REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

08 March 2017
DATE

SIGNATURE

CASE NO: 38785/2014

In the matter between:

MARK HOLLOWAY **1ST APPLICANT**

TWIN PALMS SCUBA CC **2ND APPLICANT**

And

PADI EMEA LIMITED **RESPONDENT**

J U D G M E N T

VICTOR J:

[1] The applicants in this matter seek to review a decision made by an international body of the respondent. This international body which is a global voluntary recreational diving association expelled

the applicants from the organisation and posted this fact on the respondent's website as well as in the undersea journal following upon the death of Mr Bellingham while diving under their auspices. The respondent is Padi Emea Ltd (Padi) is abbreviation for a Professional Association of Diving Instructors situate in the United Kingdom.

[2] The application that serves before me is to compel the Padi in terms of rule 53 (1)(b) of Uniform Rules of Court to dispatch to the Registrar of this Court the full record, documents and evidence of the proceedings comprising of the materials that were used in coming to the decision which they seek to impugn on 24 June 2013 to expel the first applicant in terms of the respondent's General Standards and Procedures 2002, revised version, and its decision on 24 June 2013 to terminate the second applicant's membership in accordance with those standards.

[3] The central issue for determination is whether a South African court has jurisdiction to adjudicate this matter. This is a preliminary issue and whether this issue can be disposed of finally by this court and not be traversed at hearing of the main application.

[4] The general background facts to this matter are important, although today I really only have to deal with the jurisdictional issue that has been raised. The respondent is an affiliate company of PADI

Worldwide Corporation, a Global Voluntary Recreational Diving Association. Its territories include Europe, Middle East and Africa It is responsible for the management of PADI Membership and all related activities including in South Africa. Membership of PADI is voluntary and is governed by the PADI's general standards.

[5] The applicants contend that the general standards constitute an agreement between PADI and its members. They submit that jurisdiction can be founded on the fact that PADI has a footprint in South Africa. On the website some of its addresses reflect the United States of America. There are also other addresses that are referred to on the website. The applicants contend that in South Africa PADI through Scuba.co.za has a business address. It is its new distributor's address in Beyers Naude Drive, Fairland Johannesburg. In South Africa it also trades through Kewe Sales International at 2 Perth Place in Buccleuch, Sandton Gauteng.

[6] PADI is represented in South Africa by its regional manager, Mr Pieter Driesel who is responsible for the management of PADI membership and all relevant activities in Africa including South Africa. Driesel is the regional manager and operates from 3 Ballymore Eastwood Avenue, Randburg, Gauteng.

[7] The applicants rely on the PADI website concerning PADI's international relationship with South Africa. I will say more of this.

PADI's main activities include diver education based on progressive training that introduces skills, safety related information, local and environmental knowledge to student divers in stages. PADI professionals make underwater exploration and scuba diving adventures possible.

[8] The jurisdictional point is really based on the fact that Mr Driesel has an employment contract with the respondent. That employment contract, although concluded in England, his work is carried out in South Africa. In fact, in relation to this point, the first affidavit signed on behalf of PADI made it clear that Mr Driesel was based in South Africa. More particularly, PADI alleges that he was the person in charge in South Africa and that it was from South Africa that the Africa operation was run. In a further affidavit by PADI all that was changed was that because the employment contract was concluded in England the laws of that country would prevail.

Background

[9] The late Mr Bellingham was diving under the auspices of the applicant. At some stage during the dive at the Aliwal Shoal in Durban Bay, Mr Bellingham indicated that his oxygen supply was running out. This was in relation to the person on behalf of the applicants who was supervising and controlling the dive, Mr Holloway. Mr Holloway gave the instruction to Bellingham to proceed to

terminate the dive and go to the surface. This happened at a depth of approximately 25 metres. Mr Holloway was detained at that level momentarily because he too was experiencing a difficulty with his equipment. The deceased at that stage helped him to correct the situation and it was approximately 35 minutes after that incident that the deceased approached him and said there was a problem with his equipment. Soon after that, the remaining divers continued to explore the wreck and this took 30 to 40 minutes and it was at that stage that the remaining divers saw the deceased, Mr Bellingham, lying on the floor of the ocean. Netcare 911 was waiting on the beach. They administered CPR on the deceased for about 40 minutes before declaring him dead. The applicants did everything in their power to cooperate in the inquiry and it also bears mention that the deceased's symptoms were classical of an embolism and the autopsy report in that regard was inconclusive. All the necessary reports were filled in.

[10] There is ample evidence that the applicants cooperated with PADI but notwithstanding that, it published the fact that the applicants were negligent and that their membership to PADI had been terminated. That inquiry did not take place in South Africa. Because of the enormous prejudice resulting from the expulsion the applicants have been prejudiced and it is for this reason that they seek to review the decision of the Tribunal that heard the matter and ordered the expulsion.

[11] Mr Cassim SC argued on behalf of the applicants that the case law has developed in regard to the question of jurisdiction. That jurisdiction is now a far more relaxed form of determination and in this regard referred extensively to the *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) where Fabricius J summed up the principles of jurisdiction in actions against foreign entities, even in the absence of an attachment order to found or confirm jurisdiction. Previously a foreigner could be arrested if there was no other form of founding jurisdiction. All this changed in the Strang case, (*Bid Industrial Holdings (Pty) Ltd v Strang and Another (Minister of Justice and Constitutional Development, Third Party*) 2008 (3) SA 355 (SCA)) and a different test, or a more flexible test for jurisdiction was made. The two provisos were that the summons must have been served in South Africa. Well in this case, the summons has been served in South Africa on PADI's offices.

[12] There must be an adequate connection between the suit and the Court's area of jurisdiction. This principle will extend to corporate foreign defendants and the adequacy of the connection would be established by suitability and convenience. In this regard reference was made to the fact such as background facts, convenience and the law governing the relevant transaction or action and the place where the parties reside or carry on their business.

[13] Mr Troskie on behalf of PADI referred to a case in the Cape Court where it was found that in terms of the new Companies Act No 71 of 2008 jurisdiction can only be effective if the insolvency proceedings are served at the registered office and submits for this fact that the provides that the principle place of business must be the same as the registered office, thus introducing a more stringent approach to jurisdiction. It was submitted that the registered office is abroad and irrespective of the location of the trading entity in Fairland, Johannesburg, the Court could not recognise the jurisdiction since these application papers were served in South Africa and not at the registered head office abroad.

[14] Fabricius J in the *Multi-Links* case also referred to the former provisions of section 19 (1) of the Supreme Court Act and in this regard the question of cause of action as opposed to causes arising had to be discerned. It is in that context that the question of forum of convenience arose and the question whether there were sufficient links between the suit and this country to render litigation appropriate here rather than in the Court of the defendant's *domicile*. The question of appropriateness and convenience was clearly a factor to be taken into account and in this regard the Spiliada decision of the House of Lords that principle was introduced into our jurisprudence in the Strang case. In this regard I refer to the textbook of Andrew S Bell Forum Shopping and Venue in Trans-National Litigation at pages 94 – 95, where Lord Goff at the House of Lords in dealing with the

Spiliada case says the following and bearing in mind that he did not approve of the language of the word convenience but he nevertheless stated the following:

> ‘It is most important not to allow it [the latin *forum non conveniens*] to mislead us into thinking that the question at issue is one of mere practical convenience. It is evident that the indicia of the ‘natural forum’ which he identified will point to a venue that is convenient both for the parties and the Court. The natural forum is primarily a neutral venue and secondly, a convenient one. This must not be viewed as an end in itself of English jurisdictional rules but rather as the means to a different end. In this light, in England and countries that have adopted the Spiliada, the undoubted administrative efficiency and judicial convenience that follow from the process of identifying the natural forum are consequential benefits rather than the reason for the search for such forum.’

Now this was fully adopted into our law and of course has its origin in the doctrine of the natural forum.

[15] In this matter it is clear that the accident happened in South Africa. The question of the suspension or cancellation of membership is a decision that was made abroad. However, the effects of that decision are very much a tribal issue in this jurisdiction and Fabricious J said that the question of jurisdiction ought to be finally decided by the Trial Court and referred to another SCA decision that is of Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd 2005 (2) SA 522 (SCA) and in this regard the legal principles were made clear that it is better to determine the question of jurisdiction during the trial.

[16] The Supreme Court Act 59 of 1959 has been repealed by the Superior Court's Act 10 of 2013 which for the most part came into operation on 23 August 2013 and section 21 (1) reads as follows:

> (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance.

Jurisdiction means the power vested in a Court by law to adjudicate upon determine and dispose of a matter. See *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation) 1987 (4) SA 883 (A*) at 886D."

[17] The question for determination by me is whether there is a sufficient connecting factor to found the relief in this interim application which the applicants seek. They seek the disclosure of all the documents that served before the Tribunal which made the decision to expel it. It was submitted on behalf of the applicants that Mr Driesel's employment in South Africa, although the employment contract was concluded in England, does supply a sufficient connecting factor and that the area of jurisdiction must now be determined by the wider test and that is the question of appropriateness and convenience.

[18] It is submitted by Mr Cassim that the address on the internet regarding Kiwi Sales International and Scuba.co.za is reflective of the connecting factor and that this will go further to demonstrate that South Africa is the appropriate forum for the review the decision of the Tribunal despite that Tribunal being abroad.

[19] The applicants have been members of the respondent since 20 September 2004 and this is common cause. It is also not denied that the respondent does considerable business in South Africa and has a substantial turnover in excess of R20 million. The respondent accepts that it does business in South Africa but denies the quantum. Be that as it may, the respondent does have a bank account in South

Africa and there is a turnover whether it is R20 million or less nonetheless it is operating in South Africa.

[20] The respondent also has an emergency first response, a subsidiary of its subsidiary which distributes CPR and first aid programs for divers and non-divers in South Africa and this is not disputed. The respondent's opposition to the jurisdiction is really based on the fact that it itself does not have an office or branch in South Africa and that management of the PADI membership of South African members is governed by the respondent's office is Bristol, United Kingdom. The respondent admits that it is a foreign company and as such an external company in terms of our law and that it is required to register in terms of the provisions of section 23 of the Company's Act 71 of 2008.

[21] It is common cause that the respondent is registered for VAT and although his working conditions are governed by the foreign employment contract nonetheless, in terms of the Labour Relations Act 66 of 1995 an employee is defined in section 213 as any person excluding an independent contractor who works for another person or for the State and who receives or is entitled to receive any remuneration and any other person who in any manner assisting, carrying on or conducting the business of an employer. In this regard the respondent submitted that Mr Driesel is in fact paid abroad. However, upon a proper application of section 213 of the Labour

Relations Act Mr Driesel would be protected by the provisions of our Labour Relations Act. See *Board of Executives Ltd v McCafferty* 1997 (7) BLLR 835 (LAC).

[22] Mr Cassim submitted that there was a further jurisdictional fact for the jurisdictional point taken by the respondents and that it should fail. In *Ngqula v South African Airways (Pty) Ltd 2013 (1) SA 155 (SCA)* the Court found that an order in terms of section 3 of the Interim Rationlisation of Jurisdictions of High Court's Act 41 of 2001 led to the jurisprudence developing to the extent that the jurisdiction of different High Courts in South Africa can be interpreted as being procedural in character and therefore a dispute can be transferred to any division of the High Court of South Africa.

[23] In the *Multi-Links* case Fabricius J was the case manager and heard the argument on jurisdiction. I too am of the view, with respect, that the approach taken in the *Multi-Links* case, that a jurisdictional point can be heard as a preliminary issue is the correct one. I can decide on a preliminary basis whether this Court does have jurisdiction. This does not preclude the trial court or the opposed motion court hearing the matter in due course to finally deal with that point. I have already indicated that the submission PADI that this preliminary step is not appropriate in this particular circumstance must fail. This is not an insolvency matter.

[24] PADI makes the further submission that it is common cause that it is a foreign company and that it does have a main place of business in a foreign country and therefore cannot simultaneously reside in this country. In addition the foreign Tribunal will not subject itself to the jurisdiction of this Court. The respondents contend that because of PADI'S limited presence within this division the order sought compelling the production of the record of the International Tribunal cannot be effected. If the order cannot be an effective since the Tribunal would not be obliged to provide the record and there is very little that a South African Court could do in this regard.

[25] The reference in rule 53 (1), extends to proceedings of any inferior Courts and of any Tribunal, Board or officer performing judicial or quasi-judicial or administrative functions also extends to the disciplinary proceedings of which the applicant seeks the record.

[26] In other words, PADI submit that the reference to a Tribunal in Rule 53 can only be wide enough to refer to a domestic Tribunal of contractual origin. There is no contractual nexus, so PADI submits, between the applicants and the foreign Tribunal that heard the matter. The further submission is that rule 53 clearly contemplates proceedings that at the very least took place within the Republic of South Africa and it does not extent to disciplinary proceedings that took place in the United Kingdom. In the result, the parties are at diametrically opposed ends of this jurisdictional point.

[27] I, however, am satisfied that based on the adoption of the Spiliada case into South African jurisprudence and the acceptance that jurisdiction is now a much wider concept than simply the question of founding jurisdiction or arresting someone to found jurisdiction, the applicants succeed in proving jurisdiction.

[28] The applicants have succeeded in demonstrating that on a proper interpretation of the jurisdictional facts they have oroved jurisdiction. Tthis Court does have the power to order the production of the record. A draft order was prepared. Both parties had two counsel. The matter is important and is complex. Therefore a costs order including the costs of two counsel is justified.

Order:

I make an order in terms of the draft marked X where I order the respondents to comply and provide the record in accordance with the draft.

M. VICTOR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION