Nampak Products Ltd and another v Man-Dirk (Pty) Ltd
[1999] 2 All SA 543 (A)

Division:	Supreme Court of Appeal
Date:	26 March 1999
Case No:	162/97
Before:	Vivier, Howie, Schutz, Plewman JJA and Melunsky AJA
Sourced by:	JJF Hefer and I Potgieter
Summarised by:	G Harris
Parallel Citation:	1999 (3) SA 708 (SCA)

. Editor's Summary . Cases Referred to . Judgment .

Patents - Infringment of - Party alleging patent infringement has to show that all features or limitations of the claim are present in article allegedly infringing patent - Whether features of invention taken represent all essential features of the claim is a question of construction.

Editor's Summary

The Appellants were the registered joint proprietors of a patent in respect of an invention entitled "Pressure Resistant Bag", used in support systems in mines. The Respondent manufactured and sold a competing product. The Appellants alleged that their patent had been infringed and applied for a permanent interdict restraining the Respondent from selling or offering its product for sale and for an order for the delivery-up of any infringing bags. The court *a quo* dismissed the application.

On appeal, the Court was required to decide whether the Respondent's product infringed the Appellant's patent.

Held - The Court stated that infringement proceedings are concerned only with the invention claimed. *In casu* there was no evidence to show that the patent should be read in a manner which would give the words of the claim a meaning other than their primary meaning.

The Court held that the Appellants had to show that all of the features or limitations of the claim were present. It noted that it was common cause that the Respondent's product was very similar to the patented product. The Court only had to decide whether or not Respondent's product included a second bag, ie whether the sleeve of its bag was a second bag.

The Court found that there was no room for the application of the concept of a purposive construction in interpreting the patent specification. Whether the particular features of the claimed invention taken by the alleged infringer represent all the essential features of the claim remains a question of construction. A test which necessitates extrinsic evidence will be inappropriate in most cases.

The Court noted that the patent *in casu* did not involve technical complexities. The words of the claim were ordinary English words clearly used in their ordinary connotation and the claim was unambiguous. There was nothing that would justify a reference either to phraseology in the body of the specification or to extrinsic evidence relating to the art. The claim in issue should be read in its own terms.

The Court held that the patentee should be understood to have intended that effect should be given to the limitation to the claim which followed from the use of the words "second bag". The Respondent's product did not have a second bag and therefore did not infringe the claim.

The appeal was dismissed with costs including the costs of two counsel.

Page 544 of [1999] 2 All SA 543 (A)

Notes

For Patents, see *LAWSA* (Vol 20, paragraphs 1-65)

Cases referred to in judgment

("**C**" means confirmed; "**D**" means distinguished; "**F**" means followed and "**R**" means reversed.)

South Africa

Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) - **F**

Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd 1983 (1) SA 709 (A) - **D**

Selas Corporation of America v Electric Furnace Co 1983 (1) SA 1043 (A) - **D**

Stauffer Chemical Co and another v Safsan Marketing and Distribution Co (Pty) Ltd and others 1987 (2) SA 331 (A) - **D**

Sappi Fine Papers (Pty) Ltd v ICI Canada Inc 1992 (3) SA 306 (A) - **D**

Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd and others 1990 (1) SA 925 (A)

United Kingdom

Catnic Components Limited and another v Hill and Smith Limited [1982] RPC 183 (HL) - **D**

Improver Corporation and others v Remington Consumer Products Limited and others FSR [1990] 181 - **F**

Southco Inc and another v Dzus Fastner Europe Ltd [1990] RPC 587

View Parallel Citation

Judgment

PLEWMAN JA

This is an appeal against an order by Roux J, sitting as Commissioner of Patents, in a matter concerning an alleged infringement of a patent. The appellants are the registered joint proprietors of South African Letters Patent 90/2427 in respect of an invention entitled "Pressure Resistant Bag". They acquired this by an assignment from the original patentees. The respondent manufactures and sells a competing product. Appellants applied in the court *a quo* on notice of motion for a permanent interdict restraining the respondent from selling or offering its product for sale and for an order for the delivery up of any infringing bags. The Commissioner dismissed the application with costs but granted leave to appeal to this Court.

The patent was granted with effect from 27 February 1991. It was applied for by appellants' predecessors in title in March 1990, claiming priority from three prior patent applications. It seems, however, that the respondent, too, had been active in the field for some years. The affidavits filed in support of the notice of motion are of a somewhat perfunctory nature. This may have had an influence on the response thereto by the respondent. There was (unusually for patent litigation) no challenge to the validity of the patent. In the result there is on the record no evidence in which the prior art is discussed in any depth. Perhaps more importantly, there is not any evidence to show that the patent, when viewed through the eyes of the skilled addressee, should be read in any manner which would give the words of the claims a meaning other than their primary meaning. This is an aspect to which I shall return.

In its commercial embodiment the patent takes the form of a bag used in the support systems employed underground in mines. Mine support bags are fitted in or into packs of timber support in excavated stopes or other underground working places. The bags are filled under pressure to wedge the timber supports into position. There are two systems in use. In one system (known as the "weeping system") the bag is of a porous woven material and is filled with grout. The water in the grout passes through the bag while the solids remain behind and set to provide solid support. In the other system (the "non-weeping system") the bag is impervious to liquid and a chemically reactive mix is pumped into the bag which hardens by chemical action to provide the support.

The specification is (fortunately) not a technically complex document. The general description of the invention in the specification reads:

> "This invention relates to a flexible bag which is resistant to damage from high internal pressure such as would be caused by filling the bag to a high pressure with a liquid, grout or the like and to damage caused by loads and/or shock loads imposed on the outside of the bag when the bag is filled with air or liquid under pressure."

View Parallel Citation

The consistory clause reads:

> "A pressure resistant bag according to the invention includes a first bag which is made from an air-impervious plastics material, an envelope which is made from a reinforced flexible material and in which the first bag is located, a second bag which is made from reinforced flexible material in which the envelope is located and a filler arrangement which is attached to the first bag and passes through apertures in the envelope and second bag. Conveniently, the first bag is made from an unseamed tube of plastics material with the ends of the tube sealed to provide a closed bag.
>
> Further according to the invention the envelope is in the form of an open-ended tube in which the first bag is located. Preferably, however, the envelope is made from a woven plastics material with the weft threads of the weave conveniently being circumferential in the tube and of a higher tensile strength than the warp threads.
>
> In the preferred form of the invention the sealed ends of the first bag are transverse to the tube axis of the envelope and are located on the inside of and adjacent the open ends of the envelope with the end portions of the envelope together with the sealed end portions of the first bag being folded back on to an outer surface of the tube with the first bag and envelope being so located in the second bag."

In infringement proceedings one is concerned only with the invention claimed. The patent has twenty claims but what is in dispute between the parties can be dealt with having regard only to the main claim. Indeed, only one integer is in dispute and in that regard it is, in the main, the bearing one phrase has on the construction of that claim that must be debated. The claim may, for convenience, be set out as having the following integers:

"(i) A pressure resistant bag including

(ii) A first bag which is made from an air-impervious plastics material

(iii) An envelope which is made from a reinforced flexible material and in which the first bag is located

(iv) A second bag which is made from a reinforced flexible material in which the envelope is located and

(v) A filler arrangement which is attached to and opens into the first bag and passes through apertures in the envelope and second bag."

It is integer (iv) that gives rise to the debate.

The respondent's product is very similar to the patented product. It is stated in the answering affidavits that respondent was engaged in 1989 in development work on, initially, weeping bags but later also on non-weeping bags. Tests conducted by it established that the pressures applied to the non-weeping bags were of such an order that the bags were unable to withstand the loading. They required some form of transverse securement. What respondent's witness says is that respondent then attempted to provide this securement by putting the bag into a restraining sleeve. It was found that the bag when so reinforced worked well and the sleeve assisted in restraining the tendency of the folded over flaps of the bag to pull away and open the bag up. This had been a major problem. What respondent manufactured at relevant times was a bag reinforced in this manner - that is by the addition of a restraining sleeve to provide the necessary resistance or strength. It is common cause that respondent's bag exhibits the features of all the integers of the main

View Parallel Citation

claim - other than integer (iv). It is asserted by respondent that its bag avoids the extra material and labour required to form a second full bag around the composite inner bag as in the patent. It therefore does not contain integer (iv) and, accordingly, does not infringe.

The first task of the court is to construe the claim. When the meaning of the claim has been determined the alleged infringing article is to be compared therewith. What must be shown is that all of the features or limitations of the claim are present. Appellants' contention is that respondent's bag consists of a "bladder" of an impervious plastic material (which is said to constitute the first bag of the claim), a "casing" (which is said to constitute the envelope of the claim) and a "sheath" (which is said to "correspond" to the second bag). The case then turns on a short point of construction namely whether the sleeve of respondent's bag is a second bag, as that expression is used in the claims of the patent.

The correct approach to the interpretation of a patent specification is a topic adverted to in almost every reported decision in patent law. But one need go no further than the careful examination of the problem in *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 613D-618G. Appellants' counsel, however, sought to invoke as an aid to the interpretation of the claim the principle known as "purposive construction". For this reason a brief word must be said with regard to that proposition. The epithet-laden term "purposive construction" derives from Lord Diplock's speech in *Catnic Components Limited and another v Hill and Smith Limited* [1982] RPC 183 (HL). It has been invoked in this Court in the field of patent law *inter alia* in *Multotec Manufacturing (Pty) Ltd v Screenex Wire Weaving Manufacturers (Pty) Ltd* 1983 (1) SA 709 (A); *Selas Corporation of America v Electric Furnace Co* 1983 (1) SA 1043 (A); *Stauffer Chemical Co and another v Safsan Marketing and Distribution Co (Pty) Ltd and others* 1987 (2) SA 331 (A) and *Sappi Fine Papers (Pty) Ltd v ICI Canada Inc* 1992 (3) SA 306 (A). The concept of a purposive construction was used as an interpretive aid in these cases in different ways. In some it is employed as a phrase of general application in the construction of claims connoting an approach based upon the skilled addressee's knowledge of the art (as opposed to a purely verbal analysis). In others (as for example in the *Multotec* case, *supra*) it is invoked as an interpretive

aid where the alleged infringer was considered to have appropriated what has been called the "pith and marrow" of the invention and merely substituted a mechanical equivalent for an inessential part. There is in fact no room for its application in the present case but it is necessary to point out that in all of the above cases the court was concerned to establish whether the particular features of the claimed invention taken by the alleged infringer represented all the essential features of the claim.

This, in the final analysis, remains a pure question of construction. In the *Catnic* case Lord Diplock, after noting that a patent specification is "a unilateral statement by a patentee in words of his own choosing" addressed to persons skilled in the art went on to say (at 243):

> "A patent specification should be given a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal

View Parallel Citation

> analysis in which lawyers are too often tempted by their training to indulge. The question in each case is: whether persons with practical knowledge and experience of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that *any* variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked."

How this proposal is implemented is discussed below. What should first be noted is that in the *Catnic* case too the ultimate question was one of construction. This is explained in a careful analysis of Lord Diplock's test (in the *Catnic* case) by Hoffman J in *Improver Corporation and others v Remington Consumer Products Limited and others* FSR [1990]

181. At 189 the learned Judge stated:

> "In the end, therefore, the question is always whether the alleged infringement is covered by the language of the claim. This, I think, is what Lord Diplock meant in *Catnic* when he said that there was no dichotomy between 'textual infringement' and infringement of the 'pith and marrow' of the patent and why I respectfully think that Fox LJ put the question with great precision in *Anchor Building Products Ltd v Redland Roof Tiles Ltd* when he said the question was whether the absence of a feature mentioned in the claim was 'an immaterial variant which a person skilled in the trade would have regarded as being *within the ambit of the language*" (the emphasis is that of Hoffman J).

But there is another facet of Lord Diplock's test to which attention must be directed. This is the role of section 125 of the English Patents Act of 1977 and article 69 of the European Patent Convention. The convention was concluded in Munich in 1973.

England has adhered to it. Article 69 was an attempt to ensure a measure of uniformity in the construction of patent specifications within the European community by stipulating permissible readings of patent claims (the Protocol). The reason, in brief, lies in the difference between the traditional approach to claim interpretation in United Kingdom and the continental approach which rests largely on the views of persons skilled in the particular art. An article by B Sherman in [1991] 54 *Modern Law Review* page 499 "Patent Claim Interpretation: The Impact of the Protocol on Interpretation" is instructive in this regard. It seems as if the aim has not been wholly achieved. What Hoffmann J's analysis showed is that Lord Diplock's proposed test was influenced by the Protocol (see Hoffman J in the *Improver* case, *supra*, at 190 and *Southco Inc and another v Dzus*

Fastner Europe Ltd [1990] RPC 587 at 603 and 604). Lord Diplock's proposal is that the court should ask itself three questions. Two of these are questions of fact dependent on extrinsic evidence. To the extent to which this could be understood to suggest that extrinsic evidence on interpretation be led in all cases it would not be in accordance with our law. It is contrary to the judgment of this Court in the *Gentiruco* case (see the judgment of Trollip JA at 617A-618G). In the cases in this Court in which the concept of a purposive construction has been invoked this has always been in a context which in no way detracted from the firmly established principles of claim construction. Generally, evidence on record for other reasons, such as evidence to explain the art and science in question to enable the court to view the patent "through the eyes of

View Parallel Citation

the addressee", allowed the court to adopt a purposive approach. In the *Multotec* case, for example, the claim in question was ambiguous and the invocation of an aid to interpretation was appropriate.

What I have said has been prompted only by the need to point out that it is not always open to a court to resort to evidence as an aid to construction. None of the South African authorities to which I have referred (nor indeed the English cases other than the *Improver Corporation* case and the *Southco* case) have directed attention to the effect of the Protocol in the *Catnic* case or to the factual nature of part of the test. In most cases a test which necessitates extrinsic evidence will be inappropriate. The caution sounded by Trollip JA in the *Gentiruco* case at 613D-E about the use of English and American decisions remains valid and apposite. (I should add that Lord Diplock's approach has also been invoked in cases not concerning patents. An example is *Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd and others* 1990 (1) SA 925 (A) at 943C-H - again a case where ambiguity was a problem. But it is beyond the scope of this judgment to discuss the application of the *Catnic* test in decisions other than patent cases.) What can be said is that in patent cases the need for a practical construction is obviously desirable. But care is called for in the manner in which recourse may be had to Lord Diplock's test.

As I have said, the present case is a good example of circumstances where it would be singularly inappropriate to attempt to apply the *Catnic* procedure. Counsel sought to do so both in the main argument and in an alternative argument. In his main argument he addressed an argument, without evidence on the point, as to what the "true" invention was. In the alternative argument he sought to raise a "pith and marrow" contention, again without any appropriate evidence having been adduced. The present patent in fact involves no technical complexities and uses no esoteric phraseology. The words of the claim are ordinary English words clearly used in their ordinary connotation and the claim is unambiguous. There is therefore nothing which would justify a reference either to phraseology in the body of the specification or to extrinsic evidence relating to the art. The claim in issue must simply be read in its own terms.

No aid to interpretation (going any further than the need to read the document as a whole) is called for. In the consistory clause itself there is discussion of the first bag being made of an unseamed tube with ends sealed to provide a closed bag. This statement is followed by a description of the envelope being in the form of an open-ended tube. The open-ended member is thus accurately described as a tube in contrast to a bag. With that background one turns to the claim where one encounters the word "bag" not only used in its ordinary sense but also used in juxtaposition to the word "envelope". There is also a reference to a first bag and a second bag. The ordinary meaning of the word "bag" according to the *Shorter Oxford English Dictionary* is "a receptacle of flexible

material open only at the top (where it can be closed)". The word is unambiguous. The patentee must therefore be understood to have intended the limitation to the claim which follows from the use of the

View Parallel Citation

words "second bag" to be given effect to. The respondent's product does not have a second bag and therefore does not infringe the claim.

The appeal is dismissed with costs including the costs of two counsel.

(Vivier, Howie, Schutz JJA and Melunsky AJA concurred in the judgment of Plewman JA.)

For the appellant:

C Puckrin SC and *M Jansen* SC instructed by *Adams & Adams*, Pretoria; *Honey and Partners*, Pretoria

For the respondent:

L Bowman SC and *B du Plessis* instructed by *John & Kernick*, Pretoria; *Lovius-Block*, Bloemfontein