



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 1 April 2016  
**STATUS** Immediate

*Please note that the media summary is for the benefit of the media and does not form part of the judgment.*

**Merial v Cipla Vet (20772/2014) [2016] ZASCA 57 (1 April 2016)**

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#### **MEDIA STATEMENT**

Today, the Supreme Court of Appeal (SCA) upheld an appeal by Merial, Merial Limited and Merial South Africa (Pty) Ltd (the appellants), against an order by the Court of the Commissioner of Patents, in which it was found that Cipla Vet (Pty) Ltd (Cipla) had not infringed the appellants' patent relating to an anti-parasitic treatment for domestic animals. Overturning this decision, the SCA found that Cipla's product ('Fiprotec') had infringed the patent, and accordingly granted an order inter alia (i) interdicting Cipla from infringing the relevant claims in the patent; (ii) that Cipla deliver up all products infringing the patent; (iii) that an inquiry be held to determine damages or a reasonable royalty; and (iv) certifying as valid the relevant claims in terms of s 74 of the Patents Act 57 of 1978.

The main issues before the SCA were whether the patent was invalid for lack of clarity, and whether the patent had in fact been infringed.

The patent in suit was for an anti-parasitic treatment for domestic animals, which when applied would cover the coat of the animal. The active anti-parasitic ingredient of the treatment was a compound known as 'fipronil', which had previously been patented. However, an unpleasant side effect of fipronil was that it tended to crystallise on the animals' coats, leaving them sticky. What distinguished the patent in suit from previous patents was the presence of a 'crystallisation inhibitor', which reduced the degree of this crystallisation.

The patent consisted of four ingredients, each of which served a specific function: first, the fipronil, which was the active anti-parasitic ingredient; second, the crystallisation inhibitor; third, a solvent; and fourth, a co-solvent (ie a second solvent) which also acted as a drying promoter. For each ingredient

(other than fipronil), the patent listed a number of possible compounds which could be used, either alone or in combination with one another. However, the patent taught that the compounds selected to act as the crystallisation inhibitor would also have to satisfy a 'crystallisation inhibitor test'. This test was conducted using all the chosen ingredients but *excluding the co-solvent*.

Cipla challenged the validity of the patent on the basis that this crystallisation inhibitor test rendered the claims unclear. The basis for this was that there was some overlap between the compounds that could make up the various ingredients, for example, a compound which could be used as the solvent could also be used as the co-solvent and/or the crystallisation inhibitor. As a result, Cipla's argument went, it was not always possible to objectively determine which compound formed part of which ingredient, and accordingly it was not always possible to objectively determine which compounds should be excluded from the test. To support this argument, Cipla presented a number of complex hypothetical compounds in order to demonstrate the lack of clarity.

The SCA held that the interpretation of a patent is a process of construction by a mind willing to understand, not deconstruction by a mind desirous of misunderstanding. After reviewing the expert evidence, the court held that a skilled addressee was capable of understanding the ambit of the claims, and the existence of contrived or 'mythical' hypotheticals did not render the patent in suit invalid for lack of clarity.

Concerning the question of infringement, Cipla argued that Fiprotec did not infringe the patent in suit because it did not satisfy the crystallisation inhibitor test, and therefore it did not come within the scope of the patent's claims. It based this argument on experiments conducted by its expert which purportedly demonstrated that Fiprotec did not satisfy the crystallisation inhibitor test. However, the SCA held that the manner in which these experiments had been carried out was open to criticism and that their results were unreliable. Accordingly, the experiments conducted by the appellants' expert witness, which showed that Fiprotec did in fact satisfy the crystallisation inhibitor test, were to be preferred, and Fiprotec was held to infringe the patent in suit.

In coming to this conclusion, the SCA also noted that the court below was wrong to reject the appellants' expert's experiments on the basis that the ingredients she used were sourced from another supplier (and were not precisely the same as those used in Fiprotec). The SCA held that this was irrelevant, as there was no evidence that this would have made any material difference to their chemical composition or the results of the experiments she had conducted.

The SCA accordingly upheld the appeal, and held that the appellants' patent had been infringed by Cipla, and granted the order described above.

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