CONSTITUTIONAL COURT OF SOUTH AFRICA

Villa Crop (Pty) Limited v Bayer Intellectual Properties GmbH

CCT 237/21

Date of hearing: 26 May 2022

Date of Judgment: 08 December 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 29 November 2022 at 10h00, the Constitutional Court handed down a judgment in an application for leave to appeal against the judgment and order of the Commissioner of Patents handed down in the High Court of South Africa, Gauteng Division, Pretoria which refused the applicant, Villa Crop Protection (Pty) Limited's application to introduce a special plea.

Bayer Intellectual Property GmbH, the respondent, filed a patent on 23 July 1997 (the basic patent) in respect of spirotetramat in a number European countries. On 1 July 2003, Bayer filed an equivalent to the basic patent in South Africa on 1 July 2003 (the 2005 patent). Spirotetramat is used as an active substance in a plant protection product which is sold by Bayer in South Africa under the commercial name of "Movento". In March 2018, Bayer instituted proceedings in the Commissioner of Patents to interdict Villa Crop from infringing the basic patent by selling products containing spirotetramat. Bayer sought to protect Movento from competition against Villa Crop's product Tivoli, which also contains spirotetramat, by enforcing its monopoly in spirotetramat.

Villa Crop filed a plea and counterclaim for the revocation of the patent on the ground that it lacks novelty and inventiveness. It disputed that the patent has at all material times been valid and pleaded that it is incapable of being infringed; thus it is liable to be revoked in terms of the Patents Act 57 of 1978. Villa Crop also filed an application for leave to amend its plea. The essence of the plea was that Bayer, in advancing its action, was approaching the courts in bad faith and with unclean hands; in breach of its duty as a patentee; abusing court processes and depriving it of its right to a fair trial in terms of section 34 of the Constitution. Bayer objected to the proposed amendment on the basis that the doctrine of unclean hands would enjoin the Commissioner of Patents to determine the validity of the patent, which is impermissible because the validity of the patent is something that should be considered during the trial.

The Court had to determine whether the plea should be amended. It found that this was a complicated enquiry, which would require expert and technical evidence to explain to a court the law and process applicable in the different jurisdictions in respect of the applications for supplementary protection certificates and inevitably result in the trial being dragged out unnecessarily. Importantly, the Court held, even if it were to find that the statements made by Bayer in other jurisdictions were contradictory to the ones made before it, the main issue in dispute, namely the validity of the South African patent, would remain alive. The Court therefore held that it was not in the interests of justice to embark on such a protracted inquiry particularly as it detracts from the real issue in dispute in the action and refused to grant the amendment.

Aggrieved by this, Villa Crop sought leave to appeal to the Full Court and Supreme Court of Appeal, but the applications were dismissed on the basis that there were no reasonable prospects of success. Unhappy with the outcomes, Villa Crop now approaches the Constitutional Court.

Before the Constitutional Court, Villa Crop submitted that the Commissioner of Patents incorrectly applied the test to determine whether leave to amend should be granted. Villa Crop contended that the matter concerns the principles of honesty and the doctrine of unclean hands which requires a patentee that informed other forums that an active ingredient is disclosed in and protected by a particular patent, to not be permitted to advance litigation in a South African court, based on a later patent, in which it sought to enforce a monopoly in the same active ingredient. Therefore, the appeal should succeed.

The respondent submitted that the Constitutional Court has no jurisdiction because the matter does not raise a constitutional issue neither does it raise an arguable point of law of general public importance and as a result, leave to appeal should not be granted. The respondent also submitted that there are no reasonable prospects of success that the Court would find that the doctrine of unclean hands is applicable in the field of patent law or that it finds application on the bases of the allegations made by the applicant. The respondent finally submitted that, the applicant's argument that its section 34 right and that to a fair hearing are undermined by the Commissioner of Patent order, is baseless because the applicant has had access to court as evidenced by its application to amend its pleadings before the Constitutional Court. Therefore, the respondent contended that the appeal should be dismissed.

The first judgment was penned by Mathopo J (Mlambo AJ and Tshiqi J concurring). The question that had to be answered, insofar as the first judgment was concerned, was whether Villa Crop's application to amend particulars of claim in order to introduce a doctrine of unclean hands in patent law should be granted. In so doing, the first judgment considered whether the matter raised a constitutional issue, and if so, whether it was in the interests of justice to grant leave to appeal. With regards to the constitutional issue, the first judgment held that on the facts of this case, there was no basis to suggest that the refusal of an amendment unjustifiably limited Villa Crop's rights of access to courts in terms of section 34. This was so based on the Court's judgment in *NVM obo VKM v Tembisa Hospital* [where the majority held that "[t]o a greater or lesser extent, the rights guaranteed in the Bill of Rights cover the whole field of human existence. Almost any case could be framed as touching on one or other fundamental right. This is not enough to make the case a constitutional matter". The first judgment further considered whether this matter raises an arguable point of law of general public importance. In that regard, Mathopo J held that that the issues implicated in this matter are too narrow and do not implicate the interests of the public. The reason being that the crisp issue is whether the Commissioner of Patents correctly dismissed the application for amendment. Villa Crop's contention was that the court *a quo* incorrectly applied the test relating to amendments of pleading, therefore the Court's jurisdiction is engaged.

Mathopo J held that the material flaw in the judgment of the Court of Patents is that, save for the superficial and fleeting references to cases dealing with amendments, no proper engagement with the principles can be discerned. He further held that the Commissioner only focussed on the interests of justice criteria and refused to exercise her discretion in favour of Villa Crop and that relying on the interests of justice alone is not enough. The first judgment held that, as a result, the Commissioner of Patents misapplied the legal test related to amendments. Relying on this Court's decisions in *Mankayi, University of Johannesburg, Booysens* where it was held that it does not "entertain appeals that seek to challenge only factual findings or incorrect application of the law by the lower courts", the first judgment held that Villa Crop fails on this ground of jurisdiction too.

Mathopo J held that even if the matter did raise a constitutional issue or an arguable point of law, leave to appeal could nevertheless be refused if it was not in the interests of justice for the Court to hear the appeal. The first judgment held that the matter did not bear reasonable prospects of success. The reason being that the patent system is capable of dealing with the misrepresentation of the kind advanced by Villa Crop and there is accordingly no need to import or introduce the doctrine into our Patents Law even if it were to be done under the realm of section 65(4). The first judgment, thus, held that it was thus not in the interests of justice to grant leave to appeal.

The second judgment penned by Unterhalter AJ (Kollapen J, Majiedt J, Madlanga J, Mhlantla J and Theron J concurring), disagreed with the first judgment and held that this matter does indeed engage this Court's jurisdiction.

The second judgment first considered the question of jurisdiction and whether the Court of Patents made an error of law or simply misapplied the law. The second judgment disagreed with the first judgment that the Court of Patent's error merely amounted to a misapplication of the law. The second judgment found that the Commissioner of Patents, having cited the well-known principles relevant to an application to amend, then pronounced and adopted an entirely different and incorrect standard: the interests of justice. Having found this, the second judgment held that the adoption of an incorrect legal standard to decide an application to amend is to make an error of law. This engages this Court's jurisdiction.

The second judgment cautioned that the holding in *Affordable Medicines Trust v Minister of Health* did not serve as an invitation to elevate the interests of justice as the ultimate criterion by reference to which discretionary judicial power is to be exercised. It held that, if replicated, the test applied by the Commissioner of Patents would damage the rights of litigants to access the courts, and thereby damage a central tenet of our system of justice. Accordingly, the second judgment found that the matter engaged this Court's jurisdiction.

The second judgment then considered whether the matter raised an arguable point of law of general public importance. It found that the first judgment had failed to recognise the frailties of the contentions of the respondent. According to the second judgment, the respondent's premise, that the applicant's proposed amendment could only be determined by recourse to the Patents Act, failed to appreciate the true juridical nature of the power enjoyed by the courts to prevent an abuse of process, of which the doctrine of unclean hands, invoked by the applicant, is a species. It found that the unclean hands doctrine referenced an abuse of process where the behaviour of the litigant may be so tainted with turpitude that the court will not entertain the litigant's case. In such a case, the court protects its process and the court does so, even though the litigant claims a right that it would vindicate in the court proceedings.

The second judgment also considered the respondent's central contention that the proposed special plea is a novel ground of revocation. It disagreed with this proposition because the applicant's

claim of abuse was not that the 2005 patent is invalid, but that the respondent came to Court tainted with turpitude by reason of its misrepresentations. It then followed that the respondent's objection to the proposed special plea was aimed at the wrong target. The second judgment found that the invocation of the unclean hands doctrine is a claim as to whether the respondent is a litigant the courts should hear. It is not a claim as to whether the respondent's patent is valid. Thus, so it was held by the second judgment, the amendment sought by the applicant to introduce the special plea does raise an arguable point of law of general public importance which engages this Court's jurisdiction.

When considering whether it was in the interests of justice to grant leave to appeal, the second judgment again disagreed with the first judgment.

First, it disagreed that the applicant's invocation of the unclean hands doctrine was redundant because section 61(1)(g) of the Patents Act was already pleaded by the applicant. The second judgment held that the statutory ground of revocation provided for in section 61(1)(g) of the Patents Act was not the cause of action that the applicant sought to advance in its proposed special plea. It held that section 61(1)(g) was a statutory ground for revocation, whereas the proposed special plea invoked the power of the courts to prevent abuse of process. The second judgment found the approach by the first judgment to be problematic. According to the second judgment, if the invocation of the unclean hands doctrine in the special plea was simply redundant because it had already been raised in the plea, that would not be a valid reason to refuse an amendment. According to the second judgment, pleadings are often replete with repetitive averments, but that does not render a pleading excipiable, nor, on that basis, does it establish a reason to resist an amendment. The second judgment found that the finding of redundancy by the second judgment left unexplained the first judgment's definitive holding that the proposed special plea had no merit.

The second judgment further disagreed with the first judgment's finding that the Commissioner of Patent's decision entailed a finding on the facts. It found that the Commissioner of Patent's decision entailed no findings on fact and thus the application for leave to appeal raised no challenge on questions of fact. The merits of the application for leave to appeal before this Court concerned the proper application of the correct test for the grant or refusal of an amendment sought to the pleadings. That is not a matter that concerns disputes of fact. The second judgment disagreed with the first judgment that the interests of justice are not served by entertaining this appeal.

The second judgment then considered the merits of the matter. It found that the principles governing the grant or refusal of an amendment were restated in *Affordable Medicines.* They require no further elaboration. The second judgment reiterated that in terms of the well-established test, an amendment should be allowed unless it is brought in bad faith, or unless the amendment would cause an injustice to the respondent that cannot be cured by an appropriate order for costs.

The second judgment found that the Commissioner of Patents relied upon a number of considerations that were irrelevant. That the introduction of a defence will likely require technical and expert evidence is not a reason to refuse the grant of an amendment. The second judgment found that the Commissioner of Patents considered that the interests of justice would not be served by embarking upon the protracted enquiry entailed by the proposed special plea because it would detract "from the real issue in dispute in the action", that is, the alleged lack of novelty of the 2005 patent. This, too, was not a basis upon which an amendment may be refused.

According to the second judgment, the invocation of the unclean hands doctrine is not reducible to the statutory claim of revocation. It is a distinct cause of action, and there is no reason why it should not have application when a litigant comes to court to vindicate rights under the Patents Act.

The second judgment found that the proposed special plea was not excipiable on the grounds advanced by the respondent. Whether the averments made in the special plea would, if proven, ultimately persuade a court to non-suit the respondent was not a question for this Court to determine in deciding whether to grant the amendment sought.

In the result the second judgment found that the Commissioner of Patents erred in refusing the amendment sought. The second judgment granted leave to appeal; upheld the appeal with costs, including the costs of two counsel; set aside the order of the Commissioner of Patents, and in its place granted the applicant leave to amend by the introduction of its “special plea in limine”.