

IN THE COURT OF THE COMMISSIONER OF PATENTS
FOR THE REPUBLIC OF SOUTH AFRICA

Date: 2008-08-15

Patent Case Number: 2002/6992

In the matter between:

ALCATRAZ INTEGRATED SYSTEMS (PTY) LTD

Applicant

and

**AUTOMATED IDENTIFACTION TECHNOLOGIES
(PTY) LTD**

Respondent

This matter being an application for revocation of South African patent number 2002/6992

JUDGMENT

SOUTHWOOD J

[1] This is an application in terms of section 61(1)(c) of the Patents Act 57 of 1978 ('the Act') for the revocation of the respondent's patent number 4260/2005 entitled 'Security System' ('the patent'). The applicant seeks the revocation of the patent on the grounds that the invention (a) was not new and (b) did not involve an inventive step.

- [2] The matter was enrolled for hearing and *in limine* the applicant seeks orders condoning the applicant's failure to file its replying affidavit timeously and that certain issues be referred for the hearing of *viva voce* evidence. Both applications are opposed by the respondent which contends that the application should be dismissed. Since it will affect the outcome of this matter the application for condonation must be considered first.
- [3] In terms of section 61(1) of the Act any person may at any time apply in the prescribed manner for the revocation of a patent on any of the stipulated grounds. Regulation 89 provides that an application for revocation shall be made on Form P20 and shall be accompanied by a statement of particulars of the grounds on which the application is based. Regulation 90(1) stipulates that within two months of the lodging and service of the application for revocation the patentee shall lodge and serve a counterstatement in the form of a plea. Regulation 90(2) provides that within two months of the lodging and service of the counterstatement the applicant shall file and serve his evidence in the form of an affidavit and Regulation 90(3) provides that within two months of the filing and service of the applicant's evidence the patentee may serve and file his answering affidavit in the form of an affidavit. Regulation 91 provides that within two months of the filing and service of the patentee's answering evidence the applicant may file

and serve replying evidence, in the form of an affidavit, confined to matters strictly in reply. Of importance are:-

- (1) Regulation 92, which provides that no further evidence shall be filed by either party except by leave or direction of the commissioner;
- (2) Regulation 93, which provides that all evidence shall be by affidavit unless otherwise directed by the commissioner; and
- (3) Regulation 99 which provides that time limits specified may be extended by consent of the parties or, failing such consent, by the registrar on a request made to him.

- [4] (1) On 29 September 2006 the applicant initiated this application by serving and filing its Form P20 and statement of particulars. The applicant alleged that the state of the art consisted of –

- ‘2.1 PCT Patent Application number WO99/36647 published on 22 July 1999 (annexure “A”);
- 2.2 An electrified palisade split fence that was installed at Investec Head Office, 100 Grayston Drive, Sandton in 1997 (annexure “B”);
- 2.3 An article entitled “The Eskom route to safety” that was published in Eskom News in July 2003 (annexure “C”); and

2.4 South African Patent number 2002/6992 in the name of Automated Identification Technologies (Pty) Ltd (annexure “D”).’

- (2) On 22 November 2006 the respondent served and lodged its counterstatement. The respondent formally admitted that the above items formed part of the state of the art before the patent priority date.
- (3) On 22 March 2007 the applicant served and filed its evidence. The respondent granted an extension of two months for the applicant to do so.
- (4) On 20 July 2007 the respondent served and filed its answering evidence. The applicant granted a two month extension for the respondent to do so. When granting this extension the applicant stated that it would not grant further extensions.
- (5) In terms of Regulation 91 the applicant was obliged to serve and file its replying evidence within two months of 20 July 2007: i.e. by 20 September 2007.
- (6) On 13 September 2007 the applicant, without furnishing any reasons, requested an extension until 22 November 2007 to serve and file its replying evidence. The respondent refused to

grant the applicant the two months extension and granted one month extension: i.e. until 22 October 2007. The applicant did not pursue the request for a longer extension or request the Registrar to grant such an extension. The applicant simply failed to meet the deadline.

- (7) On 23 October 2007 the applicant's attorney, Hahn & Hahn, addressed a letter to the respondent's attorney, Bowman Gilfillan, pointing out that as they had not received the applicant's replying evidence they assumed that the applicant did not wish to file a reply and asking Bowman & Gilfillan to apply for a hearing date by 19 November 2007 failing which Hahn & Hahn would apply for a hearing date.
- (8) On 19 November 2007 Bowman Gilfillan faxed the following letter to Hahn & Hahn:

'We advise that we have not been able to consult with our client for a variety of reasons which include our client's unavailability for medical reasons and the writer's unavailability because of attendances at the AIPPI and FICPI conferences in Singapore and Seville respectively.

We are, however, now able to consult with our client and expect to be in a position to advise whether or not we will be filing a replying affidavit later this week. If we do then we will apply for condonation and if we do not then we will apply for a hearing date.

We will inform you of our decision this week.'

- (9) On 21 November 2007 Bowman Gilfillan faxed the following letter to Hahn & Hahn:

'As indicated in our letter of 19 November 2007 we have now had an opportunity to consult with counsel and our client on how best to advance with the above matter and advise as follows:

- (1) It will be necessary for the incorrect reference in the patents form P20, to the name of the patentee to be corrected and also the error in the Power of Attorney authorising Mr Graham to depose to an affidavit on behalf of our client. This we will attend to depending on your client's attitude to our next suggestion.
- (2) From a reading of the evidence presented by Mr Armand Terblanche for our client and Mr Hartmuth Oellermann for your client it is clear that there is a dispute of fact around several aspects of the electrified palisade fence erected for Eskom in Brits and around the Eskom News Publication that describes its fence. We are of the opinion that it will not be possible for a court to resolve this dispute of fact on affidavit only and, in an attempt to avoid running up unnecessary costs and further delaying the matter we suggest that the above matter be referred to oral evidence as soon as possible, preferably with your client's agreement.

We would appreciate it if you would put this to your client and revert to us with its attitude thereto. Please note that should your client agree to a referral to oral evidence then the steps our client needs to take to rectify the oversights mentioned in (1) above will be different to those it will need to take if your client does not agree. Consequently we will await your client's response for taking the necessary steps.'

(10) On 7 December 2007 Hahn & Hahn informed Bowman Gilfillan that the respondent did not agree to the matter being referred to oral evidence.

(11) On 14 December 2007 Bowman Gilfillan faxed the following letter to Hahn & Hahn:

'Thank you for your telefaxes of 7 and 11 December 2007 advising that your client does not agree that the above matter should be referred to oral evidence and requesting dates for a hearing of the above matter respectively.

We are of the opinion that the matter should be referred to oral evidence for there is a clear dispute of fact between our respective experts. To this end we will be making an application for it to be referred to oral evidence.

We also advise that we intend filing a replying affidavit to, at least, correct certain minor inaccuracies contained in

our founding affidavit. We will also apply for condonation for the late filing of a replying affidavit.

We do, however, have a problem in that our counsel, Corrie van der Westhuizen, is out of the office until the second week in January 2008. We will thus file our replying affidavit and application for a referral to oral evidence as soon thereafter as the papers can be settled.

In the light of the above we do not believe that the above matter is ripe for hearing for, in the light of your client not agreeing to having the matter referred to oral evidence we presume that our application to have it referred will be opposed and that your client will want to file affidavits supporting its opposition.

We trust that your client will not take any precipitous action until we have had an opportunity to prepare and file the above-mentioned documents for we will oppose any such action.

Should your client reconsider its objection to having the matter referred to oral evidence then please let us know.'

- (12) On 24 January 2008 the applicant delivered a notice to amend its statement of particulars by adding the following items to the state of the art –

'2.5 An electrified palisade fence that was installed at the Eskom Brits Industries site in 2003;

2.6 Use since 2003, by Eskom, of an electrified palisade split fence installed at its Brits Industries site; and

2.7 Actual knowledge, on the part of Mr Armand Terblanche, of an electrified palisade fence installed at the Eskom Brits Industries site in 2003 and several similar fences installed for Eskom prior to July 2003.'

(13) The respondent did not object to the amendment and on 8 February 2008 the applicant delivered the amended Statement of Particulars. On 9 July 2008 the respondent served and filed its counterstatement to the amended statement of particulars. The respondent denied that the new items formed part of the state of the art.

(14) At no stage did the applicant request the leave of the Commissioner to file further evidence.

(15) On 24 January 2008, some three months late, the applicant filed a set of replying affidavits. These include a request for condonation for the late filing of the affidavits and new evidence by Armand Terblanche relating to the Eskom fence. The applicant's attorney, Mr Llewelyn Parker, has made a supporting affidavit.

Condonation

[5] Section 19(1) of the Act states:

‘(1) Save as is otherwise provided in this Act, the procedure in connection with any proceedings before the commissioner shall, as far as is practicable, be in accordance with the law governing procedure in civil cases in the Transvaal Provincial Division of the Supreme Court of South Africa, and in default thereof and where no relevant provision is made in this Act, the commissioner shall act in such a manner and on such principles as he may deem best fitted to do substantial justice and to give effect to and carry out the object and provisions of this Act.’

Section 16(2) of the Act provides:

‘(2) Whenever by this Act any time is specified within which any act or thing is to be done, the registrar or the commissioner, as the case may be, may, save where it is otherwise expressly provided, extend the time either before or after its expiry.’

Neither the Act nor the regulations (which in terms of section 2(xiv) are part of the Act) deal with the procedure where a party has not complied with the regulations. Uniform Rule 27 governs *inter alia* the grant of condonation. It provides that –

‘The court may, on good cause shown, condone any non-compliance with these rules.’

- [6] In seeking condonation for failing to file and serve its replying evidence timeously the applicant accepts, correctly, that it must show 'good cause'. The courts have refrained from attempting an exhaustive definition of 'good cause'. Nevertheless, it is accepted that the court has a wide discretion but that the discretion must be exercised judicially on a consideration of the facts of each case – ***S v Yusuf* 1968 (2) SA 52 (A)** at 53H: ***Federated Employers Fire and General Insurance Co Ltd v McKenzie* 1969 (3) SA 360 (A)** at 362G-363A – and that in essence, it is a matter of fairness to both sides – ***S v Yusuf supra*** at 53H: ***Cairns Executors v Gaan* 1912 AD 181** at 186 – and that the discretion is not an absolute or unqualified discretion but must be exercised in accordance with recognised principles – ***S v Yusuf supra*** at 53H-54B.
- [7] The applicant's counsel concedes that the explanation given by the applicant for its failure to file its replying evidence timeously is 'thin' but submits that 'it passes muster'. He argues that an explanation has been given even though it lacks detail. I do not agree that the explanation passes muster. I also do not consider that the circumstances of the case justify the grant of condonation and that granting condonation would be fair to both sides. In my view the applicant is opportunistically seeking to make a new case in its replying affidavits which inevitably will delay the finalisation of this case and result in increased costs. I shall deal with these issues more fully hereafter.

[8] At the outset it should be noted that the applicant (or its attorney) has conducted this case as if the Act and the regulations do not apply. Having been refused the extension of two months it did not immediately seek the extension it (apparently) needed from the registrar. It is noteworthy that when seeking the extension of two months the applicant's attorney did not furnish any reasons for needing an extra two months. By then the applicant had already had almost two months to prepare its replying evidence and no mention was made of any difficulty in communicating with the client or obtaining information for the replying affidavits. While the regulation pertinently allows the applicant the opportunity to file replying evidence 'confined to matters strictly in reply' it clearly does not provide for the applicant to make out a new case.

[9] On 24 January 2008 the applicant eventually served and filed its replying affidavits which include an application for condonation and new evidence about the fence erected at Eskom's Brits premises. The applicant did not seek leave to file further evidence as it was required to do by Regulation 92. If the applicant had intended to make out a new case in its replying affidavits it should have sought the commissioner's leave and the commissioner could then have directed what other evidence should be filed thereafter and when it should be filed.

[10] The replying evidence was filed three months later than when it should have been (i.e. 22 October 2007). The applicant should have furnished a satisfactory explanation for failing to serve and file its replying affidavits before that date and during the three months thereafter. The applicant has taken from 20 July 2007 until 24 January 2008 to prepare a 10 page affidavit by Glen Graham, a 10 page affidavit by Armand Terblanche and a one page confirmatory affidavit by the applicant's attorney, Llewellyn Parker.

[11] After setting out the correspondence between the attorneys the applicant's deponent, Glen Graham, furnishes the explanation for the delay in preparing and filing the applicant's replying affidavits. According to Mr Graham this was caused by him being hospitalised on two occasions, the first in Hillcrest, Kwazulu Natal, in October 2007 (no dates given) as a result of a broken arm and the second in the Olivedale Clinic in Gauteng in November 2007 (no dates given) as a result of a broken leg. In addition, says Mr Graham, the applicant's attorney Mr Parker was not available for almost the whole of October 2007 (attending an Intellectual Property Law Conference in Beijing from 18 September 2007 to 10 October 2007) and most of November 2007 (attending an Intellectual Property Law Conference in Singapore from 5 November 2007 to 16 November 2007). Finally, says Mr Graham, by the time that both he and Mr Parker were available (no dates given) the end of year holidays intervened (no dates given).

[12] As pointed out by the respondent's counsel, these allegations do not stand scrutiny. The fact that Mr Graham was hospitalised (if indeed he was) in October and November 2007 would not prevent the applicant's attorney from communicating with him. Furthermore the fact that he was hospitalised in Gauteng in November 2007 means that he was within easy reach of the applicant's attorney. The failure to set out the dates is obviously deliberate. It is hard to imagine why Mr Graham would need to be hospitalised on each occasion for more than a few days at the most. The allegations about Mr Parker are also a gross exaggeration. From the dates given, Mr Parker was away from 1 to 10 October, not almost the whole of October. He was therefore available from 11 to 22 October 2007 when the replying affidavits had to be filed. The failure to do anything in this period is simply not explained. Mr Parker's affidavit takes the matter no further. He merely confirms the allegations in Mr Graham's affidavit. Mr Parker was also away from 5 to 16 November 2007 which cannot be described as most of November. The failure to attend to the matter during 1 to 4 and 17 to 30 November has not been explained. The failure to state when Mr Graham and Mr Parker became available and when the end of year holidays commenced is also deliberate.

[13] As already mentioned when the applicant sought the extension of two months on 13 September 2007 no reasons were given for the failure to meet the September deadline or why an additional two months were required to prepare and file the replying affidavits. It appears that once

the applicant's counsel was available in the new year it took only about 10 days to prepare and file the affidavits. It is a matter of concern that the applicant's explanation for not filing its replying affidavits sooner is contradicted by the contents of Bowman Gilfillan's letters. On 19 November 2007 Mr Parker wrote that he was now able to consult with his client and expected to be in a position to advise later that week whether or not the applicant would file a replying affidavit and on 21 November 2007 Mr Parker wrote that he had been able to consult with counsel and client on how best to advance with the matter and suggested that the matter be referred to oral evidence. No mention was made of the replying affidavits. The respondent's attorney advised Bowman Gilfillan on 7 December 2007 that the respondent did not agree to the matter being referred to oral evidence. Nowhere in the applicant's explanation is the failure to prepare and file the replying affidavits before 13 September 2007 dealt with. On reading the applicant's explanation the conclusion is unavoidable that the applicant and/or its attorney considered that however vague and however illogical, any statement would suffice. In my view this is unacceptable.

- [14] On 24 January 2008 the applicant filed a notice of intention to amend the statement of particulars to allege that other matters formed part of the state of the art, in particular the as-built fence at Eskom's Brits premises and Armand Terblanche's knowledge of it and other fences. This would be a new case for the respondent to meet and would require that further evidence be presented. The applicant did not wait

for the period of objection to the amendment to expire before filing its evidence. It simply incorporated the evidence in the replying affidavits served and filed on 24 January 2008. It did so without seeking the leave of the commissioner as required by Regulation 92. It then enrolled the matter without the commissioner having given leave to file further evidence or the respondent having had an opportunity to file any evidence on the new case. It now seeks to have the matter referred to oral evidence to avoid these difficulties. During the hearing it became clear that the affidavits were incomplete and that the parties would have to file further affidavits to cover the new case. The court was not asked to issue directions in this regard.

- [15] Finally, it is clear that the applicant's new case relating to the Eskom fence was not considered at the beginning of the case. The applicant chose to rely on the article 'The Eskom Route to Safety' rather than the fence itself. The applicant did this knowing that the actual fence could form part of the state of the art – it relied on the electrified palisade fence installed at Investec Head Office. It is significant that Armand Terblanche who testified pertinently about the Eskom article and who was advised about the requirements for lack of novelty did not immediately state that the Eskom fence, as built, did contain all the integers of claim 1 of the patent. Despite having designed and installed the fence he did not allege this but confined himself to the Eskom article. He concludes his analysis by saying that the sentence in the article 'Both sections are connected to the alarm network'

disclose integers (vi) and (vii) of claim 1 of the patent: i.e. a sensor for automatically sensing tampering with the lower part and a switch for automatically connecting the energising means to the electrical conductive path of the lower part to energise the lower part if the sensor sense tampering with the lower part. It is inconceivable that if the as-built fence contained these integers Armand Terblanche would not have said so. At no stage did he attempt to demonstrate that it did and there is no evidence in the applicant's affidavits to that effect. There is no explanation for his failure to do so. It is now opportunistic of the applicant to attempt to make out a such a case. It could and should have done so in its initial statement of particulars and affidavits.

[16] As will appear later in this judgment the issue of whether the Eskom article discloses all the integers of claim 1 of the patent must be decided on the contents of the article. Oral evidence cannot assist the court in this regard.

[17] For these reasons condonation for the late filing of the replying affidavits is refused and these affidavits will be ignored. The application to refer the matter for oral evidence must now be considered.

Application for referral to oral evidence

- [18] The applicant seeks an order that certain defined issues be referred for *viva voce* evidence because they cannot be resolved on the papers. In my view the application is misconceived as the matter can be decided on the papers. During argument the applicant's counsel conceded that the issues formulated in the application for referral for the hearing of *viva voce* evidence are not appropriate and that what the applicant really wishes to do is have a hearing about whether the fence at the Eskom, Brits premises discloses all the integers: i.e. whether the Eskom, Brits fence destroys novelty. As already pointed out this is not the issue in the affidavits filed. The applicant's case is and was based on the article about the fence and not the fence itself. It is therefore not appropriate to refer the issue for *viva voce* evidence and this request must be refused. As already mentioned the issue of whether the Eskom article discloses all the integers of claim 1 must be decided with reference to the article itself and this means that the issue must be decided on the papers alone.

Merits

- [19] The applicant seeks revocation of the patent on the grounds that the invention is not novel and that the invention does not involve an inventive step.

Novelty

[20] For present purposes it is only necessary to consider the Eskom article (annexure C) as it is common cause that the two patents (annexures A and D) and the electrified palisade split fence installed at Investec Head Office, 100 Grayston Drive, Sandton (annexure B) do not disclose integers (vi) and (vii) of claim 1 of the patent.

[21] For the attack on the novelty of the patent to be upheld it must be shown that, in substance, the same invention was described in the allegedly anticipatory publication, the Eskom article. In ***Netlon Ltd and another v Pacnet (Pty) Ltd 1977 (3) SA 840 (A)*** at 861H-862B (1977 **BP 87 (A)** at 108F-109C) the court set out the relevant principles as follows –

‘[T]he defence (or objection) of anticipation relates to the claims and not to the description of the invention in the body of the specification in suit (see too, the ***Letraset*** case, *supra* at pp264-5). The prior printed publication alleged to be anticipatory must be construed, for the exercise is primarily one of construing and comparing the two documents; moreover it must be construed as at the date of its publication to the exclusion of information subsequently discovered; the question then considered is whether the prior publication ‘describes’ the invention in suit as claimed; that is, whether it sets forth or recites at least the latter’s essential integers in such a way that the same or substantively the same process or apparatus is identifiable or perceptible and hence made known or the same or substantially the same product can be made from that description in the prior publication; if the description in the prior document differs, even in a small respect, provided it is a real difference, such as the

non-recital of a single essential integer, the anticipation fails; the opinions of expert-witnesses that the prior publication does or does not anticipate a claim in suit must be disregarded for that is for the Court to decide.'

See also ***Schlumberger Logelco Inc v Coflexip* 2003 (1) SA 16 (SCA) (2002 BIP 35 (SCA))** para 23; ***Genturico AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A)** at 646C-647A (***1971 BP 58 (A)*** at 138-139); ***Veasey v Denver Rock Drill and Machinery Co Ltd* 1930 AD 244** at 282.

To constitute an anticipation the description in the prior publication must be contained in a single prior publication. It cannot be synthesised or mosaiced from two or more publications.

- [22] The applicant contends that all the integers of claim 1 of the patent are disclosed in the article (annexure C). The applicant contends that these integers are covered by the sentence 'Both sections are connected to the alarm network'. I do not agree. The words do not state expressly or by implication that there is a sensor such as that referred to in integer (vi) or a switch such as that referred to in integer (vii). The article therefore does not anticipate claim 1 of the patent or any of the other claims, all of which are dependent on claim 1.

Obviousness

- [23] In terms of section 61(1)(c) of the Act a patent may be revoked on the ground that the invention is not patentable. In terms of section 25 of the Act, in order to be patentable an invention must involve an inventive step. With regard to this requirement, subsection 25(10) provides –

‘Subject to the provisions of section 39(6), an invention shall be deemed to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms, immediately before the priority date of the invention, part of the state of the art by virtue only of subsection (6) (and disregarding subsections (7) and (8)).’

Subsection 25(6) provides –

‘The state of the art shall comprise all matter (whether a product, a process, information about either, or anything else) which has been made available to the public (whether in the Republic or elsewhere) by written or oral description, by use or in any other way.’

- [24] The necessary first step for the application of these provisions is the determination of (i) what the art is as to what the invention relates; (ii) what the state of the art was at the relevant time and (iii) who is to be regarded as a ‘person skilled in the art’ - ***Roman Roller CC and Another v Speedmark Holdings (Pty) Ltd* 1996 (1) SA 405 (A)** at 413D (**1995 BP** at 210D-F).

[25] After this step the structured enquiry described in the case of ***Ensign-Bickford (SA) (Pty) Ltd and Others v AECL Explosives and Chemicals Ltd 1999 (1) SA 70 (SCA)*** at 80H-J (1998 BIP 271 (SCA) at 280E-G) must be undertaken and the following four matters must be determined –

- (1) what the inventive step said to be involved in the patent is;
- (2) what, at the priority date, the state of the art (as statutorily defined) relevant to that step, was;
- (3) in what respect the step goes beyond, or differs from, that state of the art; and
- (4) whether, having regard to such development or difference, the taking of the step would be obvious to the skilled man.

[26] On the question of whether what has been claimed is inventive is obvious the court in the ***Ensign-Bickford*** case said at 81C-I –

‘Firstly, the question to be determined is whether what is claimed as inventive would have been obvious, not whether it would have been commercially worthwhile ... Secondly, the emphasis must lie on the technical features. A passage in the judgment of Sir Donald Nicholls, Vice Chancellor, in the case of ***Mölnlycke v Proctor & Gamble (supra)*** bears repetition. At 113 the Vice Chancellor said:

“In applying the statutory criterion and making these findings the Court will almost invariably require the assistance of expert evidence. The primary evidence will be that of properly qualified expert witnesses who will say whether or not in their ‘opinions the relevant step would have been obvious to a skilled man having regard to the state of the art’. All other evidence is secondary to that primary evidence. In the past, evidential criteria may have been useful to help to elucidate the approach of the common law to the question of inventiveness. Now that there is a statutory definition, evidential criteria do not form part of the formulation of the question to be decided.

...

What with hindsight, seems plain and obvious, often was not so seen at the time. It is for this reason that contemporary events can be of evidential assistance when testing the expert’s primary evidence. For instance, many people may have been industriously searching for a solution to the problem for some years without hitting upon the allegedly obvious invention ... Yet again, evidence of the commercial success of the invention can lead into an investigation of the reasons for the success; there may be commercial reasons for this success unrelated to whether the investigation was or was not obvious in the past.

Secondary evidence of this type has its place and the importance, or weight, to be attached to it will vary from case to case. However, such evidence must be kept ‘firmly in its place. It must not be permitted, by reason of its volume and complexity, to obscure the fact that it is no more than an aid in assessing the primary evidence’”.

[27] The law requires only that there be inventiveness. It is not a requirement that the invention involves a large step forward. See ***Veasey’s*** case *supra* at 282.

[28] There is little or no evidence on the issue. The applicant’s counsel concedes that he is hard pressed to contend that the applicant has

made out a case on this basis. It should be recorded that in the heads of argument filed on behalf of the applicant the applicant made no submissions on the issue.

[29] On the facts set out I cannot find that the applicant has discharged its onus.

Order

[30] The application is dismissed with costs.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: Patent 2002/6992

HEARD ON: 29 July 2008

FOR THE APPLICANT: ADV. C.J. van der Westhuizen

INSTRUCTED BY: Mr L. Parker of Bowman Gilfillan Inc.

FOR THE RESPONDENT: ADV. D.P. HUGO

INSTRUCTED BY: Ms C. Berndt of Hahn & Hahn Inc.

DATE OF JUDGMENT: 15 August 2008