9/98

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 4/95

In the matter between:

ENSIGN-BICKFORD (SOUTH AFRICA) (PTY) LIMITED 1s t APPELLANT

BULK MINING EXPLOSIVES (PTY) LIMITED 2nd APPELLANT

DANTEX EXPLOSIVES (PTY) LIMITED 3rd APPELLANT

and

AECI EXPLOSIVES & CHEMICALS LIMITED RESPONDENT

CORAM: **VAN HEERDEN DCJ, MARAIS, SCHUTZ, SCOTT and PLEWMAN JJA**

DATE OF HEARING: **16 FEBRUARY 1998**

REASONS: **13 MARCH 1998**

REASONS FOR JUDGMENT

PLEWMAN JA

The Rules of this Court require an appellant within a prescribed period to "lodge with the registrar six copies of the record of the proceedings in the court appealed from" (Rule 5(4)). Such a record "shall contain a correct and complete index of the evidence and of all the documents and exhibits in the case, the nature of the exhibits being briefly stated in the index" (Rule 5(11)). The record lodged in this appeal, in purported compliance with the rules, was (and still is) defective in material respects as regards both the content thereof and the indexing thereof. To the extent that this is necessary I will presently expand on this observation. As a consequence, and after events to which reference will also presently be made, and after hearing counsel, the court, for reasons to be filed, made the following orders.

> "1. The appeal is postponed *sine die.*
> 2. The appellants are to pay jointly and severally, the one paying the other to be absolved, on the scale of attorney and client the costs wasted as a result

of the appeal being postponed including the costs of two counsel.

3. The appellants are to file a proper record within 30 days and the appellants are to file within 15 days and the respondent within 30 days of the lodging of the record amended heads of argument.

4. The postponement hereby ordered is granted on the basis that the appellants have waived the suspension, pending the outcome of the appeal, of paragraph 1 of the order of the court *a quo*."

The Court's reasons are as follows.

A brief explanation of the nature of the litigation is necessary. The appellants were the defendants in actions (which were consolidated) in the Court of the Commissioner of Patents in which they were sued by respondent on the grounds of patent infringement. The respondent is the owner by reason of an assignment to it of South African Letters Patent 79/3210 in respect of an invention entitled

"Low-energy fuse consisting of a plastic tube the inner surface of which is coated with explosive in powder form". Appellants denied infringement and pleaded in terms of s 65(4) of the Patents Act 57 of 1978 that the patent was invalid on a number of grounds and counterclaimed for revocation thereof. The pleadings thus gave rise to a wide area of dispute.

The matter went to trial before MacArthur J sitting as Commissioner of Patents. After a lengthy hearing he held the patent to be valid and to have been infringed. He granted an order interdicting appellants from infringing claims 1 and 4 of the patent, granted appropriate supplementary relief and dismissed the counterclaims. On 6 December 1994 the appellants were granted leave to appeal to this Court.

The appeal was duly noted. Appellants thereafter experienced difficulty in preparing the record and sought and obtained an extension of the time within which to do so. One source of their

difficulties was that the original record had been mislaid in the Patents Office. On 3 April 1995 (within the period of the agreed extension) appellants attempted to lodge the record but it was rejected by the registrar because of errors therein. Appellants again sought and obtained respondent's agreement to a further extension of time. Ultimately on 28 April 1995 appellant lodged, in a form which has given rise to this Court's order, a record consisting of twenty four volumes (or 2265 pages) of pleadings, evidence and documentary exhibits.

In March 1996 the original record was traced. It does not seem that the form and content of the appeal record which had been lodged was re-examined in the light of this discovery. Further, counsel's heads of argument were prepared on the record lodged. The appellants' heads of argument are dated 22 April 1996. Counsel, it is clear, found that certain documents to which they wished to refer had been omitted from the record. It is stated in paragraph 7 of

appellants' heads of argument that "due to an oversight the Appeal Record is incomplete in that certain documents referred to in oral evidence have not been included". A supplementary bundle comprising "these documents" was prepared and a petition dated 17 October 1996 seeking condonation for the late lodging thereof was filed. This then became "Supplementary Record: Volume 25". In the meantime respondent's heads of argument, dated 18 July 1996, had been filed. No comment is made therein with regard to the state of the record. How counsel (on both sides) could have overlooked certain other serious deficiencies in the record is not clear.

Upon delivery of the record to the members of the Court it was apparent that there were serious deficiencies in the record. In argument which this Court required to be presented in terms of a directive to be referred to below, appellants' counsel conceded that the record was indeed defective and that he could not ask that the appeal proceed on the record as it stood. It is therefore strictly

unnecessary to discuss the defects in detail or, indeed, to recount the further efforts to rectify it which followed from a request made by the Court in December 1997. But a few examples of the shortcomings may be given to portray the degree of the defects.

In the form in which it stood when delivered to the members of the Court it was impossible to ascertain by reference to a volume and a page where many of the documentary exhibits referred to in the evidence of witnesses were to be found. The index of the appeal record gave no assistance in this regard. As an example one may take exhibit B - an exhibit in respect of which a finding of major importance was made regarding the allegation of invalidity on the ground of prior use of the invention, clearly a document of fundamental importance. It was not listed in the index. Nor is reference made in appellants' heads to where it is to be found, though the court *a quo's* finding is attacked. It should not be thought that this was an isolated and unfortunate omission. In a perusal of the first

1000 pages of the record of oral evidence (alone) I noted at least 23 instances where the document being dealt with in evidence could not be traced even after attempts to locate it by perusing the index and the general description there given and making a comparison with the description given of the document in the evidence. Volume 25 was of some assistance but in many cases that task was in fact impossible.

Another difficulty with the record was the frequent references in the evidence to certain trial bundles marked A, B and C. These bundles are not reproduced as such in the record and the original pagination to which reference is made in the evidence has been deleted. In some instances it was possible by reference to matters such as the date or general description given in the evidence to trace the documents in volume 14 and onwards. But again this was not possible in all cases. Here too Volume 25 was of some assistance only. Volume 25 was a partial remedy, at best, because (as subsequent events demonstrated) in some instances the relevant

documents had not been included in the record even as supplemented thereby. This finally became clear on 30 January 1998 when a yet further volume - Volume 26 was tendered - a matter to be referred to in its correct sequence.

In the light of the difficulties encountered by the members of the Court the registrar, at the direction of the presiding judge, addressed a letter to appellants' attorneys calling upon appellants to furnish the Court by 2 January 1998 with:

(i) An index in which is reflected not only the current pagination but also the original pagination.

(ii) An index in which current pagination (by volume and page) of each reference to exhibits or other documents contained in the oral evidence is given. In other words, a judge reading the oral evidence should have a page reference to other parts of the current record to which reference is made.

On 5 January 1998 appellants' attorneys, in response to

paragraph (i) above, filed a second index. It should be understood that in fact the members of the Court only receive documents of this nature sometime later. That index contained references to the trial bundles and identified where documents contained therein were to be found in the record so that it was, subject to what follows, of some assistance. But it soon again became clear that this index too was defective. This is so notably in regard to documents which were contained in trial bundles B and C. It was only in the second index that the bundles are listed. In so far as bundle B is concerned, the last document listed is reflected as having been numbered in the original numbering as page 472. In the evidence there are many references to documents at later pages in the bundle - for example at p 1140 there is a reference to page 494 of the bundle and at p 1193 to page 491 of the bundle. Obviously a substantial portion of the bundle had simply not been included in the record. The problem with Bundle C was even more acute.

On the other hand a large number of unnecessary documents were (contrary to Rule 5(12)) included and there are numerous duplications. The index to the oral evidence omitted to state where the evidence in chief, the cross-examination and the re-examination of each witness commenced and ended. Again these are merely illustrative examples of the defects in the record. Many more could be cited but for the reason already given this is unnecessary.

Finally on 30 January 1998 appellants lodged with the registrar a 22 page document which purported to meet the request in paragraph (ii) of the registrar's letter of 22 December 1997 - the appeal being on the roll for 16 and 17 February 1998. This was accompanied by a petition dated 29 January 1998 seeking condonation for the late filing of a yet further addition to the record being Volume 26. The respondent in heads of argument handed up (but not argued because of appellant's concession) dealt with this last index and referred to correspondence which shows that it (the respondent) was asked to

assist in checking the correctness of the index - a task it apparently agreed to undertake. In the heads it is submitted that a considerable number of inaccuracies and duplications were found in the document by respondent, reported to appellants but not corrected by appellants in the document filed with the Court. It is unnecessary to consider the correctness of these assertions. What has been demonstrated overall is a woeful failure on the appellants' part to lodge a proper record.

On 6 February 1998 the registrar at the direction of the presiding judge gave the parties notice that counsel should be ready to argue on 16 February:

> "1) Whether the appeal should be struck from the roll because of the state of the appeal record at various stages.
> 2) Whether an appropriate costs order should be made depending on the answer to question 1."

I have referred to counsel for the appellants' concession. It was not, so counsel argued, also a concession that the appeal should be

struck from the roll. Respondent's counsel argued that this course was the appropriate course to follow. Such an order, if made, would not necessarily finally close the door to appellants as appellants could avail themselves of Rule 13 in order to seek condonation and the re-instatement of the appeal.

In *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362 F-G Holmes JA said:

> "In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefore, the importance of the case, the prospects of success, the respondent's interest in finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice."

The present situation is comparable to that which arises under Rule 13. The degree of non-compliance is clearly serious and the explanation or excuse not particularly compelling, the appeals of other parties who have complied with the rules have been delayed and

the time of five judges wasted. But the failure is the failure of the persons responsible for the preparation of the record and not the appellants themselves. While their efforts to prepare a proper record were unavailing they were at least dogged. Appellants have furthermore at all times evidenced an intention to pursue the appeal by all means open to them. Whether their prospects of success are or are not good cannot be determined on the record now available but there is at least the consideration that the court *a quo* did not wholly discount them and granted leave to appeal.

The respondent obviously has a very real interest in obtaining finality and has, up to this point, been unable to enforce the interdict. But, this notwithstanding, the present situation is one calling for a practical solution. Counsel for the appellants, recognising his difficulties, urged that we postpone the appeal and make such orders as are appropriate to counter prejudice to respondent. He, in this regard, tendered the wasted costs (on whatever scale the Court saw fit

to make such an award) and he agreed on appellants' behalf to waive the suspension of the interdict which flowed from the noting of the appeal.

There is a real prospect that finality will be achieved sooner if this course is followed than would, in all likelihood, be the case if the appeal were struck from the roll. This factor, in the final analysis, is what has dictated the Court's order. These then are the Court's reasons.

The case however must serve as a very clear warning to litigants. This Court has in the past had occasion to warn litigants of the consequences of a failure to comply with the rules. See for example: *Lafrenz (Pty) Ltd v Dempers* 1962 (3) SA 492 (A) at 497H; *Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk* 1984 (1) SA 680 (A) at 692H - 693A; *Blumenthal and Another v Thompson NO and Another* 1994 (2) SA 118 (A) and *McKenzies's* case *(supra)*. Litigants who do not in future

follow the rules fully and intelligently will run the risk of being debarred from proceeding with their appeals.

C PLEWMAN JA

CONCUR

VAN HEERDEN DCJ)
MARAIS JA)
SCHUTZ JA)
SCOTT JA)