

SOUTH AFRICA / JUDGMENT

Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH (2005/00230) [2021] ZACCP 1; 2021 BIP 2 (COP) (14 January 2021) [2021] ZACCP 1

COURT

Court of the Commissioner of Patents

BEFORE

AC Basson

CASE / FILE NUMBER

2005/00230

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF THE COMMISSIONER OF PATENTS

FOR THE REPUBLIC OF SOUTH AFRICA

Case No: Patent 2005/00230

In the matter between:

VILLA CROP PROTECTION (PTY) LTD

Applicant

and

BAYER INTELLECTUAL PROPERTY GmbH Respondent

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

AC BASSON, J

- [1] This is an application for leave to appeal against the judgment and order of this court dated 3 September 2020 refusing an application brought by Villa Crop Protection (Pty) Ltd (“Villa Crop”) leave to amend its plea by introducing a special plea. The application for leave to appeal is opposed by Bayer Intellectual Property GmbH (“Bayer”).

[2] The merits of the application for leave to appeal must be considered against the background of the test for leave to appeal. It is now trite that section 17(1)(a)(i) of the Superior Courts Act[1] have raised the threshold for granting leave to appeal. Bertelsmann, J in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*[2] explains:

"[6] It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985

(2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[3] The Supreme Court of Appeal in *S v Smith*[3] also had occasion to consider what constituted reasonable prospects of success in terms of section 17(1)(a)(i):

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[4] There must therefore exist more than just a mere possibility that another court will, not might, find differently on both facts and law.

[5] *Villa Crop* has raised various grounds for leave to appeal. Bayer opposes the application for leave to appeal, inter alia, on the basis that the application for leave to appeal does not satisfy the requirement imposed by section 17(1)(c) of the Superior Courts Act:

"17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”
- [6] Both parties have filed extensive and detailed heads of argument. I do not intend dealing with all the arguments raised. I have considered all the grounds for leave to appeal and the arguments put forward in the heads of argument. I only intend to briefly deal with some of the more pertinent arguments raised on behalf of both parties.
- [7] I have dismissed the application for leave to appeal for the following two reasons:
- (i) the application for leave to appeal is premature and will result in a piece-meal appeal. (ii) In any event, even if the jurisdictional requirements for leave to appeal are satisfied, the application has no reasonable prospects of success on appeal.
- [8] Bayer argues that the basis that the decision now sought to be appealed would not, if successful, dispose of the real issues in dispute and the appeal would not lead to a just and prompt resolution of the real issues between the parties (section 17(1)(c) of the Superior Courts Act). It is further argued that, even if the appeal were to be successful and the amendment to the applicant’s plea were to be allowed, the trial court would still be required to deal

with, at the very least the following issues: (i) the validity in law, in the context of patent litigation, of the applicant’s

special plea; (ii) the factual merits of the applicant’s special plea and (iii) the applicant’s substantive counter-claim for the revocation of the patent (which counter-claim includes reliance on the “material misrepresentation” ground for revocation provided for in section 61(1)(g) of the Patents Act.[4] If the court were to find that there is no legal basis for the “special plea” or that the facts do not support the

upholding of the special plea, the court would then, in addition, be required to consider the merits of the respondent’s case relating to the infringement of the patent and the merits of any defences, apart from the special plea, to that case. Villa Crop’s defences to the respondent’s case on infringement would include the grounds for the revocation of the patent pleaded by the applicant in the counterclaim.

- [9] I am in agreement with the submission that granting leave to appeal at this stage would lead to a piece-meal consideration of the case and that the balance of convenience does not in the present circumstance favour such an approach. Hearing appeals piece-meal has consistently been discouraged by our courts. In *Health Professions Council of South Africa and another v Emergency Medical Supplies and Training CC t/a EMS*[5] the Court, for example, cautioned against granting leave to appeal in circumstances where the issue on appeal is only but one of the issues to be decided and where the balance of the issues in the matter have yet to be determined.

- [10] Moreover, granting leave to appeal will not result in a just and reasonably prompt resolution of the real issues between the parties: The refusal of the amendment was not definitive of the rights of the parties nor does it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Should Villa-Crop wish to dispute the consequences of the refusal to grant the amendment, it would be appropriate to do so after the hearing of the trial as pointed out in *Zweni v Minister of Law and Order*[6]

“8. A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586I-587B; Marsay v Dilley [1992] ZASCA 114; 1992

- (3) SA 944 (A) at 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992
- (4) SA 202 (A) at 214D-G).
9. The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability (*South Cape Corporation (Pty) Ltd v Engineering*

Management Services (Pty) Ltd 1977

- (3) SA 534 (A) at 550D-H). To illustrate: the exclusion of certain evidence may hamper a party in proving his case. That party may notionally be able to prove it by adducing other evidence. In that event an incorrect exclusion would not necessarily have an effect on the final result. In deciding upon the admissibility of evidence a court is not called upon to speculate upon or divine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation. Should it appear at the conclusion of the matter that an incorrect ruling amounted to an irregularity which may have had a material effect on its outcome, the Court of appeal may, in adjudicating the 'merits', set aside the final judgment on that ground and, in an appropriate case, remit it back to the trial Court (*Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH* 1976
- (3) SA 352 (A); *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* [1990] ZASCA 47; 1990
- (3) SA 547 (A) at 566C-D).”
- [11] Villa Crop submits that the interests of justice demand the amendment sought should have been granted. Villa Crop further takes issue with this court’s view that the special plea is not simple and that it necessitates “an in-depth enquiry” and that the trial will be dragged out unnecessarily.

[12] It is now argued on behalf of Villa Crop that an “in-depth inquiry” would not be necessary and that the proposed special plea could be heard as a stated case as there is no dispute about the facts of Bayer’s submissions in support of the Supplementary Protection Certificates (“SPC’s”). There is no merit in this submission. Firstly, the point now raised that the special plea could be decided as a stated case has not been raised before. Secondly, the point that there is no dispute about the facts of Bayer’s submissions in support of the SPC’s, has no merit as the existence and extent of factual disputes will only appear once Bayer has pleaded to the special plea (if the amendment were to be allowed).

Thirdly, the argument now raised that the issue involved in the proposed special plea is a simple one and that only one foreign jurisdiction would have to be considered in support of Villa Crop’s special plea (if it is to be allowed), is not borne out by the facts that were placed before this court when the application to amend was argued.

[13] In support of the application to amend by the introduction of a special plea in limine, Villa Crop argued that Bayer approached this court mala fide, dishonestly and with unclean hands. In support of this contention, Villa Crop argued that Bayer’s representations made in various countries in Europe are destructive of its representations in South Africa referred to the SPC’s in, at least six European Countries namely: The United Kingdom, France, the Netherlands, Belgium, Germany and Switzerland. If Villa Crop had intended to refer to only one European country, it would have said so in its papers and would certainly not have dealt in such detail (in the application to amend) with what is contained in the various jurisdiction’s SPC’s. Moreover, in the two applications to compel further particulars, detailed further particulars were sought in respect of all these European Countries.

This of course begs the question: If it was the intention all along to only rely on one European Country (most notably England) – as it appears to be the contention now - why was this court then subjected to lengthy submissions regarding further particulars with reference to these six European jurisdictions?

[14] I am in agreement with the submission that, contrary to what it argued on behalf of Villa Crop, a hearing on the merits of the proposed “special plea” will result in a lengthy trial where the intricacies of the laws relating to SPC applications in the numerous foreign jurisdictions referred to in the proposed special plea as well as the relevant facts and arguments pertaining to the applications for SPC’s that may well be put forward by the respondent, will have to be considered.

[15] The contention that the court’s ruling closes the door of justice on Villa Crop regarding the issues raised in the special plea, is also misplaced. I have already pointed out that the order does not dispose of the issues between the parties nor does it dispose of the issue intended to be raised in the amendment: Villa Crop will not be precluded from raising the issue which is the subject of the amendment sought in the main proceedings. In this regard Bayer also accepts that Villa Crop will not be precluded at the trial from raising the issue which is the subject of the amendment sought as the issue raised in the special plea forms part and

parcel of Villa Crop's claim that the patent falls to be revoked as a result of "material misrepresentation" as provided for in section 61(1)(g) of the Patents Act.

[16] Returning to the test for leave to appeal. Apart from the fact that I am not persuaded that the jurisdictional requirements to engage the appellate court has been satisfied, this application, even if it did, does not have reasonable prospects of success of appeal. I am also not persuaded that there exist "other compelling reasons for an appeal to be heard" (section 17(1)(a)(ii) of the Superior Courts Act). Also, although I have no doubt that the matter is of considerable important to the parties, the granting leave to appeal will not dispose of the issues between the parties. As repeatedly pointed out, Villa Crop may, in any event, raise the issues it sought to introduce by means of the amendment sought, during the trial. This is not, in my view, an instance where it can be said that the refusal of the amendment will cause prejudice to a party. Nor is it, for the

reasons set out in the judgment, in the interest of justice that the amendment be granted particularly in light of the fact that the amendment would result in protracted litigation.

[17] The following order is made:

"The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel who were so employed."

AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 January 2021.

For the applicant (in the application for leave to appeal)

RM ROBINSON SC

Instructed by:

Von Seidels Attorneys

c/o Smith & Van Wyk Attorneys

For the respondent (in the application for leave to appeal)

L BOWMAN SC

BRAHM DU PLESSIS SC

DM Kisch Inc t/a Kisch IP

[1] Act 10 of 2013.

[2] 2014 JDR 2325 (LCC).

[3] 2012

(1) SACR 567 (SCA).

[4] Act 57 of 1978.

[5] 2010 (6) SA 469 (SCA).

[6] 1993 (1) SA 523 (A) .

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZACCP/2021/1.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/villa-crop-protection-pty-ltd-v-bayer-unknown-topic-accp-2021--6a3ea50e3b1caa9129807486>

Prepared on 14 October 2026 · Esheria