JUDGMENT OF THE COURT OF FIRST INSTANCE (Seventh Chamber)

19 November 2008 *

In Case T-187/06,

Ralf Schräder, residing in Lüdinghausen (Germany), represented initially by T. Leidereiter, W.-A. Schmidt and I. Memmler, and later by T. Leidereiter and W.-A. Schmidt, lawyers,

applicant,

v

Community Plant Variety Office (CPVO), represented by B. Kiewiet and M. Ekvad, acting as Agents, assisted by G. Schohe, lawyer,

defendant,

ACTION against the decision of the Board of Appeal of the CPVO of 2 May 2006 (Case A 003/2004), concerning an application for Community plant variety rights in respect of the plant variety SOMCOL 01,

* Language of the case: German.

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Seventh Chamber),

composed of N.J. Forwood (Rapporteur), President, E. Moavero Milanesi and L. Truchot, Judges,

Registrar: J. Plingers, Administrator,

having regard to the application lodged at the Registry of the Court of First Instance on 18 July 2006,

having regard to the response lodged at the Court Registry on 4 October 2006,

having regard to the reply lodged at the Court Registry on 19 December 2006,

having regard to the decision refusing leave to submit a rejoinder,

further to the hearing on 14 May 2008,

gives the following

Judgment

Legal context

1 According to Article 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), Community plant variety rights are to be granted for varieties that are distinct, uniform, stable, and new.

2 According to Article 7 of Regulation No 2100/94:

'1. A variety shall be deemed to be distinct if it is clearly distinguishable, by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.

2. The existence of another variety shall in particular be deemed to be a matter of common knowledge if on the date of application determined pursuant to Article 51:

(a) it was the object of a plant variety right or entered in an official register of plant varieties, in the Community or any State, or in any intergovernmental organisation with relevant competence;

(b) an application for the granting of a plant variety right in its respect or for its entering in such an official register was filed, provided the application has led to the granting or entering in the meantime.

The implementing rules pursuant to Article 114 may specify further cases as examples which shall be deemed to be a matter of common knowledge.'

3 According to Article 55(1) of Regulation No 2100/94, as amended, where the Community Plant Variety Office (CPVO) has not discovered any impediment to the grant of a Community plant variety right, it is to arrange for the technical examination relating to compliance with the conditions laid down in Articles 7, 8 and 9 to be carried out by the competent office or offices in at least one of the Member States (Examination Offices).

4 Under Article 56(1) of Regulation No 2100/94, unless a different manner of technical examination relating to compliance with the conditions laid down in Articles 7 to 9 has been arranged, the Examination Offices are, for the purposes of the technical examination, to grow the variety or undertake any other investigations required.

5 Under Article 61(2)(b) of Regulation No 2100/94, the CPVO is to refuse applications for a Community plant variety right if it reaches the opinion, on the basis of the examination reports pursuant to Article 57, that the conditions laid down in Articles 7, 8 and 9 have not been fulfilled.

6 According to Article 62 of Regulation No 2100/94, if the CPVO is of the opinion that the findings of the examination are sufficient to decide on the application and there are no impediments pursuant to Articles 59 and 61, it is to grant the Community plant variety right.

7 According to Article 67 of Regulation No 2100/94, decisions of the CPVO which have been taken pursuant, inter alia, to Articles 61 and 62 are subject to appeal.

8 Under Article 70 of Regulation No 2100/94:

‘1. If the body of the [CPVO] which has prepared the decision considers the appeal to be admissible and well founded, the [CPVO] shall rectify the decision. This shall not apply where the appellant is opposed by another party to the appeal proceedings.

2. If the decision is not rectified within one month after receipt of the statement of grounds for the appeal, the Office shall forthwith:

— decide whether it will take an action pursuant to Article 67(2), second sentence, and

— remit the appeal to the Board of Appeal.'

9 According to Article 76 of Regulation No 2100/94:

'In proceedings before it the [CPVO] shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55. It shall disregard facts or items of evidence which have not been submitted within the time-limit set by the [CPVO].'

Background to the dispute

10 On 7 June 2001, the applicant, Mr Ralf Schräder applied to the CPVO for a Community plant variety right pursuant to Regulation No 2100/94. That application was registered under number 2001/0905.

11 The plant variety for which the right was sought was SUMCOL 01 ('the candidate variety'), originally submitted as belonging to the species *Coleus canina, Katzenschreck*. The parties later agreed that it belonged to the species *Plectranthus ornatus*.

12 In his application, the applicant indicated that the candidate variety had already been marketed within, but not outside of, the European Union, initially in January 2001, under the name 'Verpiss dich' ('get lost'). It was the product of a cross between a plant of the species *Plectranthus ornatus* and a plant of the species *Plectranthus ssp.* (known in German as South American 'Buntnessel').

13 On 1 July 2001, the CPVO requested the Bundessortenamt (Federal Plant Variety Office, Germany) to conduct the technical examination pursuant to Article 55(1) of Regulation No 2100/94.

14 It is clear both from the file, from the statement of facts in the contested decision and from the claims of fact made in the application and not disputed by the CPVO that, during the first year of the examination procedure, the applicant's competitors opposed the grant of the right being sought. The competitors argued that the candidate variety was not a new plant variety but a wild variety originating in South Africa and which had been marketed for years in that country and in Germany.

15 The candidate variety was first compared to a reference variety provided by the Unger firm, one of the applicant's competitors, and classified by it as belonging to the species *Plectranthus comosus,* 'similar to *ornatus*'. It appeared that the two varieties were not clearly distinguishable from each other. However, Unger was unable to provide any evidence that the reference variety was already known. In its interim report, drawn up in accordance with the rules of the UPOV (International Union for the Protection of New Varieties of Plants) and dated 28 November 2002, the Bundessortenamt stated the following:

'… this year, SUMCOL 01 was not distinct from the plants from Unger, designated as *Plectranthus ornatus*. Mr Unger was unable, however, to provide any proof of the

plants' commercialisation in the market since 1998. The examination needs to be retaken in 2003.'

16 On 20 March 2002, Dr Menne, acting on behalf of Mrs Heine, the Bundessortenamt examiner responsible for the technical examination, approached Mr E. van Jaarsveld from Kirstenbosch Botanical Gardens (South Africa) with a request to provide cuttings or seeds of *Plectranthus comosus* or *Plectranthus ornatus*, which he wished to use as reference varieties. At the same time, he was asked whether varieties of this species were available on the market in South Africa.

17 In his reply of 25 March 2002, Mr van Jaarsveld stated the following:

'*Plectranthus comosus* and *P. ornatus* are grown commonly in our country. The first named is now a declared invasive weed and may no longer be sold by nurseries. There are variegated cultivars available which are often grown and I think is still legal to propagate. *P. ornatus* is still used a lot and sold by nurseries. It is now autumn and I will search for seeds of both species. As not one are [sic] indigenous locally we do not grow them here at Kirstenbosch and I will have to check the plants in peoples [sic] gardens for seed.'

18 In a letter of 15 May 2002, Mrs Miller, of the Royal Horticultural Society Garden in Wisley (United Kingdom) wrote to Mrs Heine in the following terms:

'I am afraid that we do not have seeds of *Plectranthus*. I suggest that you contact either the Botanical Society of South Africa at Kirstenbosch … or Silverhill Seeds …, Cape Town, South Africa.

The *Coleus canina* is almost certainly *Plectrantus ornatus* which has been known incorrectly as *P. comosus* in the past. I have bought some plugs of "*C. canina*" and they are more or less identical with the plants of *P. ornatus* that I have been growing for years and with a plant I received from a British nursery early last year for identification.'

19 In a letter of 16 October 2002, Mr van Jaarsveld expressed the following opinion of a photograph of the candidate variety sent to him by Mrs Heine:

'Your plant in question is definitely *P. ornatus Codd*. I know that species very well. *P. comosus* is a large shrub with very different hair leaves.'

20 On 12 December 2002, the Bundessortenamt received cuttings sent by Mr van Jaarsveld, which he said had come from his private garden. Since some of the cuttings had not survived the journey, probably because of the cold, the Bundessortenamt reproduced the survivors in order to obtain additional cuttings. The plants thus obtained were cultivated along with the plants of the SUMCOL 01 candidate variety during the examination year 2003. At the end of that examination, it appeared that the differences between the candidate variety and the plants obtained from the cuttings sent by Mr van Jaarsveld were minimal. According to an email from Mrs Heine dated 19 August 2003, the differences were 'significant' but barely visible.

21 In a letter of 7 August 2003, the CPVO informed the applicant that the Bundessortenamt had established that 'there are shortcomings in the distinctiveness of the plants from the plants being tested at the Botanical Gardens Kirstenbosch'. It is common ground between the parties that in actual fact the plants came from Mr van

Jaarsveld's private garden. The letter also stated that, according to Mrs Heine, the applicant had been unable to identify his variety SUMCOL 01 when inspecting the Bundessortenamt's test field.

22 In September 2003, the applicant submitted his comments on the results of the technical examination. On the basis, on the one hand, of the results of his fact-finding mission to South Africa, on which he embarked between 29 August and 1 September 2003 and, on the other, on the results of his visit to the botanical gardens in Meise (Belgium) on 15 September 2003 he stated that he was convinced that the plants from Mr van Jaarsveld's garden, used for the purposes of comparison, did not belong to the reference variety but to the SUMCOL 01 variety itself. Furthermore, he expressed doubts as to whether the reference variety was a matter of common knowledge.

23 The concluding report of the Bundessortenamt of 9 December 2003, drawn up in accordance with UPOV rules, was sent to the applicant for observations on 15 December 2003, with a covering letter from the CPVO. The report concludes that the candidate variety SUMCOL 01 is not distinguishable from the reference variety *P. ornatus* South Africa (van Jaarsveld).

24 The applicant submitted his final comments on that report on 3 February 2004.

25 By Decision No R 446 of 19 April 2004 ('the rejection decision'), the CPVO rejected the application for a Community plant variety right because of a lack of distinctiveness of the SUMCOL 01 variety, in accordance with Article 7 of Regulation No 2100/94.

26 With regard, more particularly, to whether the reference variety was a matter of common knowledge, the CPVO stated as follows in the rejection decision:

'During the technical examination, the SUMCOL 01 variety was not clearly distinguishable, in regard to the characteristics observed, from the reference material, *Plectranthus ornatus* from South Africa, which at the time that the application was introduced (7 June 2001), was a matter of common knowledge.

…

Mr van Jaarsveld stated that the botanical garden in Kirstenbosch concentrated on native species. *P. ornatus* is not a species native to South Africa, which explains why it is not cultivated in the botanical garden. However, the [reference] variety is on the market and is sold in nurseries in South Africa, with the result that it can be found in private gardens, such as that of Mr van Jaarsveld. Since that variety is available on the market and can be found in private gardens, it must be regarded as a matter of common knowledge.

The [CPVO] has no reason to doubt the origin of the plant material indicated by Mr van Jaarsveld.'

27 On 11 June 2004, the applicant brought an appeal before the Board of Appeal of the CPVO against the rejection decision. At the same time, he petitioned to be permitted to inspect the files in the case. The petition was granted on 25 August 2004, that is to say, five days before the expiry of the four-month time-limit for filing a written statement

setting out the grounds of appeal laid down in Article 69 of Regulation No 2100/94. The applicant none the less filed such a statement on 30 August 2004.

28 The rejection decision was not the subject of interlocutory revision under Article 70 of Regulation No 2100/94 within one month after receipt of the statement of grounds for the appeal, as provided for in that article. By letter of 30 September 2004, the CPVO informed the applicant, however, of its decision of the same day to 'defer' its decision on that point for two weeks on the ground that new investigations seemed useful.

29 On 8 October 2004, Mr van Jaarsveld provided the CPVO with the following information:

'*Plectranthus ornatus* was described in Dr L.E. Codd's "Plectranthus and allied genera in southern Africa" [Bothalia 11, 4: page 393-394 (1975)]. Dr Codd in his diagnosis states "Grows over rocks in semi-shade at altitudes of 1 000 and 1 500 m from Ethiopia to Tanzania. Cultivated and semi-naturalised in South Africa". I can thus state and confirm with Dr Codd that this plant has been in our local nursery trade for more than 30 years. By 1975 the plant had already been extensively used and traded, but under the name *P. neochilus*. *Plectranthus ornatus* is found today in gardens all over South Africa and is widespread in the horticultural trade.'

30 On 13 October 2004, the CPVO asked Mr van Jaarsveld further questions about the location and date of the cuttings sent, proof of their purchase, alternative sources of

acquisition and possible origins of the plant material from Europe, as well as the literary reference to Dr Codd's book.

31 On 15 October 2004, Mr van Jaarsveld replied as follows:

'The plants in question were not bought — it is a common clone which people all over Cape Town and RSA [Republic of South Africa] grow. The plants I sent them were from my private garden (I live and work at Kirstenbosch Botanical Gardens), I got a cutting some years back from a friends [sic] garden in Plumstead which were spread by the [horticultural] trade. We even used to grow it in our Botanical Gardens under the name *P. neochilus*, however since we found out that it is an alien we have eradicated it from Kirstenbosch Botanical Gardens as we only grow RSA plants. This clone is available from nurseries all over RSA and has been in our [horticultural] trade since the early seventies. I have been working with *Plectr.* for many years and am well acquainted with this clone; it is not grown from seed and thus all from the same genetic source, thus a single clone.

I will send you a copy of the relevant pages from Dr Codd.'

32 The CPVO also contacted the South African Ministry of Agriculture, with reference to Mr van Jaarsveld's opinion, and asked for more information about the general availability of *Plectranthus ornatus*.

33 In her reply of 2 November 2004, Mrs J. Sadie of that ministry stated the following:

'I have been in contact with another *Plectranthus* expert, Dr Gert Brits who is also a breeder.

Firstly, *Plectranthus* is one of the genera in the work field of Mr Ernst van Jaarsveld for many years; therefore he is really the expert with regard to this genus and you can believe his information.

Secondly, *Plectranthus ornatus* is a species of tropical African origin (Tanzania and Kenya). This species is very similar to the South African species, *P. neochilus*, the differences are the longer inflorescence of the latter and the rounded leaf tip of *P. ornatus*. It seems that nurseries get mixed up with the 2 species. As the nurserymen are mostly not qualified botanists, they take the word of others for identification of plants and also very few will know the fine distinction made between species like these two.

There are herbarium specimens of *P. ornatus* in the Pretoria Herbarium which were collected from a garden in 1960. Confirmation of herbarium specimens collected from naturalised and garden plants in South Africa is in the recent publication of Dr H.F. Glen, "Cultivated Plants of southern Africa — names, common names, literature", 2002, p. 326.

The publication by L.E. Codd in 1975, "*Plectranthus* (Labiateae) and allied genera in southern Africa", Bothalia 11(4): 371-442 refers to *P. ornatus* as cultivated and semi-naturalised in South Africa. This is confirmed by Andrew Hankey in his article in Plantlife No 21, September 1999, "The genus *Plectranthus* in South Africa: diagnostic characters and simple field keys", p. 8-15.

Fact is, this species originates from Africa, and if plants, even from a private garden are indistinguishable from a variety submitted for plant breeders' rights, it means that the "variety" is not unique.

… We can determine sources of production of *P. ornatus*, but that will take time. However, one reference I can give you is Rodene Wholesale Nursery in Port Elizabeth that complained about a *P. neochilus* variety being registered in the USA, but from the pictures they can't distinguish it from the standard *P. neochilus* they've been growing for about 15 years.'

34 On 10 November 2004, the CPVO decided not to rectify the rejection decision under the interlocutory revision procedure laid down in Article 70 of Regulation No 2100/94 and remitted the appeal to the Board of Appeal. The CPVO noted that the crucial question was whether the plant material of the reference variety sent to the Bundessortenamt by Mr van Jaarsveld was, as the applicant claims, material of the SUMCOL 01 variety exported from Germany to South Africa. The CPVO answered that question in the negative on the basis of the technical examination carried out by the Bundessortenamt, which revealed the existence of differences in regard to plant height, leaf width and the length of the tube of the corolla.

35 In its written answer of 8 September 2005 to a question asked by the Board of Appeal, the CPVO admitted that the change of climate and site could cause the plants to react and, as the Bundessortenamt had explained, it could not be completely excluded that the varieties which showed such minimal differences as the candidate variety and the reference variety could be of the same variety.

36 The parties presented oral argument to the Board of Appeal at the hearing on 30 September 2005. It is clear from the minutes of that hearing that Mrs Heine attended as a representative of the CPVO. She stated, inter alia, that, of the six cuttings sent by Mr van Jaarsveld, only four survived the journey. In order to exclude the possibility that the differences between the candidate variety and the reference variety were due to environmental factors, new cuttings were made and used as the reference variety. Since they were of the second generation, the differences noted should, in her view, be imputed to genotypical factors.

37 It is also clear from the minutes of the hearing that, when it ended, the Board of Appeal was not totally convinced that the reference variety was a matter of common knowledge. Without questioning the credibility and technical expertise of Mr van Jaarsveld, it considered that certain of his statements to that effect had not been sufficiently supported, with the effect that it considered it necessary for one of its members to visit South Africa as a measure of inquiry pursuant to Article 78 of Regulation No 2100/94.

38 In that regard, the minutes of the hearing states the following:

‘The Chairman closed the oral proceedings.

After taking advice in secret, the Chairman announced the following decision:

…

… the intention was to deal with the question of whether the reference variety was a matter of common knowledge by carrying out an inspection in South Africa and by gathering relevant information (Article 78 of Council Regulation (EC) No 2100/94) by C.J. Barendrecht, Member of the Board of Appeal.

Grounds:

Although the Board assumed that the notifications by email from van Jaarsveld offered no basis for doubt as to his technical expertise and credibility, the content of the certifications did, however, give grounds to suspect that van Jaarsveld had not devoted the necessary level of seriousness to the clear questions raised by the Office, as would have been asked of him by other official agencies and courts. For this reason, the Board was still not fully convinced that the plants from the garden of van Jaarsveld really were the *ornatus* that had once grown in the Botanical Gardens. A corresponding claim had not been sufficiently explained. In particular, no clarification had been given as to how *ornatus* had found its way from the Botanical Gardens to the garden of a friend or what facts could be used in support of the claim that *ornatus* from the Botanical Gardens was the same variety as that from the garden of van Jaarsveld.

The parties to the proceedings were notified (sic) in good time of the time and course of the trip, giving them time to take part. The taking of evidence was to be made conditional on the payment of a fees advance by the appellant (Article 62 of Commission Regulation (EC) No 1239/95. In the final analysis, the cost would be borne by the losing party.'

39 On 27 December 2005, the Board of Appeal ordered the measure of inquiry in question. It made implementation of that measure subject to the condition that the applicant pay a fees advance of EUR 6 000 under Article 62 of Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office (OJ 1995 L 121, p. 37).

40 In a document dated 6 January 2006, the applicant claimed that he was not required to provide evidence and had not sought the measure of inquiry which had been ordered. He pointed out that it was for the CPVO to determine distinctness within the meaning of Article 7 of Regulation No 2100/94. That was why, in his view, a 'reconnaissance trip' to South Africa could be envisaged only under Article 76 of Regulation No 2100/94. Under that provision, it was not for him to pay a fees advance.

41 By decision of 2 May 2006 (Case A 003/2004, the 'contested decision') the Board of Appeal rejected the appeal against the rejection decision. It considered, essentially, that the SUMCOL 01 variety could not be clearly distinguished from a reference variety which was a matter of common knowledge at the time that the application was made.

42 With regard to the failure to implement the order for measures of inquiry, the Board of Appeal indicated as follows at page 20 of the said decision:

'The order for evidence relating to the issue of the identity and common knowledge of the reference variety originating from the garden of van Jaarsveld was not issued because the Board, after initial doubts about the abovementioned reasons, was finally persuaded that the variety used for comparison was the reference variety and not SUMCOL 01, and that the reference variety was common knowledge on the date of application.

For this reason, the fact that the Appellant has not paid the advance fee for the taking of evidence was not a causal factor in the decision not to take evidence.'

Procedure and forms of order sought

43 By application lodged at the Registry of the Court of First Instance on 18 July 2006, the applicant brought the present action.

44 On 6 July 2007, the applicant lodged a further document in support of his argument concerning the burden of proof. That document was a letter of 3 July 2007 addressed to his lawyer and to the President of the CPVO by the International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants (Ciopora) which expressed an opinion on that question. That document was provisionally placed on the

file and a decision as to its admissibility was reserved until a later stage in the procedure. It was also notified to the CPVO, which was invited to submit its observations at the hearing.

45 After a change in the composition of the Chambers of the Court with effect from the new judicial year, the Judge-Rapporteur was assigned to the Seventh Chamber, to which the present case was, consequently, assigned.

46 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Seventh Chamber) decided to open the oral procedure.

47 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 14 May 2008. At the joint request of the parties, due to the unavailability of Mr Schohe by reason of illness, the CPVO was permitted to use English as the language of the case pursuant to Article 35(2)(b) of the Rules of Procedure of the Court of First Instance. The applicant withdrew his second and third heads of claim, and the Court took formal notice of that withdrawal at the hearing. The CPVO stated that it had no objection to account being taken of the opinion of Ciopora, mentioned in paragraph 44 above, of which formal notice was also taken in the minutes of the hearing. The Court decided to maintain the document in question on the file.

48 The applicant claims that the Court should:

— annul the contested decision;

— order CPVO to pay the costs.

49 The CPVO contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

— in the alternative, should CPVO be unsuccessful, order it to bear only its own costs, pursuant to Article 136(1) of the Rules of Procedure.

Law

50 In support of his action the applicant raises, essentially, eight pleas. The first plea, which is divided into three branches, alleges an infringement of Article 62 in conjunction with Article 7(1) and (2) of Regulation No 2100/94. The second plea alleges an infringement of Article 76 of Regulation No 2100/94. The third plea alleges an infringement of Article 75 of Regulation No 2100/94 and the 'general prohibition, in a State governed by the rule of law, on taking decisions by surprise'. The fourth plea alleges an infringement of Article 60(1) of Regulation No 1239/95. The fifth plea alleges an infringement of Article 62(1) of Regulation No 1239/95. The sixth plea alleges an infringement of Article 88 of Regulation No 2100/94. The seventh plea alleges an infringement of

Article 70(2) of Regulation No 2100/94. Finally, the eighth plea alleges an infringement of the first sentence of Article 67(2) of Regulation No 2100/94.

51 The Court will consider the first plea at the start, then the third and fifth pleas together and, finally, the second, fourth, sixth, seventh and eighth pleas.

The first plea, alleging infringement of Article 62 in conjunction with Article 7(1) and (2) of Regulation No 2100/94.

Arguments of the parties

52 The applicant claims that, under Article 62 of Regulation No 2100/94, a Community plant variety right must be granted where the findings of the examination are sufficient to decide on the application and there are no impediments pursuant to Articles 59 and 61 of the regulation. The CPVO has no discretion in that regard and the right must be granted once the conditions of substance and form are fulfilled.

53 In the present case, the CPVO misapplied that provision by wrongly considering that the conditions for the grant of a Community plant variety right were not fulfilled. Essentially, the applicant complains that the Board of Appeal based is reasoning exclusively on the information provided by Mr van Jaarsveld, which the applicant

considers to be, in part, manifestly false and, in general, contradictory, as to the origin and the extent of common knowledge of the cuttings which Mr van Jaarsveld sent and on the latter's knowledge as an expert on the *Plectranthus* species.

54 In the first branch of his plea, the applicant claims, in particular, that the CPVO infringed Article 7(1) of Regulation No 2100/94 by wrongly considering that the SUMCOL 01 variety was not distinctive within the meaning of that provision. In that context, the applicant repeated his argument, already put forward before the CPVO and its Board of Appeal, that, bearing in mind the minimal nature of the differences noted between the candidate variety and the reference variety, the latter is nothing more than the candidate variety itself. In his view, Mr van Jaarsveld did not transmit plant material of the reference variety to the Bundessortenant but of the SUMCOL 01 variety itself. Consequently, the candidate variety was not compared to a reference variety within the meaning of Article 7(1) of Regulation No 2100/94. At very least, the Bundessortenamt was not in a position to exclude that possibility, which is sufficient to establish an infringement of the provision in question.

55 In the second branch of his plea, put forward in the alternative if it were accepted that the plants sent by Mr van Jaarsveld were indeed a reference variety, the applicant claims, more specifically, that the CPVO infringed Article 7(2) of Regulation No 2100/94 by wrongly considering that the alleged reference variety was a matter of common knowledge at the time that the application was made. He claims, in particular, that Mr van Jaarsveld is wrong to state that the plants in question come from a variety which has been available 'for years in garden shops in South Africa'. The only thing which has been proved so far is the existence of an isolated plant growing in Mr van Jaarsveld's private garden.

56 In the third branch of his plea, the applicant claims, more particularly, that the errors which vitiate the substantive assessments of the Board of Appeal also led to an infringement of Article 62 of Regulation No 2100/94. In his view, the findings of the

CPVO do not justify the supposition that plants of the SUMCOL 01 variety are not clearly distinguishable from a variety whose existence was a matter of common knowledge at the date on which the application was made.

57 In that regard, the applicant adds that it was not for him to prove that a reference variety which was a matter of common knowledge did not exist and that if there was a doubt on that point, the Community plant variety right should be granted. Thus, even if it was not possible definitively to clarify the origin and identity of the plants sent by Mr van Jaarsveld, that did not, in his view, justify rejection of the application. The CPVO's conception whereby the Community plant variety must be refused in respect of the candidate variety once it is not possible to establish without the slightest doubt that it is clearly distinguishable from all other varieties which are a matter of common knowledge at the date on which the application was made is, he claims, fundamentally erroneous.

58 The CPVO contends that all three branches of the plea are unfounded.

Findings of the Court

— Preliminary considerations as to the scope of the Court's powers of judicial review

59 It is clear from the case-law of the Court of Justice that where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to limited judicial review in the course of which the Community judicature may not substitute its assessment of the

facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by the authority is not vitiated by a manifest error or misuse of powers and that it clearly did not exceed the bounds of its discretion (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 382; Case 55/75 *Balkan-Import-Export* [1976] ECR 19, paragraph 8; Case 9/82 *Øhrgaard and Delvaux* v *Commission* [1983] ECR 2379, paragraph 14; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 24 and 25; and Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 39).

60 Likewise, in so far as the administrative authority's decision is the result of complex technical appraisals, for example, in the medico-pharmacological sphere, those appraisals are in principle subject to only limited judicial review, which means that the Community Courts cannot substitute their own assessment of matters of fact for that of the administrative authority (order of the President of the Court of Justice in Case C-474/00 P(R) *Commission* v *Bruno Farmaceutici and Others* [2001] ECR I-2909, paragraph 90, and judgment in Case T-210/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 88 and the case-law cited therein).

61 However, while the Community Courts recognise that the administration has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. Not only must the Community judicature establish, in particular, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, the Community judicature must not substitute its own economic or technical assessment for that of the administration (Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 57, and *Microsoft* v *Commission*, paragraph 60 above, paragraph 89 and the case-law cited therein).

62 That case-law may be transposed to cases in which the administrative decision is the result of complex appraisals in other scientific domains, such as botany or genetics.

63 In the present case, the appraisal of the distinctive character of a plant variety in the light of the criteria laid down in Article 7(1) of Regulation No 2100/94 is of a scientific and technical complexity such as to justify a limit to the scope of judicial review.

64 Those criteria require that it be ascertained whether the candidate variety 'is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety'. As can be seen, inter alia, from UPOV document TG/1/3 of 19 April 2002, entitled 'General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonised Descriptions of New Varieties of Plants', such an appraisal requires special expertise and technical knowledge, particularly in the fields of botany and genetics (see, by analogy, Case T-179/00 *A. Menarini* v *Commission* [2002] ECR II-2879, paragraphs 44 and 45).

65 On the other hand, appraisal of whether there exists another variety which is a matter of common knowledge in accordance with the criteria laid down in Article 7(2) of Regulation 2100/94 does not require expertise or special technical knowledge and is not of a complexity such as to justify a limit to the scope of judicial review.

66 Those criteria merely require it to be ascertained, for example, whether, on the date of application for a plant variety right in respect of the candidate variety, another variety 'was the object of a plant variety right or entered in an official register of plant varieties, in the Community or any State, or in any intergovernmental organisation with relevant

competence' or whether, on the same date, 'an application for the granting of a plant variety right in its respect or for its entering in such an official register was filed, provided the application has led to the granting or entering in the meantime'.

67 The Court will consider the lawfulness of the substantive assessments made by the Board of Appeal in the contested decision under Article 7(1) and (2) and Article 62 of Regulation No 2100/94 in the light of those preliminary considerations.

— Assessments under Article 7(1) of Regulation No 2100/94

68 First of all, it should be pointed out that, like the Bundessortenamt, the Board of Appeal ruled solely by reference to the van Jaarsveld variety. Under those circumstances, and as the applicant rightly argues, there is no need to consider the argument put forward by the CPVO in its defence as to the alleged existence of two other varieties which were a matter of common knowledge and which also are not clearly distinguishable from the candidate variety. In particular, in so far as the letter from the Royal Horticultural Society Garden in Wisley, cited in paragraph 18 above, was not taken into account by the Board of Appeal, it cannot be relied upon by the CPVO in the context of the present proceedings to justify the legality of the contested decision.

69 According to the contested decision, the candidate variety SUMCOL 01 and the van Jaarsveld reference variety are not identical and therefore, contrary to the applicant's

argument, constitute two different varieties, but they are not clearly distinguishable from each other within the meaning of Article 7(1) of Regulation No 2100/94.

70 Those assessments are based on the results of the technical examination, set out in the final report of the Bundessortenamt dated 9 December 2003 (see paragraph 23 above) and on the the clarification provided at the hearing before the Board of Appeal by Mrs Heine, the Bundessortenamt examiner who carried out the technical examination (see paragraph 36 above).

71 With regard to the question whether the van Jaarsveld reference variety is in fact a different variety from the candidate variety SUMCOL 01, the final report of the Bundessortenamt shows that differences were noted between the two varieties in regard to three of the 26 criteria of comparison used for the purposes of the technical examination, in accordance with UPOV rules: namely, plant height, leaf width and the length of the tube of the corolla. In addition, at the hearing before the Board of Appeal, Mrs Heine excluded the possibility that the differences in question could be due to environmental factors. In her view, the differences were caused by genotypical factors. It necessarily follows that, according to that assessment, the candidate variety and the reference variety are not the same variety.

72 The applicant himself accepts that those differences exist but continues to attribute them to the influence of environmental factors.

73 However, given the broad margin of discretion which the CPVO enjoys in regard to complex botanical assessments, the factors referred to by the applicant in support of his

argument are not sufficient to establish that the Bundessortenamt, and, later, the CPVO and the Board of Appeal, committed a manifest error of assessment capable of leading to annulment of the contested decision.

74 First of all, the explanations, testimony and expert's reports put forward by the applicant deal in a general way with the effect which environmental factors may have on characteristics such as those identified as different by the Bundessortenamt. However, that effect is not denied by the CPVO. On the other hand, the Bundessortenamt arrived at the conclusion that, in the specific circumstances of the case, the differences noted could not be attributed to such factors but to genotypical factors. The general considerations referred to by the applicant are not sufficient to refute that specific conclusion.

75 Secondly, the applicant's claim that sufficient account was not taken of the fact that the applicant's plants and those sent by Mr van Jaarsveld had been exposed for years to different climatic conditions appears to be a mere difference of assessment between him and the CPVO. It does not establish that the latter's assessment was manifestly erroneous.

76 Thirdly, the applicant's claim that the Bundessortenamt itself was not able to exclude the possibility that all the plants cultivated in 2003 were of the SUMCOL 01 variety appears to be mistaken.

77 It is true that, in an email to the CPVO dated 20 June 2005, Mrs Heine stated the following:

'We were unable to distinguish the plants which are the subject of the application from the plants from South Africa, for which reason it could naturally be argued that all the plants originate from the plants which are the subject of the application.'

78 On the strength of that answer, the CPVO accepted, in its written reply of 8 September 2005 to a question from the Board of Appeal, that the change of climate and site could cause a reaction in the plants and that, as the Bundessortenamt explained, it could not therefore be completely excluded that varieties having differences as minimal as those between the candidate variety and the reference variety are from the same variety (see paragraph 35 above).

79 In the overall assessment of the evidence, however, particular credit should not be accorded to the abovementioned statement by Mrs Heine nor, as a consequence, to the written reply of the CPVO to the Board of Appeal which followed it. On the one hand, that declaration, contained in a hastily-drafted email almost two years after the technical examination and when the person concerned probably could not remember all the elements in the file, is contradicted by the final report of 12 December 2003, which concludes that factors exist which distinguish two varieties. Moreover, contrary to the applicant's argument, it is in no way clear from the minutes of the hearing before the Board of Appeal that Mrs Heine made the same statement at the hearing. On the contrary, it is clear from the more detailed explanations which she provided at the hearing that, in her view, the two varieties in question were genetically different (see paragraph 71 above).

80 Fourthly, the applicant's argument that he was able to distinguish clearly the SUMCOL 01 variety and the van Jaarsveld variety from the example of the *Plectranthus ornatus* species grown in the botanical garden in Meise is irrelevant inasmuch as, as the Board of

Appeal pointed out without being contradicted by the applicant, *Plectranthus ornatus* is a species with numerous varieties and it is possible that some of them are clearly distinguishable from SUMCOL 01 but others not.

81 Fifthly, the arguments put forward by the applicant to refute the thesis adopted by the Board of Appeal that on the basis of experience 'it could be excluded' that plants of the SUMCOL 01 variety could have reached Mr van Jaarsveld's private garden are unconvincing.

82 According to the applicant's own statement in the application for the Community plant variety right, marketing of SUMCOL 01 began in January 2001 in the territory of the European Union but not outside it (see paragraph 12 above). Moreover, there is no evidence of the SUMCOL 01 variety being marketed in South Africa at the time of the facts at issue. At very most, the applicant has established that a Kenyan undertaking, Florensis, had a small number of specimens at the end of 2001 for the purposes of productivity tests and that a South African undertaking, Alba-Atlantis, had shown a passing interest at the beginning of 2002 in obtaining an exclusive distribution licence for that variety in South Africa.

83 In addition, Mr van Jaarsveld was contacted by the CPVO for the first time on 20 March 2002 and, on 25 March 2002, he indicated that *Plectranthus ornatus* was grown commonly and sold by nurseries in South Africa (see paragraph 17 above). On 16 October 2002, he identified a photo of the SUMCOL 01 variety as being the variety *Plectranthus ornatus Codd* (see paragraph 19 above). Mr van Jaarsveld sent cuttings of the variety to the Bundessortenamt at the beginning of December 2002 (see paragraph 20 above). In October 2004, Mr van Jaarsveld informed the CPVO that they came from a cutting he had got 'some years back from a friends [sic] garden' and that they came from the horticultural trade (see paragraph 31 above).

84 The applicant's argument thus presupposes not merely that Mr van Jaarsveld managed to acquire seeds or cuttings of the SUMCOL 01 variety at a time when that variety was not marketed in Southern Africa and that he immediately began to cultivate them in his private garden, but also that he made untruthful statements to the CPVO concerning the origin of the cuttings he sent in December 2002, all for the sole purpose of preventing the grant of the Community plant variety right sought by the applicant. Even if it cannot be refuted categorically, such a scenario seems improbable to such a degree that it can only be rejected in the absence of supporting evidence.

85 It must be added in that regard that the applicant has produced no evidence which casts serious doubt on the credibility of Mr van Jaarsveld's statements, whereas his credibility has been confirmed by the South African Ministry of Agriculture (see paragraph 33 above). He merely mentions that Mr van Jaarsveld was in contact with 'many' competitors without, however, going so far as to 'want to accuse' him. Such insinuations are not sufficient to call into question the credibility of a witness whose technical expertise is recognised by the competent South African authorities and nothing in the file suggests that he has the slightest interest in the outcome of the present dispute.

86 Sixth and finally, the applicant's argument intended to refute the thesis adopted by the Board of Appeal that on the basis of experience 'it could be excluded' that plants of the SUMCOL 01 variety could have reached Mr van Jaarsveld's private garden is, in any event, of no consequence.

87 Even supposing that such a possibility cannot be categorically excluded, it is not sufficient to call into question the CPVO's assessment, based on the results of the technical examination, that the SUMCOL 01 variety and the van Jaarsveld variety constitute two different varieties. That assessment is sufficient in itself to justify the contested decision since any error committed by the Board of Appeal in excluding that possibility would have no effect on the legality of that decision.

88 It follows that the first part of the first plea must be rejected as unfounded.

— Assessments under Article 7(2) of Regulation No 2100/94

89 The question which the Board of Appeal regarded as crucial is whether the van Jaarsveld variety could be regarded as a matter of common knowledge within the meaning of Article 7(2) of Regulation No 2100/94 on the basis of the evidence in the file.

90 According to the contested decision:

'It is beyond dispute that *P. ornatus* is not indigenous ("alien") in South Africa. For this reason, varieties of this species are not exhibited at botanical gardens. It does not follow on from this, however, that varieties of this species are not available in South Africa. "Aliens", too, i.e. non-indigenous plants, which are good at being propagated and adaptable in foreign climes, enjoy great popularity because of their exotic nature. The Appellant had come across *P. neochilus* everywhere in South Africa, which according to his testimonies was "very similar" to SUMCOL 01. As outlined in particular by Sadie at the South African Ministry of Agriculture — also like van Jaarsveld in his communication of 8 October 2004 — the two species *P. ornatus* and *P. neochilus* are often confused because they are so alike, something which has led to the fact that *P. ornatus* is also offered for sale by untrained employees of garden centres under the name *P. neochilus*. For this reason, it cannot be ruled out that the Appellant also came across *P. ornatus*, albeit under the name *P. neochilus*. This would then coincide with the

testimonies given by van Jaarsveld and Sadie and their references (inter alia Codd, Brits, Glen) that *P. ornatus* has been in South Africa for a long time.

Sadie refers, among other things, to Pretoria Herbarium, which keeps *P. ornatus* and which obtained plants from a garden from as early as 1960. In addition, she refers to experts Dr L.E. Codd and Andrew Hankey, who both stated, in publications in 1975 and 1999 respectively, that *P. ornatus* — originally native in Ethiopia and Tanzania — was "cultivated and semi-naturalised" in South Africa.

Van Jaarsveld refers to his own many years of research and to a description by Dr L.E. Codd., according to which *P. ornatus* had been available to the public for decades in South Africa. When van Jaarsveld then declares in his email of 15 October 200[4] that the cuttings from his garden, which he sent, came from the garden of a friend in Plumstead and that such plants had once grown under the name *P. neochilus* in botanical gardens, all this says is that the cuttings sent were those of the *P. ornatus* species as cultivated in South Africa.'

91 It must be pointed out from the start that the applicant did not put forward any specific argument or evidence in support of the second branch of the plea, which challenged the assimilation by the Board of Appeal of the reference variety from Mr van Jaarsveld's garden to the South African variety of the *Plectranthus ornatus* species described in the scientific publications in question and referred to in the statements made by Mr van Jaarsveld and Mrs Sadie. In the absence of any evidence to the contrary, the Board of Appeal was justified in making such an assimilation on the basis of Mr van Jaarsveld's various statements, as it did on page 19 of the contested decision. Moreover, that assimilation already follows from the final report of the Bundessortenamt of 9 December 2003, which refers to the van Jaarsveld variety as 'the reference variety *Plectranthus ornatus* South Africa (van Jaarsveld)'.

92 Under those circumstances, the Board of Appeal was fully entitled to base itself on the factors mentioned in Paragraph 90 above and conclude that the reference variety was a matter of common knowledge.

93 With regard to Mr van Jaarsveld's statements, it must be pointed out that in his email of 25 March 2002, that is to say, at a time which was not *a priori* suspect since he had not yet had any contact with the applicant, he indicated to the Bundessortenamt that *Plectranthus ornatus* 'is still used a lot and sold by nurseries' (see paragraph 17 above). He later confirmed that statement and expanded on it on several occasions (see paragraphs 19, 29 and 31 above).

94 Moreover, contrary to the applicant's argument, the Board of Appeal did not base its reasoning solely on Mr van Jaarsveld's statements. It also based its reasoning on the information transmitted by the South African Ministry of Agriculture and on scientific literature, which confirmed Mr van Jaarsveld's statements (see paragraph 33 above).

95 In particular, Mrs Sadie, an official of the South African Ministry of Agriculture, confirmed that Mr van Jaarsveld was genuinely an expert on *Plectranthus ornatus* and that the information provided by him was reliable ('he is really the expert with regard to this genus and you can believe his information'). It is also clear from the correspondence with him that nurseries market both *Plectranthus ornatus* (the Tanzanian and the Kenyan variety) and *Plectranthus neochilus* (the South African variety), although they are often confused because of their similarity. In addition, Mrs Sadie stated that there were specimens of *Plectranthus ornatus* in the Pretoria Herbarium 'which were collected from a garden in 1960'.

96 Moreover, Mr van Jaarsveld's statements were also confirmed by the scientific literature. It is clear from the file that *Plectranthus ornatus* has been described in detail

in the works of L.E. Codd (1975), A. Hankey (1999) and H.F. Glen (2002) (see paragraph 33 above). Those authors describe the species as being 'cultivated and semi-naturalised in South Africa'.

97 It must be pointed out in that regard that, according to the terms of the UPOV rules, and contrary to the applicant's argument, the publication of a detailed description of a plant variety is one of the factors which may be taken into account in establishing whether it is a matter of common knowledge.

98 According to point 5.2.2.1, 'Common Knowledge', of UPOV document TG/1/3 of 19 April 2002, cited in paragraph 64 above, the publication of a detailed description is, inter alia, one of the aspects which should be taken into consideration in order to establish common knowledge.

99 Such a factor may also be taken into account under Article 7(2) of Regulation No 2100/94. First, that provision does not contain an exhaustive list of the factors which can establish that a reference variety is a matter of common knowledge and that is confirmed by the use of the words 'in particular'. Secondly, according to the penultimate recital in Regulation No 2100/94, the regulation takes account, in particular, of the UPOV Convention.

100 In the present case, the Board of Appeal was therefore entitled to take account of the detailed descriptions contained in the works by Codd, Hankey and Glen to establish whether the reference variety was a matter of common knowledge.

101 In the light of all those convergent factors, the few approximations or contradictions pointed out by the applicant in the successive statements made by Mr van Jaarsveld, particularly in regard to the exact origin of the cuttings he sent to the Bundessortenamt, appear to be of minor importance. It is true that those contradictions weaken Mr van Jaarsveld's testimony to a certain extent and it is understandable that the Board of Appeal decided initially to undertake measures of inquiry in order to dissipate its doubts in that regard. It is none the less true that, on the crucial question of whether the reference variety was a matter of common knowledge, Mr van Jaarsveld's statements were corroborated by the South African authorities and several scientific publications.

102 It the light of the foregoing, the second branch of the first plea must be rejected as unfounded.

— Assessments under Article 62 of Regulation No 2100/94

103 The third branch of the first plea, alleging an infringement of Article 62 of Regulation No 2100/94, is based on the premiss that the Board of Appeal was not justified in law in concluding, on the basis of the evidence which it had before it, that a reference variety existed which was a matter of common knowledge from which the candidate variety was not clearly distinguishable. The applicant considers, on the contrary, that if the CPVO had correctly taken account of the facts and, in particular, the contradictions on Mr van Jaarsveld's part, pointed out in the context of the first two branches of the plea, it should have held that the SUMCOL 01 variety was clearly distinct.

104 The Court points out first of all that the applicant's thesis that the SUMCOL 01 variety should have been recognised as clearly distinct is in apparent contradiction with the thesis he put forward under the first branch of the plea that the candidate variety SUMCOL 01 and the van Jaarsveld reference variety are one and the same variety.

105 In any event, it is clear from a consideration of the first two branches of the plea that the applicant's argument is based on an erroneous premiss.

106 Under those circumstances, the general considerations put forward by the applicant regarding the burden of proof and the CPVO's duty to examine the facts of its own motion is immaterial or irrelevant.

107 The same is true of the considerations put forward by Ciopora in its expert's report of 3 July 2007, mentioned in paragraph 44 above.

108 It follows that the third branch of the first plea must be rejected as unfounded together with the first plea in its entirety.

The third and fifth pleas, alleging, respectively, infringement of Article 75 of Regulation No 2100/94 and of the 'general prohibition, in a State governed by the rule of law, on taking decisions by surprise' and infringement of Article 62(1) of Regulation No 1239/95

Arguments of the parties

109 In his third plea, alleging an infringement of Article 75 of Regulation No 2100/94 and the 'general prohibition, in a State governed by the rule of law, on taking decisions by surprise', the applicant argues that the contested decision was adopted by surprise and is based on considerations of which he had never heard beforehand. First, the applicant considers that nothing prepared him for such a decision, in view of what took place at the hearing on 30 September 2005 before the Board of Appeal and the notification of the order of 27 December 2005 concerning the measure of inquiry. Secondly, the applicant claims that he did not have an opportunity to take a position on the considerations set out in that decision which, in his view, are supposed to justify a totally new assessment of the facts.

110 In his reply, the applicant states that the Board of Appeal could not alter its 'provisional opinion' in the course of its deliberation after adopting the order to undertake a measure of inquiry nor could it adopt the contested decision without first having heard him on that point. At that time, the Board of Appeal seemed to agree with the applicant that the evidence submitted up to that point was not sufficient to establish that the reference variety was a matter of common knowledge. In the applicant's view, the Board of Appeal should therefore have explained to him the circumstances which had led it to change its mind and give him an opportunity to submit his observations.

111 In the fifth plea, the applicant claims that, contrary to Article 62(1) of Regulation No 1239/95, the Board of Appeal made the implementation of the measure of inquiry

adopted by it subject to the condition that he pay an advance on costs even though he had neither asked for the specific evidence nor applied to have it taken.

112 The CPVO contends that the Board of Appeal did not infringe any of the provisions referred to by the applicant.

Findings of the Court

— The fifth plea

113 According to Article 62(1) of Regulation No 1239/95, entitled 'Costs of taking evidence':

'The taking of evidence may be made conditional upon deposit with the [CPVO], by the party to proceedings who requested that such evidence be taken, of a sum to be quantified by the [CPVO] by reference to an estimate of the costs.'

114 In the present case, the measure of inquiry at issue was not sought by the applicant but ordered by the Board of Appeal of its own motion.

115 The board was thus not entitled to base its reasoning on Article 62 of Regulation No 1239/95 and make implementation of the measure in question subject to the deposit of a sum by the applicant.

116 The fifth submission thus appears to be well founded inasmuch as it is intended to establish that the order providing for a measure of inquiry of 27 December 2005 is vitiated by illegality.

117 However, this plea must be rejected as ineffective in the context of an application for the annulment of the contested decision once that decision was adopted without the measure of inquiry in question having been implemented and without the Board of Appeal drawing therefrom any legal consequence which was unfavourable to the applicant.

— The third plea

118 According to Article 75 of Regulation No 2100/94:

'Decisions of the [CPVO] shall be accompanied by statements of the grounds on which they are based. They shall be based only on grounds or evidence on which the parties to proceedings have had an opportunity to present their comments orally or in writing.'

119 Contrary to the applicant's argument, the contested decision is based on such grounds and evidence, essentially, the written statements of Mr van Jaarsveld and Mrs Sadie and extracts from the works of Codd, Hankey and Glen, all of which were in the file in the administrative proceedings, to which the applicant had access and on which he could express his views both orally and in writing.

120 With regard to the fact that the Board of Appeal changed its mind regarding the need to implement the measure of inquiry decided on in the order of 27 December 2005, the applicant does not claim that the Board of Appeal was not entitled to abandon that inquiry if, in the course of its deliberation, it regarded it as no longer necessary in order to resolve the dispute. His thesis, as set out in his reply, is that the Board of Appeal could not change its assessment of that point without informing him of the circumstances which lead it to change its mind and without giving him an opportunity to submit his observations.

121 That argument cannot be accepted. Generally speaking, in so far as a measure of inquiry may be decided on of the Board of Appeal's own motion, without it being required to discuss with the parties beforehand whether the measure is appropriate or necessary, such a measure can also be deferred of the board's own motion under the same conditions if, in the course of its deliberation, the Board of Appeal makes a different assessment. Such decisions are not adopted by surprise, contrary to an alleged general principle of Community law, but are merely the exercise by the Board of Appeal of the discretion conferred on it by Article 76 of Regulation No 2100/94 to carry out an examination of the facts of its own motion by way of the means of taking evidence set out in Article 78 of the said regulation.

122 In the present case, the Board of Appeal indicated in the contested decision that it was able to overcome its initial doubts and was convinced that the reference variety was a matter of common knowledge without it being necessary to implement the measure of inquiry initially envisaged and ordered. Moreover, the grounds and evidence which justified that conviction were indicated in the decision.

123 In the final analysis, the only question that counts for the purposes of judicial review in the framework of the present plea is whether the parties were able to make their views known on the said grounds and evidence.

124 Since that was the case, as has been set out in paragraph 119 above, the third plea must be rejected as unfounded.

The second plea, alleging infringement of Article 76 of Regulation No 2100/94

125 The applicant claims that, even supposing that there was a need, in the present case, for further explanations for the purpose of dispelling doubts arising from the contradictions in Mr van Jaarsveld's statements, the CPVO should, in accordance with Article 76 of Regulation No 2100/94, have ordered a new technical examination within the meaning of Article 55 of the said regulation.

126 The CPVO replies, essentially, that the supposition on which the second plea is based is erroneous.

127 It is clear, in that regard, from consideration of the first plea that the Board of Appeal was entitled to deduce from the evidence at its disposal that the SUMCOL 01 variety could not be clearly distinguished from a reference variety which was a matter of common knowledge at the time that the application was introduced. It was thus in no way required to carry out a new technical examination.

128 Consequently, the second plea can only be rejected as unfounded.

The fourth plea, alleging infringement of Article 60(1) of Regulation No 1239/95

129 The applicant claims that, contrary to Article 60(1) of Regulation No 1239/95, Mrs Heine, the competent examiner in the Bundessortenamt, took part in the hearing alongside the CPVO, although she had not been summoned to the hearing and no decision had been adopted ordering measures of inquiry. Her statements were included in the contested decision, in the same way as those of a witness or expert and, in addition, in an incomplete fashion.

130 In that respect, the CPVO rightly contends that the presence of Mrs Heine at the hearing did not require the adoption of a measure of inquiry within the meaning of Article 60(1) of Regulation No 1239/95. It is clear from the minutes of the hearing that Mrs Heine appeared in her capacity as an agent of the CPVO and not a witness or an expert (paragraph 36 above). The statements she made were recorded in the minutes as statements made by the CPVO and not as statements made by a witness or expert. In that context, the CPVO was entitled to point out that, pursuant to Article 15(2) of Regulation No 1239/95, the acts performed by Mrs Heine pursuant to the terms of the agreement between the CPVO and the Bundessortenamt concerning the technical examination are acts of the CPVO as far as third parties are concerned.

131 For the rest, the applicant puts forward no evidence in support of his argument that Mrs Heine's statements were recorded in the contested decision in an incomplete fashion.

132 Consequently, the fourth plea must be rejected as unfounded.

The sixth plea, alleging infringement of Article 88 of Regulation No 2100/94

133 The applicant claims that the CPVO prevented him for an unacceptable length of time from consulting the pleadings, thereby rendering the exercise of his defence rights more difficult.

134 In that regard, it is clear from the file concerning the administrative procedure, transmitted to the Registry of the Court by the CPVO, that the applicant received the entire file and was placed in a position effectively to defend his point of view.

135 More particularly:

— in his action of 11 June 2004, the applicant applied under Article 88(2) of Regulation No 2100/94 and Article 84(3) of Regulation No 1239/95 for a copy of the documents concerning the request for the grant of a Community plant variety right in respect of the SUMCOL 01 variety;

— that request was reiterated by letter of 30 July 2004;

— by letter of 10 August 2004, the CPVO transmitted all the documents in its possession to the applicant;

— by fax of 17 August 2004, the applicant requested production of all additional documents concerning the correspondence between the Bundessortenamt and Mr van Jaarsveld;

— on 17 August 2004, the CPVO asked the Bundessortenamt to transmit the documents in question to it, which was done on 18 August 2004;

— by email of 18 August 2004, the CPVO transmitted the documents to the applicant;

— by fax of 18 August 2004, the applicant applied to extend by one month the time for filing the written statement setting out the grounds of appeal; he also asked for a copy of the Bundessortenamt's complete file to be sent to him;

— on 19 August 2004, the secretary of the Board of Appeal informed the applicant by telecopy that the time for filing the written statement setting out the grounds of appeal had been extended to 6 September 2004;

— by express letter of 24 August 2004, received on 25 August 2004, the CPVO transmitted to the applicant a copy of the Bundessortenamt's complete file and reminded him of the time-limit of 6 September 2004;

— the applicant filed his written statement setting out the grounds of appeal on 30 August 2004.

136 As the CPVO rightly points out, since the applicant did not take advantage of the extra time accorded to him for filing his written statement, he has not established that the late communication of the file impeded the exercise of his rights of defence at that stage.

137 In addition, the applicant could also have made his views known both at the hearing on 30 September 2005 before the Board of Appeal and in his written statement of 14 October 2005.

138 Under those circumstances, the sixth plea must be rejected as unfounded.

The seventh plea, alleging infringement of Article 70(2) of Regulation No 2100/94

139 The applicant claims that, contrary to Article 70(2) of Regulation No 2100/94, the CPVO waited two months before deciding not to rectify its rejection decision. He adds, in his reply, that the infringement in question seriously damaged his rights. Even if protection of the priority of the candidate variety was maintained pursuant to Article 95 of Regulation No 2100/94, that protection is much less extensive. A person who has submitted an application for a plant variety right does not have a right to prevent infringement comparable to that provided for in Article 94 of Regulation No 2100/94. The applicant cannot therefore prevent reproduction of the variety by other persons.

140 It is true, in that regard, that, under Article 70 of Regulation No 2100/94, entitled 'Interlocutory revision', where an appeal is brought, the body of the CPVO which has prepared the decision has one month to rectify it if it considers the appeal to be admissible and well founded. Article 70(2) provides that if the decision is not rectified within that time-limit, the CPVO is to 'remit the appeal to the Board of Appeal' forthwith.

141 In the present case, the document introducing the appeal was notified to the CPVO on 30 August 2004 (see paragraph 27 above). The body of the CPVO which prepared the decision met on 24 and 29 September 2004 for the purposes of a possible rectification of the decision in question pursuant to Article 70 of Regulation No 2100/94. On 30 September 2004, that body informed the Board of Appeal and the applicant that it had adjourned its decision on that point for two weeks so as to make further inquiries (see point 28 above). Those further inquiries consisted of asking Mr van Jaarsveld to provide additional details, which he did by email on 8 and 15 October 2004 and asking questions of the South African Ministry of Agriculture, which replied by letter of 2 November 2004 (see paragraphs 29 to 33 above). The body of the CPVO then met

again on 10 November 2004 and decided, on the basis of the outcome of the additional inquiries, not to rectify its decision and to remit the appeal forthwith to the Board of Appeal (see paragraph 34 above).

142 Even if the time-limit laid down in Article 70 of Regulation No 2100/94 was exceeded by a month and 10 days, the Court considers that that delay is justified in the light of the specific circumstances of the present case, in particular, by the need to question persons in a distant country.

143 In any event, the exceeding of that time-limit is not of such a nature as to justify the annulment of the contested decision, but, at most, the award of damages, should the applicant appear to have suffered any sort of damage.

144 In his reply, the applicant insists, in that regard, on the difference between the protection conferred on the holder by Article 95 of Regulation No 2100/94 in regard to acts prior to the grant of the Community variety right and the right conferred on the holder by Article 94 of the regulation in regard to an infringement involving the protected variety.

145 However, those considerations are wholly irrelevant in the present case, since, in the final analysis, the Community plant variety right was not granted in respect of the candidate variety.

146 Under those circumstances, the seventh plea must be rejected as unfounded.

The eighth plea, alleging infringement of the first sentence of Article 67(2) of Regulation No 2100/94

147 The applicant claims that, contrary to the first sentence of Article 67(2) of Regulation No 2100/94, his application was removed from the register of the CPVO immediately after the adoption of the rejection decision. The consequence is a considerable weakening of his legal position, as put in place by Article 95 of Regulation No 2100/94.

148 In that regard, even supposing that the application for the plant variety right was removed from the register of the CPVO immediately after the adoption of the rejection decision, contrary to the first sentence of Article 67(2) of Regulation No 2100/94, which provides that an appeal lodged against such a decision is to have suspensory effect, that illegality is extraneous to the rejection decision itself and therefore cannot affect the validity of that decision or, consequently, the validity of the contested decision.

149 As a result, the eighth plea must be rejected as irrelevant.

150 It follows from the whole of the foregoing that the action must be dismissed as unfounded.

Costs

151 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the

applicant has been unsuccessful, he must, having regard to the form of order sought by the CPVO, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Orders Mr Ralf Schräder to pay the costs.

Forwood Moavero Milanesi Truchot

Delivered in open court in Luxembourg on 19 November 2008.

[Signatures]

Table of contents