
IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

HANDED DOWN: 30 MARCH 2010

NOT REPORTABLE

CASE No. 6350/10

In the matter between:-

DES-O-GERM (PTY) LTD

Applicant

and

CITRUS GROWERS ASSOCIATION

First Respondent

CITRUS RESEARCH INTERNATIONAL

Second Respondent

PAUL HARDMAN

Third Respondent

JUDGMENT

Van der Byl, AJ:-

Introduction

[1] In this matter the Applicant on 9 February 2010 obtained, on an *ex parte* basis and as a matter of urgency, an interim order, returnable on 30 March 2010, interdicting the Respondents and all affiliated employees of the First and Second Respondents

from -

- (a) discussing the “*elimination of Des-O-Germ SP VEG and or QAC’s in the dump tanks in pack houses until finalisation of this application*”;
- (b) advising the First and Second Respondents’ members not to make use of Des-O-Germ SP VEG and or any products containing QAC’s in any pack house dump tanks until finalization of this application;
- (c) publishing any and all material regarding the non use of Des-O-Germ SP VEG and or any products containing QAC’s in the dump tanks of pack houses packing citrus for export until finalization of this application.

[2] The Respondents, having filed their opposing affidavits on 25 February 2010, elected, because of, *inter alia*, the broad terms of the order obtained, to anticipate the return date and has set the matter down for hearing on 2 March 2010 on which date the matter stood down by agreement until 4 March 2010 in order to afford the Applicant an opportunity to file its replying affidavit which it indeed filed soon thereafter.

[3] On having heard this matter on 4 March 2010 I reserved judgment after the parties agreed to an interim order interdicting the Respondents in narrower terms from publishing to any third party any untrue allegations that state or imply -

- (a) that the use of the Applicant’s Des-O-Germ SP Veg product creates a risk regarding the export of citrus fruit to markets world wide;
- (b) that citrus growers or pack houses should avoid the use of Applicant’s

Des-O-Germ SP Veg product.

Relevant facts of the matter

[4] The Applicant, a private company duly registered as such, is the owner of various products, amongst which is a product called “*Des-O-Germ SP VEG*” which is manufactured by it and has been retailed to citrus farmers and pack houses in South Africa for the last 12 years. It is used as a post harvest wash in the citrus industry for the past 10 years without any incidents relating to residues, being chemical traces left on citrus fruit which are unacceptable to export markets.

[5] The First Respondent, the Citrus Growers Association, is a section 21 company created to fill the void left by the demise of the former Citrus Board and is, broadly stated, responsible for, *inter alia*, providing the industry with access to global markets and advising its members, being, particularly, some 1400 growers of citrus throughout South Africa, of developments which may impact on the business of growing and selling citrus. It is funded through a compulsory statutory levy on fresh citrus fruit intended for export imposed by the Minister of Agriculture in terms of the Marketing of Agricultural Products Act, 1996 (Act 47 of 1996).

[6] The Second Respondent, the Citrus Research International (Pty) Ltd, is a private company. All the shares in the Second Respondent are owned by the Citrus Research Trust, the beneficiaries of which are the citrus growers of Southern Africa, represented by trustees who are the board of directors of the First Respondent and works closely with the First Respondent in the interests of the industry. The aim and core business of the Second Respondent are research and extension services in the citrus industry. Its

mission is to maximise the long term global competitiveness of the Southern African citrus growers through the development, support, co-ordination and provision of research and technical services. The Second Respondent is, furthermore, the publisher of circulars to its members and various interested parties called the "*Cutting Edge*".

[7] The Third Respondent is the Industry Affairs Manager of the First Respondent.

[8] The evidence on the papers, particularly, the answering affidavit of the Respondents on which this matter was argued by Mr. Wagener SC who appeared, together with Mr. Van Zyl, on behalf of the Applicant, shows that citrus fruit, as it arrives at pack houses from the orchards, is put into containers called dump tanks which are large vats filled with water which is treated with chemicals which act as disinfectants to remove dirt and organic substances and to keep the water clean.

[9] For this purpose either chlorine or Quaternary Ammonium Compounds ("QAC's") can be used, but QAC's are generally favoured by pack house managers. Simply put, QAC's are ammonium based compounds which help to keep the water clean which also prevent secondary functions, such as, fungal infections, on the fruit.

[10] QAC is the name for a group of approximately 900 chemical compounds which is ammonium based. Although similar, each compound is different and has unique properties.

[11] In dump tanks in South Africa only two types of QAC's are used. The one is *Didecyl Dimethyl Ammonium Chloride* ("DDAC") and the other is *Alkyl Benzyl Ammonium Chloride* ("ABAC") which is also known as *Benzalkonium Chloride* ("BAC").

[12] The Applicant produces a range of products some of which contain DDAC, but Des-O-Germ SP Veg, however, does not contain DDAC.

[13] Legislation and regulations in Japan, as in almost all countries in the world market, require that citrus fruit entering the country should not have detectable DDAC or ABAC residues. QAC's, such as DDAC and ABAC have prior to July 2009 been used in the South African citrus market for approximately the last ten years without any difficulties in the Japanese or other export markets.

[14] In July 2009, apparently as a result of a new test method, residues of two substances forming part of QAC's were detected on consignments of South African grapefruit which had been exported to Japan which came to the attention of Japanese importers who are obliged to notify the Japanese health authorities with the consequential prospect that the practice of using QAC's in the way South Africa does might be deemed an unacceptable practice leading to the rejection of the imported fruit regardless of the presence of residues.

[15] One of these consignments came from a pack house which had used the Applicant's product, namely, Des-O-Germ SP Veg. This resulted in a furore and almost resulted in a proportion of the 1,5 million cartons of South African citrus being withdrawn from the market and the other approximately million cartons that were then *en route* being rejected.

[16] Because of these developments the Second Respondent published a circular, written by the Third Respondent in the course of his duties as Industry Affairs Manager

of the First Respondent in a publication called the “*Cutting Edge*”, in which citrus growers, pack house managers and exporters were advised as follows in edition 87 of the publication:

*“Recent feedback from commercial residue testing in Japan has raised a possible concern with Quaternary Ammonium Compound (QAC’s) residues in citrus. QAC’s are used globally in food processing plants as disinfectant - one of the most common in South Africa citrus packhouses is **Didecyldimethyl ammonium Chloride (DDAC)**, the active ingredient in products such as Desogerme, Prasin, Quattrokill, Sporekill and Terminator (used in fruit washing systems in packhouses), and any other QAC’s used throughout the food chain to maintain appropriate hygiene on equipment used to handle fruit.*

Despite QAC’s having been used in South Africa for a number of years now, this is the first instance where the residue tolerances in an importing country have been exceeded (Japanese MRL = Limit of Determination). CGA/CRI are engaging with the distributors of these products, counterparts in Japan and the exporter and pack houses involved to determine the likely cause of the MRL exceedances, and whether the Japanese Food Sanitation Laws actually prohibit the use of of specific QAC’s Aspects of the investigation include the validation of the analytical results and determination of whether the current residue analysis methods used in Japan differentiate between the (many) actives within the QAC group to isolate possible sources of QAC residues.

Until further details are available, packhouses managers packing fruit for Japan should note this current situation and consider reverting to alternative chlorine-based cleaning systems (e.g. HTH powder of the Buccaneer system). CGA/CRI will provide more information as soon as it is available”.

[17] The *Cutting Edge* is disseminated by email to all persons on the First and Second Respondents’ mailing list. There are approximately 950 members of the First Respondent on the mailing list. Also on the First Respondent’s mailing list are 167 people who are stakeholders in the industry but who are not members of the First

Respondent, such as, agents, chemical suppliers to the citrus industry, citrus buyers, officials in the Department and the like. The Second Respondent's mailing list comprises about 300 export agents, chemical company representatives, researchers, students and technical managers on citrus farms.

[18] According to the Respondents, as is apparent from the answering affidavit, after edition 87 of the *Cutting Edge* was dispatched, the sole director of the Applicant phoned the Third Respondent and informed him that SP Veg did not contain DDAC as was stated in the edition in question and demanded that the error be retracted. The Third Respondent accepted that he had made a mistake. According to him it had arisen due to a misunderstanding between himself and one Keith Lezar of the Second Respondent as he had asked him for a list of products containing DDAC but he had understood his request as being for a list of products with QAC's. On this basis he immediately sent out an email to all members on the *Cutting Edge* mailing list in which it is stated as follows:

"Cutting Edge 87 send out this morning refers.

Please note that Desogerme does not have Didecyldimethyl ammonium Chloride (DDAC) as an active ingredient, but does form part of Quaternary Compound (QAC's) group. The QAC group is the subject of the Cutting Edge 87 cautionary."

[19] The Applicant also caused a letter, **Annexure M, record p. 119**, to be addressed to the First Respondent on 20 July 2009 demanding, indicating that the Applicant is because of the statement published in the *Cutting Edge* No, 87 is "causing financial loss" for the Applicant, that the Third Respondent issue within three days a new *Cutting Edge* circular "wherein it was made abundantly clear that no proof that the active ingredients of Des-O-Germ have left any residues and that Des-O-Germ may be used in pack

house dump tanks for the washing of citrus that is to be exported to Japan and elsewhere in the world”, failing which appropriate action will be taken against the Respondents for urgent relief.

In response to this letter the Respondents’ attorneys addressed a letter, **Annexure N, record p. 122**, to the Applicant’s attorney on 23 July 2009 in which the request was in effect declined. The reason for this attitude was explained as follows:

“Our client has an obligation to advise its members of any development which may impact on the business of growing and selling citrus. The Cutting Edge no. 87, was issued by our client based on information provided by parties in Japan.

Our client’s communication did not contain a statement that ‘members of your Association must use our client’s products’.

The communication pointed out that there was a ‘possible concern with regard to QAC residues on citrus’. DDAC was referred in the communication as one of the most common active ingredients in various products but the communication applied equally to othe QAC’s used in the food chain.

The communication pointed out that that this was the first instance where residue tolerances had been exceeded and that our client was engaging with the authorities in Japan to clarify the situation.

Our client did not direct packhouse managers to take any particular action but suggested that they ‘consider’ reverting to chlorine based cleaning systems.

It was incumbent upon our client to provide this information to its members.

Based on your client’s contact with our client, a notice was sent out on the same day stating that Des-O-Germ does not have DDAC as an active agreement and does form part of the QAC Group and that it is the QAC Group which is the subject of the earlier cautionary. This was not, as you categorised it, an attempt by Mr. Hardman to correct

this information. It pointed out unequivocally that your client's product does not contain DDAC and is a clear and effective rectification of the earlier notification."

I can immediately say that this was in my view an unsatisfactory and unreasonably approach to a reasonable request by the Applicant.

It is in my view apparent from a reading of the contents of the *Cutting Edge* No. 87 that, apart from referring to developments in Japan, the request or advice that packhouse managers should consider revering to alternative chlorine based cleaning systems was clearly based on the admittedly incorrect perception that Des-O-Germ SP Veg contains DDAC. Why the Respondents were not prepared to publish a circular in a new issue of the *Cutting Edge*, being the publication in which the incorrect information was initially published, is not clear if not mind boggling. A reasonable and regular reader of the *Cutting Edge*, whether or not he or she became aware of the email forwarded to members on 6 July 2009, **Annexure C, record p. 94**, must clearly be left with the impression that the caution, coming from an organization representing his or her interests, that he or she should, at the financial loss of the Applicant, rather revert to a chlorine based cleaning system. The Respondents in my view had insufficient or no grounds (and as it turned out still have no such grounds) for having extended such a caution to its members.

The Respondents could have and should have adhered to the Applicant's request and refrained irresponsible in doing so. Had they done that the Applicant would have had no reason to have launched this application.

According to the Respondents the Japanese were at the time unsure whether to define QAC's as a food additive or an agricultural chemical. The difficulty arose because the

Japanese practice is that any product applied to the fruit post harvest constitutes a food additive and agricultural chemicals are seen as only those substances applied pre-harvest can be viewed as agricultural chemicals. Thus, because QAC's are applied to the fruit after they have been picked, the Japanese regulatory approach tended towards categorizing them as food additives with the consequential prospect that all South African citrus treated with QAC post harvest disinfectants be removed from the market. Such a directive from the Japanese would, so it is contended by the Respondents, would have had a devastating effect on the South African citrus market. At the time the issue arose there were approximately 1,5 million cartons of citrus in the Japanese market with another one million *en route*. The fruit in Japan at that time was worth approximately R100 million alone. An unsuccessful marketing campaign in Japan would also have adversely affected the returns to growers in other grapefruit markets. The Respondents' main objective was to ensure that the trade in South African citrus was not stopped they engaged extensively with the Japanese trying to convince them that South African citrus was safe and not dangerous to consumers and that although QAC's were used post-harvest they were not used as food additives but were in the nature of agricultural chemicals.

[20] This seems to be the reasons why the Respondents caused the following follow-up to be published in the *Cutting Edge* 89 under the heading "*Quaternary Ammonium Compound residue cautionary*" in which the following is stated, *inter alia* -

"Early in the engagement process MHLW (ie., the Japanese Department of State charged with the function of controlling the import of fruit and food) made it very clear that any transgression of the Food Additives legislation would be seen as a violation of Japanese Food Safety Law. The consequence of a violation is the immediate recall of fruit already in the market and the prohibition of

sale of any fruit suspected to have been treated with an unauthorized chemical. The use of QAC's as a disinfectant does however create a unique situation and the status of DDAC in this context has been the subsequent focus of the engagement with the Japanese

Feedback received from Japan on 13th July 2009 indicate that the decision on whether DDAC should be deemed a Food Additive (by Japanese definition) or disinfectant has been deferred to MHLW head office. If seen as a disinfectant MHLW will also consider what the applicable tolerance should be

In conclusion, until a final decision has been reached by MHLW it remains critical that packhouse managers understand the potential risks. It is hoped MHLW will view this situation with reason and allow fruit already in the pipeline to be released onto the market, but it seems unlikely that treated-fruit that has not yet been shipped will be permitted."

[21] Eventually the Japanese Importers' Association announced to importers in an email dated 18 January 2010 that fresh fruits with DDAC would not be allowed to be imported into Japan in 2010.

[22] On 8 February 2010 the Applicant was informed by the Second Respondent that it intended informing stakeholders in the citrus industry at a meeting then to be held on 9 February 2010 as follows:

"During the 2009 citrus season DDAC residues were detected on South African citrus fruit in Japan.

.....

Japan has not made a final decision on classification of DDAC as Agric Chemicals or Food Additives

Japanese importers have advised that use be suspended until clarified

.....

It is not known if use of other QAC's will result in detectable residues and what the implications thereof would be

The Japanese situation applies to other markets as well."

Applicant's submissions

[23] Mr Wagener on behalf of the Applicant submitted that, particularly, the contents of the circular published in edition 87 in the *Cutting Edge*, in edition 89 of the *Cutting Edge* and in the email of 18 January 2010 and the information intended to be communicated to stakeholders at the meeting convened for 8 February 2010 are all factually incorrect in that, *inter alia* -

- (a) the feedback from commercial residue testing in Japan did not raise a possible concern with QAC's residues on citrus, except with only one of about 900 QAC's known as DDAC;
- (b) the Japanese authorities had in fact made a decision, as appears from an email dated 18 January 2010, **Appendix X**, announced that fresh fruits with DDAC are not allowed from 2010;
- (c) there is no evidence that supports the contention that the Japanese situation applies to other markets as well.

[24] Instead, so the argument furthermore went, the Respondents have, as appears from the intended meeting to be held on 8 February 2010, escalated a DDAC issue in Japan to a QAC problem world wide, notwithstanding the fact that the Japanese Government announced that only fresh fruits with DDAC will not be allowed to be

imported into Japan in the year 2010, by having stated that Japanese importers have advised that *“use be suspended until clarified”* and that *“it is not known if use of other QAC’s will result in detectable residues and what the implications thereof would be”*.

[25] In the circumstances the Applicant’s product is, so it was submitted, clearly at the receiving end of the failure to mention that DDAC’s have in fact been banned for import into Japan for 1010 and of groundless speculation that other QAC’s may perhaps also be affected that the world wide market has the same attitude as Japan.

[26] In fact, so it is contended, -

- (a) the Applicant’s product, Des-o-Germ, is a well-known and widely product that does not contain DDAC;
- (b) that, as such, it stands to gain a material market share when all the other products that do contain DDAC are no longer used for fruit intended for export to Japan, being s substantial portion of the market;
- (c) that, however -
 - (i) a groundless cautionary that all QAC’s may somehow be affected by the decision regarding DDAC;
 - (ii) advice that chlorine-based products should rather be used;
 - (iii) baseless allegations that the Japanese situation applies to other

markets as well,

will obviously negatively affect the Applicant's product.

Respondents' submissions

[27] Apart from criticizing the Applicant for bringing this application on an *ex parte* basis where, so it is contended, no basis existed for dispensing with notice to the Respondents and it disregarded its obligations to make full disclosure of all facts, for having prayed and obtained an order that is over-broad and vague and for, having done that, having impermissibly infringing the Respondents' constitutional rights of freedom of expression and to impart information or ideas on, particularly, scientific research, it is, broadly speaking, the Respondents' case that they have never advised their members not to use the Applicant's product, but has simply cautioned them of the dangers of doing so when exporting to the Japanese market.

Evaluation of the parties' respective cases

[28] In so far as the Applicant is criticized for having launched the application on an *ex parte* basis, that is an issue dealt with by the Judge who granted the Rule *nisi* and the interim interdict and who obviously in his discretion regarded the allegations made in the founding papers sufficient to justify it be granted on an *ex parte* basis.

In my opinion there is no basis or reason for me to comment or make any findings thereon.

[29] As far as the over-breath and vagueness of the interim order is concerned, it would seem that the parties were in agreement, at least for the interim, that the order granted be narrowed down in the terms to which I have already referred to.

[30] Having read the founding papers I have no reason to believe that the Applicant deliberately failed to disclose relevant facts or deposed to any falsehoods. In view of the conclusion I have reached in this matter I do not regard it necessary to deal with the contentions on both sides on the alleged non-disclosures and falsehoods.

[31] As is apparent from the foregoing, the infringement complained of by the Applicant is the contents of edition 87 of the *Cutting Edge* in which it was incorrectly stated that DDAC is an active ingredient in, *inter alia*, “*Desogerme*” and pack house managers should consider reverting to “*chlorine-based cleaning systems*”.

[32] After having been informed by the Applicant that Des-O-Germ SP Veg does not contain DDAC and, having admitted he made a mistake, the Third Respondent forwarded an email to all members on the *Cutting Edge* mailing list informing them that “*Desogerme*” does not have DDAC as an active ingredient, but nevertheless indicated that the product does form part of the QAC’s group which is the subject of the “*Cutting Edge 87 cautionary*” and, in so doing, persisted, notwithstanding a reasonable request, as I have already indicated, to issue a circular in the *Cutting Edge* to make it clear that there is no proof that Des-O-Germ left any residues and that it may be used in pack house dump tanks, with the advise given in *Cutting Edge 87* to pack house managers to rather reverse to chlorine-based cleaning systems.

[33] The Respondents persistence with the caution and subsequent circulars and the

meeting to be held on 8 February 2010 seems clearly to be found in the uncertainty in Japan whether to define QAC's as a food additive or an agricultural chemical.

[34] They have, as is apparent from the slides prepared for the intended meeting of 8 February 2010, so persisted notwithstanding an indication on 18 January 2010 that fresh fruits with DDAC would not be allowed to be imported into Japan in 2010.

[35] It is now this persistence which is the subject matter of the Applicant's claim and its insistence on relief.

[36] There is in my view, whether or not there is uncertainty in Japan whether to define QAC's as a food additive or an agricultural chemical, no need or basis for persisting with a caution in terms where members are advised to revert to chlorine-based systems, to advise pack house managers to consider reverting to other cleaning systems and to have refused or failed to publish in a new issue of the *Cutting Edge* a circular as requested by the Applicant.

[37] That, however does not mean that the Respondents should be debarred from informing their members of the true factual developments in Japan or elsewhere on the use of QAC's or compounds of QAC's.

[38] I am accordingly of the opinion that the Applicant's rights are, because of the persistence to advise members to revert to chlorine-based systems, infringed, not only on a single once and for all occasion, but on a continuous basis and that it is, therefore, entitled to be protected from such infringement (see: ***National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA)*** at 347F,

para [22]).

[39] For these reasons I make the following order:-

1. The Respondents are interdicted from suggesting, recommending or advising any person in any manner whatsoever to revert from using the Applicant's Des-O-Germ SP Veg product to any alternative cleaning system for use in water of dump tanks in South African citrus pack houses or not to make use of Des-O-Germ SP VEG for that purpose for as long as the use of Des-O-Germ SP Veg is not prohibited by any legislation whether in South Africa or elsewhere.
2. The Respondents are ordered to publish within 15 days as from the date of this order a circular in the *Cutting Edge* informing members that Des-O-Germ SP Veg does not contain DDAC and retracting the following words contained in the last paragraph of the *Cutting Edge 87*"

"Until further details are available, packhouses managers packing fruit for Japan should note this current situation and consider reverting to alternative chlorine-based cleaning systems (e.g. HTH powder of the Buccaneer system)."

3. The Respondents are ordered to pay the Applicant's costs incurred in respect of this application.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT

ADV S D WAGENER SC

ADV H VAN ZYL

On the instructions of:-

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ON BEHALF OF RESPONDENTS

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DATE OF HEARING

4 March 2010

JUDGMENT DELIVERED ON

30 March 2010