

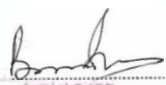
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE/PATENT NO: 95/0812
5 October 2010

In the matter between:

AUSPLOW PTY LTD

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES NO.	Applicant
(2) OF INTEREST TO OTHER JUDGES: YES NO.	
(3) REVISED.	
05/10/2010	
DATE	SIGNATURE

NORTHPARK TRADING 3 (PTY) LTD

First Respondent

THE REGISTRAR OF PATENTS

Second Respondent

MARAIS ENGINEERING (PTY) LTD

Third Respondent

MARAIS STEYN

Fourth Respondent

LEAVE TO APPEAL JUDGMENT

MURPHY J

1. The applicant seeks leave to appeal against my judgment handed down on 30 April 2010.

2. The litigation currently between the parties flows from an order of the Supreme Court of Appeal ("SCA") either suspending and postponing its decision to revoke the patent in suit, or provisionally revoking it, pending consideration of an application to amend the patent.
3. In the main judgment I granted absolution from the instance in respect of an action for infringement based on the patent as proposed to be amended, and further refused the application for amendment on the grounds that the proposed amendment would not remedy the continued invalidity.
4. As I stated in the judgment, it appears to me from the terms and substance of the order of the SCA that it intended to revoke the patent provisionally and not to suspend revocation, despite the reference by the SCA to section 68 of the Act. Counsel sought an order in terms of section 68 but failed to alert the SCA to the jurisdictional preconditions, which, as was common cause before me, had not been met. In any event, from the wording of the order of the SCA it appears that the SCA did not intend to make an order in terms of section 68, but preferred to provisionally revoke the patent in terms either of section 61 or its inherent jurisdiction. In consequence, I held that it is not competent to bring infringement proceedings in respect of a patent which had been revoked, albeit provisionally, and hence I granted absolution. Despite the clear wording

of the order, there is, in view of the reference to section 68, an inescapable ambiguity in the intention of the SCA, and accordingly a reasonable possibility that I have erred in concluding that the intention was to revoke the patent provisionally. If that is so, then another court might see no obstacle in the way of referring the action for infringement to trial on the basis of proposed amendments considered to be *prima facie* valid.

5. In this latter respect, I am also of the view that, contrary to my finding, another court might conclude that in determining whether to grant an amendment the court should not have regard to the normal grounds for revocation, but should limit itself to the issues of formal compliance and allow the questions of validity to be determined as part of infringement proceedings.
6. If I have indeed erred in both respects, it would mean that another court might grant the amendments solely on the basis of formal compliance and then would allow the questions of infringement and validity in relation to the amended patent to be determined at a trial.
7. Additionally, it has been submitted that I erred in assuming that the SCA, by reason alone of its conclusion that the patent did not involve an inventive step, had in effect overruled the finding of the court *a quo* that the unique combination and arrangement of the assembly components

was inventive. The basis of Southwood J's dismissal of the defence of obviousness was the existence of such a unique combination. As I say in my judgment, although the SCA made no overt finding on the point, had it considered the combination unique, it would not have upheld the defence of invalidity. More pertinent though is the question of whether the proposed new claim 1, providing for a second mounting means, as set out in the amendment, overcomes the lack of inventiveness, by reason, *inter alia*, of the arrangement of the assembly components (including the second mounting means) constituting a unique combination. My finding is to the effect that the second mounting means does not overcome the lack of inventiveness, because such is obvious and does not go beyond or differ from the prior state of the art, disclosed in the Dreyer patent in the form of a roller adjustably mounted relative to the sowing share, and a pivoting lever adjusting the height of the sowing share which together achieve a planting depth in appropriate alignment with the land contour. I held further that it was not necessary for the court to hear expert evidence on the matter because the question regarding the provision of the second mounting means and attachment to the tine, to the extent that such may differ from the Dreyer invention, was whether it would be obvious to the skilled person, and such determination is a question for the court and not an expert - *Schlumberger Logelco Inc v Coflexip* 2003 (1) SA 16 (SCA). That said, I accept that another court could conclude that the technical evidence of an expert witness may be required to determine in what

respect the combination, embodied in part, by the second mounting means and attachment to the tine, differs from the arrangement disclosed in the Dreyer combination, where I have found no difference.

8. In the premises, there is a reasonable prospect that a higher court may reach different conclusions to those I have reached and accordingly leave to appeal to the SCA should be granted.

9. In the result, I make the following orders:

1. The applicant is granted leave to appeal to the Supreme Court of Appeal
2. The costs of this application will be costs in the appeal.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	9 September 2010
For the Applicant:	Adv DR Harms, Cape Town
Instructed By:	Adams & Adams, Pretoria
For the Respondent:	Adv C van der Westhuizen SC, Adv RD Engela, Pretoria
Instructed By:	Dr Gernholtz Inc., Pretoria