



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: 2023/039977

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVIEWED: YES/NO
 	
12 March 2025 DATE	
SIGNATURE	

In the matter between:

VETVAX (PTY) LTD

1st Applicant

DESIGN BIOLOGIX CC

2nd Applicant

KAREN NEL

3rd Applicant

and

REGISTRAR: FERTILIZERS, FARM FEEDS,

AGRICULTURAL REMEDIES AND STOCK REMEDIES

1st Respondent

AGRICULTURAL RESEARCH COUNCIL

2nd Respondent

ONDERSTEPSPOORT BIOLOGICAL PRODUCTS SOC LTD

3rd Respondent

JUDGMENT

The Court (Molopa-Sethosa J, Yacoob J *et* Raubenheimer AJ):

Order

[1] In this matter we make the following order:

1. The application is dismissed with costs on the scale as between attorney and client.

[2] The reasons for the order follow below.

Introduction

[3] The matter was enrolled as a Special Motion before a full court convened by the Deputy Judge President of this Division on application by the parties.

[4] The application has been dragging on since 2023 and entails a number of interlocutory applications. The total volume of the papers, excluding authorities, is in excess of 3000 pages.

[5] The first respondent abides the decision of the court, and does not participate in these proceedings. Where we refer to “the respondents”, this refers to the second and third respondent. Reference to “the applicants” means all three applicants.

[6] The applications before us are the main application, two applications to strike, three condonation applications and an application in terms of rule 30.

[7] In the week leading up to the week in which the matter was set down, the court was inundated with correspondence, eventually seeking a case-management meeting before the hearing to determine the order in which these various issues should be dealt with at the hearing. The court declined that request, and directed that, should the parties not agree on how oral argument should proceed, the parties will be afforded 45min at the commencement of the hearing to make submissions on this issue. Parties were also required to submit heads of argument on their proposed course of action.

[8] In short the respondents contended that the points *in limine* should be dealt with first, as it was more efficient, since the success of the points *in limine* would mean that the remaining preliminary issues, as well as the main application, would not have to be dealt with. Only if the points *in limine* were found to have no merit, would the remaining issues have to be dealt with. The preliminary points raised by the respondent were that there was no compliance by the applicants with statutory requirements for possessing the viral strain that is the subject of the main application, and that there were disputes of fact that could not be resolved on the papers. The applicants were alerted to the existence of disputes of fact, as well as the need to show compliance with statutory requirements as far back as 2022. Once the litigation was well-developed, the respondents invited the applicants to refer the matter to trial and tender costs. The applicants did not avail themselves of this invitation. The respondents now contend that the application must be dismissed on the basis of the two points *in limine*.

[9] The applicants contend that the interlocutory applications be dealt with first so that a full and comprehensive set of “cleaned up” papers could be before the court in order to hear the points *in limine* and the main application. The applicants, in fact, submitted that it would be appropriate to “clean up” the papers and then refer the matter to oral evidence. It was also submitted for the applicants that the points *in limine* were not points *in limine* but should be dealt with as part of the main argument.

[10] The interlocutory applications are the following. An application by the applicants for the striking out of irrelevant, vexatious and scandalous allegations of the Answering Affidavit. A condonation application for the late filing of the Replying Affidavit. This application was met with an application to strike certain paragraphs from the Founding Affidavit in the condonation application as being vexatious, irrelevant and scandalous. The applicants brought a Rule 30 application for the Respondents’ notices in terms of Rule 35 to be declared irregular and set aside and ordering the respondents to file their answering affidavit. This application was met with a counter application to compel the applicants to comply with the respondents’ Rule 35 notices and file their answering affidavit after compliance with the Rule 35 notices. The applicants did

not comply with a directive of the Deputy Judge President for the delivery of a confirmatory affidavit and launched an application for condoning this non-compliance as well as their omission of certain annexures to the Founding Affidavit in the condonation application for the late filing of the Replying Affidavit. The applicants also filed a Rule 30 application after the respondents filed a fourth set of affidavits.

[11] After hearing the arguments on the sequence of the oral arguments the court ruled that it would be appropriate that the preliminary points be argued first. The reason is that, if the points *in limine* dispose of the matter, then time and resources are not wasted dealing with issues which ultimately become irrelevant. This is obviously in the interests of the proper administration of justice.

[12] The respondents raises three preliminary points namely:

- 12.1 If the subject matter of the dispute was a virus there was no compliance with the Non-Proliferation of Weapons of Mass Destruction Act, 87 of 1993 ("The Non-Proliferation Act"), while
- 12.2 If the subject matter of the dispute was a vaccine there was no compliance with the Animal Diseases Act, 35 of 1984 ("The Animal Diseases Act");
- 12.3 There are substantial disputes of fact that the applicants were alerted to in correspondence in 2022 already. These disputes of fact were comprehensively dealt with in correspondence and was also raised in the answering affidavit to the main application as well as other affidavits in the interlocutory applications.

[13] The Applicants aver that the disputes of fact only emerged after the fourth set of affidavits to be admitted. This is not correct as the likelihood of the existence of disputes of fact is evident in the reams of correspondence annexed to the Founding Affidavit dating from 2022. In addition the existence of a dispute of fact

is made clear in the Answering Affidavit, which was filed nine months before the Replying Affidavit.

[14] It was submitted for the applicants that the Replying Affidavit comprehensively deals with the disputes of fact raised in the Answering Affidavit. In our view this is not the case. The Replying Affidavit repeats assertions made in the Founding Affidavit, and engages in word play, for example conflating a “vaccine strain” with a “vaccine”. It also includes new assertions about how the strain was obtained, which do not deal with the dispute of fact as they are, again, mere assertions.

[15] In the Replying Affidavit, the applicants contend that they do not have to comply with the Non-Proliferation Act, as vaccines are exempted. This allegation ought to have been included in the Founding Affidavit, as the applicants were alerted to the possible need to comply in 2022 in correspondence. Be that as it may, the applicants annex to their Replying Affidavit the 2019 iteration of the Declaration of the Minister in terms of the Non-Proliferation Act, which declares “Certain Biological Goods” as “Controlled Goods”.

[16] In terms of the Declaration, listed “[v]iruses, whether natural, synthetic, enhanced or modified, either in the form of isolated live cultures or as material, including living material which has been deliberately inoculated or contaminated with such cultures” are declared controlled goods. Rift Valley virus is one of the viruses listed.

[17] The relevant exception to this is “any goods in the form of a vaccine or toxoid”. It is impossible for this court to determine, as a matter of fact, on the papers, and taking into account the obfuscatory and conflating language used by the third applicant in her Replying Affidavit, and the applicants’ representative in the hearing, whether a “vaccine strain” falls into the definition of a vaccine. Certainly the evidence currently before us does not determine the issue. All that has been established is that a vaccine strain is used to produce a vaccine. In addition, the evidence regarding what exactly is the substance at issue is

contained in the Replying Affidavit, and the respondents were therefore not permitted to properly meet that case, even if the fourth affidavit is not excluded.

[18] The applicants complain that the question of compliance with the Animal Diseases Act was raised late. The respondents submitted that this is because it was for the first time in reply that the substance was identified (although loosely) as a vaccine, rather than a vaccine strain or an element in a vaccine. The applicants sought in the hearing to demonstrate that the Founding Affidavit refers to the substance as a vaccine, but this is not the case. It refers to the substance as a strain of a virus used in a vaccine and variations on that theme.

[19] For a court to be able to determine such an issue, proper evidence must be adduced, not just argument which seeks one interpretation of the affidavit evidence over another. The applicant does not make out a case in its Founding Affidavit regarding what the substance is and what regulatory framework applies to it. It is impossible for this court to find in its favour on this issue.

[20] Taking into account that the applicants always knew that the compliance with the Non-Proliferation Act was going to be an issue, the first point *in limine* must succeed. Even if it does not, there is a fundamental dispute of fact on that issue which cannot be resolved on the papers. There is in addition a dispute of fact regarding the manner of acquisition of the substance by the applicants, and whether the substance obtained is proprietary in nature. Neither of these are able to be determined on the papers.

[21] It was submitted for the applicants that, rather than dismissing the application and the applicants then, if they wish, issuing summons, the matter should be referred to trial. The reasons were that, because of the large amount of paper that has been put before the court, issues have now been "crystallised" and, secondly, that the respondents have asked the Registrar (the first respondent) to cancel all the applicants' registrations, and that the Registrar has put that request on hold pending the outcome of this application. The dismissal of this application would then result in the Registrar making a decision.

[22] The second point does not hold any water. The applicant cannot require that this court take a course in order to delay some other process. The requests to the

Registrar and any resulting decision must be dealt with separately and with the appropriate legal processes.

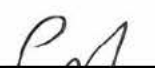
[23] The first point, similarly, is baseless. The applicants' own submission is that the papers need to be "cleaned up" before the matter can be referred to trial. Any crystallisation that has occurred will not be lost, and can be put to use by whoever formulates the summons and particulars of claim. There is absolutely no reason to prolong this application, which is replete with repetitive, unnecessary and vague allegations and submissions (at times on both sides), and which is more likely to confuse matters than clarify them.

[24] In any event, the applicants ought to have known, and in fact were warned, that a dispute of fact would arise, and ought at the outset to have issued summons rather than a notice of motion. This is also the reason why a punitive costs order is justified.

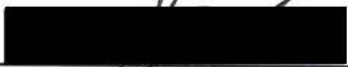
Conclusion

[25] For the reasons mentioned above, we make the following order:

"The application is dismissed with costs on the scale as between attorney and client."



 LM MOLOPA-SETHOSA
 JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG, DIVISION, PRETORIA


 S YACOOB
 JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION, PRETORIA


 E RAUBENHEIMER
 ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION, PRETORIA

Delivered: This judgement was prepared and authored by the Acting 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 of the judgment is deemed to be **12 March 2025**

COUNSEL FOR THE APPLICANT: A Liversage SC and K Pretorius

INSTRUCTED BY: Prinsloo Bester Inc

COUNSEL FOR THE RESPONDENT: L Van Tonder SC

INSTRUCTED BY: Kisch Inc

DATE OF ARGUMENT: 11 March 2025

DATE OF JUDGMENT: 12 March 2025