NOT REPORTABLE

CASE NO. A 278/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

OLYMPIC FRUIT BV	**APPLICANT**

and

NAGRAPEX HOLDINGS (PTY) LTD	**1st RESPONDENT**
NIVEX HOLDINGS (PTY) LTD	**2nd RESPONDENT**
EXOTIC INTERNATIONAL (NAMIBIA) (PTY) LTD	**3rd RESPONDENT**
INTERNATIONAL GRAPE COMPANY (PTY) LTD	**4th RESPONDENT**

CORAM: CORBETT, A.J.

Heard on: 10, 11 November 2011

Delivered on: 14 November 2011

JUDGMENT

CORBETT, A.J: .

[1] In this matter it was not the grapes but rather the relationship between the parties which went sour. The applicant is a company registered and incorporated in the Netherlands conducting business in the fruit and vegetable trade. The respondents, commonly referred to as the Navico Group of Companies, are all companies registered in Namibia producing table grapes at Aussenkehr on agricultural land situated near the Orange River in the south of Namibia. The harvesting season for the year commenced on approximately 11 November 2011 and is due to endure for a period of approximately six weeks.

[2] On 18 March 2009 applicant and the respondents entered into a marketing and sale Agreement ("the marketing agreement"), together with an addendum to that agreement. The marketing agreement was further amended by an addendum dated 3 September 2010. The essence of the marketing agreement as amended was that applicant was appointed as the sole and exclusive agent for the marketing and sale of the respondents' total production of table grapes at Aussenkehr. The grapes so produced are sold worldwide by applicant to clients in Europe, Russia, the Middle and Far East. The sale of grapes attracts an annual turnover for respondents of approximately N$160

million, and in the previous season the applicant earned roughly N$17 million in commission in terms of the marketing agreement.

[3] The applicant alleges that the respondents have breached the marketing agreement. Applicant accordingly approached this Court on an urgent basis seeking an interim interdict in the form of a *mandamus* ordering respondents to comply with their obligations in terms of the marketing agreement, pending the outcome of an action to be instituted by applicant against respondents. In the action applicant is to seek declaratory relief that the marketing agreement is of full force and effect and that the letter of intent entered into between the parties on 10 March 2011 could not be the cause of obligations of a reciprocal nature *vis- a-vis* the marketing agreement. Applicant further sought an order that for the purposes of monitoring respondents' compliance with the interdict, respondents be ordered to permit applicant to be represented on respondents' properties at Aussenkehr during the harvesting, packing and shipping of the grapes of the 2011 harvest.

[4] In opposing the application, it was contended *in limine* by Mr Coetsee SC, who appeared together with Mr Gess, that this Court lacks jurisdiction to entertain this matter by virtue of the provisions of the marketing agreement which determines that the Courts of Rotterdam in the Netherlands shall have exclusive jurisdiction to adjudicate on disputes between the parties. It was further contended *in limine* that this Court should not grant a mandatory interdict against

an *incola* of Namibia where the performance is to be carried out in a foreign country and not in Namibia. A further basis of opposition was that, given that the marketing agreement is one of agency giving rise to duties of a personal and fiduciary nature to be performed by the applicant, where the respondents had lost all confidence or trust in the applicant's performance in terms of the marketing agreement, a mandatory interdict would be an inappropriate remedy. It was further contended that the applicant had in any event not met the requirements for a final interdict, the nature of relief which is sought being in the form of a final interdict. The issue of urgency was also contested. I will deal with these issues in turn.

The issue of jurisdiction

[5] The marketing agreement, read together with the addendums thereto, appointed applicant as the sole and exclusive agent for the marketing and sale of the respondents' total production of table grapes. The marketing agreement was to endure from the 2009 harvesting season up to and including the harvesting season ending in December 2019. Clause 9 the marketing agreement provides that:

> "**This Agreement is the entire agreement between the parties and neither party relies in entering into this agreement, on any warranties, representations, disclosures or expressions of opinion which have not been incorporated into this Agreement as warranties or undertakings. No**

variation, extension or consensual cancellation of this agreement shall be of any force or effect unless reduced to writing and duly signed by all parties."

[6] In regard to choice of law and jurisdiction, clause 7 of the marketing agreement provides that:

"**7.1 This agreement shall be governed by and construed in accordance with the laws of The Netherlands.**

7.2 The parties agree that any legal action or proceedings arising out of or in connection with this agreement shall be brought in any competent court in Rotterdam, The Netherlands, and irrevocably submit to the exclusive jurisdiction of such court and each appoints a person (at the address chosen as its *domicilium citandi et executandi* in terms of clause 8) to receive for and on its behalf service of process in such jurisdiction in any legal proceeding in respect of this Agreement."

[7] It was contended by Mr Heathcote SC, who appeared with Mr Dicks, that the exclusive jurisdiction clause contained in clause 7 of the marketing agreement is not enforceable and contrary to Articles 80, 5 and 12 of the Namibian Constitution, alternatively that the Court in any event has a discretion to hear the matter, despite the existence of the jurisdiction clause. It was further

contended that there was insufficient time – given the imminent commencement of the grape harvesting season at Aussenkehr – to institute proceedings in Rotterdam and thereafter to institute proceedings in this Court for the enforcement of the order. It was contended on behalf of the respondents that the Court cannot ignore the express provisions of the marketing agreement, but that should the Court hold that it has a discretion to entertain this matter, then it should not exercise such discretion in favour of the applicant.

[8] Experts who deposed to affidavits on behalf of both the applicant and the respondents were *ad idem* that it was theoretically possible to approach the Rotterdam Courts in the Netherlands for urgent interim relief. However, the applicant's expert, Jan Verhoeven, considered that it would be "*virtually impossible*" for the applicant to bring a successful urgent application in the circumstances of this case. His opinion was based on the fact that the respondents were foreign companies to The Netherlands jurisdiction and it would be doubtful whether the time limits for service on the respondents could be reduced to one or two weeks. The respondents' expert, Prof. Koppenol-Laforce, opined that the Rotterdam Court would have freedom to allow the applicant to summon the respondents to Court on a period shorter than even a week. The opinion, however, fell short of stating what in her view would have in all likelihood happened should the applicant *in casu* have approached the Rotterdam Court on short notice. In my view, this omission makes it difficult for this Court to determine

whether on the facts of this case, the Rotterdam Court could afford effective urgent relief to the applicant.

[9] I am inclined to the view that the decisive determinant of the jurisdictional issue lies in whether or not the Rotterdam Court could give effective relief to the applicant. Allied to this question is the crisp issue as to whether the exclusive jurisdiction clause contained in the marketing agreement ousts the jurisdiction of this Court. In the matter of *Butler v Banimar Shipping Co SA* Howie AJ (as he then was) said: [1]

> "A foreign jurisdiction clause, although obviously not the equal of an arbitration clause in form or effect, is nonetheless equivalent to the latter in the sense that neither is absolutely binding and, in the case of both, the Court in which the action is brought in breach thereof has a discretion to hear the matter itself and not to refer it to the chosen foreign court or arbitrator: see, as regards England, *The Athenee* (1922) 11 Lloyd's LR 6 at 7; *The Fehmarn* (1957) 2 All ER 707 and, on appeal, (1958) 1 All ER 333 at 335 and 336; *The Eleftheria* (1969) 2 All ER 641; and, as regards South Africa, *Commissioner for Inland Revenue and Another v Isaacs NO and Others* 1960 (1) SA 126 (A) at 134 G; the *Yorigami* case *supra* at 692 E-693A and 694A-B.
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> It was held in the *Yorigami* case *supra*, wherein an application was made for the setting aside of an attachment order, that it was not for the Court hearing such application to decide whether the trial ought to be stayed and referred to

[1] 1978 (4) SA 753 (SECLD), at 761 G – 762 C

> arbitration under an arbitration clause but merely to decide whether that Court's jurisdiction was at all ousted. It was decided that an arbitration clause did not oust the Court's jurisdiction and the application was dismissed. I think, on parity of reasoning, that jurisdiction is also not ousted where, as here, attachment is being requested, where the clause relied on by the party opposing attachment is a foreign jurisdiction clause and where all the requirements for attachment have been shown.
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> It will, in my opinion, be for the trial Court to decide whether the latter clause ought to result in the action being pursued in Greece or in South Africa and, even if the indications now are – and I express no view in this regard – that the trial Court will probably grant a stay, this is not enough to disentitle the applicant to the attachment which he seeks. It is to be noted that the aforesaid decision in the *Yorigami* case concerning the effect of the arbitration clause was not attacked or overruled when the matter went to appeal: see 1978 (2) SA 391 (C)."

[10] I am in respectful agreement with the conclusion reached by Howie AJ. It will be for the trial Court to decide whether the exclusive jurisdiction clause ought to result in the action in this matter being pursued in the Namibian High Court, or alternatively the matter should be pursued in the Court of Rotterdam in The Netherlands. In exercising a discretion whether or not to hear the matter, I am of the view that a compelling consideration on the facts *in casu* is that the applicant seeks at this stage of the proceedings an interim order, pending an action to be instituted at a later stage. This Court has stressed that it is final foreign

judgments that are recognized and given effect to. In *Westdeutsche Landesbank Girozentrale v Horsch* Levy J, in upholding this proposition, stated: [2]

> "The exigencies of international trade and commerce require that final foreign judgments be recognised as far as is reasonably possible in our Courts, and that effect be given thereto. To assist a judgment creditor who has obtained such a foreign judgment, our Courts grant such judgment creditor the right to invoke the extraordinary remedy of provisional sentence, that is he has the right to obtain a provisional judgment speedily, and without resorting to the more expensive and dilatory machinery of an illiquid action.
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> However, because this is an extraordinary remedy, the Court is strict about the compliance with certain prerequisites. These prerequisites include annexation to the summons of a certified copy of such judgment and, where the judgment is in a foreign language, a due and proper translation thereof. All foreign documentation must be duly authenticated in terms of the Rules of Court. It is essential to prove that the foreign judgment is final and enforceable according to the foreign law concerned and that it has been handed down by a court of competent jurisdiction.

This principle was further enunciated upon by Teek J in *Bekker N.O v Kotze and Another*, where the following was stated: [3]

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[2] 1992 NR 313 (HC), at 314 F - I
[3] 1994 NR 345 (HC), at 348 I – 349 B

> "Mr *Le Roux* further argued that 'it is trite law that the Namibian Courts can only recognise final foreign judgments and orders and not provisional orders' and he relied on what was stated in *Estate H v Estate H* 1952 (4) SA 168 (C) at 171A:
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> > 'It is common cause that this Court will only *enforce* the order of a foreign Court if it is a final judgment.'
>
> I agree with this submission and what was stated in *Estate H* for it is logical that this Court cannot enforce a foreign judgment unless it is final because a provisional order or judgment can be confirmed or be discharged on the return date.

[11] In the matter of *Jones v Krok* [4] the Court confirmed the principle that the enforceability of foreign judgment is dependent upon the judgment being final and conclusive. In that matter Corbett CJ referred to the case of *Greathead v Greathead, 1946 TPD 404, at 407 – 408* where Ramsbottom J in considering the meaning of the words "*final and conclusive*" in this context, referred to the following remarks of Lord Herschell and Lord Watson in the English case of *Nouvion v Freeman and Another* (1890) 15 App Cas 1 (HL):

> "My Lords, I think that in order to establish that such a judgment has been pronounced it must be shown that in the Court by which it was pronounced it conclusively, finally and forever established the existence of the debt of which it

[4] 1995 (1) SA 677 (AD), at 689 B - C

> is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt.
> (*Per* Lord Herschell at 9.)
>
> '…(N)o decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it…" [5]

[12] I accordingly find that the Court's jurisdiction was not ousted by the exclusive jurisdiction clause contained in the agreement between the parties. In determining the further question of whether in the exercise of the Court's discretion this Court should hear the matter itself or the matter should rather be referred to the chosen foreign Court of the parties, I am mindful of the duty imposed upon the Court as part of its inherent jurisdiction to grant *pendente* relief to avoid injustice and hardship. This power has been described by Kotzé JA in *Airo Express v LRTB, Durban* as follows: [6]

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[5] at 768 D - F
[6] 1986 (2) SA 663 (AD), at 676 C - D

> "An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless, as is the case here."

[13] In *Melamed NO v Munnikhuis* Van Schalkwyk J in the context of jurisdiction dealt with the doctrine of effectiveness in the following way: [7]

> "The concept that different Courts might have jurisdiction in respect of the discrete parts of intra-national contractual relationships is not foreign to the law. *Executors of Muter v Jones* (1860) 3 Searle 356 at 358-9; *Chatenay v The Brazilian Submarine Telegraph Co Ltd [1891] 1 QB 79 (CA) ([1886-90] All ER Rep 1135) at 83-4.*
>
> The same conclusion may be derived in a different way. The doctrine of effectiveness, which is an important component of the rules on jurisdiction and which Mr *Van der Linde* invoked in support of his contention that the Court should not make the order sought upon the basis that it might be ignored with impunity can, I think, be applied with the opposite effect. If the facts before the Court demonstrate that the order which it proposes to make will be effective notwithstanding that the order is to be performed beyond its jurisdiction, then there is no reason why the Court should not make the order if it is based upon a contract upon which the Court manifestly does have jurisdiction."

[7] 1996 (4) SA 126 (W), at 131 E - H

The uncertain factor of the applicant being able to obtain effective relief in the Rotterdam Court weighs heavily. There is firstly the reservation as to whether an expeditious remedy avails the applicant should it approach the Rotterdam Courts; and secondly, more compellingly even if such relief were to be granted in the Netherlands, relief *pendent lite* being interim relief would not be effective relief since any such foreign order could not be enforced by this Court. For these reasons, I conclude that this Court does have jurisdiction to entertain this application, and I exercise my discretion to hear this matter.

Jurisdiction to grant mandatory relief

[14] The relief sought by the applicant is a mandatory interdict to compel the respondents to perform their obligations to the applicant in terms of the marketing agreement. It is contended on behalf of the respondents that at no stage have the respondents delivered any table grapes to the applicant in Namibia, but that the agreed point of delivery had always been the Cape Town harbor in South Africa. The obligations to deliver, and the point of delivery – so it was contended by counsel representing respondents – had never been within the territory of Namibia. It was accordingly submitted that this Court should not grant a mandatory (as opposed to a prohibitory) interdict against an *incola* of Namibia, where the performance (which, in this instance, commences with the delivery of the table grapes) is to be carried out in a foreign country and not in Namibia.

[15] It is correct that in terms of the agreement the table grapes are to be delivered in a foreign country. However, that obligation is only one of the obligations imposed upon the respondents in terms of the agreement. Clause 3 of the second addendum to the marketing agreement obliges the respondents during the duration of the agreement to "*fully support the marketing activities of OF* (the applicant) *in the Republics of Namibia and South Africa and all over the rest of the world*". Thijs van den Heuvel, the Chief Executive Officer of the applicant, points out that the destination of the table grapes depends upon the instructions obtained from the respondents. The employees of the logistics company GoReefers (Pty) Ltd are situated on the respondents' farms at Aussenkehr during the harvesting season. Should the order sought in this matter be granted, GoReefers would simply continue to carry out the instructions based upon the documentation and orders conveyed to its officers at the Aussenkehr farm. In the circumstances, I find that performance of some of the material obligations, referred to earlier, arising from the marketing agreement are to be carried out in Namibia. In this sense, the granting of a *mandamus* by this Court would have effect in Namibia, irrespective of whether further obligations are required to be performed in South Africa or some other foreign country.

[16] Prof. Christopher Forsyth, in his authoritative work "*Private International Law*" [8] distinguishes between different jurisdictional rules applicable to mandatory interdicts on the one hand and prohibitory interdicts on the other. The distinction has its foundation in the notion that to order an act to be done in a foreign state,

[8] 4th Ed., pp. 230 - 233

would infringe its sovereignty, whereas to command something not to be done would not violate the rights of another state. Prof. Forsyth, however, confirms that this distinction has not commended itself to courts. He states that whilst the law of jurisdiction in regard to interdicts is unclear, he supports the view that –

> "…if a respondent is an *incola*, the court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) no matter if the act in question is to be performed or restrained outside the Court's area. [9]

I am in respectful agreement with the learned author. *In casu*, mention has already been made of the fact that some of the obligations which are affected by the *mandamus* sought are to be performed within Namibia, whilst others are to be performed beyond its borders. In either event, I find that this Court may assume jurisdiction to grant the relief sought. This further point taken *in limine* by the respondents accordingly has no merit.

The factual basis for mandatory relief

[17] The agreement relied upon by the applicant is a contract providing for the appointment of the applicant as an agent to market, distribute and sell the

[9] at 233

respondents' crop throughout the world. It is contended on behalf of the respondents that the contract relied upon is one of an agency which creates duties of a personal and fiduciary nature to be performed for and on behalf of the respondents. These duties would include to at all times act in the utmost good faith; at no time to permit the applicant's interests to conflict with those of the respondents; to not make a secret profit at the expense of the respondents; and to account to the respondents, supported by appropriate vouchers, in regard to aspects of the performance of its mandate.

[18] The respondents allege that the applicant acted in a dishonest manner in respect to its dealings with them. They state that the applicant's accounts in respect of sales do not correctly reflect the true returns; that certain commission was paid by the applicant to its sub-agents without disclosing this to the respondents; that the applicant specifically did not comply with its obligations in terms of clause 3.6 of the marketing agreement in that it failed to furnish, at the written request of the respondents, reports, returns and other information relating to the marketing, sale and distribution of the grapes; and that the applicant has committed fraud on the respondents by withholding substantial sums of money from the respondents, thereby destroyed any relationship of trust between the parties. This situation, so it is contended on behalf of the respondents, justified the respondents, on the advice of their attorneys in The Netherlands, to suspend the operation of the agreement in accordance with the provisions of the law of The Netherlands. It is stated that the respondents cannot henceforth be expected

to trust the applicant with the marketing and sale of the respondents' table grape crop worth some N$160 million annually.

[19] The applicant counters these allegations by claiming that Deon Brand, the Chief Executive Officer of respondents, makes these claims based on a misunderstanding of how market forces operate, and furthermore, based upon hearsay. Thijs van der Heuvel explains that the applicant uses many sub-agents. Sometimes the sub-agents would determine a fixed price with the end customer. In those instances the applicant would agree to give part of its commission earned to pay the sub-agents. This the applicant did in the case of Southern Fruit Growers. In this instance the commission was shared. On the other hand, so he explained, a company like Freshgold delivers grapes to many countries in the world. The average price, together with various other deliveries all over the world, would then determine the market price. Once these averages are known to Freshgold after the delivery of the grapes, Freshgold would then indicate what it is prepared to pay to the applicant. Negotiations would then take place and a price would be agreed upon. It was only at this later stage that the applicant would invoice Freshgold. The applicant would not know what the profit of Freshgold in fact is. Freshgold itself is not required to disclose its profit to the applicant. On this basis the applicant denies Mr Brand's allegations of fraud and submits that this allegation and the further allegations of wrongdoing have no factual substratum.

[20] The applicant points to the evidence of Pieter Von Maltitz where he confirms that the prices referred to are indeed gross prices which Freshgold obtained on the world market. It is accordingly contended by the applicant that this by no means indicates that the applicant has made a secret profit. In these circumstances, the difference to which Mr Brand refers to in his affidavit, being the difference between the price referred to in the Freshgold report and the prices paid by the applicant to the respondents is Freshgold's gross profit. It accordingly is not a secret profit and does not amount to fraud upon the respondents.

[21] Whilst I am dealing with the evidence of Pieter Von Maltitz, I mention that the applicant sought leave to file a supplementary affidavit of Deon Brand to deal with some of the issues raised in Von Maltitz's affidavit as well as to place before the Court further facts of an alleged continuing breach of the agreement due to the applicant's failure to comply with its obligations in terms thereof. After considering the application, which was opposed by the applicant, I refused leave to introduce the further affidavit and indicated that the reasons for this ruling would be incorporated into this judgment .

[22] The Court has a discretion to permit the filing of a further affidavit. It has been held that leave will be granted only in "*exceptional circumstances*" [10] or "*special circumstances*" [11] or if the Court considers such a course advisable. [12]

[10] Kasiyamhuru v Minister of Home Affairs, 1991 (1) SA 643 (W), at 649 – 650
[11] Stark v Fisher, 1935 SWA 44
[12] Rieseberg v Rieseberg, 1926 WLD 59

The Courts on occasion have permitted supplementary affidavits where there is something unexpected in the applicant's replying affidavits or when new matter is raised in them. However, the general test to be applied has been stated as follows:

> "It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted." [13]

[23] It was expressly stated in the application for leave that the respondents wish to raise new facts concerning a continuing breach of the agreement. Where the affidavit sought to be introduced did not constitute a reply, but raised wholly fresh issues, entailing the filing of further affidavits by the applicant, leave would ordinarily be refused. [14] In the circumstances, I did not consider that the application for leave raised exceptional or special circumstances, or put forward sufficient facts to persuade me that it would be in the interests of justice that leave be granted. In fairness to the applicant, should the supplementary affidavit have been allowed, the applicant should then have been entitled to file further

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[13] James Brown and Hamer (Pty) Ltd (previously named Gilbert Hamer and Co Ltd) v Simmons, 1963 (4) SA 656 (A), at 660 D - F

[14] Herbstein & Van Winsen, The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa, 5th Ed., at p. 434 and the authorities cited in footnote 87

affidavits to deal with the new facts raised in such affidavits. For these reasons I refused the application to file the further affidavit.

[24] Even if the facts put up by the respondents had some evidentiary value, in order to establish fraud, the evidence must be clear. The bar is set high when a party seeks to establish fraud in motion proceedings. In *Loomcraft Fabrics CC v Nedbank Ltd and Another* Scott AJA (as he then was) stated: [15]

> "In order to succeed on the grounds of fraud, the appellant had to prove that Perfel, acting through its agents, and with the purpose of drawing on the credit, presented the bills of lading to the bank knowing that they contained material representations of fact upon which the bank would rely and which they (the agents of Perfel) knew were untrue (see the *United City Merchants* case *supra* at 725*g*). Mere error, misunderstanding or oversight, however unreasonable, cannot amount to fraud (see *R v Myers* 1948 (1) SA 375 (A) at 383). Moreover, as previously indicated, fraud will not lightly be inferred, particularly when, I should add, it is sought to be established in motion proceedings".

Based on the evidence put up by the respondents in the papers, and bearing in mind the hearsay nature thereof, I am not convinced that fraud has been established.

[25] I also do not consider that a case has been made out by the respondents that there has been a breach of the fiduciary duty owed by the applicant to the

[15] 1996 (1) SA 812, at 822 G - I

respondents. The respondents' stance has to be viewed in the light of the respondents' contrived interpretation of the letter of intent entered into between the parties on 10 March 2011. The letter served as a basis for the applicant to record its intention to purchase the shares or assets of the entities mentioned in the letter. Reference is made in paragraph 2 of the letter to "*this contract*" confirming the intention of the parties to negotiate and enter into a legally binding agreement in respect of the transfer, the legally binding agreement being referred to as the "*Definitive Agreement*". Express reference is made in paragraph 3 of the letter of intent that the parties acknowledge that "*this contract is a non-binding expression of their intent*" and furthermore in paragraph 10 that the letter of intent was "*not intended to create or constitute legally binding obligations between the parties*". The definitive agreement was never entered into. In order to avoid the consequences of the marketing agreement, Mr Dusan on behalf of the respondents claimed in an e:mail that:

> "We again record that we do not accept the validity of the marketing and sale agreement due to same having become obsolete as a result of the conclusion of the letter of intent pertaining to the sale of the farms to you."

[26] Generally the Court should come to the assistance of a party seeking enforcement of a contract. Davidson J in *Industrial and Mercantile v Anastassiou Bros* stated:

> "It seems to me that a Court should avoid becoming supine and spineless in dealing with the offending contract breaker, by giving him the benefit of paying damages rather than being compelled to perform that which he had undertaken to perform and which, when he was called upon to perform by summons, and he chose to defy the claim of the plaintiff." [16]

In my view, the allegations of fraud and breach of the fiduciary duty owed by the applicant to the respondents must be viewed in the light of the respondents' opportunistic attempts to avoid the consequences of the binding marketing agreement on them. In any event, since I have found that on the facts there is no substance to these allegations, these factors cannot form a valid basis to resist the relief sought in these proceedings.

Exceptio non adimpleti contractus

[27] According to Article 262 of Book 6 of the Dutch Civil Code where one party to the contract does not perform its obligations, the other party has a right to suspend performance of its corresponding obligations. This is the principle contained in the defence also available in Namibian law of *exceptio non adimpleti contractus*. On this basis Professor Koppenol- Laforce states that:

[16] 1973 (2) SA 601 (W) at 609 A - C

"Under Dutch law it is beyond doubt that:

- if it is established that a contractor has intentionally provide his principal with incorrect account sales and has wrongfully withheld money that was due to the principal, the principal is entitled to terminate his agreement with the contractor;
- if there are objective indications that the contractor has failed in the performance of its obligations in the said manner, the principal is entitled to suspend his obligations under his agreement with the contractor pending further investigation."

[28] In regard to the *exceptio* Dutch law appears to be the same as Namibian law. The respondents' Dutch law expert says that it can be invoked where, firstly, it is an exigible claim; secondly, where there is a "*sufficient relationship between the claim and the obligation to justify this suspension*" or "*the claims are related*"; and thirdly, "*in circumstances where one party has reasonably good grounds for fear that the other party will not fulfill its obligations*". As regards reciprocity the applicant and the respondents entered into an agreement that the applicant would market and sell the respondents' table grapes during the harvesting season of November to December of each year. The practice was that after the season's work was completed, books were written up and commission was paid to the applicant by the respondents on the basis of the sales recorded.

[29] A distinction needs to be drawn between the interdependence of obligations and their reciprocity. In this regard, Smalberger JA in the matter of *Rand Mines (Pty) Ltd v Giddie N.O* states: [17]

> "'Interdependence of obligations does not necessarily make them reciprocal. The mere non-performance of an obligation would not *per se* permit of the *exceptio*; it is only justified where the obligation is reciprocal to the performance required from the other party. The *exceptio* therefore presupposes the existence of mutual obligations which are intended to be performed reciprocally, the one being the intended exchange for the other (*Wynn's Car Care Products (Pty) Ltd v First National Industrial Bank Ltd* 1991 (2) SA 754 (A) AT 757 E-F; *ESE Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 809 (C) at 809 D-E). Furthermore, for the *exceptio* to succeed the plaintiff's performance must have fallen due prior to or simultaneously with that demanded from the defendant (*Mörsner v Len* 1992 (3) SA 626 (A) at 633J). Whether or not obligations in terms of a contract satisfy these requirements and are reciprocal in the above sense (being the strict sense in which the word is used in this judgment) is ultimately a matter of interpretation."

[30] In referring to the reciprocal or collateral obligations contemplated in an agreement, Maritz J (as he then was) in *Du Plessis v Ndjavera* stated: [18]

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[17] 1999 (1) SA 960 (SCA), at 965F-I,
quoted with approval by O'Linn AJA in the Ndjavera v Du Plessis, 2010 (1) NR 122 (SC), at 132 I – 133 C

[18] 2002 NR 40, at 43 F – 44 F

"The *exceptio non adimpleti contractus* as a defence in an action for specific performance is inextricably linked to the principle of reciprocity under a bilateral contract – as Jansen JA remarked after an extensive analysis of the Roman law and the Roman Dutch common law in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 417H, the *exceptio* is a 'meeganger' ('companion') (literally translated) of the principle of reciprocity. It is only if and when there are reciprocal obligations contemplated in a contract (irrespective of whether they are to be discharged concurrently or consecutively) that the *exceptio* may afford a defence to a claim for specific performance. The position is, in my view, correctly stated in the *dictum* of Corbett J (as he then was) in *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 8808H-809D:

'In a bilateral contract certain obligations may be reciprocal in the sense that the performance of the one may be conditional upon the performance, or tender of performance, of the other. This reciprocity may itself be bilateral in the sense that the performance, or tender of performance, of them represent concurrent conditions; that is, each is conditional upon the other. A ready example of this would be delivery of the *res vendita* and payment of the purchase price under a cash sale. (See *Crispette and Candy Co Ltd v Oscar Michaelis N.O and Another* 1947 (4) SA 521 (A) AT 537) Alternatively, the reciprocity may be one-sided in that the complete performance of his contractual obligation by one party may be a condition precedent to the performance of his reciprocal obligation by the other party. In other words the obligations, though inter-dependent, fall to be performed consecutively. An example of this would be a *locatio conductio operis* whereunder the *conductor operis* is normally obliged to carry out the work which he is engaged to do before the contract money can be claimed. In such a case

the obligation to pay the money is conditional on the preperformance of the obligation to carry out the work, but, of course, the converse does not apply (see, eg, *Kamaludin v Gihwala* 1956 (2) SA 323 (C) at 326; De Wet and Yeats *Kontraktereg* 3rd ed at 139).'

The question whether the obligations created in a contract are reciprocal or not, is to be ascertained from the intention of the contracting parties as expressed therein (see *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* (*supra* at 418B-C)). In some types of contracts, such as those referred to by Corbett J (ie contracts of sale or for the rendering of services), 'the principle is so appropriate to the nature of the contract that it applies by operation of law unless a contrary intention appears'. (See Christie *The Law of Contract* 3rd ed at 471; see further *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* (*supra*, at 418D).

The fact that a contract is bilateral in nature affords no assistance in answering that question. Neither does the fact that the obligations are due on the same date (see *Strydom v Van Rensburg* 1949 (3) SA 465 (T) at 467).

'For reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and that due by the other party as to indicate that one was undertaken in exchange for the performance of the other and, in cases where the obligations are not consecutive, *vice versa.*'"

[31] In *Minister of Public Works and Land Affairs and Another v Group Five Building Ltd* Marais JA said: [19]

> "Reciprocity of debt in law does not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted in some way to the other. A far closer, and more immediate correlation than that is required. See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 415H-418C. The contractor's right [*under a building construction contract*] to claim damages for a breach of contract is not matched by any *particular* obligation towards appellants on its part. It is not required to have performed or to tender performance of any reciprocal obligation in asserting such a claim."

[32] In the light of the fact that I have already found that no fraud by the applicant was established on the papers, there can be no suggestion that the applicant intentionally provided the respondents with incorrect account sales and accordingly wrongfully withheld money that was due to them. Even if the respondents are correct in their allegations of fraud and this could be proved against the applicant during the bookkeeping process of the previous year, I accept Mr Heathcote's contention that those obligations in fact related to past performances. There was no reciprocity whatsoever between past obligations relating to the 2010 harvest and obligations currently owed by the parties to each other for the 2011 harvesting season. There accordingly is neither a basis to

[19] 1996 (4) SA 280 (A), at 288 E - G

terminate the marketing agreement nor is there a basis for the respondents to suspend the obligations under the agreement. The marketing agreement is accordingly of full force and effect.

The correct test to be applied

[33] In any event, it is common cause that the marketing agreement has not been cancelled. The applicant is accordingly *prima facie* entitled to enforcement of the agreement. As to the existence of an alternative remedy, such as the payment of damages, Van Niekerk J comprehensively dealt with this issue in an authoritative judgment in the unreported case of *Channel Life Namibia Ltd v Finance and Education (Pty) Ltd and 2 Others*, in which reasons were given on 11 April 2005 (under case no. (P) A 215.04. She said: [20]

> "Regarding the requirement that the applicant must show that it has no alternative remedy, the respondent contends that the applicant can claim specific performance and/or damages from the first respondent in the main action. The applicant submits that it has a right to specific performance and that it need not settle for a claim for damages. This is a performance and that it need not settle for a claim for damages. This is a right which the first respondent does not enjoy. It cannot claim to be allowed to pay damages instead of having an order for specific performance entered against it. (*Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 (2) SA 459 at 463 J). Although this is a matter in which the applicant was in a situation similar to that of an owner

[20] at pp. 42 - 44

seeking an order of specific performance and this may have influenced that Court to grant an interdict enforcing the applicant's rights in pledged goods, the Court made it clear (at 463J – 464) that –

'In our law

'…a plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he had bound himself to do, or to claim damages for the breach …This right of choice a defendant does not enjoy; he cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him.
It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod* interest.'

(*Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378E-F; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781 H-L)

In my respectful view these principles apply *mutatis mutandis* in an application for an interdict.

In a recent Appellate Division case it was stated:

'(t)hat a right to specific performance exists was decided as long ago as 1882 … and subsequently reaffirmed in a host of cases…, subject only to the qualification

that the Court has a discretion to grant or to refuse an order for performance. This right is the cornerstone of our law relating to specific performance. Once that is realised, it seems clear, both logically and as a matter of principle, that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right to performance and that there can be no rule, whether it be flexible or inflexible, as to the way in which the discretion is to be exercised, which does not affect the plaintiff's right in some way or another. The degree to which it is affected depends, of course, on the nature and extent of the rule; theoretically, I suppose, there may be a rule which regulates the exercise of the discretion without actually curtailing it but, apart form the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion.'

(*Benson v SA Mutual Life Assurance Society* (*supra* at 782H-783B)

In my respectful view this principle applied and this Court was bound to apply it in an application for an interdict. Simply stated: the grant or refusal of an interdict is a matter within the discretion of the Court hearing the application and depends on the facts peculiar to each individual case and the right the applicant is seeking to enforce or protect.

The rule that a decree of specific performance would not be granted where the applicant could be compensated adequately by an award of damages is an impermissible curtailment of the Court's discretion. This rule was based on English authority and derived purely from Chancery practice. The English rules

> regulating their Courts' discretion to decree specific performance being predicated upon the remedy being available by way of equitable relief only are in conflict with the principle of our law and the indiscriminate application of English case law was deprecated by the Appellate Division in *Benson's* case in which it was held that there is no longer any need nor reason for this practice to continue (see *Benson's* case at 785 A-E)"

[34] The applicant has in my view laid a proper basis for requiring that the respondents be held to their bargain. I can see no reason why on the facts of this matter the applicant should content itself with an award of damages. This is particularly so where the applicant is dependent upon undertakings it gives in the international grape export market, and should it be forced to renege thereon due to the suspension of the marketing agreement, the reputational damages would be significant but difficult to establish with any accuracy.

[35] It is contended on behalf of the respondents that the relief sought in this matter is final in effect and therefore should be determined by virtue of the requirements of a final interdict. In the matter of *Knox D'Arcy Ltd and Others v Jamieson and Others* Stegmann J stated: [21]

> "I take the very common example of an interlocutory order for the temporary attachment of a car pending the resolution of a dispute over its ownership. The main substantive right for determination is that of ownership. If the person from

[21] 1995 (2) SA 579, at 604 B - E

> whose possession the car is taken in terms of the interlocutory order is ultimately (after six months or a year) found to have been the owner all along, the interlocutory order will be seen to have interfered with two of the most important rights incidental to his ownership, viz the right to possess and the right to enjoy the use of the car. Although the possession and use will at that stage be restored to him, his dispossession for six or twelve months and the deprivation of the use for the same period can never be restored. Such period of dispossession and deprivation amounts to an irreversible, and to that extent final, infraction of his rights. Nevertheless, it is settled law that such a final consequence or the prospect of it does not convert such an interlocutory interdict into an interdict which, although interlocutory in form, is final in effect."

[36] In the light hereof, the requirements which need to be established by the applicant are as set out in the oft-quoted case of *Webster v Mitchell* [22] namely that where disputes on affidavit allow for a conclusion that the applicant has made out a *prima facie* right, though open to some doubt, and has similarly has satisfied the further requirements for an interlocutory interdict.

[37] In this regard, on the facts before me, I find that the applicant has made out a *prima facie* case. As to the second requirement of irreparable harm, the applicant has put up facts that its commission on the sale of grapes worth approximately N$170 million would translate into commission of approximately N$16 million, which the applicant stands to lose should the respondents seek to avoid their obligations in terms of the marketing agreement and use other agents

[22] 1948 (1) SA 1186 (W)

to market and sell the grapes for the 2011 harvesting season. In the circumstances, I find that there is an objective probability of harm to the applicant should the relief not be granted. This aspect is closely related to the issue of balance of convenience, and for the reasons already stated, I find that the balance of convenience and the prejudice that the applicant would indeed suffer should the agreement be suspended and it lose its commission and its international business reputation, outweighs any inconvenience the respondents may suffer should they be required to use the applicant as their marketer for the current grape harvesting season. For these reasons, I find that the applicant has satisfied the requirements for interim mandatory relief.

Urgency

[38] It is contended on behalf of the respondents that the applicant was well aware from 19 September 2011, alternatively from 10 October 2011, that the respondents had no intention to deliver table grapes to the applicant in terms of the marketing agreement. It was argued on behalf of the respondents that the applicant had created its own urgency. The papers in this matter were served on the respondents on 4 November 2011, less than a week before the hearing, it being further contended by the respondents that in the circumstances the manner in which the applicant came to Court was an abuse of the process of Court.

[39] It was pointed out in argument by counsel for the applicant that the harvesting season starts on or about 11 November 2011. Grapes had to be harvested, put in boxes, pre-cooled and thereafter transported from Aussenkehr to the Cape Town harbour. Thijs van den Heuvel stated that the applicant had already entered into agreements with clients for the purchase of the harvest. He confirmed that the applicant stands to lose income of N$50 million should it be excluded from being the sole exporting agent of the respondents' grapes. Based on the expected yield of grapes for the 2011 season and factoring into this figure the average prices for the 2010 season the commission to be earned by the applicant for the current season would be approximately N$17,5 million. This was not the applicant's only concern. The applicant claims that it is a well-known name in the international food business. He states that it would be difficult to calculate the reputational damage which would be suffered by the applicant should it be prevented from marketing and selling the respondents' grapes. He referred to the penalties that would be payable if the applicant was to be in breach of its various agreements with its clients. Whilst the applicant was aware of the threat to its continued marketing and sale of the respondents' grapes, the applicant attempted to resolve the differences by scheduling a meeting for 1 November 2011 in Cape Town to seek a resolution. Thijs van den Heuvel traveled from Amsterdam to Cape Town to attend this meeting, but the respondents' Dusan did not make an appearance at the scheduled meeting.

[40] In exercising a discretion in terms of Rule 6 (12) of the High Court Rules, the Court recognises that there are varying degrees of urgency. [23] The urgency of commercial matters has also been recognized in the matter of *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* [24]. It would be required of the applicant with reference to the facts of the matter to demonstrate that it is unable to receive redress in the normal course and that the facts justify the degree of urgency with which the application has been brought. At the hearing of this matter, although the respondents were brought before Court on relatively short notice, they did not seek a postponement of the matter, on that ground, save to request a postponement of one day in order to properly consider the applicant's replying papers which were only served during the course of that morning. The respondents have in fact filed very full answering papers in response to the application.

[41] In the light of the principles I have referred to, and on the facts of this matter – principally the imminent commencement of the grape harvesting season and the fact that it would only endure for a short period of some six weeks – I am of the view that the applicant has made out a case for urgency as envisaged by Rule 6 (12) and accordingly I grant condonation in respect of the urgent basis upon which this application was brought.

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[23] Luna Meubelvervaardigers (Edms) Bpk v Makin and Another, 1977 (4) SA 135 (W). Cited with approval in, amongst others, Clear Channel Independent Advertising Namibia (Pty) Ltd v TransNamib Holdings Ltd, 2006 (1) NR 121 (HC) and Bergmann v Commercial Bank Namibia Ltd, 2001 NR 48 (HC)

[24] 1982 (3) SA 582 (W), at 586 G

Conclusion

[42] As a result, I am satisfied that the applicant has made out a case for the mandatory relief sought *pendente lite*. Mr Coetsee rightly did not take issue with Mr Heathcote's submission that should an order be granted, any future order for costs should include the costs of one instructing and two instructed counsel. The complexity of the legal issues and the importance of the matter to the parties would warrant such an order. I accordingly make the following order:

1. The applicant's non-compliance with the Rules of Court is condoned and the matter is heard as one of urgency as envisaged by Rule 6 (12) of the Rules of the High Court;

2. An interim interdict is hereby issued, ordering the respondents to comply with their obligations in terms of the marketing and sale agreement entered into between the parties on 18 March 2009, as amended by an addendum on the same day, and as further amended on 3 September 2010, pending the outcome of an action to be instituted by the applicant against the respondents for the following declaratory relief:

2.1 that the marketing and sale agreement is of full force and effect;

2.2 that the letter of intent entered into between the parties on 10 March 2011 cannot be the cause of obligations of a reciprocal nature *vis- a- vis* the marketing and sale agreement;

2.3 Cost of suit.

3. For the purposes of monitoring respondents' compliance with the interdict, the respondents are ordered to permit the applicant's Mr Bernhardt du Toit to be represented on the respondents' properties at Aussenkehr during harvesting, packing and shipping;

4. The applicant is ordered to institute its action within 21 days of this order;

5. The costs of this application be costs in the action.

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CORBETT, A.J

ON BEHALF OF THE APPLICANT:
Adv R Heathcote SC
and with him
Adv. G Dicks
Instructed by : Ellis Shilengudwa Inc.

ON BEHALF OF RESPONDENTS:
Adv. P Coetsee SC

and with him
Adv. DW Gess
Instructed by Diekmann Associates