

**Weltevrede Nursery (Pty) Ltd v Keith Kirsten's (Pty) Ltd and others  
[2004] 1 All SA 181 (SCA)**

**Division:** Supreme Court of Appeal  
**Date:** 28 November 2003  
**Case No:** 515/2002  
**Before:** Harms, Streicher, Mthiyane, Conradie JJA and Southwood AJA  
**Sourced by:** PR Cronje  
**Summarised by:** MT Naidoo  
**Parallel Citation:** [2004 \(4\) SA 110](#) (SCA)

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[1] *Patents and inventions - Infringement - Plant breeders right - Plant Breeders' Rights Act 15 of 1976 - Provides for the application and registration of plant breeders rights - Court had to examine the validity of the Plaintiff's plant breeders right.*

### Editor's Summary

The Respondent, Keith Kirsten (Pty) Ltd referred to as "the Plaintiff" in the court *a quo* held a plant breeder's right certificate ("the certificate") in terms of a particular variety of plant ("tropicanna"). The Appellant, Weltevrede Nursery (Pty) Ltd "the Defendant" in the court *a quo* realised that there was an export market for it so they obtained an export order for a substantial number of the tropicanna rhizomes. The Plaintiff had become aware of this and obtained an order in terms of which the rhizomes in the Defendant's possession were attached pending infringement proceedings. In the court *a quo* the Defendant made a conditional admission to "infringement". The admission was subject to the failure of the defence of invalidity of the Plaintiff's registration and a counter-claim for the termination of the plant breeder's right. The court *a quo* gave judgment for the Plaintiff. This was an appeal against this decision.

**Held** - The Court looked primarily at the validity of the Plaintiff's plant breeder's right and examined the relevant statutory provisions. The relevant statutes were the Plant Breeders' Rights Act [15 of 1976](#) ("the Act") which was amended by the Plant Breeders' Rights Amendment Act [15 of 1996](#) ("the amending act"). The Court found that the Plaintiff's application and the grant by the Registrar both predate the 1996 amendment. The validity of the Plaintiff's rights had to be assessed under the provisions of the Act prior to the amendment. Other matters such as the content of the plant breeder's right and the permissible court orders had to be determined under the amended act. The Court held that both the court *a quo* and the Plaintiff had assumed that all the issues had to be decided under the 1996 amendment.

The Court looked at requirements prescribed by the Act in terms of a plant breeder's right.

#### *Description of new variety*

The Court held that Plant Breeder's right was granted consequent to registration and like any other intellectual property rights dependant on registration that right had to appear *ex facie* the register. The right granted must bear a relationship to the right applied for. A new variety had to be "distinct" or in the words of the amending act "it is clearly distinguishable from any other variety" and its characteristics "precisely describable". All this must appear from the register.

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The Court held that the prescribed mandatory requirement of a description of a new variety was not complied with since the application form filed with the Registrar contained no trade description of the plant.

#### *The Applicant and the Holder*

[Section 20\(2\)\(a\)](#) of the Act required the Plant Breeders Right certificate to be issued to the person who applied for it. The Court found that the certificate was issued to the Plaintiff yet the applicant for the Plant breeder's right was Morgenzon. Further, the Government Notice in which the application was advertised, indicated Morgenzon as the applicant.

#### *The Breeder*

In terms of the Act only a "breeder" could apply for a plant breeders right. The question asked by the Court was whether the Plaintiff had "developed or discovered" the plant. The Court held that multiplying and testing a plant are not the same as developing it and successfully developing a market is also not the same as developing a plant. The Court found that the Plaintiff having sent rhizomes to Morgenzon for testing and bulking purposes did not mean that the plaintiff had "developed or discovered" the plant.

#### *Novelty*

Section section 2(1)(a) of the Act provided that an application for plant breeders' rights had to be in respect of a "new" variety and a plant was deemed to have been new if it complied with the prescribed requirements found in [section 2\(2\)](#) of the Act.

The Act as amended, stated when a variety would have been deemed to have been new but in the process

matters such as common knowledge, distinctiveness, homogeneity and stability all became aspects of novelty.

The Court held that historically, patent law drew a distinction between "public knowledge" and "common knowledge". Common knowledge referred to the knowledge of the average person in that particular art. Public knowledge is knowledge that is available to the public.

The Court held that in the absence of cogent evidence to the contrary, there was sufficient evidence to establish that the plant had "otherwise come to the knowledge of the public" and that the plant was not distinctive.

The Court held that the plaintiff was not the holder of a valid plant breeder's right for the reasons given.

Appeal was upheld.

## Notes

For Patents and Inventions see

- . LAWSA Reissue (Vol 20(1), paras 55 - 102)
- . Burrell, TD *South African Patent Law and Practice* 2ed Durban Butterworths 1986

## Cases referred to in judgment

|                                                                                             |                     |
|---------------------------------------------------------------------------------------------|---------------------|
| Bendz Ltd and another v South African Lead Works Ltd <a href="#">1963 (3) SA 797</a><br>(A) | <a href="#">191</a> |
| Cointreau et Cie v Pagan International SA <a href="#">1991 (4) SA 706</a> (A)               | <a href="#">185</a> |

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|                                                                                                                                                     |                     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------|---------------------|
| Gentiruco AG v Firestone SA (Pty) Ltd <a href="#">1972 (1) SA 589</a> (A)                                                                           | <a href="#">190</a> |
| Keith Kirsten's (Pty) Ltd v Weltevrede Nursery (Pty) Ltd and another<br><a href="#">[2002] 3 All SA 624</a> ( <a href="#">2002 (4) SA 756</a> ) (C) | <a href="#">183</a> |

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## Judgment

### HARMS JA:

- [1] The plaintiff, Keith Kirsten's (Pty) Ltd, holds a plant breeder's right certificate for a particular variety of canna, named for purposes of registration "Phasion", a corruption of and pronounced as "passion". The registration certificate (PBE-ZA 961 360) was issued on 27 February

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1996 and the right is due to expire on 26 February 2011.<sup>1</sup> What makes this canna, which is marketed under the trade name "Tropicanna", special is the colour of its leaves. A trade leaflet describes them in these terms: each leaf is an exotic combination of vivid colours; new foliage emerges in rich burgundy tones, which quickly develop flamboyant stripes of red, pink, yellow and deep green fanning out from the vivid green central vein.

- [2] The variety is a commercial success and there is an export market for it. Intending to capitalise on its popularity the defendant, Weltevrede Nursery (Pty) Ltd, obtained an export order for a substantial number of Tropicanna rhizomes (root stock). To fulfil the order it had to purchase rhizomes from other nurseries. The plaintiff became aware of this and obtained an order in terms of which the rhizomes in the defendant's possession were attached pending infringement proceedings. Some of the attached rhizomes were grown and on comparison found to be the same as a Phasion plant obtained from the plaintiff. During the course of the trial the defendant admitted "infringement" conditionally - the admission was subject to the failure of its defence of invalidity of the plaintiff's registration. The defendant also counter-claimed for the termination of the plaintiff's plant breeder's right. In the event the defence and counter-claim did not succeed and the court below<sup>2</sup> gave judgment for the plaintiff in the sum of R10 000,00 which is the amount a successful plaintiff is statutorily entitled to absent proof of loss.<sup>3</sup>

### The statutory setting

- [3] The Patents Act [37 of 1952](#) provided for the registration of plant patents by including in the definition of "[invention](#)" any distinct and new variety of plant, other than a tuber propagated plant, which had been reproduced asexually ([section 1](#)). Patents for plants were abolished and replaced by plant breeders' rights in the Plant Breeders' Rights Act [22 of 1964](#) which in turn was superseded by the current Plant Breeders' Rights Act [15 of 1976](#) as amended from time to time. Some of the amendments were necessitated by international developments. There is namely an International

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Convention for the Protection of New Varieties of Plants.<sup>4</sup> The amendments to the 1976 Act effected by the

Plant Breeders' Rights Amendment Act [15 of 1996](#) are of particular importance to this case. The reason is this: the plaintiff's application and the grant by the Registrar both predate the 1996 amendment. This means that the validity of the plaintiff's rights has to be assessed under the provisions of the Act prior to the amendment. Other matters such as the content of the

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plant breeder's right and the permissible court orders have to be determined under the amended Act. This both the court below and the plaintiff failed to appreciate and both acted on the assumption that all the issues had to be decided under the 1996 amendment.

- [4] I consequently deal with the provisions of the Act as they existed before the 1996 amendment. (Many of the provisions are still the same or substantially so and the reader must not be misled by the use of the past tense to believe that what follows applies only to the pre-1996 position.) Only a "breeder" of a new variety of plant was entitled to apply for a plant breeder's right (section 6(1)) and a "breeder" was defined to mean the person who directed the breeding of the new variety, or who "developed or discovered" it ([section 1](#) sv "breeder"). An application for a plant breeder's right had to be in respect of a "new" variety and a variety was deemed to be new if it complied with the prescribed requirements (section 2(2)). [5](#) It had to be made in the prescribed manner and be accompanied by the prescribed application fee and documents (section 7(1)). The regulations prescribed a form which had to be accompanied, *inter alia*, by a description in a technical questionnaire of a typical plant of the variety concerned.
- [5] At the time of the filing of the application the applicant could also have applied for provisional protection which the Registrar had to grant if satisfied that the required information, facilities and material had been furnished (section 14(2)(a)). While a protective directive was in force, the variety was protected as if a plant breeder's right had already been granted ([section 15](#)).
- [6] The application had to be advertised (section 13(1)) and after the lapse of the opposition period the Registrar had to consider the application and establish whether or not it complied with the requirements of the Act (section 19(1)(a)). If the application, *inter alia*, conformed "to the requirements of the Act" the Registrar was obliged to issue a plant breeder's right (section 20(1)) by issuing a certificate of registration "to the person who applied for the grant of the right", the entering of certain particulars in the register, and by notice in the *Government Gazette* (section 20(2)).
- [7] On 25 July 1994, Morgenzon Estates, which is a trading name of Sapekoe (Pty) Ltd, applied as applicant for a plant breeder's right for a Canna Phasion. It stated that the "discoverer" of the plant was Keith Kirsten's (which the plaintiff argues is a reference to it, the "(Pty) Ltd" having been omitted by mistake); that no other person participated in the discovery of the variety; and that the variety had been transferred to Morgenzon by means

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of a contract. (The Act permitted a successor-in-title of the breeder to apply as "applicant" (section 6(1)(c)).)

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### Description of the new variety

- [8] A plant breeder's right is granted consequent to a registration process and like other intellectual property rights that depend on registration, the right has to appear *ex facie* the register and the right granted must bear a relationship to the right applied for. The point is well illustrated by *Cointreau et Cie v Pagan International SA* [1991 \(4\) SA 706](#) (A), a trade mark case. The registration was for a container mark which was represented on the register by means of a two-dimensional drawing. In order to establish infringement reliance was placed on a specimen of a bottle produced by the owner of the trade mark. Corbett CJ pointedly made the following remarks:

"It is clearly of great importance, both to the proprietor of the trade mark and to the general public, that the trade mark be adequately represented in the trade mark register." (At 710H.)

"Appellant's counsel was not able to cite any authority for the proposition that the Court is entitled to look at an embodiment of the trade mark in order to supplement an inadequate representation of the mark in the register. I myself know of none and the proposition appears to me to run counter to principle. It is after all the mark as registered, ie as represented in the register, which delineates the proprietor's monopoly and proclaims to the general public what the forbidden territory is. And it is the mark as registered which forms the basis of the comparison which must be made when it is alleged that someone else is using a mark which infringes the rights of the registered proprietor (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984 \(3\) SA 623](#) (A) at 640-1; *Kerly's Law of Trade Marks and Trade Names* 12th ed at 271-2). If the proprietor were entitled in infringement proceedings to add to or supplement the representation of the mark as registered, these principles would be wholly subverted and substantial inequity could arise. I am accordingly of the view that in this case the proper basis of comparison is appellant's mark as represented in the register and that it is not permissible to have regard to the container actually used by the appellant to market its goods. (At 711G-712B.)

These principles, in my judgment, apply to all registered intellectual property rights. In the case of plant breeders' rights, the rule has a close relationship with the requirement that a new variety has to be "distinct", i.e. - in the words of the amended section 2(b) - that "it is clearly distinguishable from any other variety"[6](#) and - in the words of Regulation 3(4) - its characteristics "precisely describable". All this must appear from the register.

- [9] At the beginning of this judgment reference was made to a trade description of the Phasion canna, one of the reasons being that the application form filed with the Registrar contained none. In other words, the prescribed mandatory requirement of a description of the new variety was not complied with. What was not omitted though was an application by Morgenzon for a provisional protective direction. This the Registrar granted on 23 August 1994 and he advertised Morgenzon's application

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in the *Government Gazette* of 9 December 1994. How that could have happened

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in the absence of a description of the new variety is a mystery. What happened in effect was that Morgenzon did no more than apply for the registration of the name of a new canna and that the Registrar, in substance, accepted an application for and granted interim plant breeders' rights in relation to an unidentified variety. A member of the public would not have been able to establish the scope of the interim protection and no one could have opposed the application in the absence of the description.

- [10] There is another reason why I used the trade description of Phasion. During the course of the registration process the Registrar undertook tests and trials with this variety (sections 19(2) and (3)), plants or rhizomes presumably having been provided by either the plaintiff or Morgenzon. The Registrar then entered a description of the plant in the register on a form entitled "Variety Description". What it sets out are the plant height and the leaf shape, length, width and colour. The colour is said to be, for young leaves "red with dark red stripes", for mature leaves "green with white stripes" and for flowers "orange" (no 28A). This description of the colour of the leaves, plaintiff's counsel conceded, is not a description of the Phasion leaf. Interestingly but not surprisingly, the registrations in the USA and in New Zealand of the same variety provide flamboyant descriptions which are more in line with the trade description than with the locally registered description. Nevertheless, both parties conducted the litigation without any reference to the registered description. On the incorrect premise that what was in issue was the plaintiff's commercial Tropicanna or Phasion canna and not the registered plant, the defendant admitted infringement and disputed novelty. In this respect the evidence at the trial was mostly misdirected. If one asks the wrong question one tends to receive the wrong answer.

**The applicant and the holder**

- [11] I have mentioned that the applicant for the plant breeders' right was Morgenzon. However, contrary to the provisions of section 20(2)(a), which require that the certificate should be issued to the person who had applied for it, the certificate was issued to the plaintiff. The court below thought that this was in order because, it held, Morgenzon intended the application to be that of the plaintiff and that is how the Registrar understood the position. Since no one testified on behalf of Morgenzon, I do not know how the Court could have determined what Morgenzon's intention was. How the Registrar "understood" the application cannot be a relevant consideration. The evidence of a member of the staff of the Registrar, Mr Joubert, in this regard was hardly admissible - the public is entitled to rely on the information contained in a public register and not on the personal knowledge of one or other official in that office - and is in any event disproved by his own actions. In the Government Notice in which the application was advertised, Morgenzon was indicated as the applicant. Somewhere else in the same notice is an application for another variety in the name of Mr Keith Kirsten, the then managing director of the plaintiff. Furthermore, when the Registrar granted the

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interim protection it was to Morgenzon and not to the plaintiff. Another problem with the evidence of Joubert, who is a scientist and not a lawyer, is that he was unable to distinguish between someone who acts as agent for a breeder and

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someone who applies in his own name as successor-in-title of the breeder. He was also unable to distinguish between Kirsten personally and the plaintiff - he knew that "Keith" was the applicant for these rights, he said.

**The breeder**

- [12] Was Morgenzon entitled to a plant breeders' right? It alleged in the application form that it was by virtue of a contract with "Keith Kirsten's". It is common cause that there was no such contract nor was there ever an intention to enter into such a contract. All there was before the Registrar was a letter from Kirsten, on the plaintiff's letterhead, confirming that he ("I") was the owner of Phasion and that he ("I") authorised Morgenzon to apply for a plant breeder's right. This then raises the question whether the plaintiff or Kirsten was entitled to apply for a plant breeder's right. The fact that a certificate had been granted to someone who was not entitled to it is (since the 1996 amendment) not necessarily destructive of the plant breeder's right because the right may under those circumstances be transferred to the person entitled to it (section 33(2)(h)). In answering this question I do not intend to draw a distinction between Kirsten and the plaintiff because it makes no difference to the result and I shall assume that whatever Kirsten did he did as an employee of the plaintiff (section 6(1)(b)).
- [13] As mentioned, the application form indicated that "Keith Kirsten's" was the discoverer of the Phasion variety

and that no one else participated in the discovery. This is a material allegation because in terms of the Act only a "breeder" could apply for a plant breeder's right. Did Kirsten then discover this allegedly new canna? He gave the answer: he did not. He saw the plant for the first time during 1991 in the garden of one Kruger who was a well known nurseryman in Bethal. Kruger was fully aware of the existence of the variety in his garden. Kirsten, consequently and apart from his concession that he had not discovered the variety, was not the first person to learn about something previously unknown and he did not bring it to light. As an Australian expert panel has suggested, "a person cannot normally be considered the 'discoverer' of a plant if someone else provides the particulars of its existence to that person."<sup>7</sup>

- [14] In addition, Kirsten at all times believed that Kruger discovered the plant because it was growing in his garden and he was fully aware of its existence. (There was, however, no evidence which showed that Kruger in fact discovered it; on the contrary, the evidence was that Kruger received the plant from someone else some years before.) The later events confirmed that Kirsten never believed that he had discovered the

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plant. Before the application for a plant breeder's right was filed, Kruger died and thereafter before the plant breeder's right was granted, on 7 April 1995, the plaintiff, represented by Kirsten, entered into a "Licence Agreement" with one Jan Plant. Jan Plant is in actual fact Mr Jan Harm Potgieter, the husband of a sister of Kruger, who together with his wife lived with Kruger until Kruger died. The agreement contains various strange features which caused Kirsten to give contradictory and highly unsatisfactory evidence. Apart from

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the fact that Jan Harm Potgieter's name does not appear in the agreement, he did not sign it as Jan Plant or Jan Harm Potgieter but as "Harm". Jan Plant is falsely described in the agreement as the "original, first and sole inventor of the new and distinct plant variety" being the Canna Phasion. As such he granted to the plaintiff the "exclusive worldwide licence to grow, distribute and market Canna Phasion". Although Potgieter, according to his evidence, did not want anything in respect of the exploitation of the Canna Phasion Kirsten "out of the good of (his) heart" agreed to remit a royalty of R 0.25 per plant sold, 40% of which was to be distributed to the SANA Bursary Fund and 60% to a Mrs Steinmann. Mrs Steinmann happened to be Potgieter's daughter. It does not appear from the agreement to whom the royalty had to be remitted for distribution. In the event royalties of between R10 000 and R20 000 per annum were remitted to a trust formed by Potgieter. The beneficiaries of the trust are the SANA Bursary Fund, Mrs Steinmann and Potgieter's wife. Potgieter testified that he signed the agreement "on behalf of actually my brother-in-law's agreement with Keith" which he said he was entitled to do because he thought that his wife was the heir to the movable property of Kruger and that the rights to Phasion was part of the movable property. Again the statement was false. His wife was one of many legatees of Kruger. She inherited a cash amount, the furniture and the household utensils. Jan Plant, in his capacity as "discoverer", proceeded to apply for plant breeders' rights in other countries through the offices of the plaintiff's sub-licencees and this in spite of the fact that Jan Plant and Kirsten knew, as they admitted, that he had no claim to the variety.

- [15] The plaintiff was accordingly not the discoverer of Phasion and the statement to the contrary in the application was a material misrepresentation without which the Registrar would not have granted a plant breeder's right.<sup>8</sup> Unfazed, the plaintiff submitted that it could rely on the fact that it had "developed" the Phasion canna. It will be recalled that under the Act as it then stood a person who "developed" a new variety qualified as a breeder. Assuming this to be an answer to the defendant's objection that the application was flawed, the fact is that the evidence establishes that the plaintiff did not "develop" the variety. Kruger gave Kirsten some rhizomes from the plants growing in his garden.<sup>9</sup> These Kirsten planted and once satisfied with the result he sent rhizomes to

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Morgenzon for testing and bulking purposes which Morgenzon did. This does not mean that the plaintiff or Morgenzon on its behalf "developed" the plant. It is the same plant as the one received from Kruger. Multiplying and testing a plant, plain English<sup>10</sup> and the Act make clear, are not the same as developing it (cf section 14(3)). Successfully developing a market is not the same as developing a plant.

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**Publication**

- [16] The sorry tale of corporate and administrative bungling does not end here. I have said that the Act required that the grant of a plant breeder's right must be gazetted (section 20(2)(c)). This, in context, means as soon as possible after the grant of the right, ie as soon as possible after the date of the certificate of grant, namely 27 February 1996. The Registrar did not gazette the grant until 1 February 2002 which, albeit before judgment, was after conclusion of the trial. The explanation the Registrar gave was a lack of funds within the Department. How much, one wonders, does an advertisement in the *Government Gazette* cost considering that all the applications granted in the preceding seven years were suddenly accommodated in an advertisement of no more than two pages. It does not enhance the image of a country that wishes to become a major economic force if, in spite of binding international obligations and parliamentary laws, some State department is unwilling to find or expend a minimal amount of money. It is not as if the applicants for plant breeders' rights do not have to pay for the privilege. Indignation aside, what the Registrar apparently failed

to appreciate is that the gazettement of the grant of a right has legal consequences. It serves as notice to the public of a monopoly. The public is not required to dig into the files of the Registrar to find whether or not rights have been granted. And it is no answer to the legal requirement of advertising to say, as the court below did, that the defendant was told of the registration. It is, however, unnecessary to decide whether publication was a prerequisite for the institution of action and whether matters could have been put right by late publication.

## Novelty

- [17] I have mentioned that the defendant attacked the novelty of Phasion. An application for plant breeders' rights had to be in respect of a "new" variety (section 2(1)(a)) and a plant was deemed to have been new if it complied with the prescribed requirements (section 2(2)).<sup>11</sup> Regulation 3, as amended, stated when a variety would have been deemed to have been new but in the process matters such as common knowledge, distinctiveness, homogeneity and stability all became aspects of novelty. Much evidence was led about the novelty issue. However, as I have indicated,

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the evidence failed to address the real issue namely whether the plant *as described* in the register was new; instead the plaintiff's commercial plant was used as the benchmark.

- [18] In any event, since the plaintiff was not the breeder of the plant the question of lack of novelty, in principle, could not have arisen. What the defendant attempted to prove was that the plant had been sold before the application date by Kruger from his nursery to members of the public and to Kirsten, an issue on which much time and effort was expended. Desai J, eventually, rejected the evidence of Ms Clara Kruger, the main witness in this regard. In terms of the applicable regulation (as amended) a variety was deemed to have been "new" unless, at the date of application, it had "been sold in the Republic for longer than one year" "with the agreement

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of the breeder concerned", the "breeder concerned" being the plaintiff. Sales by Kruger were, consequently, for purposes of novelty irrelevant because he was not said to be the "breeder" and according to the register he was not. The evidence of Mr Rasmussen and of Mr Rogers that they had purchased the same plant before the application date was also in this regard irrelevant. Patent law novelty and plant breeders' rights novelty are not the same.

- [19] The next question is whether Phasion was not a "new" variety because it was not  
"by reason of any important characteristic clearly distinguishable from any other variety of the same kind of plant, the existence of which is a matter of common knowledge at the time of the application . . ." (Regulation 3(1)(c)).

A variety was deemed to have been generally known for purposes of this provision:

"if the variety, at the time of the relevant application for a plant breeder's right -

- (a) was entered in an official list of varieties, or an application for such entry is under consideration;
- (b) is included in a reference collection accessible to the public;
- (c) has been precisely described in a publication which is accessible to the public; or
- (d) has otherwise come to the knowledge of the public" (reg 3(3)).

- [20] Historically, patent law drew a distinction between "public knowledge" and "common knowledge". Common knowledge refers to the knowledge of the average person in the art. It is his working knowledge or stock-in-trade. Public knowledge is knowledge that is available to the public, ie, to which the public has access. This distinction was clearly drawn in *Gentiruco AG v Firestone SA (Pty) Ltd* [1972 \(1\) SA 589](#) (A) at 654-658.

- [21] The defendant did not rely on the kind of knowledge referred to in sub-paragraphs (a), (b) or (c) but the evidence of its witnesses established that persons in the horticultural world knew of a canna with identical leaves long before the application date. Even the evidence of Mr Grey, a witness called by the plaintiff, was to the effect that the plant must have

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been available to the public before the plaintiff began marketing it. Mr Rasmussen, an 89-year old nurseryman has had it in his garden since the late 1960's. Mr AL Kruger, a relation of the late Kruger, has known it since 1969. So did the late Kruger. Mr Rogers purchased it from a nursery during the 1980's and used them for landscaping. Mrs Cywes has had the plant in her garden since the 1970's. Potgieter has known it since at least 1991.

- [22] The court below, in general terms, found this evidence unacceptable. The problem with the finding is that the court sought to find the answer to the question whether the existence of the variety "was a matter of common knowledge", without paying any regard to the deeming provision contained in Regulation 3(3). Except in relation to the evidence of Ms Clara Kruger, Desai J's findings in this regard were unjustified and the criticism unfair. For instance, Rasmussen produced a plant and testified that he had it in his nursery at Howick and Hilton since about 1969. Desai J failed to appreciate that it was common cause that this canna was identical to Phasion.

Mrs Cywes had a canna in her garden in Constantia, Cape Town, for many years before the application date. She gave rhizomes to one Henrico and Henrico sold their offspring to the defendant. These formed part of the infringing batch. Desai J nevertheless concluded that there was no proof that her plant was identical to Phasion. And one of the reasons why Rogers was rejected was because, Desai J found, he was strongly opposed to plant breeders' rights because they are a money-making scheme. But this misstates Rogers's evidence. He stated clearly that he was opposed to people obtaining plant breeders' rights for plants that are not new, a feeling shared by Parliament (when it made novelty a requirement for a valid right) and by others. There is no reason to doubt Rogers' evidence that he had bought an identical plant at Magaliesburg and that he had used it for landscaping in the Cape during the late 1980's. In the absence of cogent evidence to the contrary, this evidence was sufficient to establish that the plant had "otherwise come to the knowledge of the public"<sup>12</sup> and that the plant was not distinctive. All there is was Kirsten's evidence that he had not encountered the plant before he had seen it in Kruger's garden during 1991, and Joubert's statement that his office had not found the plant in a nursery during the registration process. This may be true but regard must be had to the fact that cannas were not in demand at the time and it was to be expected that they would not have been exhibited at nurseries among the more fashionable plants. In any event, the evidence did not refute that of the defendant.

## Conclusion

- [23] Although this judgment deals with issues that are somewhat more wide-ranging than the pleadings, the additional matters are matters of law based upon common-cause facts. Irrespective of these issues, the plaintiff's claim should have been dismissed by the court below. The plaintiff was not the holder of a valid plant breeder's right for the reasons

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given. The plaintiff has to suffer the consequence of its misrepresentations because the responsibility for the accuracy of an application for plant breeders' rights rest "fairly and squarely upon the applicant".<sup>13</sup> Unlawful administrative action cannot give rise to substantive rights.

- [24] Concerning the counterclaim<sup>14</sup> in which the defendant claimed the termination of the plaintiff's rights in respect of Phasion, the rather strange provisions of section 33(2) of the Act, as they now stand, must be considered:

"The registrar may terminate a plant breeder's right prior to the expiry of the plant breeder's right if -

- (a) any information submitted to him or her in the application for such a right or in connection with such an application, was incorrect and if such a right would not have been granted if he or she had known that the information was incorrect;

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- (b) information has come to light which, if discovered earlier, would have resulted in the plant breeder's right being refused;

(c)-(g) . . .

- (h) the plant breeder's right has been granted to a person who is not entitled thereto, unless it is transferred to the person who is entitled thereto; or

- (i) the holder of the plant breeder's right is ordered to terminate the plant breeder's right by an order of court."

- [25] What this literally means is that if a court finds that a holder's grant is void it must order the *holder* "to terminate" the right in which event the Registrar must then exercise a discretion which, in turn, may give rise to an administrative appeal (section 42). I do not accept that the section can have such a perverse meaning. It cannot mean that the Registrar would be entitled to ignore a court judgment in the exercise of an administrative discretion. In any event, on the facts of this case there is no possibility that the Registrar can exercise a discretion in favour of the plaintiff under either paragraph (a) or (b) and, as I have said earlier, there is no evidence that anyone could legally benefit from a transfer under (h).

- [26] Section 38 of the Act cannot assist the plaintiff. It provides:

"A defect in the form of any document which is in terms of any law required to be executed in a specific manner, or in a notice issued in terms of this Act, shall not render unlawful an administrative action executed in respect of the matter to which such document or notice relates, and shall not be a ground for exception to any legal procedure which may be taken in respect of such matter, if the requirements and meaning thereof are substantially and intelligibly set forth."

The defects herein found were not defects in "form" but in substance and the statutory requirements were not "substantially . set forth".

- [27] Reliance on section 36(1) also provides but cold comfort. It reads:

"The registrar may authorise -

- (a) the correction of any clerical error or error in translation appearing

- in any plant breeder's right, the application for such a right or any document filed in pursuance of such an application, or the register;
- (b) the amendment of any document for the amendment of which no express provision is made in this Act;
  - (c) the condonation or correction of any irregularity in procedure in any proceedings before him, if such condonation or correction is not detrimental to the interests of any person."

Since there are no proceedings before him, (c) has no application. Paragraph (b) is also not apposite because one cannot by means of an amendment create rights where none exist and (a) is also of no use because there is no suggestion that any of the errors (if they are indeed errors) are clerical errors. They are errors of substance. It follows that the counter-claim must also succeed.

[28] In the result the appeal is upheld with costs and the order of the court below is set aside and replaced with an order:

- (a) dismissing the plaintiff's claim;
- (b) terminating the plant breeder's right in relation to Canna Phasion PBE ZA 961360;

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- (c) that the plaintiff pay the costs of the claim and counter-claim and also the costs of the Anton Piller application 12100/99.

(Streicher, Mthiyane, Conradie JJA and Southwood AJA concurred in the judgment of Harms JA.)

For the appellant:

*AR Sholto-Douglas and MD Edmunds* instructed By *Jan S De Villiers*, Stellenbosch

For the first respondent:

*M Nowitz* instructed by *Curr Vivier Attorneys*, Cape Town

For the Second Respondent:

*Registrar of Plant Breeders' Rights c/o Department of Agriculture*, Pretoria

**Footnotes**

- 1 The certificate gives the date of expiry as 27 February 2011 but since the term is to be calculated in years from the date of the certificate, this is an error: Plant Breeders' Rights Act [15 of 1976 s 21](#).
- 2 Per Desai J. The judgment has been reported: *Keith Kirsten's (Pty) Ltd v Weltevrede Nursery (Pty) Ltd and another* [2002] 3 All SA 624 (C); [2002 \(4\) SA 756](#) (C). Desai J refused leave to appeal, which was subsequently granted by this Court.
- 3 Plant Breeders' Rights Act [15 of 1976, s 47\(1\)](#).
- 4 [www.upov.int](http://www.upov.int). It also has been the subject of amendments,
- 5 GG Notice R 2630 of 24 December 1980 (*Reg Gazette* 3116) as amended by GG Notice R 37 of 6 January 1984 (*Reg Gazette* 9024).
- 6 Reg 3(1)(c) had a similar requirement at the time.
- 7 "Clarification of Plant Breeding Issues under the Plant Breeders' Rights Act 1994": Report of the Expert Panel on Breeding, December 2002. [www.anbg.gov.au/breeders/index.html](http://www.anbg.gov.au/breeders/index.html)
- 8 The Community Plant Variety Office of the European Union reached the same conclusion in a decision (No A4) of 6 November 2003.
- 9 It is not alleged that Kruger developed the variety or that the plaintiff was the successor-in-title of Kruger.
- 10 *Encarta World English Dictionary* gives as the primary meaning of 'develop': 'to change, or to cause to change, and become larger, stronger, or more impressive, successful or advanced'. There is no other appropriate meaning which can be attached to the word in this context.
- 11 Fortunately, the Act itself now prescribes what novelty means.
- 12 Cf *Gentiruco* (*supra*) at 656A.
- 13 Cf *Bendz Ltd and another v South African Lead Works Ltd* [1963 \(3\) SA 797](#) (A) at 808F.
- 14 The defendant joined the Registrar for purposes of the counter-claim as second defendant but the Registrar abides the decision of the Court.