CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 237/21

In the matter between:

VILLA CROP PROTECTION (PTY) LIMITED Applicant

and

BAYER INTELLECTUAL PROPERTY GmbH Respondent

Neutral citation:	*Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgments:	Mathopo J (minority): [1] to [53] Unterhalter AJ (majority): [54] to [93]
Heard on:	26 May 2022
Decided on:	8 December 2022
Summary:	Amendment of Pleadings — misapplication of applicable test — application of incorrect test —introduction of the special plea of unclean hands — section 61(1)(g) of the Patents Act

---

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. The application for leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the Commissioner of Patents is set aside and in its place Villa Crop is granted leave to amend by the introduction of its "special plea in limine".

JUDGMENT

MATHOPO J (Mlambo AJ and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and order of the Court of the Commissioner of Patents in the High Court of South Africa, Gauteng Division, Pretoria (Court of Patents). It relates to an order granted by that Court refusing the applicant, Villa Crop Protection (Pty) Ltd (Villa Crop), leave to amend its plea in patent infringement proceedings instituted by the respondent, Bayer Intellectual Property GmbH (Bayer) as the plaintiff, against Villa Crop as the defendant.

[2] At the heart of this application is whether the Court of Patents correctly exercised its discretion when it refused Villa Crop leave to amend its particulars of claim when it sought to introduce a special common law defence of unclean hands.[1] Villa Crop contends that in breach of its duty as a patentee, Bayer made statements in

[1] The doctrine of unclean hands concerns the honesty of a party's conduct. It holds that where a party seeks to advance a claim that was obtained dishonestly or mala fide, that party should be precluded from persisting and enforcing such a claim.

European countries (ECs) that are in direct contradiction to the case advanced in the infringement proceedings.

Background

[3] Bayer is a registered proprietor of a South African patent number 2005/00230, (2005 patent) in respect of a chemical substance referred to as spirotetramat, an active ingredient in a plant protection product sold by it in South Africa under the commercial name of Movento.[2] Villa Crop is a proprietor of a product named Tivoli 240 SC (Tivoli). Movento competes with Villa Crop's Tivoli which also contains spirotetramat. Spirotetramat is a chemical compound formed by different elements that bond together in a fixed ratio relative to each other. The ratio of the elements relative to each other is usually expressed by a chemical formula. The connectivity of atoms of the various elements in a substance is usually depicted by a structural formula that can be represented in more ways than one.[3]

[4] Bayer instituted infringement proceedings in the Court of Patents seeking protection for its compound spirotetramat. In those proceedings, Bayer sought to protect Movento from competition against Villa Crop's product, Tivoli. Bayer alleged that it had suffered damages as a result of the infringement of its patent by Villa Crop.

[5] Villa Crop disputed the validity of the 2005 patent and was adamant that it could not be infringed. Villa Crop claimed that the patent is liable to be revoked in terms of

[2] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2020] ZACCP 1 at para 3 (High Court judgment).

[3] Id at para 4.

sections 61(1)(c),[4] 25(1),[5] (6)[6] and (7)[7] of the Patents Act[8] in that the invention by Bayer is not new because it formed part of the state of the art immediately before the priority date of the invention and that the patentee (Bayer) knew, alternatively, reasonably ought to have known that the patent is not new.[9]

[6] In support of the allegation that Bayer knew or ought to have reasonably known at the time that the statements or representations were false, Villa Crop made reference to European patent number O 915 846 (the basic patent). It also made reference to the fact that Bayer had, shortly after the making of the declaration, applied for the relevant regulatory approval in various ECs permitting the commercial product containing spirotetramat to enter the market.

[7] Villa Crop submitted that the chemical composition, chemical structure and geometry of the compound disclosed in the South African patent number 1997/06915 (referred to as *Lieb et al*) is exactly the same as the chemical composition, structure and geometry of the compound spirotetramat and is equivalent to the basic patent. As a result, Villa Crop claimed an order revoking the 2005 patent.

---

[4] Section 61(1) provides that any person may at any time apply, in the prescribed manner, for the revocation of a patent on any of the specifically listed grounds therein. One of the listed grounds for revocation is that the invention concerned is not patentable under section 25.

[5] Section 25(1) provides that "[a] patent may, subject to the provision of this section, be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture".

[6] Section 25(6) states that "[t]he state of the art shall comprise all matter (whether a product, a process, information about either, or anything else) which has been made available to the public (whether in the Republic or elsewhere) by written or oral description, by use or in any other way".

[7] Section 26(7) provides that "[t]he state of the art shall also comprise matter contained in an application, open to public inspection, for a patent, notwithstanding that that application was lodged at the patent office and became open to public inspection on or after the priority date of the relevant invention, if—

(a) that matter was contained in that application both as lodged and as open to public inspection; and

(b) the priority date of that matter is earlier than that of the invention."

[8] 57 of 1978.

[9] High Court judgment above n 2 at para 5.

Litigation history

Application for leave to amend in the Court of Patents

[8] Following the filing of their plea and counterclaim for revocation, Villa Crop filed an application for leave to amend its particulars. Villa Crop sought to introduce a special plea based on the principle of unclean hands and abuse of process by Bayer of its duty of good faith as a patentee.

[9] Pruned to its essentials, the special plea amounted to this:

(a) When Bayer applied for a Supplementary Protection Certificate (SPC) in relation to spirotetramat, it made certain representations during the proceedings in the ECs which demonstrate that spirotetramat has been in the public domain since 1997. This means that it had been described and disclosed well before the priority date of the 2005 patent. If this is so, based on these representations, it can never be said that Bayer's 2005 patent was a novel disclosure. It is on this basis that Villa Crop argued that Bayer should not be permitted to advance an evidently dishonest case.

(b) Villa Crop argued that Bayer cannot contend in the infringement proceedings that spirotetramat had not been disclosed before. This, according to Villa Crop, constitutes an abuse of the South African patent system and court processes.

[10] In essence, the special plea sought to have the action dismissed. In response, Bayer objected to the proposed amendment on the following grounds:

(a) The special plea would enjoin the court to determine the validity of the patent, an issue which can only be determined after a finding has been made that Bayer's 2005 patent lacked novelty.

(b) The proposed special plea is founded on allegations concerning facts and circumstances relating to patent laws and procedures of foreign jurisdictions, dating back to eight years after the priority date of the

patent. The facts and circumstances are irrelevant to the validity of the patent.

(c) The amendment sought is not *bona fide* but an abuse of process calculated to delay the hearing of the trial causing prejudice to Bayer.

[11] The Court of Patents declined the proposed amendment. It took the view that on Villa Crop's approach, the Court would be required to make a factual comparison of what was disclosed in ECs regarding spirotetramat compared with what Bayer was advancing in the current proceedings. It reasoned that—

> "for this exercise to yield a reliable and accurate finding a court will be required to undertake an in-depth enquiry into the manner in which each of the various foreign jurisdictions deal with SPC applications in accordance with, not only the sovereign patent laws applicable in each jurisdiction, but in accordance with commercial and other policy considerations of an applicant for a patent."[10]

[12] The Court of Patents declined to exercise its discretion in favour of Villa Crop. To this end, it relied on the reasoning of this Court in *Affordable Medicines*[11] which held:

> "The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in *Commercial Union Assurance Co Ltd v Waymark N.O*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is *mala fide* (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?"[12]

[10] High Court judgment above n 2 at para 28.

[11] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[12] Id at para 9.

[13] The Court of Patents concluded that it would not be in the interests of justice to embark upon a protracted enquiry particularly since the main issue between the parties, namely: the validity of the South African patent was still a live issue and thus left the question of unclean hands open. It expressed itself as follows:

> "This is a complicated enquiry and would, in my view 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 SPCs. This will, in my view, inevitably result in the trial to be dragged out unnecessarily. Even if such a conclusion is reached, the main issue in dispute, namely the validity of the South African patent, will remain alive. The validity of the 2005 patent is not for Bayer to prove, it is for Villa Crop to do so."[13]

[14] Dissatisfied with the outcome, Villa Crop unsuccessfully applied for leave to appeal to the Court of Patents. A further appeal to the Supreme Court of Appeal suffered the same fate. So did its subsequent application for reconsideration before the President of the Supreme Court of Appeal. Villa Crop now approaches this Court for leave to appeal.

In this Court

Applicant's submissions

[15] Before us, Villa Crop principally bases its argument on three grounds. It contends that the Court of Patents incorrectly applied the test to determine whether leave to amend should be granted. It argues that the provisions of rule 28 of the Uniform Rules of Court which provides that amendments should generally be allowed unless good cause is shown, were not properly considered. To this end, it submits that the question whether the Court of Patents erred in refusing its application for leave to amend engages the jurisdiction of this Court in terms of section 167(3)(b) of the Constitution. Villa Crop maintains this is so because the refusal by the Court of

[13] High Court judgment above n 2 at para 29.

Patents is connected to its right of access to courts as enshrined under section 34 of the Constitution. It specifically contends that its right to a fair hearing including a right to raise issues of honesty and integrity in the application for and maintenance of a patent as well as in patent litigation, are matters of public interest.

[16] Villa Crop argues that the Court of Patents unjustifiably limited its right by refusing leave to amend and in so doing denied it the opportunity to raise a separate self-standing common law defence of unclean hands. In a nutshell, Villa Crop says it would suffer injustice if barred from raising the special defence. In support of its proposition, it relied on the remarks by Khampepe J in *Ascendis*[14] to the effect that:

> "It is well-established that *res judicata* implicates the rights contained in section 34. However, the High Court, as will become evident later, extended the application of *res judicata* and as a result, adversely affected the right by denying the applicant an opportunity to raise a defence, which potentially taints the fairness element of the hearing. This *prima facie* extension of *res judicata* interferes with the applicant's constitutional right to have the merits of the separate, undecided causes of action heard in Court and thus gives this Court jurisdiction to decide the matter."[15]

[17] Villa Crop also submits that the matter raises arguable points of law of general public importance. It states that the effect of granting it leave to amend would go beyond the interests of the parties in the matter. In this regard, it maintains that this Court would be sending a strong message to all patent holders that they cannot approach courts to enforce patent rights if those rights were obtained dishonestly. This it states, is important because the South African patent system does not have a system of assessing the validity of patents upon application.

[18] Asserting its right to introduce the special defence, Villa Crop also contends that when Bayer applied for the SPC in ECs, it represented that spirotetramat was protected

[14] *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC).

[15] Id at para 32.

by its basic patent. However, in the main action in South Africa, Bayer presented spirotetramat as a novel invention in its 2005 patent. Villa Crop submits that this is contradictory as spirotetramat could not have been a novel invention when Bayer filed its 2005 patent. Consequently, Villa Crop argues that the special plea of unclean hands is directed towards misrepresentations made by Bayer and if found that there was dishonesty or *mala fide* conduct, Bayer should be barred from pursuing the action against it. It called in aid *Deton.*[16]

[19] Lastly, Villa Crop submits that the doctrine of unclean hands is part of our common law, and it is in the interests of justice that it be granted leave to amend. Supporting its argument, it relied on *Zyp Products*[17] and *Tullen Industries*[18] where the courts emphasised that dishonesty must be proven by the party alleging it, in order to rely on the doctrine. It also argues that the special plea of unclean hands is potentially dispositive of the trial and in the event of it being successful, it would save the courts valuable time and resources.

Respondent's submissions

[20] Bayer submits that the matter does not raise a constitutional issue and nor does it raise an arguable point of law of general public importance and as a result, leave to appeal should not be granted. It also contends that it is not in the interests of justice for leave to appeal to be granted. In response to Villa Crop's submissions that this Court has jurisdiction, Bayer submits that this is not an issue of public importance. It argues that Villa Crop's attempt to clothe the issue as a constitutional issue is misconceived. Bayer urges us to accept that this case is simply about a misapplication of the legal test which according to a long line of cases in this Court, does not engage the jurisdiction of this Court.

[16] *Deton Engineering (Pty) Ltd v JP Mckelvey* 1997 BIP (CP).

[17] *Zyp Products Coy Ltd v Ziman Bros Ltd* 1926 TPD 224.

[18] *Tullen Industries v A de Sousa Costa (Pty) Ltd* 1976 (4) SA 218 (T) at 221.

[21] In addition, Bayer emphasises that Villa Crop's reliance on section 34 and *Ascendis* to assert that this case raises a constitutional issue is misplaced. Bayer submits that *Ascendis* is distinguishable in that it dealt with the issue of *res judicata* that implicated the rights contained in section 34 which provided this Court with jurisdiction to decide the matter whereas that is not the case in this matter.

[22] Bayer submits that there are no reasonable prospects of success that a court would find that the doctrine of unclean hands is applicable in the field of patent law or that it can find application solely based on the allegations made by Villa Crop. Furthermore, Bayer argues that Villa Crop's reliance on *Deton* to enforce the doctrine of unclean hands is equally misconceived because that matter dealt with an amendment of a patent and not pleadings.

[23] Bayer further contends that Villa Crop should not be granted leave to amend because the proposed special plea would destabilise the existing patent system which only the Legislature can reform or amend. In response to Villa Crop's submission that if the appeal were to be successful and an amendment granted, Bayer states that it will not be the end of the matter as the following issues would still require adjudication: (a) the validity in law, in the context of patent litigation; of the special plea; (b) the factual matrix of the special plea and; (c) Villa Crop's counterclaim for the revocation of the patent, which includes reliance on lack of novelty and material grounds for the revocation provided for in terms of section 61(1)(g)[19] of the Patents Act.

[19] Section 61(1) states:

> "Any person may at any time apply in the prescribed manner for the revocation of a patent on any of the following grounds only, namely—
>
> . . .
>
> (g) that the prescribed declaration lodged in respect of the application for the patent or the statement lodged in terms of section 30(3A) contains a false statement or representation which is material and which the patentee knew or ought reasonably to have known to be false at the time when the statement or representation was made."

Issues

Jurisdiction and leave to appeal

[24] In order for this Court to entertain this matter, Villa Crop must show that the matter is a constitutional matter or that it raises an arguable point of law of general public importance.[20] Additionally, it must demonstrate that it is in the interests of justice for leave to appeal to be granted.[21] Villa Crop advances three propositions in support of its argument that this matter engages jurisdiction of this Court. I deal with these below.

[25] First, Villa Crop argues that the matter raises a constitutional issue as it implicates the right of access to courts in terms of section 34 of the Constitution. In support of its argument, it relies on this Court's judgment in *Ascendis*. In essence, Villa Crop contends that by refusing leave to appeal, the Court of Patents deprived it of its right to defend itself in the patent infringement proceedings. It specifically contends that its right to a fair hearing including a hearing on the merits of the dispute was unjustifiably limited. It went as far as to suggest that the dictum by Khampepe J in *Ascendis* applies with equal force to this case. I agree with Bayer that *Ascendis* is distinguishable from this matter. In that matter, it was not the refusal of an amendment *simpliciter* that was being held to infringe upon the right of access to courts. Rather, it was the question of *res judicata* which was at the heart of that application.

[26] On the facts of this case, there is 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. The question whether each time section 34 is implicated the jurisdiction of the Court is engaged, was definitively answered by this Court in *NVM*[22] where Rogers AJ, as he was then, writing for the majority, held:

[20] Section 167(3)(b)(i) and (ii) of the Constitution.

[21] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Paulsen*) at para 18.

[22] *NVM obo VKM v Tembisa Hospital* [2022] ZACC 11; 2022 (6) BCLR 707 (CC).

> "To 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. This is shown by *Boesak*."[23]

[27] In the circumstances of this case, a refusal to grant the amendment does not raise a constitutional issue and Villa Crop's reliance on *Ascendis* is misplaced.

[28] Villa Crop submits that this matter raises arguable points of law of general public importance. Villa Crop argues that the nature of the South African patent system places a duty on patentees to be honest when applying for patents and that if this doctrine was applicable, it would extend beyond the narrow interests of the parties. It argues that this matter is of public interest because it concerns honesty and integrity in the application for and maintenance of a patent as well as in patent litigation.

[29] Whether a matter raises an arguable point of law of general public importance requires this Court to determine whether the point being raised is one of law and is arguable. In *Paulsen*, Madlanga J said:

> "It cannot be any and every argument that renders a point of law arguable for purposes of section 167(3)(b)(ii). *Surely, a point of law which, upon scrutiny, is totally unmeritorious cannot be said to be arguable*. Indeed, in *Baloi* Centlivres JA said 'there are very few cases which are not arguable in the wide meaning of that word'. The notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of *plausibility*. In what appears to have been a judge-created test, leave to appeal under section 369 of the then applicable Criminal Procedure and Evidence Act could be granted if the question at issue was arguable. Not surprisingly, in *Beatley & Co* Tindall AJP held that the word 'arguable' is used 'in the sense that there is substance in the argument advanced.'"[24] (Emphasis added.)

[23] Id at para 92.

[24] *Paulsen* above n 21 at para 21.

[30] There is no merit to Villa Crop's argument. The cornerstone of Villa Crop's case is misrepresentation. The patents system is capable of dealing with any misrepresentation that Villa Crop alleges may have been made in South Africa. It is common cause that in the infringement proceedings, Villa Crop asserted defences based on misrepresentation. If successful in those proceedings, the patent would be revoked.

[31] What makes Villa Crop's special defence startling is that it does not attack the validity of the patent. Villa Crop purely seeks to subvert the existing patent system and introduce reforms by way of a special plea, something which belongs to the terrain of the Legislature. Allowing this would destabilise the patent system. In *Ascendis*, Cameron J cautioned against the destabilisation of our patent system through novel defences such as the one advanced by Villa Crop.[25] In my view, the special plea is nothing else but a stratagem to insert into the South African patent system, a defence which is available to Villa Crop under the current patent system.

[32] There is yet another reason, why Villa Crop's arguments do not raise an arguable point of law of general public importance. Its attack on the South African patent system and the Patents Act that provides for its "depository" system was also not pleaded nor was it raised before the Court of Patents. It is therefore important that a point be made clear that the Patents Act along with its depository system is not impugned in this litigation.

[33] I conclude that the issues implicated in this matter are too narrow and do not implicate the interests of the public. These are purely issues that involve two protagonists and not the general public. The attempt by Villa Crop to widen the issues with the introduction of a special plea has no foundation. The crisp issue is whether the Court of Patents correctly dismissed the application for amendment. I now address this issue.

[25] *Ascendis* above n 14 at para 139.

Whether the Commissioner of Patents misapplied the test

[34] Villa Crop's principal submissions are that the Court of Patents incorrectly applied the legal test relating to amendments. Based on the plethora of decided cases, one would have thought that the principle is now settled. It seems to me that this Court is yet again confronted with the issue whether it has jurisdiction to decide a matter which concerns the mere application of accepted legal principles. This is so because Villa Crop persists with its argument that because the Commissioner incorrectly applied the test, therefore this Court's jurisdiction is engaged.

[35] The starting point in considering whether this argument has merit is to look at the judgment of the Court of Patents. That Court refused the amendment on the basis that allowing the special plea would lead to "a complicated enquiry and would require expert and technical evidence to explain to a court the law and process applicable in different jurisdictions in respect of applications for SPC".[26] It concluded that it was not in the interests of justice to embark on such a protracted enquiry.[27] The reasons advanced for the refusal of the amendment do not evince a proper interrogation and application of the principles relating to amendments. The Court of Patents cites *GMF Kontrakteurs*[28] which lists the applicable principles in granting amendments:

> "The granting or refusal of an application for the amendment of pleadings is a matter for the discretion of the Court, to be exercised judicially in the light of all the facts and circumstances of the case before it. The principles relating to the exercise of that discretion are well settled. They were exhaustively reviewed in *Zarug v Parvathie N.O.* 1962 (3) SA 872 (D). At 876A-D the following principles were set out:
>
> > '1. That the Court will allow an amendment, even though it may be a drastic one, if it raises no new question that the other party should not be prepared to meet.

[26] High Court judgment above n 2 at para 28.

[27] Id at para 30.

[28] *Gmf Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T).

> 2. With its large powers of allowing amendments, the Court will always allow a defendant, even up to the last moment, to raise a defence, such as prescription, which might bar the action.
> 3. No matter how negligent or careless the mistake or omission may have been and no matter how late the application for amendment may be made, the application can be granted if the necessity for the amendment has arisen through some reasonable cause, even though it be only a *bona fide* mistake.'
>
> An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made some reasonably satisfactory account must be given for the delay. Of course, if the application to amend is *mala fide* or if the amendment causes an injustice to the other side which cannot be compensated by costs, or, in other words, if the parties cannot be put back for the purposes of justice in the same position as they were in when the pleading it is sought to amend was filed, the application will not be granted."[29]

[36] 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. The Court of Patents simply overlooked, in large parts, the principles governing the application for amendments. Even if one were to read the judgment liberally, the only reference that one can find in the judgment relates to the overarching principles of the interests of justice as stated in *Affordable Medicines.* The Commissioner of Patents only focussed on the interests of justice criteria and refused to exercise her discretion in favour of Villa Crop. Relying on the interests of justice alone is not enough. There clearly was no proper application of the legal test.

[37] I do not think that mere reference to *Affordable Medicines* can save the judgment from misapplication of the test. In my view, the misapplication of the test is not

[29] Id at 222B-F.

sufficient to grant Villa Crop jurisdiction before this Court. The decision of *Booysen*[30] offers an instructive point of departure in this regard. That Court, relying on the reasoning of this Court in *Phoebus Apollo*[31] held:

> "The thrust of the argument presented on behalf of the appellant was essentially that though the Supreme Court of Appeal has set the correct test, it had applied that test incorrectly ─ which is of course not ordinarily a constitutional issue. This Court's jurisdiction is confined to constitutional matters and issues connected with decisions on constitutional matters."[32]

[38] In *University of Johannesburg*,[33] this Court reiterated that "it is trite that a wrong decision in the application of the law raises neither a constitutional issue nor an arguable point of law of general public importance".[34] Furthermore, in *Mankayi*[35] this Court "refused to entertain appeals that seek to challenge only factual findings or incorrect application of the law by the lower courts".[36] This, in my view, is the difficulty facing Villa Crop in this case.

[39] Froneman J in *Jacobs*,[37] concurring with the first judgment said:

> "I do not think it would generally be in the interests of justice to grant leave to appeal *where there has merely been a misapplication of accepted legal principles*. A practical and functional arrangement based on a shared constitutional endeavour between all courts should acknowledge that the structure of our legal system is set up to allow other courts to apply uncontroversial laws on a day-to-day basis. *It is not for the Constitutional Court to engage in that exercise*. *It is important that the distinction is*

[30] *Booysen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC).

[31] *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC).

[32] Id at para 9. See also *Booysen* above n 30 at para 53.

[33] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC).

[34] Id at para 49.

[35] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC).

[36] Id at para 12.

[37] *Jacobs v S* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC).

> *maintained, not least because this Court does not have the capacity to hear every case of alleged misapplication.* In maintaining the proper distinction between cases that this Court should and should not hear, we have to recognise the need for a certain amount of judicial trust; we have to trust that the system of appeals all the way up to the Supreme Court of Appeal will ordinarily return the correct result. *We should be wary that so called 'misapplication cases' should not undermine that trust*."[38] (Emphasis added.)

[40] In *Jacobs*, the applicants had submitted that the doctrine of common purpose was incorrectly applied and that their sentences therefore resulted in a violation of their right not to be deprived of freedom arbitrarily and without just cause as protected in section 12(1)(a) of the Constitution. Goliath AJ wrote the first judgment in which she held that the applicants' submissions did not involve the interpretation of the common-purpose doctrine or its development and that because only factual issues were involved, the Constitutional Court had no jurisdiction to hear the appeal under section 172(1)(a) of the Constitution.[39] Froneman J in his judgment held that if there was indeed no factual finding on when and where the fatal injury was inflicted and that the factual finding about a continuous act was flawed, the result would have been that the *Full Court simply misapplied the existing rule* in respect of the presence of the accused when the fatal blow was struck.[40] He concluded that in the absence of such an effort to develop the common law he always understood the Constitutional Court not to have jurisdiction.[41]

[41] Rautenbach, in his article titled "Does the Misapplication of a Legal Rule raise a Constitutional Matter: A fifty-fifty Encounter with Common-purpose Criminal Liability", states that an inept application of legal rules to the facts of a case amounts to misapplication:

---

[38] Id at para 115.

[39] Id at para 44.

[40] Id at para 108.

[41] Id.

> "To the extent that the application of a legal rule involves determining whether and how the legal rule relates to a particular set of facts, an application of a legal rule always has at least two aspects. The first is to make a finding in respect of the facts to which the rule must be applied. The second is to determine the meaning of the legal rule. An incorrect assessment of the facts or an incorrect interpretation of the legal rule could amount to a misapplication. When one assigns a meaning to a legal rule that differs from the meaning previously assigned to it, it could amount to a misapplication. It need not necessarily be the case. *An inept application of rules or principles of interpretation, or an indefensible failure to apply aspects of the legal rule to the proven facts, or failure or unsuccessful efforts to interpret statutory rules or to develop the common law and customary law in conformity with the Constitution would indeed result in misapplication*."[42] (Emphasis added.)

[42] My concern with my Brother Unterhalter AJ's stance (second judgment) is that it has serious and far–reaching consequences. In holding that the Court of Patents committed an error of law, the second judgment blurs the distinction between the two principles. This will undoubtedly lead to an influx of unmeritorious applications before this Court. In my view, placing undue weight on one leg of an enquiry cannot, in itself, be classified as an error of law. Similarly, in underscoring the interests of justice factor, the Commissioner of Patents was alive to the other requirements relating to amendments and simply failed to fully interrogate the said requirements.

[43] Here too, we are faced with an instance where the Court of Patents correctly outlined the test but failed to adequately apply the test to the facts before it. This is not a misreading of the test in *Affordable Medicine* as postulated by second judgment.

[44] What in my view tends to diminish the force of that finding is that it is not anchored in the pleadings, there appears to be no evidence to support it. None of the parties advanced that argument either in the pleadings or during oral argument before us. It is abundantly clear that the parties correctly conducted their case on the understanding that, what was at stake was the misapplication of the legal test by the

[42] Rautenbach "Does the Misapplication of a Legal Rule Raise a Constitutional Matter: A Fifty-Fifty Encounter with Common-Purpose Criminal Liability" (2019) 4 *SALJ* 759.

Court of Patents. At no stage whether expressly or impliedly was it suggested or urged upon us that the finding of the Court of Patents constituted an error of law. The thrust of Villa Crop's submissions was exclusively directed at what it considered to be the misapplication of the legal test. I did not understand Villa Crop's contentions to be any different.

[45] This Court in *Gcaba*[43] said:

> "Jurisdiction is determined on the basis of the pleadings . . . and not the substantive merits. . . . . In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the Court's competence."[44]

[46] The kernel of its submissions was that its right of access to court was infringed upon by the Court of Patents' refusal to allow it to introduce the special defence of unclean hands. This point was set out in Villa Crop's written submissions and argued with equal force by its counsel during the hearing. What it in fact asked the Court to determine is a factual comparison between what was disclosed in ECs against what Bayer was advancing in support of its action. In essence, it contended that the two versions are mutually contradictory and indicative of the fact that Bayer did not approach the courts with clean hands. These are nothing but purely factual issues which, on the authority of *Boesak*,[45] do not engage the jurisdiction of this Court.

[47] The second judgment concludes that the Court of Patents in reaching its decision committed an error of law. It is trite that a party has to show that such error prevented a fair trial of issues. In this case it was not shown that the Court of Patents committed a gross irregularity which amounted to an error of law. The Commissioner of Patents was well aware of the principles concerning amendments. The fallacy in the Court of

[43] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[44] Id at para 75.

[45] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 35.

Patents is that it placed undue weight on one leg of the enquiry and in the process ignored other essential requirements. In doing so, the Court of Patents fell short of properly applying the legal test. I disagree with the second judgment that this constitutes an error of law.

[48] It is therefore my conclusion that on this ground alone the jurisdiction of this Court is not engaged.

Interests of justice

[49] I must make it clear that even if the matter did raise a constitutional issue or an arguable point of law, this Court has previously pronounced that leave may be refused if it is not in the interests of justice for this Court to hear the appeal.[46] Importantly, in considering the interests of justice, prospects of success, although not the only factor, are obviously an important aspect of the enquiry.[47] In the present matter, while Villa Crop argues that the matter raises a constitutional issue and an arguable point of law of general public importance, I am of the view that it is not in the interests of justice to grant leave to appeal because there are no reasonable prospects of success.

[50] Of significance here is that no prejudice would be suffered by Villa Crop if the amendment is refused, because it will not be hampered from proceeding with its counterclaim and resisting the action instituted by Bayer. The refusal of the amendment will not lead to the end of the matter, the dispute remains, Villa Crop would still be able to argue the same point in the special plea and counterclaim based on material misrepresentation as a ground for revocation. Tellingly, what counts against Villa Crop is that there are certain important issues which remain to be adjudicated by the trial court. These include the alleged anticipation or lack of novelty of the 2005 patent – in light of the disclosure in patent number EP 0 915 846 and whether it contains an enabling disclosure of the invention claimed in the 2005 patent.

[46] Id at para 12.

[47] Id. See also *Fraser v Naude* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

[51] One further matter that illustrates why Villa Crop's contentions cannot be correct is that the patent system is capable of dealing with the misrepresentation of the kind advanced by Villa Crop. The refusal of the amendment would not put Villa Crop in a worse position than it would have been if the amendment had been granted. 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).[48] The concession by Villa Crop's counsel during the hearing puts paid to this argument, Villa Crop can still approach the court as it has done, to revoke the patent on the basis of lack of novelty in terms of section 61(1)(g). On the other hand, the grant of an amendment would cause Bayer prejudice, which prejudice would not be cured by an appropriate costs order or postponement, because its infringement action would be delayed. It is common cause that the patent will expire in 2023 and Villa Crop's action would render the patent nugatory. This is an injustice.

[52] In conclusion, another reason which militates against acceptance of Villa Crop's submissions is that the factual matrix of Villa Crop's special defence involves a determination of the factual disputes. A factor which Villa Crop conceded before the Court of Patents when it described its case as a "simple factual issue". It is trite that this Court will refuse to entertain appeals that seek to challenge only factual findings[49] and misapplication of the law by lower courts.

[53] For these reasons, I would refuse the application for leave to appeal with costs, including costs of two counsel.

[48] Section 65(4) provides: "In any proceedings for infringement the defendant may counterclaim for the revocation of the patent and, by way of defence, rely upon any ground on which a patent may be revoked".

[49] *Jacobs* above n 37 at para 38.

UNTERHALTER AJ (Kollapen J, Majiedt J, Madlanga J, Mhlantla J and Theron J concurring):

Introduction

[54] I have had the pleasure of reading the judgment of my Brother, Mathopo J (first judgment). Regrettably, I do not agree with the order proposed or the reasons marshalled in support of it.

[55] The first judgment declines jurisdiction. It does so on three grounds. First, it is said that the refusal of an amendment does not raise a constitutional issue. Second, the amendment sought does not raise an arguable point of law of general public importance. Third, it is not in the interests of justice to entertain the appeal. I consider the first judgment to have fallen into error in arriving at these conclusions, and I traverse each ground in turn. Before doing so, a brief exposition of the pleadings, the application for leave to amend, and Bayer's objection will be helpful.

The pleadings, the application for leave to amend and the objection

[56] Prior to Villa Crop's application to amend, the dispute, on the pleadings, was as follows. Bayer brought proceedings before the Commissioner of Patents alleging that Villa Crop was infringing its 2005 patent. Bayer made specific averments as to the origin of the 2005 patent. Bayer alleged that Villa Crop's pesticide, TIVOLI 240 SC, infringed a number of claims of the 2005 patent, and sought relief by way of an interdict, delivery-up and an enquiry as to the reasonable royalty payable.

[57] In its plea, Villa Crop claimed that the 2005 patent relied upon by Bayer was invalid. Villa Crop also brought a counterclaim for the revocation of the patent and pleaded a number of grounds of invalidity. Of particular relevance, it relied upon section 61(1)(g) of the Patents Act to revoke the 2005 patent. It alleged that a false statement or representation was made in the prescribed declaration required in respect of the application for the 2005 patent. The false statement or representation, which was material, was known by the patentee or its predecessors in title to be false at the time it

was made, or ought reasonably to have been known. Villa Crop then pleaded, in detail, the basis for its contention that the statement or representation was false.

[58] On 15 April 2019, Villa Crop gave notice of its intention to amend. It sought to introduce what it styled "a special plea in limine" with the heading "Plea in limine: unclean hands; abuse of process; breach by patentee of duty of good faith". Villa Crop invited the Commissioner to refuse to entertain Bayer's claim on the basis that Bayer was approaching the Court mala fide, dishonestly, and with unclean hands; that Bayer was in breach of its duty of good faith; that it was engaging in an abuse of process; and depriving Villa Crop of its right to a fair trial. I refer to these various complaints as the invocation of the unclean hands doctrine.

[59] At the heart of Villa Crop's reliance upon the unclean hands doctrine is a claim of contradiction. What Villa Crop pleads is that Bayer applied to various authorities in the European communities for SPCs in order to obtain an extension of its basic patent. In so doing, Bayer represented that the active ingredient in its plant protection product, spirotetramat, was protected by its basic patent. However, in South Africa, and after these European applications were made, Bayer represented, at the time of filing the 2005 patent, that spirotetramat was a novel invention. This representation was also perpetuated by Bayer in the proceedings before the Commissioner of Patents. Villa Crop's case is that the representations made in support of the SPCs contradict those relied upon before the Commissioner of Patents. Bayer thus comes before the Commissioner of Patents in breach of the unclean hands doctrine. This special plea, it was submitted, relies upon a common law doctrine that prevents a litigant from engaging the courts on a dishonest basis; and it is a defence that is quite distinct from the statutory grounds of invalidity set out in the counterclaim.

[60] Bayer filed a notice of objection to the amendments sought to be made by Villa Crop. The objection to Villa Crop's proposed special plea is two-fold. First, it is said that the special plea is vague and embarrassing and lacks the averments necessary to sustain a defence. In support of this objection, Bayer contends that the special plea

proceeds on the premise that the 2005 patent is invalid, whereas the validity of the patent is the subject of the counterclaim. Therefore, the special plea "seeks to elevate to a special plea an alleged ground for the invalidity of the patent where such ground forms part of the counterclaim itself". Furthermore, the special plea is founded on allegations of fact arising eight years after the priority date of the patent, and are thus irrelevant to the invalidity of the patent. Second, Bayer objects on the basis that Villa Crop has unduly delayed in seeking to introduce the special plea.

[61] This then summarises the pleaded case before the Commissioner of Patents, the amendment sought to be introduced and the objection to it.

Jurisdiction

[62] The first judgment declines the application for leave to appeal on the basis that this Court's jurisdiction is not engaged. It does so, in part, because the error of the Commissioner of Patents is said to be an error of the application of law, and not an error of law. The first judgment explains that the Commissioner of Patents misapplied the law in deciding the application to amend and that the misapplication of law does not engage the jurisdiction of this Court.

[63] The Commissioner of Patents, in her judgment, set out the well-known principles of an application to an amendment that is sought. Those principles are summarised in *Affordable Medicines*,[50] and are cited in the Commissioner's judgment. The Commissioner of Patents then made an evaluation of the application to amend. She decided the application on the basis of the following reasoning: "It is not in my view, 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".[51] The first judgment construes this to be a misapplication of law.

[50] *Affordable Medicines* above n 11 at para 9.

[51] High Court judgment above n 2 at para 30.

[64] I do not agree. The misapplication of law ordinarily occurs when a legal standard that is correctly stated and adopted is then applied to the facts so as to derive a conclusion that cannot be sustained. So, for example, a crime that requires intention when the facts merely support negligence cannot sustain a conviction because the application of the law to the findings of fact does not support the conclusion that the accused is guilty of the crime. Here though, the Commissioner of Patents, having cited the well-known principles of law relevant to the application before her, then pronounced and adopted an entirely different and incorrect standard: the interests of justice. That is apparent from the salient passage of her judgment quoted above. It is also apparent from the reasoning adopted by the Commissioner of Patents to arrive at her conclusion. There is no trace in that reasoning that the Commissioner of Patents adopted the relevant legal principles that she had referenced. Nothing is to be found of the permissive principle that amendments are always allowed, unless they are sought in bad faith or would cause an injustice that cannot be remedied by an award of costs. Rather, the Commissioner of Patents adopted and applied a distinct and incorrect standard: the interests of justice. She then exercised her discretion to refuse the application to amend, by recourse to that incorrect standard.

[65] The adoption of an incorrect legal standard to decide an application to amend is to make an error of law. It is not a misapplication of law because the decision does not proceed from a correct legal premise to an incorrect conclusion as a result of a failure properly to apply the law to the relevant facts. And it is an error of law of no small consequence. The legal principles that are restated in *Affordable Medicines* reflect the constitutional right to have a dispute resolved by the application of law before a court. This entails the right of a litigant to frame the dispute that requires resolution, and in the present matter, to formulate a defence. Hence, the importance of the permissive principle, to which I have referred.

[66] The Commissioner of Patents failed to adopt the permissive principle, but instead arrogated to herself a broad discretion to decide the application to amend under the capacious concept of the interests of justice. That is not our law. More particularly, as

a general principle, courts do not decide for litigants what disputes the interests of justice permit them to pursue before the courts. Yet that is what the Commissioner of Patents decided. The proposed special plea, she found, would give rise to a protracted enquiry that detracts from the real issue in dispute in the action. A court cannot exclude a cause of action or a defence because the enquiry entailed by it is protracted. That is for the litigant to decide. Nor should a court decide for a litigant, at the stage of pleadings, the real issue in dispute. That too is a choice which the courts should afford litigants considerable latitude to determine. What is plain from the reasoning of the Commissioner of Patents is that she considered herself to enjoy a wide discretion to regulate what disputes should go to trial on the basis of the Court's judgment as to what disputes may usefully be litigated. That is an error of law and one that, if followed, would infringe upon the rights of litigants to enjoy access to the courts, contrary to section 34 of the Constitution.[52]

[67] Plainly, the permissive principle is not without limits. Pleadings that are excipiable, or, as the holding in *Affordable Medicines* affirmed, are introduced in bad faith or cause an injustice that cannot be compensated by an order for costs, afford grounds for refusing a proposed amendment. What the Commissioner of Patents did was to interpret *Affordable Medicines* as an invitation to elevate the interests of justice as the ultimate criterion by reference to which discretionary judicial power is to be exercised. That is not the holding in *Affordable Medicines*. It is important that this legal error is corrected. By so doing, we are not inviting disaffected litigants, whose amendments have been refused, to seek leave to appeal. We do no more than to correct an error of law arising from a misreading of *Affordable Medicines* that, if replicated, would damage the rights of litigants to access the courts, and thereby damage a central tenet of our system of justice. The refusal of Villa Crop's proposed special plea by the Commissioner of Patents was predicated upon an error of law that implicates the

[52] Section 34 states the following:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

constitutional right of access to the courts. That is a constitutional matter that engages the jurisdiction of this Court.

[68] The first judgment correctly observes that this Court's jurisdiction cannot be engaged in every case where a court decides an application to amend a pleading. Indeed not. But where a court does so on the basis of an error of law that implicates the constitutional rights of a litigant, the well-established jurisprudence of this Court holds that our jurisdiction is engaged.[53]

[69] The first judgment, having decided that the refusal to grant Villa Crop leave to amend does not raise a constitutional issue, then considers whether the matter raises an arguable point of law of general public importance. The first judgment holds that the special plea has no merit. It does so on the basis that the proposed special plea, if allowed, would subvert the existing patent system (and in particular its depositary system) because it would allow a defence that does not attack the validity of the 2005 patent; that it is a novel defence that would destabilise the 2005 patent system; and, finally, the reform of the patent system should be left to Parliament.

[70] The first judgment comes to these robust conclusions, even though the Commissioner of Patents found it unnecessary to determine whether the unclean hands doctrine finds application in patent law. Bayer, in its objection to the proposed special plea, contended that the pleading is vague and embarrassing and lacks averments necessary to sustain a defence. Bayer thus objected to the proposed special plea on the basis that it does not in law disclose a defence to its claim. In essence, Bayer's objection is that the grounds of invalidity that Villa Crop seeks to allege and prove are to be found

[53] See *University of Johannesburg* above n 33 at para 47 where this Court held that "the test is that the point of law must have reasonable prospects of success". The question is this: are there reasonable prospects that the lower courts erred in their exposition of the law? See also *Paulsen* above n 21 at para 16 where this Court indicated that to raise an arguable point of law, the point raised must (a) be one of law; (b) it must be arguable and (c) ought to be considered by this Court. At para 21, the Court went on to say:

> "Surely, a point of law which, upon scrutiny, is totally unmeritorious cannot be said to be arguable. . . . The notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility."

in the Patents Act, as indeed it has pleaded in its counterclaim. Bayer contends that there is no basis upon which Villa Crop may invoke the unclean hands doctrine to dismiss Bayer's claim for infringement, absent a determination of the validity of the 2005 patent.

[71] Whether there is a common law doctrine of unclean hands that can deprive a plaintiff of its claim for infringement, absent a finding of the invalidity of the 2005 patent on one or other of the statutory grounds set out in the Patents Act, was a matter much debated before us.

[72] Our courts have long recognised their power, in exceptional circumstances, to prevent an abuse of process.[54] That power has more recently been affirmed,[55] and an abuse of process may include a litigant who comes to court with unclean hands.[56] The power is an incident of the court's inherent power to ensure that those who use the process of law do not do so for ulterior ends that undermine what the courts are established to secure. It is a power most sparingly used. That is so because the exercise of the power prevents a litigant from having their dispute resolved before the courts, the very essence of their right under section 34 of the Constitution. But the authorities do bear out the proposition that to dismiss a claim that a litigant would pursue before the courts on the grounds of abuse is not precluded because that claim exists in law. The claim is dismissed because the litigant who would bring it is disqualified from doing so by reason of their abuse.

[73] Villa Crop relied upon a number of cases that it contended recognised and applied the doctrine of unclean hands, and the consideration of the doctrine was not

[54] *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 275B-C.

[55] *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734D-G, cited with approval by this Court in *Lawyers for Human Rights v Minister in the Presidency* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) at para 20.

[56] *Mostert v Nash* [2018] ZASCA 62; 2018 (5) SA 409 (SCA) at para 24.

ousted in cases concerning intellectual property rights, more particularly in the law of trademarks and patents.[57] The essential proposition was that the courts will not assist a wrongdoer, irrespective of whether their rights derive from the common law or a statute.

[74] Bayer submitted that the proposed special plea would "insert into the South African patent system a novel ground for the revocation of patents". Such an intervention, Bayer contended, is entirely unnecessary because the statutory grounds for the revocation of a patent are sufficient, including lack of novelty and material misrepresentation grounds, already invoked by Villa Crop in its plea. The recognition of the unclean hands doctrine, and its application to patent law, it submitted, would destabilise the basic tenets of the patent system. As to the authorities relied upon by Villa Crop, Bayer argues that *Deton* is distinguishable in that it dealt with an application to amend the claims of a patent, and not pleadings, the grant of which is discretionary; whereas the patentee's right to enforce its patent is not.

[75] The first judgment holds that Bayer's submissions are correct; that the special plea has no merit; and consequently, Villa Crop's application for leave to appeal does not raise an arguable point of law of general public importance.

[76] The first judgment, however, fails to recognise the frailties of the contentions of Bayer that it is too quick to adopt. The premise of Bayer's position is that the issues of infringement and invalidity can only be determined by recourse to the Patents Act. Accordingly, if Villa Crop can prove the invalidity of the 2005 patent by establishing a statutory ground of invalidity, Bayer will have no right to claim an infringement. If Villa Crop fails to prove the invalidity of the 2005 patent, how can Bayer then be deprived of its right to enforce a valid patent?

[77] This binary position fails to appreciate the true juridical nature of the power enjoyed by the courts to prevent an abuse of process, of which the doctrine of

[57] Reference was made to *Deton* above n 16 at 114 and 122; *Tullen Industries* above n 18 at 221; and *Zyp Products* above n 17 at 224.

unclean hands is a species. An abuse of process can occur in a variety of ways. The litigation may be frivolous or vexatious. A litigant may seek to use the legal process for an ulterior purpose or by recourse to conduct that subverts fundamental values of the rule of law. The behaviour of the litigant may be so tainted with turpitude that the court will not come to such a litigant's aid. The unclean hands doctrine references this latter type of abuse. It is the abusive conduct of the litigant that, in a proper case, may warrant the exercise of the court's power to non-suit such a litigant. The court does so, even though the litigant claims a right that they would vindicate in the court proceedings. For this reason, the power is to be exercised with great caution. Put simply, the court enjoys the power to safeguard the integrity of its process. The court will only exercise this power upon a careful consideration of the prejudice that this may cause to the abusive litigant, and, in particular, the harm that may be occasioned to a litigant whose claim of right will not be decided by the court. But the court's power to prevent the abuse of its process is not determined by the right that the abusive litigant claims.

[78] Bayer's central contention is that the proposed special plea is a novel ground of revocation. That premise appears to me to be faulty. Villa Crop's claim of abuse against Bayer is not that its 2005 patent is invalid, but that it has come to Court tainted with turpitude by reason of its misrepresentations. Its claims should not be entertained by the Court because of its conduct, whether or not its patent is valid. It follows that Bayer's objection to the proposed special plea is aimed at the wrong target. The invocation of the unclean hands doctrine is a claim as to whether Bayer is a litigant the courts should hear. It is not a claim as to whether its patent is valid, and hence whether Villa Crop's case is bounded by the four corners of the Patents Act.

[79] Entirely different questions arise as to whether the misrepresentations relied upon by Villa Crop, even if proven, would amount to an abuse of process, and whether such an abuse would warrant a court taking the drastic step of non-suiting Bayer, given the rights it comes to Court to vindicate. But those are not questions for us to determine. It suffices to observe that the power of the courts to prevent abuse of process is well

recognised. The unclean hands doctrine marks out a species of such abuse. In egregious cases that power may be exercised to non-suit a litigant. The law of patents is not exempted from the application of the doctrine because abuse of process may occur just as surely among litigants who claim rights in the law of patents, as it does among those who would make claims in the law of contract or delict.

[80] It follows that, in my view, the refusal of the Commissioner of Patents to grant the amendment sought by Villa Crop to introduce the special plea does indeed raise an arguable point of law of general public importance. How the standards of honesty expected of a litigant relate to their claims to enforce rights under the Patent Act gives rise to arguable points of law that have resonance beyond the particular dispute in this case. For this reason, this Court's jurisdiction is engaged.

The interests of justice

[81] Villa Crop's application for leave to appeal may be refused if the interests of justice do not favour its grant. The first judgment concludes that it is not in the interests of justice to grant leave because the appeal has no reasonable prospects of success.[58] The first judgment finds this to be so for two reasons. First, it holds that Villa Crop's proposed special plea raises the same issue that it had already pleaded in its plea: material misrepresentation as a ground of revocation.[59] Section 61(1)(g) of the Patents Act already provides for the revocation of a patent on the basis that the prescribed declaration contains a false statement or representation. As a result, the refusal of the amendment will occasion Villa Crop no prejudice, but allowing the amendment will give rise to delay that will prejudice Bayer.[60] I call this the finding of redundancy. Second, the determination of the proposed special plea requires the determination of factual disputes.[61] This Court will not entertain appeals that challenge

[58] See [49].

[59] See [50].

[60] See [50] to [51].

[61] See [52].

factual findings, and on this basis also leave to appeal should be refused. I call this the finding of factual disability.

[82] I am not in agreement with either of these findings. As to the finding of redundancy, the statutory ground of revocation provided for in section 61(1)(g) of the Patents Act is not the cause of action that Villa Crop seeks to advance in its proposed special plea. As I have already sought to explain, section 61(1)(g) is a statutory ground of revocation. The proposed special plea invokes the power of the courts to prevent abuse of process. The basis upon which that power is exercised is entirely distinct. It has nothing to do with revocation. The conduct that may constitute abuse is not confined to the particular misrepresentation or false statement referenced in section 61(1)(g), nor are the averments made in the special plea so confined.[62]

[83] The finding of redundancy is problematic on its own terms. 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. 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 finding of redundancy leaves unexplained the first judgment's definitive holding that the proposed special plea has no merit. If the proposed special plea is simply a reincarnation of the statutory ground of revocation, how is it possible to hold that it lacks merit at this stage of the proceedings? In fact, the first judgment considers the invocation of the unclean hands doctrine to lack merit because it does not warrant recognition, and not because it simply covers the same ground as section 61(1)(g). The finding of redundancy appears to me to be at odds with the first judgment's holding as to the merits of the special plea.

[84] Nor am I in agreement with the finding of factual disability. The Commissioner of Patents refused Villa Crop's application to amend. That decision entailed no findings

[62] See [38].

of fact, and hence the application for leave to appeal raises no challenge on questions of fact. Doubtless, if the amendment were to be granted, and the special plea went to trial, there may well be disputes of fact that require resolution. But the trial court is the proper court for that to be done. The merits of the application for leave to appeal before this Court concern 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.

[85] For these reasons, I cannot agree that the interests of justice are not served by entertaining this appeal.

Leave to appeal

[86] The amendment sought by way of the introduction of the proposed special plea was refused upon an adoption of the wrong legal test by the Commissioner of Patents. Villa Crop, as a result, did not have its right to introduce a defence lawfully adjudicated. That directly affected its right of access to the courts in terms of section 34 of the Constitution. The proposed special plea gives rise to an arguable point of law of general public importance and the interests of justice are served by granting leave. This Court's jurisdiction is thus engaged and leave should be granted.

The merits

[87] The principles governing the grant or refusal of an amendment were restated in *Affordable Medicines.* They require no further elaboration. The amendment should be allowed unless it is brought in bad faith, or unless the amendment will cause an injustice to Bayer that cannot be cured by an appropriate order for costs.

[88] The Commissioner of Patents relied upon a number of considerations that are irrelevant. That the introduction of a defence will likely require technical and expert evidence is not a reason that weighs against granting an amendment. The type of evidence required to prove a defence is not a criterion for refusing an amendment. Nor

can an amendment be refused because its introduction is likely to "drag out the trial". Judicial supervision of trial process may be required to use court time effectively. But if a litigant considers a claim or defence to be a warranted addition to its case, it is not for the court to disallow the amendment because the trial will be lengthier, or, more charitably, because the court has taken the view that the cost of the extension is not worth any enhanced prospect of success.

[89] The Commissioner of Patents, as I have set out above, 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, is not a basis upon which an amendment may be refused. It is sometimes appropriate (and even helpful) for a Judge to indicate what the court considers the main issues in a case to be. But the court must ultimately respect the autonomy of a litigant to plead their case as they will, provided that the pleading is not excipiable, nor brought in bad faith, or a cause of irremediable prejudice. That the Commissioner of Patents thought the real dispute lay in the case pleaded as to lack of novelty provided no basis to deprive Villa Crop of the defence it sought to plead in the proposed special plea.

[90] The Commissioner of Patents found it unnecessary to decide whether the unclean hands doctrine should be applied in the field of patent law. She thus declined to determine the objection that Bayer had raised. That is to say, that the proposed special plea is excipiable. I have already considered Bayer's objection as it bears upon jurisdiction. There I was required to do so under the less demanding standard as to whether the proposed special plea raised an arguable point of law. Here I must decide whether the amendment cannot be granted because it does not disclose a defence in our law.

[91] For the reasons that I have set out above, I do not think that is so. Abuse of process invites the court to non-suit a litigant by reason of their conduct. And in the proposed special plea, that is averred by reason of the turpitude that is said to attach to

Bayer by virtue of the misrepresentations allegedly made by it. This, it is said, warrants the exercise by the court of its power not to assist a party that has committed a substantial wrongdoing in connection with the very patent that it would enforce. 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 the litigant in question comes to court to vindicate rights under the Patents Act. I find that the proposed special plea is not excipiable on the grounds advanced by Bayer. Whether the averments made in the special plea would, if proven, ultimately persuade a court to non-suit Bayer is not a question for us to determine in deciding whether to grant the amendment sought.

[92] It remains for me to consider the question of delay. Bayer submits that if the amendment were to be granted, the completion of the trial would be so long delayed that the 2005 patent would likely expire before the trial ended. This is a question of prejudice that I must weigh. I find however that it is of insufficient weight to warrant the refusal of the amendment. First, there is no showing by Bayer that, absent the amendment, the trial on the existing pleadings would be completed (together with any possible appeal) before the 2005 patent expires. Second, Bayer's objection complained that the amendment should have been sought earlier, but did not raise the issue of the expiration of the 2005 patent. We must consider whether the Commissioner of Patents erred in refusing the amendment at the time it was sought, and not in the light of the time that has since gone by. Third, while the expiration of the 2005 patent will impact upon the grant of interdictory relief, it will not prevent a court from awarding damages. There is thus insufficient prejudice established by Bayer to justify denying Villa Crop its presumptive right of defence.

[93] For these reasons, the Commissioner of Patents erred in refusing the amendment sought. Therefore, I grant leave to appeal; uphold the appeal with costs, including the costs of two counsel; set aside the order of the Commissioner of Patents, and in its place grant Villa Crop leave to amend by the introduction of its "special plea in limine".

Order

1. The application for leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the Commissioner of Patents is set aside and in its place Villa Crop is granted leave to amend by the introduction of its "special plea in limine".

For the Applicant:	R M Robinson SC, M B de Wet and K Boshomane instructed by Von Seidels
For the Respondent:	L Bowman SC and B du Plessis SC instructed by DM Kisch Incorporated