

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG, PRETORIA)

CASE NO: 3152/2013

(1)	REPORTABLE: <del>YES</del> / NO	
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO	
(3)	REVISED.	
	<u>2/9/2014</u>	<u>Es. Webber</u>
	DATE	SIGNATURE

In the matter between:

**THE SOUTH AFRICAN BOERBOEL BREEDERS' SOCIETY**

**FIRST APPLICANT**

**JOHANNES JACOBUS ERASMUS**

**SECOND APPLICANT**

**ALEX DU PLESSIS LE GRANGE**

**THIRD APPLICANT**

And

**THE REGISTRAR OF ANIMAL IMPROVEMENT**

**FIRST RESPONDENT**

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

**SECOND RESPONDENT**

**THE ELITE BOERBOEL BREEDER ASSOCIATION  
OF SOUTH AFRICA**

**THIRD RESPONDENT**

**JOHAN SWART**

**FOURTH RESPONDENT**

**BOERBOEL INTERNATIONAL**

**FIFTH RESPONDENT**

**VINCENT MARVILLE**

**SIXTH RESPONDENT**

**KENNEL UNION OF SOUTH AFRICA**

**SEVENTH RESPONDENT**

**GREG EVA**

**EIGHTH RESPONDENT**

## JUDGMENT

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### WEBSTER J,

The first applicant, the South African Boerboel Breeders' Society, was registered in terms of the provisions of section 8(7)(a)(ii) of the Animal Improvement Act No 62 of 1998 under registration number 62/98/B-68 and issued with a certificate in this regard by the "Registrar: Animal Improvement", dated 10 April, 2012.

On 25 April, 2012 the 3<sup>rd</sup> to the 8<sup>th</sup> respondents lodged an objection to the registration of the 1<sup>st</sup> applicant.

On 2 May, 2012, the 1<sup>st</sup> respondent suspended the certificate of the 1<sup>st</sup> applicant's registration and the applicant launched this application seeking the following order, viz.:

1. *Reviewing and setting aside the decision by the first respondent to suspend the registration of the first applicant as an animal breeders' society in terms of section 8(7)(a) of the Animal Improvement Act No 62 of 1998 (the Act) taken on or about 2 May 2012;*
2. *declaring the first applicant to be legally registered as an animal breeders' society in terms of the above section;*
3. *ordering the first respondent to comply with section 8(7)(c) of the Act in respect of the first applicant;*
4. *ordering the first and second respondents to pay the costs of the applicants in this application and, in the event that any one of the third to eighth respondents may oppose this application, a cost order against such respondent(s) be granted as well;*
5. *granting such further or alternative relief as the Honourable Court may deem fit."*

The case made out by the applicants, in a nutshell, is that it complied with all the necessary requirements for registration with the 1<sup>st</sup> respondent. The allegations in support of this provide detail of the various individuals and breeders associations that were involved in the formation of the applicant, their interests, their aims, the

breed and kind of animal that they sought to breed. The founding affidavit sets out fairly extensively the various meetings that were held and resolutions adopted on issues pertinent to the breed of dog they were committed to breeding. It is averred that at the Special General meeting of 5 May, 2012, of the South African Boerboel Breeders' Association attended not only local members but by breeders from "...other regions (North America, Europe and Namibia) comprising:

1. *Chris Nel*
2. *Frans Lundie*
3. *Alwyn Victor*
4. *Lood Mienie*
5. *William Fouchè*
6. *Andrè Nel*
7. *Marius Kotzè*
8. *Danie Venter*
9. *Dirk Taljaard*
10. *Andrè Nel*
11. *Andrè Basson*
12. *Patrick Nkosi*
13. *Dumi Obed Nkabinde*
14. *Johan Geldenhuys*
15. *Anemari Pretorius*
16. *Hueston Groenewaldt*
17. *Aldu Le Grange*
18. *Marileen van Wyk*
19. *Rhyno Meyer*
20. *Jakkie Erasmus*
21. *CD Erasmus*
22. *Jaco Du Plessis*
23. *Neville Comley*
24. *Johann Pottas*
25. *Lukas van Vuuren*
26. *Jacques Augustyn*
27. *Madelein Labuschagne*
28. *Dolf Carstens*

29. *Thys van Solms*
30. *Alan Pittam*
31. *Shirley & Buddy Hagler*
32. *Yvonne van Wyk*
33. *Johan van Wyk*
34. *Clint Gouws*
35. *James Allen*
36. *Alexander Bekker*
37. *Beverli Steenkamp*
38. *Karin Pieterse*
39. *Kenny van der Merwe*
40. *Koos van der Westhuizen*
41. *Doepie Du Plessis*
42. *Izak J Joubert*
43. *Pieter Janse van Rensburg*
44. *Andrè Taljaard*
45. *Wynand van Huyssteen*
46. *Mike Wiese*
47. *C van Nieuwenhuys*

*with voting rights present signed their support for the registration of the 1<sup>st</sup> applicant...".*

It is averred that the 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents in a letter on a letter-head "THE BOERBOEL BREED COUNCIL" dated 25 April 2012 (Annexure JJE9) lodged an objection to the registration of the Applicant and requested the "immediate suspension of the applicant pending an independent and in-depth investigation...".

Dealing further with Annexure "JJE9" the 1<sup>st</sup> applicant avers that "the application...to suspend the 1<sup>st</sup> applicant's registration, is devoid of any substance and does not justify any suspension or similar action by the 1<sup>st</sup> and 2<sup>nd</sup> respondents...".

The deponent to the founding affidavit avers that neither he nor the 1<sup>st</sup> applicant have ever received any official notification from the 1<sup>st</sup> respondent of any

“suspension”. They only learnt of the 1<sup>st</sup> applicant’s “suspension” “...through an internet notification of the 1<sup>st</sup> respondent to Dr Pierre van Rooyen of SA Studbook which was copied to the 3<sup>rd</sup> applicant...”.

The applicants aver that “...any complaint by the Registrar (1<sup>st</sup> respondent) or complaint raised with him, has to be lodged with the Minister to be dealt with in terms of section 22...” of the Act which provides for a specific process to be followed. It is averred that no such process was followed.

The deponent dealt further with meetings called by the 1<sup>st</sup> respondent.

It has been submitted that “...the decision by the 1<sup>st</sup> respondent to suspend the registration of the 1<sup>st</sup> applicant in terms of the Act was irregular with no foundation in law and stands to be set aside...”.

It has been submitted further that the “...1<sup>st</sup> respondent failed to allow the 1<sup>st</sup> applicant an opportunity to respond to the allegations made by other respondents that filed the objection and failed to follow a due and fair process, i.a. by failing to have any regard to the audi alterem partem...” rule and other pertinent and relevant considerations.

It was submitted that the decision to suspend the 1<sup>st</sup> applicant’s registration “...is devoid of any substance and does not justify any suspension or similar action...” by the 1<sup>st</sup> or 2<sup>nd</sup> respondents.

Criticism has been directed to the “ostensible” reasons advanced for the 1<sup>st</sup> applicant’s suspension including i.a. that “...unification was never the motivation for the Boerboel Breeders’ Council”.

In his founding affidavit JOHANNES JACOBUS ERASMUS avers that the 3<sup>rd</sup> to the 8<sup>th</sup> respondents “...would not engage on a serious discussion on the formation of one single organisation is that the third and fifth respondents have very limited support and that they were manoeuvring to keep an influence in the management of

*the breed far beyond what would be possible in a democratic structure, as allowed by their support base”.*

Erasmus emphasizes the reasons for the impediment to the formation of a unified structure.

Dealing pertinently with the “suspension” of the 1<sup>st</sup> applicant, Erasmus avers that neither the 1<sup>st</sup> applicant nor he himself ever “...received any official notification from the 1<sup>st</sup> respondent of any “suspension””.

Dealing with the issue of its suspension of a member the applicant has submitted that “...the Act prescribes that any complaint by the Registrar (1<sup>st</sup> respondent) or complaint raised with him, has to be lodged with the Minister to be dealt with in terms of section 22 of the Act which provides for a specific process to be followed. Any complaint originating from another source (e.g. another organisation) must also be processed in terms of section 22. No such process was followed.”

In an effort to settle the matter a meeting was held on 13 June, 2012: no solution could be found, however nor a proper discussion held.

According to the applicant the main issue between the applicants and the third to eighth respondents was that the representatives of SABT “...insisted on a democratically founded organization where all Boerboel breeders would be welcome to enlist as members and all members would have equal voting rights”. The 3<sup>rd</sup> and 5<sup>th</sup> respondents “...insisted on an entrenched leadership position where all the member organizations would be equally represented irrespective of its membership numbers...”.

A second meeting was held at the first respondent’s office on 14 September, 2012. “The essence of the outcome of the meeting was that a new constitution be drafted and circulated to all Boerboel breeders for comment and a Special General Meeting of all Boerboel breeders to be convened for the adoption of a new constitution”. This initiative was not embraced by some of the participants despite strong words in an effort to galvanise the parties into constructive action.

The applicant highlights the fact that “...any complaints against a registration...” must if the complaint is raised by the Registrar be lodged with the Minister to be dealt with in terms of section 22 of the Act or, if originating from another source, must be processed in terms of section 22.

The applicants aver that none of the statutory provisions that precede the exercise by the Minister to “cancel” or suspend the registration of the applicant were followed. They (the applicants) “...called upon and demand[ed] from the Registrar to comply with the requirements of section 8(7)(c) of the Act or that the Registrar lodge a complaint with the Minister in terms of section 10(3) of the Act”.

In summary, the applicants averred that (i) the registration of the 1<sup>st</sup> applicant was a *fait accompli*; (ii) the 1<sup>st</sup> respondent is compelled in law to publish the registration of the 1<sup>st</sup> applicant in the Government Gazette and to notify the Registrar of Companies; (iii) “if a valid complaint was received...the complaint must be referred to the Minister to appoint a committee to investigate the complaint”; (iv) the decision by the 1<sup>st</sup> respondent to suspend the registration of the 1<sup>st</sup> applicant was irregular “...and stands to be set aside”; (v) the 1<sup>st</sup> respondent failed to follow a fair process and to have regard to the *audi alterem partem* rule.

A supporting affidavit was filed by Alex du Plessis Le Grange, “the chairperson of the Steering Committee to lead the 1<sup>st</sup> applicant to the democratic election of the first board by the Steering Committee members”. For convenience, he will be referred to as Chairperson du Plessis.

Chairperson du Plessis confirms the contents of the Founding Affidavit, “...copies of internet documentation and e-mails” he provided the 1<sup>st</sup> applicant, the contents of paragraph 78 of the founding affidavit. He endorses the relief sought by the applicant herein.

Attorney Jacobus Tertius Delpoort likewise confirms the contents of the founding affidavit.

The answering affidavit was deposed to by Joel Mamabolo who describes himself as the “Registrar of Animal Improvement in the Department of Agriculture Forestry and Fisheries” (“the department”). For convenience, he will be referred to as Registrar Mamabolo.

Registrar Mamabolo confirms having received, in his official capacity, an application “...through Dr Pierre van Rooyen of the SA Studbook, a registering authority registered in terms of the Act...” from the applicants for the registration of the 1<sup>st</sup> applicant “...as a Breeder’s Society”, “...accompanied by the relevant documents in terms of the Act and the regulations”.

Registrar Mamabolo confirms that the application was accompanied “...by the relevant documents required in terms of the Act and the regulations”. Registrar Mamabolo avers that he (i) “...was given the impression by the SA Studbook that the 1<sup>st</sup> applicant was the only society interested in the breeding of the Boerboel and all other societies who I know to be interested in the breeding of the Boerboel had consented to the registration of the applicant as a breeders’ society”; (ii) based on the aforesaid he did not “...consult the other interested breeders’ societies in particular the 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents who I knew were interested parties in the breeding of Boerboel dogs”; (iii) he duly registered the applicant without consulting other interested breeders/societies.

Registrar Mamabolo admits having issued the 1<sup>st</sup> applicant with the registration certificate in terms of the Act. He avers further that he ought to have given notice in the Government Gazette of such registration. Before he could “...even record the registration of the applicant...” he received a letter from the 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents “...complaining about the registration of the 1<sup>st</sup> applicant”. He “...was left with no option but to suspend the certificate that I had issued to the 1<sup>st</sup> applicant until such time that a meeting with the representatives of all interested parties to be held during the first, and second week of June 2012...”. Registrar Mamabolo sets out what his intention was in suspending the registration of the certificate.



Registrar Mamabolo avers further that the applicants (i) never objected to the suspension of their certificate; (ii) "...agreed to hand over the certificate back...until the matter has been resolved between them and the respondents..."; (iii) that "...a new constitution will be drawn which will incorporate the ideas of the respondents but that the applicant's constitution shall be used as a model for such constitution...".

Registrar Mamabolo proceeds to set out that meetings with the applicants, some of the respondents and other interested parties and government officials were held with a view to reaching consensus and the drawing up of a new constitution.

The 1<sup>st</sup> respondent avers that "*since the first applicant's registration had not yet been finalised...the first applicant had not yet acquired any rights to act as an animal breeders' society and consequently the decision that is the subject of this review is not an administrative action...and is consequently not reviewable*", alternatively that the applicants have failed to exhaust the internal remedy of an appeal.

The 1<sup>st</sup> respondent avers further that the provisions of section 8(7) of the Act had not been complied with and the applicant's name had not been recorded in the register as an animal breeders' society that has been registered. Further that since "*...the registration of the applicant, which was a first registration, had not been published in the Gazette and the validity date of such registration had not been published in the Government Gazette...*" the applicant had not acquired legal status at the time of the "*...suspension of the registration certificate since the provisions of section 8(7)(b) and (c) had not yet been complied with...*" and such registration "*...has not been finalised to date...*". It is further emphasized that "*...the registration of the first applicant excluded some of the Boerboel breeders contrary to the provisions of the Act which required that there must be one breeders' society in respect of any breed*".

The 1<sup>st</sup> respondent admits that the notification of the suspension of the certificate issued to the first applicant was sent to Dr Pierre van Rooyen of Studbook as "*...he was the person who had submitted the application in his capacity of the Studbook on behalf of the first applicant*".

It was disputed that “...the provisions of section 22 of the Act are applicable in the present matter...as the complaint by the other respondents was not a complaint as envisaged in section 22 of the Act”.

In the replying affidavit referred to as the “affidavit in replication...” in reply to the answering affidavit deposed to by Joel Mamabolo, the deponent Johannes Jacobus Erasmus deals with the issues as follows regarding registration:

He avers that the Registrar is (i) obliged to consider an application that has been submitted; (ii) if he is convinced that the application may be granted, he shall register the group of persons as an animal breeders’ society and issue to the society a registration certificate (section 8(7)(a) of the Act); (iii) the Registrar is obliged to record the particulars in the register and publish the particulars in the Gazette including the date of registration which shall correspond with the date on the registration certificate (*Vide* section 8(7)(b) and (c) of the Act); (iv) the register shall be *prima facie* evidence of the registration in terms of section 6(1) but the certificate (and not the publication in the Gazette) shall be *prima facie* evidence of the registration as it is the certificate which is intended to constitute proof of registration.

It was submitted further that this interpretation is consistent with the provisions of regulation 18(1), 18(4)(a), (b), (c) and (d). It was submitted that the certificate could only have been issued upon completion of the applicant’s registration.

It was argued that there was no merit in the submission that “...until the registrar has issued a notice in the Gazette proclaiming the date on which the registration is valid...”. The decision taken by the Registrar lacks validity and is unenforceable.

In my view, there is a distinction between the validity of the decision and its existence. Put differently it is not a natural corollary that the decision can only be proved by its publication. The decision to “suspend” if indeed that was the 1<sup>st</sup> respondent’s intention the entry of the applicant’s registration was a clear infringement of the 1<sup>st</sup> applicant’s rights and the 1<sup>st</sup> respondent’s infringement cannot be sanctioned in law.

On the issue of exhausting its internal remedies the applicant conceded that section 23 of the Act as well as regulation 19 provide for internal remedies in situations where the Registrar exercises a discretion in terms of the Act. It was submitted that the applicant's registration was completed upon the issuing of the certificate and that it is subsequent actions or decisions such as the suspension of the registration, embarking on a course of negotiations after registration, failing to notify the 1<sup>st</sup> applicant of the reasons for his decision to "suspend" the applicant's registration whilst initiating, conveying and participating in the negotiations and meetings to include other breeders that the 1<sup>st</sup> respondent regarded as being eligible for registration as breeders.

It has been submitted further that in the present application the 1<sup>st</sup> applicant not only seeks the review of the 1<sup>st</sup> respondent's actions but also seeks an order compelling *i.a.* the 1<sup>st</sup> respondent to comply with his further obligations in terms of the Act and further relief.

It was submitted further that the internal remedy provided by the Animal Improvement Act is a limited remedy only dealing with decisions of 1<sup>st</sup> respondent made in execution of his duties in terms of the Act and does not provide for a remedy in actions of the 1<sup>st</sup> respondent that fall outside the remedy bestowed upon him by the Act.

It is this court's considered view that even if the applicant may be held to have failed to exhaust his internal remedies this was clearly in consequence of the introduction of this issue at the express instance of the first respondent in engaging whether directly or not the other animal breeders to remedy a situation in which many ball-players have direct or indirect interests. In any event and even if it were not for the considerations referred to, justice dictates that, given the history of the matter and its clear pre-disposition to generating and extending litigation, that this court, having the jurisdiction to deal with all the issues raised in these papers, the interests of justice will best be served if it condones, as it hereby does, any failure by the applicants to comply with whatever preliminary steps they ought to have taken in

order to properly place this matter before this court. To whatever extent that condonation may be required it is hereby granted.

**It is accordingly ordered:**

- (1) THAT the suspension by the first respondent of the first applicant's registration as an animal breeders' society in terms of the Animal Improvement Act No 62 of 1998 be and is hereby rescinded and set aside.**
- (2) THAT the first applicant is legally registered as an animal breeders' society in terms of the Act.**
- (3) THAT the first respondent comply with section 8(7)(c) of the Act.**
- (4) THAT the first and second respondents pay the costs of the application jointly and severally, the one paying, the other to be absolved.**



**G. WEBSTER**

**JUDGE IN THE HIGH COURT**

Date of Hearing	:	10 March 2014
Counsel for the Applicants	:	Adv. D.E. van Loggerenberg SC
Instructing Attorneys	:	Delpont van Niekerk Attorneys
Counsel for the 1 <sup>st</sup> and 2 <sup>nd</sup> Respondents:	:	Adv. Z.Z. Matebese
Instructing Attorneys	:	State Attorney