IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: PATENT 95/4779

In the matter between:

NU-WORLD INDUSTRIES (PTY) LTD — Applicant (Defendant)

and

STRIX LIMITED — Respondent (Plaintiff)

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

31/10/18
DATE

SIGNATURE

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

D S FOURIE, J:

[1] The applicant seeks leave to appeal to the Supreme Court of Appeal against the judgment and order handed down by Matojane J on 23 April 2018, sitting as Commissioner of Patents, but who is not available to hear this application. The judgment follows an application by the respondent to amend its declaration in an inquiry into damages arising from patent infringement by the applicant. The order granted by Matojane J reads as follows:

"1. *The application by the plaintiff for leave to amend its declaration is granted.*

2. *The defendant is ordered to pay the costs."*

[2] The respondent instituted action against the applicant for patent infringement. The patent related to liquid heating vessels (kettles) containing thermally sensitive controls which fell within the claims of the patent. The respondent initially relied on a number of further controls, but the action in respect of such controls was abandoned before the hearing.

[3] I was informed that in accordance with an agreement between the parties, the issues on merits and quantum had been separated and the trial proceeded to determine only whether these four controls infringed claim 1 in the patent, and if so, whether the respondent was entitled to interdict relief to restrain such infringement.

[4] The respondent was unsuccessful in the patent trial, but was successful on appeal before the Supreme Court of Appeal. That Court granted an interdict prohibiting the applicant from infringing the respondent's patent and granted an inquiry into the damages suffered by the respondent as a result of the infringement by the applicant.

[5] The Supreme Court of Appeal granted an order which reads as follows:

"(a) *The defendant is interdicted from infringing claim 1 of South African Patent 95/4779 ('the patent') by making, using,*

disposing, offering to dispose of, or importing liquid heating vessels containing Liang Ji LJ-06A, Liang Ji LJ-06 or Sunlight SLD-105A IL thermally sensitive overheat controls or any other thermally sensitive overheat controls as claimed in claim 1 of the patent;

(b) The defendant is ordered to deliver up any product infringing the patent and any article or product of which an infringement product forms an inseparable part;

(c) As to damages:

i. An inquiry is ordered as to the damages suffered by the plaintiff as a result of the infringement of the patent by the defendant, alternatively as to the amount of a reasonably royalty as contemplated in s 65(6) of the Patents Act, 1978 and payment of the amount found to be due to it;

ii. In the event of the parties being unable to reach agreement as to the further pleadings to be filed, discovery, inspection or other matters of procedure relating to the inquiry, any of the parties may make application to the Court for directions in regard thereto."

[6] Pursuant to that order, the respondent filed a declaration on 11 April 2016 in which it set out its claim for damages. The applicant has already pleaded to the declaration. On 13 February 2017 the respondent gave notice of its intention to amend its declaration by introducing other controls which, it says, also infringe the patent. It contended that it is entitled to expand the damages enquiry to include such other controls, despite the fact that there is no finding by

any Court that such other controls also infringe. An order allowing such amendment was granted by Matojane J.

[7] Counsel for the applicant contended that the jurisdiction of a Court conducting an inquiry into damages, is limited. It cannot without a prior amendment of the referral order expand the ambit of the inquiry into another merits dispute. Counsel for the respondent submitted that the order is not appealable and, having regard to the words *"or any other thermally sensitive overheat control as claimed in Claim 1 of the patent"* as they appear in the order of the Supreme Court of Appeal, it is not likely that another Court will come to a different conclusion.

[8] The order granted by Matojane J is an interlocutory order. In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (AD) at 536B it was stated that, generally speaking, a non-appealable decision is a decision which is not final, nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. However, it was thereafter decided that the factors referred to above were not exhaustive to determining whether an order was appealable (*Health Professions Council of South Africa v Emergency Medical Supplies & Training* 2010 (6) SA 469 (SCA) par 15). The Supreme Court of Appeal also found that, under the Constitution, *"what is of paramount importance in deciding whether a judgment is appealable is the interests of justice"* (*Philani-Ma-Afrika v Myilula* 2010 (2) SA 573 (SCA) par 20).

[9] The Supreme Court of Appeal granted an interdict against the applicant (defendant) and ordered an inquiry as to the damages suffered by the respondent (plaintiff). It was pointed out to me during argument that in Evans v Shield Insurance Co Ltd 1980 (2) SA 814 (A) at 836D the Appeal Court said:

> *"(w)here the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so ... but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages."*

[10] In the case before me it is possible that a Court of Appeal may find that a final order had already been handed down on the issue of merits and that the amendment sought by the respondent was not part and parcel of the original cause of action. Therefore, is the order granted by Matojane J an error which needs to be corrected? On the other hand, it may also be necessary, for a proper interpretation of the order granted by the Supreme Court of Appeal with regard to the words *"or any other thermally sensitive overheat control as claimed in Claim 1 of the patent,"* to consider the implications of that order. Put differently, was the intention of that Court to convey that if other controls are also thermally sensitive overheat controls as claimed in claim 1 of the patent, that they should also fall within the scope of the damages inquiry as suggested by Matojane J in par 22 of his judgment? It may also be that the intention was to cast the net as wide as possible for purposes of the interdict only. Fortunately, I need not have to answer these questions.

[11] Having regard to all these considerations, I am of the view that it will be in the best interests of justice to grant an order for leave to appeal, notwithstanding the fact that this is an interim order with no final effect. I am of the view, for the reasons set out above, that there is a reasonable prospect that another Court may come to a different conclusion.

In the result I grant the following order:

(1) The applicant is granted leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of Matojane J handed down on 23 April 2018;

(2) Costs of this application will be costs in the appeal.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 31/10/18