff's answering affidavit does not qualify as an expert who can express an opinion in this regard, and that a court is not entitled to assume that the foreign law is the same as the law of South Africa. They submit that the court should grant the requested leave to amend for the issue to be ventilated at the hearing of the special plea where evidence can be led as to the laws of Swaziland and a decision can be made with a full appreciation of the applicable law.



- [9] The plaintiff contends that the proposed amendment should not be permitted because the special plea sought to be introduced is not sustainable in law and does not amount to a defence to the claim. The plaintiff avers that there is a fundamental misconception in the stance adopted by the defendants. The plaintiff explains that it is common cause that the action instituted by the plaintiff is concerned with the running of an Eswatini company – Spintex- in Eswatini. The plaintiff seeks relief based upon the wrongful conduct of the defendants in the running of the Eswatini company. The plaintiff seeks to enforce a claim where the proper law applicable to the dispute is Eswatini law. The plaintiff thus seeks to enforce a right that has accrued in Eswatini concerning the running of an Eswatini company. The plaintiff does not seek, extra-territorially, to enforce the provisions of s 361 of the Eswatini Companies Act, but rather to enforce the rights accruing in Eswatini against defendants who are not subject to the jurisdiction of Eswatini but are subject to the jurisdiction of this court. The plaintiff proposes to litigate an Eswatini dispute in the court that has jurisdiction over the defendants by virtue of their domicile. The plaintiff contends that defendants conflate the question of extra-territoriality with the application of the proper law of the dispute in a South African suit against South African *incolae*. The plaintiff submits with reference to *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others*<sup>1</sup> that where the proper law of a dispute is foreign, the court will apply that law, including any relevant statute. Plaintiff's counsel submitted with reference to applicable case law that in a case where the *lex causae* is foreign, that law applies to the dispute, and the matter will be decided by reference to the law of the country concerned, including its statutes where applicable. During argument counsel for the plaintiff submitted that the issue should be decided now or the same arguments will be regurgitated when the special plea is to be determined.
- [10] The defendants' case is that the issue introduced by the proposed special plea is not about which law constitutes the proper law that needs to be applied in adjudicating the dispute. They concede that the dispute is to be determined in accordance with the Eswatini Companies Act (the EC Act). The defendants' proposition is, (i) that the EC Act has no extra-territorial effect, and (ii) that the very

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<sup>1</sup> 1983 (1) SA 276 (A).

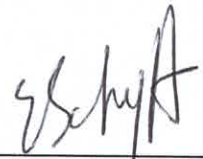
Act excludes this court's jurisdiction to adjudicate the dispute. The second submission is based thereon that the EC Act provides that the issues in question are to be determined by the Eswatini courts because the reference to 'the court' in s 361 of the EC Act is a reference to the High Court of Swaziland and not the High Court of South Africa.

- [11] I agree that the issue raised in the proposed amendment is a triable issue. To determine the validity of the defendants' plea, this court needs to interpret a foreign statute. There is no evidence regarding the principles underpinning statutory interpretation in terms of the law of Eswatini before the court.
- [12] As far as costs are concerned, the principle that costs follow success finds application. No reasonable grounds underpin the opposition of the application to amend. The application to amend is not so complex that it justifies the costs of two counsel.

## ORDER

In the result, the following order is made:

1. The defendants are granted leave to amend their plea in accordance with the notice of intention to amend dated 7 July 2021;
2. The defendants shall deliver an amended plea within five days of this order;
3. The plaintiff is to pay the costs of opposition to the defendants' application for the amendment of the defendants' plea.




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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 4 October 2021.

Counsel for the applicants:

Adv. C J McAslin SC

With

Adv. Govender

Instructed by:	AM THERON INC.
Counsel for the respondent:	Adv. G Hoffman SC
Instructed by:	VZLR INC.
Date of the hearing:	14 September 2021
Date of judgment:	4 October 2021