

SOUTH AFRICA / JUDGMENT

Gallagher Group Ltd and Another v I O Tech Manufacturing and Others (96/6799) [2012] ZACCP 1; 2012 BIP 1 (CP) (8 February 2012)

[2012] ZACCP 1

COURT

Court of the Commissioner of Patents

BEFORE

M F Legodi

CASE / FILE NUMBER

96/6799

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH, PRETORIA)

Case

no. 6799/1996

Patent

96/6799

Date:08/02/2012

In

the matter between:

GALLAGHER

GROUP

LIMITED.....FIRST

PLAINTIFF

GALLAGHER

POWER FENCE

(S.A.)

(PTY)

LTD.....SECOND

PLAINTIFF

and

I

O TECH

MANUFACTURING.....FIRST

DEFENDANT

NEMTEK

(PTY)

LTD.....SECOND
DEFENDANT
NEMTEK
CONSTRUCTING (PTY)
LTD.....THIRD
DEFENDANT

JUDGMENT

LEGODI J

[1] A complete specification of a South African Patent 96/6799 with the amended claims registered in favour of the first plaintiff became the centre of a dispute before me. The question in particular, is whether the safety method of operation of a fence security system is being infringed by the defendants.

[2] The said safety method of operating security fence device, is contained in claims 1,2,3 and 4 as amended. The said method of

operation in claims 1,2,3 and 4 as amended, and registered in favour of the first plaintiff reads as follows:

"1. A method of transmitting energy pulses on a conductive system where such a system includes: two or more conductive lines,

one or more pulse generators capable of transmitting an energy pulse along each conductive line, and Junction points where the conductive

lines are in close physical proximity to each other, the method characterized by the step of: a) coordinating the operation of the energy pulse generators to ensure that the effect pulses in the vicinity of a junction point of a conductive line are within a predetermined pulse rate and magnitude range,

whereby pulse production is coordinated with a timing means included in each generator, wherein the timing means determines at what times pulses are produced by a pulse generator, and wherein there is provided a central control unit capable of transmitting a synchronization signal to each pulse generator, said synchronization signal acting to reset the timing means associated with each pulse generator.

2. A method of transmitting energy pulses on a conductive system where such a system includes: two or more conductive lines,

one or more pulse generators capable of transmitting an energy pulse along each conductive line, and

Junction points where the conductive lines are in close physical proximity to each other, the method characterized by the step of:

- (a) coordinating the operation of the energy pulse generators to ensure that the effective pulses in the vicinity of a junction point of a conductive line are within a predetermined pulse rate and magnitude range, whereby pulse production is coordinated with a timing means included in each generator, wherein the timing means determine at what times pulses are produced by a pulse generator, and wherein there is provided a central control unit capable of transmitting a synchronization signal to each pulse generator, said synchronization signal acting to reset the timing means associated with each pulse generator, said pulse generators operating independently until said timing means receive a further synchronization signal to reset them,
3. An energy pulse transmitting system substantially as herein described with reference to the accompanying drawings.
4. A method of transmitting energy pulses substantially as herein described with reference to the accompanying drawings."
- [3] This method of transmitting energy pulses on a fence conductive system, is said to have been infringed by the defendants. In order to prove the infringement, the plaintiffs in their particulars of claim, seek to rely on the following alleged conduct of the defendants:

"10.1. the installation and/or manufacturing, using, exercising, disposing or offering for sale by the defendants of a conductive system, which system includes multiple conductive lines together with pulse generators such as the Merlin Stealth Energisers Master and Slave, marketed as the M25S and M28S respectively;

10.2 the publication by the defendants of an advertisement of Merlin Stealth Energisers, having synchronization and intercommunication

features, during April 2006 in the Security Focus magazine, a copy hereto attached as annexure "B";

10.3 the promoting demonstrating and offering for sale by the defendants of the Merlin Stealth Energisers Master and Slave, such as the M25S and M 28S during June 2006 at the Securex Show;

10.4 the publication by the defendants of a price list containing the Merlin Stealth Energisers Master and Slave, such as the M25S and M28S during August 2006, hereto attached as annexure "C",

10.5 the sale by the defendants on the 20th March 2007 In Johannesburg of a pair of Merlin Stealth Energisers Master and Slave, the M25S,

10.6 the offering for sale, supporting and promoting by the defendants of the Meriin Stealth Energisers and Slave, such as the M25S and M28S on a website at: <http://www>nemtek.com> "

- [4] It is alleged in paragraph 12 of the particulars of claim that as a further proof of infringement, the defendants have from a date unknown to the plaintiffs, wrongfully, knowingly and intentionality procured or induced, alternatively aided, and abated, incited or instigated, alternatively assisted each other and or third parties to infringe the claims as set out in paragraph 2 above.
- [5] The purchase of a pair of Merlin Stealth Energisers Master and Slave, M 25S, as indicated in paragraph 10.5 of the particulars of claim, was by the only witness for the plaintiffs on infringement, a certain Mr Jaco Raubenheimer, who also testified as an expert. He testified as an expert after the court had found that his evidence was not to be allowed as no expert notice and the summary of the evidence thereof was not given as envisaged in Rule 36.
- [6] I did not give the reasons for my ruling and I indicated that reasons for the ruling would be given later, should it become necessary to do so. After the ruling, disallowing the evidence of Mr Raubenheimer, the defendants accepted such a notice and summary of his evidence on a short notice. Because of this, the matter proceeded and the evidence of Mr Raubenheimer as an expert was allowed to be adduced. At the end of his evidence, the defendants on infringement, closed their case without adducing any evidence. I therefore do not find it necessary to give reasons for the ruling as indicated above.
- [7] Before I deal with the plaintiffs' case on infringement, it might be necessary to have regard to the defendants' plea. In paragraph 5 of the plea, dealing with paragraphs 9, 10, 11 of the particulars of claim, it is pleaded as follows:
- '5.1 Apart from admitting that the Merlin Stealth Energisers are that of the Defendants, the remaining allegations contained In these paragraphs are denied by the Defendants.
- 5.2 In particular the Defendants deny that they have Infringed and are Infringing the patent either as alleged or at all.
- 5.3 The Defendants deny their energisers and their conduct fail within the scope of any of the claims of the patent and the Defendants put to the Plaintiffs to the proof thereof."
- [8] Further in paragraph 6 of the plea, dealing with paragraphs 12, 13, and 14 of the particulars of claim, it is pleaded as follows:
- "Apart from admitting that the Merlin Stealth Energisers are that of the Defendants, the remaining allegations contained in these paragraphs are denied by the Defendants.

- [9] The averments made in paragraphs 10.1 to 10.6 of the particulars of claim are quoted in paragraphs 3 of this judgment. Averments made in paragraphs 13.1 to 13.6 of the Particulars of claim are the same as those made in paragraphs 10.1 to 10.6. It is clear from paragraph 5 of the plea that the defendants deny any infringement of the plaintiffs' patent. In particular, the defendants deny that their energisers and their conduct fall within the scope of any of the claims of the patent.
- [10] The issue for the present proceedings as I see it, is whether the method of operating the Merlin Stealth Engineer falls within the scope of any of the plaintiffs' patent claims set out earlier in paragraph 2 of this judgment. It is common cause that the onus rests on the plaintiffs to prove the infringement and in particular whether the safety method of operation of Merlin Stealth M25S Master and Slave energisers falls within the scope of any of the claims of the patent.
- [11] Before I deal with the nature of Mr Raubenhiemer's evidence, it might be necessary to refer to some principles and authorities relevant to the issue at hand. Remember, the first plaintiff is a patentee and the second plaintiff is a licensee of a right in the patent. In terms of section 45(1) of the Patents Act 57 of 1978, any person who during the duration of the patent, makes, uses, exercises, disposes or offers to dispose of or imports the invention, infringes the patent.
- [12] The plaintiff must allege and prove that the defendant has infringed one or more of the claims of the patent. The practice is to plead one or more particular instances of infringement that will be the subject of the evidence. In an action for infringement of a patent, the courts first step is one of interpretation. The court has to ascertain the nature and scope of the invention claimed by construing the claims in question so as to determine the invention's essential constituent elements or integers. (See *Gentiruco AGV Firestone SA (Pty) Ltd* 1972 1 ALL SA 201(A), 1972 (1) SA 589 (A), See also *Sappi Fine Papers (Pty) Ltd v ICI Canada Inc* 1972 (3) SA 306 (A).
- [13] Determining whether there is an infringement, turns on a comparison between the articles or process involved in the alleged infringement and the words of the claims of the patent. (*Nampak Products Ltd v Man-DIR (Pty) Ltd* 1999 2 All SA 543 (A), 1999 (3) SA 708 (SCA). The onus is on the plaintiff to prove that all the essential integers of a claim were taken. (See *Selero (Pty) Ltd v Chauvier* 1982 3 ALL 394 (T), 1982 (2) SA 208 (T).)
- [14] Just to give a complete picture of the pleadings before me, the defendants filed a counterclaim in which they challenged the validity of the patent. The defendants elected, as they are entitled to do, not to raise alleged invalidity as a defence in the plea, but rather as a counter claim. For this, the onus rests on the defendants to allege and prove the invalidity of the patent. Each particular statutory ground of invalidity relied on must be specifically and separately pleaded, and must be considered separately by the court. (See *Par Excellence Colour Printing v Ronnie Cox Graphic suppliers (Pty) Ltd* 1983 (1) SA 295 (A) 308.)

- [15] The attack of invalidity should as far as possible be directed at the claims relied on by the plaintiff because some relief may be granted in respect of a partial valid patent. The defendants indeed in their counter claim are attacking the validity of the patent. The onus is on them. However, at the end of the plaintiffs' evidence on the infringement, the defendants closed their case on infringement, without adducing any evidence. Parties in any way, agreed that the counter claim relating to the invalidity of the patent, should be postponed sine die. For this reason, this judgment relates only to the infringement.
- [16] Mr Raubenheimer's evidence in a nutshell could be summed up as follows: The defendants in their website indicated that they were offering a course to the public in electric fence installation. Mr Raubenheimer then enrolled for the course and paid registration fee.
- [17] He was then e-mailed documents entitled 'Nemtek Electric Fencing Introduction to Nemtek Electric, Training Fence Course'. On the 19 February 2011 he attended the course at which, the presenter of the course handed out further documents entitled 'Installation and Programming-Hardware & Electronics'.
- [18] During the course, the presenter dealt with the contents of Installation and Programming and the Hardware & Electronics documents. Practical training using a mock trial installation of an electric fence and energiser was conducted. At the conclusion of the course, test was conducted to assess the knowledge of the usage of the defendants' Energisers and the installation thereof. Mr Raubenheimer passed the test with 100% mark.
- [19] On the 2 March 2011 Mr Raubenheimer purchased the defendants' Merlin M25S Master and Slave Energisers (herein after referred to as the Merlin KIT). On the 11th March 2011 he conducted a test on the said Master and Slave energisers. He did so by also connecting an oscilloscope to the Merlin Kit. The oscilloscope was meant to produce the visual representation of the electrical signals, as it is not possible to visualise the electricity pulsing produced by the Merlin Kit with naked eyes.
- [20] He connected a probe to the output of the Merlin Kit, both to the Master and Slave energisers respectively, each through a voltage divider. The energiser set was pre-programmed and pre-set by the supplier for the purpose synchronisation or communication. The grey synchronisation Communication cable was connected between the Master and the Slave energisers. The two probes were connected to the oscilloscope.
- [21] The difference in time between synchronisation pulses from the two outputs displayed on the oscilloscope was 3.460 Milliseconds. From the starting point, the waveforms start 3.460 milliseconds apart and the Slave energiser pulse is before the Master energiser pulse, that is, to the left of the screen on oscilloscope. The gaps between the pulses of the two energisers; that is, the Master and Slave, reduced at the observed rate of about 50 micro seconds per consecutive pulse. After approximately 60 such consecutive pulses, during which the gap has been reduced, the gap between the respective pulses of the two energisers then returns to

approximately its original gap of 3.460 milliseconds. It became clear that a communication or synchronisation signal was transmitted between the Master energiser, that is, the central control unit and the slave energiser, the signal acting to reset the timer associated with each pulse generator.

- [22] That changing of the gap between the pulses as explained above, is said to clearly demonstrate that each energiser, master and slave, has its own timer that determines at what time pulses are generated by that energiser and these pulses drift apart until the respective timers are re-communicated or re-synchronised.
- [23] The time between consecutive sets of pulses was observed to be a pre-determined time of not less than 1 second. With both the Master and Slave energisers operating with the communication cable disconnected, the time gap between any two consecutive pulses from one of the energisers, was observed never to be less than 1 second. This is said to demonstrate that each of the two energisers has its own timer.
- [24] When the Master and Slave energisers are connected to each other by a communication cable, immediately after disconnecting the said cable between the Master and slave energiser, both of them were observed to continue to pulse in step for about a further 10 seconds, at which time, the Slave energiser is said to have switched to low voltage mode for the remainder of the 60 seconds period, at which time the communication between the Master and Slave energiser was lost. This is said to further demonstrate that each of the energisers has its own independent timer.
- [25] The challenge on the reliability of Mr Raubenheimer's evidence was characterised as follows during oral argument and also as stated in the written heads of argument:
- [25.1] That he was not an expert on energisers, testing procedures with an oscilloscope, the testing of energisers with an oscilloscope and the methodology of such testing procedures.
- [25.2] In particular of the contention it was argued that during his evidence in chief and cross-examination the following emerged:
- [25.2.1] That he has no experience in the design of energisers
- [25.2.2] That at the time of his test, he had no prior experience in the testing of energisers;
- [25.2.3] That at the time of the test, he had no prior experience in testing energisers with oscilloscope.
- [25.2.4] That at the time of testing, the sum of his knowledge of energisers was limited to that acquired during an introductory course on electric fence conducted by the defendants in 2002;
- [25.2.5] That he did not attend the defendants' advanced course in electric fences;

[25.2.6] That he was directed by the plaintiffs' attorneys to a laboratory for the purpose of testing the Defendants' Merlin Stealth M25S Energiser Master and Slave, and that at Laboratory he was provided with an oscilloscope for the purpose of testing.

[25.2.7] That he simply assumed that the oscilloscope has been correctly calibrated for accuracy.

[25.2.8] That he did not ask for and was not handed or shown a current certificate for the oscilloscope.

[25.2.9] That he made no attempt whatsoever to verify the results of his tests for reliability and accuracy, for example by repeating them a number of times to cross-check and verify the results.

[25.2.10] That he did not follow the recommended methodology for the testing of energisers and their output characterised as advanced in SABS 1EC1011.

[25.2.11] That he conceded that, had he followed the mentioned recommended methodology, for example, by using an instrument with an input impedance consisting of a non inductive resistance of not less than 1MO rather than 208KQ, the wave-forms displayed on the oscilloscope would have been different.

[26] I do not intend to deal with each of the attacks identified on behalf of the defendants.

However, I do not think that Mr Raubenheimer

needed to be an expert in order to operate the defendants' Merlin Stealth M25S both the Master and Slave energisers'. The only thing that did not form part of the Merlin Stealth M25S was the oscilloscope. The rest was Merlin Kit-5J four zone kit, which caused

Mr Raubenheimer R4545.00 including vat. It is accompanied by a manual which has a table of contents; introduction, consideration in a Networked energiser, defaulted the Master and Slave energisers, converted card settings, connecting the network, programming

individual energisers and networking examples.

[27] In addition to the Manual which is marked "Installers Manual", Mr Raubenheimer as indicated earlier in this judgment attended the defendants' training course. For example, during the training facilitated by the defendants', the presenter lectured them on the installation and pre-programming techniques of the Merlin Stealth M25S. They also conducted a mock trial on the installation energisers in electric fencing. All of these was followed by a test, for which Mr Raubenheimer obtained 100%.

[28] I did not understand the plaintiffs' to be suggesting the insufficiency of the training attended by Mr Raubenheimer and the

difficulty of understanding the installation procedures of the energisers as contained in the manual document. The suggestion that

Mr Raubenheimer's knowledge should be found to be wanting because he did not attend the defendants' advanced course in electric fencing, in my view, is not sufficient to doubt his ability to understand and to follow up the installation manual procedure. For example, it was not suggested that having purchased the Merlin Kit, it would not have been possible to install it and render it functional on an electric fence, unless the installer had attended the defendants' advanced training course in electric fences.

[29] I do not think one needed to be an expert in the design of energisers in order to render the Meriin Stealthy M25S Energisers Master and Slave functional and or to install it on the electric fence. The suggestion that at the time of the test, he had no prior experience in the testing of energisers has to be seen in context. You do not have to have prior experience in the testing of energisers, in order to install and make them functional in transmitting energy or power on electric fencing. The manual is mere to direct you as to how to install the Meriin Kit.

[30] The criticism around the usage of oscilloscope to see the wave-forms, or energy generated by the Master and Slave energisers, movement and the communication thereof is a different story. The criticism is firstly, that Mr Raubenheimer had no knowledge in testing of energisers with an oscilloscope. I do not think that to be the issue. The issue as I see it, is whether anything displayed on the oscilloscope can be relied upon once the Master and Slave energisers are installed and operational. In other words, whether the oscilloscope is capable of displaying accurate and reliable information or pictures; but in particular, as I see it, the readings

generated from the oscilloscope.

[31] For such reliability, the contention was that it must have been shown firstly, that the calibration certificate that was handed in relates to the oscilloscope that was used on the date of testing. Secondly, that the certificate was valid as on the date of testing. This refers to the Certificate of Calibrations SANAS ACCREDITED LABORATORY NUMBER 210522. Date of the calibration is indicated as the 1 February 2012 which date is also date of issue.

[32] At the bottom of page 1 of the calibration certificate, it is written as follows: 'VALIDITY OF CALIBRATION. The values in this certificate are correct at the time of calibration. Subsequent accuracy measurements will depend on various factors, such as the care exercised in handling, use of the instrument and the frequency of use. Re-calibration should be preformed after a period which has been chosen to ensure that, under normal circumstance, the instruments' accuracy remains within desired limits.'

[33] Remember, the test on the Merlin Stealth M25S Master and Slave energisers using the oscilloscope as a display, was on the 10 March

2011. I want to imagine that the plaintiffs were unable to produce the calibration certificate for the oscilloscope used and valid as on the 10 March 2011. Therefore the calibration certificate issued on the 1 February 2012, for whatever is worth should be seen as an example.

[34] Failure to produce valid calibration used on the 10 March 2011, should be seen as rendering Mr Raubenheimers' evidence on the

readings observed on the oscilloscope, as being unreliable. (Underlying is my emphasis)

[35] I now turn to deal with the critical challenge in this case. In paragraph 105 of the defendants' written heads of argument, it is stated as follows:

"despite these shortcomings, (referring to shortcomings or attacks as dealt with above), I nevertheless proceed to deal with the evidence of Raubenheimer in order to show that on his evidence, the featuring of the defendants' Merlin Stealth M25S Energisers Master and Slave identified by him do not correspond with the integers of the method claimed in the characterisation clause of claim 1."

[36] This as I see it, was meant to introduce the suggestion that the plaintiffs have not succeeded in proving the infringement as alleged in the particulars of claim. Before I deal with infringement, I find it necessary to deal with other peripheral issues raised in regard to the infringement.

[37] It was suggested that the defendants' documents referred to in the evidence of Mr Raubenheimer have not been proved. The issue was raised by the defendants' counsel like this, "no reliance can be placed on the content of any documents of the admitted documents of the defendants, because the contents were not proved by any witness seen in the light of section 34."

[38] Remember, some of these documents were e-mailed to Mr Raubeneheimer after he had enrolled with the defendants for a training course facilitated by them or on their behalf. The other documents were handouts given to the participants on the 19 February 2011. Put it in this way, the documents were offered to the public for the training course purposes. But even most importantly, they were meant for the public to rely on, as to how to use the defendants' Merlin Stealth M25S Master and Slave energisers in electric fences. The information contained in the documents was intended to be relied upon by the public and it was intended to advance the defendants' business, both with regards to their training and sale of their Merlin Stealth M25 S Master and Slave energisers.

[39] It was not the defendants' suggestion that the information contained therein was unreliable, when it comes to the use of the Master and Slave energisers in question. The Merlin Kit is theirs. The reliability of the contents of the documents is a matter falling within their knowledge. I see the attack in this regard as having been a tactical manoeuvre to frustrate the plaintiffs' claim in relying on the contents of the documents. The defendants' cannot claim any prejudice by relying on their own documents or information which they offer to

the public. The evidence relating to the contents of the defendants' documents is, therefore found to be admissible.

[40] Coming back to the infringement, and at the risk of repeating myself, the first exercise is one of interpretation. One needs to ascertain the nature and scope of the patent or invention claimed. This is done by construing the claims in question so as to determine the patent's essential constituent elements or integers. Determining whether there is an infringement turns on comparison between the articles or process in the alleged infringement. This one can find or trace to the defendants' documents and the plaintiffs' words of the claims of the patent. Just to start with the latter, the scope of the claims relied upon is set out in paragraph 2 of this judgment.

[41] The plaintiffs' counsels in their written heads of argument sought to illustrate the comparison which appears to have been a very tedious process. This is the comparison of what is stated in claim 1, with what is stated on page 110 of the defendants' Installers manual. The relevant page of the manual, reads as follows:

"PROGRAMMING THE INDIVIDUAL ENERGISERS.

After the networking is programmed the Master and Slave units can now individual be programmed to suit the requirements i.e gate delay times, siren on times, fence alarm voltage ect.

If at some stage the network has to be reprogrammed these individual setting will fall back to the factory setting when the unit are defaulted and have to be reprogrammed. CAUTION.

The Merlin stealth Range, when programmed to be part of a synchronized energizer network: configures the energizer energy output with the assumption that only one other correctly programmed energizer, of the same network, may be touched simultaneously and still remain within the current limited energizer limits as defined in the IEC 60335-2-76

In other words if a synchronized net work is selected the networking program will assume that a person can touch two fences at the same time and to stay legal the output energy is reduced during the network programming to half to the maximum energy of the energizer.

If three fences supplied by three different energizers of the same synchronised network would be within 2.5 meter of each other, the output energy of each of the energizers would have to be individually reprogrammed to one third of the maximum energy of the energizers to stay legal.

If an electric fence of a synchronized network is more than 2.5 meter away from other electric fences the output energy of the energiser

supplying that fence can be individual reprogrammed to the maximum output of the energizer.

Refer to the appropriate regulations and law pertaining to the installation of electric fences."

[42] Page 205 of the paginated papers, deals with the introduction of the defendants' Merlin Stealth Master and Slave energisers, the entire page reads as follows:

"1.0

INTRODUCTION

The Merlin Stealth energizer M25S Master or M28S Master enables up to ten energizer to be networked.

The system user can be send through the Master energizer global or energizer specific commands to turn energizers On\Off and change

between High Voltage and Low-Voltage modes. Fence and gate alarms indication is given for individual zones on the Master keypad.

Familiarity with the Merlin Stealth Energiser Range wiii facilitate the understanding of the master controller.

Each of the networked energisers may have their own individual keypads giving access to all the programmable features of the individual

energizer. For security reasons, the individual keypads can be disabled by using a unique personal identification number (PIN) on each energizer.

The lid tamper switches, mains and battery condition, communication and synchronization status of each energiser is monitored and displayed once a second.

For safety reasons the energizer may be pulsed in a synchronized manner. Communication errors in a network can occur and it is the

responsibility of the user to ensure that the system is in the desired state. If operating as a synchronized network, system safety

is of paramount importance, and any loss of components defaulting to a safe operating level. The Master will detect a loss in synchronization and take corrective action. The master will periodically align the individual energizer clocks to ensure correct operation."

[43] What is quoted above, is read in part with what is quoted in paragraph 41 of this judgment and then compared with what is stated

in claim 2 quoted earlier in paragraph 2 of the judgment. Further on page 212 of the paginated papers the defendants' document reads as follows: "INTRODUCTION

This manual must be read and used in conjunction with the Merlin Stealth Installer manual.

The Merlin Stealth Energizer range of energizers are configurable to be part of networked security system. This enables control and monitoring of multiple energizers from one central location or from any location in the world with internet access.

There is no better electric fence security solution than multiple energizers being connected to different portions of a perimeter

fence. Redundancy can be incorporated and bypassing the system becomes a lot more difficult. This necessitates the control of output

energy and synchronization of energizer pulsing in order to avoid potentially hazardous conditions."

[44] Just to revert to claim 1, on page 186 of the paginated papers, the relevant part reads as follows:

"The Merlin Stealth Energiser M25S Master and Slave energiser up to ten energisers to be networked."

[45] Remember, the plaintiffs' claims quoted in paragraph 2 of this judgment is the amended one. Objection to the amendment not having been raised, the claim should therefore be seen as having been valid at registration of the patent.

[46] Whilst I found the evidence of Mr Raubenheimer lacking, insofar as it relates to the usage of the oscilloscope without valid calibration, especially with regards to the readings therefore, his evidence with regards to what was displayed on the oscilloscope during testing, insofar as it is supported by the defendants' own documents, should be found to be admissible. It is admissible only insofar as it is supported by the defendants' own documents.

[47] It is not my intention to go through the tedious process of comparison. It suffices to state that the words of the claims of the patent under consideration and that of the process involved in the defendants' documents pertaining to the method of transmitting energy pulses on a fence conducting system, appear to be similar. For example, in claim1 the words:

XA method of transmitting energy pulses on a conductive system where such a system included two or more conductive lines, one or more pulse generators capable of transmitting on energy pulses along each conductive line and junction points where the conductive lines are in close physical proximity to each other, the method characterises by step (a) coordinating the operation of the energy pulses generators to energise that the effective pulses in the vicinity of a junction point of a conductive line are within a predetermined pulse rate and magnitude rate, whereby pulse production is coordinated with a timing means included in each generator, wherein the timing means determined at what lines pulses are produced by a pulse generator and wherein there is, provided a central control unit capable of transmitting a synchronisation signal to each pulse generator, said synchronisation signal acting to reset the timing means associated with each pulse generator', can be traced to the method of transmitting energy similar to that of defendants expressed in their documents as follows:

"The Merlin Stealth Range, when programmed to be part of a synchronised energiser network: configures the energiser energy output with the assumption that only one other correctly programmed energizer, of the same network, may be touched simultaneously and still remain within the current limited energizer limits as defined in the IEC 60335-2-76.

In other words if a synchronized work is selected the networking program will assume that a person can touch two fences at the same time and to stay legal the output energy is reduced during the network programming to half to the maximum energy of the energizer.

The Merlin Stealth Range, when programmed to be part of a synchronized energizer network: configures the energizer output with the

assumption that only one other correctly programmed energizer, of the same network,... The Merlin Stealth Energizer M25S Master, or M28S and Master enables up to ten energizers to be networked. A person can touch two fences .If three fences supplied by three different energizers of the same synchronized network would be within 2.5 meters of each other.

The Master will periodically align the individual energizer clocks to ensure correct operation."

The master will detect a loss in synchronisation and take corrective action. The master will periodically align the individual energizer

clocks to ensure correct operation.

the Merlin Stealth Energizer M25S Master or M28S Master enables up to ten energizers to be networked.

The Merlin Stealth Energizer ranges of the energizers are configured to be part of a networked security system. This enables control and monitoring of multiple energizers from one central location..."

[48] What is quoted above, conforms also with the connections conducted by Mr Raubenheimer on the defendants' Merlin Stealth Master and Slave energisers. The quotation also in several respects restate what Mr Raubenheimer observed on the display of the oscilloscope. Therefore, his evidence in this regard did not stand alone. The readings displayed on the oscilloscope is not included in the quotation.

[49] Remember, it is the method of transmitting energy that is said to have been infringed. The defendants elected not to lead any evidence to deal with or dispel the suggestion as contained in their own documents and partly as testified by Mr Raubeneheimer that their method of transmitting energy pulses on a conductive system is the same as that of the plaintiffs. I am therefore satisfied that the plaintiffs have proved on a balance of probability infringement of their method as claimed.

[50] Before I conclude, I need to deal with another contention which was made on behalf of the defendants during oral arguments.

[51] The suggestion was that the plaintiffs have not proved infringement as envisaged in Section 45. By the way, the provisions in section 45, is set out in paragraph 11 of this judgment. At the risk of repeating myself, any person who during the duration of patent makes, uses, exercises, disposes, or offers to dispose of or imports the invention, infringes the patent. (The underlining is my own emphasis).

[52] The defendants have offered and appear to continue be offering the sale of Merlin Stealth M25S Master and Slave energisers to the public. For example, Mr Raubenheimer bought a set thereof from the defendants on the 2 March 2011. Secondly, the defendants have offered and probably continue to offer a training course at a fee to the public as to how to use the said Meriin Stealth Master and Slave energiser, whose main function is to transmit energy pulses, for example, on a electric fence system.

[53] Now, the suggestion as I understood it, was that it has not been proved that the defendants have actually installed any Merlin Stealth M25S Master and Slave energisers, and that neither has it been shown that the defendants continue to install and operate the said M25S Master and Slave energisers on any pulse conductive system.

[54] The suggestion was that actual and direct infringement is what is envisaged in Section 45 and nothing less. For the following reasons the suggestion ought to be rejected:

[54.1] The defendants must be hit by disposes or offers to dispose of... the invention'. In section 45. Offering the means through which to infringe another person's patent, should be seen as falling squarely within the ambit of the prohibition under Section 45.

[54.2] It could never have been the intention of the legislature to prohibit the infringer, but not to prohibit the means through which the infringement is facilitated. For example, in the present case, assuming Mr Raubenheimer did not only purchase the Merlin Kit, but that he also installed and operated it, it would be absurd to find him only to have contravened the provisions of Section 45, and nothing wrong with the person who facilitated such an infringement.

[54.3] The averments made against the defendants in paragraph 10 of the particulars of claim as a cause of action are quoted in paragraph 3 of this judgment. In addition to paragraph 10 of the particulars of claim, it is averred in paragraph 12 of the particulars of claim that the defendants have wrongfully, knowingly and intentionally procured, induced, alternatively aided and abated, alternatively advised, alternatively incited or instigated, alternatively assisted each other and or third parties to infringe claims 1, 2 ,3 and 4 of the plaintiffs. To say these averments do not establish a cause of action seen in the light of the provisions of section 45, in my view, tends to make a mockery of the section.

[54.4] I cannot agree that it was important for the plaintiffs to have proved that the defendants continue to offer training course on the usage of the Merlin Stealth M25S Master and Slave energisers and that the defendants continue to sell the said Master and Slave energisers to the public. It was not the defendants' case that they have ceased in doing so. I am saying, it was not their case because they declined to testify on infringement. Whether or not they still offer the

training to the public and whether or not they still sell to the public the Merlin Stealth M25S Master and Slave energisers, is a matter falling within their knowledge. They were therefore obliged to lead evidence on it if they seriously wanted to raise it as an issue, or defence.

[55] I was urged not to interdict the defendants, in the event I was to find infringement to have been proved. The suggestion was that the defendants would suffer more harm should they be interdicted. This submission makes a mockery of the earlier submission. That is, wanting the plaintiffs to prove that the defendants are still offering to the public training course of the Merlin Kits and to prove that the defendants are still offering to the public the sale of the Merlin Kits.

[56] The fear of closing down shops, suggests that the defendants are still offering training and or selling the Merlin Kits to the public. A balancing exercise of discretion is required in dealing with the issue. It looks like I am urged not to grant interdict pending finalisation of the defendants' counterclaim. This is the second leg of the dispute between the parties on the novelty of the plaintiffs' patent. The decision not to proceed with the counterclaim was prompted or initiated by the defendants. Now they want to use it as the basis not to grant the interdict. I am not persuaded in this regard.

[57] The defendants seem to ignore the fact that it would be difficult for the plaintiffs to quantify their claim for damages against the defendants, should the defendants fail with their counterclaim. I do not want to venture into whether or not the defendants would be entitled to claim damages against the plaintiffs, should the defendants succeed in their counterclaim. If they are entitled to, it would in my view, not be so difficult to quantify their claim as would be with the plaintiffs. Lastly, all that the defendants would have to do for now is to apply for a trial date for the hearing of the counterclaim. This would not cause inordinate delay.

[58] In conclusion, I would I make an order, as follows:

[58.1] An interdict restraining the defendants from infringing the claims 1,2, 3 and 4 of the patent, is hereby granted.

[58.2] An interdict restraining the defendants from wrongfully, knowingly and intentionally procuring or inducing, alternatively aiding and abetting, alternatively advising alternatively inciting or instigating alternatively assisting each other and/or third parties to infringe the claim of the patent, is hereby granted.

[58.3] Delivery-up of any infringing article or product, in possession of defendants or under their control, and such articles or products to be kept in safe place pending the finalisation of the defendants' counterclaim is hereby ordered.

[58.4] An enquiry into damages, alternatively on enquiring into the calculation of a reasonable royalty in lieu of damages suffered by the plaintiffs as a consequence of defendants' infringement and payment of the amount of damages and/or royalties found to have been so suffered, is deferred pending finalisation of the defendants' counterclaim.

[58.5] The defendants counterclaim is hereby postponed sine die.

[58.6] Defendants to pay costs of the suit, including costs of two counsels.

M F LEGODI

JUDGE OF THE HIGH COURT

Heard on: Tuesday, 3 FEBRUARY 2012

Date of judgment: 14 March 2012

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