

SOUTH AFRICA / JUDGMENT

Camworth Technologies Ltd v Videx Wire Products (Pty) Ltd t/a Videx Mining Products (702/2012) [2013] ZASCA 112; 2013 BIP 57 (SCA) (17 September 2013)

[2013] ZASCA 112

COURT

Supreme Court of Appeal

BEFORE

Nugent, Ponnann, Bosielo, Wallis, Swain

CASE / FILE NUMBER

702/2012

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 702/2012

In the matter between:

CAMWORTH TECHNOLOGIES LIMITEDAppellant

and

VIDEX WIRE PRODUCTS (PTY) LTD T/A

VIDEX MINING PRODUCTSRespondent

Neutral citation: Camworth Technologies Ltd v Videx Wire Products (Pty) Ltd (702/12) [2013] ZASCA 112 (17 September 2013)

Bench: NUGENT, PONNAN, BOSIELO and WALLIS JJA and SWAIN AJA

Heard: 21 AUGUST 2013

Delivered: 17 SEPTEMBER 2013

Summary: Patent – infringement of – construction of specification – patented device and infringing device fundamentally different in operation – no infringement where essential integers of the claim in the patent not present in infringing device.

ORDER

On appeal from: The Court of the Commissioner of Patents (Louw J):

The appeal is dismissed with costs, including those consequent upon the employment of two counsel.

PONNAN JA (NUGENT, BOSIELO and WALLIS JJA and SWAIN AJA concurring):

[1] The respondent, Videx Wire Products (Pty) Ltd t/a Videx Mining Products (Videx), instituted action in the Court of the Commissioner

of Patents against the appellant, Camworth Technologies Ltd (Camworth), the patentee of South African Patent 98/7928 entitled:

'Elongate support preload device' (the patent). Videx sought a declaration in terms of s 69(1) of the Patents Act 57 of 1978 (the

Act) that a pre-stressing device (a Videx pot) that it intended to manufacture and dispose of in the Republic of South Africa did not infringe the claims of the patent.

[2] Section 69(1) of the Act, headed 'Declaration as to non-infringement', provides:

'(1) A declaration that the use by any person of any process, or the making or use or offer to dispose or disposal or importation of any article by any person, does not or would not constitute an infringement of a patent, may be made by the commissioner in proceedings between that person and the patentee, notwithstanding that no assertion to the contrary has been made by the patentee, if it is proved –

(a) that such person has applied in writing to the patentee for a written acknowledgement to the effect of the declaration claimed, and has furnished the patentee with full particulars of the process or article in question; and

(b) that the patentee has failed to give such an acknowledgement.'

[3] There is no dispute between the parties that the procedural requirements of s 69(1) of the Act were complied with. The issue is thus whether the Videx pot falls within the ambit of any of the claims of Camworth's patent and therefore infringes it. A determination of that question turns upon a comparison between the Videx pot and the words of the claims in the patent (*Letraset Ltd v Helios Ltd* 1972 (3) SA 245 (A) at 274G-H). For, as Trollip JA observed in *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 613F-H: 'our very 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'.

- [4] 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.'
- [5] Broadly speaking, the patent relates to a pre-stressing unit for preloading an elongate timber mine support between a hanging wall and a foot wall in a mine working. The unit takes the form of a closed pressure vessel with an inner component and an outer component. When erecting a mine support, a timber prop is cut to a length just short of the distance between a hanging wall and a foot wall of a mine working. The device is then located between the underside of the timber prop and the foot wall (it may also be located between the top of the timber prop and the hanging wall). A high pressure hose is then used to fill it with water – or some other suitable liquid
- resulting in deformation of the pressure vessel and shallowing of the socket. As the socket shallows, the upper end of the prop engages the hanging wall and the base of the device deforms into anchoring conformity with the foot wall. The axial expansion of the device loads the mine prop, locking it in place and compressing the hanging wall of the mine working. This compression may serve to close cracks in the roof of the mine working and may secure loose blocks of rock to reduce ground fall.

[6] Figures 1 to 3 of the patent specification on Annexure A hereto, illustrate the preferred embodiment of the invention. Figure 1 is a sectioned side elevation of the preload device of the invention. Figure 2 is a partially diagrammatic sectioned side elevation of the preload device of figure 1 prior to activation. And figure 3 is a view similar to that of figure 2 showing the preload device fully activated. The numerals below correspond with those in the figures in Annexure A. The body of the specification explains that the pot will generally be formed from sheet metal. It has an inner component (14) and an outer component (16) which are welded together at 18 to provide a pressure vessel. The pressure vessel includes an 'annular chamber portion' (20) which surrounds the recess (19). The recess is in the form of a socket which houses the elongated load support in use. The outer component of the pot is the 'outer wall' of the device while the inner component is the 'cylindrical side wall' of the socket. Importantly, the rim of the inner component of the pot is convexly curved in cross-section at 21 in Figure 1. The pot also includes means for inflating the vessel in the form of a liquid inlet

(22) over which a threaded socket (24) is located. A valve (12) functions to connect a hose to the pot in conventional fashion. In use, a high pressure water hose is connected to the valve (12) and the pot is filled with water at a pressure between 100 and 150 bar. This high pressure causes the inner component of the housing (14) to deform outwardly thus shallowing the recess (19) as illustrated in Figure 3. The inner wall may be made from thinner gauge sheet material than the outer wall to ensure that it deforms prior to the outer wall. The shallowing of the recess (19) results in the elongated load support being in pressure-bearing contact with the foot wall or hanging wall (as the case may be) in the mine. The convexly curved shape of the inner wall (at 21) allows the socket to 'roll out' or shallow evenly until the elongated load support is in pressure-bearing contact with the wall.

[7] The patent comprises seven claims. It hardly needs re-stating that the function of the claims is to define with clarity and

precision the scope of the invention so that others may know the exact boundaries of the area within which they may not trespass

(Ensign-Bickford (SA) (Pty) Ltd & others v AECI Explosives and Chemicals Ltd 1999 (1) SA 70 (SCA) at 77H-78B). The language of the claim, as Nugent JA observed in *Aktiebolaget Hässle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 8, must be construed purposively, so as to extract from it the essence, or the essential elements, of the invention.

[8] All seven claims are product or apparatus claims to a preload device. Claims 2 to 6 are dependent on claim 1. Claim 7 is a

so-called omnibus claim. The matter thus proceeded on the basis that if claim 1 of the patent is not infringed by the Videx pot none of the other claims will be infringed. It is therefore necessary to consider only claim 1, which reads:

'A preload device for an elongated load support including a closed pressure vessel, a recess in the form of a socket having a cylindrical side wall in one wall of the vessel in which an end of a support may be located, an outer wall which is radially spaced from the cylindrical wall of the socket with the outer end of the socket wall being convexly curved in cross-section onto the outer wall of the vessel to define at least a portion of a chamber in the vessel which surrounds the socket and means for inflating the vessel to shallow the socket.'

[9] Claim 1 of the patent can be divided into the following integers:

- (a) A preload device for an elongated load support including;
- (b) a pressure vessel;
- (c) a recess in the form of a socket having a cylindrical side wall in one wall of the vessel in which an end of a support may be located;
- (d) an outer wall which is radially spaced from the cylindrical wall of the socket with the outer end of the socket wall being convexly curved in cross-section on the outer wall of the vessel;
- (e) to define at least a portion of a chamber in the vessel which surrounds the socket;
- (f) and means for inflating the vessel to shallow the socket.

[10] The case advanced by Videx is that its pot does not include integers (d) and (f) of the patent in suit. The Commissioner (Louw J) agreed with Videx. Louw J accordingly issued a declaration of non-infringement and ordered Camworth to pay Videx's costs including

those consequent upon the employment of two counsel. This appeal is with the leave of the Commissioner.

[11] Before the commencement of the trial it was foreshadowed that experts would be called by each party to testify. In the event

neither party did. On the first day of the trial it was agreed, as recorded by the learned judge in the court below, that:

'... [T]he evidence tendered on behalf of the plaintiff in the form of the expert summary in the name of Doctor N D L Burger dated 2 March 2012 together with the report of CTMI Consulting (Pty) Ltd (of which he is the managing director) dated 9 June 2011, and the evidence filed on behalf of the defendant in the form of the report by Spectramech CC, authored by Prof. C Scheffer of Stellenbosch University, would be admitted as the evidence on which the parties rely without there being any need to call the expert concerned, there being no challenge to the accuracy of the observations, summaries, reports and opinions by either side's expert witness by the other side.'

[12] Louw J approached the evidence of the experts - which was the only evidence that served before him - thus:

'[12] Mr Bowman SC submitted on behalf of the plaintiff that the only test carried out by Prof. Scheffer which was within the specifications of the plaintiff's Videx pot was the one carried out on the 140mm pot with a gap size of 30.2mm, and that the result of that test showed a deepening of the socket. He pointed out that the specifications of the Videx pot, which were provided to the defendant in terms of the requirements of s 69(1) of the Act, clearly stipulate that the recommended gap size for both pot sizes is 20mm and that the maximum gap size for both, which is not to be exceeded, is 50mm. "Gap size" is expressly defined as the maximum difference between the cut-to-length elongate and the stope height at the place where the elongate and the pot are installed. He submitted that the gap size used by Prof. Scheffer for the 183mm pots was outside the gap size specification for use of the Videx pot and that those test results are therefore irrelevant.

[13] Mr Bester did not disagree with Mr Bowman's submissions, but submitted that it was clear from the reports of both experts that if the gap size was increased to more than 50mm, there would be a shallowing of the socket of the Videx pot upon inflation.'

In that the learned Judge cannot be faulted.

[13] Before turning to analyse integers (d) and (f), which it was common cause were essential integers of claim 1 of the patent, it may be convenient to first give a description of the Videx pot and its operation, in order to delimit the areas of dispute between the parties in regard to the infringement. In doing so I have not lost sight of the fact that a patent specification should be construed without reference to what the alleged infringer has done (*Selero (Pty) Ltd & another v Chauvier & another* 1984 (1) SA 128 (A) at 137F).

[14] In its particulars of claim, Videx alleges that its pot 'is designed and specified to be used in gaps of up to 50mm between an external surface and an elongate member which is receivable in a socket of the Videx pot'. The general structure of the Videx pot appears from the enlarged drawing on Annexure B, which has been attached to this judgment in order to facilitate an explanation of its operation. According to the evidence, the Videx pot comprises a closed vessel (202) comprising a first dish-shaped component (a recess component) (204) defining a support locating recess in the form of a socket (206) wherein a region towards an end of the elongate is receivable. The support locating recess has a base (208) and a cylindrical side wall (the inner wall) (210). The vessel further comprises a second dish-shaped component (the opposite component) (212), which is welded to the recess component (204). The opposite component (212) provides a base (214) of the device. The opposite component (212) also provides an outer wall (the outer wall)

(216) for the device. The outer wall is spaced radially outwards from the inner wall (210), to define at least a portion of a chamber (218) in the vessel which surrounds the socket (206). An outer end of the inner wall (210) forms an annular rim or roof (222) of the component

(204) which connects the inner wall (210) to the outer wall (216). The Videx pot further comprises a one-way valve (220) at an inlet to the chamber (218) for inflating the vessel, which valve is fixed to the rim or roof (222). The recess component (204) defines an annular stiffening groove (224) adjacent to the socket (206). The opposite component (212) comprises concentric first and second annular folds (226 and 228). The first fold (226) is located radially inwardly of the inner wall (210) and the second fold (228) is located between the inner wall (210) and the outer wall (216).

[15] Turning then to the essence of the dispute between the parties: Integer (f) - the 'means for inflating the vessel to shallow the socket' - is a means for inflating the vessel to deform the base of the socket upwardly from a position indicated in figure 2 to a position indicated in figure 3 of the patent specification. Approaching the matter sensibly, as one must, that is the only way in which this feature of the claim can be understood in the context of the whole of the body of the complete specification of the patent. It is clear from the evidence of Dr Burger that the axial expansion mechanism of the Videx pot is provided by deformation of the opposite component (base of the vessel) downwardly and more particularly the unfolding under pressure of the first annular fold and the second annular fold to provide lift and to load the prop between the Videx pot and the hanging wall. In contradistinction, the patent specification requires that the base of the socket is to deform upwardly (from the position as depicted in figure 2 to the position depicted in figure 3 of the patent specification) while the vertical wall of the socket, because of its curved profile, rolls evenly outwardly in the direction of the arrows in figure 3 to load the prop between the device and the hanging wall. It may be that the Videx pot seeks to achieve the same result as the patented device but it does so in a fundamentally different way. The Videx pot, by virtue of the geometry of its foot plate, is designed to straighten upon inflation. The purpose of the inflating mechanism of the Videx pot is thus not to shallow the socket as occurs in the patented device. And as Diplock LJ observed in *Rodi and Wienenberger AG v Henry Showell Ltd* 1966 RPC 441 (CA) at 467, which was cited with approval by Nicholas AJA in *Raubenheimer & another v Kreepy Krauly (Pty) Ltd & another* 1987 (2) SA 650 (A) at 656I-657B:

'In construing a modern specification, to speak of looking for the "substance" or the "pith and marrow" of the invention may lead one erroneously to suppose that the patentee, whatever be the precise language in which he has framed his claim, is entitled to a monopoly of the mechanical or other principle of which his invention makes use of or the result which his invention achieves. This is not so. If the language which the patentee has used in the claims which follow the description upon its true construction specifies a number of elements or integers acting in a particular relation to one another as constituting the essential features of his claim, the monopoly which he obtains is for that specified combination of elements or integers so acting in relation to one another – and for nothing else. There is no infringement of his monopoly unless each and every one of such elements is present in the process or article which is alleged to infringe his patent and such elements also act in relation to one another in the manner claimed.'

[16] Moreover, as is made clear by Dr Burger, the Videx pot does not include the feature of integer (d) of claim 1 of the patent. The Videx pot does not have 'an outer wall which is radially spaced from the cylindrical wall of the socket with the outer end of the socket wall being convexly curved in cross-section onto the outer wall of the vessel'. The annular rim of the recess component of the Videx pot is not convexly curved in cross-section onto the outer wall but is flat over a substantial part of its radial extent. It is the unfolding of the annular stiffening grooves of the Videx pot that serves to lengthen the device thereby pushing the footplate down. There can thus be no 'rolling outwardly' of the rim of the Videx pot as in the patented device. Louw J was alive to that distinction when he held:

'[22] The patent specification therefore requires that the base of the socket be deformed upwardly to shallow the recess while the vertical wall of the socket rolls evenly, because of its curved profile, outwardly to load the prop between the device and the hanging wall. According to the summary of Dr Burger's evidence, which is not disputed by the defendant, the Videx pot operates according to a different principle, viz. that the expansion mechanism thereof is provided by deformation of the base of the vessel downwardly to provide lift and to load the prop between the Videx Pot and the hanging wall.'

[17] In *Stauffer Chemical Co & another v Sabsan Marketing and Distribution Co (Pty) Ltd & others* 1987 (2) SA 331 (A) at 342G-J, Corbett JA stated:

'There have been a number of judgments of this Court dealing with the situation where an alleged infringer has taken, say, all but one of the features of the invention as claimed by the patentee and, as regards that one feature, has either omitted it or substituted an equivalent; and the question has arisen as to whether he should be adjudged to have infringed the patent in that he has appropriated the substance or pith and marrow of the invention. . . . The answer to this question depends basically on whether the features of the claimed invention taken by the alleged infringer represent all the essential integers of the claim and the feature omitted or substituted by an equivalent is an unessential integer. If so, then the alleged infringer may have infringed, depending on the nature of the so-called equivalent. If, on the other hand, the feature omitted or substituted is an essential integer, then no infringement has been committed.'

[18] It follows, in my view, that the conclusion of Louw J cannot be faulted. In the result I would accordingly dismiss the appeal with costs, including those consequent upon the employment of two counsel.

V M PONNAN

JUDGE OF APPEAL

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Prepared on 11 October 2026 · Esheria