

Republic of South Africa

‘REPORTABLE’

IN THE HIGH COURT OF

SOUTH AFRICA

(Cape of Good Hope Provincial Division)

Case No: 554/2000

In the matter between

KEITH KIRSTEN’S (PTY) LIMITED

Plaintiff

and

WELTEVREDE NURSERY (PTY) LIMITED

First

Defendant

THE REGISTRAR OF PLANT BREEDERS’ RIGHTS Second Defendant

JUDGMENT DELIVERED ON MONDAY 22 APRIL 2002

DESAI, J:

The plaintiff herein seeks damages and ancillary relief based on first defendant's alleged breach of the plaintiff's Plant Breeders' Rights ("**PBR**") registered in respect of the pink veined burgundy striped *Canna* known locally as *Canna Phasion* and, in certain other countries, as *Canna Tropicanna*.

The plaintiff company has its principal place of business in Johannesburg and conducts business, *inter alia*, as nurseries, landscape gardeners and as a plant breeder. Mr **Keith Kirsten ("Kirsten")** was plaintiff's managing director until 2000. The first defendant's business is located in Stellenbosch, Cape, where it operates a wholesale nursery. The Registrar of Plant Breeders' Rights ("**the Registrar**") has been joined as second defendant for reasons which will become apparent shortly. The Registrar is an employee of the Department of Agriculture and a letter has been filed on its behalf indicating that they do not intend opposing this matter and will abide by the decision of the court.

On 27 February 1996 the Registrar issued a Certificate of Plant Breeders' Right in respect of the aforementioned *Canna Phasion*. The certificate expires on 27 February 2011. It is common cause that during 1999 *Canna* rhizomes were shipped to Belgium by first defendant. These rhizomes were split from plants purchased as *Phasion* or under various other names, including *Tropicanna* and *geel bontblaar Canna*. Whatever the name under which they were sold, they were indistinguishable from the *Cannas* registered as *Canna Phasion*.

It is not in dispute that the PBR had in fact been issued by the Registrar to the plaintiff. Furthermore, it was conceded during the trial that if the PBR had been validly issued to the plaintiff, then in fact first defendant was guilty of the conduct ascribed to it by the plaintiff, namely, that it infringed plaintiff's PBR as contemplated in s23 of the Plant Breeders' Rights Act 15 of 1976 (as amended) ("the Act"). In response to plaintiff's case, first defendant on its pleadings raised two main defences. Firstly, it was contended that the plaintiff was not the "breeder" of the *Canna* as envisaged in the Act and was accordingly not entitled to apply for a PBR in respect thereof. Secondly, it was argued that the PBR should not have been granted as the *Canna* was "neither new nor distinct" as contemplated in the Act. Certain other defences were also raised during the course of the trial. Mr **M Nowitz**, who appeared on behalf of the plaintiff, submitted that as these issues were not pleaded first defendant should not be entitled to stray outside the ambit of its Amended Plea. That submission is not without merit. However, Mr **Nowitz** dealt with the issues raised in the course of his argument and I shall similarly refer to them at a later stage herein. Finally, with regard to the pleadings there is the first defendant's claim in reconvention in which it seeks the termination of plaintiff's PBR in respect of the *Canna Phasion*. According to the first defendant the PBR is invalid and falls to be terminated by the Registrar for the reasons contained in its Amended Plea and referred to above. The nature of the claim in reconvention necessitated the joinder of the Registrar as a party to these proceedings.

In respect of the first main defence raised on behalf of the first defendant, its Amended Plea reads as follows:

“4.3.1 In amplification of the Defendant’s denial that the Plaintiff is a person contemplated in terms of Section 20(2)(a) of the Act, the Defendant pleads as follows:

4.3.1 The “person who applied for the grant of the right” referred to in Section 20(2)(a) of the Act refers to the person in Section 20(1)(b) of the Act, ie, “the applicant entitled under the Act to make the application”.

4.3.2 By virtue of the fact that the applicant was not the breeder of the plant, the plaintiff was not entitled to make the application referred to in Section 20 of the Act.”

Mr **A R Sholto-Douglas**, who appeared on behalf of the first defendant, contended in the first instance that the plaintiff was not the person who applied for the grant of the right and, if so, he was not entitled to make the application as he was not the breeder of the plant.

This leg of the argument relates to the confused manner in which the application (Exhibit “C”, pages 1-4) was completed. It cites a Miss **Michelle Cubbins** or Mr **Jaco Breytenbach** applying for the right. The said form also indicates that the variety was transferred to the applicant by means of a contract. Mr **Sholto-Douglas** argued that it was not competent for the Registrar to issue a PBR to anyone other than the applicant and, in the circumstances, the issue of the certificate to plaintiff was *ultra vires* the powers of the Registrar.

As is apparent from page 1 of Exhibit “A”, **Kirsten** advised **Morgezon Estate (“Morgenzon”)** on 3 August 1994 that he was the owner of *Canna Phasion* and authorised **Morgenzon** to apply for a PBR for such *Canna*. When bringing the application **Morgenzon**, though not filling in the form correctly, intended it to be the plaintiff’s application. This is how the application was understood by the Registrar who granted the PBR to the plaintiff and not to anyone else. Mr **M S Joubert (“Joubert”)** testified in this regard. He commented as follows: *“I knew it was Keith who was applying for the right”* and *“I knew that Keith was the applicant”*. **Joubert** regarded **Morgenzon** and its employees as the plaintiff’s representatives or, as he called it, “proxies”. The letter accompanying the application was also handed up in evidence and in the said letter **Kirsten** identified himself as the owner of the *Canna*. **Joubert** also testified that **Morgenzon** submitted the application because they had a tissue laboratory. It appears to have been the practice that the breeder did not have to apply itself. In any event, as Mr **Nowitz** further submitted, there is nothing in s6 and s7 of the Act which precludes a breeder from submitting an application through a duly authorised agent. The fact that the application form was incorrectly completed in certain respects is immaterial, especially in that the Registrar knew that plaintiff was the applicant.

Mr **Sholto-Douglas** furthermore contended that the plaintiff had failed to show that either it or **Kirsten** was the breeder of the variety. “Breeder” is defined in the Act as follows:

“Breeder’ in relation to a variety referred to in section 2 means –

- (a) the person who bred, or discovered and developed, the variety;*
- (b) the employer of the person referred to in paragraph (a), if that person is an employee whose duties are such that the variety was bred, or discovered and developed, in the performance of such duties;*
- (c) the successor in title of the person referred to in paragraph (a) or the employer referred to in paragraph (b).*

The plaintiff argues that it falls within the definition of “breeder” as contemplated in the Act because it discovered and developed the *Canna*. The plaintiff does not claim that it bred the *Canna* from scratch. It contends that it is a breeder as defined in the aforementioned section of the Act because it had discovered and developed the *Canna*.

The events leading to the discovery and development of the *Canna* are set out in some detail in **Kirsten’s** evidence. It appears that on or about 21 February 1991 **Kirsten** travelled to Bethal in order to judge a garden competition in the township outside Secunda. He stayed overnight at the home of Mr **Theunie Kruger (“Theunie Kruger”)**. It is common cause that **Theunie Kruger** was a well-known and well respected nurseryman who had conducted business as such for many years. His sister, Ms **Clara Kruger (“Clara Kruger”)**, and brother-in-law Mr **Jan Potgieter (“Potgieter”)** lived with him at the time. In any event, **Theunie Kruger** was very hospitable and showed **Kirsten** around his garden. They came across a bed where *Cannas* were growing and included amongst the ordinary *Cannas* was a pink veined burgundy striped *Canna*. **Kirsten** became excited when he saw these *Cannas*. Despite his years of experience with *Cannas* he had never seen anything like it. **Theunie**

Kruger agreed that it was a wonderful and different plant. He thereafter gave **Kirsten** the authority to take the *Canna* and remarked as follows:

“Keith, you may do with it what you wish and you think it has got potential, you may take the matter forward and you do something with it if you feel that it has the merits’.”

Kirsten was given a little bag of cuttings, which he took to his garden in Long Meadow, Johannesburg. The cuttings were planted in a specific spot and they grew into a batch of test plants. **Kirsten** also began bulking them up before going to the expense of marketing it. The bulking up was done in conjunction with the **Morgenzon** nursery in the Northern Province, who propagated the *Canna* on his behalf. Having evaluated and bulked up the plants in his own garden and at **Morgenzon**, plaintiff applied for a PBR in 1994 and the first batch of *Cannas* became available for commercial exploitation in 1995 and 1996. The *Cannas* were introduced on the South African market as *Canna Phasion*.

Clara Kruger was the first defendant’s key witness with regard to the alleged sale of the *Canna* by **Theunie Kruger** to **Kirsten**. According to her **Theunie Kruger** came to her the morning after **Kirsten** had stayed over and told her to write up the sale of forty *Cannas* to **Kirsten** for R40,00. **Clara Kruger** was an appalling witness and when she was recalled at a later stage her credibility dwindled even further under very able, and effective, cross-examination by Mr **Nowitz**. As **Kirsten** was a guest in **Theunie Kruger’s** house it is highly improbable that he would have expected payment from **Kirsten**. On **Clara Kruger’s** version, **Kirsten** was simply sent invoices for two and a half years. **Kirsten**

denied receiving such invoices. The outstanding amount was allegedly increased in 1993 to R50,00, the difference apparently being interest. Later that year the amount was written off. One or more of the entries in **Clara Kruger's** book of accounts were out of chronological sequence. It is also apparent from the said book that nobody else purchased *Cannas*, or any other plant, from **Theunie Kruger** in quite the same way as **Kirsten**.

The first defendant's other witness with regard to the alleged sale of the *Cannas* did not fare much better. According to Mr **Louis Kruger** ("**Louis Kruger**"), **Theunie Kruger** had given him a small rhizome. He did not buy the plant. He had planted the rhizome with a view to selling the plant himself. He presently sells about twenty such *Cannas* a year. However, under cross-examination he stated that he had not sold any *Cannas* last year and he could not produce any proof of any sales at either of his nurseries.

Mr **Sholto-Douglas** has fairly and properly conceded that on the probabilities **Kirsten's** version as to how the *Cannas* were acquired by him from **Theunie Kruger** is the more acceptable version. That is indeed so. **Kirsten** saw a rare plant in **Theunie Kruger's** garden, was given some rhizomes and the right to develop the *Canna*. **Kirsten** took the rhizomes home, propagated them, increased the propagation by selling them to **Morgenzon** and thereafter applied for and obtained a PBR. He has marketed the *Cannas* since then. **Kirsten** could not have known that

Theunie Kruger would die in October 1993 and, as Mr **Nowitz** has correctly pointed out, he would have been running a risk in relation to the time, effort and development necessary to obtain a PBR, if **Theunie Kruger** had not given him the rights.

The Act, more especially s2 thereof, provides that it shall apply only in respect of a new variety of the same kind of plant. In its other main defence, first defendant contended that, as at the date of the application for the registration of the *Canna Phasion*, the variety described in the application was not new. The relevant portion of its Amended Plea reads as follows:

“4.3.3 In any event, the application by the person referred to in Section 20(2) (a) of the Act must, in terms of Section 20(1)(c) of the Act in respect of a variety referred to in Section 2 of the Act and conform to the requirements of the Act

4.3.4 The plant does not comply with the requirements of Section 2 of the Act in that it is neither new nor distinct as provided for therein.

4.3.5 The plant does not comply with the requirements of Regulation No. R2630 promulgated in terms of the Act on 24 December 1980 in Government Gazette No. 7349 (as amended by Regulation 37 dated 6 January 1984 promulgated in Government Gazette No. 9024) in that it fails to meet the requirements for new varieties stipulated in Regulation 3 thereof in that it is not a new variety as contemplated therein.”

Several witnesses called to testify on behalf of the first defendant

endeavoured to show that the same plant had been sold previously by others, that its existence was common knowledge and that it was not distinguishable from any other variety of the same kind of plant. Anticipating this attack upon the newness and distinctiveness of the *Canna*, plaintiff's witnesses testified to the contrary.

According to **Kirsten** both he and **Theunie Kruger** recognised the *Canna* as being a "distinct plant". He knew *Cannas* pretty well from the days when he was employed by the Durban Parks Department and had not seen this *Canna* elsewhere in Southern Africa until he noticed the batch in **Theunie Kruger's** garden. He grew up in Durban and frequently visited nurseries in Durban, the Midlands and Botha's Hill. He cannot believe that the *Cannas* were being sold in this region for 20 or 30 years as Mr **Henry Rasmussen ("Rasmussen")** was to testify. He pointed out that there were similarities between the *Canna Phasion* and other *Cannas*, such as "*Canna Durban*", growing around the country with a variegated leaf.

Plaintiff's expert witness, the retired horticulturist and nurseryman Mr **Wilfred Grey ("Grey")**, testified how the *Canna Phasion* had evolved. He was emphatic that it was a mutation not a hybrid as Mr **Sholto-Douglas** at one stage suggested in order to demonstrate that it was neither new nor distinct. **Grey** challenged the assertion that the *Canna* had been around since 1969 and said that if it had been around nurserymen such as himself and **Kirsten** would have seen it. He confirmed **Kirsten's** testimony that the Durban Parks Department never

had any *Canna Phasion*.

The witness **Joubert** described how the PBR was granted by the Registrar. **Joubert** himself had never seen the *Canna* before, nor had he seen any literature dealing with the *Canna* under any other name. According to him when someone applies for a PBR, the Registrar uses the guidelines provided for in the UPOV (Union for the Protection of Varieties) Convention and different characteristics of the plant are noted and marked with an asterisk. On receipt of **Kirsten's** plants the Registrar kept them in glass houses where they were examined for the aforementioned purpose. Besides the technical examinations, the Registrar or his staff also checked the Hortus Publication – an inventory of plant types – and visited a few nurseries in order to ascertain whether similar *Cannas* were being sold. Satisfied as to the newness of the *Cannas* and that it had not been sold before, the Registrar granted the PBR. Even if **Theunie Kruger** had sold the rhizomes to **Kirsten**, **Joubert** would not have considered it as serious selling and, in any event, as **Theunie Kruger** did not fall within the definition of a “Breeder”, what happened between him and **Kirsten** did not fall within the ambit of s2(2) (a) of the Act. He conceded, however, that if the Registrar or his staff had found¹⁰ such plants for sale in a nursery they visited, the PBR would not have been granted.

Mr **Nowitz** has pointed out that the first defendant's evidence with regard to the newness of the *Canna* is somewhat contradictory. There is merit in this submission. **Clara Kruger** and **Louis Kruger** attempted to show that

the *Canna* was new and distinct. The import of the evidence of its other witnesses was that the *Canna* was not new as envisaged in terms of s2(2)(a) of the Act.

Clara Kruger's evidence in this regard is that she could remember the plant many years later as it had "*n besonderse blaar, Edelagbare. Die ander Kannas het dit nie.*" According to **Louis Kruger** the *Canna* was a unique plant in the sense that it was peculiar to his uncle's nursery and not "*freely available*" or "*freely bought and sold throughout the country*". He was so excited about the *Canna* that he once took a leaf with him to college because it was different and everybody was excited about it. I have already commented on the credibility of these witnesses.

The 89 year old **Rasmussen** was first defendant's expert witness. He has been a nurseryman for many years. Of Danish birth, he eventually moved to Hilton near Pietermaritzburg, KZN, where he started a nursery in 1969. In 1970 he found a pink leaved plant under a fig tree. He does not recall buying the plant. The *Cannas* were growing at the Old Hilton Nursery and he planted them at his other nursery in Howick. They were sold at both nurseries. The plant was found in a bed of *Canna* which had been planted about 25 years ago and he could not say whether there was more than one plant. He only sold about 10 or 20 *Cannas* annually and could not say how many of these were the *Canna* in question. Though he had heard the word "*Tropicanna*" before, he did not know what a *Tropicanna* was until he saw it in court. He only heard the name "*Phasion*" a month before testifying. **Rasmussen** could also not say

where else he had seen the red leafed *Canna* other than in his own nurseries. In a letter forming part of Exhibit “C” p82 he commented as follows:

“I should like to make it clear that I cannot say categorically that the plant was discovered here at least 30 years ago, although, as far as my memory goes, this was the case.”

In his oral testimony **Rasmussen** indicated that he was not comparing the plant in his garden with the *Canna Tropicanna* which is marketed by the plaintiff but referring to the plant in his garden. He could also not back up the statement in his expert notice that it was common knowledge that these *Cannas* were available for commercial exploitation for a period in excess of 30 years.

The evidence of **Rasmussen’s** wife did not take the matter any further.

Cannas were apparently planted in the Constantia garden of Ms **Marlene Cywes (“Cywes”)** in 1970 or 1971. when asked by Mr **Sholto-Douglas** if the *Canna* was around in the 70’s in any garden other than her garden, she stated:

“I think so because it was at that stage variegated stuff was not so popular it was something new but it wasn’t that popular so you know if I had it and somebody liked it I would say have a half or take out some. So I think lots of gardens had it, it wasn’t a strange thing, you know it wasn’t exclusive.” (my underlining)

When asked if she could identify the plants which had been in her garden as *Canna Phasion*, she responded as follows:

“I think that can only be done by DNA but the plant started by being a reddish colour and then as it gets older it goes to a more green and yellow stripes with

slight pink on the edge, and that's what I remember."

Cywes could also not say whether her plant was identical to the plant in court because *"... you know this is 30 years ago."*

Mr **William Rogers ("Rogers")** owns a nursery in Brackenfell, Cape, and apparently elected to testify because of an article about the case which he had seen in a local newspaper. It later transpired that he knew about the case before the article appeared in the newspaper as he had supplied **Kirsten** with one of the exhibits. His credibility diminished further when it became apparent that he was strongly opposed to PBR's, which he regarded as a money making scheme. His evidence as to where he obtained a *Canna Phasion* was inconsistent with other testimony. Furthermore, while professing to have the largest collection of *Cannas* in the country, he was quite clearly not an expert on the subject.

The evidence, on the probabilities, supports the conclusion that the *Canna Phasion* is new, distinct and clearly distinguishable from any other variety. There is also insufficient acceptable evidence to conclude that others had been selling the plant previously or that its existence was a matter of common knowledge. In the circumstances, the first defendant has failed to discharge the evidentiary burden it has in respect of this defence.

During the course of the trial it appeared that the Registrar had not complied with the provisions of s13(1) and s20(2)(c) of the Act. Though this aspect became an issue in evidence, it was not specifically pleaded.

The aforementioned sections provide for the publication in the Government Gazette of particulars relating to the application and, if the application is granted, publication of such particulars relating to the grant of the right as may be prescribed. Mr **Sholto-Douglas** submitted that the advertising provisions are cast in peremptory language as the advertisements are foreshadowed in the objection procedure laid down in s17 of the Act. The failure to comply with the said sections, he argued, resulted in the PBR certificate being invalid *ab initio*.

According to **Joubert** the publication in all likelihood was not effected because the department did not have sufficient funds to do so. This was not a satisfactory answer in that the proper construction of a statute cannot be influenced by administrative difficulties that are encountered in carrying it out after its enactment. (see **Amalgamated Packaging Industries Ltd v Hutt & Another** 1975(3) SA 943 A at 951C.) Joubert's further evidence in this regard was that the application had been published in the Plant Variety Journal and if anyone had enquired as to whether a PBR existed or not in respect of a particular plant, he could provide an answer within a minute or two to anyone making such enquiry.

Shortly after this matter was adjourned for judgment, a letter was received by the court from the Registrar, that is, second defendant, indicating that the publication of plaintiff's application had in fact taken place in the Government Gazette (No. 16151) on 9 December 1994. The parties agreed that a copy of the relevant Government Gazette should be placed before the court and they elected to make further written submissions on the issue.

The Government Notice which is now available clearly establishes that

there was substantial compliance with the provisions of s13(1) of the Act. That section provides that if the Registrar does not reject an application under s11, he shall by notice in the Gazette, publish such particulars relating to the application as may be prescribed. Mr **Sholto-Douglas** conceded that there had been substantial compliance with the provisions of s13(1) of the Act. However, he attacked the validity of the Government Notice on the basis that the name of the applicant is reflected as **Morgenzon** and the name of the breeder is given as **Keith Kirsten**.

The incorrect description of the applicant has already been referred to, the same arguments apply in this instance and I do not propose re-stating them. Furthermore, the importance of s13(1) quite patently lies in the other information contained in the notice. The emphasis is upon the plant and the proposed denomination as opposed to the identity of the applicant.

Prior to the Government Notice becoming available the arguments advanced by Mr **Sholto-Douglas** related largely to the alleged non publication in terms of s13. He argued that the failure on the part of the Registrar to comply with the provisions of s13 of the Act made it impossible for anyone to object to the grant of the PBR as contemplated in s17 of the Act. Mr **Sholto-Douglas** now submitted that his earlier argument was not restricted to the publication referred to in s13. Section 20(2)(c) of the Act provides that in respect of each PBR granted, the Registrar shall, by notice in the Gazette, publish such particulars relating to the grant of the right as may be prescribed. The obvious purpose served by such publication requirements is to notify the public at large of the outcome of an application. Mr **Sholto-Douglas** contended that the

granting of the right is an administrative act which is unenforceable against third parties until publication takes place. As no such publication took place, he argued, the plaintiff's claim falls to be dismissed.

It appears from s20(2) that the publication takes place after the grant of a PBR by the Registrar. In other words, the PBR is already in existence at the time that such publication is required to take place. The time period within which the envisaged publication is required to take place is not stipulated either in the Act or in the Regulations.

Several arguments have been raised by Mr **Nowitz** against the proposition that the PBR granted is invalid because of non compliance with the provisions of s20(2)(c) of the Act. He contended that this was not a defence raised by the first defendant on its pleadings. In the absence of any time limits, he argued, the Registrar could still comply with the provisions of s20(2)(c) now that it has been brought to his attention. The evidence is compelling that first defendant was aware of the grant to the plaintiff of a PBR in respect of the *Canna*. In October 1996 already the first defendant had been advised that it could grow the *Canna Pink Phasion* under licence if it was interested in doing so. There are several other indications that the first defendant was aware of the PBR and its details before it was infringed. Instead of utilising the machinery afforded by the Act to set aside the PBR it elected to breach such right.

In the light of these arguments I agree that plaintiff's claim should not be dismissed on the basis of the Registrar's failure to comply with the provisions of s20(2)(c) of the Act. Besides the fact that this omission did not constitute part of first defendant's pleaded case, it is capable of being remedied without any prejudice to first defendant.

I am accordingly of the view that the plaintiff has a valid PBR in respect of the *Canna Phasion*. It follows that first defendant's claim in reconvention, in which it sought an order terminating the PBR, must fail.

There is substantial evidence to the effect that plaintiff's PBR in respect of the said *Canna* has been infringed by the first defendant. This conclusion was not seriously disputed. In terms of s47(1) of the Act the plaintiff is entitled, upon proof of the infringement, to damages in an amount not exceeding R10 000,00 without proof of damages. This is plaintiff's alternative claim. In the first instance it claims damages in the amount of R30 304,88 arising out of the sale and exportation of 10 300 *Canna Phasion* rhizomes. The amount claimed is calculated on the basis that plaintiff would have received R2,96 as royalty for each *Canna*. The *onus* to prove the *quantum* of its claim, as also the debatement of account, rests on the plaintiff. Mr **Sholto-Douglas** has argued that the damages cannot exceed 46 cents per plant. The reason advanced for this amount per plant is that the R2,96, including VAT, which the plaintiff claims includes expenses. It would seem proper in the circumstances to deduct the saved expenditure from the royalty in order to calculate plaintiff's true damages. The evidence is unclear with regard to the precise amount to which the plaintiff is entitled as damages per plant. The plaintiff has accordingly failed to prove this aspect of its case. With regard to the debatement of account claimed, Mr **Sholto-Douglas** has argued there is no need to extend the usual remedy for infringement beyond the common law as modified by s47 of the Act. In any event it appears that the shipment of 10 300 rhizomes, which form the subject matter of this

litigation, has been accounted for and dealt with as set out herein.

The question of costs presents one difficulty. Mr **Nowitz** has asked that the costs include the costs of an Anton Piller Application.

The plaintiff launched an Anton Piller Application out of this court under case number 12100/1999. Certain plant material, as also documentation, was seized by the Sheriff pursuant to the granting of the order. The documentation has been handed up in evidence as an exhibit in this file. The Anton Piller Order was confirmed without opposition and the costs of that application were reserved for determination in the present trial.

In **Sunworld International Inc v Unifruco Ltd 1998(3) SA 151 (C) at 162D-F, Van Reenen J** commented that the application had not excluded the possibility that the required information may be obtained from other sources by means of *subpoenas duces tecum*. Similarly, in this instance s24A of the Act authorises the Registrar, an officer in his department, or a person to whom he has delegated such power, to obtain a warrant issued by a judge or a magistrate to perform a number of acts such as entering and inspecting premises; obtaining delivery of books, records and documents; inspecting books, records and documents; seizing plants, propagating material and taking samples thereof. Though certain safeguards are built into the exercise of the Registrar's powers it cannot be contended that the procedure set out therein is any less effective than an Anton Piller order. It was therefore open to the plaintiff to approach the Registrar to act in terms of s24A. The basis upon which the Anton

Piller Order was sought and the necessity therefore is also open to some criticism. On the other hand, its implementation did result in some success for the plaintiff. In all the circumstances I am of the view that neither party should be saddled with the costs of that order.

In the result,

1. First defendant is ordered to pay to plaintiff damages in the sum of R10 000.00, together with interest thereon at the rate of 15,5% per annum *a tempore morae*;
2. First defendant's claim in reconvention is dismissed;
3. First defendant is ordered to pay plaintiff's costs of suit, including the qualifying expenses of expert witnesses;
4. No order as to costs is made in respect of Anton Piller Application issued under case number 12100/1999.

DESAI J