

SOUTH AFRICA / JUDGMENT

G I Marketing CC v Fraser-Johnston (172/94) [1995] ZASCA 131; [1996] 1 All SA 1 (A) (20 November 1995) [1995] ZASCA 131

COURT

Supreme Court of Appeal

BEFORE

Corbett, E M Grosskopf, Nestadt, Harms, Scott

CASE / FILE NUMBER

172/94

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Case No 172/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the appeal of :G I MARKETING CC AppellantandI FRASER-JOHNSTON Respondent

CORAM: CORBETT CJ, E M GROSSKOPF, NESTADT, HARMS JJA, et SCOTT AJA.DATE OF
HEARING: 18 September 1995 DATE OF JUDGMENT: 20 November 1995

JUDGMENT

CORBETT CJ: / 2 CORBETT CJ:

In the Court below, the Court of the Commissioner of Patents, the

respondent made separate applications for the revocation of patent no 87/6659("the 1987 patent") and patent no 89/8855 ("the 1989 patent"). The patenteein each case was the appellant. The two applications were heard together bythe Commissioner (Van Dijkhorst J).

The history of the two patents is briefly as follows. The 1987 patent application was filed on 7 September 1987. One aspect of the invention as described in the body of the specification was a lavatory plumbing arrangement, which included a toilet pan incorporating a water-trap, a waste disposal pipe connected to the pan, a waste pipe extension, which extended only a short height above the pan flood level, and a two-way valve means (normally closed) leading to the atmosphere. Another aspect of the invention described in detail in the specification was the two-way valve means. The patent specification contained 15 claims. Of these claims 1 to 8 inclusive and 14 related to the lavatory plumbing arrangement; and claims 9 to 13 inclusive and 3 15 to the two-way valve means. In 1989 applications were made to amend the

1987 patent by the excision of the claims pertaining to the valve means, i e claims 9 to 13 and 15. At the same time the patentee launched a divisional application for the 1989 patent with the request that it be antedated to 7 September 1987. This application related essentially to the same invention but, when granted (as it was), it had the effect of claiming the valve means formerly claimed in the 1987 patent, though in different language and in 25 claims. These applications were granted.

It later transpired, however, that the amendments to the 1987 patent were not sought and effected in the manner prescribed in sec 51(1) of the Patents Act 57 of 1978 ("the Act") and in 1992 the amendments were set aside by the Commissioner. In the result the 1987 patent reverted to its original state. Thus claims relating to the valve means are to be found in both patents.

At the hearing before Van Dijkhorst J the grounds of revocation were reduced to three, viz lack of novelty, obviousness and, in the case of the 1987 patent, ambiguity as well. These issues were referred for the hearing of 4 oral evidence, but at the request of the parties Van Dijkhorst J decided the

issues of novelty and ambiguity on the papers. For the purposes of deciding the issue of novelty he concentrated on claim 9 of the 1987 patent and claim 1 of the 1989 patent, since it was common cause that a successful attack upon them would, as he put it, "bring about the demise of the patents". He held that claim 9 of the 1987 patent was anticipated by a state-of-the-art document referred to as "the Schneider patent" and that both patents were anticipated by a document known as "the Blau patent". He further held that claim 2 of the 1987 patent was ambiguous, i e was not clear (see sec 61(l)(f)(i) of the Act).

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Prepared on 14 October 2026 · Esheria