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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 228/2018

In the matter between:

ELAN BOULEVARD PROPRIETARY LIMITED	**APPELLANT**
and	
FNYN INVESTMENTS (PTY) LTD	**FIRST RESPONDENT**
FARHAT ESSACK	**SECOND RESPONDENT**
NADIA ESSACK	**THIRD RESPONDENT**

Neutral citation: *Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd & Others* (228/2018) [2018] ZASCA 165 (29 November 2018)

Bench: Ponnan, Dambuza, Mocumie and Schippers JJA and Mothle AJA

Heard: 22 November 2018

Delivered: 29 November 2018

Summary: Private International Law – enforcement and recognition of a foreign judgment – whether judgment final and conclusive – whether enforcement of judgment precluded by Protection of Businesses Act No 99 of 1978.

ORDER

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

1. The appeal is upheld with costs.
2. The order of the court below is set aside and replaced by:

   '(a). The judgment of the Supreme Court of Queensland, Brisbane, Australia, delivered on 21 July 2016, under case number SC 1539 of 2012, is recognised and enforced on the terms set out hereunder.

   (b). Judgment is granted in favour of the applicant:

   i. against the second and third respondents in the sum of AUS$597 926.23 jointly and severally, the one paying the other to be absolved; and

   ii. against the second respondent in the sum of AUS$574 688.03.

3. The second and third respondents are directed to pay interest on the aforesaid amounts from 21 July 2016 to date of payment in full at the current annual rate of 7.75% per annum.
4. The second and third respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Ponnan JA (Dambuza, Mocumie and Schippers JJA and Mothle AJA concurring):

[1] This is an appeal against the dismissal of an application for the recognition and enforcement of a foreign civil judgment sounding in money delivered on 21 July 2016 by the Supreme Court of Queensland. The appellant, Elan Boulevard (Pty) Ltd, is the

judgment creditor. The Essacks - Farhat, the second respondent, and his wife, Nadia, the third respondent, are two of the three judgment debtors.

[2] The Essacks are South African nationals. They were intent on emigrating to Australia and, having obtained permanent residence visas, settled there in 2002. According to Farhat, whilst living in Australia, 'he thought it advisable to set up an entity which would enable [him] to conduct some business in Australia, to the extent necessary.' Accordingly, the Farhat Essack Family Trust (the Australian Trust) was set up and the sole Trustee of the Australian Trust, FNYN Investments (Pty) Ltd ACN 101 848 515 (FNYN), was established. The directors of FNYN were the Essacks. They, however, returned to South Africa in December 2003, without having completed the necessary residence requirements for Australian citizenship. As they did not wish to completely sever ties with Australia, no steps were taken to dissolve the Australian Trust or de-register FNYN.

[3] The appellant was the developer and vendor of apartments in the Hilton development at Surfers Paradise in the State of Queensland, Australia. In December 2007 the Essacks travelled to the Gold Coast from South Africa to attend a family wedding. Prior to returning to South Africa in early 2008, the Essacks were informed by Yunis Omar, a good friend, about the Hilton development. Omar told them that it was an excellent investment. They decided to buy into the development. During March and April 2008 FNYN, on behalf of the Australian Trust (the purchaser), and the appellant concluded written contracts for the purchase of two 'off-the-plan' apartments in the development, namely lot numbers 12203 and 12603 and two furniture contracts in relation to those apartments. The obligations of the purchaser were guaranteed by: (a) both Essacks in respect of lot number 12203 and the furniture contract in relation that lot; and (b) only Farhat in respect of lot 12603 and the furniture contract in relation to that lot.

[4] The appellant issued a claim out of the Supreme Court of Queensland, Brisbane, Australia against the purchaser (as the first defendant), for damages for breach of contract and against Farhat (as the second defendant) and Nadia (as the third

defendant) for recovery of monies pursuant to the guarantees given by them. All three defended the claim on the basis that a sales consultant of the appellant had made misleading and deceptive representations to Omar, who passed those on to Farhat, as a consequence of which, so it was alleged, they entered into the contracts. By way of a counterclaim, they sought compensation for the losses suffered as a result of having entered into the contracts as well as return of the deposit paid in respect of each contract.

[5] The matter proceeded to trial before Boddice J, who noted 'subject to determination of their counterclaim, the defendants admit the plaintiff's claim'. The learned judge added:

'4. At issue in the trial is whether Ogilvy made the alleged misleading and deceptive statements, whether the defendants relied upon those statements in entering into the contracts and whether at law representations made to Omar can sustain the defendants' claim for relief.'

On that score, the judge held:

'66. Omar did not impress me as a reliable witness. His evidence was strongly suggestive of reconstruction rather than recollection. The fact that the defendants' initial defence, prepared on the instructions of Omar, contained no reference to the alleged representations now sought to be relied upon was strongly supportive of the conclusion that Omar's evidence is reconstruction.

. . .

73. In rejecting Omar's evidence as neither reliable nor credible, I have given careful consideration to the evidence of the second defendant and of Osman. That evidence was in large measure consistent with Omar's account. However, I found the evidence of the second defendant and of Osman neither persuasive nor cogent. I did not find the second defendant's evidence credible or reliable. His initial description of his occupation was, at best, disingenuous. His suggestion that he did not read the contracts prior to signing or initialling in various places lacked credibility. The second defendant struck me as a commercially savvy businessman who was unlikely to have entered into a substantial financial transaction without consideration of the relevant documentation.'

[6] Boddice J concluded that '[t]he defendants have not established the plaintiff, through Ogilvy, made any of the alleged misrepresentations' and accordingly dismissed the counterclaim. He added:

'83. The defendants accept that if they fail in their counterclaim they are liable for damages for breach of contract and pursuant to the guarantees. They admit the quantum of the plaintiff's claim for damages on resale. The only dispute is as to the plaintiff's entitlement to interest on the amount of the purchase price, from the date of settlement to the date of judgment.'

The learned judge accordingly issued the following order:

'1. There be judgment for the plaintiff on its claim;

2. The defendants' counterclaim is dismissed;

3. The defendants pay to the plaintiff the sum of $1 172 614.26;

4. The defendants pay the plaintiff's costs of the proceeding (including any reserved costs), to be assessed on a standard basis up to and including 26 April 2016 and thereafter on an indemnity basis from 27 April 2016'.

[7] On 29 November 2016 the appellant applied to the Gauteng Division of the High Court, Pretoria for an order:

'1. Recognizing and enforcing the judgment handed down in favour of the applicant (as the plaintiff) against the respondents (as the defendants) by the Supreme Court of Queensland, Brisbane, Australia under case number SC1539/2012 on 21 July 2016 ("the judgment");

. . .

3. Directing, in consequence of any order made in terms of paragraph 1 above, that the respondents pay to the applicant:

3.1 Australian $1 172 614.26;

3.2 interest on the sum of Australian $1 172 614.26 from 22 July 2016 to date of payment in full at the current annual rate of 7.75% per annum;

3.3 the costs of this application'.

The application failed before Legodi J, who dismissed it with costs. The appeal is with the leave of this court.

[8] FNYN was cited as the first respondent in the application. In support of the application it was stated: '[t]he First Respondent is the trustee of the Farhat Essack

family trust, a trust regulated in South Africa in terms of the Trust Property [Control] Act 57 of 1988'. In his answering affidavit, Farhat asserted that:

'9. Fnyn Investments (Pty) Ltd ("Fnyn") is not a trustee of the first respondent and the applicant's applications are incorrect in this regard.

10. Fnyn is however a trustee of an Australian Trust with the same name as the first respondent, namely the Farhat Essack Family Trust ("the Australian Trust") . . .'

In the replying affidavit filed on behalf of the appellant, it came to be accepted that:

'6. . . . while it is clear from the transcript of the hearing before the Queensland Court that there was an Australian trust and a South African trust, it is far from clear from the transcript as to what was the relationship between the two trusts and whether Fnyn was the trustee of both trusts. For the purpose only of this application I now accept from annexure "B" to the answering affidavit (being the Letters of Authority appointing the trustees of the Farhat Essack Family Trust) that the first respondent is not the trustee of the South African trust. The applicant will accordingly not apply for any relief against the first respondent in this application'.

Accordingly, nothing further need be said about the first respondent.

[9] That leaves the Essacks. It is apparent from the judgment of Boddice J that 'the defendants pay to the plaintiff the sum of $1 172 614.26'. It is not in dispute that the basis of the judgment against the Essacks was their respective guarantees in respect of the principal debt. Boddice J in an obvious error, granted judgment against each of them qua guarantor for the full amount of the judgment debt. Farhat had bound himself in respect of both lots. Nadia, only the one. The appellant accepted before Legodi J that Nadia could not be held liable for the full amount of the judgment debt in the sum of $1 172 614.26. It accordingly gave notice that it would seek judgment against both Essacks jointly and severally for $597 926.23 and Farhat alone for $574 688.03. It is principally because of the approach adopted by the appellant in the court below, which acknowledges that there was an error in respect of the quantum of the liability attributed to Nadia, that the Essacks contend that the judgment is not final and conclusive because, so they argue, it is subject to correction by the Australian court.

[10] As Corbett CJ observed in *Jones v Krok* 1995 (1) SA 677 (A) at 689B-C, it is a legal requirement of any action to enforce a foreign judgment in a South African court that the judgment be final and conclusive. The requirement of finality means that the

judgment must be final in the particular court which pronounced it.[1] Contending that it was not, counsel for the Essacks called in aid *Nouvion v Freeman and Another* (1890) 15 App Ass 1 (HL). It was there held, by the House of Lords (per Lord Herschell) that it must be shown that the court by which the foreign judgment was pronounced 'conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country so as to make it *res judicata* between the parties.'

In *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and others* (No 2) [1966] 2 All ER 536 (*Carl-Zeiss-Stiftung)*, the House of Lords had occasion to refer to the *Nouvion* judgment. At page 555 of the reported judgment, Lord Reid explained why the English court had refused to give effect to the foreign judgment:

> 'In this connexion the case of *Nouvion v Freeman* is important. There had been in Spain a final judgment in a summary form of procedure; but that was not necessarily the end of the matter because it was possible to reopen the whole question by commencing a different kind of action, so the summary judgment was not res judicata in Spain. I do not find it surprising that the House unanimously refused to give effect in England to that summary judgment.'

[11] Lord Hodson observed in *Carl-Zeiss-Stiftung* (at p 560) that the expression 'final and conclusive', which is to be found in the Foreign Judgments (Reciprocal Enforcement) Act are repetitive and 'conclusive' must mean that the judgment cannot, although it may be subject to appeal, be varied by the court which made it, as can for example, some maintenance or alimony orders. According to Lord Hodson, '[o]ne asks, about what is the judgment to be final and conclusive? The answer is that it must be on the merits and not only as to some interlocutory matter not affecting the merits.' The natural meaning of 'final and on the merits' is that there has been a final, as opposed to provisional determination of the parties' substantive rights (*Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 at 855).

[12] Our courts will ordinarily not investigate the merits of a case adjudicated by a foreign court.[2] It does not matter that the local court might have taken a different view or

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[1] *Jones v Krok* 1995 (1) SA 677 (A) at 689 H-I.
[2] *Joffe v Salmon* 1904 TS 317 at 319; *Jones v Krok* at 685E.

feels that the foreign court has erred.[3] This is because the remedy of an aggrieved litigant would be to appeal that judgment in the foreign jurisdiction. Our courts do not sit on appeal in relation to the judgment of the foreign court and, if it is contended that the decision of the foreign court is wrong, recourse must be had to the mode of appeal provided in that country.[4]

[13] Here, even were it to be accepted that insofar as Nadia is concerned, an Australian court could vary its judgment, such variation would not disturb her liability in respect of her personal guarantee. In regard to the law of Queensland; Chapter 16 of the Uniform Civil Procedure Rules 1999 makes provision, inter alia, for the setting aside of an order pursuant to Rule 667 upon the earlier of: (a) the filing of the order; or (b) the end of seven days after the making of the order. No such application to set aside the judgment was made by Nadia as required by Rule 667(1)(a) or (b).

[14] Thus, although notionally the order could have been varied by the Australian Court to rectify the error, such variation would not have related to the merits of the liability in respect of Nadia but merely to the quantum of such liability. In any event, the only consequence of a variation order would have been to reduce the amount of the liability to the amount now claimed in these proceedings by the appellant. The fact of the liability in such lesser amount would have remained undisturbed. This is particularly relevant given that in the Australian Court the Essacks conceded the merits in respect of the appellant's claim and relied only upon the counterclaim asserted by them, which was rejected. In the circumstances, the existence of the debt of Nadia flowing from her signature of a personal guarantee cannot be disputed and there is no reason why a South African Court should not, in the circumstances, recognise the judgment even if only to enforce a part thereof;[5] the part – in this instance, which is not disputed. Further, and in any event, with specific regard to Farhat, it cannot be contended that the judgment against him is not final and conclusive. He, of course, provided a guarantee in

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[3] CF Forsyth *Private International Law* (5 ed) at 469.
[4] *B.G. Smart v A.M. Raymond and G Smart* 1903 NLR 347 at 353.
[5] See the unreported judgment of Rogers J in *International Fruit Genetics LLC v Redelinghuys NO others*, Western Cape Division, Cape Town, case no. 2478/16, delivered on 7 February 2017, paras 50 and 51.

respect of both lots. There was no appeal by the Essacks against the order of the Australian court, nor was there any attempt by them to have the obvious error corrected. It follows, in my view, that reliance by the Essacks on *Nouvion v Freeman* is misplaced.

[15] The second main ground upon which the Essacks seek to defend the judgment of Legodi J is that the appellant seeks to enforce joint and several liability against them, when the liability *ex facie* the order, so it is contended, is joint. The learned judge stated that the Australian judgment 'is silent on whether joint liability is applicable or whether it is a situation where each must pay his or her proportionate liability if any such liability exists'. In response to the argument that the court should 'look beyond the judgment to the terms of the guarantee', he held to do so 'would be to seek to interpret the judgment, bearing in mind that conclusion has to be 'manifest, clear and obvious'.

[16] An order is merely the executive part of the judgment and to interpret it, it is necessary to read the order in the context of the judgment as a whole. In *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) Trollip JA passed some general observations about the rules for interpreting a court's judgment or order. As Nicholas AJA pointed out in *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 715 F-I:

'[Trollip JA] said (at 304 D-H) that the basic principles applicable to the construction of documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it.'

A part of the 'usual well-known rules' of interpretation, according to Olivier JA, is:

'dat mens jou nie moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasie is van dit wat gesê is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is.'[6]

[17] In my view a South African court is not precluded from construing the order in the light of the judgment and the reasons therefor and concluding that at all material times the intention of the Australian Court was to impose joint and several liability upon the Essacks. Indeed, this conclusion is inescapable in the light of the fact that the Australian judgment was granted in favour of the appellant 'on its claim', which in respect of the Essacks was founded upon their provision of guarantees in respect of the liability assumed by the purchaser under the various contracts of sale. Clause 3(2)(d) of each contract of sale provides 'if an obligation is imposed on two or more parties, each party is liable for the obligation individually and together with each other person'. Clause 43 governs the guarantors. It provides that each guarantor, *inter alia* (i) accepts 'all obligations specified in the contract' (clause 43.1(b)) and (ii) 'guarantees to us payment of all money and the performance of all obligations by you under the contract' (clause 43.2). It thus seems clear from the contracts, read as a whole, that liability was intended to be joint and several.[7] Clearly, it could never have been the intention of the Australian Court, as the Essacks would have it, to have ordered each of the defendants before it to have been liable only for their aliquot share of the judgment debt. Such a conclusion would fly in the face of the judgment and the provision by the Essacks of guarantees. Indeed, such a conclusion would be absurd; it would carry with it the necessary implication that the purchaser, was, in terms of the judgment only liable for its joint, i.e. one third portion of the judgment.

[18] It remains to consider the contention that s 1 of the Protection of Businesses Act No 99 of 1978 precludes enforcement of the Australian judgment. Section 1 (1) of the Act provides that, except with the permission of the Minister of Economic Affairs, no judgment, order or arbitration award delivered, given, issued or emanating from outside

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[6] *Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal* 2001 (3) SA 9 at 18J - 19A. Loosely translated: 'One should not stare blindly at the black-on-white words, but try to establish the meaning and implication of what is being said. It is precisely in this process that the context and surrounding circumstances are relevant.'

[7] *Tucker and Another v Carruthers* 1941 AD 251 at 254.

the Republic and arising from any act or transaction contemplated in ss (3) shall be enforced in the Republic. Section 1(3) reads:

'(3) In the application of ss (1)(*a*) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership or any matter or material, of whatever nature, whether within, outside, into or from the Republic.'

[19] In *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax)*, Howard JP held:

'The dictionary definitions indicate clearly enough that "matter or material" in this context means raw materials or substances from which physical things are made not a manufactured thing such as a ship. The reference in s 1(3) to the mining, production, importation, exportation and refinement of "matter or material" (with no reference to manufacture) is a further pointer to the meaning which that expression is intended to bear: *cognoscitur a sociis*. I do not think that the words "of whatever nature" justify an extension of the ordinary meaning of "matter and material". If that expression ordinarily denotes raw materials or substances, the words "of whatever nature" merely indicate that it embraces everything within that category. I therefore conclude that the ship which features in this case is not "matter or material" within the meaning of that expression as used in s 1(3) of the Act.' [8]

[20] In *ChinaTex Oriental Trading Co v Erskine*, Chetty J rejected the contention that *Tradex* had been wrongly decided. He stated:

'In my view the above reasoning is convincing and the matter correctly decided. The wording of the section evinces a clear indication that the Legislature intended to refer to raw material or substances and not manufactured goods such as garments.'[9]

The correctness of *Tradex* and *ChinaTex* was endorsed by this court in *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA). In upholding the Essacks' defence on this score, Legodi J observed that the 'Richman judgment, does not seem to support wholly the contention that permission is required only when dealing with raw materials'. That with respect to the learned judge is plainly wrong. In *Richman v Ben-Tovim*, Zulman JA noted: '[t]he wording of the section refers to transactions connected with raw materials or

[8] *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax)* 1994 (4) SA 119 at 120J - 121C.
[9] *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 at 1095F - 1096C.

substances. Even manufactured goods are excluded from the operation of the Act.' It follows that the foreign judgment that the appellant seeks to enforce does not arise from any act or transaction contemplated in s 1(3) and this defence accordingly ought to have failed before Legodi J.

[21] In the result:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and replaced by:

'(a). The judgment of the Supreme Court of Queensland, Brisbane, Australia, delivered on 21 July 2016, under case number SC 1539 of 2012, is recognised and enforced on the terms set out hereunder.

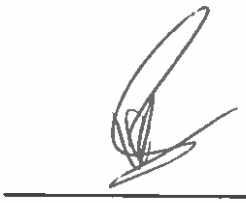
(b). Judgment is granted in favour of the applicant:

i. against the second and third respondents in the sum of AUS$597 926.23 jointly and severally, the one paying the other to be absolved; and

ii. against the second respondent in the sum of AUS$574 688.03.

3. The second and third respondents are directed to pay interest on the aforesaid amounts from 21 July 2016 to date of payment in full at the current annual rate of 7.75% per annum.

4. The second and third respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.'



V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	M J Fitzgerald SC
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For Respondent:	G D Harpur SC (with him C V Du Toit)
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