

SOUTH AFRICA / JUDGMENT

Voor-Groenberg Nursery CC and Another v Colors Fruit South Africa (Pty) Ltd (A21/12) [2012] ZAWCHC 157 (23 August 2012)

[2012] ZAWCHC 157**COURT**

Western Cape High Court, Cape Town

BEFORE

Griesel, Fortuin, Samela

CASE / FILE NUMBER

A21/12

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Source record**IN THE HIGH COURT OF SOUTH
AFRICA****(WESTERN CAPE HIGH COURT,
CAPE TOWN)****Case No A21/12****In the matter between:**

VOOR-GROENBERG

NURSERY CCFirst

Appellant

OLYVENBOOM

BOERDERY

(PTY)

LIMITED

.....Second

Appellant

and

COLORS

FRUIT SOUTH AFRICA

(PTY)

LIMITED

.....Respondent

Court:GRIESEL,
FORTUIN & SAMELA JJ**Heard:**25
July 2012

Delivered: 23
August 2012
Counsel
for Appellants: Adv P Ginsburg, SC et Adv P van Eeden
Instructed
by: Adams & Adams (C K Job)
Counsel
for Respondent: Adv A R Sholto-Douglas, SC et
Adv
C R Cilliers
Instructed
by: Werksmans Incorporated (Mr M Bronn)
Reportable
In

the matter between:

Court: GRIESEL,
FORTUIN & SAMELA JJ

Heard: 25 My 2012

Delivered: 23 August
2012

JUDGMENT

GRIESEL J:

Introduction

Court: GRIESEL, FORTUIN & SAMELA JJ

Heard: 25 My 2012

Delivered: 23 August 2012

JUDGMENT

GRIESEL J:

Introduction

- [1] This is an appeal against the whole of the judgment of Davis J in terms of which the first appellant (the first respondent in the court a quo) was ordered to deliver to the respondent (then the applicant) certain 'vegetative materials' listed in an annexure to the order.¹ In addition, the second appellant (then the second respondent) was interdicted and restrained 'from transferring possession or control of, or from disposing of or otherwise dealing with [such material]'.

- [2] For convenience, I refer to the parties to his appeal as 'Voor-Groenberg' (first appellant), 'Olyvenboom' (second appellant) and 'Colors' (respondent) respectively. In the court a quo, a third and fourth respondent were also joined as parties: Sheehan Genetics LLC ('Sheehan Genetics'), a company incorporated in terms of the laws of the State of California USA, was the original third respondent, whereas a British company, Special New Fruit Licensing Limited ('SNFL'), was the fourth respondent. No relief was sought or granted against either of these respondents and neither of them features as parties to the present proceedings. Sheehan Genetics, however, continues to play a central role in the disputes between the parties to the present appeal, which comes before us partly with the leave of the court a quo and partly with the leave of the SCA.

The factual background

- [3] The application that forms the subject of this appeal concerned plant material in respect of ten different varieties of seedless grapes originally bred and developed by Sheehan Genetics, a developer and breeder of new table grape varieties in California. During 1998 Sheehan Genetics entered into a licence agreement with a Spanish company, Antonio Munoz Y Cia SA ('AMC'), in terms of which AMC was granted an exclusive licence ('the head licence') to test and commercially develop all new plant material bred, acquired and developed by Sheehan Genetics. AMC was further allowed to sub-licence such plant material for the territory of Europe. (In terms of a subsequent amendment to the head licence, the applicable territory in respect of the licence was extended to include, inter alia, South Africa and Namibia.)
- [4] In terms of the head licence, Sheehan Genetics undertook to provide consultation to AMC in relation to the areas in which Sheehan Genetics had special knowledge, skills and expertise. It would also conduct plant-breeding activities, which would be personally directed by Mr Tim Sheehan, the driving force behind Sheehan Genetics. In return, AMC would pay Sheehan Genetics a royalty of US\$ 50 000 per annum irrespective of the amount of plant material delivered. AMC would plant, grow, market and sell the plant material and produce them at its own risk.
- [5] On 10 March 2003 Sheehan Genetics and AMC entered into a sub-licence agreement with Colors, a company operating in Paarl, whose business involves the commercial exploitation of fruit, notably table grapes and related plant material.² In terms of the sub-licence Colors was granted certain rights regarding the exploitation of the so-called Sheehan varieties in South Africa and Namibia. These entailed -
- (a) an exclusive right (to the exclusion of both AMC and any third party) 'to obtain from AMC ... all the propagating samples of all new vegetative material bred and/or developed by Sheehan Genetics and received by AMC from time to time, so that Colors Fruit may (i) test, plant and cultivate them; (ii) obtain their products; and (iii) secure their statutory protection' in the form of registration of plant breeders' rights in the name of Sheehan Genetics within the defined territory ('Planting and Cultivation Rights'); and

- (b) a non-exclusive right to use the intellectual property rights of which Sheehan Genetics was the proprietor, to market and distribute the products in the agreed distribution territory ('Marketing and Distribution Sub-Licence').
- [6] The duration of the sub-licence was linked to that of the head licence inasmuch as the sub-licence would automatically be terminated at the end of the term of the head licence, subject thereto that if any exclusive rights in respect of the vegetative material remained vested in AMC despite the termination of the head licence, the Marketing and Distribution Sub-Licence would remain in force in respect of those surviving rights.
- [7] In terms of a schedule to the sub-licence agreement, Colors was appointed as Sheehan Genetics' South African agents in connection with matters relating to plant breeders' rights, governed locally by the Plant Breeders' Rights Act, 15 of 1976 ('the Act'). Provisional protection in terms of s 14 of the Act was subsequently, during March 2009, granted in the form of a number of protective directions with the effect of provisionally protecting Sheehan Genetics' embryonic rights as would-be plant breeder.
- [8] During the currency of the sub-licence, AMC provided 'vegetative materials' to Colors in the form of budwood of specific Sheehan varieties bred in California. Budwood constitutes very short vine lengths, each having about 10 buds on them. This plant material was delivered to a quarantine station in Stellenbosch operated by the National Department of Agriculture where it was used to establish five to ten plants per variety by a process of grafting the buds onto existing rootstock.
- [9] Colors enlisted the services of Voor-Groenberg, a nursery doing business as such in Wellington, to propagate and multiply the plant material obtained by it. After completion of the propagation process of the original budwood, Colors would sell the resulting buds ('ogies') to Voor-Groenberg, who would graft the buds onto rootstock owned and produced by it [Voor-Groenberg]. The resulting vines would then be sold by Voor-Groenberg to growers (i.e. farmers), whereupon Voor-Groenberg would account to Colors in respect of its share of the proceeds, being a levy (royalty) of R1,00 per vine. All these activities took place on land belonging to Olyvenboom, which is a company associated with Voor-Groenberg. As consideration for the use of its land, it was agreed that Colors would pay Olyvenboom rental based upon the sum which Olyvenboom would have derived had it produced wine grapes on the area now occupied by the foundation block.
- [10] During August 2009 Mr Tim Sheehan died. AMC accordingly served notice on Sheehan Genetics, on 3 December 2010, that the head licence agreement would be terminated with effect from 6 March 2011 on the grounds that the continuing personal involvement of Mr Sheehan had been crucial and that as a result of his death Sheehan Genetics was in 'material breach' of the agreement. On 20 January 2011, AMC wrote to Colors to inform it that the sub-licence agreement would automatic-ally terminate with effect from 3 March 2011 as a result of the termi-nation of the head licence.

- [11] This communication gave rise over the next few months to a flurry of correspondence between the various parties and their respective attorneys. In a nutshell, Colors took up the attitude that the cancellation of both the head licence and the sub-licence was unlawful and unjustified; that Colors would 'not terminate any of its production or cultivation programs'; and further that it would not surrender any of its rights. It relied in this regard mainly on the provisions of s 23(6) of the Act and claimed that it 'may therefore deal with the Sheehan plant material it currently owns (i.e. all plants and plant material currently in South Africa) to the extent envisaged in s 23(6) to the exclusion of Sheehan Genetics, SNFLSA and any other third party, without a licence from the plant breeder'.
- [12] In reply, Sheehan Genetics' attorneys took issue with Colors' claim of ownership in respect of the vines in question, stating *inter alia*:
- 'Your client does not on any possible basis own the vines in the possession or under the control of VG. The original budwood and all propagated buds derived therefrom (through the process of propagation by SAPO and VG) are our client's property including the intellectual property rights. The sub-licence between AMC and your client did not transfer ownership of the Vegetative Material. The rootstocks to which the buds have been grafted are the property of VG and furthermore, your client invoiced VG for the buds harvested by it from the motherblock and VG paid for them. Your client has no claim to ownership of the resulting vinestocks whatsoever. To the extent that your client is alleging ownership of the buds or any other propagating material, that contention is false.'
- [13] In the weeks following the letter just referred to, Colors unsuccessfully attempted to assert their rights with regard to the plant material and to obtain delivery thereof from Voor-Groenberg. This eventually gave rise to the application in issue.
- [14] The disputes between the parties on the papers ranged far and wide. Thus, in its founding affidavit - as in the correspondence referred to above - Colors initially relied on the provisions of s 23(6) of the Act and clause 8(3) of the sub-licence as 'the first main ground' for its claim. The 'second main ground' was 'the nature of its relationship with Voor-Groenberg, which ... is that of principal/agent or mandatory/contractor'. Colors also persistently disputed the validity of the termination of both the head licence and the sub-licence. By the time the matter came to be argued before Davis J, however, these 'main' causes of action and the disputes surrounding them had faded into the background. Instead, Colors had nailed its proverbial colours to the mast by claiming that it had become the owner of the plant material in question and hence was entitled to assert its *rei vindicatio* against Voor-Groenberg by claiming delivery of all the plant material. This was recognised as the 'key issue' in the court *a quo* and before us on appeal.

Ownership of the plant material

[15] Regarding the issue of ownership, it was observed by Wessels J, more than 100 years ago, that 'the exact scope of dominium has been a matter of controversy for centuries'.³ He quoted Savigny's authoritative definition with approval, which is to the effect that '[d]ominium is the unrestricted and exclusive control which a person has over a thing', before proceeding as follows:

'Inasmuch as the owner has the full control, he also has the power to part with so much of his control as he pleases. Once the owner, however, he remains such until he has parted with all his rights of ownership over the thing. One of the ways in which an owner can part with a certain measure of his control is to grant the use of the thing to another for a certain time in return for the periodical payment of money. In other words, the owner may, if he chooses, let his property to another.'⁴

[16] As for the transfer of ownership of movables, such as the plant material in issue in this matter, it is settled law that ownership passes 'when delivery of possession is given accompanied by an intention on the part of the transferor to transfer ownership and on the part of the transferee to receive it'.⁵ Such intention may be proved in various different ways, for example by direct evidence, from surrounding circumstances, or from the

underlying contractual arrangement between the parties, such as sale or exchange.⁶ In each case, it remains a question of inference, to be drawn from all the facts.

[17] It is, of course, correct - as argued on behalf of Colors and held by Davis J⁷

- that a valid underlying transaction is not a requirement for the valid transfer of ownership. This is because our law follows an abstract system when it comes to the transfer of ownership:

'... [T]he abstract theory applies in our law in respect of the passing of ownership in property. In terms thereof, a valid underlying

transaction or *iusta causa traditionis* is not a requirement for the valid transfer of ownership. Provided that the agreement to transfer ownership (the "real agreement"

or "saaklike ooreenkoms") is valid, ownership will pass in pursuance and on implementation thereof, notwithstanding that the *causa* (the "verbintenisskeppende ooreenkoms" or "contractual agreement") may be defective. In other words, all that is required is delivery (actual or constructive) coupled with an intention to pass and receive ownership.'⁸

[18] However, the fact that a valid underlying transaction is not a requirement for the valid transfer of ownership does not mean that a valid underlying transaction, where there is one, can be ignored for purposes of determining the question of ownership. On the contrary, I venture to suggest that in the vast majority of cases the underlying agreement would constitute the most crucial piece of evidential material in seeking to establish an intention to transfer ownership or the absence of such intention. Thus, for example, one would expect a contract of sale to regulate the question of ownership, failing which the residual rules

of the common law would apply. By contrast, one would ordinarily search in vain for any intention to transfer ownership where the underlying transaction is one of lease - or pledge, or safe custody, or use, for that matter.⁹

- [19] Recognition of this basic fact has important consequences in the present scenario. One of the main pillars in the argument of Colors in support of its claim to ownership is the fact that the sub-licence did not contain a reservation of ownership in favour of Sheehan Genetics or AMC. This fact, together with supply of the plant material to Colors, 'can lead only to the conclusion that the intention must have been for Colors to become owner', so it was argued. I cannot accept this argument, which is based on the fallacy that the failure of the parties to reserve ownership in favour of Sheehan Genetics is to be regarded as proof of an intention to transfer such ownership to Colors. It simply does not follow.
- [20] Colors sought support for this argument in the fact that in a licensing agreement entered into between Voor-Groenberg and Sheehan Genetics, after termination of the sub-licence agreement with Colors, it was specifically provided that 'all Sheehan Cultivars and Planting Material shall at all times remain the property of the licensor'. Colors saw this as an indication that Sheehan Genetics was aware of the concept of reservation of ownership, as contended for by Colors. Accordingly, so it was argued, 'the fact that the relevant sub-licence agreement contained no reservation of ownership in favour of [Sheehan Genetics] was indicative that the latter had appreciated that, in order for [Colors] to enjoy rights to exploit the plant materials, there would be no other option but to effect the transfer of ownership in the plant materials from [Sheehan Genetics] to Colors.' However, this argument can be turned on its head: the fact that there is no reservation of ownership clause in the sub-licence between Sheehan Genetics, AMC and Colors is equally consistent with a finding that the parties did not regard it as necessary to include such a clause in their agreement - just as parties to a lease agreement would ordinarily not deem it necessary to insert a clause reserving ownership to the lessor. Given the nature of the underlying agreement in issue, namely a sub-licence in respect of plant breeders' rights,

the absence of a reservation of ownership clause in the agreement is therefore hardly surprising. Inclusion of such a clause in the subsequent agreement with Voor-Groenberg can most probably be ascribed to an abundance of caution (or a 'belts and braces'

approach) on the part of Sheehan Genetics, flowing from its experience in this case.

- [21] Both parties sought to rely on the provisions of the sub-licence in support of their competing arguments regarding transfer of ownership. Thus, counsel for Colors sought to demonstrate that certain clauses are consistent with an intention, when placing Colors in possession of the plant material, that it would become owner of such material. Counsel for the appellants, on the other hand, pointed to various provisions in both the head licence and the sub-licence which, in their view, are inimical to a suggestion that it was intended that ownership in the plant material would pass to Colors. I do not propose to analyse the various agreements in any detail. In my view, it is a rather sterile exercise to examine the minutiae

of the various agreements in search of indications to support or rebut an intention to transfer ownership in the plant material to Colors.

The fact of the matter is that neither the head licence nor the sub-licence deals pertinently with the ownership of the physical property, as opposed to the intellectual property attaching to the plant material. In these circumstances, as stated by Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd*,¹⁰ where an agreement does not expressly provide for what is to happen when some event occurs, the most usual inference in such a case is that nothing is to happen:

'The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.'

The absence of a clause in the sub-licence dealing with the transfer of ownership or the reservation of ownership is therefore a strong factor in favour of Sheehan Genetics and Voor-Groenberg.

[22] Not only is there no provision in the head licence or the sub-licence dealing with the transfer of ownership; there is also no evidence on record to show that either Sheehan Genetics or AMC intended trans-ferring ownership in the plant material to Colors. As mentioned earlier, the question of ownership of the plant material was not originally the mainstay of Colors' case in the court a quo. Consequently this issue was only obliquely dealt with in the founding papers, where it was intimated that legal argument would be addressed to the court regarding the issue. As the authorities make clear, however, the intention to acquire and to pass ownership is a factual, not a legal, issue. Such direct evidence as there is tends to indicate that Sheehan Genetics

- the admitted owner of the original budwood - categorically denied that it ever intended to transfer ownership of such plant material to either AMC or to Colors. Bearing in mind where the onus rests, it is not possible to find that Sheehan Genetics had intended parting with all its rights of ownership in respect of the plant material when putting AMC and subsequently Colors in possession thereof.¹¹

[23] In this regard, it is important to emphasise that it is common cause that the original ownership of the budwood vested in Sheehan Genetics and that ownership in the rootstock vested in Voor-Groenberg. By grafting the former onto the latter, a new vine was created. Colors has failed to explain how ownership in the final product - the new vines - can be said to vest in it where ownership in the constituent parts at all relevant times vested elsewhere.¹²

[24] In finding that Colors had become the owner of the plant material in question, Davis J also relied on an unsigned draft agreement annexed to the answering affidavit of Voor-Groenberg and Olyvenboom.¹³ In the draft, which purported to regulate the arrangement between

Colors and Voor-Groenberg, it was recorded that Colors would at all times remain the owner of the propagating material. In my view, this document does not assist Colors to prove ownership of the plant material. Apart from the fact that the unsigned document was nothing more than a preliminary draft, with various gaps that still had to be filled in, and that Colors specifically disavowed reliance on it, Sheehan Genetics was not a party to the document. The mere recordal or acknowledgement of ownership by a remote party cannot by itself bestow such ownership upon the other contracting party or deprive the true owner of its ownership. Upon the basis of the evidence analysed above, Voor-Groenberg's purported acknowledgement of Colors' ownership was simply wrong in law and could not alter or affect the legal positions under the head licence and the sub-licence regarding ownership of Sheehan Genetics.

- [25] Finally, Voor-Groenberg adduced evidence by way of an affidavit by an independent expert, Mr Burgert van Dyk, who described himself as the business unit manager of product development of the South African Plant Improvement Organisation Trust, who has held that position since 1993. His duties include, inter alia, assessing new varieties of grapes as well as negotiating agreements for the testing and commercialisation of such fruits, taking into account the relevant plant breeders' rights. He was asked whether there was an industry norm governing the ownership of vegetative materials, including buds and budwood, where the propagation, testing and growing of such plant materials is licensed by the owner of the plant breeder's rights. He stated his opinion as follows:

'In my experience at SAPO over approximately the last two decades, the industry norm appears to be that ownership of buds and budwood remains with the owner of the plant breeder's rights, irrespective of whether such vegetative materials are in possession of the licensor, licensee, or a sub-licensee.

Ownership of the vegetative materials, in my experience, does not pass to licensee or a sub-licensee when such materials leave the hands of the licensor. The nature of the relationship between the licensor and licensee (or sub-licensee) dictates that the licensor cannot and does not retain possession of the plant materials used for propagation. It would be untenable and illogical in the context of such relationship for ownership of the plant materials to pass to the licensee (or sub-licensee) on physical transfer of the goods/

Colors sought to counter this evidence by submitting that even if such a norm existed, it would have been and was excluded by the more specific contractual arrangement of the parties in this case, which is to the contrary effect. However, as I have attempted to demonstrate above, I am not persuaded that the contractual arrangement of the parties in this case is indeed to the contrary effect. Where their agreement is silent on the question of transfer of ownership, the status quo remains unaltered, which is exactly in line with the industry norm relied on by Voor-Groenberg.

[26] For all these reasons, I conclude that Colors has not discharged the onus of proving that ownership of the plant material in question had been transferred to it by AMC or Sheehan Genetics.

Section 23(6) of the PBRA

[27] It remains for me to deal briefly with the provisions of s 23(6) of the Act, on which Colors strongly relied. In an alternative argument, Colors claimed that it was entitled to possess and exploit plant materials in terms of and to the extent allowed by those provisions, which read as follows:

'(6) Notwithstanding the provisions of section 23A(a), a person who procured any propagating material of a variety in a legitimate manner shall not infringe the plant breeder's right in respect of the variety if he or she—

- (a) resells that propagating material;
- (b) subject to the provisions of subsection (2), sells any plant, reproductive material or product derived from that propagating material for purposes other than the further propagation or multiplication thereof;
- (c) uses or multiplies that propagating material in the development of a different variety;
- (d) uses that propagating material for purposes of bona fide research;
- (e) uses that propagating material for private or non-commercial purposes; or
- (f) is a farmer who on land occupied by him or her uses harvested material obtained on such land from that propagating material for purposes of propagation: Provided that harvested material obtained from the replanted propagating material shall not be used for purposes of propagation by any person other than that farmer.'

[28] Section 23A of the Act, as far as relevant, provides that 'a plant breeder's right shall be infringed by any person who -

- (a) not being the holder of the plant breeder's right, performs, or causes to be performed, an act contemplated in section 23 (1) without a licence obtained under section 25 or 27;
- (b) has obtained a licence under s 25 or 27 but fails to comply with any term thereof; . . .'

[29] The reference in the opening line of s 23(6) to the provisions of s 23A(a) makes it clear, first, that it refers to persons who perform certain infringing acts without a licence obtained from the plant breeder in question. Colors manifestly was not such a person, as it obtained the plant material

in issue pursuant to a valid licence. Secondly, reading s 23(6) in context, it provides a defence - not a cause of action - to a limited class of persons, namely persons without a licence obtained under s 25 or 27, who are accused of infringing a plant breeder's right. Like estoppel, therefore, s 23(6) is meant to be utilised as a shield, not as a sword.¹⁴ For both these reasons, I am of the view that Colors' reliance on the provisions of s 23(6) is misplaced.

[30] As for the claim against Olyvenboom, it had no active involvement in any of the activities dealt with in the application and it posed no threat to Colors. On the papers, Colors has failed to establish any of the essential requirements for a final interdict. That part of the order, likewise, cannot be sustained. It follows that the application against both appellants should have been dismissed with costs.

Order

[31] For the reasons set out above, it is ordered as follows:

- (a) The appeal is upheld with costs, including the costs of two counsel.
- (b) The order of the court a quo is set aside and replaced with the following order:

'The application is DISMISSED with costs, including the costs of two counsel.'

B M GRIESEL

Judge of the High Court

FORTUIN J: I agree.

C M J FORTUIN

SAMELA J: I agree.

M I SAMELA

1Colors Fruit (South Africa)(Pty) Ltd v Voor-Groenberg Nurseries/Kwekerye CC & others (14891/2011)

[2011] ZAWCHC 453 (16 September 2011), accessible at <http://www.saflii.org/za/cases/ZAWCHC/2011/453.html>

2There has been a change in corporate identity and ownership of Sheehan Genetics from time to time and the company which was the third respondent in the court a quo is not the same as the partnership that had originally concluded the head licence or the subsequent sub-licence, but nothing turns on this aspect.

3Johannesburg Municipal Council v Rand Townships Registrar 1910 TS 1314 at 1319.

4Loc cit.

5Commissioner of Customs and Excise v Randies, Brothers & Hudson Ltd 1941 AD 369 at 398; Bank Windhoek Bpkv Rajie 1994

(1) SA 115 (A) at 141C-F and the cases cited therein.

6Bank Windhoek, *supra*, loc cit.

7Judgment, para 25.

8Mathenjwa NO v Magudu Game Company (Pty) L/∧ 2010 (2) SA 26 (SCA) para 25.

9Cf D Carey Miller *The Acquisition and Protection of Ownership* at p 121.

10 [2009] 2 All ER 1127; [2009] UKPC 10; [2009] 1 WLR 1988 para 17.

11Cf Johannesburg Municipal Council v Rand Townships Registrar, *supra*, n 3.

12Some attempt was made to show that, as between Colors and Voor-Groenberg, the former had obtained ownership of the vines by means of accessio. However, this argument only becomes relevant if ownership of the budwood indeed passed from Sheehan Genetics to Colors.

13Judgment, paras 28, 34.

14Mann v Sydney Hunt Motors 1958

(2) SA 102 (GW) at 106G-H. See also Estoppel; 9 Lawsa (2 ed) para 672.

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