OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE COURT OF THE COMMISSIONER OF PATENTS

(FOR THE REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

07 JUNE 2023

DATE **SIGNATURE**

GDP CASE NO. 2022/8099

PATENT CASE NO: 06238/2007

In the matter between:

BAYER INTELLECTUAL PROPERTY GMBH First Applicant

BAYER AG Second Applicant

BAYER (PTY) LTD Third Applicant

And

NEW CLICKS SOUTH AFRICA (PTY) LTD First Respondent

ALPHA PHARM (PTY) LTD Second Respondent

DIS-CHEM PHARMACIES (PTY) LTD Third Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 07 June 2023.

JUDGEMENT

COLLIS J

INTRODUCTION

1. On 7 February 2021, the Applicants (*Bayer*) issued out of the Court of the Commissioner of Patents an urgent application seeking the following relief:

> "1. That the forms and service provided for in the Uniform Rules of Court are dispensed with and it is directed that the application be enrolled and heard as one of urgency.
>
> 2. Pending the final determination of the patent infringement action which has been instituted by the applicants against Dr. Reddy's Laboratories (Pty)Ltd in respect of South African Patent No. 2007/06238 or the dismissal of the applicants' application to join the respondents as defendants in that action, the respondents are interdicted and restrained from infringing the claim of South African Patent No. 2007/06238 by disposing of or offering to dispose of the product Rivaxored (or any other product falling within the scope of the claim of the patent) in the Republic and by importing any such product into the Republic.
>
> 3. The respondents are ordered to pay the cost of this application, including the costs of counsel, jointly and severally, the one paying the other to be absolved."

2. The urgent relief sought by the applicants is in the form of an interim interdict preventing the consequential infringement of South African patent 2007/062381[1] (the Patent) occasioned through the sale and offer for sale of an anticoagulant drug called Rivaxored.

3. The urgent relief is sought pending the outcome of a trial action.

4. The application was initially issued against three respondents. Insofar as it relates to second and third respondents, it was later settled on the basis that the pharmacies would cease selling Rivaxored pending the outcome of the trial.[2]

5. The application against the second and third respondents was as a result withdrawn,[3] and proceeded only against the first respondent on the basis of its alleged refusal to cease its infringing conduct.

URGENCY

6. Rule 6(12)(b) provides as follows:

[1] The claim of the patent is a so-called "Swiss-type claim" directed at a once-daily dosage regimen for an active pharmaceutical ingredient called Rivaroxaban in a rapid release formulation.
[2] Answering Affidavit, p. 5-6, para 16 and Replying Affidavit, p. 4-21, para 6.6.
[3] Caselines, p. 5-10 – 17.

“(b) In every affidavit or petition filed in support of the application under the application under para. (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in due course.”

7. In paragraph 15 of its Founding Affidavit, deals with the basis for urgency relied upon by the applicants in their application. In this regard the applicants assert that during December 2021, Keightley J granted an interim interdict against Dr. Reddy, the company that imports Rivaxored into South Africa to sell it to pharmaceutical wholesalers and retailers.

8. In terms of the interdict so granted, the court had found that the patent was prima facie valid and that the sale of Rivaxored in South Africa constituted a prima facie infringement of the patent.[4] This judgment of Keightley J has not been taken on appeal.

9. In addition the court had found that the continued sale of Rivaxored in South Africa gave rise to irreparable harm to Bayer in that it would not be able to prove the full extent of its damages occasioned by these sales; that

[4] Dr Reddy’s Judgment, p. 2-74 para 77 and 2-76, para 83.

Bayer had no alternative remedy available to it;[5] and that the balance of convenience in the circumstances of that case favoured Bayer.[6]

10. Notwithstanding the above findings, and the order granted against Dr Reddy's, UPD and Clicks Retailers (together "Clicks") refused to stop selling Rivaxored pending the outcome of the trial against Dr Reddy's.[7]

11. Clicks' continued sale of Rivaxored, the applicants argues, undermines the purpose of the interim interdict granted by Keightly J against Dr Reddy's; and gives rise to precisely the same irreparable harm to Bayer that it sought to prevented by that order.[8]

12. Indeed, the very purpose of the order granted against Dr Reddy's, in an urgent application, is being defeated by Clicks.[9] This conduct, by Clicks after the granting of the interim interdict against Dr Reddy's,[10] warranted the bringing of a separate, urgent application against Clicks and only once the

[5] Dr Reddy's Judgment, p. 2-79, para 90 and 91.
[6] Dr Reddy's Judgment, p. 2-82, para 100.
[7] Founding Affidavit, p. 2-8, para 23.
[8] Founding Affidavit, p. 2-5 to 2-6, para 15 – 19.
[9] Founding Affidavit, p. 2-44, para 127 – 129.
[10] The judgment of Keightley J appears 2-47 – to 2-83. Notably, the order against Dr Reddy's was handed down on 15 December 2021 and came to the attention of the parties on 19 January 2022 (See p. 2-3, para 9). Dr Reddy's sought leave to appeal against the judgment and order, but that application was dismissed with costs on 1 March 2022.

intention of Clicks was made clear did the applicants move with all reasonable expedition in instituting this application.

13. Moreover, while it is conceded that Clicks is not bound by the order against Dr Reddy's and there is therefore no question of contempt, their conduct clearly undermines the authority of the court to prevent unlawful commercial conduct in the same way that contemptuous conduct does. Simply put, Clicks has shown scant regard for the findings of this court: it is quite content to continue selling a product, the sale of which this court has already found to be prima *facie unlawful* and based on this reason alone, it renders the matter urgent.

14. The first respondent disputes that the application is urgent. The position adopted by the first respondent is that the urgency of the application is self-created. This the first respondent asserts, is so, as the applicants only waited until the judgment by Keightley J was handed down, before approaching this court on an urgent basis seeking an interdict against New Clicks South Africa (Pty) Ltd (*NCSA*), without providing any reason as to why NCSA was not cited in the Dr. Reddy's matter.

15. In finding support for the argument of self-created urgency the respondent relied on the decision of Lindeque v Hirsch,[11] where Adams J held:

“As rightly pointed out by Mr Subel, self-created urgency does not constitute acceptable urgency for purposes of uniform rule 6(12) justifying the determination of a matter on an urgent basis.”

16. The first respondent further asserts that the applicants could further be afforded substantial redress in due course and have delayed in approaching this court.

17. If this application were to be heard on the ordinary roll, the first respondent had argued that NCSA’s limited stocks of Rivaxored would by then have been distributed to Clicks pharmacies, and most likely sold.

18. This however would not mean that the applicants would not be able to obtain substantial redress in due course. Should they be successful in their pending action, they would be entitled either to damages, or should

[11] Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited [2019] ZAGPJHC 122 at para 10.

quantification prove impossible (as they allege), a reasonable royalty in lieu of damages.[12]

19. That being said, it is trite that "[r]ule 6(12) confers a general judicial discretion on a court to hear a matter urgently".[13] In *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo*, Tuchten J set out the considerations that a court ought to take into account when exercising that discretion:

> "It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.
>
> Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondents and the administration of justice, the strength of the case made by the applicant[,] and any delay by the applicant in asserting its rights. This last factor is often

[12] Section 65(6) of the Patents Act.
[13] Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) at para 63.

called, usually by counsel acting for respondents, self-created urgency."

20. This Court aligns itself with what has been stated in the judgment quoted above. Considering what has been presented before this Court on urgency, it seems to me that irreparable harm will potentially be suffered by the applicants with any delay in asserting their rights - that is if the application is not dealt with in the urgent court. Given that the alleged infringing conduct has not been stopped or ceased after Keightley handed down her judgment, I find that there is justification in enrolling this application in the urgent court.

21. For the above reasons, I am inclined in exercising my judicial discretion to enroll the application as an urgent application in terms of Rule 6(12)(c) of the Uniform Rules of Court. The first issue for adjudication prior to dealing with the merits of the interdict, concerns the question of joinder.

JOINDER OF CLICKS RETAILERS (PTY) LTD

22. In and around March 2022 the applicants have simultaneously with the Replying Affidavit, served a Notice to amend the Notice of Motion,

specifically seeking to join Clicks Retailers (Pty) Ltd as the fourth respondent in these proceedings.[14]

23. The applicants contend that the amendment was as a result of new facts that came to light, namely that contrary to what Bayer understood at the time of filing its application and as alleged in its founding affidavit,[15] it established that, while the first respondent operates Clicks' group's pharmaceutical wholesaling business known as "UPD",[16] it does not operate "Clicks" stores, the retail pharmacy business of the Clicks group.[17] The latter business is operated by a separate company within the Clicks group called Clicks Retailers (Pty) Ltd.

24. On this basis Bayer has applied, to join Clicks Retailers (Pty) Ltd as the fourth respondent in this application.[18]

25. In support of the joinder of Clicks Retailers Group (Pty) Ltd, the applicants argue that there is no prejudice to either the first respondent or Clicks Retailers occasioned by Bayer joining them. The case made out in the

[14] Index 5-30.
[15] Founding Affidavit, p. 2-16 to 2-17, para 54.
[16] Answering Affidavit, p. 3-2, para 5.
[17] Answering Affidavit, p. 3-2, para 4.
[18] Amended notice of motion, prayer 2, p. 4-30. See further Replying Affidavit, p. 4-3 to 4-5, para 2.

founding affidavit is against UPD and Clicks retail stores because both businesses sell Rivaxored.[19] This Clicks understood as much.[20] The case against the first respondent is in fact no different to that against Clicks Retailers; and the parent company of both the first respondent and Clicks Retailers, Clicks Group (represented by the Head of Legal for the group, Matthew Welz), has answered that case to the extent that Clicks was able to do so.

26. In the circumstances, the applicants argued that Clicks Retailers must be joined as a respondent to give effect to the relief sought against Clicks at the retail level. Bayer therefore asks that Clicks Retailers (Pty) Ltd be joined as the fourth respondent.

27. The first respondent opposes the joinder of Clicks Retailers (Pty) Ltd on the basis that no formal joinder application has been issued and served on Clicks Retailers or its legal representatives. In the absence of a formal notice for joinder the respondents had argued, the Court should not entertain the application to join Clicks Retailers (Pty) Ltd.

[19] Founding Affidavit, p. 2-16 to 2-17, para 54.
[20] That is why it has adduced evidence of the number of Rivaxored packages in the control or possession of UPD and Clicks retail stores – see AA, p. 5-7, para 18.

28. In addition the first respondent argued that the explanation for the belated request to join Clicks Retailers Group (Pty) Ltd is further wholly unconvincing in that the applicants suggest that they only became aware of the true state of affairs after receipt of the answering affidavit (on 25 March 2022).[21] This the first respondent contends, is simply not true. In a letter to the applicants' attorneys dated 11 March 2022,[22] NCSA's Mr Welz made it clear that Clicks Retailers is "*the entity which owns and operates Clicks pharmacies*".

29. Regarding the alleged need for the joinder, and any consequent amendment to the notice of motion, counsel submitted that the applicants ought to have done their homework as it is a matter of public record that Clicks Retailers, and not NCSA, owns and operates Clicks pharmacies. The applicants have offered no explanation as to why, with the resources available to them, they were unable to obtain this publicly available information. It is for this reason that it was implored upon this Court, to not allow the joinder.

[21] Replying Affidavit, para 2.1, p 4-3
[22] Answering Affidavit, Annexure MFW1, para 2(a), p 5-43.

30. Rule 10 of the Uniform Rules of court provide for the joinder of parties in pending proceedings and Rule 6(14) also makes the provisions of Rule 10 applicable to urgent applications.

31. Rule 10 inter alia provides as follows:

(1) “Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.”

32. In Hoffman NO v Livewell Devco 1 (Pty) Ltd Cloete J, with reference to rule 10, observed that the rule ‘is silent on the procedure to be followed, and accordingly rule 6(1) applies, namely that every application must be brought on notice of motion supported by an

affidavit as to the facts upon which the applicant relies for relief'. I agree with the sentiments expressed in this judgment.

33. In the present application, the applicants sought to join Click Retailers (Pty) Ltd as a fourth respondent not by way of a substantive application supported by an affidavit as envisaged by Rule 6(1), but sought to join Clicks Retailers (Pty) Ltd by way of an amendment without even compliance with Rule 28.

34. A party to be joined should be given due notice and should be afforded an opportunity to oppose any such joinder and once joined all pleadings filed as at by that time should be served on the party that is then joined. In *casu*, no substantive application has been filed by the applicants, nor has the party to be joined been given an opportunity to oppose its joinder as the Notice to Amend the Notice of Motion was simultaneously filed with the Replying Affidavit.

35. This is completely unprocedural and prejudicial to the party to be joined. The rights of the party sought to be joined, including rights to potentially oppose the joinder have been severely curtailed.

36. In *casu*, the non-compliance with the provisions of Rule 10 was also not addressed by the applicants. They merely traversed the reasons for the joinder. Absent compliance with the provisions of Rule 10, it must follow that the 'joinder' disguised as an amendment must therefore fail.

MERITS

37. In order to succeed with the merits of the application, the applicant must satisfy this court that the following requirements have been met, namely:

37.1 that it has a clear right or, if not clear, that it has a prima facie right;

37.2 that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief by way of summons issued is eventually granted;

37.3 that the balance of convenience favour the grant of an interim interdict; and;

37.4 that the applicant has no other satisfactory remedy.[23]

38. In Beecham Group Ltd v B-M Group (Pty) Ltd[24] the Court said with regards to the various factors, to be considered:

[23] L.F Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C) at 267.
[24] 1977 (1) SA 50 (T).

‘I consider that both the question of the applicant’s prospects of success in the action and the question whether he would be adequately compensated by an award of damages at the trial are factors which should be taken into account as part of a general discretion to be exercised by a Court in considering whether to grant or refuse a temporary interdict. Those two elements, should not be considered separately or in isolation, but a part of the discretionary function of the Court which includes a consideration of the balance of convenience and the respective prejudice which would be suffered by each party as a result of the grant or refusal of a temporary interdict.’

39. The test to be applied for purposes for determining whether, on the facts, the applicant has met these requirements is well established.

‘The proper manner of approach I consider is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain relief at trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on a case of the applicant, he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to some doubt. But if there is mere contradiction, or an unconvincing explanation, the matter should be left for

trial and the right to be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."[25]

40. In *Annex Distribution (Pty) Ltd v Bank of Baroda*,[26] Fabricius J noted that "[m]ost applications for an interim interdict are decided on the basis of the balance of convenience". It is with this foremost in mind, in dealing with the merits of this application purportedly brought in terms of rule 6(12), that we focus primarily on this key requirement for the grant of interim interdictory relief.[27]

41. In patent matters further, where an interim interdict is being sought, a court should refrain from making final findings, but nevertheless consider the relative strength of each party's case. Each case must be decided on the basis of fairness, justice and common sense, in relation to the whole of the issues.[28]

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[25] Webster v Michell 1948 (1) SA 1186 (W) at 1189

[26] Annex Distribution (Pty) Ltd and Others v Bank of Baroda 2018 (1) SA 562 (GP) at para 9, cited with approval in South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others 2019 (4) SA 608 (GJ) at para 77

[27] As indicated above, we also consider the fourth requirement (no suitable alternative remedy).

[28] Beecham Group decision quoted supra.

42. It is important to bear in mind that all these requirements for an interim interdict should be met before a Court can come to the assistance of an applicant, and it follows that where one or more of the requirements have not been met, the application must fail.

Prima facie right

43. It is the case for the applicant that the first respondent does not dispute that Rivaxored falls within the scope of Bayer's patent and therefore that the sale of the product infringes the patent.

44. The first respondent however, baldly asserts that the patent is invalid. Mr Welz the deponent to the answering affidavit states in this regard that the first respondent is not willing to accept that the claimed invention contains an inventive step;[29] and that "there is nothing exceptional about the new dosage claim".[30]

45. In the replying affidavit it is alleged that Mr Welz is not a person skilled in the art of the patent;[31] and his opinions on such matters are plainly inadmissible.

[29] Answering Affidavit, p. 5-17, para 47
[30] Answering Affidavit, p. 55-20, para 55.
[31] Replying Affidavit, p. 4-3, para 1.6.

46. In addition a further argument advance on point is that in Dr Reddy's application, the inventiveness of the patent was dealt with through the leading of expert evidence and comprehensively dealt with in the Keightley judgment, and it thus follows that any findings made on the inventiveness of the patent stands until set aside on appeal.[32]

47. In addition the first respondent attacks the validity of the patent under section 25 of the Patents Act. This is done in circumstances where the first respondent attacks the constitutionality of section 25 of the Patents Act.

48. Aside from the first respondents' wholly unsubstantiated attack on the inventiveness of the patent, Mr Welz appears to suggest that section 25 of the Patents Act, which is the cornerstone of the entire Patents Act and which has never been the subject of a Constitutional challenge (despite not having changed materially since 1994), is unconstitutional.[33]

49. It is not clear from Mr Welz's affidavit why the first respondent maintains that section 25 of the Patents Act is unconstitutional. Nor indeed is it clear

[32] See Dr Reddy's judgment, p. 2-69 to 2-70, para [58] – [62].
[33] See the heading on p. 5-16.

which of the 12 subsections that make up section 25 is alleged to fall foul of the Constitution, and in what respect.

50. The complaint of Mr Welz is rather that in the Dr Reddy's judgment the court ought not to have found, prima facie, that Swiss form claims to dosage regimens are allowable under the Patents Act.

51. In fact, when one reads what Mr Welz says[34], what Keightley J ought to have found is that "*absent exceptional circumstances, a new dosage claim in respect of an existing medicine, for the same invention, ought not to be a patentable invention".*[35]

52. On behalf of the applicant it was argued that this in fact is not an attack on the Constitutionality of section 25. It is instead an attack on the interpretation of the section adopted in the Dr Reddy's judgment, on Constitutional grounds.

53. Mr Welz' affidavit, I agree, fails to disclose any facts relevant to the determination of the Constitutionality of section 25 of the Act, and in the

[34] Answering Affidavit, p. 5-17, para 48.
[35] Answering Affidavit, p. 5-17, para 48, 5-20, para 54 and p. 5-21, para 57.

absence thereof, this Court cannot be called upon to determine constitutionality of section 25 of the Act.

54. Consequently, absent a challenge on the Bayer patent as found by Keightley J, I cannot but conclude that the applicant has satisfied the first requirement of having a prima facie right in respect of which protection is to be afforded.

IRREPARABLE HARM, BALANCE OF CONVENIENCE AND NO ALTERNATIVE REMEDY.

55. In relation to the further requirements which should be met, the applicants assert that the first respondent has been afforded ample time and opportunity to explain why it is that it should be allowed to continue selling a product which has already been found, prima facie, to infringe the patent and which the importer of the product (Dr Reddy's) is not currently entitled to import or sell in South Africa.

56. Despite this finding, the first respondent has failed to advance a credible defense to this application.

57. In this regard the argument advanced by the applicant is that the first respondent does not dispute that Bayer will suffer irreparable harm if it is allowed to sell its remaining stock of Rivaxored.

58. In support of the argument on irreparable harm, Ms Steenekamp on behalf of Bayer gave detailed evidence, explaining precisely why it is that Bayer will never prove the full extent of the damages that it is likely to suffer as a result of any continued sale of Rivaxored.[36] It is therefore undisputed that Bayer loses sales as a result of the conduct of the first respondent by its continued sale of Rivaxored and that Bayer will find it difficult in time to prove the full extent of its losses.

59. Mr Welz in answer does attempt to proffer an argument on the issue of an alternative remedy. In this regard he argues that Bayer has a statutory right to claim a reasonable royalty in lieu of damages. This is the same argument previously raised by Dr Reddy's in his application and which argument was rejected in paragraph 90 of the Dr Reddy's judgment.[37]

[36] Founding Affidavit, p. 2-21, para 70 – p. 242, para 120.
[37] Dr Reddy's Judgment, p. 2-79.

60. In the said judgment the reasoning employed by Keightley J was in line with similar rejections of the same argument in two earlier cases, first by this court in *Pfizer v Cipla Medpro:*

> "*The statutory provision that a royalty may be imposed in lieu of damages is an option available to a plaintiff. It is not an invitation to infringers to become de facto licensees."*[38]

61. And then by the Supreme Court of Appeal in Aventis:

"*Nor is it an answer to its claim for an interdict that Aventis might be awarded a reasonable royalty as an alternative to damages. That is a remedy available at the option of a patentee and it cannot be compelled in effect to licence the use of its patent."* [39]

62. The similar argument having earlier been rejected in the Dr. Reddy's judgment in relation to the importer, it follows it will have very little persuasive value before this Court in relation to the Clicks group's Pharmaceuticals wholesaling business (the First respondent) where the

[38] Pfizer Ltd and Another v Cipla Medpro (Pty) Ltd and Others 2005 BIP 1 (CP) p. 12C – 12D.
[39] Cipla Medpro (Pty) Ltd v Aventis Pharma SA and Related Appeal 2013 (4) SA 579 (SCA) para [41].

judgment of Keightley J, has not been set aside on appeal. Consequently, it follows, it must therefore also be rejected.

63. In the absence of any evidence in rebuttal this court as such is satisfied that the applicant has established that it stands to suffer irreparable and that there is no alternative remedy which is available to it.

64. On the balance of convenience, the first respondent does not argue, or adduce evidence in support of an argument that it will be prejudiced by the grant of the interim interdict.[40]

65. Instead the argument advance by the first respondent is that the applicants stand to lose only in the region of R3m in sales based on its current stock levels; and this prejudice is outweighed by the public interest in that it would be able to access a cheaper alternative to the applicants' patented product.

66. A similar argument, namely, that of the public interest based on the availability of cheaper generic medicines should outweigh the interests of

[40] Answering Affidavit, p. 5-22, para [59] – [66].

the patentee in the enforcement of its statutory patent right, was also considered by the Supreme Court of Appeal in Aventis and rejected.[41]

67. This same argument of the public interest was also relied upon by Dr Reddy on the availability of cheaper generic medicines in his application, which argument was similarly rejected by Keightley J,[42] in that the court had found a lack of persuasive evidence was placed before it and that the protection of a patent will also serve the public interest.

68. In the absence of any persuasive evidence that the first respondent has placed before this Court, which will deprive the applicant of its relief, this Court must find that the applicants would be entitled to the interim interdict they seek.

69. On the balance of convenience, the first respondent's evidence on point is that medical aids and some patients in the private sector who do not have medical aid may have to pay more for rivaroxaban than they do currently.

[41] See para [51]-[59] of the Aventis-judgment supra.
[42] Dr Reddy's Judgment, p. 2-81 to 2-82, para [97] and [98].

70. Similar arguments and facts were placed before the court in the Aventis-decision, but the marginal harm to a small percentage of patients in the private sector (who don't have medical aid or who have to make a small co-payment) was not considered to be sufficient to outweigh the negative public interest effect of failing to enforce valid patents.[43] It is for this reason that it was found that the balance of convenience favours the applicants and that they ought to be granted the interim interdict.

ORDER

71. In the result the following order is made:

71.1 The application is enrolled as an urgent application in terms of Rule 6(12)(c) of the Uniform Rules of Court.

71.2 The joinder of the Clicks Retailers (Pty) Ltd as fourth respondent is refused.

71.3 Pending the final determination of the patent infringement action which has been instituted by the applicants against Dr.Reddy's Laboratories (Pty)Ltd in respect of South African Patent No.2007/06238 or the dismissal of the applicants' application to join the respondents as defendants in that action, the first respondent is interdicted and restrained from infringing the claim of South African Patent No.2007/06238, by disposing of or offering to

[43] See para [58] of the Aventis-decision.

dispose of the product Rivaxored (or any other product falling within the scope of the claim of the patent) in the Republic and by importing any such product into the Republic.

71.4 The first respondent is ordered to pay the cost of this application, including the costs of counsel.

COLLIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Applicants: Adv. G. Marriot

Attorneys for the Applicants: Adams and Adams Attorneys

Counsel for the Respondents: Adv. J. Berger

Attorneys for the first respondent: Von Seidels Intellectual Property Attorneys

Attorneys for the second respondent: Kingsbury Incorporated Attorneys

Attorneys for the third respondent: Margo Attorneys

Date of Hearing: 07th April 2022

Date of Judgement: 07th June 2023