Enforceability of foreign judgments for punitive damages under English law and South African law

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In *Motorola Solutions v Hytera Communications Corporation*, the Court of Appeal held that a judgment that includes a punitive damages component is unenforceable in its entirety (the judgment is available here). The punitive component cannot be severed so that the judgment creditor can enforce non-punitive components.

Motorola sued Hytera in the U.S. One of its causes of action was under the Defend Trade Secrets Act, a federal statute that allows for punitive damages of up to double any compensatory damages. On that cause of action, the U.S. court awarded Motorola compensatory damages of $135 million and punitive damages of $270 million. Motorola tried to enforce the U.S. judgment in England.

Enter the Protection of Trading Interests Act. Section 5 precludes recovery of "any sum payable" under a "judgment for multiple damages" (later defined as "a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given").

Motorola argued that s.5 did not preclude enforcement of the compensatory component of the judgment, just the punitive component. The Commercial Court and the Court of Appeal rejected that argument: the language of s.5 "is clear and unambiguous in barring enforcement of the whole of multiple damages claim including its compensatory part."

The Court of Appeal also noted that this interpretation of s.5 "acts as a discouragement to the claimant from seeking an award of multiple damages in the first place". One wonders whether that aligns with the usual concern over comity:

why should an English court project its own view of public policy onto foreign litigants and how foreign litigants choose to conduct litigation in foreign courts (and choose to ask for remedies under foreign statutes that expressly allow punitive damages). A few years ago, the Fourth Circuit's Judge Wilkinson did not mince his words about the (in his view, exorbitant) effect of an English anti-suit injunction (here). An English court attempting to apply English public policy to create ex ante incentives and disincentives for how a U.S. litigant litigates under a U.S. statute may again raise eyebrows (and ire).

Motorola would have had better luck if Hytera had had some assets farther south. The equivalent statute in South Africa, the Protection of Businesses Act, also precludes enforcement of a "judgment … directing the payment of multiple or punitive damages". On its plain text, the Act, like the English equivalent, seems to bar a judgment in its entirety. However, South African courts have effectively interpreted the Act out of existence. The Act says it applies to judgments "connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic", which seems broad. But courts have interpreted that phrase to mean that the Act applies only to judgments about raw materials used to make other things: *Tradex Ocean Transportation SA v MV Silvergate* 1994 (4) SA 119 (D); see also *International Fruit Genetics LLC v Redelinghuys* 2019 (4) SA 174 (WCC) (here) (holding that the Act does not even apply to a foreign judgment about a licensing agreement over grape varieties: grapes are raw materials, but, apparently, they aren't made to use other things). So it should come as no surprise that, according to the leading practitioner text, "there is in fact no recorded instance in which the Act has been successfully invoked as a defence to enforcement" (C F Forsyth *Private International Law* (5th ed. 2012). The Act is, however, remarkable for this reason: if the Act applies, it precludes enforcement of *any* judgment (not just judgments that include punitive damages) without the permission of the "Minister of Economic Affairs" (now, presumably, the Minister of Trade, Industry and Competition). That is almost certainly unconstitutional (it probably survives only because the narrow interpretation of the Act's ambit means that there has not been any need to challenge it—see *International Fruit Genetics*, above, noting that the constitutionality of the permission requirement is "questionable").

With the Protection of Businesses Act out of the way, the common law would

govern the enforceability of Motorola's U.S. judgment (South Africa has an Enforcement of Foreign Civil Judgments Act, which sounds promising enough, but it applies only to "designated" countries: a list with just Namibia on it). There is no appellate authority on this, but High Courts seem to agree that an order for punitive damages is contrary to South African public policy, but disagree about how to characterise damages as punitive (unenforceable) or compensatory (enforceable). In *Danielson v Human* 2017 (1) SA 141 (WCC) (here), the High Court held (probably on shaky ground) that an order for treble damages under RICO is not punitive but compensatory (based on expert U.S. evidence on how U.S. law characterises treble damages under RICO—query why that should matter to a South African court, and, if so, query also whether that should have been a matter of U.S. federal or state law). *Danielson* distinguished *Jones v Krok* 1996 (1) SA 504 (T), which held that an order awarding punitive damages for breach of contract under California law was punitive and contrary to public policy. *Jones* did, however, still enforce the compensatory component of the order.

So, Motorola would have two arguments in a South African courtroom. It could be argued that an order for 'punitive' damages under the Defend Trade Secrets Act, like treble damages under RICO, is not punitive but compensatory (*Danielson*). Or, as a fallback, it could at least enforce the compensatory component of the U.S. judgment even if the punitive component were unenforceable (*Jones*).