



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19206/12

In the matter between:

ARVUM EXPORTS (PTY) LTD
(Formerly Unlimited Fruit (Pty) Ltd)
(Registration Number 2000/013357/07)

First Applicant

UNLIMITED FRUIT (PTY) LTD
(Formerly Arvum Exports (Pty) Ltd)
(Registration Number 2008/028031/07)

Second Applicant

ARVUM FINANCE (PTY) LTD
(Registration Number 2007/022356/07)

Third Applicant

and

ZELDA MARGARETHA COSTA N.O.

First Respondent

DANIEL COETZEE N.O.

Second Respondent

**JOHANNES NICHOLAAS JACOBUS
VAN DER WESTHUIZEN N.O.**
(In their capacities as trustees for the time being of the
Klein Botrivier Trust, Number IT852/2007)

Third Respondent

ESTATE OF THE LATE ALBERTO COSTA

Fourth Respondent

Court: Judge J Cloete

Heard: 28, 29, 30 and 31 October 2013, 4, 5, 6, 7, 21 and 22 November 2013

Delivered: 12 December 2013

JUDGMENT

CLOETE J:

Introduction

- [1] The applicants are associated sister-companies which, broadly speaking, carry on business as fruit supply managers, agents and exporters. For ease of reference the applicants are hereinafter collectively referred to as '*Fruits*'.
- [2] The Klein Botrivier Trust (*'the KBT'*) is a family trust founded in March 2007 by the late Alberto Costa (*'Alberto'*). Alberto, along with his wife the first respondent (*'Zelda'*) and the second respondent (*'Coetzee'*) were the trustees of the KBT from its inception until Alberto was tragically murdered in February 2011. Thereafter the third respondent (*'Van der Westhuizen'*, also known as *'Klip'*) replaced Alberto as a trustee with effect from 8 March 2011, from which date the first to third respondents (hereinafter collectively referred to as *'the respondents'*) have been the trustees of the KBT. Zelda is also the executor of Alberto's estate. I will return to the workings of the KBT hereinbelow.

[3] Relief is only sought against the fourth respondent if it is found that Alberto breached his warranty of authority in concluding the agreements with Fruits which form the main subject matter of the dispute.

[4] Fruits and Alberto had enjoyed a productive business relationship since about 2004. On 12 July 2009 Fruits concluded two agreements with the trustees for the time being of the KBT, represented by Alberto. The agreements reflect that Alberto explicitly warranted his authority to enter into them; this is also the version of Fruits. During the course of the hearing of oral evidence it emerged that a resolution of the trustees of the KBT, at least purportedly authorising Alberto to represent the trust, was telefaxed from Alberto's home (which he shared with Zelda) to Fruits when he was asked by them to provide proof of his authority. The two agreements, which were expressly inter-related, were:

4.1 A production loan agreement (*'the PLA'*) in terms of which Fruits were to advance amounts totalling not more than R881 000 to facilitate and enhance production on the farm Botterkloof, which was to be repaid *inter alia* by set-off against amounts which became due by the KBT in terms of the other agreement. The advances were to be effected by payment either to the KBT or to its suppliers.

4.2 A supply and marketing agreement (*'the SMA'*) in terms of which Fruits was appointed as the export, marketing and sale agent in respect of fruit crops (including the Flavor Fall variety of plum) on Botterkloof, as more

fully described in a crop forecast signed by the parties at the time, and referred to in the SMA. The KBT was obliged to deliver this produce to Fruits.

[5] The agreements were duly implemented, without demur, both prior to and after Alberto's death, until May 2012, shortly after the end of the 2011/2012 fruit season. Indeed, in September 2011 Zelda, through her attorney, had expressed the wish to amend certain terms of the SMA. However, on 17 May 2012 Zelda asserted, for the first time, that the agreements were void for alleged lack of authority on Alberto's part to bind the KBT. Since that date the KBT has refused to perform under the agreements.

[6] Subsequent attempts to resolve the impasse failed. On 5 October 2012 Fruits launched these proceedings (*'the main application'*) in which they sought two distinct categories of relief:

6.1 First, declaratory orders aimed at establishing that the two agreements executed by Alberto on behalf of the KBT are binding on it, together with orders enforcing performance thereof (*'the first relief'*); and

6.2 Second, interdictory relief to preserve, or prevent, the contravention of their plant breeder's rights in respect of the Flavor Fall variety of fruit (*'the second relief'*).

[7] The main application was opposed by the KBT on the following grounds:

- 7.1 In respect of the first relief, that Alberto lacked actual or ostensible authority to sign the agreements on behalf of the KBT, and that it is accordingly not bound thereby. It is unclear whether specific performance of the agreements was resisted on any other grounds, although Zelda seemed at a point to contend for some form of impossibility of performance, on the basis that the KBT was not the owner of Botterkloof, and is not involved in the farming operation which was Alberto's sole domain until his death, whereafter Zelda (as executor of his estate) in March 2011 transferred the farming operation to another family trust, namely the Alberto Costa Trust (*'the ACT'*). The trustees of the ACT have at all material times been the same individuals who served as trustees of the KBT.
- 7.2 In respect of the second relief, *not* that the respondents or the KBT have any rights under the Plant Breeder's Rights Act No 15 of 1976 (*'the PBR Act'*) to harvest or exploit the Flavor Fall variety, but rather that the applicants lack *locus standi* to enforce plant breeder's rights cognisable under that Act in relation to Flavor Fall.
- 7.3 There were consequently four issues before Binns-Ward J who heard the application, namely:

7.3.1 In relation to the first relief: (a) whether Alberto had actual or ostensible authority to sign the agreements on behalf of the KBT, and/or whether the KBT was bound by operation of the *Turquand*-rule; (b) if not, whether the KBT should nevertheless be bound by the agreements by reason of any pertinent abuse of the trust form by Alberto, Zelda and/or Coetzee; and (c) if the KBT is bound by the agreements, whether facts have been established which excuse it from specific performance.

7.3.2 In relation to the second relief, whether Fruits have a sufficient legal interest in plant breeder's rights registered under the PBR Act to afford them *locus standi* to enforce the Act.

[8] The main application was heard over three days from 30 October to 2 November 2012. On 23 November 2012 Binns-Ward J handed down judgment in which it was held that Fruits had established a *prima facie* right to the relief sought. He found however that there were material disputes of fact in relation to whether Alberto was authorised to conclude the agreements on behalf of the KBT and, if not, whether the KBT should nevertheless be bound thereby as a result of an abuse of the trust form. These two issues were referred to oral evidence and a limited interim interdict was granted, requiring the KBT to deliver, or procure the delivery, to Fruits of nectarines and Flavor Fall fruit produced on Botterkloof. The nectarines and Flavor Fall fruit produced on Botterkloof represent only about 30% of the fruit crop previously delivered to Fruits from Botterkloof in terms of the

SMA. The learned judge also ordered that Zelda and Coetzee were to testify at the hearing of oral evidence.

[9] On 19 November 2012 Davis J granted an interim interdict in case no: 22095/2012 against the respondents, effectively requiring that they deliver the fruit described in the crop forecast to Fruits, pending the determination of the main application. Costs were ordered to be costs in the cause in the main application. Binns-Ward J (who had been apprised of the application under case no: 22095/2012) expedited his judgment in the main application, which then overtook the interdict granted by Davis J.

[10] Pursuant to the interim order granted by Binns-Ward J in the main application, the KBT caused nectarines and Flavor Fall produced on Botterkloof to be delivered to Fruits in the 2012/2013 season, which ended in approximately April 2013. Zelda contends that the KBT *'made arrangements with the ACT'* for this delivery to Fruits *'in order to ensure the KBT's compliance with the court order'*.

[11] Fruits contends that it dealt with and accounted for these deliveries in accordance with the PLA and the SMA. These agreements provide for the set off and retention of amounts accruing under the SMA against, *inter alia*, amounts due to Fruits under the PLA. Consequently, no payments were made to the KBT. However on 6 May 2013 the KBT sought to cancel the SMA and PLA on the ground that Fruits had failed to make payment to the KBT, which the KBT

claimed was due to it. Fruits denied any obligation to make such payment. This resulted in the respondents launching an application (*'the second application'*) under the same case number as the main application on 14 June 2013, in which they sought the following urgent relief:

11.1 A declaratory order that the SMA and PLA had been validly cancelled and *'are no longer of force and effect'*;

11.2 That the interim order made by Binns-Ward J *'has lapsed'*;

11.3 Alternatively, if the interim order had not lapsed, varying it *inter alia* to order Fruits to pay to the ACT an amount of R749 270 in respect of the fruit delivered pursuant to the interim order, to provide security for payment of future deliveries, and to effect payment of amounts *'determined in the SMA, without applying any set off'*.

11.4 Also sought were orders directing Fruits to furnish the KBT with security for its costs in the main application (this relief was subsequently abandoned) and that Fruits pay the costs of the second application.

[12] The relief sought by the respondents in the second application and was the subject of a plethora of factual disputes. The second application was ostensibly brought on behalf of the KBT by Zelda. It was unsupported by affidavits from

either Van der Westhuizen or Coetzee, and the oral evidence revealed that there was no meeting or resolution as required by the KBT's trust deed authorising either the purported cancellation of the two agreements or the second application. Zelda claimed that she was authorised to act in terms of the written authority granted to her by Coetzee in March 2011, but this merely authorised her to act on *Coetzee's* behalf in relation to the affairs of the trust.

[13] Fruits brought a counter-application in the second application for *inter alia* an order that the registrar be directed to enrol the main application for the hearing of oral evidence on the first available date on the semi-urgent roll, because, since April 2013, attempts by Fruits to enrol it in accordance with the order of Binns-Ward J had allegedly been thwarted by the respondents. The counter-application was opposed until 22 August 2013 when the respondents consented to an order enrolling the main application for the hearing of oral evidence on 28 October 2013.

[14] The second application was heard by Dolamo J on 19 and 20 September 2013. In judgment handed down on 10 October 2013 the learned judge held that the second application was not urgent, and it was postponed for hearing simultaneously with the main application. It was also ordered that the costs of the second application be determined by the court hearing the main application. The matter then came before me.

The Klein Botrivier Trust (KBT)

- [15] The capital and income beneficiaries of the KBT include the late Alberto, Zelda, their children, the ACT and two former farm managers of Botterkloof, namely Mr Christiaan Burger and Mr Matthys Visagie. The only asset of the KBT is the farm Klein Botrivier.
- [16] Zelda was the designated custodian of all of the KBT's documents and records, which she kept in her office at home, although Coetzee's evidence was that a few trust documents were kept at his office as well.
- [17] Clause 5 of the KBT trust deed allows for only two modes of valid decision making by the trustees. The first is by way of a majority decision of the trustees at a properly convened meeting, of which a proper minute must be kept. The second is by way of a written resolution signed by all of the trustees.

The Alberto Costa Trust (ACT)

- [18] The ACT is also a family trust, established by Luigi Costa, Alberto's father. The late Alberto (along with Zelda and their children, and Luigi's other children) are both income and capital beneficiaries of the ACT. With effect from 3 December 2007 the trustees of the ACT were the same persons who served as trustees of the KBT, namely Alberto, Zelda and Coetzee. Until Zelda transferred the late Alberto's farming operation into the ACT, this trust had only been a property owning entity.

[19] Although no Master's letter of authority or other documents to support this were produced, according to Zelda and Coetzee, Van der Westhuizen was appointed as a trustee of the ACT after Alberto's death. Consequently the trustees of the ACT have at all material times been the same persons who serve as trustees of the KBT. Zelda was similarly the custodian of all of the documents and records of the ACT.

[20] Clause 28 of the ACT trust deed allows for only the same two modes of valid decision making by the trustees. The first is by way of a majority decision of the trustees at a properly convened meeting, of which a proper minute must be kept. The second is by way of a written resolution signed by all of the trustees.

The farm Botterkloof

[21] In 2007 Alberto approached Fruits with a request for finance to develop new plantings on a farm which he described as '*Botterkloof*'. This was part of a proposal involving Fruits' appointment as the supply and marketing agent for Botterkloof's fruit production.

[22] Representatives of Fruits also visited Botterkloof with Alberto, *inter alia* to inspect the proposed location of new plantings to be financed by the loan agreement and, subsequently, to inspect the new plantings which had been effected. These were all on Botterkloof.

- [23] Unbeknown to Fruits at the time, Botterkloof consisted of two properties, namely:
- (a) Portion 10 of the Farm 851 named '*Boter Kloof*', which had been transferred to the ACT in 2002 and of which it was the owner; and (b) Portion 0 of the Farm 1022 '*Klein Botrivier*', which had been acquired by the KBT in 2007 and was registered in its name.
- [24] Alberto, however, simply referred throughout to '*Botterkloof*', and this was the "farm" that was in turn referred to in the two agreements. Although they were two properties, they were farmed as one under Alberto's control and that of his two managers, Burger and Visagie. The crop forecast which forms part of the agreements signed by the parties referred specifically to the farm Botterkloof. It reflects crops planted on both Klein Botriver and Boter Kloof, the majority of which are on the latter. In addition, the crop estimate does not list all of the varieties of fruit on Botterkloof. It must therefore be accepted that Botterkloof, which formed the subject matter of the agreements, constituted both components of the property. It is also clear that the crop estimate was not intended to, and did not, contain a list of all the fruit grown on Botterkloof, which explains why, even before Alberto's death, fruit was also delivered to other agents. It is also plain that those living and/or working on the farm regarded Klein Botrivier as part of Botterkloof. Burger for example, who lived on the Klein Botrivier component, described his residential address as '*Botterkloof Farm*'.
- [25] After conclusion of the two agreements, over the ensuing period from July 2009 until May 2012, both agreements were implemented in relation to fruit on

Botterkloof as a whole. Some R730 000 was advanced by Fruits in terms of the PLA; pursuant to the SMA roughly 65 000 cartons of fruit produced on Botterkloof were delivered to Fruits and dealt with in terms of the agreements; and Fruits paid out approximately R2.5 million under the SMA in respect of fruit.

- [26] More than half of these deliveries and payments made in respect thereof were effected after Alberto's death during the 2011/2012 season, which extended from the 43rd week of 2011 (i.e. roughly the end of October) to the 8th week of 2012 (i.e. 24 February). This was whilst the KBT was under the management and control of the respondents.
- [27] The only contracts or agreements in existence with Fruits in relation to Botterkloof were those referred to above. The oral evidence revealed that there are no other agreements between Fruits and the late Alberto or the ACT. Zelda's contention, in cross-examination, that there was an oral, implied or tacit agreement between Fruits and the ACT, the terms of which were entirely unclear, cannot be accepted. It seems to have been more of an afterthought in response to the proposition that deliveries of fruit by the ACT to Fruits in the absence of any agreement to that effect was highly unlikely, given the stance adopted by the respondents in this litigation. Coetzee certainly knew nothing about such an agreement.

The effect of findings of Binns-Ward J

[28] Binns-Ward J made it clear that his factual findings were provisional only. The parties agreed that they had been made within the context of determining: (a) whether the dispute on the papers in the main application was such that certain issues required referral to oral evidence; and (b) whether Fruits was entitled to interim interdictory relief.

[29] The scope of the enquiry involving testimony is limited to those issues referred to oral evidence (*Drummond v Drummond* 1979 (1) SA 161 (A) at 170H), but it is also open to the court to which the matter has been referred to hold that it is unnecessary to hear oral evidence and decide the matter on the papers (*Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263G-H).

[30] It was accordingly agreed that, in determining whether Fruits is entitled to final relief in the main application, this court is at large to make its own factual findings in relation both to the two issues referred to oral evidence, and any other material facts.

The status of the affidavits in the main application and the applicable evidential test

[31] The proceedings in the main application retain their status as an application, despite referral to oral evidence on specific issues (*Combrink v Rautenbach* 1951 (4) SA 357 (T) at 359G-H).

[32] In *Lekup Prop Co No 4 (Pty) Ltd v Wright* [2012] 4 All SA 136 (SCA) at para [32] it was held that:

‘... A referral to trial is different to a referral to evidence on limited issues. In the latter case, the affidavits stand as evidence save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.’

(See also *Du Plooy and Another v Du Plooy and Others* [2012] 4 All SA 239 (SCA) at para [20].)

[33] In relation to the second application, where there has been no referral to oral evidence, the material facts fall to be determined solely on the basis of the *Plascon-Evans* test. [*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.]

The issues to be determined

[34] Subject to what is set out below, the issues to be determined, as agreed between the parties and contained in the case management directives dated 28 October 2013, are:

34.1 Whether Alberto had actual or ostensible authority to enter into the two agreements on behalf of the KBT.

34.2 If it is found that Alberto was not duly authorised, whether the KBT is nonetheless bound by the agreements as a result of an abuse of the trust form.

34.3 If Alberto was not authorised and the KBT is not bound, whether Alberto breached his warranty of authority.

34.4 If it is found that the KBT is bound by the agreements, whether the agreements have been validly cancelled by the KBT or should be enforced as claimed by the applicants.

34.5 If the SMA is void or not binding on the KBT, whether the applicants are entitled to the interdictory relief in respect of the removal, delivery and/or destruction of the Flavor Fall varietal.

34.6 Costs, including reserved costs in the main and second applications. In this regard, on 31 October 2013 Fruits delivered a notice advising of its intention to seek a special costs award against the trustees of the KBT (in their representative capacities) jointly and severally with Zelda and Coetzee *de bonis propriis*, and on the scale as between attorney and own client.

[35] It is self-evident that if I find that Alberto had actual or ostensible authority to enter into the agreements on behalf of the KBT, it is not necessary to consider

the issues relating to an abuse of the trust form, or whether Alberto breached his warranty of authority. Most of the interdictory relief sought in respect of the Flavor Fall varietal would ordinarily follow if the KBT is indeed bound, as well as the further relief sought by Fruits, namely that when the SMA ceases to be binding on the KBT, the latter is to remove and deliver to them, alternatively to destroy, all vegetative matter or material of the Flavor Fall variety.

- [36] Just before the hearing of oral evidence, the respondents recorded that they also disputed that the two agreements are otherwise valid, and counsel informed me that this was apparent from the papers. Counsel undertook to direct me to the relevant passages but those he referred me to did not assist the respondents. Nothing significant emerged on this issue in Zelda's testimony, and it was not canvassed with Coetzee during his evidence. It is accordingly not necessary to deal further therewith.

The oral evidence

- [37] The only witnesses who testified were Burger, who was called by the applicants, and Coetzee and Zelda, who were called by the respondents in terms of the order of Binns-Ward J.
- [38] The hearing ran for a number of days, largely due to the unfortunate manner in which both Coetzee and Zelda testified. However, at the conclusion of evidence the following material facts were common cause, or were no longer seriously disputed by the respondents, and as such were resolved in favour of Fruits.

- [39] Prior to Alberto's death there was only one KBT resolution of general import, signed by all three trustees on 8 March 2007. This resolution authorised Alberto to '*sign the necessary documentation*'. It was the same resolution relied upon by Fruits and which had been telefaxed to them from the home shared by Alberto and Zelda when they had asked him to provide proof of his authority to contract on behalf of the KBT shortly prior to the conclusion of the two agreements. Mr van Rooyen, senior counsel for the respondents, rightly conceded during argument that it must be accepted that it was Alberto himself who had despatched this resolution to Fruits, given Zelda's vigorous denial that she had done so.
- [40] On its plain language the resolution evidences authority for Alberto to sign documents on behalf of the KBT without limitation. Coetzee acknowledged as much. Zelda eventually conceded that the authority conferred by the resolution did not restrict Alberto to signature of specific documents; and that Alberto had seemingly used the resolution to hold himself out to Fruits as being authorised to contract on behalf of the KBT. The resolution had furthermore never been revoked by the trustees.
- [41] Alberto was clearly the "controlling mind" of the KBT during his lifetime. He was the one who made the decision to acquire Klein Botrivier in 2007; to harness the KBT as a vehicle for this acquisition; and to utilise this vehicle – clearly for maximum tax relief and estate planning purposes – to enhance the value of Botterkloof by new plantings to be financed by Fruits.

- [42] The evidence revealed that there are no separate minutes or resolutions by the trustees pertaining to various important transactions and decisions involving the KBT, notably the alleged lease between the KBT and Alberto personally, in respect of what the respondents referred to as his personal farming operation conducted on Botterkloof as well as other farms.
- [43] Coetzee's testimony showed that he knew very little, if anything, about Alberto's *de facto* farming and related operations. His role was to advise Alberto from time to time on matters of tax and accounting, which is his chosen profession, and to attend to the preparation of the annual financial statements of Alberto, the KBT and the ACT. Coetzee was to all intents and purposes a complicit passenger in the business affairs of the KBT, to the extent that he did not even know that Alberto had concluded the two agreements with Fruits on behalf of the KBT. Zelda's evidence revealed that she too went along with Alberto's *modus operandi* – for example, she herself had no hesitation in forwarding the self-same resolution to ABSA bank for an entirely different purpose during 2009.
- [44] As a result of this shared attitude of all three trustees, Alberto himself appears to have believed that he was authorised to do as he pleased in relation to the business of the KBT merely by producing the resolution. He was the one who decided to contract with Fruits on behalf of the KBT. An outsider such as Fruits with less intimate knowledge of the inner workings of the KBT could hardly have been expected to know better.

[45] Fruits and Alberto had a business relationship going back to 2004. The consensus was that Alberto was a man of his word. There was nothing to indicate that Fruits would or should have had any reason to suspect that the position would be any different if Alberto chose to divert one of his business interests through a different vehicle for purposes of tax relief or estate planning. Equally, Alberto clearly trusted and respected the relevant representatives of Fruits and wished to further a business relationship with them, given that it was he who approached them during 2007, leading ultimately, after almost two years of negotiations, to the conclusion of the agreements.

[46] Burger, who was employed as senior manager on the farm he described as '*Botterkloof*' from 2006 until 2010, testified as to the acquisition by Alberto of the property known as Klein Botrivier. He also gave evidence about Alberto's plans for the improvement thereof by entering into an arrangement with Fruits for the provision of trees for new plantings in return for the delivery of fruit; the farming of the original '*Boter Kloof*' farm and '*Klein Botrivier*' as one unit utilising the same employees and equipment; the delivery to Fruits of fruit produced on both components of the farm; and the introduction of both himself and Visagie into the KBT trust deed as income and capital beneficiaries on the basis that they were to share in 5% of what could only have been, in the circumstances, the KBT's profit from farming operations on Klein Botrivier.

[47] Burger also testified that, although he had not seen them, Alberto had told him of the agreements with Fruits, and that until his resignation in 2010 there were no

problems with deliveries to Fruits or with payment arrangements. As regards Burger's testimony that he and Visagie were to receive 5% of the KBT's farming profits, this was corroborated both by Coetzee in his evidence and by the content of the KBT trust deed including (in particular) clause 14.2 thereof. Burger was a credible, reliable and patently honest witness, and there is no reason to question his testimony which was largely unchallenged.

[48] Consistent with the approach adopted by Alberto, Zelda and Coetzee to the affairs of the KBT, there are no minutes or resolutions authorising the plethora of transactions and decisions involving the ACT, a number of which were evidently taken by Alberto acting on his own, and thereafter by Zelda on her own, for example, in relation to: (a) an alleged lease between the ACT and Alberto (for the same purpose as that between the KBT and Alberto); (b) Alberto's purchase, on behalf of the ACT, of Klein Botrivier in December 2006; (c) Alberto's subsequent cancellation, on behalf of the ACT, of that agreement of sale to enable the property to be purchased by the KBT; (d) the ACT's purported acquisition of the farming enterprise from Alberto's estate, seemingly for no consideration; and (e) the ACT's alleged arrangement with the KBT to deliver the fruit required by the order of Binns-Ward J.

[49] That Zelda stepped into the shoes of Alberto after his untimely passing and conducted the affairs of the KBT in similar vein, is evidenced by the fact that there are no minutes, resolutions or other documents authorising any of the following, namely: (a) Zelda's attempt to amend the terms of the SMA in

September 2011; (b) the KBT's express notification to Fruits in May 2012 that it did not consider itself bound by the agreements; and (c) the KBT's purported cancellation of the agreements in 2013.

[50] Van der Westhuizen was a trustee of both the KBT and the ACT from March 2011. There is no evidence that Van der Westhuizen ever attended a properly constituted meeting of trustees in the KBT, or was involved in passing any proper resolutions. There is thus no evidence that he properly authorised any of Zelda's actions as outlined above. The extent of Van der Westhuizen's non-involvement in the affairs of the KBT is illustrated by a general power of attorney that he executed, together with Coetzee, on 9 June 2011 in Zelda's favour, authorising her *'om namens ons op te tree in alle en enige dokumente namens ons te mag teken, met betrekking tot enige aangeleentheid van genoemde trust'*. Coetzee's evidence showed that he was to all intents and purposes in the dark about Zelda's actions.

[51] As previously stated the two issues referred by Binns-Ward J to oral evidence both concern matters within the knowledge and domain of the respondents, and in particular the inner workings of the KBT, the ACT and their interaction with Alberto. Although Van der Westhuizen was appointed as a trustee after Alberto's death, he could surely have testified and cast light on issues germane to the question of Alberto's authority to contract with Fruits on behalf of the KBT (given the KBT's outward acceptance thereof until May 2012), as well as any abuse of the trust form. There is thus merit in the contention of Fruits that an adverse

inference should be drawn against the respondents for their failure to call Van der Westhuizen to testify: see *Humphreys v Laser Transport Holdings Ltd and Another* 1994 (4) SA 388 (C) at 400C-E.

[52] Zelda's claim that she did not have access to, or could not find, the KBT's copy of the resolution until May 2012, seems to have been contrived to explain the otherwise damaging failure of the respondents to dispute the validity of the agreements until that date. This is because, on the respondents' own version, Van der Westhuizen had received a copy of the agreements as well as the resolution at the beginning of September 2011; and the probabilities are that Zelda had the resolution in her custody all along, given that she had also faxed a copy of it to ABSA bank for an unrelated purpose on 29 August 2009.

[53] Despite the unfortunate quality of her evidence and her demeanour in the witness box, Zelda's testimony that she had not been aware, at least prior to his death, that Alberto had telefaxed the resolution to Fruits on behalf of the KBT, had the ring of truth. She appeared shocked and angry that Alberto had not told her, but the impression that I gained was that this had more to do with her personal relationship with him than with the affairs of the KBT. It cannot be seriously disputed that Alberto chose the KBT as the entity to contract with Fruits, and not the other way around, given that Fruits, in light of their prior relationship with Alberto, had no reason to have insisted on contracting with a separate and distinct entity.

Alberto's authority to contract on behalf of the KBT

[54] Authority to contract is determined by the principles of agency, and may be actual or ostensible. These principles apply equally in the context of a trust. In *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at para [23] the Supreme Court of Appeal put it as follows:

'The fact that trustees have to act jointly does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but whether a particular trustee has the ostensible authority to act on behalf of the other trustees is a matter of fact and not one of law.'

[55] Actual authority may be express or implied. It is express when it is given by express words, such as when a resolution is passed by a board of directors or trustees authorising one of their number to sign documents. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when a board of directors or trustees appoints one of their number to manage affairs: see *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 at para [24], citing with approval Denning MR in *Hely-Hutchinson v Brayhead Ltd and Another* 3 All ER 98 at 102A-E.

[56] Thus, in *Land & Agricultural Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA) it was held at para [37.2] that:

'The inference may in appropriate cases be drawn that the trustee who concluded the allegedly unauthorised transaction was in fact authorised to conduct the business in question as the agent of the other trustees... Such an inference may in a suitable case be drawn from the fact that the other trustees previously permitted the trustee or trustees in effective charge of affairs free reign to conclude contracts. A close identity of interests between trustee-beneficiaries, as in most family trusts, may make it possible for the inference of implied or express authority to be more readily drawn.'

[57] As a general rule *'the law concerns itself with the external manifestations, and not the working of the minds of parties to a contract'*: see *Sonap Petroleum SA (Pty) Ltd v Pappadoqianis* 1992 (3) SA 234 at 238I-239A. The exception to the general rule relates to where there is alleged *dissensus*, which is not relevant here.

[58] It is common cause that on 8 March 2007 the three trustees of the KBT all signed and certified, as a true extract from the minutes of a meeting of trustees, that it had been resolved *'That Alberto Costa in his capacity as a trustee of the Klein Botrivier Trust IT 852/2007 is hereby appointed and authorised to sign the necessary documentation'*.

[59] In terms of clause 5.5 of the KBT trust deed this document is binding on the trust. (Insofar as it purports to be an extract from a minute of a meeting attended by all three trustees, it is equally binding under clauses 5.3 and 5.4.)

- [60] The evidence showed that it was accepted by the trustees that Alberto could sign documentation on behalf of the KBT generally; Alberto himself probably believed that he was authorised to sign the agreements with Fruits on behalf of the KBT; and that Alberto or Zelda were at liberty to use the resolution whenever they so required.
- [61] The authority conferred by the resolution did not restrict Alberto to signature of particular documents. Alberto used the resolution to hold himself out as authorised to contract on behalf of the KBT. There was no other resolution of general import authorising the signature of documents or conclusion of transactions on behalf of the KBT which came into existence prior to Alberto's death.
- [62] The resolution was never revoked by the trustees, and would therefore have remained of full force and effect in 2009 when the agreements were concluded with Fruits. Burger's evidence showed that the acquisition of Klein Botrivier was for the purpose of building up the farm by entering into agreements with Fruits. It is thus not surprising that, armed with the 2007 resolution authorising him to sign documentation on behalf of the KBT, Alberto had no hesitation in producing it to Fruits.
- [63] Against this background, the probabilities are that Alberto had actual authority to contract on behalf of the KBT with Fruits. However, for the reasons that follow, I

am in any event satisfied that, at the very least, ostensible authority has been established.

[64] Ostensible or apparent authority is the authority of an agent as it *appears* to others. It may coincide with actual authority, but sometimes ostensible authority may exceed actual authority: see *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* at para [24]. Thus, if a board of directors or trustees appoint one of their number as a manager, they invest him not only with actual implied authority but also with ostensible authority to do all things that fall within the ambit of that role. Ostensible authority thus flows from the *appearance* of authority created by the principal.

[65] The requirements for ostensible authority are: (a) representation by words or conduct by the principal that the agent had authority to act as he did; (b) that such representation was made in a form in which the principal should reasonably have expected that outsiders would act on the strength of it; (c) reliance by the other party on the representation; and (d) the reasonableness of that reliance with resultant prejudice: see *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* at para [26].

[66] It is my view that all of these requirements have been satisfied. Zelda and Coetzee left Alberto, armed with the resolution, to have free reign over the business affairs of the KBT. It is now accepted that it was Alberto who produced the self-same resolution to Fruits when asked to furnish proof of his authority to

contract on behalf of the KBT. It was conceded by both Zelda and Coetzee that they could or should reasonably have expected an outsider such as Fruits to have acted on the strength of it. There is no doubt that Fruits acted reasonably on that representation. The prejudice suffered by Fruits as a result, subsequent to May 2012, is self-evident.

- [67] It thus follows that I find that the KBT has at all material times been bound by the two agreements. In light of this finding it is not necessary to consider the *Turquand*-rule.

Cancellation of the agreements by the KBT

- [68] The KBT has thus been in breach of the two agreements since at least May 2012, given its repudiation thereof as well as its refusal to deliver to Fruits all of the fruit that it was required to deliver in terms of the SMA.
- [69] These breaches have never been purged and are ongoing. The interim order of Binns-Ward J merely required – as an interim measure – that some of the fruit (about 30%) required by the SMA be delivered, and the KBT has persisted with its refusal to deliver the remainder.
- [70] The KBT has thus been in *mora* since at least May 2012 when it declared itself not bound by the agreements and repudiated them; and failed and/or refused to deliver the majority of the fruit required. Indeed, were it not for the interim order of

Binns-Ward J, on the respondents' own version, none of the fruit would have been delivered.

[71] As is clear from the main application Fruits sought to enforce the agreements, and rejected the KBT's repudiation. The KBT's opposition in the main application evidences its continuing breach and *mora*.

[72] A party in breach and in *mora* may neither exact performance by the other, nor cancel, until it has cured its breach. Van der Merwe *et al* in Contract: General Principles (5th Edition) at 323 puts it as follows:

'If a contractant repudiates his duty to perform the repudiation affects the outstanding counter-duties of his co-contractant even where the latter elects not to "accept" the repudiation, in other words chooses to uphold the contract. These special consequences of repudiation are twofold in nature. In the first place, due to his co-contractants repudiation, the innocent contractant is excused from any steps that must be taken in preparation for his own performance... In the second place, the innocent contractant is also excused from any duty to tender his own performance unless he can perform without the co-operation of the guilty party.'

[73] Accordingly, from the date when the KBT repudiated the agreements, Fruits was, as a matter of law, excused from making any performance which would require the co-operation of the KBT. As a result the contractual obligations owed by Fruits to the KBT prior to the interim order were limited in nature, given that all of their major obligations rested squarely on the KBT's delivery of all of the fruit required in terms of the SMA.

[74] The basis of the declaratory relief sought by the respondents in the second application in relation to the agreements rests on the contention that they were validly cancelled on 6 May 2013 because Fruits had not made payment as required pursuant to the interim order. The issue of whether Fruits had breached the agreements as alleged must be decided on the papers in the second application in accordance with the *Plascon-Evans* test.

[75] The interim order specifically provided that, in respect of fruit delivered in terms thereof, Fruits were to account for that fruit in terms of the PLA and SMA. The order states that the fruit supplied is *'to be marketed and accounted for by [Fruits] in accordance with the loan and supply agreements...'*

[76] It is clear that the PLA and SMA must be read together (as was found by Binns-Ward J). The PLA and SMA are linked and cross-reference each other. Clause 13 of the PLA provides *inter alia* as follows:

'Notwithstanding the aforesaid the parties confirm that this agreement is to be read in conjunction with the provisions of the SMA. Should there in this regard be found to be any conflict between the two agreements the provisions of this agreement, as far as it pertains to the subject matter here, will prevail...'

[77] In terms of these agreements:

77.1 Fruits would advance amounts to the KBT totalling approximately R881 000 as a production loan. Repayment of this loan was to commence in the 2012 season and would be completed during the 2016 season.

77.2 The KBT appointed Fruits to market and sell produce listed in Annexure B to the SMA for a period of 10 years (i.e. terminating in 2019).

77.3 The KBT would deliver to Fruits produce of the type, cultivar, quality and quantity as set out in Annexure B to the SMA, including the Flavor Fall variety.

77.4 The KBT granted Fruits a *lien* over all fruit and ceded rights in the fruit and the proceeds thereof to Fruits.

[78] Clauses 8 and 9 of the PLA entitle Fruits to deduct the amount of R183 289,30 each year commencing in 2012, which amounts are for the repayment of the loan advanced in terms of the PLA.

[79] Clause 11 of the PLA provides that should the KBT for any reason fail to deliver produce as set out in the crop forecast, and/or terminate the SMA prior to 2015, then penalties will be payable as set out in the PLA.

[80] The SMA has a number of provisions which deal with set-off and the entitlement of Fruits to retain funds. These are clauses 11.3, 13, 19.1 and 19.7, and

effectively provide that Fruits is entitled to apply set-off against amounts owing to the KBT against amounts owing by the KBT to Fruits.

[81] It is common cause that the KBT failed to deliver the fruit as set out in the crop forecast. The version of Fruits is that they were aware of this but did not initially enforce the penalty provision out of goodwill towards the late Alberto. The PLA and SMA both contain non-waiver clauses, and the failure by Fruits to immediately invoke the penalty is thus of no legal significance. However in 2012 the penalty was indeed invoked, and in terms of the PLA the KBT is thus obliged to pay to Fruits the amount of R1 135 651.91.

[82] It is also the version of Fruits that, in keeping with the terms of the SMA and PLA, it accounted for fruit delivered under the interim order by the set-off of amounts which were owing to the KBT with amounts which were owed by the KBT to Fruits. The interim order explicitly required Fruits to deal with and account for those amounts in terms of the PLA and SMA. In essence, therefore, it is the version of Fruits that the loan capital was repaid by operation of set-off but the penalty was triggered because of non-performance on the part of the KBT.

[83] Given that the *Plascon-Evans* test applies, the relief sought may only be granted if those facts averred in the KBT's affidavits which have been admitted by Fruits, together with the facts alleged by Fruits, justify such an order. During argument the respondents' junior counsel, Ms Joubert, produced a series of schedules with calculations of amounts allegedly owing by Fruits to the KBT. These schedules

ultimately served to highlight the extent of the factual disputes. These, together with the affidavits, have led me to conclude that the version of Fruits is not so far-fetched or clearly untenable that I am justified in rejecting it merely on the papers; nor am I persuaded that the facts alleged by the KBT which have been admitted by Fruits, together with the facts alleged by Fruits, justify an order for the relief sought. They consequently do not justify a finding in favour of the KBT that Fruits breached the agreements as alleged.

[84] It is thus my view that the purported cancellation by the KBT was not valid because: (a) there was no proven breach by Fruits; and (b) the KBT, having been in *mora* since at least May 2012, was not entitled to cancel the agreements.

[85] It remains to consider whether there is any basis on which enforcement of the agreements can be avoided by the KBT.

[86] In *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A) at 378F-G it was stated that:

'It is... settled law... 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... The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.'

- [87] In *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (AD) at 783C-F, it was said that:

'This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle. It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal or public policy... Furthermore, the Court will not decree specific performance where performance has become impossible.'

- [88] The onus is on the party resisting the claim for specific performance to place evidence before the court to persuade it to refuse specific performance: see *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 442B-443F.
- [89] For the reasons that follow the respondents have failed to persuade me that I should refuse specific performance. First, their submission that Fruits should instead institute a damages claim is no answer. Second, there seems to be a contention that the KBT does not have possession or control over any fruit and that the ACT now has control of the fruit which is the subject matter of the SMA. This argument is artificial and is not borne out by the facts. The KBT owns the property on which 18.28 hectares of orchards are located, all of which produce varieties listed in Annexure B to the SMA. The respondents have failed to

produce any evidence to show that they have divested the KBT of control of that fruit or property, other than the bald allegation that the KBT has leased its property to the ACT. Third, the respondents do not allege that it would be impossible for the KBT to perform under the SMA and procure delivery of the crop from Botterkloof. They would have been ill advised to do so. The ACT – which they now claim is the entity conducting the farming enterprise – comprises exactly the same individuals who are the trustees of the KBT and who plainly have a common purpose and objective.

- [90] What this contention has however alerted me to is the distinct possibility that, if specific performance is ordered only against the KBT, the respondents may well attempt to pursue this line in order to avoid their obligations. The history of this litigation shows that it is one of those unusual cases where wider relief, in order to ensure compliance with this court's order, is warranted. To my mind, the appropriate manner in which to deal with this aspect would be to order not only the KBT but each of the respondents personally to ensure performance under the agreements. It is possibly for this reason that, during argument, Fruits sought to amend its relief (without objection) to extend the ambit of any order made by this court to include each of the respondents in their personal capacities. I intend to make such an order.

Plant breeder's rights in respect of Flavor Fall

- [91] Flavor Fall is a variety of inter-specific plum, and a '*protected variety*' within the meaning of the PBR Act.

- [92] Burger Van Dyk, the business unit manager of Product Development of the South African Plant Improvement Organisation Trust ('SAPO'), deposed to an affidavit on behalf of Fruits. According to Van Dyk, SAPO produces certifiable propagation plant materials, and is responsible for their phyto-sanitary and genetic improvement; and SAPO is the licensee, under s 25 of the PBR Act, of the registered holder of plant breeder's rights in respect of the Flavor Fall variety.
- [93] The registered holder of the Flavor Fall plant breeder's rights is Zaiger's Inc. Genetics, a company incorporated in California. The Flavor Fall variety of plum was developed by Zaiger's, and registered by it as US Plant Patent No. 1 1990 in the United States.
- [94] Van Dyk stated that in 1982 SAPO was licenced by Zaiger's Inc to import and commercially exploit a wide range of stone fruit varieties in respect of which the latter had plant patents, including the Flavor Fall variety. This agreement constituted a licence in terms of s 25 of the PBR Act.
- [95] Acting under this licence, SAPO first imported the Flavor Fall variety into South Africa on 13 January 1997 and began experimental plantings in about 2000. These experimental plantings produced favourable results, and in approximately 2007 SAPO decided to engage in full-scale commercial exploitation of the Flavor Fall variety. Pursuant to a tender process, the exclusive right to commercialise the Flavor Fall variety was awarded to Fruits in terms of a written agreement concluded in 2007.

- [96] Van Dyk explained that obtaining registration of plant breeder's rights under the PBR Act is a lengthy and complicated process. This process was commenced by SAPO on behalf of Zaiger's, in about 2006. Pending this application, SAPO/Zaiger's procured provisional protection in respect of Flavor Fall under ss 14 and 15 of the PBR Act. The application for registration of Zaiger's plant breeder's rights in respect of Flavor Fall was finally granted in May 2008, when a certificate of registration was duly issued by the Registrar of Plant Breeder's Rights in terms of s 20 of the PBR Act. Van Dyk annexed a copy of the certificate of registration.
- [97] Van Dyk also explained that once a plant breeder's rights in respect of a variety have been acquired under the PBR Act, ownership of the genetic material of that variety remains with the holder of the rights, irrespective of whether such vegetative materials are in the possession of the licensor or licensee, or a sub-licensee. Ownership does not pass to a licensee or sub-licensee when vegetative materials leave the hands of the licensor. The relationship between the licensor and licensee, or sub-licensee, dictates that the licensor cannot, and does not, retain possession of the plant materials used for propagation.
- [98] In January 2007 SAPO licensed the first applicant in terms of a written agreement (*'the SAPO licence agreement'*) exclusively to propagate, distribute and exploit the commercialisation rights of the Flavor Fall variety. A copy of the relevant licence was annexed to Van Dyk's affidavit. The SAPO licence

agreement was subsequently amended on 7 April 2010 and again on 11 June 2010 in terms of agreements which are similarly annexed to Van Dyk's affidavit.

[99] In terms of the aforementioned agreements the first applicant acquired the exclusive cultivation and commercialisation rights of the Flavor Fall variety within the Republic of South Africa. In July 2009, by concluding the SMA, the first applicant (as it was entitled to do) effectively sub-licensed the KBT to farm 5 hectares of Flavor Fall.

[100] Thereafter, in 2010 and as part of Fruits' group restructuring, the first applicant's rights and obligations under the SAPO license agreement were duly ceded and assigned to the second applicant. SAPO had authorised the first applicant to do so, and a copy of the agreement to this effect is also annexed to Van Dyk's affidavit.

[101] At the time when this occurred the second applicant had full knowledge of, and accepted, the KBT's entitlement to farm Flavor Fall trees and crops in terms of the agreement which it had concluded with the first applicant in 2009. It is the contention of Fruits that, but for that agreement between the first applicant and the KBT, the latter would have had no right, license or other entitlement to grow, harvest or otherwise commercially exploit Flavor Fall trees or crops.

[102] The KBT's response to these allegations was, effectively, to put Fruits to the proof of its *locus standi* to enforce its plant breeder's rights. It did not produce a shred of evidence to counter these allegations.

[103] During argument Ms Joubert informed me that the respondents do not deny that 'a registration' exists, but that it is the 'scope of the registration' that is disputed. She submitted that further evidence should have been produced by Fruits in order to establish its *locus standi*. She argued that Fruits have not provided 'the best evidence' as to the existence of a license agreement between Zaiger's and SAPO or, in fact, any evidence at all which could substantiate Van Dyk's 'claims'. She contended that Zaiger's should have been joined as a party; and that Zaiger 'on the face of it' remains unaware of this litigation.

[104] As far as I am concerned, the last submission was patently incorrect. Annexed to a further affidavit of Van Dyk filed in reply in the main application is a letter from Zaiger's, the content of which reads as follows:

'To whom it may concern:

PLANT BREEDER'S RIGHTS IN RESPECT OF "FLAVOR FALL" VARIETY IN SOUTH AFRICA

1. SAPO Trust (previously known as "The South African Plant Improvement Organization, 'SAPO') are our agent in South Africa for varieties imported prior to July 2000. We hold plant breeder's rights in respect of the 'Flavor Fall' variety in terms of the Plant Breeder's Rights Act (15 of 1976) ('the PBR Act') in South Africa.

2. *We have authorized SAPO to commercially exploit the “Flavor Fall” variety in South Africa and undertake the activities referred to in Section 23 of the PBR Act.*
3. *SAPO has in turn made an agreement with Arvum Exports (Pty) Ltd (formerly Unlimited Fruit (Pty) Ltd) and Unlimited Fruit (Pty) Ltd (formerly Arvum Exports (Pty) Ltd) to commercially exploit and promote the “Flavor Fall” variety in South Africa. We were informed that growers were nominated, with approval of SAPO, to cultivate the “Flavor Fall” variety in South Africa.*
4. *We authorize and support any steps taken to protect our rights and those of the parties mentioned above in respect of the “Flavor Fall” variety.’*

[105] The respondents argue that there are technical and procedural hurdles imposed by the Act for the granting of a license, which Fruits have not shown that they have overcome. However, on the plain language of s 23 read with s 25 of the PBR Act, all that is required is written authority which – in the case of Fruits – has been demonstrated by way of the SAPO licensing agreement; and as previously stated, SAPO in turn is the South African agent of Zaiger’s.

[106] The respondents also argue that: (a) the plant breeder’s rights have not been shown to exist; (b) there is no evidence to demonstrate that SAPO would have been entitled to sub-license rights to Fruits in terms of the PBR Act; (c) the court is not in a position to assess the scope of the plant breeder’s rights which it is requested to enforce, as there are insufficient details of the plant variety protected; and (d) there is no evidence that the KBT is in possession of any plant material falling within the scope of the plant breeder’s rights.

[107] However: (a) a certificate of plant breeder's rights has been produced by Fruits which clearly originates from the registrar of plant breeder's rights and which constitutes *prima facie* evidence of the matters specified in that certificate in terms of s 5(2) of the PBR Act; (b) the PBR Act does not restrict the nature of an agreement which may be concluded between a licensee (in terms of s 25 of the PBR Act) and other parties; (c) the Flavor Fall variety has been referred to by the respondents extensively and is clearly known to them, and there is accordingly no dispute regarding the variety referred to by Fruits; and (d) the respondents on their own version confirm that the KBT owns property on which all the Flavor Fall trees on the farm known as Botterkloof are planted.

[108] Ms Joubert relied on a passage from *Weltevrede Nursery v Keith Kirsten's (Pty) Ltd and Another* 2004 (4) SA 110 (SCA) at para [8]. However in *Weltevrede* the Supreme Court of Appeal had to consider, in particular, whether the plant breeder's rights claimed had been properly granted. This thus involved a consideration of whether the rights had been properly registered. The respondents do not contend that the rights have not been properly granted but rather that this court is not in a position, on the basis of the evidence produced by Fruits, to assess whether Fruits has plant breeder's rights at all.

[109] The *Plascon-Evans* test does not require of Fruits to have produced '*the best evidence*'. The respondents have been unable to meaningfully refute any of Van Dyk's allegations.

[110] On the essentially uncontroverted facts, Zaiger's is the registered holder of plant breeder's right in respect of Flavor Fall under the PBR Act; SAPO as its authorised agent and licensee has the exclusive right to exploit this variety in South Africa; and SAPO in turn has granted the exclusive right to do so to Fruits. Accordingly, in terms of s 23 of the PBR Act, Fruits are entitled *inter alia* to undertake production, sale, export, stocking and other activities in relation to Flavor Fall.

[111] S 23 read with s 23A of the PBR Act precludes the KBT (or any other person) from *inter alia* from producing, marketing or selling Flavor Fall other than by way of prior license under s 25 or s 27 of the PBR Act. Since Fruits hold the exclusive license from SAPO in South Africa, this would require the KBT to be licensed by Fruits, hence the provisions of the SMA.

[112] Fruits, as authorised persons who are allowed by the holder of the plant breeder's rights, clearly have a legal interest in Flavor Fall. As such they have a sufficient interest to found their *locus standi* to interdict the KBT from conduct which contravenes this legislation: see Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa 5th Edition Volume 2 at p1476-1478.

[113] On application of the *Plascon-Evans* test, I am persuaded that Fruits have established their *locus standi* for the following reasons:

113.1 Zaiger's plant breeder's rights in respect of Flavor Fall are registered under the PBR Act in terms of a certificate issued by the Registrar under that Act.

113.2 S 5(2) of the PBR Act provides *inter alia* that: '*(a) certificate by the Registrar to the effect that an entry has or has not been made in the register or that any other thing authorised by this Act to be done, has or has not been done, shall be prima facie evidence of the matters specified in that certificate*'.

113.3 In addition, s 5(1) of the PBR Act records that the register is *prima facie* evidence of all matters directed or authorised by the Act to be noted therein.

113.4 SAPO has at all material times been licensed by Zaiger's to import and commercially exploit, *inter alia* the Flavor Fall variety. SAPO has been importing Flavor Fall into South Africa since 1997, was responsible for the registration of Zaiger's plant breeder's rights under the PBR Act and has been engaged in the exploitation of this variety since at least 2007.

113.5 In 2007 SAPO granted the first applicant the exclusive rights to exploit the Flavor Fall variety in South Africa, and these rights were subsequently ceded by the first applicant to the second applicant with SAPO's approval.

113.6 As previously stated, the KBT has never asserted a right to exploit the Flavor Fall variety, notwithstanding that 5 hectares of Flavor Fall is being farmed on Klein Botrivier.

[114] I accordingly find that Fruits has the necessary *locus standi* to enforce its plant breeder's rights. It follows that Fruits is entitled to the interdictory relief sought in respect thereof. For the reasons I have already given in relation to specific performance under the agreements, it is similarly my view that the interdictory relief should be extended to include the respondents personally.

Costs

[115] In light of my findings, there is no reason why costs should not follow the result. As previously stated, Fruits now seeks a punitive costs order against the KBT as well as Zelda and Coetzee in their personal capacities. However, in the exercise of my discretion I am not inclined to grant such an order. The clear impression that I gained, at least from Zelda's testimony, is that she, and by all accounts Coetzee to the limited extent that he involved himself in this litigation, relied on legal advice provided to them. I do not believe that it would be appropriate to punish them for following the advice that they received.

Conclusion

[116] **In the result I make the following order:**

1. It is declared that the following agreements executed on 12 July 2009 are binding on the Klein Botrivier Trust (Reg. No: IT 852/2007) as represented by its trustees for the time being (*'the KBT'*), and on the First to Third Respondents (*'the Respondents'*), both in their representative and personal capacities:
 - 1.1 the Production Loan Agreement (*'the PLA'*) by and between the First Applicant, Third Applicant, and the KBT, a copy of which is annexed to the Applicants' founding affidavit marked 'H';
 - 1.2 the Supply and Marketing Agreement by and between the First Applicant and the KBT (*'the SMA'*), a copy of which is annexed to the Applicants' founding affidavit marked 'I';
2. The KBT and each of the Respondents personally are interdicted and restrained from:
 - 2.1 transferring (or allowing the transfer of) possession or control of any of the fruit, trees, bud stock, root stock or other vegetative matter of the Flavor Fall variety to any person or entity other than the First and Second Applicants; or
 - 2.2 disposing (or allowing the disposal) of any of the fruit, trees, bud stock, root stock or other vegetative matter of the Flavor Fall variety to any person or entity other than the First and Second Applicants; or
 - 2.3 otherwise commercially exploiting or selling (or allowing the exploitation or sale of) any of the fruit, trees, bud stock, root

stock or other vegetative matter of the Flavor Fall variety (other than by sale to or through the agency of the First and Second Applicants).

3. The KBT and each of the Respondents personally are directed to deliver to the Applicants, or to procure the delivery of, the fruits of the Flavor Fall varietal, nectarines, and plums produced on the farm Botterkloof (comprising the farms currently held under deeds of transfer T036273/2002 and T000041238/2007) and described in the SMA read with Annexure 'B' thereto in respect of the 2013/2014 stone fruit season and subsequent seasons for the full duration of the SMA to be marketed, accounted and paid for by the First Applicant and the Third Applicant in accordance with the PLA and the SMA.
4. The KBT and each of the Respondents personally are interdicted and restrained from selling, delivering or otherwise dealing with the plum or nectarine stone fruits of the type referred to in Annexure 'B' to the SMA unless and until they have effected delivery of the full quantities and description of such fruit described in Annexure 'B' to the First and/or Second Applicants.
5. If the SMA is terminated , or ceases to be binding on the KBT, the KBT and each of the Respondents personally shall:
 - 5.1 remove from the Botterkloof farm all trees, fruit, bud stock, and other vegetative matter or material of the Flavor Fall variety; and

- 5.2 deliver to the Second Applicant all trees, fruit, bud stock and other vegetative matter of the Flavor Fall variety in the KBT's direct or indirect possession or control, alternatively destroy the same and furnish proof to the Applicants of such destruction.
6. The Applicants' costs in these proceedings, including the reserved costs of all interlocutory and related applications under this case number and case no: 22095/2012 shall be borne by the KBT on the scale as between party and party. Such costs shall include:
- 6.1 the costs of two counsel where employed;
- 6.2 the costs of the hearings before Davis J, Binns-Ward J and Dolamo J; and
- 6.3 the qualifying and expert fees and expenses of Mr Burger Van Dyk.

J I CLOETE