Not reportable

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 25427/2005

DATE: 14 SEPTEMBER 2007

In the matter between:

NATURAL CORP PROTECTION (PTY) LTD FIRST APPLICANT

ALMOND AGROCHEMICALS (PTY) LTD SECOND APPLICANT
VILLA CORP PROTECTION (PTY) LTD THIRD APPLICANT
THE REGISTRAR OF FERTILIZERS,

FARM FEEDS, AGRICULTUREL REMEDIES
AND STOCK REMEDIES FOURTH APPLICANT

and

SUMITOMO CHEMICALS COMPANY LTD FIRST RESPONDENT

PHILAGRO SOUTH AFRICA (PTY) LTD SECOND RESPONDENT

J U D G M E N T

MAKGOKA (AJ)

[1] This is an application in terms of Rule 30. The First to Third Applicants in this application, are the First to Third Respondents in the main application. The First and Second Respondents are the

First and Second applicants in the main case. For the purposes of this judgment the parties would be referred to as in the main application. In this application, the First to Third Respondents seek an order setting aside as irregular, affidavits filed on behalf of the Applicants on 1 February 2007. The Respondents further seek an order of costs against the Applicants on an attorney and client scale. The Applicants oppose the relief sought by the Respondents.

[2] **FACTUAL BACKGROUND OF THE APPLICATION.**

[2.1] The First Applicant is a Japanese company which manufactures a wide range of products, including chemical products for use in agriculture, pesticides and insect growth regulators, and supplies such products to the Second Applicant;

[2.2] The Second Applicant is a South African company and an authorised licensee of the trade marks of the First Applicant. The Second Applicant trades in various products for use in agriculture including pesticide and insect growth regulators. The Second Applicant trades in products manufactured by or with the authority of the First Applicant.

[2.3] The First to Third Respondents are South African companies and all trade in products competing with those sold by Applicants, including pesticides and insect growth regulators.

[2.4] In the main application, the Applicants seek certain interdictory relief against the Respondents. The main application is in two parts, namely the interim relief and final relief. The interim relief was sought on an urgent basis and the final relief was sought in the normal course. The Respondents opposed the application and filed answering affidavits. The application for interim relief came before Court, on a urgent basis on 20 September 2005. Botha J dismissed the application for interim relief with costs.

[2.5] It is worth mentioning at this stage that in their answering affidavits, the Respondents indicated that they were not in a position to file an answering affidavit in the main application before conducting certain tests. Thus they could only do so once samples, products and documents requested from the Applicants, had been furnished. In the application for interim relief, the Applicants did not file any replying affidavits.

[2.6] On 1 November 2005, the attorneys representing the Respondents, wrote a letter to the attorneys representing the applicants. The letter reads:

> "We persist in our view that, in order for th*at clients are able to prepare a full and proper reply to the application for a final relief, we request that you make available all the documents and\or evidence requested by our client in*

the notices served on your offices on 15 August 2005."

[2.7] In response, the Applicant's attorneys tendered the requested documents on 28 November 2005 to the Respondent's attorneys. They have never been collected. No step was taken by either party to move the matter forward until the Applicants filed the affidavits, titled "Replying" and "Confidential" respectively, which form the basis of the present application..

[3] That in brief, is the factual background of the matter.

[4] Turning to the present application. This application was preceded by a notice in terms of Rule 30(2)(b), in terms of which the Respondents gave notice that the Applicants affidavits served on 1 February 2007, represent an irregular step. The Applicants were afforded an opportunity to remove the causes of the complaint within 10 days of the date of service of the said notice. In the main, the Respondents contended that the Applicants, by filing their "Replying Affidavits" sought to supplement their founding affidavits. The evidence contained in such affidavits, it is further argued, is the type of evidence which should have been contained in the founding affidavit. The Applicants delivered an answer to the said notice.

[5] The thrust of such answer is that the Respondents, in the interim

relief sought, indicated that they wished to file an answering affidavit to the main application after conducting certain test once certain samples were furnished by the Applicants. The materials were tendered by the Applicants but were not collected by the Respondents. The Applicants further contended that the Respondents having failed to collect the samples, and having failed to file an answering affidavit in over a year's time, the Applicants had to take steps to move the matter closer to finality, hence the filing of the said affidavits.

[6] The result of the above matter is the present application. In considering this application, one must keep in mind the fact that the Court has a discretion, which discretion must be exercised judicially, on a consideration of the circumstances and what is fair to both sides. In other words, even if I come to a view that the step complained of is an irregular one, I must be satisfied that substantial prejudice would be visited upon the other party if the step is not set aside.

[7] Regard being had to the totality of the application, its background and issues involved, I am unable to agree that the filing of the affidavits complained of is irregular. Certainly, it might not be the best way to move the matter towards finality. At worst, and without expressing an opinion on this aspect, the filing of such affidavits

might be ill-conceived in the light of the order made by Botha J in the interim relief. But that is the path chosen by the Applicants. If eventually the Court in the main application for a final interdict finds that the step taken was ill-conceived or unnecessary, an appropriate cost order might be made against the Applicants. Even if I am wrong in the views expressed above, I am unable to find any or substantial prejudice to the Respondents as a result of the filing of such affidavits. During argument, I asked Ms Jansen, on behalf of the Respondent, as to what prejudice would be attendant upon the Respondents should the affidavits stand. From her answer, all I could deduct is that the Respondents are likely to incur further unnecessary inconveniences and costs in opposing what, in the view of the Respondents, is a hopeless case of the Applicant. These factors do not constitute prejudice. They are inherent hassles with which litigants before courts have to grapple with.

[8] As a result, this application cannot succeed. With regard to costs, my view is that this was not a complex application warranting employment of senior counsel. However, both parties were represented by senior counsel in the application. It would only be fair in the circumstances to allow their costs.

[9] In the premises the application is dismissed with costs, such costs to include costs attendant upon employment of two counsel.

T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT.

Date of hearing: 22 AUGUSTUS 2007

Advocate for the 1st to 3rd Respondent: M M JANSEN SC
Attorneys of 1st to 3rd Respondent: ADAMS & ADAMS
Advocate for Applicant: P GINSBURG SC
Attorneys for Applicant: BOWMAN GILFILLAN ATTORNEYS
Date of Judgment: 14 SEPTEMBER 2007