

SOUTH AFRICA / JUDGMENT

Nu-World Industries (Pty) Ltd v Strix Ltd (1349/18) [2020] ZASCA 28; 2020 BIP 329 (SCA) (26 March 2020) [2020] ZASCA 28

COURT

Supreme Court of Appeal

BEFORE

Maya, Mbha, Van der Merwe, Mokgohloa, Gorven

CASE / FILE NUMBER

1349/18

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1349/18

In the matter between:

NU-WORLD INDUSTRIES (PTY) LTD APPELLANT

and

STRIX LIMITED RESPONDENT

Neutral citation: Nu-World Industries (Pty) Ltd v Strix Ltd (Case no 1349/18) [2020] ZASCA 28 (26 March 2020)

Coram: MAYA P, MBHA, VAN DER MERWE and MOKGOHLOA JJA and GORVEN AJA

Heard: 12 November 2019

Delivered: 26 March 2020

Summary: Court order – interpretation – infringement of patent – separation of issues – determination of infringement – impermissible to introduce new infringements in determination of damages or royalties enquiry.

ORDER

On appeal from: Court of the Commissioner of Patents, Pretoria (Matojane J, sitting as court of first instance):

1 The appeal is upheld with costs to the extent reflected in paragraph 2 hereof.

2 The order of the court of first instance is set aside and substituted by the following order:

- (a) Paragraphs 3, 4 and 5 of the application to amend are granted.
- (b) Save for paragraph (a) hereof, the application to amend is dismissed with costs.

Gorven AJA (Maya P, Mbha, Van der Merwe and Mokgohloa JJA concurring)

- [1] In this appeal it will be convenient to refer to the appellant as Nu-World and the respondent as Strix. The appeal concerns domestic kettles which are imported and sold by Nu-World. Strix has registered patent 95/4779 (the patent) under the Patents Act[1] (the Act). Claim 1 of the patent lists various components of domestic kettles. The one material to this appeal is ‘a thermally sensitive overheat control arranged to operate in the event of said element overheating so as to interrupt or reduce the supply of electrical energy to the element; said thermally sensitive overheat control comprising at least two thermally responsive sensors arranged in good thermal contact with, and at spaced apart locations on, the base of the container or the element, said sensors individually being operable, in the event only of said element overheating when the vessel boils dry or is switched on dry so as to interrupt or reduce the supply of electrical energy to the element.’ In everyday parlance the control is called a cut-out switch.
- [2] In April 2011, Strix instituted action against Nu-World in the Court of Commissioner of Patents, alleging that it had infringed claim 1 of the patent. It averred that certain kettle models imported by Nu-World contained thermally sensitive overheat controls protected by the patent. It listed four such controls; Liang Ji LJ-06A, Liang Ji LJ-06, Sunlight SLD-105A IL and Jia Tai KSD688-A.
- [3] Two of the aspects on which Strix sought relief relate to the present appeal. The first aspect of the relief sought was an interdict against Nu-World preventing it from breaching the patent in these terms:

‘[A]n interdict restraining the defendant from infringing claim 1 of South African patent 95/4779 by making, using, disposing, offering to dispose of, or importing liquid heating vessels containing Liang Ji LJ-06A, Liang Ji LJ-06, Sunlight SLD-105A IL or Jia Tai KSD688-A thermally sensitive overheat controls . . .’.

The second aspect was:

‘as to damages

(i) an enquiry as to the damages suffered by the plaintiff as a result of the infringement of the South African patent 95/4779 by the defendant, alternatively as to the amount of a reasonable royalty as contemplated in s 65(6) of the Patents Act, 1978 and payment of the amount found to be due to it;

(ii) an order directing that, in the event of an enquiry in terms of sub-paragraph (i) being ordered and 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 enquiry, any of the parties may make application to the court for directions in regard thereto.’

The issues were separated, with the court initially dealing only with the issue of whether the four controls of Nu-World listed in the prayer had infringed the patent and interdictory relief arising from any such infringement (the infringement part of the action).

[4] The claim was dismissed by Preller J, sitting in the Court of Commissioner of Patents.[2] He found that Nu-World had made out the defence of lack of novelty. On appeal, this court found that this defence should not have

succeeded. It found that the Jia Tai KSD688-A control did not infringe.[3] However, the other three controls listed in the prayer did infringe the patent (the three infringing controls). On that basis, this court set aside the order of the court of first instance and substituted it with the following order:

‘(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 infringing product forms an inseparable part;

(c) as to damages:

(i) an enquiry 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 reasonable 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 enquiry, any of the parties may make application to the court for directions in regard thereto;

(d) the defendant is ordered to pay the plaintiff’s costs, including the costs of two counsel to the extent that such were employed and including the qualifying and attendance fees of the expert witness Richard Moorhouse.’[4]

[5] In arriving at its conclusion, this court reasoned:

- (a) ‘The question was whether a Nu-World kettle with any one of these [four] controls constituted an infringement of claim 1 of the patent in suit.’
- (b) ‘The Jia Tai KSD688-A kettle . . . had a distance of 0,5 millimetres between the two sensors . . . In respect of that kettle the infringement would not have been proved.’
- (c) ‘In respect of the remaining [three] kettles, Preller J disregarded the evidence and erred in concluding that in relation to them there was no infringement.’[5]

[6] Strix thereafter sought to amend its declaration. Paragraphs 3 to 5 of the Notice of Intention to Amend were not objected to. Paragraphs 1 and 2 did attract opposition. Paragraph 1 sought to insert the following two new paragraphs after paragraph 5:

‘5A Properly interpreted the Supreme Court of Appeal order, and specifically paragraphs 2(a) and 2(c)(i) thereof, provide that an enquiry is ordered as to the damages suffered by the plaintiff as a result of the infringement of the patent by the defendant by making, using, disposing, offering to dispose of, or importing liquid heating vessels containing Liang Ji LJ-06A, Liang Ji LJ-06, Sunlight SLD-105A or Sunlight SLD-105 IL thermally sensitive overheat controls or any other thermally sensitive overheat controls as claimed in claim 1 of the patent.

5B As a result of the aforesaid, the Commissioner is authorised and required in the enquiry into damages to ascertain whether any

controller relied upon by the plaintiff in support of its claim for damages is a thermally sensitive overheat control as claimed in claim 1 of the patent.’

And paragraph 2 sought to insert the following two new paragraphs after paragraph 8:

‘8A In addition to that which is pleaded in paragraph 8 above, the defendant imported and sold infringing liquid heating vessels in which the thermally sensitive overheat controller was modified during the manufacturing process by:

8A(a) Removing one bimetal sensor where the controller consisted of two discrete bimetal sensors and no meltable fuse;

8A(b) Removing the meltable fuse where the controller consisted of a meltable fuse and bimetal combination;

8A(c) Fitting a thermal fuse in contact with the heating element and connected to the controller alternatively to the heating element.

8B Liquid heating vessels containing controllers modified in the aforesaid manner fall within claim 1 of the patent.’

[7] Nu-World objected that it is impermissible to amend so as to include in the enquiry into damages or royalties (the damages part of the action) any controls other than the three infringing controls. Sunlight SLD-105A and Sunlight SLD-105 IL, referred to in paragraph 5A,

were not considered in the infringement part of the action. However, Strix clarified that the second of these two arises from an error in the Notice. It ought to have referred to Sunlight SLD-105A IL which is one of the three infringing controls. The only one not dealt with in the infringement part of the action and sought to be introduced in paragraph 5A is thus Sunlight SLD-105A. Further, Nu-World complained that paragraph 5B would allow Strix to attempt to prove that other controls not even identified in the Notice also infringe claim 1 of the patent. Finally, the complaint of Nu-World lay against the proposed inclusion of modified controls dealt with in paragraphs 8A and 8B for similar reasons. These, too, did not form part of the infringement part of the action. Apart from this, Nu-World asserted that at least part of any claim relating to any of these (if proved to have infringed)

would have prescribed because the period of the claim runs from 2008 to 2015.

- [8] The nub of the objection, however, is that the judgment on the separated issue of the infringement part of the action is final. This court made no finding on any of the controls sought to be introduced. The damages part of the action is limited to damages or royalties arising from infringement by the three infringing controls. It cannot consider any further infringements. All that is left to determine is the quantum of damages or the reasonable royalties payable to Strix arising from the three infringing controls and those controls only.
- [9] Strix squarely bases its right to the amendment on the words in paragraph (a) of the order of this court. This interdicts against use of the three infringing controls ‘or any other thermally sensitive overheat controls as claimed in claim 1 of the patent’ (the additional words). As a result, it says it is entitled to bring controls other than the three infringing controls into account in the damages part of the action. Strix concedes that if the amendment is allowed, this ‘would require the court hearing the damages enquiry to determine whether thermally sensitive overheat controls other than the three controls already found to infringe the patent, are also infringing’.
- [10] The application to amend came before Matojane J in the Court for the Commissioner of Patents. He granted the application to amend. It is this order which is before us on appeal, with the leave of Fourie J since Matojane J was not available to hear the application for leave to appeal. It is clear that the appeal is directed only against that part of the order allowing paragraphs 1 and 2 of the Notice of Intention to Amend.
- [11] The appeal hinges on the interpretation of the order of this court. It is this on which Strix relies for its contention that controls other than the three infringing controls can be brought into account. The law relating to the interpretation of court orders is set out in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*: [6]

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.’

[12] The order is premised on a positive finding that the patent was infringed by the three infringing controls. For present purposes, there follow two, discrete aspects to the order. Paragraph (a) grants interdictory relief. Paragraph (c)(i) relates to an enquiry into the damages or royalties payable as a consequence of the controls found by the court to have infringed.

[13] This is the standard approach in infringement claims and is based on s 65(3) of the Act, which provides:

‘A plaintiff in proceedings for infringement shall be entitled to relief by way of—

- (a) an interdict;
- (b) delivery up of any infringing product or any article or product of which the infringing product forms an inseparable part; and
- (c) damages.’

And s 65(6) provides:

‘In lieu of damages the plaintiff may, at his or her option, be awarded an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee or sub-licensee in respect of the patent concerned.’

It will be noted that the relief in the order of this court is based on these provisions.

[14] The interdictory relief which was granted is not limited to the three infringing controls. It includes the additional words. It goes beyond what was sought by Strix in its prayer. But interdictory relief is essentially forward-looking and geared to prevent future unlawful conduct. The patent affords Strix, as holder, a clear right to prevent any infringement, past or future, established or not. Infringements not yet committed frequently form the basis of interdictory relief. It is designed to protect against any future infringement, both by the three infringing controls and by any other controls. Paragraph (a) of the order of this court is accordingly widely framed. It is unremarkable that the interdict goes beyond the three infringing controls to include the additional words.

[15] The proposed paragraph 5A claims that the entitlement to damages from other infringements arises from an interpretation of this court’s order and ‘specifically paragraphs 2(a) and 2(c)(i)’ thereof on the basis of the additional words. There are at least two insurmountable difficulties with this assertion. First, paragraph 2(c)(i) of the order does not use those words. They are only used in paragraph 1. Secondly, it ignores the wording of

paragraph 2(c)(i) of the order which limits the enquiry into damages or royalties claimable 'as a result of the infringement of the patent by the defendant'.^[7] What infringement is implicated? It can only refer to that which had been found in the infringement part of the action. The enquiry

directed to be held into damages or royalties is firmly based on, and limited to, the finding of actionable past conduct. The infringement

which has given rise to the order in paragraph 2(c)(i) is that of the three infringing controls and those alone. There is no suggestion in the judgment that damages for any other infringements can form part of the damages part of the action.

[16] This interpretation is buttressed by the fact that a separated issue has been finally decided. As I have noted, Strix concedes that, if granted, the amendment will require the court to determine whether controls other than the three infringing controls also infringed. The purpose of separating the issues in a suit is to deal finally with a discrete part of it. This is because that issue might be dispositive of the entire matter. If it proves to be dispositive, the additional time and expense of dealing with the other issues is saved. Other than on appeal, the judgment cannot be revisited. This is why such a judgment is appealable. It is final in effect, despite not having disposed of all of the issues in the action.

[17] The effect of an order made on a separated issue is similar to that explained by Innes J in *Steytler NO v Fitzgerald*:^[8]

'It is sufficient for the purposes of this case to say that when an order incidentally given during the progress of litigation has a direct effect upon the final issue, when it disposes of a definite portion of the suit, then it causes prejudice which cannot be repaired at the final stage, and in essence it is final, though in form it may be interlocutory.'

This approach has not changed. The general principle of when an order has final effect (and is thus appealable) was explained again in *Marsay v Dilley*:^[9]

'[W]here a trial Court has under some competent procedure (such as an application under Rule 33(4)) made an order which has the effect of being a final decision (ie one which cannot be corrected or altered or set aside by the trial Judge at a later stage of the trial) and the decision is definitive of the rights of the parties and has the effect of disposing of a substantial portion of the relief claimed by the plaintiff in the main action, then this order is a judgment (as understood in s 20(1) of the Supreme Court Act 59 of 1959) and is appealable, despite the fact that the main action has not been concluded.'^[10]

The order concerning infringement disposed of that portion of the action concerning which of the controls of Nu-World infringed claim 1 of the patent. This has been finally determined. Not only that, but the initial order was appealed and resulted in the order now under consideration being granted on appeal. To allow an enquiry into whether Nu-World has infringed by other or modified controls amounts to dealing with material which belongs under the infringement part of the action on which a final judgment has been given. This is impermissible.

[18] It is not as if Strix applied to reopen the infringement part of the action. Depending on the circumstances of a matter, this may or may not be permissible.[11] Because Strix does not seek to do so, it is unnecessary to say anything further on this score. Instead, Strix seeks to argue that

the enquiry as to whether additional controls infringe the patent can take place during the damages part of the action. But in that part, all that is to be determined is the damages or royalties which should accrue as a consequence of the infringement which this court determined had taken place. Strix admits that this strays beyond the territory of the damages part of the action, saying that it 'would require the court hearing the damages enquiry to determine whether thermally sensitive overheat controls other than the three controls already found to infringe the patent, are also infringing'. This, too, is not permissible and militates against the interpretation contended for by Strix.

[19] Therefore, on the basis that the order, properly interpreted, did not open the door to new claims of infringing controls, on the finality of the separated aspect of the suit dealing with past infringements, and on the fact that the amendment would result in the enquiry into damages or royalties to stray beyond those arising from the three infringing controls, the amendment should not have been allowed. In the result, the court of first instance erred in doing so. The appeal must be upheld and that order must be set aside.

[20] The following order

issues:

1 The appeal is upheld with costs to the extent reflected in paragraph 2 hereof.

(b) Save for paragraph (a) hereof, the application to amend is dismissed with costs.

GORVEN AJA

ACTING JUDGE OF APPEAL

Appearances

For appellant: AJ Bester SC

Instructed by: Bouwers Inc, Johannesburg

Phatshoane Henney, Bloemfontein

For respondent: P Ginsburg SC, with him KD Iles

Instructed by: Spoor & Fisher, Pretoria

Matsepes Inc., Bloemfontein.

[1] Patents Act 57 of 1978.

[2] Strix Limited v Nu-World Industries (Pty) Ltd [2014] ZACCP 1.

[3] Strix Limited v Nu-World Industries (Pty) Ltd [2015] ZASCA 126; 2016 (1) SA 387 (SCA).

[4] See para 26.

[5] Strix paras 9, 22 and 24.

[6] Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others

[2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13.

[7] My emphasis.

[8] Steytler NO v Fitzgerald 1911 AD 295 at 313.

[9] Marsay v Dilley

[1992] ZASCA 114; 1992 (3) SA 944 (A) at 962C-F.

[10] The repeal of the Supreme Court Act 59 of 1959 and its replacement by the Superior Courts Act 10 of 2013 has not altered the principle involved.

[11] In this regard see David Hersch Organisation (Pty) Ltd and Another v ABSA Insurance Brokers (Pty) Ltd 1998 (4) SA 783 (T) at 787C-G; Schmidt Plant Hire (Pty) Ltd v Pedrelli 1990

(1) SA 398 (D); Tolstrup NO v Kwapa NO 2002 (5) SA 73 (W) at 77I-J&78A.

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