

SOUTH AFRICA / JUDGMENT

Costa NO and Others v Arvum Exports (Pty) Limited and Others (969/2016) [2017] ZASCA 113 (21 September 2017) [2017] ZASCA 113

COURT

Supreme Court of Appeal

BEFORE

Lewis, Leach, Saldulker, Lamont, Schippers

CASE / FILE NUMBER

969/2016

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 969/2016

In the matter between:

ZELDA MARGARETHA COSTA NO

FIRST

APPELLANT

DANIEL COETZEE NO SECOND

APPELLANT

JOHANNES NICOLAAS JACOBUS

VAN DER WESTHUIZEN NO

THIRD APPELLANT

[in their capacities as trustees for the time

being of the KLEIN BOTRIVIER TRUST,

IT852/2007]

ESTATE OF THE LATE ALBERTO COSTA FOURTH

APPELLANT

and

ARVUM EXPORTS (PTY) LIMITED

(formerly Unlimited Fruit (Pty) Ltd)

(Registration Number 2000/013347/07) FIRST

RESPONDENT

UNLIMITED FRUIT (PTY) LIMITED

(formerly Arvum Exports (Pty) Ltd)

(Registration Number 2008/028031/07)

SECOND RESPONDENT

ARVUM FINANCE (PTY) LIMITED

(Registration Number 2007/022356/07)

THIRD RESPONDENT

Neutral Citation: Costa NO v Arvum Exports (969/2016)

[2017] ZASCA 113 (21 September 2017)

Coram: Lewis, Leach and Saldulker JJA and Lamont and Schippers AJJA

Heard:

5 September 2017

Delivered:

21 September 2017

Summary: Trust: a resolution of trustees of a family trust, that authorized one trustee to ‘sign all the documentation’, does not authorize the conclusion of two business agreements when read in context; no ostensible authority arises where an agent, and not the principal, makes a misrepresentation as to authority.

Plant breeders’ rights: rights not infringed where there is no propagation of a fruit tree varietal.

ORDER

On appeal from: The full court of the Western Cape Division of the High Court, Cape Town (Savage and Yekiso JJ concurring and Veldhuizen J dissenting sitting as court of appeal).

The appeal is upheld with the costs of two counsel. The order of the court a quo is replaced with:

‘1 The appeal is upheld with the costs of two counsel.

2 The application brought by Arvum Exports (Pty) Ltd, Unlimited Fruit (Pty) Ltd and Arvum Finance (Pty) Ltd is dismissed with the costs of two counsel where so employed.’

Lewis JA (Leach and Saldulker JJA and Lamont and Schippers AJJA concurring)

[1] The late Mr Alberto Costa was a successful farmer, who ran a large farming enterprise in the Western Cape that extended over several farms. He was murdered on 18 February 2011. The appellants are the trustees of the Klein Botrivier Trust (the KB trust): Mr Costa’s widow, Mrs Zelda Costa, his former financial adviser, Mr Daniel Coetzee, and Mr Johannes van der Westhuizen (the latter was made a trustee after Mr Costa’s death) and the estate of Mr Costa of which Mrs Costa is the executor. The respondents are three associated companies, Arvum Exports (Pty) Ltd, Unlimited Fruit (Pty) Ltd and Arvum Finance (Pty) Ltd, to which I shall refer collectively as the ‘Fruit Group’.

Litigation history

[2] The litigation that preceded this appeal concerned the supply of fruit by the KB trust to the Fruit Group. The principal question at issue is whether Mr Costa had authority, on behalf of all the trustees, to enter into two agreements with the Fruit Group. Some

time after Mr Costa’s death in 2011, the trust advised the Fruit Group that it disputed Mr Costa’s authority to conclude

the agreements (the basic details of which shall be set out later) and refused to perform in terms of them. The Fruit Group responded by bringing an urgent application in the Western Cape High Court declaring the agreements binding on the trustees, and for an order

for performance, and, in the alternative, if the agreements were not binding, an order for the enforcement of rights in a variety of plum tree known as ‘Flavor Fall’ in terms of the Plant Breeders’ Rights Act 15 of 1976.

[3] The application was heard by Binns-Ward J, who found that the Fruit Group had established a prima facie right to the relief sought, but referred the questions whether Mr Costa had actual authority to conclude the agreements, and the possible abuse of the trust form by Mr and Mrs Costa and Mr Coetzee, to oral evidence. Binns-Ward J also granted an interim interdict against the trustees, requiring them to supply particular fruit to the Fruit Group in terms of the one agreement pending the determination of the application. His judgment was handed down on 23 November 2012. Prior to that the Fruit Group had sought an interim interdict compelling the delivery of fruit, but that fell away when Binns-Ward J handed down his judgment.

[4] The KB trust complied with the order compelling it to supply fruit, but the Fruit Group did not make any payment to the trust,

maintaining that it was entitled to set off the payment due against payments due to it by the KB trust. It accordingly brought an application against the Fruit Group for an order that the agreements had been validly cancelled as the Fruit Group was in breach of the agreements. The claim was conditional on a finding that the trustees were bound by the agreements.

- [5] The two applications were heard together by Cloete J, who also heard the oral evidence of Mrs Costa and Mr Coetzee for the KB trust, and the evidence of a former farm manager, Mr C Burger, who had worked for Mr Costa, led by the Fruit Group. Cloete J sat for several days in October and November 2013, and handed down judgment in December
2013. She found that Mr Costa had had actual authority to conclude the agreements, and even if she were wrong in that respect, had ostensible authority. She dismissed the application by the KB trust on the basis that because it was in breach of the agreements, it was not entitled to cancel them even if the Fruit Group were in breach itself. Cloete J also found that the Fruit Group was entitled to protection under the Act, and granted an order interdicting the KB trust and the trustees from transferring possession or control of any of the fruit, trees, bud stock or root; or disposing of, or commercially exploiting or selling, any of the Flavor Fall variety to any person other than the Fruit Group. The interdictory relief was granted despite the fact that it was sought only in the alternative, in the event of the agreements not being binding. Cloete J gave the KB trust leave to appeal to a full court of the division against her order.
- [6] A majority of the full court (Savage J, Yekiso J concurring) upheld the decision of Cloete J, also finding that Mr Costa had actual authority (and if not, ostensible authority) to conclude the agreements. Veldhuizen J dissented on the basis that Mr Costa did not have authority from the other trustees to conclude the agreements in question, and could not enforce any plant breeder's rights as the Fruit Group had not proved any actual or threatened infringement by the trust. Special leave to appeal against the judgment of the majority of the full court was granted by this court.

The background to the conclusion of the agreements

- [7] As indicated in the introductory paragraph, Mr Costa ran a large farming operation on several farms. He had supplied fruit to the Fruit Group over a number of years. He wished to expand his orchards and had discussed ways of doing this with the representatives of the Fruit Group over a couple of years. His father, Luigi Costa, had formed a family trust, the Alberto Costa trust (the AC trust), with Mr Costa and other family members as trustees and income and capital beneficiaries. The AC trust owned a farm 'Boter Kloof' which was purchased by it in 2002.

- [8] In 2007 Mr Costa formed the KB trust, also designated as a family trust. At that stage, the trustees of the AC trust were the same as those of the KB trust. The capital beneficiaries were Mr and Mrs Costa, their children, and two farm managers, Mr Burger and Mr M Visagie. In March 2007, the trustees of the KB trust signed a resolution authorizing the purchase by the KB trust of the farm Klein Botrivier. The farm was transferred to the KB trust in May 2007.
- [9] Mr N J Steenkamp, who deposed to the founding affidavit in the Fruit Group's application, said that Mr Costa had approached him in 2007 with a request that the Fruit Group finance the development of the farm Botterkloof, with fresh plantings. Mr

Steenkamp did not know at the time that Botterkloof actually comprised two farms, Klein Botrivier, owned by the KB trust, and portion of the farm Boterkloof, acquired by the AC Trust in May 2002. Part of the proposal made by Mr Costa to Mr Steenkamp was that in return for financing, the Fruit Group would be appointed as supply and marketing agents of the fruit grown on Botterkloof.

The agreements that Mr Costa and the Fruit Group concluded

- [10] Negotiations between Mr Costa and the Fruit Group continued from 2007 until 2009. In July 2009 representatives of the Fruit Group and Mr Costa signed two agreements. One was named a 'Production Loan Agreement' (PLA). It was between two companies in the Fruit Group and, on the face of it, 'the trustees at the time being of the Klein Botrivier Trust', represented by Mr Costa who was said to be duly authorized. Mr G J Malan signed on behalf of the Fruit Group and Mr Costa signed, again on the face of it, for the KB trust. I shall assume for the purpose of describing the agreement that the KB trust was party to it. In summary, the obligations of the Fruit Group were to advance agreed sums to the KB trust over a number of years as a 'production loan', to enable the KB trust to facilitate and improve production on the farm Botterkloof. In turn the KB trust would simultaneously conclude a 'Supply and Marketing' agreement (SMA) in terms of which the KB trust would, for a period of ten years, supply fruit to the Fruits Group which would sell and export the fruit.
- [11] The SMA was, as I have said, also concluded in July 2009. The parties were 'Fruits Unlimited' (Unlimited Fruit, the second respondent), represented by Mr Steenkamp, and 'The trustees at the time being of the Klein Botrivier Trust' 'Herein represented by its duly authorized trustee Alberto Costa'. The cover page of the SMA also stated that Alberto Costa 'warranted his authority' to enter into the agreement on behalf of the KB trust. For some reason, Mr Steenkamp had inserted in handwriting, above the typed name of the KB trustees, the name 'Alberto Costa'.

- [12] The SMA made detailed provision for the type, cultivar, quality and quantity of fruit to be supplied by the KB trust to the Fruit Group. As security for the amounts owed to the Fruit Group, the KB trust granted a lien over the fruit, and ceded its rights in the proceeds to the Fruit Group. Both agreements were drafted by the Fruit Group's attorney, Basson Blackburn Inc.
- [13] Mr Steenkamp averred, and this was not controverted by Mrs Costa, who deposed to the answering affidavit, that both agreements were implemented by the Fruit Group and the KB trust. The Fruit Group advanced the sum of R733 354 to the KB trust under the PLA: the money was in fact paid by the Fruit Group to the nurseries that provided the new fruit trees planted on Botterkloof. A significant portion was used for the planting of Flavor Fall trees in 2009. In turn, fruit was supplied from the farm to the Fruit Group as required under the SMA. And even after Mr Costa's death, fruit was supplied to the Fruit Group in terms of the SMA. A farm manager had been appointed to take over Mr Costa's work, and Mr Steenkamp had dealt with him as the fruit producer.
- [14] Some months after Mr Costa's death, Mr Steenkamp visited Mrs Costa to condole with her about her husband's death, and they had talked about the fruit production. Subsequently, in August 2011, Mrs Costa advised Mr Marais, the technical adviser of the Fruit Group, that she wished to meet him with her co-trustee, Mr van der Westhuizen. At the meeting, Mr Marais advised Mrs Costa that she was required to sign a non-propagation agreement in respect of the Flavor Fall trees. She and Mr van der Westhuizen had a number of queries about this, and Mr Marais referred them to Mr Malan.
- [15] A meeting was held between Mr Malan and the two trustees on 20 September 2011, at the offices of Mr J Spamer, an attorney representing the KB trust. Both the PLA and the SMA were discussed at the meeting, and it is clear from an email sent by Mr Spamer to Mr Malan on the same day that the terms of the agreement were not acceptable to Mrs Costa. Mr Spamer came away with the impression that Mr Malan was willing to amend some of the terms. Interestingly, he stated that Mrs Costa's commitment to the Fruit Group was as important to her as the Fruit Group's 'investment in the Trust'.
- [16] Mr Malan responded the following day, indicating that he had agreed to do no more than clarify terms and had not agreed to change them. He also asked Mr Spamer for the non-propagation agreement that Mrs Costa had been requested to sign. Correspondence ensued in respect of the terms of the various agreements, as well as to rumours that Botterkloof was going to be sold.
- [17] In May 2012, Mr Spamer wrote to Mr Malan explaining that it had taken time for Mrs Costa to acquaint herself with the workings of the AC trust and the KB trust. He said that on investigation of the agreements, of which the trustees had learned only after Mr Costa's death, he had concluded that the agreements were invalid as Mrs Costa and Mr Coetzee, the other trustees at the time of their conclusion, had not authorized Mr Costa to enter into them. Mr Spamer advised that the resolution that Mr Costa had furnished to the Fruit Group

before the signing of the PLA and SMA had been taken two years previously, and did not authorize the conclusion of the PLA and SMA agreements in its terms.

- [18] While it is permissible for trustees to authorize one of them to act on their behalf (Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk 2004 (3) SA 486 (SCA) paras 6 and 23) it is a question of fact whether they have done so. The trust deed in this matter provided (clauses 5.3 and 5.5) that unless otherwise provided in the trust deed, decisions could be taken by a majority of the trustees present at a meeting; but a written resolution signed by all the trustees would have the same effect as that taken by majority at a meeting. There is no doubt that the resolution on which the Fruit Group relied was signed by all three trustees. The question is what meaning it bore.

The resolutions of the trust in issue

- [19] The records of the KB trust include two resolutions. The first – and more important since it is the centre of the dispute – is reflected as an extract of the minutes of a meeting of the trustees held on 8 March 2007. Mr Costa had sent it by fax to Mr Steenkamp before the agreements were signed. It read:

‘Resolved that:

- a) That Alberto Costa in his capacity as trustee of the Klein Botrivier trust 852/2007 is hereby appointed and authorized to sign the necessary documentation.’ (My emphasis.)

I shall refer to it as the first resolution for the sake of convenience.

- [20] The second resolution, taken at the same meeting in respect of the acquisition of the farm Klein Botrivier, is also signed by the three trustees. It stated (I shall not reproduce the format):

‘Besluit dat:

1 Die trust koop die volgende eiendom:

Die plaas Klein Botrivier Nr 1022 in die Swartland Munisipaliteit, afdeling Malmesbury, in die Wes-Kaap Provinsie;

Groot 198,4761 . . . hektaar

van C G Smit Trust

vir die bedrag van R5 700 000 . . . bekragtig.

2 Dat Alberto Costa in sy/haar hoedanigheid as ‘n trustee gemagtig word om alle dokumente te onderteken wat nodig mag wees vir registrasie van die oordrag van die bogenoemde eiendom aan Klein Botrivier Trust.’ (My emphasis.)

- [21] There is no explanation as to what purpose the first resolution served other than empowering Mr Costa to sign the documents necessary for the purchase and transfer. The second resolution did just that, however. Both were made, and the extracts of the meeting were signed, at the very meeting at which the trustees of the KB trust resolved to buy the farm, and which authorized Mr Costa to sign the documentation necessary for its transfer. Mr Costa may have believed that the first resolution authorized him to conclude the PLA and SMA with the Fruit Group. And obviously Mr Steenkamp thought so too.
- [22] Cloete J in the court of first instance accepted that the resolution was wide enough to empower Mr Costa to enter into those contracts. The majority of the full court agreed. Hence the finding that Mr Costa had actual authority. And the Fruit Group contends on appeal to this court that they were correct. The KB trust argues otherwise.

The interpretation of the first resolution

- [23] The plain wording of the resolution empowers Mr Costa to sign the 'necessary documentation'. The obvious question that springs to mind is 'necessary for what'? The meaning is obscure. And so one must look to the context in which the resolution was taken in order to ascertain what the trustees' intention was.
- [24] In my view, the clear context was the acquisition of the farm Klein Botrivier. The trustees, having resolved to purchase and take transfer of the farm, authorized Mr Costa to sign all documentation necessary for that purpose. They did not confer upon him the authority to conclude business agreements with other parties. The conclusion of business contracts, as opposed to the day-to-day

administration of a trust, is not something that trustees may delegate to a person. They must decide what contracts to conclude.

Mrs Costa and Mr Coetzee denied that they were aware of the PLA and the SMA, and thus could not have authorized them. Since the dispute was determined by way of application, Mrs Costa's version must be accepted: *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009

(2) SA 277 (SCA) para 26.

- [25] That two issues were referred to oral evidence does not change the fact that proceedings were brought by way of application: *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) para 32. The referral of issues to oral evidence, as opposed to a referral to trial, means that the affidavits stand as evidence. In any event both Mrs Costa and Mr Coetzee persisted when giving oral evidence in their denial of any knowledge of the PLA and SMA before Mr Costa's death. There is no reason to disbelieve them in the light of what is discussed later.
- [26] There are other indicia that Mr Costa was not authorized to conclude the agreements by the other trustees, and that he had in fact contracted in his personal capacity. The KB trust was not a business trust. Its sole function was to hold the farm. Indeed, there was a lease between Mr Costa and the KB trust in terms of which he hired the farm. The trustees met

annually and it is common cause that there was no contract other than the purchase of the farm Klein Botrivier authorized by the trustees. The insertion of Mr Costa's name above that of the trustees in the SMA, by Mr Steenkamp, leads to the inference that even the Fruit Group knew that it was contracting with him in his personal capacity. Mr Steenkamp did not testify so no other plausible explanation is available.

[27] The financial records of Mr Costa reveal that all payments by the Fruit Group were made to his personal account. None was paid by him to the KB trust in turn. And the advances made in terms of the PLA were paid directly to the nurseries that propagated the fruit trees planted on Botterkloof. Tellingly, the Fruit Group's attorney, Mr Blackburn, when faced with the statement by Mr Spamer that Mr Costa was not authorized to conclude the agreements, reacted in such a way as to leave no doubt that his view was that the resolution did indeed not give Mr Costa authority for that purpose. Moreover, when commenting on a draft of the SMA as far back as February 2008, Mr Blackburn had indicated that the first resolution that Mr Costa had sent to the Fruit Group to show his authority to contract on behalf of the KBT was dated – it was taken 'lank gelede'. He did not, however, comment on the adequacy of the first resolution for the purpose of concluding the agreement.

[28] While advising Mr Spamer that the Fruits Group had bona fide believed that Mr Costa was authorized to conclude the agreements, and had performed in terms of them, Mr Blackburn in a letter dated 28 June 2012 said the following:

'For present purposes, and if accepted that no resolution existed authorizing Mr Costa to enter into the [PLA], such agreement was

indeed void ab initio.

. . .

As far as the SMA is concerned we also accept the fact that no resolution exists authorizing Mr Costa to enter into such an agreement on behalf of the Trust. That would then potentially also lead thereto that the agreement be void ab initio.'

[29] Mr Blackburn assumed that Mr Costa had added his own name as a party to the SMA. That was not so as Mr Steenkamp had made the insertion. Nothing much can turn on this, particularly as Mr Steenkamp did not give evidence to explain why he had inserted the name after the agreement had been typed. Mr Blackburn then asserted as a fact that the relationship 'in respect to the SMA was between Unlimited Fruit and Alberto Costa personally. All payments were made to Mr Costa directly into his bank account and there was no question of the involvement of the Trust at all.' He suggested that there were various legal permutations – that the estate of Mr Costa was bound, or that the KB trust was liable to an enrichment claim.

- [30] Mr Blackburn sought to retract these admissions in an affidavit attached to the replying affidavit of Mr Steenkamp. He said that prior to making them he had not yet taken instructions from the Fruit Group. That is plainly far-fetched, and in the absence of a better explanation (which he might have proffered had he given oral evidence) can safely be ignored under the Plascon-Evans rules as to the assessment of evidence in application proceedings.
- [31] Thus if one interprets the first resolution in context, having regard to the meeting at which it was passed, the fact that the trustees had agreed at the same time to purchase and take transfer of the farm Klein Botrivier, the nature of the trust, the fact that all payments under the SMA had been made to Alberto directly, that Mr Costa had himself invoiced the Fruit Group, and Mr Blackburn's conclusion that it had not authorized the conclusion of the PLA and the SMA, there can be little doubt that it was not intended to deal with any contract other than the purchase of the farm. Even the wording of the resolution is such that it cannot be construed as a general authorization to enter into contacts: it is no more than an authorization to sign documents for a particular purpose – the purchase and acquisition of Klein Botrivier. Nothing else, in the context of the meeting of 8 March 2007, was anticipated by the trustees. I conclude therefore that Mr Costa did not have actual authority to conclude the PLA and SMA on behalf of the KB trust.

Ostensible authority

- [32] That brings me to the question whether the Fruit Group was entitled to rely on a representation that he did have such authority even if it had not actually been given. Both Cloete J in the court of first instance and the majority in the full court found that if actual authority had not been given, there was at least ostensible authority. Relying on *NBS Bank Ltd v Cape Produce (Co) (Pty) Ltd* 2002 (1) SA 396 (SCA), Cloete J said that the requirements for ostensible authority are that there must be a representation, by words or conduct, by the principal, that the agent had the authority to act; that the representation must be in a form that the principal should have accepted that third parties might reasonably rely on it; actual reliance by the third party and resultant prejudice. (See also
- Glofinco v Absa Bank Ltd t/a United Bank* paras 12 and 13 where the requirements are repeated.)
- [33] Cloete J concluded that the requirements for establishing ostensible authority had been satisfied: Mrs Costa and Mr Coetzee left Mr Costa, 'armed with the resolution' to have free reign over the business affairs of the [KBT]. And the Fruit Group had reasonably relied on that representation. However, in my view, the Fruit Group could not reasonably have relied on a vague resolution, passed some two years prior to the conclusion of the agreements, and which did not refer to any contract, but only to 'the necessary documentation'.

- [34] The majority of the full court, finding apparently that Mr Costa had himself made the representation that he was duly authorized, was clearly wrong in that he was not the principal, but merely the agent of the other trustees. Only if Mrs Costa and Mr Coetzee had represented to the Fruit Group, by their words or conduct, that Mr Costa was duly authorized, would ostensible authority have possibly been found. The Fruit Group has not shown any conduct on their part that would lead to that conclusion.
- [35] I consider, therefore, that Mr Costa had neither actual nor ostensible authority to enter into the PLA and the SMA and that they are not enforceable.

Abuse of the trust form

- [36] Although no claim was made by the Fruit Group that the trustees were to be held liable under the PLA and SMA, Binns-Ward J, when the application was first considered, considered that a possible basis for liability was that the peculiar facts of the case justified the façade of the trusts being disregarded. He referred this question to oral evidence, citing his decision in *Van der Merwe NO & others v Hydraberg Hydraulics CC & others*; *Van der Merwe NO & others v Bosman & others* 2010 (5) SA 555 (WCC) in support of the principle that where a trustee conducts the affairs of a trust, ignoring the distinction between his personal capacity and that of his capacity as a trustee, the trustee might himself be liable for the apparent liability of a trust.
- [37] As I see it, even if that is a principle generally recognized in South African law, which this court need not determine here, it is only Mr Costa who would be held personally liable. And since he had died, that is not possible. That argument need not detain me any longer.
- [38] I accordingly consider that the KB trust was not bound by either the PLA or the SMA. The second application, brought by the KB trust for a declaration that the agreements had been validly cancelled, need not therefore be considered.

The Fruit Group's claim to protection under the Plant Breeders' Rights Act

- [39] The Fruit Group asserts a right to a 'variety of inter-specific plum' called Flavor Fall. The proprietor of the relevant Plant Breeders' registration for Flavor Fall is a Californian based company, Zaiger's Inc Genetics, which is not a party to the proceedings. Zaiger's plant breeders' rights in respect of Flavor Fall are registered under the Act in terms of a certificate issued by the registrar under that Act. The South African Plant Improvement Organization Trust (SAPO) was licensed by Zaiger's to propagate Flavor Fall plum trees, and SAPO had in turn, in 2007, licensed the Fruit Group to exploit the variety. Flavor Fall trees were planted on Botterkloof. The Fruit Group argued that if the PLA and SMA were not binding, then the KB trust was precluded from dealing with the plums unless by agreement with the Fruit Group. The argument before the courts a quo was that the KB trust was not entitled to 'propagate' the fruits.

- [40] On appeal to this court, the Fruit Group contends that ss 23 and 23A of the Act preclude the KB trust from producing, marketing or selling Flavor Fall plums other than by way of prior licence under ss 25 or 27 of the Act. The SMA had authorized the KB trust to produce and supply Flavor Fall plums: once that agreement was not enforceable, the KB trust is not so authorized. And the plums can be supplied only to the Fruit Group.
- [41] Before the courts a quo, the KB trust contested the Fruit Group's rights as licensees. Veldhuizen J, in his dissenting judgment in the full court, concluded that the mere presence of the trees on Botterkloof did not constitute an infringement of the Fruit Group's rights. There was no evidence of any infringement, actual or threatened.
- [42] In this court, the Fruit Group contended that the KB trust was not entitled to grow, harvest or otherwise commercially exploit Flavor Fall plums. The failure by it to give an undertaking not to breach plant breeder's rights amounted to an infringement of that right. The KB trust argues that the failure to give any undertaking is irrelevant. The business of the trust was not that of propagation – the breeding of the varietal. Growing and supplying of the fruit itself did not entail any breach of the plant breeder's rights under the Act. That seems to me to be correct.
- [43] The Act deals with the propagation – the reproduction – of plants. Section 23 deals with the reproduction of a plant, not with its fruit. Section 23A, which deals with infringement of a plant breeder's right, prohibits various acts that entail propagation. The Fruit Group has not demonstrated that the KB trust at any time attempted, or intended, to propagate Flavor Fall trees. There was thus no act of infringement on the part of the KB nor any threat apprehended. The Fruit Group was accordingly not entitled to the interdict that it sought.
- [44] In the circumstances the appeal is upheld with the costs of two counsel. The order of the court a quo is replaced with:

C H Lewis

Judge of Appeal

APPEARANCES

For the Appellants:

W R E Duminy SC (with him I Joubert)

Instructed by:

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