THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 0018/14
Reportable

In the matter between:

MARINE 3 TECHNOLOGIES HOLDINGS (PTY) LTD **APPELLANT**

and

AFRIGROUP INVESTMENTS (PTY) LTD **FIRST RESPONDENT**
DU TOIT, HENDRINK MACHIEL **SECOND RESPONDENT**

Neutral citation: *Marine 3 Technologies Holdings v Afri-Group Investments* (0018/14) [2014] ZASCA 208 (1 December 2014)

Bench: Ponnan and Swain JJA and Mathopo, Mocumie and Gorven AJJA

Heard: **25 November 2014**

Delivered: **1 December 2014**

Summary: Patents Act 57 of 1978 - s 61(1)*(d)* – application for revocation on the ground of alleged inutility of the Patent.

ORDER

On appeal from: North Gauteng Division, Pretoria (Tuchten J, sitting as the Court of the Commissioner of Patents)

(1) The appeal is upheld.

(2) The order of the court below in the revocation application is set aside and substituted with the following order:

'The application for the revocation of South African Patent No. 2008/10778 is dismissed.'

JUDGMENT

Ponnan JA (Swain JA and Mathopo, Mocumie and Gorven AJJA concurring):

[1] The appellant, Marine 3 Technologies Holdings (Pty) Ltd (Marine 3), is the patentee of South African Patent Number 2008/10778 (the patent), issued on 30 June 2010 for a 'surface active ingredient composition'. Marine 3 applied for patents for the invention in various jurisdictions internationally including examining jurisdictions such as the USA, the European Community (EC), Australia and New Zealand.[1] At the date of the hearing in the court below, patents for the invention had issued in Australia and New Zealand, but the applications in the USA and EC were still pending. The claims

[1]An examining jurisdiction is one where a patented application is examined by suitably qualified examiners for formal and substantive registrability. South Africa is a non-examining country.

in the Australian and New Zealand issued patents are the same as those in the patent in suit.

[2] The second respondent, Hendrik du Toit (Du Toit), was previously associated with Marine 3, having approached it to finance the exploitation of the invention. On 14 November 2008 Du Toit, his alter ego Afri-Group Investments (Pty) Ltd (Afrigroup) (the first respondent) and Marine 3 entered into a written distribution agreement in terms of which Afrigroup became the sole distributor of Marine 3`s product range. However, towards the end of 2009 or early 2010 the relationship between the parties soured, apparently because Du Toit wanted to market products of Marine 3's competitors as well.

[3] The relationship between the parties deteriorated to such an extent that litigation, which included an Anton Piller application and an application for interim relief to interdict an alleged infringement of the patent, was launched by Marine 3 against the respondents. Those applications were opposed by Afrigroup who, in turn, applied for the revocation of the patent.

[4] All three applications served before the Court of the Commissioner of Patents (per Tuchten J), who found for the respondents with costs in all three applications but granted leave to Marine 3 to appeal to this court.

[5] Subsequent to the grant of leave to appeal, the parties concluded an agreement that inter alia recorded:

'3.3 This is a judgement in the public interest that cannot be abandoned by Afri-Group.

3.4 In the light of Marine 3`s appeal to the Supreme Court of Appeal in respect of the revocation of the relevant patent:

3.4.1 Afri-Group herewith agrees that there is no reason why the Supreme Court of Appeal, after due consideration, should not find in favour of the Appellant; and

3.4.2 Afri-Group will take no further steps nor file any documents in opposition to Marine 3`s appeal to the Supreme Court of Appeal and Marine 3 will not hold Afri-group or any other party liable for any costs in this regard, whether before the Commissioner of Patents or in the Supreme Court of Appeal;

3.4.3 Afri-Group will not oppose any potential amendment of patent no 2008/10778 by Marine 3; and

3.4.4 Afri-Group will not oppose any declaration of validity of patent no 2008/10778.'

[6] Inasmuch as the judgment of Tuchten J is one *in rem* in that it affects a public register, Marine 3, notwithstanding the settlement of the matter, is constrained to proceed with the appeal because, as Steyn CJ put it in *Rembrandt Fabrikante en Handelaars (Edms) Bpk v Gulf Oil Corporation* 1963 (3) SA 341 (A) at 348H:

'. . . generally speaking, the existence of an exclusive right to a trade mark flows from and is dependent upon registration, and the nature and extent of such a right is determined by the entries in the register. The right to a registered trade mark is effectively assigned, transferred, modified, partly divested of its exclusiveness, or terminated, by such entries.' (See *The Gap Inc v Salt of the Earth Creations (Pty) Ltd* 2012 (5) SA 259 (SCA) para 2.)

[7] In support of the revocation application, Afrigroup contended that the invention claimed is subject to revocation in terms of s 61(1) of the Patents Act 57 of 1978 (the Act), inter alia, because:

(i) the invention cannot be performed or does not lead to the results and advantages set out in the complete specification (subsec *d*);

(ii) the invention is neither novel nor inventive (subsec *c*);

(iii) the complete specification concerned does not fully describe, ascertain and, where necessary, illustrate or exemplify the invention and the manner in which it is to be performed (subsec *e*); and

(iv) the claims of the complete specifications concerned are not clear (subsec *f*(i))

However, at the hearing of the revocation application, Afrigroup abandoned the alleged lack of novelty and inventiveness and, save for the alleged inutility, Tuchten J found against it in respect of the remaining grounds.

[8] In so far as the alleged inutility is concerned, the court below stated:

'But it is quite another matter whether the invention is useful. The uncontradicted evidence adduced by the experts on behalf of the respondents is that sodium chloride and SLES cannot by any process be dissolved in the base liquid in the claimed proportions.'

It accordingly held:

'The evidential material before me establishes that it is not possible to create a composition in which the base liquid, sodium chloride and SLES are present in solution in the given ratios. The attack on the utility of the patent must therefore succeed.'

The court granted leave to Marine 3 to apply for the amendment of the patent to overcome the inutility. The revocation order that issued was thus subject to Marine 3`s right in terms of s 61(3) of the Act to amend the patent to overcome the inutility.

[9] The patent having been granted, the onus would naturally be on the person wishing to challenge its validity (*Miller v Boxes and Shooks (Pty) Ltd* 1945 AD 561 at 576). That onus has to be discharged on a balance of probabilities. The onus of

establishing invalidity on the grounds of inutility thus rested on Afrigroup. An invention that cannot be performed is obviously not capable of being used or applied in trade, industry or agriculture and will therefore not be patentable and, if patented, the registration for that invention would be liable to be revoked.

[10] 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* 1972 (1) SA 589 (A) 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.'

[11] The patent basically relates to the composition, manufacture and application of a surface active solution. The invention of the patent, a so-called surfactant, is a chemical composition which, when mixed with water, changes, enhances and improves the wetting, emulsification and de-agglomeration properties of water. Surfactants are compounds that lower the surface tension between two liquids or between a liquid and a solid and act as detergents, dust suppression agents, emulsifiers, foaming agents and dispersants. The invention finds application in various and diverse industries, including: (a) the mining industry, where it is used for dust control; (b) the fire fighting industry, where it acts as a suppressant by enhancing wetting; and (c) the agricultural industry, where it enhances wetting and fertilizer penetration.

[12] Inutility is a question of fact which must be decided in the circumstances of each case (*Coflexip SA v Schlumberger Logelco Inc* 2001 BIP 1 (CP) at 30H-I). An invention is not useful if it does not effectively produce the result aimed at or promised by the specification (*Filta-Matix (Pty) Ltd v Freudenberg & others* 1998 (1) SA 606 (SCA) at 612I). In particular, where a claim involves the use as ingredients of a class of chemical compounds, it is invalid if any of these will not work (*Transvaal and Orange Free State Chamber of Mines v General Electric Co* 1967 (2) SA 32 (T) at 63G). To determine the inutility issue, it is necessary to begin with a consideration of the meaning of the claims of the patent. It is apparent from the evidence and the judgment of the court below that for revocation purposes the focus was solely on claim 1. The only issue before this court therefore is the validity of claim 1 of the patent.

Claim 1, which claims an object, namely a chemical composition, consists (as the court below accepted) of the following integers:

‘(a) A surface active ingredient composition, which includes

(b) a base liquid including water, which has dispersed therein in percentages by volume:

(i) Sodium Chloride – 1 to 3%

(ii) Magnesium ions – 1 to 2%

(iii) Calcium ions – 1 to 2%

(iv) Potassium ions -1 to 2%

(v) Sulphate – 1 to 2%

(vi) Carbon – 0.5 to 1%

(vii) Nitrate – 1 to 2% and

(viii) Phosphate – 1 to 2%;

(c) wherein the sodium chloride if required, and sodium alkyl ether sulphate is dissolved in the base liquid,

(d) with the proportion of the base liquid to sodium chloride to sodium alkyl ether sulphate being between 1: 1: 1,5 and 1: 1:5.’

[13] In arriving at its conclusion of inutility the court below laid particular emphasis on the words ‘dispersed’ and ‘dissolved’. Whilst recourse to authoritative dictionaries is a permissible and often helpful method available to courts to ascertain the ordinary meaning of words, judicial interpretation cannot be undertaken by 'excessive peering at the language to be interpreted without sufficient attention to the contextual scene' (*Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H-727B). In *Aktiebolaget Hässle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 9, Nugent JA stated:

‘In *Multotec Manufacturing (supra* at 721C - E) Corbett JA observed that a Court should always guard against “too "textual" an approach” in the interpretation of claims in a patent

specification because by “peering too closely at the language of a claim the Court may overlook an infringement that takes the substance of the invention”. While the claim must be construed to ascertain the intention of the inventor as conveyed by the language he has used (*Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 614B - C) what is sought by a purposive construction is to establish what were intended to be the essential elements, or the essence, of the invention, which is not to be found by viewing each word in isolation but rather by viewing them in the context of the invention as a whole. To the extent that it might have been suggested in an *obiter dictum* in *Nampak Products Ltd and Another v Man-Dirk (Pty) Ltd* 1999 (3) SA 708 (SCA) at 714A that it might be called in aid only to construe an ambiguous claim I do not think that is supported by the decisions of this Court and, in my view, it is not correct. It is merely an approach to construction that is aimed at establishing what was meant in a particular context. As pointed out by Hefer JA in *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H - 727B (in a passage that was adopted in relation to the construction of patent specifications in *Monsanto Co v MDB Animal Health (Pty) Ltd (formerly MD Biologics CC)* 2001 (2) SA 887 (SCA) at 892B - C):

“The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears (*Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G *ad fin*). As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensible. Occasionally, however, it is not.”’

[14] In all cases of inutility the prime necessity is to construe the claim, and in construing it one must have regard to the way in which it would appeal to the addressee who had to work with such things (*Frank & Hirsch (Pty) Ltd v Rodi & Wienenberger Aktiengesellschaft* 1960 (3) SA 747 (A) at 756E-F). Claim 1 claims a chemical composition. In order to construe that claim it is necessary to appreciate that the words ‘dispersed’ and ‘dissolved’ point to the achievement of the claimed features

of that product by means of a process of manufacture. That process of manufacture is explained in the body of the specification and in claims 5 and 6. As Nugent JA pointed out in *Aktiebolaget Hässle v Triomed (Pty) Ltd* it is of course permissible to have regard to subsequent claims for the purposes of interpreting a preceding claim. It is in this context that the words dispersed and dissolved must be construed. It must be remembered as well that those words are employed in the claims and the body of the specification in the context of the making of chemical compounds and in that context technical words must be given the meaning as ordinarily understood by an expert skilled in the particular art or science of the patent. And, because a patent is addressed to the so called 'person skilled in the art' the court must determine what such a person would understand that claim to mean. Here the patent in suit addresses itself to an individual with qualifications and experience in chemistry and analytical chemistry.

[15] In its judgment the court below held, without elaboration, that the 'uncontradicted evidence adduced by the experts' and the 'evidential material' before it established that 'it is not possible to create . . . [the] composition' of claim 1. Accordingly, so the court held, claim 1, and therefore the patent, was invalid and liable to be revoked. It is not possible to determine from the judgment exactly what evidence the court had in mind. The witnesses gave evidence on affidavit. Afrigroup relied on the evidence of Professors Krause and Labuschagne, who are experts in chemistry. Their evidence focused primarily on lack of novelty and lack of clarity. They deal only peripherally with utility, then as well in the context of the method claimed in claims 5 and 6 of the patent. In that regard both contended that the composition cannot be manufactured by means of the method of claims 5 and 6 because the solution of

water, sodium chloride and sodium alkyl ether sulphite (SLES) in the ratios of claim 1 cannot be achieved. Professor Krause opined that it is not clear that 'it would be possible to dissolve the needed sodium chloride to satisfy the given ratio . . . in the base liquid'. He added: '[s]imilarly the SLES would not dissolve at these high amounts. There are different kinds with more or less ethoxy ether groups but I am quite sure none of these will dissolve to this extent . . . . The court below appears to have agreed with Professors Krause and Labuschagne.

[16] In restricting the meaning of 'dissolve' and 'disperse' in the manner that it did, the court below not only disregarded the body of the specification but also disregarded the evidence of Marine 3`s experts. It, moreover, ignored the cautionary words of Corbett CJ in *Roman Roller CC & another v Speedmark Holdings (Pty) Ltd* 1996 (1) SA 405 (A) at 419D-E that the skilled addressee, had neither to struggle with the language of the patent nor to adopt an attitude of 'studied obtuseness'. Corbett CJ emphasised (at 419F) that where the words permitted, an interpretation should be adopted which is consistent with the description of the problem to be overcome and the method of doing so described in the body of the specification'. The body of the specification clearly anticipates that the process of the manufacture of the composition of claim 1 read with claim 5 provides for a concentrated composition which, if suitably diluted, forms in the order of 0.5 per cent of the diluted composition.

[17] Unsurprisingly, Marine 3`s experts, Professors Domb and Du Toit, disputed the conclusions of Krause and Labuschagne. It is evident from Professor Domb`s evidence that 'the SLES' referred to in claim 1 comprises various of the compounds listed in integer (b), in particular carbon, sulphate and sodium. And whilst compounds

such as sulphate and sodium chloride would dissociate completely in water into hydrated ions, solids such as carbon cannot. Thus whereas some of the compounds listed in integer (b) and all of the compounds listed in integer (c) (the solubles) would dissociate into ions in water, some of those compounds listed in (b) (the solids) cannot dissociate in water. Accordingly, where integer (b) uses the word ‘disperse’ in the base liquid, it is used in the wide sense to mean that the solid compounds of that integer are ‘spread, distributed or divided up’ so as to form a ‘solution’, namely a blend, mixture or suspension in the base liquid, and where integer (c) uses the word ‘dissolved’ it is used in the wide sense to mean that the solubles are dissociated into ions in the base liquid. Professor Domb accordingly stated that it is possible to form a uniform dispersion of SLES with water and sodium chloride when selecting a SLES derivative which is water miscible at the given ratios. Turning to Professor du Toit: ‘disperse’, she explained, notes ‘a phase dispersed in another phase’. Accordingly, where claim 1 speaks of a dispersal of the claimed chemical elements in the base liquid, it was clearly intended to broadly define the mixing together of those elements in the base liquid, uniformly dispersed throughout the mix.

[18] The explanation by Professor du Toit of the words ‘disperse’ and ‘dissolve’ as employed in claim 1 and the employment of the word ‘miscible’ by Professor Domb in the interpretation of claim 1, are therefore consonant with the approach in *Roman Roller.* As one would expect each of those words do not admit of a single meaning. According to the Concise OED (12 ed) the ordinary meaning of the words are:

disperse - distribute in different directions or over a wide area, thin out and disappear, denoting a phase dispersed in another phase (chemistry);

dissolved – (with reference to a solid) become or cause to become incorporated into a liquid so as to form a solution; and

miscible – forming a homogenous mixture when added together; capable of being mixed (with something); a substance that will mix with another.

Whilst Webster`s Third New International Dictionary defines those words, inter alia, thus:

disperse – to cause to become spread widely; to distribute more or less evenly throughout a liquid, gaseous or solid medium with the formation of a two phase system;

dissolve – to cause to disperse or disappear, to pass into solution; to break up; and

miscible – capable of being mixed, capable of mixing in any ratio without separation of two phases.

[19] The conclusion by Professors Krause and Labuschagne that the surfactant of claim 1 cannot be manufactured, is strangely not based on any actual attempt by either of them to manufacture the compound. It was thus purely theoretical. The factual evidence that the surfactant of claim 1 had indeed been in commercial manufacture and sold under the trademarks M3T, M3T3001 and M3T3005 debunks that theoretical hypothesis. The evidence was further to the effect that the respondents were alleged to have infringed the patent by the manufacture of their own surfactant. The best evidence of utility according to *Turner v Bowman* (1925) 42 RPC 29 at 39, 'is the fact that the Defendants, who had something to do with the prior user . . ., have thought fit to use the machine which is alleged in the Particulars of Breaches as an infringement'. Perverse attempts to show failure, or the choice of unusual combinations which will not succeed, is not generally sufficient to support the plea of

non-utility (*Halsbury* (3 ed vol 29 p 124 cited with approval in *Transvaal and Orange Free State Chamber of Mines v General Electric Co*). Indeed, as it was put in *Astrazeneca Canada Inc., Astrazeneca Aktiebolag and Astrazeneca UK Limited v Apotex Inc. and Apotex Pharmachem Inc.* 2014 FC 638 para 83: '[i]n essence, an alleged patent satisfies the requirement of utility if, from the perspective of the skilled person . . ., its utility is *demonstrated*, or in the alternative, if its utility is *soundly predicted*'. It follows that the appeal must succeed.

[20] In the result:

(1) The appeal is upheld.

(2) The order of the court below in the revocation application is set aside and substituted with the following order:

'The application for the revocation of South African Patent No. 2008/10778 is dismissed.'

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V PONNAN

For the Appellant:	A J Bester SC Instructed by: Hahn and Hahn Inc Pretoria Mcintyre & Van der Post Bloemfontein