

SOUTH AFRICA / JUDGMENT

International Fruit Genetics, LLC v Okran 28 (Pty) Ltd and Another (9963/2018) [2019] ZAWCHC 37 (29 March 2019) [2019] ZAWCHC 37

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

9963/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

no: 9963/2018

In

the matter between:

INTERNATIONAL
FRUIT GENETICS,
LLC Applicant
v
OKRAN
28 (PTY)
LTD First
Respondent
ANYTIME
INVESTMENTS NO. 2
CC Second
Respondent

Coram:

Justice J Cloete

Heard:

4 March 2019

Delivered:

29 March 2019

JUDGMENT

CLOETE J:

Introduction

- [1] The applicant seeks an order recognising and enforcing a judgment against the respondents of the United States District Court, Central District of California, handed down in its favour on 18 December 2017 ('the judgment').
- [2] In summary, the judgment declared that two licensing agreements concluded between the applicant and the respondents respectively on 17 July 2014 and 12 December 2014 had been validly cancelled, and directed that the respondents return or destroy all of the applicant's plant material within their possession, custody or control, including cutting off all vines below the graft of any of the applicant's cultivars.
- [3] The respondents do not dispute the judgment, nor that it is final and conclusive and that no appeal is pending. They do not contend that any attempt has been made to have it rescinded. Their opposition to the recognition and enforcement of the judgment is that they have already complied therewith by removing all commercially useful portions of vines of the applicant's varieties growing on their farms, and accordingly no purpose would be served in granting the relief sought.

Background

- [4] The applicant, an American company, is in the business of inventing, developing and breeding new varieties of table grapes, which it licenses to commercial growers in the United States of America and elsewhere in the world.
- [5] The two respondents are commercial growers in the Paarl and Malmesbury areas. In terms of the licensing agreements, they were

allowed to plant and grow certain varieties of the applicant's proprietary plants in certain quantities, and in certain locations

specified in advance and in writing to the applicant.
- [6] On 21 February 2017 the applicant cancelled each of the agreements, relying upon an 'event of default' as defined therein. The respondents contended that the applicant's cancellation was a repudiation of the licensing agreements, which they accepted and in turn cancelled them. The applicant denies any repudiation. Be that as it may, it is common cause that the licensing agreements have been cancelled.

- [7] Ms Theodora Marcos ('Marcos'), the applicant's international business manager, deposed to the founding and replying affidavits. According to her, the value of the applicant's business lies in the intellectual property rights that it holds in respect of the proprietary plant varieties that it develops. Its income is derived principally from these rights and it is thus of critical importance to the applicant that these rights are guarded, controlled and monitored.
- [8] She also stated that the respondents initially did not respond to the applicant's cancellation of the agreements. Nor did they take steps to destroy the applicant's proprietary plants in their possession or control, as they were obliged to do in terms of the post-termination obligations contained in the agreements.
- [9] The applicant accordingly instituted proceedings in the United States District Court on 27 March 2017 for a declaratory order and injunctive (interdictory) relief against the respondents as well as their directing mind, Mr Pieter Redelinghuys ('Redelinghuys'). The latter filed certain documents with the District Court in response to the summons, purportedly on behalf of himself and the

respondents. These did not comply with the relevant procedural requirements and on 11 May 2017 the applicant filed an application for Entry of Default. After the applicant complied with certain requirements of the District Court, it issued an order on 22 November 2017 dismissing Redelinghuys from the lawsuit and granting Entry of Default against the respondents, entering judgment against them on 18 December 2017. The default judgment order reads in relevant part as follows:

'IT IS HEREBY ORDERED AND ADJUDGED, that:

1. Judgment is entered in favour of Plaintiff International Fruit Genetics, LLC and against Defendants Okran 38 (PTY) Ltd. ("Okran")

and Anytime Investments, No. 2 CC ("Anytime"), the only two remaining defendants.

2. The Court declares: that Defendant Okran violated and breached the International Fruit Genetics Proprietary Variety Planting Rights and Trademark License Agreement it had with Plaintiff (the Okran Planting Agreement) and Anytime violated and breached the International Fruit Genetics Proprietary Variety Planting Rights and Trademark License Agreement it had with Plaintiff (the Anytime Planting Agreement) (Collectively, the "Licensing Agreements"); that the acts of Defendants constituted Events of Default under each of the Licensing Agreements; and, that IFG validly and properly terminated each of the Licensing Agreements.
3. That IFG is entitled to an Order directing Defendants to return or destroy all IFG plant material within their possession custody or control.

4. Pursuant to the terms of the Licensing Agreements, Defendants are ordered to immediately:
- (a) cease all use of IFG proprietary plant material and IFG Confidential Information (including, without limitation, all Trade Secrets or Trademarks, or labels, packages or materials containing any Trademarks) in their possession, custody or control; and, (b) destroy all IFG proprietary plant material including cutting off all vines below the graft of any IFG Proprietary Cultivar in Defendants' possession or control...'

(my emphasis)

- [10] The applicant also states that after it instituted proceedings in the District Court the respondents set about cutting down the vines on their farms that carried the applicant's proprietary cultivars. The respondents contend that their cutting down of the vines represented their acceptance of the applicant's repudiation. What is undisputed is that although the respondents cut their vines, they did so on the rootstock above the graft with the applicant's cultivars. The effect of this, according to the applicants, is that they did not destroy all of the applicant's proprietary plants, as they were obliged to do – the part above the graft remains. The applicant contends that unless the cut is made below the graft, the applicant's cultivars will simply start growing again. What is required is for the respondents to cut the vines below the graft. That will ensure that the applicant's proprietary plant material does not grow on the respondents' rootstock again.
- [11] In the answering affidavit Redelinghuys maintained that the respondents have removed all commercially grown plant sections of the applicant's cultivars from their properties and that they have done so in accordance with accepted agricultural practice. He stated that, because the respondents complied with their obligations in this regard, the proceedings brought in the United States were completely unnecessary and purely academic. It was for this reason, so Redelinghuys contended, that the respondents did not wish to waste money opposing those proceedings.
- [12] Redelinghuys states that he has, through various entities, been farming table grapes for export successfully for over 30 years, and as such is well versed in agricultural practices.
- [13] According to Redelinghuys, most vines grown for commercial purpose are grafted onto permanent rootstock that is resistant to certain diseases and/or soil borne problems. The commercially viable lifespan of rootstock is between 16 to 25 years on average.
- [14] He stated that farmers graft different varieties onto rootstock. The applicant's varieties are some of many such table grape varieties available in the market from different developers of varieties. There exist two common methods of grafting of commercial table grape varieties onto rootstock. The respondents use both methods.
- [15] The first method is where a dormant stick of the variety is grafted onto the rootstock in a nursery. Once the two sticks are joined after an incubation period called calusing, the sticks are planted in soil to develop roots. After growing in the nursery for one season the plants are then removed and sold by the nursery to farmers, who then plant them on the

commercial farms in such a way that the graft point is just above the ground. This is to ensure that the variety does not produce its own roots and negate the grafting advantages. When this vine is later in life cut below the grafting point it is extremely likely that the plant will die. In his experience losses of over 90% are normal. This level of mortality is plainly something which commercial farmers must avoid.

- [16] The second method is known as aerial grafting. The rootstock is planted one growing season in advance. During the next growing season the required commercial variety is grafted onto the pre-existing rootstock. This grafting point is normally 20-50cm from the ground. When this plant is cut below the grafting point later, the probability of the rootstock dying is very low (usually less than 15%). This, according to Redelinghuys, is due to the fact that the exposed section of the rootstock above ground has numerous dormant buds which will start growing once the plant is cut.
- [17] Therefore, according to Redelinghuys, nursery grafted plants cannot commercially be cut below the graft if one intends to re-graft

another variety onto them. However aurally grafted plants can be cut below the graft with a higher survival rate. To overcome the dying back of nursery grafted plants, it is thus necessary to leave a small section of the stem – usually less than 5cm – of the previous top variety on the rootstock, and then to re-graft the new variety onto this. This is known as a vine with an intermediary stem, and is common industry practice. The intermediary stem does not produce any fruit and therefore has no commercial value. It is the varietal which is grafted onto the stem and rootstock which produces the fruit. Redelinghuys stated that none of the applicant's varietals are currently grafted onto the rootstock and stems of vines on the respondents' farms.

- [18] He thus maintains that the applicant is misguided in its view that the respondents would be able to cut the vines down again in such a way as to grow the applicant's varietals should there not be strict compliance with the judgment. The varietals which the respondents now grow, and which, according to him, have been grafted onto the rootstock, are all other varietals. Growing the applicant's varietals is of no commercial value to the respondents, given that the latter would not be able to market them.
- [19] The respondents repeated an earlier tender (declined by the applicant) for an inspection by an inspector of the Department of Agriculture for the purpose of establishing whether all commercially useful portions of vines of the applicant's varietals have been removed; and if any commercially useful part of vines bearing the applicant's varietals are found, they may be cut down appropriately, immediately upon inspection by such an individual who will ensure that the correct and appropriate method is used to ensure survival of the rootstock upon which the vines are grafted.

[20] It is the respondents' contention that the purpose of the judgment was not to destroy all plant materials growing on the respondents' farms, but to prevent them from being able to produce grapes of the applicant's varieties. The removal of residual stems that cause absolute destruction of the respondents' plant material – i.e. the underlying rootstock – is 'simply vindictive and unauthorised'. It is submitted that the tender which the respondents make achieves the object of ensuring that no grapes of the applicant's

varieties are grown on the respondents' farms without causing the destruction of the respondents' rootstock and plant

material not of the applicant's varieties.

[21] The respondents do not assert that the effect of the judgment is punitive, but only that it is contrary to public policy for the judgment to be enforced when it will serve no purpose. It should also be mentioned in this regard that – leaving aside the issue of res judicata – the respondents have instituted a damages claim against the applicants in South Africa, such damages being alleged to have arisen as a consequence of the applicant's repudiation of the licensing agreements. On the respondents' own version therefore it is not necessary to consider whether the judgment contains a punitive element which might be contrary to public policy.

[22] The applicant's response to all of this is that in truth, the respondents have not complied with the judgment, given that they were expressly directed therein to 'destroy all IFG proprietary plant material including cutting off all vines below the graft of any IFG Proprietary Cultivar in the respondents' possession or control'.

[23] The applicant submits that the respondents' attempt to argue that cutting below the graft is not required or would cause them harm is in direct conflict with the express terms of the judgment and in any event irrelevant. This is because the respondents are attempting to enter into the merits of the judgment which they are not permitted to do. The judgment does not give the respondents a discretion to cut and remove the applicant's proprietary plant material as they consider appropriate. The judgment is clear regarding what is required: the respondents must return or destroy all IFG plant material within their possession, custody or control and all IFG plant material must be destroyed including cutting off all vines below the graft of any IFG proprietary cultivar in the respondents' possession or control. The applicant states that, in any event, the respondents' tender is flawed for the following reasons:

23.1 The Department of Agriculture has not been joined in these proceedings; nor have the respondents sought to join it. Even if an official from that Department could perform the functions that the respondents would have the court assign to it, in the absence of joinder the court cannot make an order directing the Department to do so;

23.2 The respondents do not explain on what basis an official from the Department would be qualified to give effect to the judgment, particularly to identify the applicant's proprietary plant material; and

23.3 The sheriff is the appropriate official to execute orders of the court and no-one is better suited than a representative of the applicant to accompany him for the purpose of identifying its proprietary plant material.

[24] The applicant not only submits that the respondents' attempt to have the court enter into the substantive merits of the judgment is impermissible, it also disputes the opinions proffered by Redelinghuys in the answering affidavit. The applicant states that if the cut is not made below the graft union, the applicant's variety, previously grafted to the rootstock, may regrow at any time. To prevent this from happening, the cut must be made below the graft union in order to remove all of the applicant's intellectual property, which the respondents have been ordered to do. While Redelinghuys' general description of the two types of grafting is correct, his allegations as to the mortality rate when vines that are propagated using the first method are cut below the graft are extravagantly exaggerated. In fact, the mortality rate can be expected to be between 5 to 10% and not more than 90% as Redelinghuys alleges.

[25] In addition, the two methods of grafting described by Redelinghuys are not the only methods of effectively propagating grape vines by grafting. The respondents can cut the vines below the vine union, and graft a new vine onto the rootstock without the rootstock first having to produce a shoot. This is an established and successful method of grafting. These allegations were supported by a confirmatory affidavit of Mr Johan Teubes, an expert in the propagation of grape vines.

[26] The applicant also denied that growing its varieties are of no commercial value to the respondents. It contends that there is significant demand for its varieties and the respondents could easily sell them on the local market. The only way to ensure that the applicant's varieties do not grow again is to cut the vines below the graft union. It is for this reason that the applicant required, in its licencing agreements, that upon termination the vines must be cut in this manner.

[27] Redelinghuys thereafter deposed to what he called a 'Rebutting Affidavit' in which he sought to introduce new evidence that cutting vines down below the graft union has caused them to die. The explanation provided for the late filing of this affidavit was that:

'...I drew the issue of actual plant death to the attention of my attorney when consulting on Tuesday 19 February 2019... I was not, until consulting, appreciative of the relevance of this fact to the current proceedings. My attorney requested me to take photographs to assist the court – these are attached and referred to below. I apologise for filing this affidavit late in the day, but submit that, there can respectfully be no prejudice to the applicant by the late filing of this affidavit since it addresses a relevant factual issue introduced in applicant's reply...'

[28] Redelinghuys deposed to the answering affidavit on 19 July 2018, and Marcos to the replying affidavit on 14 August 2018. It is inconceivable that, given the detailed explanation furnished by Redelinghuys in the answering affidavit months earlier, he was not aware of the relevance of the 'new evidence' which he sought to introduce at the eleventh hour. Moreover, the photographs annexed to the 'Rebutting Affidavit' are of no assistance. It is simply not possible to discern therefrom what it is that Redelinghuys attempted to convey. He had more than sufficient opportunity (between August 2018 and February 2019) to produce cogent evidence of his belated claim that the vines had died, but singularly failed to do so. His explanation for the late filing of the affidavit is unacceptable and in the circumstances it is disregarded.

Discussion

[29] A foreign judgment is not directly enforceable in South Africa, but constitutes a cause of action and will be enforced by the South African courts provided that:

29.1 The court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by South African law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence');

29.2 The judgment is final and conclusive in its effect and has not become superannuated;

29.3 The recognition and enforcement of the judgment by our courts would not be contrary to public policy;

29.4 The judgment was not obtained by fraudulent means;

29.5 The judgment does not involve the enforcement of a penal or revenue law of the foreign State; and

28.6 Enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978 ('the Act').[1]

[30] The court will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law.[2]

[31] In the present case the District Court had jurisdiction to grant the judgment by virtue of the applicant being an incola of that court and the respondents having consented,[3] and therefore submitted, to its jurisdiction.[4]

[32] It is further common cause that after an initially abortive attempt to enter an appearance before the District Court, the respondents elected not to oppose those proceedings because, they contend, they complied with their obligations and therefore considered the proceedings unnecessary and academic. The respondents accordingly did not raise any formal objection to the jurisdiction of the District Court.[5]

[33] As previously stated, the respondents do not dispute the finality of the judgment. It only needs to be added that a foreign judgment is final and conclusive for the purposes of enforcement where it has dealt fully with the merits of the dispute between the parties and it cannot be set aside or in any way varied by the court which pronounced it.[6]

[34] The respondents do not suggest that the judgment was obtained by fraudulent means; that it involves the enforcement of a penal or revenue law of a foreign State; or that it is precluded by the provisions of the Act.

[35] An analysis of the answering affidavit reveals that the respondents do not seriously oppose the recognition of the judgment in South Africa but oppose the execution thereof on the grounds that:

35.1 They have complied with their obligations under the licensing agreements and hence the judgment, rendering the current application unnecessary; and

35.2 They object to a representative of the applicant 'supervising' the sheriff when executing the judgment once recognised in South Africa.

[36] This can be narrowed down further to the respondents' real issue, namely the requirement that they must destroy the applicant's

proprietary plant material by cutting off all the vines below the graft of any of the applicant's proprietary cultivars in the respondents' possession or control.

[37] The unexpressed acknowledgement in the respondents' version is that the applicant's proprietary varieties are still being grown on the respondents' farms, but not – ostensibly – for commercial purposes.

[38] The respondents' removal of what they term the 'commercially useful portion of the vines' is not in compliance with the terms of the judgment and ignores – amongst others – the applicant's intellectual property rights in its proprietary vines.

[39] The terms of the judgment are plain. It directs that the respondents:

39.1 Return or destroy all of the applicant's plant material within their possession, custody or control;

39.2 Cease all use of that plant material; and

39.3 Destroy all such material, including cutting off all vines below the graft of any of the applicant's cultivars in their possession or control.

[40] On the respondents' own version, they have not complied with the judgment. They have not ceased using the applicant's

proprietary plant material, irrespective of whether it is directly for their own commercial gain, and they have not destroyed all of that material.

[41] As previously stated, the respondents do not suggest that the enforcement of the judgment would be contrary to public policy

because it contains a punitive element. They pinned their colours squarely to the mast of prior compliance with the judgment in

submitting that its enforcement would thus be contrary to public policy. That they have not, on a proper analysis of their own

version, complied with the judgment, puts paid to their assertion that it is 'contrary to public policy for judgments to be enforced which serve no purpose'.

[42] In any event, to the extent that the respondents complain that they will suffer harm if the judgment is to be executed in its plain terms, the complaint is unspecified in extent and according to the objective expert evidence, exaggerated. Moreover, they should not be permitted to complain, ex post facto, that the execution of the judgment (which follows the express terms of the licensing agreements) will cause them harm. This is invariably the case when a court order is executed against an unsuccessful litigant. The respondents knew exactly what they were signing up for when they entered into the licensing agreements: both were represented by Redelinghuys who professes to have more than 30 years' experience in farming table grapes and being well versed in agricultural practices.

[43] As already indicated, the respondents opposed the application on the further 'limited' ground that the inspection of their farms to identify the applicant's grape varieties to be removed, should not be conducted under the 'supervision' of a representative of the applicant, but rather by an inspector from the Department of Agriculture.

[44] This is a red herring. There is no dispute between the parties regarding the identification of the applicant's proprietary

varieties. At issue is where the vines should be cut which, in terms of the judgment, must occur below the graft. The applicant does not seek an order pursuant to which execution would take place under the 'supervision' of one of its representatives. It seeks an order authorising the sheriff to execute the judgment.

[45] It is only in anticipation that the sheriff will not be able to distinguish between the applicant's plant varieties (to be removed) and other grape varieties (to be left intact), that the applicant seeks an order authorising one of its representatives to accompany the sheriff to assist him or her in identifying and pointing out its own proprietary plant material to be removed in accordance with the judgment. Clearly, a representative of the applicant is best suited to identify its own varieties.

[46] In the result the following order is made:

1. The judgment and order of the United States District Court for the Central District of California under case number 2:17-cv-02371-ODW(MRWx) granted on 18 December 2017 against the respondents is hereby recognised and enforced.
2. It is declared that:
 - 2.1 The first respondent violated and breached the International Fruit Genetics Proprietary Variety Planting Rights and Trademark License Agreement it concluded with the applicant on 12 December 2014;
 - 2.2 The second respondent violated and breached the International Fruit Genetics Proprietary Variety Planting Rights and Trademark License Agreement it concluded with the applicant on 17 July 2014;
 - 2.3 The acts of the respondents constituted Events of Default under each of the Licensing Agreements; and
 - 2.4 The applicant validly and properly terminated each of the Licensing Agreements.
3. The respondents are directed to return to the applicant or destroy all of the applicant's plant material within their possession, custody or control.
4. Pursuant to the terms of the Licensing Agreements (clause 11.1 of Exhibit F thereof), the respondents are directed to immediately:
 - 4.1 Cease all use of IFG proprietary plant material and IFG Confidential Information (including, without limitation, all Trade Secrets, Trademarks, and labels, packages or materials containing any Trademarks) in their possession, custody or control; and
 - 4.2 Destroy all IFG proprietary plant material including cutting off all vines below the graft of any IFG Proprietary Cultivar in the respondents' possession or control.
5. Capitalised words or terms used in this order shall, unless defined herein, have the meaning assigned to them in Exhibit A to the Licensing Agreements, a copy of which is attached to the applicant's notice of motion marked 'A'.
6. In the event that the respondents, or either of them, fail or refuse to comply with the terms of paragraph 4 above within 10 (ten) days of date of this order, the Sheriff of this Honourable Court is authorised and directed to immediately enter upon that respondent's property or such other property as may be required and to otherwise take all such steps as may be necessary to give effect to and implement this order.
7. Theodora Christina Marcos or another representative of the applicant appointed by her is to accompany the Sheriff and to enter upon the relevant property in order to assist the Sheriff in giving effect to the order in paragraph 6 above, by identifying and pointing out the IFG proprietary plant material to be destroyed pursuant to this order.

8. The respondents shall be entitled to appoint a representative to accompany the Sheriff and the applicant's representative.
9. The first and second respondents, jointly and severally, shall pay the costs of this application, including the costs of two counsel where employed as well as any reserved costs orders.

J I CLOETE

[1] Jones v Krok

[1994] ZASCA 177; 1995 (1) SA 677 (A) at 685B-C; Purser v Sales; Purser and Another v Sales and Another

[2000] ZASCA 135; 2001 (3) SA 445 (SCA) at paras [11] – [12]; Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC) at para [38].

[2] Jones (supra) at 685E.

[3] This is not disputed and is therefore admitted: see Traut v Fiorine [2007] 4 All SA 1317 (C) at para [35]. Moreover, the respondents' purported contesting that Exhibit F formed part of the licensing agreement is bald and unsubstantiated: see National Director of Public Prosecutions v Zuma (Mbeki and Another intervening) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para [26].

[4] Purser (supra) at para [12]; Supercat Inc v Two Oceans Marine CC 2001 (4) SA 27 (C) at 32A-B.

[5] Purser (supra) at para [13].

[6] Jones (supra) at 695D-F.

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Prepared on 10 October 2026 · Esheria