

**Orica Mining Services SA (Pty) Ltd v Elbroc Mining Products (Pty) Ltd
[2017] 2 All SA 796 (SCA)**

Division: SUPREME COURT OF APPEAL
Date: 31 March 2017
Case No: 233/2016
Before: MML MAYA AP, N DAMBUZA, KGB SWAIN JJA, Y MBATHA and C NICHOLLS AJJA
Sourced by: Z Kanku
Summarised by: DPC Harris

[. Editor's Summary .](#) [Cases Referred to .](#) [Judgment .](#)

Intellectual property - Patents - Alleged infringement - [Section 45 of the Patents Act 57 of 1978](#) - Need to ascertain nature of invention as claimed and its precise scope - Extent of protection determined by wording of claims - Purposive interpretation of patent claims showing infringement by respondent - Claims to be read in the context of the patented specification - Interpretation of "between" in claim to mean "linearly between" unjustified in context of specification as well as claims.

Editor's Summary

The present appeal arose from the dismissal of an action by the appellant ("Orica") for an interdict preventing the respondent ("Elbroc") from infringing a patent entitled "Portable Drilling Apparatus" (the "patent") held by Orica.

The parties are South African companies which conduct business as suppliers of materials and equipment used in the mining industry. Orica was granted the patent on 19 December 2001 under the Patents Act [57 of 1978](#), for a drill rig used to drill holes on the hanging roof (or wall) of a mine for purposes of placing roof-bolts or other securing attachments into the wall - to reinforce and stabilise the hanging wall. It was common cause that Elbroc sold roof bolter rigs that performed the same function as Orica's to the mining industry in South Africa. That led to the allegation of infringement by Orica. Before the court *a quo*, Orica contended that Elbroc had infringed claims 1, 16, 17 and 18 of the patent. Elbroc contended that one of the integers of the claims in the patent was not present in its drill rig. This was, according to Elbroc, the description of the drill carriage as located *between* a pair of telescopic props. The meaning of the word "between" in the patent claims thus became central to Orica's claim. Having considered the claims of the patent the Commissioner found that the Elbroc drill rig did not infringe the patent as its carriage equipment was not located "between" its two props. In interpreting the word "between" the judge adopted the dictionary meaning "linearly between" and found that because the carriage in Elbroc's drill rig was offset from the linear space between the props there had been no infringement of the patent.

On appeal, Orica persisted in its contention that on a proper construction the patent claims required only that the drill carriage be located in the space between the two props, even if not in the same linear plane as the props.

Held - As stated in case law, in dealing with aspects relating to patent infringements, the court's first task is to ascertain the nature of the invention as claimed and its precise scope. Accordingly the specification, and especially the claims, have to be construed.

There was nothing in claim 1 of the patent to show that Orica intended that a drill carriage located only linearly between the props was essential to its invention, or that a person skilled in the art would understand that the word "between" was intended to be used as a word of precise meaning. To interpret

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the word "between" as meaning linearly between the props was found by the court not to be in accordance with a purposive interpretation of the specification, as delineated by the claims. The advantage of the invention was that the telescopic props gave support not only to the hanging roof of the stope, but also to the drill located "between" them, so that it may be operated remotely. That was precisely what the respondent's drill rig sought to achieve.

The appeal was, therefore, upheld and the respondent was interdicted from infringing Orica's patent.

Notes

For Trade Marks see:

- . *LAWSA Second Edition Replacement Volume 2015 Vol 29*, paras 1-308
- . Burrell TD *Burrells South African Patent and Design Law* 4ed Durban LexisNexis 2016

Cases referred to in judgment

South Africa

Aktiebolaget Hässle and another v Triomed (Pty) Ltd [\[2002\] 4 All SA 138 \(2003 \(1\) SA 155\)](#) (SCA) - Referred to

<i>De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka</i> [1980] 3 All SA 447 (1980 (2) SA 191) (T) - Referred to	804
<i>Gentiruco AG v Firestone SA (Pty) Ltd</i> [1972] 1 All SA 201 (1972 (1) SA 589) (A) - Confirmed	801
<i>Marine 3 Technologies Holdings (Pty) Limited v Afrigroup Investments (Pty) Limited and another</i> [2015] JOL 32607 ([2014] ZASCA 208; 2015 (2) SA 387) (SCA) - Referred to	803
<i>Monsanto Co v MDB Animal Health (Pty) Ltd (Formerly MD Biologics CC)</i> [2001] JOL 7939 (2001 (2) SA 887) (SCA) - Referred to	804
<i>Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd</i> [1983] 1 All SA 314 (1983 (1) SA 709) (A) - Referred to	801
<i>Selas Corporation of America v Electric Furnace Co</i> 1983 (1) SA 1043 (A) - Referred to	805
United Kingdom	
<i>Catnic Components Limited and another v Hill & Smith Limited</i> [1982] RPC 183 - Discussed and Compared	805
<i>Electrical and Musical Industries v Lissen Ltd</i> (1938) 56 RPC 23 [UK] - Referred to	801
<i>Harrison v Anderson Foundry Company</i> (1876) 1 AC 574 (HL) - Referred to	801
<i>Kirin-Amgen Inc and others v Hoechst Marion Roussel Ltd and others; Hoechst Marion Roussel Ltd and others v Kirin-Amgen and others</i> [2005] 1 All ER 667 - Distinguished	806

Judgment

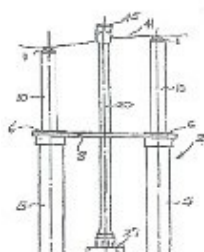
DAMBUZA JA:

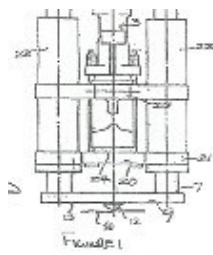
- [1] This is an appeal against the judgment of the Court of the Commissioner of Patents, (Mabuse J). The court dismissed with costs, an action by the appellant, Orica Mining Services South Africa (Pty) Ltd ("Orica") as plaintiff, for an interdict and ancillary relief, against the respondent, Elbroc Mining Products (Pty) Ltd ("Elbroc") as defendant. The object of the interdict was to restrain Elbroc from infringing South African patent

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number 2001/10382, entitled "Portable Drilling Apparatus" (the "patent") held by Orica.

- [2] Elbroc counterclaimed for revocation of the patent on the grounds of obviousness. However, the parties agreed and the court ordered separation of the issues. Elbroc's counterclaim was postponed *sine die*. Consequently, only the alleged infringement and more particularly, the meaning of the word "between" in the patent claims, which was central to Orica's claim, was before the court *a quo*. The appeal is with the leave of the court *a quo*.
- [3] The parties are South African companies which conduct business as suppliers of materials and equipment used in the mining industry. Orica was granted the patent on 19 December 2001 under the Patents Act [57 of 1978](#) ("Patents Act") for a drill rig. The rig is used to drill holes on the hanging roof (or wall) of a mine for purposes of placing roof-bolts or other securing attachments into the wall - to reinforce and stabilise the hanging wall. The invention is therefore referred to as a roof bolter rig. It enables drilling of holes in confined spaces such as stopes, without having to manually hold and maintain the machine in position. It is a self-supporting drill rig. In its preferred design it consists of two extendable telescopic props - onto which is mounted a drill carriage. The props support the surface of the hanging wall during drilling thus reducing the risk of the hanging wall collapsing onto the rig user. The machine enhances safety in the mining industry.
- [4] Each prop has a pair of cylinders joined at either end by a brace and a base. A hydraulically operated piston slides into each cylinder to extend from the end of the cylinder. The free end of the piston forms a point and a conical stud extends centrally from the outer surface of the base.
- [5] Below is a diagram of the Patent No 10382/2001.





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The diagram shows, amongst other things, extendable props (2) with a drill (3) secured thereto. Each prop (2) has a pair of cylinders (5) joined at either end (6, 7) by a brace (8) and a base (9) with a hydraulically operated piston (10) slidably secured within each cylinder (5) to extend from the end (6). The free end (11) of each piston (10) forms a point and a conical stud (12) extends centrally from the outer surface (13) of the base (9).

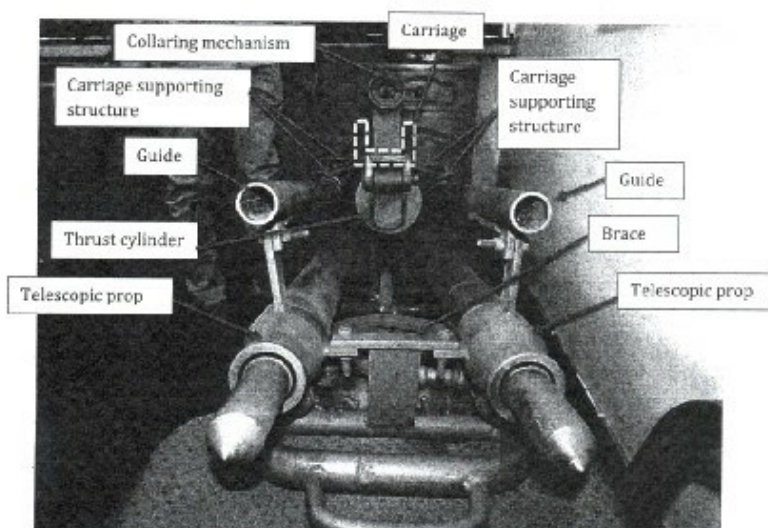
[6] It is common cause that Elbroc sold roof bolter rigs that perform the same function as Orica's to the mining industry in South Africa. This led to the allegation of infringement by Orica. Before the court *a quo*, Orica contended that Elbroc had infringed claims 1, 16, 17 and 18 of the patent. In these claims the invention is described as:

- "1. A portable self-supporting drill rig comprising a pair of spaced apart telescopic props with a carriage between them, the carriage movable along an axis substantially parallel to those of the props and supporting a drill mounted on the carriage . . . 1
16. A portable self-supporting drill rig comprising a pair of spaced apart fluid operated telescopic props with a carriage between them, the carriage movable along an axis substantially parallel to those of the props and supporting a drill mounted on the carriage, with the props each secured to a base and braced apart.
17. A portable self-supporting drill rig comprising a pair of spaced apart fluid operated telescopic props with a carriage between them, the carriage movable along an axis substantially parallel to those of the props and supporting a drill mounted on the carriage, with the props each secured to a base and braced apart and the carriage movable by an extendable piston mounted on the base.
18. A portable self-supporting drill rig comprising a pair of spaced apart telescopic props with a carriage between them, the carriage movable along an axis substantially parallel to those of the props and supporting a drill mounted on the carriage, the props each including a cylinder with one end secured to a base, the cylinders each having a fluid operated piston slidably secured therein to extend from the other end thereof, and the cylinders braced apart."

[7] Elbroc contended that one of the integers of the claims in the patent was not present in its drill rig. This was, according to Elbroc, the description of the drill carriage as located *between* a pair of telescopic props. Elbroc contended that this meant that the drill carriage in the Orica rig was located *linearly between* the props - which was not the case with its (Elbroc's) rig. For this reason, whilst admitting the presence of all the other

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integers of the patent in its drill rig Elbroc maintained that its rig fell outside the patent claims. This argument is graphically illustrated by the top view of Elbroc's drill rig.



- [8] Having considered the claims of the patent the Commissioner found that the Elbroc drill rig did not infringe the patent as its carriage equipment was not located "between" its two props. In interpreting the word "between" the learned Judge adopted the dictionary meaning "linearly between," and found that because the carriage in Elbroc's drill rig was offset from the linear space between the props there had been no infringement of the patent. He also held that Orica's interpretation of the word "between" amounted to an impermissible extension of the meaning of the word because it sought "to include a carriage which is offset at a right angle to the co-linear line between the pair of telescopic props at an undefined and unspecified distance from the space between the two props".
- [9] In this Court Orica persisted in its contention that on a proper construction the patent claims required only that the drill carriage be located in the space between the two props, even if not in the same linear plane as the props. It was submitted on behalf of Orica that Elbroc's argument incorrectly equated the word "space" with the word "line" and ignored the context of the specification and the three dimensional configuration of the props, together with the space separating them.
- [10] On the other hand, Counsel for Elbroc submitted that the correct approach is to use "the language of the claims", that being the ordinary dictionary meaning of the word "between".
- [11] [Section 45\(1\)](#) of the Patents Act provides for protection of a patentee against the making, using, exercising, disposing or offering to dispose of or importing of the patentee's invention. The protection endures for the

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- duration of the patent.² The invention is defined in the patent and the courts have indeed held that the exact nature and scope of the invention and the monopoly claimed for it by a patentee (the essential constituent features of the patent) must be determined by interpreting the patent claims.³ In the well-known case of *Gentiruco AG v Firestone SA (Pty) Ltd*⁴ this Court noted that in dealing with aspects relating to patent infringements, its first task is to "ascertain the nature of the invention as claimed and its precise scope. Accordingly the specification, and especially the claims, have to be construed; it is, after all, the instrument on which the letters patent were applied for and granted and it must therefore necessarily govern those issues."⁵ It was pointed out that "if the object of the claims is borne in mind, their meaning, as ascertained from their own language, must prevail over the rest of the specification" because that is where those to whom the patent is addressed, will look to determine if they are trespassing.⁶
- [12] The correct approach to interpreting the claims in the context of the patent as a whole, has been described in the following terms. In *Harrison v Anderson Foundry Company* (1876) 1 AC 574 (HL) the court held:
- "The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented.
- Where a claim is clearly and distinctly made, there can be no necessity for a patentee to distinguish between what is disclaimed and what is claimed. It is enough to say to Lord Gifford's suggestion that everything which is not claimed is disclaimed."
- In *Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd* [1983 \(1\) SA 709](#) (A) at 721C-E [also reported at [\[1983\] 1 All SA 314](#) (A) - Ed], Corbett JA observed that:
- "[T]he Court should always guard against too 'textual' an approach in the interpretation of claims in a patent specification. It is true that it is in the claims that a patentee stakes out and defines his monopoly; and that the claims must be looked at in order to determine whether an infringement has taken place. But by peering too closely at the language of a claim the Court may overlook an infringement which takes the substance of the invention. . . . In this context it is often said that an infringer who takes the 'pith and marrow' of the invention commits an infringement even though he omits an inessential part or substitutes for that part a mechanical equivalent. . . . Where the alleged infringer has deviated in regard to some feature from the invention as literally claimed in the specification, it may often be a matter of considerable difficulty to determine whether the deviation relates to an essential or a non-essential feature of the relevant claim or claims. In relation to this I would favour the approach stated by Lord Diplock in . . . *Catnic Components Ltd and Another v Hill and Smith* 1981 Fleet Street Reports 60 . . . (at 65-66)."
- [13] In *Electrical and Musical Industries v Lissen Ltd* (1938) 56 RPC 23 [UK] at 39 Lord Russell of Killowen whilst highlighting the function served by

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patent claims, clearly stated that the claims derive their colour from the context set out in the body of the specification. The learned Judge held:

"The function of the claims is to define clearly with precision the monopoly claimed, so that the others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to limit and not to extend monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document, and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere. It is not permissible in my opinion, by reference to some language used in the earlier part of the specification, to change a claim, which, by its own language is a claim for one subject-matter, which is what you do when you alter the boundaries of the forbidden territory. A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims . . .

A claim is a portion of the specification which fulfils a separate and distinct function. It and it alone defines the

monopoly; and the patentee is under a statutory obligation to state in the claims clearly and distinctly what is the invention which he seeks to protect."

- [14] In *Gentiruco AG v Firestone SA (Pty) Ltd*⁷ this Court, confronted with a contention by Firestone that certain claims were irresolvably ambiguous and therefore invalid, considered the provisions of [section 16\(3\)](#) of the Patents Act [9 of 1916](#) which read:

"A complete specification (1) must fully describe and ascertain the invention and the manner in which it is to be performed, and (2) must end with a distinct statement of the invention claimed."

Trollip JA remarked that "[[s 16\(3\)](#)] entrenched a method of drawing specifications that had been evolved in practice, i.e., of incorporating into the patent's specification claims that defined clearly and with precision the invention claimed as a monopoly"⁸ and went on to hold that:

"The wording of the second part of the sub-section does not effect a legal severance of the claims from the rest of the specification; 'distinct statement' there means, not a separate statement but a clear one (see Dutch version, 'duidelijke opgawe'); the claims do not constitute a separate document in any sense; they remain part of the specification which must be read as a whole . . . Moreover, as the function of the claims is to define with clarity and precision the scope of the invention claimed as a monopoly, they must of necessity also serve to describe and ascertain the invention; indeed, as will presently appear, they are not only an important but also a decisive part of its description and ascertainment."⁹

- [15] The court also held that:

"Both must therefore be regarded to ascertain whether or not the complete specification sufficiently discloses or explains the invention. Indeed the influence of [s 16\(3\)](#) on [s 27\(1\)\(g\)](#), is such that the words 'the invention' in the latter section must mean 'the invention as claimed'. For a patentee may claim something less than he has invented. Thus, if he predicates in the body of the specification an invention comprising (a), and (b) but he claims only (a), the

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inquiry into sufficient disclosure etc. under the section would be confined to (a) and would not also extend to (b)."¹⁰

- [16] More recently in *Marine 3 Technologies Holdings (Pty) Limited v Afrigroup Investments (Pty) Limited and another*¹¹ this Court said:

"Generally the first task of a court in the determination of an issue such as the present is to construe the claims in the patent (*Gentiruco AG v Firestone SA (Pty) Ltd* [1972 \(1\) SA 589](#) (A)). According to Harms JA (*Monsanto Co v MDB Animal Health (Pty) Ltd (formerly MD Biologics CC)* [2001 \(2\) SA 887](#) (SCA) para 8:

'The rules relating to the interpretation of patents have often been stated and do not need any reformulation. The problem lies in their sensible application in any given case. For present purposes the following rules as they appear in *Gentiruco AG v Firestone SA (Pty) Ltd* . at 614A-616D may be emphasised: (a) a specification should be construed like any other document, subject to the interpreter being mindful of the objects of a specification and its several parts; (b) the rule of interpretation is to ascertain, not what the inventor or patentee may have had in mind, but what the language used in the specification means, ie what the intention was as conveyed by the specification, properly construed; (c) to ascertain that meaning the words used must be read grammatically and in their ordinary sense; (d) technical words of the art or science involved in the invention must also be given their ordinary meaning, ie as they are ordinarily understood in the particular art or science; (e) if it appears that a word or expression is used, not in its ordinary sense, but with some special connotation, it must be given that meaning since the specification may occasionally define a particular word or expression with the intention that it should bear that meaning in its body or claims, thereby providing its own dictionary for its interpretation; (f) if a word or expression is susceptible of some flexibility in its ordinary connotation, it should be interpreted so as to conform with and not to be inconsistent with or repugnant to the rest of the specification; and (g) if it appears from reading the specification as a whole that certain words or expressions in the claims are affected or defined by what is said in the body of the specification, the language of the claims must then be construed accordingly."

- [17] Regarding the language used in the claim Elbroc contended that Orica would be entitled to invoke the content of the body of the specification only if the word "between", read in context, was ambiguous or had a peculiar technical or scientific meaning. But in the absence of such ambiguity the word ought to be accorded its ordinary meaning and the body of the specification could not be invoked, so it was argued. Indeed, if the meaning of a claim, properly constructed, is sensible, clear and unambiguous, it is decisive and cannot be restricted or extended by anything else stated in the body and title of the specification.¹² But Elbroc advanced three dictionary meanings of "between". These were: "[across] the space

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separating two things",¹³ "with something on each side",¹⁴ and "a point B is said to lie between points A and C where A, B, and C are distinct collinear points."¹⁵ It is important to highlight that a number of rules of interpretation of patents have developed over time, and the dictionary meaning of a word is only a guide; it is not decisive of the meaning of a word.¹⁶ The appropriate question being the meaning applicable in the context of the particular document under consideration - as even definitions must be read in context.¹⁷

- [18] There was no explanation for Elbroc's choice of the dictionary meaning selected. In my view the definition, "with something on each side" is the most sensible. It accords with the relational nature of the word "between" and is not dependant on the configuration of the objects under comparison. On the other hand, as submitted on behalf of Orica the definition "linearly between" is restricted to a situation where the objects compared are of similar configuration. Counsel for Orica pointed out that during preparation for operation of the preferred embodiment of the patent, particularly during insertion of the drill into the carriage, a portion of the carriage at times is off-set from a linear line between the two props.

- [19] With regard to context, the advantage of the invention is the enhanced safety as a result of the support provided by the telescopic props. Further, the detailed description of the invention in the specification, specifically disavowed a restriction to linear positioning of the carriage between the props and a limitation to two props. It provides that "the drill need not be located linearly between the pair of props, but may be *generally between* them. This would more likely be the case where an additional prop or additional props are used". Once there are more than two props which are not configured in a straight line, the carriage may be located between the props, without being linearly between them.
- [20] Both parties led expert evidence with regard to the understanding of persons skilled in the art. Elbroc's expert understood the word "between" to mean that the carriage could be offset from the linear line between the props and could also be off centre. Both experts understood the "linearly between" position of the carriage to be the optimal solution to the problem that the patent solved. Needless to say the optimal solution is not the only solution.
- [21] Turning to purposive interpretation, Orica's argument in this regard was raised as an alternative to the above stated submissions. Within the context of patent construction, unlike literalism, this approach takes into

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- account the practical knowledge and experience of the person skilled in the kind of work in which the invention is intended to be used.¹⁸ It considers that a person skilled in the art would understand whether strict compliance with a particular word or phrase was intended and whether a variant of a word would have an effect upon the way the invention works, such that the impugned object would fall outside the monopoly protected in the claims and there would be no infringement.¹⁹
- [22] The facts in this appeal bear a striking resemblance to *Catnic Components Limited and another v Hill & Smith Limited*²⁰ which was the leading English authority on purposive construction prior to the enactment of the UK Patents Act in 1977. Firstly, similarly to the defendant in *Catnic*, Elbroc admitted to having taken all but one of the essential features of plaintiff's patent. Secondly, there is no evidence that the variant integer that features in Elbroc's drill rig has any material effect on the functioning of the Orica drill rig.
- [23] In *Catnic* the plaintiffs were the registered proprietors of a patent for novel, commercially successful steel lintels invented by the second plaintiff. The defendants, intending to enter the market for galvanised steel lintels, obtained a copy of the plaintiffs' experimental lintel drawings from which they (the defendants) made their lintels. On being cited for infringement of the patent the defendants produced a lintel which differed from their first one and from the plaintiffs' only in that its rear support member, instead of being perpendicular to the base, was inclined 6 or 8 degrees from the vertical position. Claim 1 of the patent required the rear member to "extend vertically". The angle of 6 to 8 degrees in the defendants' lintel reduced the load bearing capacity of the rear member by 0,6 and 1,2% respectively. This reduction had a negligible effect on the functioning of the member. The Court held that it would not have been the understanding of persons with the relevant practical knowledge and experience that strict compliance with the words "extending vertically" was intended by the patentee. Moreover, "extending vertically" was, in context, capable of meaning, "*near enough to vertical to enable the back plate to perform satisfactorily all the functions that it could perform if it were precisely vertical*".²¹ (My emphasis.)
- [24] There is nothing in claim 1 of the patent to show that Orica intended that a drill carriage located only linearly between the props was essential to its invention, or that a person skilled in the art would understand that the word "between" was intended to be used as a "word of precise meaning".²² Moreover Elbroc's expert, Mr Johannes Fourie admitted that although the Elbroc drill carriage is located off the notional line between the props it was the Elbroc drill rig was still located sufficiently close to the line to be able to gain support from the props.

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- [25] Counsel for Elbroc relied upon the decision in *Kirin-Amgen Inc and others v Hoechst Marion Roussel Ltd*.²³ In support of Elbroc's contentions regarding the interpretation of claims in a patent. For the reasons set out below I do not agree with the submission.
- [26] In *Kirin-Amgen*, the issue was whether the claims of a European patent granted to Kirin-Amgen Inc in relation to a protein which stimulates production of red blood cells in the bone marrow, were infringed by Transkaryotic Therapies Inc and Hoechst Marion Roussel Ltd, in circumstances where there was striking similarity between the technologies used by the two parties for producing the hormone erythropoietin. The Court found no infringement on the facts of the case. Indeed, the Court held that patent claims are the decisive basis for determining the extent of protection.²⁴ But it also approved the basic principles of patent interpretation enunciated in *Catnic*. The court considered articles 69 and 84 of the European Patent Convention ("EPC"). Article 84 provides that:
- "The claims shall define the matter for which protection is sought. They shall be clear and concise and supported by the description."
- Article 69 states:
- "The extent of the protection conferred by a European patent or European patent application shall be determined by the terms of the claims. Nevertheless the description and the drawings shall be used to interpret the claims."
- [27] Lord Hoffman then sketched the background of these provisions, explaining that article 69 was the result of a compromise between what was viewed as the unduly narrow and literal construction approach of the United Kingdom, and the other contracting European States whose approach had been to look at the essence of the

invention. The learned Judge held that article 69 should be interpreted as "defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties."

[28] The learned Judge referred to the earlier approach in interpreting English rules which prescribed that the body of the specification could only be considered where claims had been found to be ambiguous and not where the claims had plain meaning in themselves. He remarked that to avoid possible injustice, judges were generally astute to finding the necessary "ambiguity" which enabled them to interpret the document in its proper context and said: "indeed, the attempt to treat the words of the claim as having meanings 'in themselves' and without regard to the context in which or the purpose for which they were used was always a highly artificial exercise." (At 679.)

[29] Having referred with approval to the purposive approach adopted in *Catnic*, the learned Judge held (at 680):

"Construction, whether of a patent or any other document, is of course not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable

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person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, 'the meaning of the words the author used', but rather what the notional addressee would have understood the *author* to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules. It is highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience."

[30] The reliance placed by Elbroc on *Kirin-Amgen* is therefore misplaced. Purposive interpretation is not an undue extension of the language of patent claims. In my view to interpret the word "between" as meaning linearly between the props is not in accordance with a purposive interpretation of the specification, as delineated by the claims. The advantage of the invention is that the telescopic props give support not only to the hanging roof of the stope, but also to the drill located "between" them, so that it may be operated remotely. This is precisely what the respondent's drill rig seeks to achieve.

[31] In the result, the following order is made:

1. The appeal is upheld with costs, including the costs of two Counsel.
2. The order of the court *a quo* is set aside and replaced with the following:
 - "(a) The defendant is interdicted from infringing South African Patent number 2001/10382 by way of the sale or offering for sale in South Africa of the defendant's drill rig.
 - (b) The defendant is ordered to pay the plaintiff's costs, including the costs of two counsel."

(Maya AP, Swain JA, Nicholls and Mbatha AJJA concurred in the judgment of Dambuzza JA.)

For the appellant:

R Michau SC and K Iles instructed by *Dessington & Associates Incorporated*, Pretoria and *Symington & De Kok Attorneys*, Bloemfontein

For the respondent:

AJ Bester SC instructed by *McCallum Rademeyer & Freimond*, Pretoria and *Honey Attorneys*, Bloemfontein

Footnotes

- 1 Claims two to six provide:
 - "2. A drill rig as claimed in claim 1 in which the drill is pivotally mounted on the carriage.
 3. A drill rig as claimed in claim 1 or claim 2 in which the carriage is supported by the props.
 4. A drill rig as claimed in claim 3 in which the carriage is movable along the props.
 5. A drill rig as claimed in claim 3 or claim 4 in which the carriage is mounted on a pair of fluid operated cylinders on the outside of the props.
 6. A drill rig as claimed - in claim 5 in which the carriage has a pair of members spaced apart along the length of the cylinders - the lower member providing the pivot mounting for the drill and the upper member providing a releasable lock assembly for fixing the drill in alignment with the props."
- 2 *The Law of South Africa* (2ed) Vol 20 at 179.
- 3 *Ibid*.
- 4 *Gentiruco AG v Firestone SA (Pty) Ltd* [1972 \(1\) SA 589](#) (A) [also reported at [\[1972\] 1 All SA 201](#) (A) - Ed].
- 5 *Ibid* at 613F-H.
- 6 *Ibid* at 615C.
- 7 *Gentiruco AG v Firestone SA (Pty) Ltd* [1972 \(1\) SA 589](#) (A) at 611A-C.
- 8 *Ibid* at 610C-D.
- 9 *Ibid* at 611A-D.
- 10 *Ibid* at 612B-C.
- 11 *Marine 3 Technologies Holdings (Pty) Limited v Afrigroup Investments (Pty) Limited and another* [2014] ZASCA 208; [2015 \(2\) SA 387](#) (SCA) para [10] [also reported at [\[2015\] JOL 32607](#) (SCA) - Ed].
- 12 *Gentiruco ibid* at 615E-F.
- 13 Based on a definition in the *Shorter Oxford English Dictionary* (6ed) (2007) in terms of which "between" is defined as a synonym for interjacent, which, in turn, is defined as "to lie in between"; "in between" being defined as "the middle point on

the line: the space between two points in position".

- 14 *MacMillan Dictionary*.
- 15 Wolfram and MathWorld.
- 16 *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* [1980 \(2\) SA 191](#) (T) [also reported at [\[1980\] 3 All SA 447](#) (T) - Ed]. See also *Monsanto Co v MDB Animal Health (Pty) Ltd (Formerly MD Biologics CC)* [2001 \(2\) SA 887](#) (SCA) paras [9]-[10] [also reported at [\[2001\] JOL 7939](#) (SCA) - Ed].
- 17 *LAWSA ibid* para [184] at 181.
- 18 *Selas Corporation of America v Electric Furnace Co* [1983 \(1\) SA 1043](#) (A) at 1052G-1053F.
- 19 See *Aktiebolaget Hässle and another v Triomed (Pty) Ltd* [2003 \(1\) SA 155](#) (SCA) para [8] [also reported at [\[2002\] 4 All SA 138](#) (SCA) - Ed].
- 20 *Catnic Components Limited and another v Hill & Smith Limited* [1982] RPC 183 at 244.
- 21 *Ibid* at 185.
- 22 *Ibid* at 237.
- 23 *Kirin-Amgen Inc and others v Hoechst Marion Roussel Ltd and others; Hoechst Marion Roussel Ltd and others v Kirin-Amgen and others* [\[2005\] 1 All ER 667](#).
- 24 At 667.