THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM	The Registrar, Supreme Court of Appeal
DATE	22 September 2015
STATUS	Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***Strix Limited v Nu-World Industries* (20453/2014) [2015] ZASCA 126 (22 September 2015)**

MEDIA STATEMENT

Today, the Supreme Court of Appeal (SCA) upheld an appeal by Strix Ltd (Strix), against an order by the Court of the Commissioner of Patents, in which it was found that Nu-World Industries (Pty) Ltd (Nu-World) had not infringed a patent belonging to Strix. Overturning this decision, the SCA found that the patent had been infringed, and accordingly granted an order (i) interdicting Nu-World from making, using, disposing, offering to dispose of, or importing liquid heating vessels (effectively, electric kettles) of a specific design; (ii) that Nu-World deliver up all products infringing the patent; and (iii) damages.

The main issues before the SCA were, first, whether the patent was novel, and whether the defence of lack of novelty was available to Nu-World even though it had not claimed in reconvention for the revocation of the patent, and had not clearly pleaded this defence; and, second, whether the allegedly infringing kettles belonging to Nu-World did in fact infringe the patent as described.

The facts were as follows. Strix had registered a patent over the design for a 'liquid heating vessel' which inter alia included a thermally sensitive overheat control (effectively, a trip switch) which comprised at least two sensors, in good thermal contact with the base of the container or the element, and (critically) were spaced apart. At the priority date of the patent in suit, it was common to have overheat controls, but they only measured the temperature at a single location. As a result, if the kettle was tilted, and the water level was not parallel to the base of the kettle, it was possible for the element or heated base to be partially underwater and partially above water. If the sensor only

measured the temperature at an underwater location, the measurement would not accurately reflect the heat of the above-water portions of the element or heated base, and as a result the overheat control would fail to trip even though the kettle was overheating at the dry points. The effect of the sensors being spaced apart in the patent in suit was to provide an additional safety measure against overheating because the temperature was sensed at *two* locations, increasing the chance that at least one sensor would measure the temperature should the circumstance described above arise.

As to the first issue, the SCA held that a defence of lack of novelty is available even where one fails to counterclaim for revocation of the patent. Further, although Nu-World's pleadings were initially vague, the defence was pertinently raised and fell to be considered. On the facts, the SCA held that the defence failed, as the idea of spacing the two sensors apart in order to deal with the danger described above was not part of the prior art, and the design was novel.

As to the second issue, the court a quo had concluded that the sensors in the allegedly infringing kettles were too close together to be effective as a safety feature, and accordingly the kettles did not infringe the patent in question. The SCA rejected this conclusion in respect of all but one instance of alleged infringement, and held that although the distance between the sensors was relatively small, it was sufficient to ensure a substantially effective safety feature. In respect of the remaining instance, the two sensors were physically joined, and so the infringement was not proved.

The SCA accordingly upheld the appeal, and held that Strix's patent had been infringed by Nu-World, and granted the order described above.