A Patent Problem – When the Misapplication of Law Collides with an Error of Law: *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2023 4 BCLR 461 (CC)

N Mahlangu*

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Author

Nomthandazo Mahlangu

Affiliation

North-West University, South Africa

Email

Nomthandazo.Mahlangu@nwu.ac.za

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Abstract

The judgment in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2023 4 BCLR 461 (CC) emanates from the order of the Court of the Commissioner of Patents in the High Court of South Africa, Gauteng Division, Pretoria (CoP), that refused Bayer leave to amend its plea. In this matter, Bayer accused Villa of infringing its patent. Refuting the claims, Villa attacked Bayer's patent validity, counterclaimed for its revocation, and subsequently gave notice to amend its pleadings. The CoP refused the application, which marks the point of dispute in this case. This note evaluates whether the CoP correctly exercised its discretion in refusing the application to amend the claim. It further examines issues of law that the Constitutional Court had to resolve, whether (a) the matter is a constitutional matter, (b) it raises an arguable point of law of general public importance, and (c) it is in the interests of justice for leave to appeal to be granted. The note concludes by offering an opinion on whether the decision considered current concerns about our patent system.

Keywords

Patent law; spirotetramat; *Patents Act*; amendment of pleadings; doctrine of unclean hands; misrepresentation; public interest; special plea; novelty.

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1 Introduction

Patents are legal instruments that protect intellectual property rights (IPRs). A new invention, involving an inventive step and useful in trade, industry, or agriculture may be eligible for patent protection.[1] An invention is new if it does not form part of the "state of the art" immediately before the priority date of that invention.[2] The "state of the art" includes patented products or processes disclosed to the public, whether in the Republic of South Africa or elsewhere, through written or oral description, use, or other means.[3] Information disclosed to the public remains free and accessible and cannot be subject to further patent protection. Thus, identical inventions would lack novelty because the information is already in the public domain, and society should not have to obtain a patent to access it.[4] A key aspect of a patent application is disclosure. The *Patent Act* and the *Patent Regulations*[5] require an invention to be described in sufficient detail to enable a person skilled in the particular field to use it.[6] The disclosure serves the following purpose: patent holders are granted exclusive rights to prevent others from commercially exploiting the patented inventions, and in return for such rights, patent holders are required to disclose information related to the invention. In the disclosure, the patent holder delineates the boundary of ownership over the invention. Thus, disclosure is a rationale for patent protection and facilitates the dissemination of information and access to technological knowledge, which spurs innovation.[7]

South African patent registration is a depository system. A patent is granted if it satisfies the formal requirements, irrespective of its validity. Thus, the responsibility to ensure that the application is valid lies with the applicant.[8] The patent holder's failure to properly exercise this responsibility may result in patents granted to prohibited subject matter. As the validity of a patent is not assessed, it is impossible to determine if an invention satisfies the

* Nomthandazo Mahlangu. LLB, LLM (UNISA). Lecturer, Faculty of Law, North-West University, Mafikeng, South Africa. E-mail: Nomthandazo.Mahlangu@nwu.ac.za. ORCiD: https://orcid.org/0009-0009-9690-6977.

1 Section 25(1) of the *Patents Act* 57 of 1978 (hereafter the *Patents Act*).

2 The priority date is that on which the patent application was filed (s 25(5) of the *Patents Act*).

3 State of the art comprises all matter (whether a product, a process, information about either, or anything else) that 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 (s 25(6) of the *Patents Act*).

4 Hyewon *Second Generation Patents in Pharmaceutical Innovation* 288.

5 GN R2470 in GG 6247 of 15 December 1978.

6 Section 25 of the *Patents Act*.

7 Ndlovu 2021 *PELJ* 5, 10.

8 Ncube 2014 *JIPLP* 822-823.

patentability requirements.[9] This practice differs substantially from that in other jurisdictions where patent applications are examined for compliance with basic formal requirements and legal rules. A patent found to be invalid is subject to revocation,[10] and is unenforceable. This process has financial implications for the applicants.

Scholars contend that the depository system increases social costs. Companies must protect their IPRs by monitoring competitors' patent applications to prevent the granting of unlawful patents or infringement on their domains.[11] Invalid patents also have an inequitable economic impact. The exclusive right conferred to patents prevents companies from commercially offering these inventions without royalty payments or other agreements with the patent holders. When an invalid patent is granted, companies have to pay royalties to the patent holders of invalid patents, resulting in higher societal costs as patent holders have economic monopolies and the freedom to set prices. Meanwhile, competitors may refrain from pursuing innovations due to fear of litigation, potentially leading to markets being flooded with expensive, low-quality products. The limited competition restricts innovation and market improvements, which could ultimately harm consumers by reducing the availability of affordable, high-quality alternatives.

The primary dispute in *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*[12] centres on the misapplication of the test to grant amendments to pleadings and on whether Bayer's patent was valid. This case note analyses the Commissioner of Patents' reasons for refusing to allow Villa to amend its pleadings. The note submits that the courts should have exercised their wide discretion by reviewing this case from a balancing of rights perspective. The patent holder's rights could have been weighed against the public interests. The decision does not raise new issues; it merely highlights the common deficiencies and dishonest patent holder's exploitation of the patent system. The evidence in the case demonstrates the system's susceptibility to abuse and inability to address the misrepresentation unless confined to section 61(1)(g) of the *Patents Act*. A critical and reflective analysis of the issues in the *Villa* case will contribute

9 Section 25(5) of the *Patents Act* excludes specific subject matter from being patented.

10 Section 61 of the *Patents Act* outlines the grounds for patent revocation.

11 Ndlovu 2021 *PELJ* 20-24.

12 *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2023 4 BCLR 461 (CC) (hereafter *Villa Crop Protection* (CC)).

to the ongoing patent system reforms and further discourse regarding the role of invalid patents.[13]

2 Facts

In 2018 Bayer, a multinational pharmaceutical company, instituted infringement proceedings in the Court of Patents (CoP), alleging that Villa, a South African agricultural company, infringed its South African "2005 patent" and sought relief, including an inquiry regarding the reasonable royalty payable.[14] Bayer owns a "2005 patent" that contains a chemical called "spirotetramat", which is similar to Villa's product, Tivoli 240 SC, which also contains spirotetramat.[15]

Villa challenged the validity of Bayer's patent and counterclaimed for its revocation based on section 61(1)(c) read with sections 25(1), (6) and (7) of the *Patents Act.*[16] They argued that Bayer's invention was 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 or reasonably ought to have known that the patent was not new. It further seeks to amend its particulars, introducing a common law defence, the special plea of unclean hands and the abuse of process based on the patentee's duty of good faith under section 61(1)(g) of the *Patent Act*.[17]

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13 DTI 2018 https://www.gov.za/sites/default/files/IP_Policy2018-Phase_I.pdf (hereafter the *IP Policy*). Amongst other things, the *IP Policy* aims to promote a holistic, balanced and coordinated approach to intellectual property.

14 *Villa Crop Protection* (CC) paras 2-3.

15 *Villa Crop Protection* (CC) para 3. Spirotetramat is a chemical compound formed by different elements that bond in a fixed ratio relative to each other; *Villa Crop Protection* (CC) para 56. Bayer alleged that Villa's pesticide, Tivoli 240 SC, infringed several claims of the 2005 patent.

16 Including the material grounds for the revocation under ss 61(1)(c), 25(1), (6) and (7) of the *Patents Act*. Under s 61(1), the invention concerned is not patentable under s 25. S 25(1) provides that a patent may, subject to the provisions of this section, be granted for any new invention involving an inventive step capable of being used or applied in trade, industry or agriculture. S 25(6) states that "the 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", and s 26(7) provides that "the state of the art shall also comprise matter contained in an application, open to public inspection, for a patent, notwithstanding 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."

17 *Villa Crop Protection (CC)* para 59. Also see ENSight date unknown https://www.ensafrica.com/news/detail/6595/doctrine-of-unclean-hands-definition. The doctrine of unclean hands is a legal principle grounded in common law. It stipulates that a party seeking redress from a court must not have engaged in unethical or unjust behaviour regarding the specific matter in question. This doctrine serves as a defence against claims made by a party and is often invoked by the

Villa's argument was as follows: Bayer filed an international patent application under the European patent number 0 915 846 (referred to as a "basic patent"), which contained spirotetramat, but Bayer either knew or should have known it to be false.[18] When the basic patent expired, Bayer applied for the Supplementary Protection Certificate (SPC) in various European Community (EC) countries. However, there is a contraction in Bayer's position. When applying for the SPC, Bayer made representations during the proceedings that demonstrate spirotetramat had been in the public domain since 1997. Villa argues the false statement made by Bayer was material, and that either Bayer knew the statement was false at the time it was made, or should reasonably have known.[19] Shortly after making the statements, Bayer applied for regulatory approval in various EC countries to permit the commercial product containing spirotetramat to be sold on the market.[20] Villa further claims that Bayer's 2005 patent's chemical composition of spirotetramat is equivalent to the basic patent. Consequently, Villa argues that Bayer approached the court with unclean hands, having acted in bad faith and dishonestly.

The statutory term of a patent is 20 years from the date of filing in various jurisdictions. Patent laws of states that are members of the World Trade Organisation (WTO) are harmonised, in line with the *Agreement on Trade-Related Intellectual Property Rights* (TRIPS), which established the minimum standards of protection each member has to provide.[21] As a signatory to these international agreements, South Africa's patent protection duration complies with the TRIPS requirements. However, patent protection differs in the EC, particularly in the medical or pharmaceutical industry. Due to extensive research and development (R&D), lengthy periods, and clinical trials, the patent term is shorter after the marketing approval.[22] A patent term extension can be granted to compensate for the term, subject to regulatory approvals. This applies to medicinal and plant protection products (PPP). The SPC is granted to extend the term to a period equal to the time between granting the first marketing authorisation and the patent filing date.[23] However, South Africa does not grant SPC protection.

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opposing party. The primary objective of the doctrine of unclean hands is to uphold fairness and integrity within the legal system. It is rooted in the concept that a party should not be permitted to profit from its misconduct or unethical actions.

18 *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2021 JDR 0689 (hereafter *CoP*) para 8.

19 *Villa Crop Protection (CC)* para 57.

20 An SPC is explained below.

21 Ndlovu 2021 *PELJ* 2.

22 EPRS 2023 https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/740258/EPRS_BRI(2023)740258_EN.pdf.

23 EPRS 2023 https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/740258/EPRS_BRI(2023)740258_EN.pdf.

3 Deliberations in the Court of Patents

Bayer objected to the proposed special plea, contending that the point raised in the special plea would require the court to determine the validity of the patent, which it considered impossible because the validity of its patent should be considered during the trial, along with Villa's defence and counterclaim. In other words, Bayer argued that a determination on the validity of its 2005 patent could happen only after assessing whether its 2005 patent met the novelty requirement. It further argued that it could be found to have had unclean hands only if the court found that the 2005 patent was invalid,[24] adding that the special plea relies on allegations and circumstances associated with patent laws and procedures of foreign jurisdictions dating back eight years before the priority date of the patent—facts it considered immaterial to the validity of its patent.[25]

The CoP held that comparing the facts presented by Bayer on spirotetramat in the EC proceedings with facts presented in their current proceedings required a comprehensive understanding of how different foreign jurisdictions handled SPC applications.[26] It referred to the principles for granting amendments in *Affordable Medicines Trust v Minister of Health*,[27] where Ngcobo J held[28] that the amendment of pleadings is always allowed, unless they are made in bad faith, would result in an injustice that could not be remedied by a cost order, or would prevent the parties from being restored to their positions before the pleadings, thereby affecting the fairness of the proceedings.[29]

The court emphasised that the focus should be on what the interests of justice demanded about the proposed amendment.[30]

The CoP concluded that the validity of Bayer's patent was unresolved, and it would therefore not be in the interests of justice to conduct a thorough investigation.[31] It remarked that this exercise would require expert witnesses to clarify legal and procedural issues, which would needlessly prolong the proceedings.[32] Thus, it declined the special plea.

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24 *CoP* para 16.

25 *Villa Crop Protection* (CC) para 10. Bayer's third objection was that the amendment sought was not *bona fide* but an abuse of process calculated to delay the hearing of the trial and prejudicing Bayer.

26 CoP paras 28-29.

27 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) (hereafter *Affordable Medicines*).

28 *Affordable Medicines* para 9.

29 *Affordable Medicines* para 9, quoting *Moolman v Estate Moolman* 1927 CPD 27 29.

30 *Affordable Medicines* para 9; *Villa Crop Protection* (CC) para 12.

31 *Villa Crop Protection* (CC) para 13.

32 *Villa Crop Protection* (CC) para 13.

Villa's leave to appeal this decision was denied, and so was its appeal to the Supreme Court of Appeal and the application for reconsideration before the President of that court. Villa subsequently approached the Constitutional Court for leave to appeal.[33]

4 In the Constitutional Court[34]

For the Constitutional Court to hear this matter, Villa had to establish its case, (a) raise a constitutional issue, or (b) raise an arguable point of law of significant public importance and prove that (c) it would be in the interest of justice to grant it leave to appeal.[35] The discussion below analyses each of the three elements.

4.1 A constitutional issue

This Court answers whether the CoP's refusal to allow the amendment unjustifiably restricted Villa's access to court under section 34 of the *Constitution of the Republic of South Africa,* 1996.[36]

Villa argued that the matter raises a constitutional issue regarding its right to access to court, guaranteed by section 34 of the *Constitution.*[37] The refusal of leave to appeal violated its right to defend the claim that it infringed Bayer's patent and unduly limited its right to a fair hearing. Second, the CoP's refusal to allow its application for amendment fell within the Constitutional Court's jurisdiction as per section 167(3)(b) of the *Constitution*. Third, that this matter raises arguable points of law of general public importance since the patent system requires patentees to act honestly when applying for patents. This honesty extends beyond the narrow interests of the parties. Thus, it argues that maintaining integrity and honesty in obtaining and defending patents, including litigation, is in the public interest.[38]

Bayer submitted that there were no reasonable prospects of success, as the court would be unlikely to find that the doctrine of unclean hands applies in patent law.[39] It further asserted that granting Villa's amendment could destabilise the patent system, which could be reformed or amended only by the Legislature. Lastly, even if the appeal succeeded and the amendment was granted, the following issues would still require adjudication: (a) the validity in law, in the context of patent litigation, of the special plea; (b) the

33 *Villa Crop Protection* (CC) para 14.
34 The minority judgment in *Villa Crop Protection* (CC) paras 1-53 was given by Mathopo J (Tshiqi J and Mlambo AJ concurring).
35 *Villa Crop Protection* (CC) para 24.
36 *Villa Crop Protection* (CC) paras 25 and 26.
37 *Villa Crop Protection* (CC) para 25.
38 *Villa Crop Protection* (CC) para 28.
39 *Villa Crop Protection* (CC) para 22.

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 section 61(1)(g) of the *Patents Act*.[40]

Mathopo J disagreed with the claim that the CoP's refusal to allow the amendment unjustifiably limited Villa's rights to access courts. He cited *NVM obo VKM v Tembisa Hospital*,[41] which clarified when access to court is limited under section 34.[42] He held that given the broad wording of the Bill of Rights, many cases are likely to implicate fundamental rights. Consistent with this reasoning, he said, while the CoP correctly outlined the test for granting amendments, it failed to properly apply that test to the facts of the case. Instead, the CoP focused on principles of the interests of justice specified in *Affordable Medicines*.[43] Thus, he noted, the CoP committed an error of the application of law. Nonetheless, Mathopo J said the misapplication of the test was insufficient to grant Villa jurisdiction before this Court.[44]

The majority decision disagreed with the reasons advanced against access to the Court. Unterhalter AJ (for the majority) remarked that the CoP made an error of law. While the CoP cited well-established legal principles, it based its decision on the interest of justice standard.[45] Unterhalter AJ explained that a misapplication of the law happens when an accepted legal standard is used to analyse facts in a way that leads to an unsustainable conclusion. He clarified that there is no principle that would allow amendments unless they are sought in bad faith or would cause an injustice that an award of costs cannot remedy. Thus, the CoP decision does not result from properly applying the law to the relevant facts.[46] He further affirmed that the legal principles in *Affordable Medicines* uphold the constitutional right to have disputes resolved by a court. The CoP wrongly exercised its discretion by deciding for litigants, which disputes the interests of justice that permits them to pursue before the courts, then excluded a cause of action because it would entail protracted enquiry.[47] Unterhalter AJ

40 *Villa Crop Protection* (CC) para 23

41 *NVM obo VKM v Tembisa Hospital* 2022 6 BCLR 707 (CC).

42 *Villa Crop Protection* (CC) para 26.

43 *Villa Crop Protection* (CC) para 36.

44 An argument is considered "arguable" if it has substance. So, not every legal argument qualifies as an arguable point of law under s 167(3)(b)(ii) of the law. For a point of law to be arguable, it must have merit or plausibility, even if it is not fully convincing. An unmeritorious argument cannot be considered arguable. For an argument to be deemed arguable, it must have substance rather than merely existing as a possible point of contention: *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 3 SA 479 (CC) para 21; *Villa Crop Protection* (CC) paras 29 and 37.

45 *Villa Crop Protection* (CC) para 64.

46 *Villa Crop Protection* (CC) para 64.

47 *Villa Crop Protection* (CC) para 66.

remarked that the CoP's misinterpretation of *Affordable Medicines* was a significant error that needed correction, not an invitation for disaffected litigants to seek leave to appeal.[48] Failing to correct this error would damage the litigants' right to access courts and the cornerstone of our justice system. Because Villa's special plea was rejected based on an error of law, the constitutional right of access to the courts was implicated, thereby engaging this Court's jurisdiction.[49]

4.2 An arguable point of law of general public importance

Mathopo J addressed this point by citing the *Paulsen* case, where Madlanga J said that a point of law is arguable if the argument has both substantive merit and a degree of plausibility.[50] Mathopo J stressed that Villa's case lies in misrepresentation, and opined that, if successful, Bayer's patent would be revoked, as the patent system is capable of addressing such misrepresentations.[51] Mathopo J described Villa's strategy (application for special plea) as a ploy to subvert the existing patent system to introduce reforms through a special plea, which is the responsibility of the Legislature. He remarked that this would destabilise the patent system.[52]

Unterhalter AJ disagreed, noting that this matter raises an arguable point of law of general public importance. He explained that in exceptional circumstances, courts have the power to prevent an abuse of process, such as when a litigant approaches the court with unclean hands. This inherent power ensures that litigants do not use courts to pursue ulterior motives undermining its purpose. However, the court exercises this power sparingly, as it may infringe upon the right of access to court under section 34 of the *Constitution*. Thus, a claim will be dismissed only if the litigant abuses this right.[53]

He added that the doctrine of unclean hands is applicable in patent law because abuse of process may occur among litigants claiming patent rights, just as it does in contract or delict cases.[54] In this instance the doctrine is invoked because Villa's claim of abuse against Bayer is not that its 2005 patent is invalid but rather that Bayer comes to the Court tainted with turpitude due to misrepresentations. The doctrine of unclean hands is thus

48 *Villa Crop Protection* (CC) para 42: Unterhalter AJ responded to Mathopo J, who remarked that the majority decision would undoubtedly lead to an influx of unmeritorious applications before this Court.
49 *Villa Crop Protection* (CC) para 67.
50 *Villa Crop Protection* (CC) para 29.
51 *Villa Crop Protection* (CC) para 30.
52 *Villa Crop Protection* (CC) paras 31-33.
53 *Villa Crop Protection* (CC) para 72.
54 *Villa Crop Protection* (CC) para 79.

used to assess whether Bayer is a litigant the courts should entertain, not to question the validity of the patent itself.[55]

4.3 The interests of justice

When necessary, the Court has the discretion to refuse leave to appeal if it considers that hearing the appeal would not serve the interests of justice, even if the matter raises a constitutional issue or an arguable point of law.[56] In assessing the interests of justice, the significant factor is whether there is a likelihood of success.[57] In this case, however, he noted that there were no reasonable prospects of success, as Villa would not suffer prejudice, given that it could argue the claim for revocation of Bayer's patent.[58] On the other hand, granting an amendment would cause Bayer prejudice that could not be cured by an appropriate costs order or postponement because its infringement action would be delayed. It was common cause that the patent would expire in 2023, and Villa's action would render the patent nugatory. This, he said, was an injustice.[59] In the context of determining the proposed special plea, Mathopo J found that resolving the special plea required the determination of factual disputes, and courts do not entertain such disputes.[60]

Unterhalter AJ referred to the finding of the minority that the amendment would occasion no prejudice to Villa but would delay and prejudice Bayer as the finding of redundancy.[61] He explained this as follows: the statutory ground of revocation provided for in section 61(1)(g) (statutory ground of revocation) of the *Patents Act* is not the cause of action that Villa sought to advance in its proposed special plea; rather Villa invoked the power of the courts to prevent an abuse of process. The conduct that might have constituted abuse is not confined to the misrepresentation or false statement referenced in section 61(1)(g), nor are the averments made in the special plea so confined.[62]

Regarding the finding that the proposed special plea involved the determination of factual disputes, Unterhalter AJ referred to this as a finding of factual disability.[63] He highlighted that if the doctrine of unclean hands in the special plea was deemed redundant because it had already been raised, this would not justify refusing an amendment. If the special plea merely reintroduced the statutory ground for revocation, how could it be dismissed

55 *Villa Crop Protection* (CC) para 78.
56 *Villa Crop Protection* (CC) para 49.
57 *Villa Crop Protection* (CC) para 49.
58 *Villa Crop Protection* (CC) para 50.
59 *Villa Crop Protection* (CC) para 51.
60 *Villa Crop Protection* (CC) para 52.
61 *Villa Crop Protection* (CC) para 81.
62 *Villa Crop Protection* (CC) para 82.
63 *Villa Crop Protection* (CC) para 81.

as lacking merit at this stage of the proceedings? Unterhalter AJ pointed out that the first judgment dismissed the doctrine of unclean hands, not because it overlapped with section 61(1)(g) of the *Patents Act*, but because it was considered unworthy of recognition. This conclusion, he observed, contradicted the first judgment's assessment of the merits of the special plea.[64] He concluded that the interests of justice were served by entertaining this appeal.

Lastly, Bayer submitted that the amendment, if granted, would delay the completion of the trial, and its 2005 patent could expire before the trial ended.[65] According to Unterhalter AJ, though, there was no evidence that if the amendment were refused, the trial on the existing pleadings would be completed (together with any possible appeal) before the 2005 patent expired. Although that expiry would have affected the granting of interdictory relief, it would still not have prevented a court from awarding damages. As a result, Bayer did show sufficient evidence to justify denying Villa its presumptive right of defence.[66] Thus, the CoP order was set aside, and Villa was granted leave to amend its particulars of claim by introducing its special plea.[67]

5 Case analysis

This case pivots on Villa's argument that Bayer's 2005 patent should be revoked under section 61(1)(g) because it was already in the public domain. This argument is based on the fact that when Bayer submitted the application for the basic patent, it made false declarations, which Bayer should have known were false. Specifically, Villa claims the representations made by Bayer demonstrates that spirotetramat was already protected by an existing basic patent that had been in the domain since 1997.[68]

Bayer initiated patent infringement proceedings to protect its 2005 patent, which contains spirotetramat, an ingredient also present in Villa's products. To enforce the 2005 patent, spirotatramat must not have been disclosed before the priority date, whether in the Republic or elsewhere in any form, otherwise it cannot be protected in South Africa. When a patent holder files a patent application, they are required to disclose the details of the patent. The patent claim defines the territory over which the patent holder asserts control – creating a boundary that prevents other innovators from encroaching on this territory and risking infringement. Additionally, this

64 *Villa Crop Protection* (CC) paras 81-83.
65 *Villa Crop Protection* (CC) para 92.
66 *Villa Crop Protection* (CC) para 92.
67 *Villa Crop Protection* (CC) para 93, read with the order of the court that follows para 93.

process enables the public and innovators to learn from the invention, potentially leading to improvements in existing technologies based on the original patent. This is the central purpose of the patent system: to foster the transfer and dissemination of knowledge to promote innovation. Notably in this case, Villa is not relying on information disclosed in the 2005 patent claim but rather on what Bayer disclosed in the EC in relation to the basic patent.

Bayer argued that the question whether it approached the court with unclean hands could only be assessed after determining whether the 2005 patent lacked novelty. The requirement for an invention to be novel is not only a prerequisite for patentability, but also necessary to prevent double patenting. As mentioned, patent applications are not examined under the depository system, meaning that proposed inventions are not compared with existing public domain information. However, if the 2005 patent is found to lack novelty, it would therefore be invalid and subject to revocation, as this contravenes the requirements outlined in section 25 of the *Patent Act*. Even if the 2005 patent was found to be novel, it would still not qualify for patent protection if it is anticipated by the previous disclosures.[68] Villa argued that the chemical composition, chemical structure, and geometry of the compound disclosed in the South African patent are identical to those of the compound spirotetramat, making it equivalent to the basic patent.[69] Based on this analysis, spirotetramat has been previously disclosed and is therefore unpatentable.

The note concurs with the reasoning of the CoP, emphasising that investigating the SPC procedures would have been a complicated exercise, particularly since South Africa does not offer the SPC. This inquiry would require experts with specialised knowledge in SPC matters, most of whom are likely to be located abroad. Given that six EC jurisdictions (Germany, United Kingdom, France, Belgium, and Switzerland) are implicated in this matter. Finding experts from each of these jurisdictions would have been challenging and time-consuming. Importantly, as Bayer and later the CoP stated, this exercise would not have resolved the matter entirely, as the court would still need to rule on the validity of Bayer's patent.[72]

However, this note disagrees with the CoP's finding that the investigation was not in the interest of justice, due to its protracted nature, which detracts from the main issue.[73] These outcomes merely highlight the lack of harmonization within the global patent system. The primary consideration should be how this decision impacts the public and innovation. The

68 Ndlovu 2021 *PELJ* 5, 11.
69 *Villa Crop Protection* (CC) para 7.

extended duration of Bayer's patent protection prevents Villa from practicing the invention unless a royalty fee arrangement is in place, which is the relief that Bayer sought before this court. Second, this matter has significant public interest as it imposes limitations on innovation with direct implication for the public.

Thus, the majority opinion is correct in its finding that there was insufficient weight to warrant the refusal of the amendment, which directly affected Villa's right of access to the courts in terms of section 34 of the *Constitution*. The proposed special plea does give rise to an arguable point of law of general public importance, and the interests of justice are served by granting leave.

6 Conclusion

The core of this case relates to the patent system and its associated problems. Section 25 provides that an invention qualifies for patent protection if it satisfies the novelty, inventiveness and usefulness requirements. As mentioned earlier, South Africa does not examine patent applications, a situation which poses the risk of granting patents for inventions that are either not novel or lack inventiveness. This conflicts with the common rationale for the protection of patents, which is to incentivise inventors' valuable innovations.

This note further mentions the drawbacks of granting exclusive rights: discouraging innovation, hindering competition, slowing economic growth, and creating scarcity of the product, which could increase cost due to a lack of alternatives. While the court did not directly address the problems underlying the patent system, it affirmed that if there is an abuse of the patent application process, the law of patents is not exempted from the doctrine of unclean hands.[70] Thus, the operability of the patent system, given that it affects society, is a public interest. The effects of invalid patents and the abuse of the patent system are a matter of public interest. This is why the note emphasises the significance of striking a balance between the protection conferred to patent holders and public interest.[71] Although the focus of the case was not on public interest or patent holder's rights, the facts of this case touch on those aspects.

One of the reasons for the calls to reform the patent system is that training and upskilling personnel to examine patent applications would require

70 *Villa Crop Protection* (CC) paras 78 and 79.

71 Chidede 2022 *LDD* 175; the author asserts that in the 21st century, a nation's progress is intricately linked to the global competitiveness of its economy, industries, and businesses. Advancements in knowledge and technology are driven by robust innovation systems, with the linchpin being modern and rigorously enforced IP frameworks. Also see Sindane 2022 *Pretoria Student Law Review* 1-5.

funding.[72] Additionally, the statistics of the Intellectual Property Organisation (WIPO) demonstrate that South Africa grants more patent applications than other countries. Scholars attribute this to the ease and lower cost of filing patent applications in the country.[73] If the protection of intellectual property is perceived as a significant strategy for the country's economic growth, and considering the observations regarding loopholes in our system, the above issues should have influenced the decision of the court, given that societal costs outweigh the costs that would have been incurred to investigate the presentation made in both proceedings.

The note also discusses the patent declaration, which is vital in a patent application as it enables others to commercially exploit the patent. It could have been that Villa had developed spirotetramat from Bayer's disclosure. This further highlights the function of declaration to transfer and disseminate technological information for further innovations. However, if Bayer's patent was invalid, it would not be entitled to any royalties even if Villa developed its product using Bayer's information. This is why this case is so important for patent law; it affects not only Villa and potentially other companies, but also society at large.

Lastly, the minority judgment correctly stated that the patent system is capable of dealing with the misrepresentation advanced by Villa, but ignored the fact that the patent system is restricted to those defences that can be successfully proven in a court of law. The courts can determine the validity of a patent only when confronted with a claim asserting patent invalidity. In such instances the court meticulously examines the evidence to decide the validity of the patent.[74] If it had been established in this case that Bayer was attempting to assert rights over invalid patents, that would have changed the trajectory of the patent system in South Africa as such a decision had never been taken before. It remains to be seen if this matter will go further or whether this marks the end of it.

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73 Pouris and Pouris 2011 *South African Journal of Science* 6.
74 Section 61(1)(g) of the *Patent Act*.

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List of Abbreviations

CoP	Court of the Commissioner of Patents in the High Court of South Africa, Gauteng Division, Pretoria (Court of Patents)
DTI	Department of Trade and Industry
EC	European Community
EPRS	European Parliamentary Research Service
IPRs	intellectual property rights
JIPLP	Journal of Intellectual Property Law and Practice
LDD	Law, Democracy and Development
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SPC	supplementary protection certificate
TRIPS	Agreement on Trade-Related Intellectual Property Rights