

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

12/05/2016

CASE NO: 2014/5205
PBR CASE NOS: ZA20114648 & za20114649

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

SENSAKO (PTY) LTD

Applicant

and

THE REGISTRAR OF PLANT BREEDERS' RIGHTS

First Respondent

**THE MINISTER OF THE DEPARTMENT OF
AGRICULTURE, FORESTRY AND FISHERIES**

Second Respondent

**THE CHIEF DIRECTOR PLANT PRODUCTION
AND HEALTH OF THE DEPARTMENT OF
AGRICULTURE, FORESTRY AND FISHERIES**

Third Respondent

PANNAR SEED (PTY) LTD

Fourth Respondent

J U D G M E N T

MAKUME, J:

[1] In this matter the applicant issued an urgent application on the 23rd January 2014 in which it seeks the following orders:

- 1.1 That the proceedings before the first respondent regarding the validity of wheat variety registration numbers ZA20114648 and ZA20114649 set down for the 28th January 2014 be stayed indefinitely.
- 1.2 That a rule *nisi* be issued in terms of which the first respondent is called on to within 30 days say why an order in the following terms should not be issued namely that:
 - 1.2.1 The first respondent be ordered to recuse herself from the proceedings referred to in prayer 1.1 above.
 - 1.2.2 In the event of the first respondent not granting the applicant proper and complete access to and copies of all of the 2009, 2011 and 2012 records, underlying documentation and raw data in existence and in possession and under the control of the first respondent

relating to the registration of wheat variety registration numbers ZA20114648 and ZA20114649 by the 24th January she be ordered to do that in terms of this rule.

1.2.3 Further in the alternative, the first respondent be ordered to call for the breeding records of wheat variety registration numbers ZA20114648 and ZA20114649 to be made available to the legal teams and experts of the respective parties under conditions of confidentiality.

1.3 That the fourth respondent be ordered to pay the costs of the application for the relief sought in prayer 1 in the event of the fourth respondent opposing the application.

[2] Only the fourth respondent filed a notice to oppose as well as an answering affidavit. The rest of the respondents indicated that they will abide the court order.

FACTUAL BACKGROUND

[3] The applicant and the fourth respondents are both in the business of developing new plant varieties including and in this instance wheat varieties. The first respondent derives its powers and existence from the provisions of the Plant Breeders Rights Act No 15 of 1976 (*“the Act”*). Section 3 of the Act reads as follows:

“3. DESIGNATION OF REGISTRAR

- (i) *The Minister shall designate an officer in the department as a registrar of Plant Breeders' Rights, who shall be the authority to whom the protection of varieties is entrusted and who shall exercise the powers and carry out the duties assigned to or imposed upon the registrar under this Act.”*

[4] It is common cause that during or about February 2010 the fourth respondent advertised in the Government Gazette that it intends lodging an application with the first respondent for the granting to it by the first respondent plant breeders' rights number ZA20114648 in respect of wheat variety PAN 3471 and plant breeders' rights number ZA20114649 in respect of Wheat Variety PAN 3478. The plant breeders' rights as applied for were granted by the first respondent as no objections were received.

[5] On the 16th November 2011 the applicant launched an application with the first respondent in terms of section 33(2) of the Act for the termination of the fourth respondent's plant breeders' rights number ZA20114648 and plant breeders' rights number ZA20114649.

[6] Correspondence and pleadings were exchanged between the applicant and the fourth respondent including also the office of the first respondent that correspondent which will become relevant as will appear later in this judgment is at the centre of this application. The first respondent addressed a letter to the applicant and the fourth respondent's attorneys on the 17th January 2014 advising them of the date of the hearing of the termination of rights application being the 28th January 2014.

[7] Section 33 of the Act deals with circumstances under which a registrar may terminate a plant breeders' right.

CORRESPONDENCE LEADING TO THIS APPLICATION

[8] The first respondent's letter dated the 22nd January 2014 addressed to the applicant's attorneys and copied to the fourth respondent's attorneys sets out the trail of correspondence and meetings held between the parties prior to the applicant launching this application.

[9] That letter which is quoted in full at page 26 of the papers indicates that on the 26th September 2013 the applicant was provided with copies of records of the raw data for the evaluation of the first respondent's plant breeders' rights in respect of the year 2010 as requested by the applicant.

[10] The letter further indicates that on the 11th December 2013 the applicant's representatives were afforded an opportunity to inspect the documents at the first respondent's premises. It was only during that inspection that the applicant demanded copies of records for the years 2009 and 2011. On the 12th December 2013 the applicant having failed to access the 2009 and 2011 records then filed an application in terms of Act 2 of 2000 (Promotion of Access to Information Act) ("PAIA").

[11] The letter further indicates that only on the 22nd January 2014 the applicant requested information and records for the year 2012 as well. The

first respondent advised the applicant that the information sought for 2009, 2011 as well as 2012 will be made available for inspection on the 24th January 2014.

[12] On the 16th January 2014 some 12 days before the date of the hearing of the termination application the applicant's attorneys addressed a letter to the first respondent in which letter the applicant demanded to be furnished with records by no later than 12 noon on Tuesday the 21st January 2014 failing which an application would be launched in the High Court. Paragraphs 7 and 8 of that letter read as follows:

- "7. *The Applicant is currently considering its options on how to overcome the prejudice and wasted costs being suffered as a result of the registrar's conduct. In particular the Applicant is considering launching proceedings in the High Court, should the registrar persist with its current stance in order that the matter be stayed until the registrar has complied with an order to:*

 - a. *Produce and disclose the 2009 and 2011 records.*
 - b. *Request the breeding records.*
 - c. *That the registrar be recused on the basis of her conflict and lack of impartiality in the matter.*
 - d. *Pay all costs of the Applicant to date on an attorney client scale.*
8. *In the premises we request the registrar to agree by no later than 12 noon Tuesday 21st January 2014 that a stay of the proceedings to grant the applicant the opportunity to complete the process in terms of the PAIA application and other contemplated court proceedings, failing which our client will be forced to approach the High Court for appropriate relief as the hearing cannot be adjudicated upon as it stands."*

[13] A response to the letter referred to above was not forthcoming from the first respondent instead the fourth respondent in its letter dated the 21st January 2014 which was copied to the applicant's attorneys made reference to that letter and amongst others objected to any further postponement of the termination application hearing before the first respondent. At paragraph 14 of that letter the fourth respondent's attorneys write as follows:

"14. Given the number of postponements of the hearing of this matter it was agreed by all parties in August last year that the Applicant and the Respondent should be ready to proceed with the hearing in January 2014 and there has now been more than sufficient time for the Applicant to submit evidence in support of the case set out in the application for termination of the Respondent's PBR's."

[14] It is against this background that this application was launched on an urgent basis on the 23rd January 2014. The application is about access and production of documents which the applicant says are necessary and crucial for its case in the termination of rights application before the first respondent.

[15] It is significant to note that the first respondent in a letter dated the 22nd January 2014 prior to the launching of this application tendered access to the documents that the applicant sought by the 24th January 2014. All that the applicant says in paragraph 18 of its founding affidavit is that:

"It is not known whether the Applicant will truly be provided full access on 24 January 2014 to the documents and information requested."

[16] Then at paragraph 19 the applicant says:

"It is not possible for the Applicant to prepare and be ready for the hearing when it only will receive the documentation and data on 24 January 2014."

[17] This in my view seems likely to be the reason why the applicant launched this application. The applicant did not launch this application to request an order compelling the first and/or fourth respondent to produce documents but it did so because it required time to prepare as the applicant felt that the period between the 24th January 2014 and the 28th January 2014 was not sufficient to enable it to be sufficiently prepared.

[18] The question that remains is this: was this application necessary? Couldn't the applicant have achieved its desired result by simply applying for a postponement before the first respondent, why was it necessary to burden the court with voluminous paper the bulk of which deals with what should still be decided by the first respondent in the termination application.

[19] Harms DP warned in the matter of *Cadac (Pty) Ltd v Webber* 2011 All SA Reports SCA at 343 that motion proceedings are principally for the resolution of legal issues and are not geared to deal with factual disputes.

[20] The issues to be determined in this judgment are briefly the following:

20.1 Whether the applicant is entitled to an order for access to the records and data in respect of the years 2009, 2011 ad 2012.

20.2 Whether this Court should at this stage order a stay of the proceedings before the first respondent pending fulfilment of certain orders.

20.3 Whether this Court has the power to order the recusal of the first respondent from dealing with the termination proceedings application.

[21] I deal with the issues individually hereunder with reference to the heads of argument handed up to court.

ACCESS TO DOCUMENTS

[22] It is common cause that the applicant's case for termination is based on the provisions of section 33(2)(a) and 33(2)(b) of the Act. Accordingly the applicant is only entitled to documents that will advance its case for termination under the two subsections. Those subsections provide that the first respondent may terminate a plant breeders' rights prior to the expiry of the right if:

22.1 Any information submitted to the registrar in the application for such a right or in connection with such an application was incorrect and if such right would not have been granted if he or she had known that the information was incorrect.

22.2 Information has come to light which if discovered earlier would have resulted in the plant breeders' rights being refused.

[23] In paragraph 13 of Annexure "R1A" being the letter from the first respondent to the applicant it is clearly stated that "*the information you require will be made available to you by the Chief Information Officer in compliance with the process in due course but please be advised and take note that this information will be made available for inspection on 24 January 2014*". In my view the first respondent having tendered access to the documents does not entitle the applicant to approach court for an order to compel access.

[24] Similarly on the 21st January 2014 prior to this application being launched the fourth respondent tendered to the applicant that a mutually acceptable expert review the relevant breeding records and provide the first respondent, the applicant and the fourth respondent with comments on whether or not the fourth respondent's wheat varieties number PAN 3471 and PAN 3478 were derived from the applicant's registered varieties. There was accordingly no need to rush to court. The applicant if it was genuine to proceed should have agreed to the fourth respondent's proposal which in my view was a reasonable proposal.

[25] The excuse that the applicant would not have been ready to present its case on the 28th January 2014 in view of the documents being made available for inspection only on the 24th January 2014 is in my view not correct. It

seems to me that the applicant is on a fishing expedition and is still trying to establish the legal basis for its termination application. This Court in the matter of *STT Sales (Pty) Ltd v Fourie* 2010 (6) SA 272 (GSJ) at 276C-D said that:

"The essential features of discovery is that the person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designated to put a party in a position to draw the battle lines and establish legal issues. Rather it is a tool used to identity factual issues once legal issues are established."

[26] Accordingly and in my view the applicant has failed to establish the need or reason for this Court to make an order as prayed for in prayers 4(b) and (c) of the notice of motion.

STAY OF PROCEEDINGS

[27] The applicant contends that because of the first respondent making available the documents sought on the 24th January 2014 that entitle the applicant to seek an indefinite stay of the proceedings before the first respondent.

[28] It is trite that this Court has an inherent jurisdiction to prevent abuse of process by staying proceedings in certain circumstances. It was held in the matter of *Western Assurance Co v Caldwell's Trustees* 1918 AD 262 at 274

that the power to stay proceedings will be exercised sparingly and only in exceptional cases.

[29] Nicholas J in the matter of *Fisheries Development Corporation v Jorgensen and Another* 1979 (3) SA (W) at 1339B went further to say that the grant of a stay of proceedings is a matter of discretion and is not something which can be decided as a matter of law.

[30] The learned writer Herbststein and Van Winsen in the *Civil Practice of the High Court* (Fifth Edition) Volume I at page 306 says the following:

“When the court’s inherent jurisdiction is invoked for the purpose of staying an action it is not enough for example to show that the version of the facts set out in the pleadings is highly improbable and one which it is difficult to believe could be proved. The Applicant must go further and show that the action is hopeless or impossible of success, for it is only when the case stands outside the region of probability altogether and becomes vexatious because it is impossible that the court will grant a stay.”

[31] I can find no exceptional circumstances in this application entitling the applicant to a stay of the proceedings. The applicant should have waited to inspect the documents tendered on the 24th January 2014 and if not satisfied then bring an application before the registrar (first respondent) for a postponement. The application was brought prematurely and no basis exist justifying this Court to grant a stay and accordingly that application must also fail.

THE RECUSAL APPLICATION

[32] This application was originally directed at a particular individual namely Noluthando Netnon-Nkoena. It was only after the first respondent pointed out in its answering affidavit that in terms of section 3(3)(a) of the Act that the first respondent may authorise any officer, or with the approval of the Minister any person who is not an officer to exercise or carry out any power or duty of the first respondent that the applicant in reply conceded without saying so specifically that the recusal cannot be directed at a particular individual. What I find strange is that notwithstanding that concession the applicant still insists on such an order in its heads of argument.

[33] Firstly, this application for recusal is procedurally flawed. The application should have been brought before the registrar fully substantiated and only if the registrar refused to recuse herself or himself then only then could the applicant approach this Court on review.

[34] Secondly, in terms of section 33 of the Act it is only the first respondent who is empowered to adjudicate an application for termination of Plant Breeders' Rights. In its application the applicant did not request that an alternative officer be appointed had the fourth respondent not cited section 3(3)(a) and in the event of the recusal application succeeding it would have been the end of the termination application as no one would have been appointed to deal with the application. I accordingly agree with the fourth respondent that the correct procedures would have been to request the

presiding registrar to recuse himself or herself and to appoint an alternative officer in terms of section 3(3)(a) of the Act and only if the first respondent refused that request only then would the applicant have been entitled to approach this Court on review.

URGENCY

[35] In conclusion I deal with the question whether the applicant was justified to approach this Court on an urgent basis.

[36] The applicant has failed to make out any case for urgency. This application was not only premature for the reasons set out above any reasons set out for urgency by the applicant are self-created. There was no need to have brought this application.

[37] I am satisfied that this application stands to be dismissed and I accordingly make the following order.

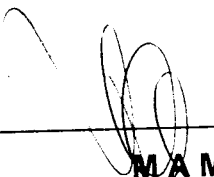
ORDER

[38]

38.1 The application is dismissed.

38.2 The applicant is ordered to pay the costs of this application on a party and party scale such costs to include those consequent upon the employment of two counsels.

DATED at PRETORIA on this the day of MARCH 2016.



M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Date of Hearing	14 th August 2015
Date of Judgment	March 2016
For Applicant	Adv D R Harms
Instructed by	D M Kisch Inc Suite 4, Parkland Building 223 Bronkhorst Street New Muckleneuk Pretoria Tel: (011) 324-3161 Fax: (012) 460-3270 Ref: R3263ZA 00/AVR
For Fourth Respondent	G E Morley SC with him A J Boulle
Instructed by	Messrs Spoor & Fisher Building No 13 Highgrove Office Park Oak Avenue Pretoria Tel: (012) 676-1025 Ref: PL100539/Mr J Whittaker