IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

REPORTABLE

CASE NO: 109/CAC/JUN11

In the matter between:

MONSANTO SOUTH AFRICA (PTY) LTD	**First Appellant**
MONSANTO INTERNATIONAL, SARL	**Second Appellant**

and

BOWMAN GILLFILLAN	**First Respondent**
PIONEER HI-BRED INTERNATIONAL	**Second Respondent**
PANNAR SEED (PTY) LTD	**Third Respondent**

CORAM	:	**D M DAVIS JP et D H ZONDI AJA et T NDITA AJA**
JUDGMENT BY	:	**DAVIS JP**
FOR THE APPELLANTS	:	**ADV GAUNTLETT (SC), ADV M DU PLESSIS & ADV A COUTSOUDIS**
INSTRUCTED BY	:	**NORTANS INCORPORATED**
FOR THE FIRST RESPONDENT	:	**ADV D U P VAN DER NEST (SC) & ADV N J GOVE (SC)**
INSTRUCTED BY	:	**BOWMAN GILLFILLAN INC**
FOR THE SECOND RESPONDENT	:	**ADV D N UNTERHALTER (SC), ADV CE WATT-PRINGLE (SC) & ADV MM LE ROUX**
INSTRUCTED BY	:	**EDWARD NATHAN SONNENBERGS**
DATE OF HEARINGS	:	**12 AUGUST 2011**
DATE OF JUDGMENT	:	**15 AUGUST 2011**

IN THE COMPETITION APPEAL COURT

OF SOUTH AFRICA

Reportable

CASE NUMBER: 109/CAC/JUN11

DATE: 18 AUGUST 2011

In the matter between:

MONSANTO SOUTH AFRICA (PTY) LTD	1st Appellant
MONSANTO INTERNATIONAL SARL	2nd Appellant
and	
BOWMAN GILFILLAN	1st Respondent
PIONEER HI BRED INTERNATIONAL INC	2nd Respondent
PANNAR SEED (PTY) LTD	3rd Respondent

J U D G M E N T

DAVIS, JP:

First respondent acted as appellant's attorney for approximately 12 years. In January 2009, appellant asked first respondent whether it could give advice in regard to certain competition issues. First respondent replied that it was unable to do so, because of a conflict of interest. It is common cause that, after that date, appellant never gave a competition law instruction to first respondent, but chose to engage its present competition solicitors, Norton Inc.

It appears that during 2008, first respondent had begun to act for second respondent in its bid to acquire third respondent. In July 2010, a process of engagement was initiated with the Competition Commission ('Commission') concerning a proposed merger of second and third respondents . On 15 September 2010, the Commission was notified through first respondent of a proposed intermediate merger transaction between second and third respondent. On 7 December 2010, the Commission decided to prohibit the proposed merger. On 20 December 2010, first respondent lodged an appeal to the Competition Tribunal against this decision.

According to appellants' attorneys, Norton's, a member of whom had attended the Competition Tribunal's merger pre-hearing conference on behalf of appellant, they were alerted to the involvement of first respondent in the merger between second and third respondent on 17 January 2011. A series of correspondence was then generated between Norton's and first respondent, which culminated in a letter on 10 February 2011 in which first respondent wrote to indicate that it considered that it was not precluded from so acting for the merging parties.

On 15 March 2011, appellant brought an application in the High Court couched in the following terms:

> "To interdict the first respondent from continuing to act or advise or otherwise assist the second and third respondents in connection with any merger or proposed merger between them, including, but not limited to the proceedings before the Competition Tribunal under case 81/AM/Dec 10."

On 28 March 2010 an application was brought by appellants before the Competition Tribunal, the relief being framed as follows:

> "Pending the final determination of the interdict application launched by the applicants against the respondents in the South Gauteng High Court under case number (11/10960), the merger proceedings before the Competition Tribunal are hereby stayed."

The Tribunal's Decision:

It appears that the respondents argued before the Tribunal that the dispute relating to the role of first respondent in the merger fell under the exclusive jurisdiction of the Tribunal and accordingly the application, to which I have made reference, should not have been brought before the High Court. The Tribunal found that the High Court had not been asked to determine the merger proceedings and that "to the extent that the resolution in this matter may have impacted on our processes, it is incidental". The Tribunal, therefore, considered that the High Court enjoyed concurrent jurisdiction in respect of the relief sought and it dealt with the stay application on this basis.

The Tribunal then approached the application for stay in terms of a test, which had been set down in Novartis SA (Pty) Ltd v Main Street 2 (Pty) Ltd (2) [2001-2002] CPLR 470 (CT):

1. Whether the applicant has reasonable prospects of success in the High Court.
2. Whether it is in the interest of justice to stay the proceedings.
3. The balance of convenience.

The Tribunal found that there had been no South African decision which had dealt with this kind of conflict of interest, which it suggested was based on a commercial as opposed a legal interest. Accordingly:

> "The legal policy issues which are raised in this application will be novel for a South African court (and therefore) the prospect of success are by no means certain."

It went on to emphasise that the application to the High Court had not been brought on an urgent basis, even though the applicants would have been aware of the fact that the merger hearing had been set down for 12 September 2011 and merger proceedings inherently require an expeditious decision.

Furthermore, on the papers, the Tribunal was not satisfied that the appellants had showed a significant degree of harm which would have been caused by the continuation of the merger proceedings. By contrast, a stay would cause substantial prejudice to second respondent, in that there would then be no certainty as to when the merger hearings could be conducted. For this reason, the Tribunal dismissed the application.

Appellants' Case:

Mr Gauntlett, who appeared, together with Mr Du Plessis and Mr Coutsoudis for appellants, submitted that this court should approach this dispute on the basis of a test formulated by the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] 1 ALL ELR 504 (HL), which had, found favour with the majority in Ferreira v Levin NO 1995 (2) SA 813 (W) at 824-825. This test was set out by Lord Diplock at 501 as follows:

> "The use of such expressions 'as a probability', a '*prima facie* case' or a 'strong *prima facie* case' in the context or the exercise of a discretionary prior to granting an interlocutory injunction, leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's functions at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations...
>
> So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing

the interlocutory relief that is sought."

On the basis of this test, Mr Gauntlett submitted that the nub of the inquiry was:

1. Whether the interdict application in the High Court raised a serious issue to be determined.

2. On the basis that it did raise a serious issue, the balance of convenience then favoured the granting of the stay. On this basis, he submitted that the Tribunal ought to have refused the stay application only if it found that the interdict application was frivolous or vexatious, or that there were clearly no prospects of success.

Applying this approach to the facts, Mr Gauntlett contended that for over 12 years first respondent had acted as appellants' attorneys in a variety of matters, including commercial, competition, regulatory and intellectual property work and had received more than R6 million in legal fees. In mid 2008, first respondent accepted an instruction to provide legal advice on various aspects of a merger between second and third respondents, including corporate, regulatory and competition law without at any time informing appellant that it had accepted this particular instruction.

On the basis of the relationship between appellant and first respondent, appellant provided five examples of the type of confidential information which had been given by appellants to first respondent during the former's role as the latter's attorneys. Accordingly appellants contend that these examples illustrate that first respondent was possessed of confidential information, that the information was still confidential and that it was relevant to the present merger proceedings. Briefly the five cases are the following:

1. From December 1999 to February 2000, first respondent advised and prepared a merger notification in relation to appellants' merger with Sensako.

2. During 2007 and 2008, first respondent advised appellant on its wheat business, which was known as Project Baker. First respondent's advice in this regard was, in the appellants' view, wide ranging, including tax, corporate, employment, pension fund, intellect for property and competition law aspects.

3. In January 2009, appellant telephonically requested advice on a licensing of a new biotech trait they had introduced into South African. Apparently, first

respondent refused to give advice, because of what it said was a conflict of interest, but not before requesting that appellant send an e-mail setting out the information upon which the advice would be based.

4. In February 2009, Mr Parker, a director of first respondent, held a meeting with appellants' chief deputy general counsel from the United States of America, and associate general counsel, Europe, Middle East and Africa. Mr Parker was informed about sensitive and confidential business issues, the potential impact on appellants' business, including a discussion concerning appellants' competitive position regarding the second and third respondents. It further asked for regulatory and legal advice in respect of maize projects.

5. In August 2010, first respondent provided advice on and preparation of a necessary response in relation to a request for access to a Research and Development Agreement between appellants and third respondent that was sought by the African Centre for Biosafety.

In summary, appellants contend, on the basis of these five cases which are the only material averments about confidentiality that they have set out in their papers, that information had been imparted in confidence in the course of a fiduciary relationship and, if this information came into possession of a third party, it could be potentially used to the disadvantage of appellants. Accordingly appellants had a right to be protected.

In support of this factual set of averments, Mr Gauntlett cited a decision in Marks & Spencer Group PLC v Freshfields Bruckhaus Deringer [2004] EWCA Ci (V) 741. In brief, Freshfields had sought to act for a group of organisations who were a consortium which had made an offer for Marks & Spencer. The Court of Appeal held that, given the fact that Freshfields had acted as solicitors for Marks & Spencer, a clear conflict was present. In coming to this conclusion, the Court of Appeal said the following at para 28:

> "Freshfields have dealt with the majority of Marks & Spencer's high end - and complex litigation and other commercial and employment matters. They are, therefore, in possession of confidential information relating to pricing, supply chains, including the terms of Marks & Spencer's supply contracts, Marks & Spencer's pricing policy, supply volumes and their attitude to termination renewal. They acquired information on logistical information,

dependency on food supply lines at peak trading periods and the Per Una contractual terms and senior management terms."

On the basis of this test the court's jurisdiction to intervene was founded on appellants' right to the protection of confidential information, in circumstances where an inherent conflict of interest was present, arising from first respondent's simultaneous representation of appellant and second and third respondents in a merger in respect of which first respondent could advance arguments which stood directly in contrast to the business interests of appellant. Appellants had, therefore, in Mr Gauntlett's view, established that first respondent possessed confidential information which was or might be relevant to the matter and the disclosure to which it had not consented.

On the strenghth of this line of argument, he contended that the burden fell on first respondent to show that there was no risk of disclosure. The High Court would intervene unless it was satisfied that there was no such risk of disclosure. The risk was a real one, it was not fanciful or theoretical. It need not be substantial, but in this case it was sufficient to justify the application which had been brought by appellants before the High Court.

Concerning the other aspects of the test, that is the interests of justice and the balance of convenience, appellants contended that a temporary delay occasioned by allowing the High Court time to make a decision on these important issues, was clearly outweighed by the prejudice which would be suffered by appellant and the concomitant damage to the administration of justice, if the Tribunal was to allow the merger to continue and later the High Court was to find that first respondent was precluded from acting for the merging parties, because of a conflict of interest and a risk of breaches of confidentiality. For these reasons, appellants contend that the balance of convenience favoured what they referred to as a 'short stay' of the merger hearings.

<u>Respondents' Case</u>:

Mr <u>Van der Nest</u>, who appeared together with Mr <u>Graves</u> on behalf of first respondent, referred to the five examples employed by appellant to justify the apprehension of a breach of conflict of interest. It is important to emphasise at this stage that no core bundle was prepared in this appeal and that the full application papers have been placed before this court as part of the record, indicating clearly that the only allegations of a breach of confidential information are the five examples to which I have already made reference. I shall deal with first respondent's reply thereto in the same sequence as I have set them out in summarising appellants' argument.

1. The Sensako merger filing: According to first respondent this merger filing took place in 1999, some 11 years ago, involved a failing firm, Sensako. First respondent's answer to the allegations made by appellant was that the information was historical and had no value at this stage. It contends that the appellant, in its papers, could point to no single fact that was confidential, is confidential and remains relevant to the merger.

2. Project Baker: The project name of the subject matter to this complaint related to disposal of appellants' wheat business. Preliminary regulatory advice was given by first respondent in December 2007 and further advice that the transaction was not notifiable to the Competition Authority in April 2008. Appellant, in reply contended that information made available regarding the wheat business, would now have an impact on its maize business. In first respondent's view, not only was this an unsustainable contention, but the entire averment was filled with what Mr Van der Nest referred to as general statements and conclusions of so vague a nature as not to justify any apprehension of a breach of confidentiality.

For example, in appellants' reply affidavit the following is stated:

> "Highly confidential business strategy information was conveyed by Monsanto to Bowman Gilfillan in respect of the South African Seed Industry. This confidential information was of vital strategic importance to Monsanto and provided material insight into the seed industry."

In short, general allegations were made, but no concrete information was provided to justify the conclusion that confidential information was at risk of being disclosed.

3. <u>The African Centre for Biosafety</u> PAIA request: First respondent was instructed to prepare a written response to the request by the African Centre for Biosafety for a copy of the research and development agreement between appellant and third respondent in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA'). The agreement was concluded with first respondent, which, of course, raises the obvious inference that, as it was a contract with third respondent, the latter would have been aware thereof. The

agreement could not possibly be regarded as confidential in the sense that third respondent was fully entitled to place this agreement before the Tribunal. In addition, the response prepared by first respondent concerned no more than the refusal to have to supply that document pursuant to the provisions of PAIA.

4. Licensing Agreements: Appellant had referred to an e-mail sent to Mr Parker from Ms Voruz on behalf of appellant, on 15 January 2009 at the request of Mr Parker to summarise the issues in the advice sought. In the e-mail, Ms Voruz said that it sought advice on, *inter alia*, competition aspects of new technology, which appellant wanted to introduce into South Africa. The e-mail referred to three parties only, being appellant, first respondent and second respondent.

To the extent that the e-mail refers to market share, Mr Van der Nest contended that all of that information was, in any event, set out in the Commission's report in which it had sought to justify its refusal to allow the merger. To the extent that any further information contained in the affidavit could be considered to be confidential, it affected both second and third respondents and, therefore, could hardly be classified as confidential, in that two other parties, who would have known about this information, were the very parties being advised by first respondent, hence they would have been already in possession thereof.

5. The Biowatch case: This instruction commenced in August 2002 and according to first respondent, to all intents and purposes was finalised on the merits during April 2005. It was a civil hearing whereby first respondent sought to resist (which they did successfully), disclosure of the documents based on PAIA. The information had been supplied to government bodies. The matter was heard by the Supreme Court of Appeal and then the Constitutional Court, which judgments are obviously in the public domain. According to first respondent, no more than a general statement that the information was confidential was set out in the papers of the appellant.

The appropriate test to determine and stay application

In the light of these disputes, and the detailed answers provided by first respondent, it is necessary to turn to the appropriate test which governs a dispute of this particular kind. The Cyanamid test was indeed, as I have noted already, followed in Ferreira v Levin supra. However it was followed within a context of a dispute, pending a determination of a constitutional matter by the Constitutional Court. That case, therefore, dealt with the specific problem of a stay pending a constitutional dispute to be determined by the Constitutional Court, that is an allegation regarding the constitutionality of legislation. See Ferreira v Levin NO, supra at 836 – 837.

This is an entirely different matter concerning a stay application relating to merger hearings. Were the same test to be adopted in stay applications such as the present, the low threshold, which is inherent in the Cyanamid test, coupled to the bifurcated jurisdiction as evident in the present proceedings, would be subversive of the kind of expedition sought to be achieved by the Act in merger cases. In my view, the approach adopted by the Tribunal in Novartis is preferable when dealing with this kind of question. It, in effect, advances a doctrine of proportionality, that is between protecting the legitimate interests of both sides and safeguarding the integrity of the proceedings.

If this test is applied, the first issue to be resolved is the question of the reasonable prospects of success. It is interesting in this connection that, if an approach such as a *prima facie* right as adopted in interdict proceedings is considered, that focuses considerable light on what could be considered to be a reasonable prospect of success. In this connection, it is illuminating to refer to the minority judgment of Streicher, J in Ferreira v Levin supra (on a point which was not in any way rejected as being incorrect by the majority) at 817F-H:

> "It has up to now been accepted that in order to establish a *prima facie* right entitling an application to an interim interdict, an applicant has to make out a case that he is entitled to final relief. If on the facts alleged by the applicant and the undisputed facts alleged by the respondent, a court would not be able to grant final relief, the appellant has not established a *prima facie* right and is not entitled to interim protection."

See also Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) at 383 and the similar arguments advanced by Herbstein & Van Winsen, The Civil Practice of the High Court of South Africa (5th Edition) at 1461-1462.

Mr Van der Nest, in my view, correctly contended that to determine reasonable prospects of success in this kind of case, the test for confidentiality, as outlined by this court, in

American Natural Soda Ash Corporation & Others v Botswana Ash & Others [2007] 1 CPLR 1 (CAC) was appropriate, that is appellant is obliged to satisfy three requirements:

1. Was first respondent given confidential information?

2. Is the information still confidential?

3. Is the information relevant to the merger?

In summary, if a court is to determine reasonable prospects of success, the least that can be expected from appellants is to show, on the papers, that, as Streicher, J noted, when the facts as alleged by both sides are evaluated, the *prima facie* right, entitling the applicant to interim relief, would have been converted into a basis for final relief, that is on these papers, is there *prima facie* case: Expressed in Ansac terms: in the papers is there a *prima facie* case that respondent given confidential this information, is this information was still confidential and does the information remain relevant to the merger.

Application of this Test:

First respondent has provided a detailed answer to all the appellants' allegations. Take the e-mail of January 2009, which I should add, was pressed by Mr Gauntlett as constituting the best report for appellants' case. As Mr Unterhalter, who appeared together with Mr Watt-Pringle and Ms Le Roux on behalf of the second respondent, submitted, the non-confidential part of the Competition Commission's report on the merger, contained a detailed breakdown of market share, which cannot, on any stretch, be considered to be confidential. In short, there is no basis to argue that this component of the e-mail raises any confidential information, even on the test that I have outlined.

The balance of the information in the e-mail regarding intellectual property, must have been known to second and third respondents independently, for, as is evident from this e-mail, the latter parties were in a relevant relationship with the appellant.

To the extent that appellants considered, as they aver, that confidential information was at risk of being disclosed to third parties, it is then instructive to analyse the relief which was sought by appellants in the other two fora.

As Mr Unterhalter submitted, the question which arises is why the appellants failed to protect its claim of confidential information by applying to the High Court for urgent interim relief, pending a final order and, further, why it chose to apply to the Tribunal for interim relief in the form of a stay. Mr Unterhalter submitted that the answer was clear: this was a stratagem to obtain an open ended stay in the Tribunal, pending a lengthy legal dispute in the High Court, which would then prevent the resolution of the merger dispute. In his view, the clue to understanding appellants' conduct in engaging in forum arbitrage, lay in a proper consideration of the relief sought in both cases.

It is significant that the appellants did not seek an order to suspend the attorney/client relationship between second respondent and first respondent, nor did it seek to prevent first respondent from continuing to consult with second respondent, take instructions for the purposes of preparing witness statements nor expert reports nor engage in any other form of preparation short of procedural, such as filing papers and pursuing interlocutory applications, pending the hearing in September 2011.

However, Mr Gauntlett contended, so long as there was a reasonable apprehension of some risk to appellant, a stay should be granted. In this connection it is instructive briefly to refer again to the case relied on by appellants, namely Freshfields. In this case the facts are demonstrably distinguishable. In Freshfields, the same firm is asked to act for a consortium which seeks to takeover a company for whom Freshfields acts. That is clearly distinguishable from the present case.

Far more compatible is the case, referred to by first respondent, of Russell McVeagh v Tower Corporation [1998] 3 NZLR 641 (CA). In this case McVeagh had acted for Tower Corporation in a tax dispute. A new client approached McVeagh to act for it in a takeover bid of Tower. McVeagh considered that it was able to act. When the new client presented its proposal, Tower found that McVeagh had acted for the new client and, therefore, objected.

The New Zealand Court of Appeal found no absolute prohibition, even in the case where both parties were clients (which is significantly different from the present case). Henry, J said:

> "It is difficult to identify where the conflict arises, other than in the realm of possession of confidential information. What is now under discussion is frequently described as a separate matter situation, namely one where the retainer covers quite distinct and unrelated issues. There is nothing incompatible between the interests of Tower, which were or are

concerned with the taxation dispute and the interest of GPG which were or are concerned with the takeover procedure. Separate matter conflicts will generally arise and probably only arise where possible problems resulting from possession of confidential information exists."

Henry, J continued thus:

"Absent the risk of disclosure of Tower's confidential information to GPG... it is difficult to see whether any conflicts could arise. No other continuing duty owed to Tower was identified."

In summary, on this component of the case, this court is confronted with a relationship between a former attorney and a client in circumstances where the proceedings sought to be stayed, are not those in which the former client is a party. Further, in none of the five examples given (which represent the entire case presented to this court as contained in the papers), is there any indication to be gleaned, on a reasonable basis, why the information remains confidential. At the very least much has been known by second and third respondents and for a long time. Further, to the extent that information was not so known, it now forms part of the Competition

Commission's non-confidential component of its report on the merger. It is difficult, on the basis of a reading of the Competition Commission's report, why any of the information so averred, remains relevant to the merger proceedings. In short, on the test adopted of reasonable prospects of success, being mediated through the Ansac test, it cannot be concluded that appellants' case passes muster.

That still leaves the question of balance of convenience and the interests of justice.

In the exercise of determining whether there are reasonable prospects of success, of course the *prima facie* inquiry with which this court is engaged, can never be definitive of a matter still to be argued and considered by another court. Hence this court is required to evaluate the prospects of success in terms of the approach that I have outlined, and then weigh this evaluation with a further assessment to the balance of convenience, so as to arrive at a final conclusion. To the extent that the interests of justice are so involved, they surely require this exercise of balancing of interests.

Appellant, from the outset, suggested that the stay could be avoided by first respondent's withdrawal and that, in any event, a delay of a few months ('a short stay') will not result in any material prejudice. By contrast, second respondent, in terms of an answering affidavit deposed to by Mr Gorsche, sets out in some detail the prejudice that may be caused to the respondents, particularly second respondent and third respondent, if the merger proceedings are stayed. I refer briefly thereto:

> "The nature of the industry in which the proposed merger would take place, must also be understood in order to confirm the prejudice that will result from a delay in the September hearing. Seed sales to farmers are highly seasonable. Farmers decide once a year what May seeds to purchase and cultivate generally between September and early October. Concomitantly seed companies have generally only one opportunity per year to make a sale to farmers. Therefore, any delay from one year to the next has significant repercussion for the seed suppliers and/or revenue and product."

He continues:

> "In addition the uncertainty created by a delay in the merger proceedings, affects Pannar's employees job security, as well as farmers risk

assessment when deciding from which supplier to purchase seeds if ongoing supply and technical support might be compromised. Delay also lessens both parties competitiveness and ability to strategically plan for the operations, all to the advantage of Monsanto, which is not similar hamstrung in its operation decision making or strategic planning."

Merger proceedings are by their nature very urgent, in that once parties have agreed to a merger, they ought to be free to consummate the merger without unreasonable delay. The Act sets out a 60 day period in respect of intermediate mergers as in the present transaction(see s14 of the Act). Second respondent has made it plain that any postponement of the merger would be so destructive of its interests that indeed, as Mr Unterhalter observed, if the stay was granted, second respondent would have to dispense with the services of first respondent to its considerable prejudice, in that it would have, within some three weeks, to find fresh attorneys to deal with the extremely complicated matter of a merger.

It should also be noted that the proceedings before the High Court will only take place in October. There is no guarantee that, having heard the case which is set down for two days, a judgment will be delivered immediately. It is, therefore, possible, given that the case will be heard midway through the fourth term, that judgment may only be delivered towards the end of the year or, in the first term of next year, in which case the merger proceedings could be delayed for an indefinite period, certainly not the 'short delay' described by Mr Gauntlett.

In considering the balance of convenience, it is also instructive that Ms Voruz's evidence, deposed to on behalf of appellant affords the court some insight into the intention of appellants, I refer in particularly to her replying affidavit in which the following appears:

> "I am most surprised, therefore, that Bowman's would seriously suggest that the merger of Monsanto's two largest competitors in the region is in some way not likely to affect the competitive or commercial interest of Monsanto. Bowman's knows the truth. Indeed in the merger filing itself, it is clearly stated that the purpose of one of the benefits of the merger is that it will limit Monsanto's purported dominance in the region. On Bowman's (indeed Pioneer and Pannar) own version, not only affect but also the purpose of the merger is to limit

> the commercial interests of Monsanto. It will be recalled that the merging parties indicate that one of the merger's benefits is that Pannar will no longer need to rely upon bio traits bought from Monsanto: simply put, the merger's aim and its potential effect is the removal of one of Monsanto's major customers."

While this statement is not definitive of appellant's motivation, it perhaps justifies, to some extent, the forcible submissions made by respondents with regard to the intention of the appellants in this particular case.

This court does not need to go so far. With regard to the balance of convenience, other than the facts which were set out by the respondents, it is important to refer back to the relief which was sought by appellants. Had the confidential information been at such risk of being disgorged, and the prejudice to appellants been so palpable, there was a clear legal avenue available to it, namely to approach the High Court as a matter of urgency, or indeed to have approached the Tribunal and then this court, which, as events now indicate, would have disposed of this case far before the October date and thus prior to the merger hearing.

In short, when the lack of specificity of information that could reasonably justify an apprehension of risk is balanced with the questions of convenience to both sides and the court's obligation to consider the interests of the parties, together with the failure of appellants to act with the kind of urgency which would have been compatible with the description of their case, there is, on the test that I have outlined, no basis by which to uphold the appeal.

In my view, therefore, the appeal is dismissed with costs, including the cost of two counsel.

DAVIS, JP

Zondi JA and Ndita AJA concurred