THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 24870/16

INTERNATIONAL FRUIT GENETICS LLC **APPLICANT**

and

PIETER EDUARD RETIEF REDELINGHUYS N.O. **FIRST RESPONDENT**

DEBORAH MARY REDELINGHUYS N.O. **SECOND RESPONDENT**

THE TRUSTEES FOR THE TIME BEING OF THE PER REDELINGHUYS FAMILIE TRUST **THIRD RESPONDENT**

Coram: ROGERS J

Heard: **26 JANUARY 2017**

Delivered: **7 FEBRUARY 2017**

JUDGMENT

ROGERS J:

Introduction

[1] The applicant applies for the recognition and enforcement of a judgment granted by a Californian court against the first and second respondents in their capacities as trustees for the time being of the PER Asset Management Trust ('AMT'). The third respondent, the PER Redelinghuys Familie Trust ('RFT'), is another trust of which the first and second respondents are also the trustees.

[2] The applicant was represented by Mr Farlam SC leading Mr Engelbrecht and the respondents by Mr Smalberger SC. The matter was set down for hearing during recess. Counsel were agreed that it was urgent.

[3] The applicant holds the rights to various proprietary varieties of table grapes. During 2004 the applicant and AMT concluded a testing agreement which allowed AMT to grow certain of the applicant's varieties for evaluation purposes. In 2010, and following successful evaluation, the applicant and AMT concluded marketing and planting agreements in terms whereof AMT was licensed to plant, grow and market grapes from certain varieties owned by the applicant. The vines were to be grown on the farm St Pieter's Roche near Paarl ('the farm'). I shall refer to these three agreements collectively as the licensing agreements.

[4] In June 2014 the applicant cancelled the licensing agreements after discovering that AMT was growing grapes in quantities exceeding what was permitted by the licensing agreements and that AMT was growing a variety not authorised by the licensing agreements and which AMT had propagated from a cutting which Mr Redelinghuys (the first respondent) smuggled into South Africa.

[5] AMT disputed the cancellation and launched an urgent application in this court for interim relief pending the final determination of the dispute. The interim relief would have required the applicant to continue providing AMT with plant material and permitting AMT to market and plant the grapes. The parties agreed to refer the urgent application to arbitration. On 23 July 2014 the arbitrator dismissed

AMT's application, finding that AMT had not established prima facie that the cancellation of the licensing agreements was invalid.

[6] On 29 August 2014 the applicant instituted proceedings against AMT in the United States District Court (Central District of California) for a declaration that the cancellation was lawful and for consequential injunctive relief. AMT defended the case. On 20 April 2016 the District Court granted the applicant's claim for summary judgment. On 29 April 2016 AMT filed a motion for reconsideration which the District Court dismissed on 22 July 2016.

[7] The order consequential upon these decisions was issued on 25 July 2016. The order defined the term 'Organic Material' as meaning 'All of the Fruit, the Graftwood, the Plants, the Plant Material, the Ovules, the Pollen, the Embryos, and the Seeds produced from' the applicant's varieties, as those terms were defined in the licensing agreements. The injunction required AMT to cease all use of Organic Material and the applicant's confidential information and to destroy Organic Material in its possession, custody or control in a way which ensured that the proprietary plant material could not be used for propagation, including by cutting off all vines below the graft of any of the applicant's proprietary cultivars.

[8] On 27 July 2016 AMT filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. The appeal did not automatically stay enforcement of the order. On 2 August 2016 AMT filed a motion in the District Court to suspend the injunction. The motion was dismissed on 4 October 2016. A further emergency motion to suspend, filed with the Court of Appeals, was dismissed by that court on 29 November 2016. The appeal itself is still pending.

[9] On 6 September 2016 the Clerk of the District Court taxed a bill of costs in the applicant's favour in the amount of $8670,38. On 16 September 2016 the District Court issued an order granting the applicant's motion for attorneys' fees in the amount of $684 384,75. AMT has appealed the latter order but has not applied to suspend its enforcement.

[10] The Californian order required AMT to deliver a sworn statement setting out in detail the manner and form in which it had complied with the injunction. On 19 December 2016 AMT delivered a declaration by Mr Redelinghuys stating that AMT had destroyed all of the applicant's material under its control and asserting that AMT did not have any of the applicant's varieties growing under its control and that it had ceased all business. Mr Redelinghuys claimed that the 2017 harvest on the farm was being grown and would be harvested 'by separate legal entities which have separate and binding Planting Rights and Trade Mark Licence Agreements with' the applicant and that this harvest was to be or had already been sold to the applicant's duly appointed South African agents. (It emerged during the course of the present proceedings that, in respect of the grapes grown on the farm, the 'separate legal entity' contemplated in the declaration is RFT, the owner of the farm.)

[11] Earlier in December 2016 the applicant discovered other information which led it to conclude that AMT had no intention of complying with the injunction.

[12] The present application was issued on 22 December 2016 for hearing on 10 January 2017. Save in certain respects to be mentioned below, the notice of motion substantially followed the terms of the District Court's order of 25 July 2016 and claimed the amounts for costs previously mentioned. On 10 January 2017 the application was postponed to 17 January 2017 for settlement negotiations, costs to stand over. The settlement negotiations failed. On 17 January 2017 the application was postponed to 26 January 2017 with a timetable, costs again reserved.

The issues

[13] Three main issues were argued: (i) whether recognition and enforcement of the District Court's orders required the permission of the Minister of Economic Affairs by virtue of the provisions of the Protection of Businesses Act 99 of 1978 ('the Act'); (ii) whether RFT's assertion that it has contractual rights from the applicant to grow the vines in question raises a bona fide dispute of fact and precludes an order for the destruction of those vines; (iii) whether, because of the pending appeal in the United States, recognition and enforcement should in this court's discretion be withheld.

[14] The following requirements for the recognition and enforcement of the Californian judgment (as to which, see *Jones v Krok* 1995 (1) SA 677 (A) at 685B-E) are either common cause or were not seriously contested by the respondents: the international competence of the Californian court to hear the case; that the Californian judgment is final and conclusive and has not become superannuated; that recognition and enforcement would not be contrary to public policy; and that the Californian judgment was not obtained by fraudulent means. (The respondents contended that it would be contrary to public policy for RFT to be bound by a judgment in proceedings where it was not cited. However, and as explained later, the applicant does not allege that RFT is bound by the Californian judgment.)

The Protection of Businesses Act 99 of 1978

[15] The relevant provisions of the Act are ss 1(1)(a) and 1(3). Read together, these provisions would require the Minister's permission if the Californian order was one given

'in connection with any civil proceedings and arising from … an act or transaction… connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.'

[16] This protectionist legislation was enacted at a time when an isolated apartheid regime was anxious to shield domestic businesses from foreign interference. It is questionable whether its provisions are justified in the current era and in view of the safeguards which our law recognises in the recognition and enforcement of foreign judgments in general. However the constitutionality of the provisions in question has not been challenged in these proceedings.

[17] There are two ways in which the ambit of the above provisions could be narrowed, namely by restrictively interpreting (i) the phrase 'connected with' and (ii) the words 'any matter or material'.

[18] It has been said that the phrase 'in connection with' seldom has the very wide meaning of including things or events which are only remotely connected (*Lipschitz*

NO v UDC Bank Ltd 1979 (1) SA 789 (A) at 804D-G). In the present case the 'act or transaction' which gave rise to the Californian proceedings comprised several elements, including (i) the conclusion of the licensing agreements; (ii) AMT's alleged breaches of the licensing agreements by growing excessive quantities of the applicant's proprietary vines and by growing unauthorized vines; (iii) the cancellation of the licensing agreements; and (iv) AMT's continued propagation of the applicant's proprietary vines after the cancellation of the licensing agreements and its continued harvesting and marketing of the grapes. There is a direct connection between these acts and transactions on the one hand and AMT's possession and use of the vines and its production of grapes on the other hand. If the vines and grapes constitute 'any matter or material' within the meaning of s 1, the 'connected with' requirement would in my view be met.

[19] As to the meaning of the words 'any matter or material' (in the Afrikaans text, 'enige stof of materiaal'), Howard DJP held in *Tradex Ocean Transportation SA v MV Silvergate & Others* 1994 (4) SA 119 (D) that they meant the raw materials or substances from which physical things are made and not the manufactured item (in that case, a ship). The learned judge reach this conclusion on the basis of dictionary definitions and the fact that the section referred to mining, production, importation, exportation and refinement but not manufacture. Howard DJP's interpretation was approved by Chetty J in *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) at 1095I-1096C and by Zulman JA in *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA) para 11.

[20] If 'any matter or material' is limited to substances used in making other things, the vines and grapes under consideration in the present case would not be encompassed. One cannot properly say that a vine is the raw material or substance from which grapes are produced. Until they are harvested, the grapes are simply part of the living vine, a natural part of its growth. Once the grapes are harvested, they could become the raw material from which wine or brandy or vinegar is made. But in the present case the harvested grapes are not intended to be the raw material from which anything else is made. The applicant's vines yield table grapes and that is their intended use.

[21] However I do not think that the authorities I have cited should be understood as holding that in order to be encompassed by the section the substance must be the raw material from which something else is made. The focus of the authorities was whether manufactured items were included, the conclusion being that they were not. There can be little doubt, I think, that coal would constitute 'matter or material' for purposes of s 1. This would be so even though the coal is intended to be consumed as is (eg burnt in a furnace as fuel) rather than to be the raw material from which something else (eg petroleum) is made.

[22] The present case, however, has a feature which did not present itself in the other authorities, namely the possible need to distinguish between living things and inanimate substances. Wool could be regarded as the raw material from which garments are made. A sheep, on the other hand, could not naturally be described as 'matter or material', even though the sheep is reared for the production of wool. For as long as the wool is on the sheep, it is part of the living creature. I think artificial distinctions would be created if one treated the sheared wool as 'matter or material' even though the sheep of which it once formed part did not. The better view, I think, is that in such a case neither the sheep nor the sheared wool is within the ambit of s 1.

[23] Plants are also living things. One would not readily describe a tree or vine as 'matter or material' even though the use of this expression in relation to plants might do less violence to English than in relation to animals. The acts mentioned in s 1(3) include mining and refinement. These words are inapt in relation to living things and their produce. Although the other actions mentioned in the section are more general (production, importation, exportation, possession, use, sale or ownership), it is nevertheless striking that the lawmaker has not used any of the obvious words relating to agriculture (planting, cultivation, farming, rearing, breeding). And if animals are excluded from the section, there is no obvious reason why the lawmaker would nevertheless have intended to include plants.

[24] One of the meanings of the word 'matter', given in the *Shorter Oxford English Dictionary*, is 'any physical substance not definitely particularised'. 'Material' is defined as meaning 'the matter from which anything is made; the elements,

constituent parts or substance of something'. In an appropriate context, the words 'any matter or material' may thus mean an amorphous substance rather than a cohesive entity or article which has assumed distinct shape. In my view this is the sense of the words in s 1. A manufactured item is a cohesive article, even though an amorphous substance may have been used in its manufacture. A living thing, whether an animal or plant, is a cohesive entity which assumes distinct shape through biological processes, even though amorphous substances such as water and nutrients are exploited in these biological processes.

[25] I have thus concluded that the vines and grapes under consideration in the present case are not 'matter or material' to which s 1 applies.

The role of RFT

[26] It is convenient next to consider the position of RFT. The applicant cited RFT as the owner of the farm on which the vines are located. Para 6 of the notice of motion sought a direction that the provisions of the order be binding inter alia on RFT. In para 10 costs were sought from all the respondents jointly and severally. The applicant did not allege, however, that RFT was bound by the Californian order. In the replying affidavit the applicant clarified that it made no such assertion and that RFT was cited only to enable practical effect to be given to the order.

[27] Were it not for the fact that RFT chose, in the answering papers, to assert its own independent right to cultivate the vines, there could have been no legitimate objection to an order which required RFT to permit AMT, failing which the sheriff, to have access to the farm for purposes of destroying the offending vines. Mr Smalberger acknowledged this. Mr Farlam for his part conceded that the relief sought in the notice of motion required modification to avoid the impression that RFT was bound by the Californian order or liable to pay the Californian costs.

[28] If RFT has an independent contractual right to cultivate the vines and market the grapes, the relief sought in the notice of motion would be eviscerated, even if technically the Californian judgment were recognised and enforced. The case advanced by AMT and RFT is in effect that AMT has none of the applicant's vines

and grapes under its control, such control having passed to RFT in terms of contracts between RFT and the applicant. Since the applicant has not obtained any relief in California against RFT, the order against AMT would not authorise the destruction of the vines.

[29] Since the applicant seeks final relief, the question is whether RFT's assertion that it has its own contract with the applicant raises a genuine dispute of fact. In my view the answer is no.

[30] RFT does not claim that there is a signed contract in place between itself and the applicant. It will be recalled that the planting and marketing agreements between the applicant and AMT were executed on 1 April 2010. The respondents' assertion that RFT subsequently acquired contractual rights rests on an email exchange between Redelinghuys and the applicant during July 2013. It appears that new agreements were being prepared at this time for entities with which Redelinghuys was associated, including in respect of the vines planted on St Pieter's Roche. Pam Dykes, apparently an employee of the applicant, sent an email to Redelinghuys and to one Tersia Marcos (also of the applicant) on 6 July 2013 as follows ('Eddie' being Redelinghuys):

'I was unable to complete the Planting Agreement for Eddie for the plants that he has on his own property in Paarl.
I would like you both to get together when Eddie returns and go over exactly what Eddie has planted since inception.
I have attached the Planting Agreement which needs to be finished and signed by Eddie.

1. Is the PER Redelinghuys Family Trust the same as the PER Asset Management Trust that signed the Marketing Rights Agreement? If so, then the same name should go on the Planting Rights Agreement.
2. …
3. …
4. …
5. …

Once all this is corrected, then please have Eddie sign and return to David for his signature.'

[31] Redelinghuys replied on the same date:

' Attached find a sheet listing all plantings to date and anticipated for 2013…

Further clarifications of questions raised below:

1. No PER Redelinghuys Family Trust is not the same as PER Asset Management Trust. PER Redelinghuys Family Trust owns farm St Pieter's Roche. PER Asset Management Trust is replaced by PER Redelinghuys Trust (Not the same as "Family Trust") (sorry I know it is confusing), PER Redelinghuys Trust is a trading entity and therefore also the exporter.
2. …
3. …
4. …
5. …'

[32] Dyke responded on 10 July 2013:

'Thanks for this information. I think I can now update your agreement and get David to sign it and send it to you.

I will let you know if I have any questions…'

[33] The respondents do not say that an updated agreement was ever signed on behalf of the applicant or sent to RFT for signature. In his answering affidavit Redelinghuys alleges that to the best of his knowledge the applicant does not grant planting rights to any person other than the owner of the land on which the vines are to be planted. He refers to two other entities (Anytime and Okran) which are farm owners and with which the applicant apparently has planting agreements. In relation to St Pieter's Roche, he says that there was 'some initial confusion' as to the name of the owner of the farm for purposes of documentation but that this confusion was clarified in 2013 by way of the above email exchange. The existing planting agreement was thus 'rectified' to identify RFT rather than AMT as the counterparty. He says that until the launching of the present application in December 2016 RFT had no reason to insist on receipt of a rectified written agreement. Business continued between the parties in the ordinary course.

[34] Redelinghuys has also annexed an internal IFG email dated 25 June 2014 in which Dyke appears to be commenting on a draft affidavit by Marcos, presumably in relation to AMT's urgent application. Redelinghuys says that this letter was produced during discovery in the Californian proceedings. In the letter Dyke

comments on allegations concerning Exercise Notices which Redelinghuys sent to the applicant on 23 June 2013. (The significance of the 'Exercise Notices' is not explained in the respondents' papers.) In the final paragraph Dyke says the following:

'David is not required to sign and accept the Notice. I proceeded to complete the Planting Rights Agreements for all the Exercise Notices sent in that June 23, 2013 email as required in our Marketing Rights Option Agreements, thus tacitly approving of the request. All were completed and signed by both David and Eddie except that of the PER Redelinghuys Family Trust. It took a while to get the correct information and even though it was fully prepared, Tersia had discovered the various issues with Eddie in the meantime and did not deliver it for final signature.'

[35] In reply the applicant's deponent, Marcos, denies that any agreement was concluded with RFT. She annexes subsequent email correspondence of 1 August 2013 in which Redelinghuys said that he would send the final version of the RFT agreement once the vine numbers and planting schedule were confirmed. Marcus says that it was shortly thereafter that the relationship between the applicant and Redelinghuys began to disintegrate because of the latter's failure to provide accurate information regarding the number of proprietary plants being cultivated on the farm.

[36] The 'initial confusion', on Redelinghuys' version, must have existed for more than three years, since the planting agreement with AMT was executed on 1 April 2010. There is no other evidence of 'confusion' during this period. It is also clear that if a new planting agreement was concluded in July 2013, it was not a mere 'rectification' of the previous agreement. Apart from substituting a new party, the email exchange shows that the new agreement would have specified different quantities of vines (I have omitted the details in reproducing the emails). Redelinghuys has not attached a copy of the draft agreement to establish what its terms were.

[37] On Redelinghuys' version, he always understood that the applicant would only execute a planting agreement with the owner of the farm. He also (on his version) believed that by July 2013 the ownership of the farm had been clarified with

the applicant. One would thus have expected him, at least as from July 2013, to act on the basis that RFT, not AMT, was the counterparty to the planting agreement and was propagating the vines on the farm. The facts tell a different story.

[38] When the applicant cancelled the licensing agreements in June 2014, it did so with reference to the signed agreements with AMT. If Redelinghuys believed that the licensing agreements, or at least the planting agreement, was with RFT, one would have expected him at that stage to make the point. He did not. Instead he disputed the applicant's right to cancel on the merits.

[39] He caused AMT, not RFT, to launch the urgent application for interim relief which I have already mentioned. In his founding affidavit on behalf of AMT he relied on the written contracts with AMT. He made no mention of RFT. He said that AMT, not RFT, had planted the vines in question (numbering 136 960 – the very vines which were the subject of the Californian proceedings).

[40] He also caused summons to be issued out of this court in AMT's name against the applicant in which he sought a declaratory order that AMT's agreements with the applicant were valid and binding and in which he claimed damages of more than R1,4 billion. In the particulars of claim AMT relied on the same contracts which the applicant invoked in the Californian proceedings. Again there was no reference to RFT as a counterparty.

[41] If Redelinghuys genuinely believed that RFT rather than AMT was the counterparty, he would not only have dealt with this in the South African proceedings mentioned above but also in opposition to the applicant's case in California. Yet the defence of the Californian proceedings was throughout conducted on the basis that the relevant contracts were those concluded between the applicant and AMT. RFT was not cited. If the contracts were held by RFT not AMT, this would have been a complete answer to the claim as formulated.

[42] In its application for reconsideration in the District Court, AMT alleged that the agreements had been modified by a course of conduct between the parties.

Significantly, AMT did not allege that one such modification was a change in the identity of the licensee.

[43] Redelinghuys' claim that RFT had no reason until December 2016 to insist on receipt of a rectified written agreement is patently false. There have been repeated occasions since June 2014 where one would have expected RFT to assert its rights if it understood itself to hold any. Redelinghuys' conduct is incompatible with the belief he now asserts.

[44] In my view, Redelinghuys' assertion that the licensing agreements were rectified in July 2013 by substituting RFT as the licensee, or that new licensing agreements were concluded at that time with RFT as the counterparty, is so patently untenable that it can be rejected as false on the papers. There is thus no genuine dispute of fact in this regard. To this I would add that each of the licensing agreements signed by AMT contained a provision that its terms could only be amended or waived if such amendment or waiver was in writing and signed by the parties.

The court's discretion

[45] In terms of the law as expounded in *Jones v Krok* supra, the fact that there is an appeal pending against the Californian judgment does not affect its finality for purposes of recognition and enforcement in this country. However, where an appeal is pending or may yet be noted, a court in this country which is asked to enforce a foreign judgment has a discretion. In the exercise of that discretion the court may, instead of giving judgment in favour of the claimant, stay the proceedings pending the final determination of the foreign appeal. The onus is on the judgment debtor to place facts before the court relating to the impending appeal and such other relevant facts as may persuade the South African court to exercise its discretion in favour of granting a stay. In exercising this discretion, the court may take into account all relevant circumstances including (but not limited to) whether an appeal is actually pending, the consequences for the debtor if judgment were to be given in favour of the claimant and the foreign judgment were thereafter to be reversed and whether the judgment debtor is pursuing its right of appeal genuinely and with due diligence.

As a rule the court will refuse to assess the merits of the pending appeal and its prospects of success (*Jones* at 692B-C).

[46] In the present case AMT's appeal is already pending. Although the applicant presented evidence from an American lawyer to the effect that the appeal had poor prospects, this is not a factor with which I should concern myself. On the other hand, AMT does not say that it is pursuing the appeal with the leave of the District Court or the Court of Appeals. I was told from the bar that AMT is appealing as of right. There is thus no indication from the American judicial system that the appeal is regarded as having prospects of success. Furthermore I think I may also take into account that the District Court and the Court of Appeals both refused to stay the District Court's order pending the determination of the appeal.

[47] As against this, the immediate destruction of the vines in accordance with the District Court's order would render any success AMT obtains on appeal nugatory. It would take some years to re-establish equivalent vines. The applicant argues that the respondents' contention of irreparable harm is inconsistent with their assertion that AMT in fact has no vines under its control. However I must exercise my discretion with regard to the facts as I have found them to be. I have rejected the respondents' contention that RFT is the counterparty to the licensing agreements. On that basis, destruction of the vines would be catastrophic for AMT if it were subsequently to succeed in its appeal.

[48] Although the respondents did not advance facts in support of a stay of enforcement of the costs orders, enforcement thereof would require AMT to pay about R9,2 million pending the outcome of the appeal. This could well be crippling for AMT.

[49] I am thus reluctant to enforce orders which would require the immediate destruction of the vines and the payment of the Californian costs. On the other hand, it does not seem right that AMT should, pending the foreign appeal, reap the benefits of the applicant's proprietary vines in circumstances where a foreign court has adjudicated that the licensing agreements have been validly terminated. To this may be added that a South African arbitrator found that AMT did not make out even

a prima facie case that the applicant's cancellation was invalid. It may well be that AMT is simply buying time.

[50] In my view, therefore, the Californian order should be partially enforced so as to require the immediate destruction of the grapes currently growing on the vines and any harvested grapes still under AMT's control. The grapes constitute one component of the 'Organic Material' as defined in the licensing agreements and in the District Court's order. There is also no reason for not immediately enforcing the injunction against AMT's use of all the 'Organic Material and IFG Confidential Information' as defined.

[51] Legally, the way in which this outcome can be achieved is by recognising the Californian orders as a whole but enforcing only part thereof. The distinction between recognition and enforcement is well established (see Forsyth *Private International Law* 5th Ed at 418-419; see also *Clarke v Fennoscandia Ltd & Others* [2007] UKHL 56 paras 18-22). There may be occasions, particularly in relation to declaratory relief, where recognition suffices. In the present case the District Court granted declaratory relief followed by consequential injunctive relief.

Conclusion

[52] If the Californian appeal in due course succeeds, AMT will be entitled to apply to have the appeal judgment recognised in this country. Upon such recognition, the appellate judgment would supersede the recognition of the District Court's judgment.

[53] My order will not preclude the parties from reaching a sensible interim arrangement for the harvesting and sale of the grapes and the payment of the proceeds into a trust account on the basis that some or all of the proceeds will go to the applicant if the Californian appeal fails.

[54] My order will make provision for the applicant to re-enrol the application for further enforcement if AMT does not prosecute its appeal with due diligence or for other good cause shown. Based on my findings, AMT's declaration in the Californian proceedings of compliance with the District Court's injunctions is untrue. I asked

counsel whether the Court of Appeals would hear the appeal in the absence of compliance with the injunctions. They did not know. If it should emerge that the appeal will not be heard unless AMT purges its non-compliance, the reason for staying enforcement in this country would fall away. This would be one basis on which the applicant might be entitled to re-enrol the application.

[55] The applicant included in its notice of motion a provision authorising the applicant's Theodora Marcos to accompany the sheriff to assist in identifying the applicant's vines. While this is unobjectionable, provision should also be made for the sheriff to be accompanied by a representative of AMT. If there is a dispute as to whether any particular vine is one of the applicant's proprietary vines, there should be no destruction until the dispute has been resolved. I must make clear, though, that this judgment already disposes of the contention that the vines are under the control of RFT.

[56] The applicant has substantially succeeded and costs should follow the result, including the reserved costs of 10 and 17 January 2017 and including the costs of two counsel where engaged.

[57] I make the following order:

(1) The judgment of the United States District Court, Central District of California – Western Division ('the District Court') constituting annexure "FA4" to the founding affidavit, the resultant order of the District Court constituting annexure "FA5" to the founding affidavit, the taxation of costs in the District Court constituting annexure "FA9" to the founding affidavit and the District Court's costs order constituting annexure "FA10" to the founding affidavit are hereby recognised in South Africa as judgments, orders and taxation binding on the first and second respondents in their capacities as the trustees for the time being of the PER Asset Management Trust ('AMT').

(2) In accordance with such recognition, the orders in (3) to (6) below are made. Capitalised words or terms in this order shall have the meaning assigned to them in annexure "X" hereto.

(3) It is declared:

(a) that AMT violated and breached the agreements entered into between the applicant and AMT, namely the IFG Proprietary Variety Testing and Marketing Rights Option Agreement dated 15 July 2004, the IFG Proprietary Variety Planting Rights and Trademark Licence Agreement dated 1 April 2010 and the IFG Proprietary Variety Marketing Rights and Trademark Licence Agreement dated 1 April 2010 (collectively the 'Licensing Agreements');

(b) that the acts of AMT constituted Events of Default under each of the Licensing Agreements; and

(c) that the applicant validly and properly terminated each of the said agreements.

(4) AMT is obliged to return or destroy all IFG plant material in its possession, custody or control.

(5) Pursuant to clause 11.1 of Exhibit F to the Licensing Agreements, AMT is obliged immediately:

(a) to cease all use of Organic Material and IFG Confidential Information (including, without limitation, Trade Secrets, Trademarks, and labels, packages or materials containing any Trademarks) in their possession, custody or control; and

(b) to destroy all Organic Material in AMT's possession, custody or control in a way which ensures that the proprietary plant material cannot be used for propagation, including cutting off all vines below the graft of any IFG Proprietary Cultivar.

(6) It is declared that AMT is obliged to pay the applicant the following taxed costs and attorneys' fees awarded to it:

(a) $8670,38; and

(b) $684358,75.

(7) The order in (5)(a) is hereby enforced forthwith.

(8) The orders in (4) and (5)(b) are hereby enforced forthwith to the following extent:

(a) AMT must return to the applicant or destroy all grapes in its possession, custody or control and forming part of the Organic Material, whether harvested or still on the vines.

(b) If AMT fails or refuses to comply with (8)(a) within five days of this order, the sheriff of this court is authorised and directed, immediately after the expiry of the five-day period, to enter upon the farm St Pieter's Roche ('the farm') or such other property as may be required and to take such other steps as may be required to give effect to and implement the order.

(c) The applicant's Theodora Christina Marcos or another authorised representative of the applicant may accompany the sheriff and enter upon the relevant property to assist the sheriff to give effect to this order by identifying and pointing out the grapes to be destroyed.

(d) The respondent shall be entitled to appoint a representative to accompany the sheriff and the applicant's representative.

(e) If there is a dispute between the representatives as to whether any particular grapes form part of the Organic Material, the said grapes shall not be destroyed or dealt with in any manner until the dispute has been resolved, if necessary by further order of the court.

(f) The third respondent is obliged to permit AMT's representatives, the sheriff and the applicant's representative to have access to the farm for purposes of carrying out this order.

(9) Enforcement of (4) and (5)(b), to the extent not enforced in terms of (8), and enforcement of para (7) (collectively 'the stayed orders') are stayed sine die pending the determination of AMT's appeal against the judgments and orders of the District Court.

(10) If AMT's appeal fails in whole or in part, the applicant may, on reasonable notice to the respondents, re-enrol the application (supplemented as needs be) for enforcement of the stayed orders.

(11) The applicant may, on reasonable notice to the respondents, re-enrol the application (supplemented as needs be) for enforcement of the stayed orders prior

to the determination of the said appeal if AMT does not pursue the appeal with reasonable expedition or on good cause shown.

(12) If AMT's appeal succeeds in whole or in part, AMT may, on reasonable notice to the applicant, re-enrol the application (supplemented as needs be) for recognition and enforcement of the appeal judgment.

(13) The respondents jointly and severally shall pay the applicant's costs to date including those attendant on the employment of two counsel.

ROGERS J

APPEARANCES

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