THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 137/2016

In the matter between:

PASADENA LEATHER PRODUCTS CC
T/A PASADENA PRODUCTS **FIRST APPELLANT**

TRIFECTA TRADING 83 (PTY) LTD
T/A DOS GROUP **SECOND APPELLANT**

and

FRANCO RESCA **FIRST RESPONDENT**

ENRICO CUPIDO **SECOND RESPONDENT**

Neutral citation: *Pasadena v Resca* (137/2016) [2016] ZASCA 204 (15 December 2016)

Coram: Leach, Swain, Dambuza and Mathopo JJA and Makgoka AJA

Heard: 23 November 2016

Delivered: 15 December 2016

Summary: Patent relating to a lockable holster : purposive interpretation : not all integers of respondents' patent having been used by the appellants in the design of their holster: patent not infringed.

ORDER

On appeal from: The Court of the Commissioner of Patents for the Republic of South Africa (Louw J sitting as court of first instance):

1 The appeal succeeds, with costs.

2 Para (c) of the order of the court a quo is set aside and is substituted with the following:

'(c)(i) The plaintiffs' claims flowing from an alleged infringement of South African Patent ZA 98/6778 are dismissed.

(ii) The parties are to bear their own costs.'

JUDGMENT

Leach JA (Swain, Dambuza and Mathopo JJA and Makgoka AJA concurring)

[1] The first appellant manufactures what is called a 'swivel holster' in which handheld firearms may be housed, a product both appellants have disposed of in this country. The respondents are the joint registered proprietors of a registered patent number ZA 98/6778 entitled 'A Lockable Holster' (the patent). They sued the appellants in the Court of the Commissioner of Patents, claiming that their swivel holster infringes the patent in various respects and seeking consequential relief. The appellants, in turn, filed a counter claim,

contending that the patent was invalid as the invention to which it referred is not patentable under s 25 of the Patents Act 57 of 1978 (the Act) and ought to be revoked.

[2] The respondents were successful. Not only was the appellants' counter claim dismissed but an order in the respondents' favour containing, inter alia, the following relief, was granted:

'(i) The first and second appellants are interdicted from infringing each of claims 1 and 7 of the patent by, in the Republic, manufacturing, using, making, disposing or offering to dispose of the Swivel Holster or any other product falling within the scope of those claims.

(ii) An order for the delivery up for destruction of any product in the possession or under the control of the appellants which infringe any of claims 1 and 7 of the patent;

(iii) An enquiry into damages suffered by the respondents as a consequence of the infringement of the patent and payment of the amount of damages found to have been so suffered, alternatively into the extent of the infringement and the amount of a reasonable royalty to be paid in lieu of damages, and payment of the amount of royalties found to be so payable.'

It is against this order that the appellants appeal to this court. There is no appeal against the dismissal of their counter claim or a further order declaring the patent to be valid.

[3] It is hardly necessary to say that an inquiry as to whether there has been an alleged infringement of a patent requires, as a first step, an interpretation of the patent itself. A patent is divided into two parts, firstly a description or the

body of the specification which serves to describe the invention in sufficient detail that the rational person skilled in 'that art' can understand what the invention is and how it is put into practice. The second contains the claims in the patent, which serve to define and set limits to the monopoly that the patent is intended to secure and protect. As opposed to the specifications, the function of the claims in a patent is 'to inform prospective rivals of the limits of the field denied to them while the patent lasts'.[1]

[4] The various claims thus define the exclusive rights of the patentee and are often referred to as the 'fences' or 'boundaries' which provide the 'fields' of the monopoly. As the primary object of a claim is therefore to limit and not extend the patentee's monopoly, it has given rise to the well-worn phrase that 'what is not claimed is disclaimed'. As was said in *Electric and Musical Industries*:

'The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundary of the area within which they will be trespassers. Their primary object is to limit and not extend the monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere.'[2]

[1] Per Holmes JA in *Letraset Ltd v Helios Ltd* 1972 (3) SA 245 (A) recently cited with approval in this court in *Cipla Medpro (Pty) Ltd v Aventis Pharma SA and related appeal* 2013 (4) SA 579 (SCA) para 24.
[2] *Electric and Musical Industries Ltd v Lissen Ltd* (1938) 56 RPC 23 [UK]: Quoted by LTC Harms *The Enforcement of Intellectual Property Rights: A Case Book* 3 ed (2012) at 259.

The necessity for the monopoly to be defined in the claim was graphically described as follows in *Marconi's Wireless Telegraph v Phillips Lamps Ltd* 1933 RPC 287:[3]

'It is not sufficient for the inventor to discover his gold mine ─ he must also peg out his claim. Outside the pegs, the gold, if it is there, is free to all.'

[5] Bearing these principles in mind, I turn first to the specifications which are exhaustively and repetitively set out in the patent. Mention is made therein of 'camming' surfaces and how 'attempted withdrawal of the fire-arm from the holster cavity without releasing the locking member results in the trigger guard bearing against the second camming surface exerting a moment around the pivot axis of the locking member thereby urging the locking member into a more firmly locked position'.

[6] Crucial to this description and the operation of the invention (and for that matter the outcome of this appeal) is the meaning of 'camming' surfaces. In *M Props (Pty) Ltd v K Riemann and Riemann Associates and another* 1997 BIP 17 (CP) 22 the expert witnesses on both sides agreed that a cam is 'a mechanical device used to convert one kind of displacement or motion to another kind of displacement or motion by making use of a specially designed profile'. The court (MacArthur J) accepted this and continued:

[3] Also quoted by Harms at 259.

'The conversion of the motion is achieved by the cam driving or guiding another component called a follower. It is not necessary to discuss the situations referred to by Dr Hunt where the follower controls the cam. Through the special shaping of the cam, i.e. the designed profile, the rotational movement in the cam may be converted into a linear motion in the follower. In the same way the cam could have a linear motion and be provided with a particular profile as to give a different linear motion in the follower. Likewise a rotational motion in the cam can provide a different rotational movement in the follower. In other words, the cam mechanism which comprises the cam and the follower can convert a given input motion into an output motion of a particular desired form. A cam system is clearly a versatile and flexible tool.'

[7] Relying upon *M Props*, the court a quo held a 'camming surface' to be the surface or site at which motion is imparted to the cam by the follower, in this case, the trigger guard. This finding was accepted by both sides in the appeal in this court, quite correctly, and will be used by me in the analysis that follows.

[8] Bearing that in mind, the somewhat convoluted description of the patented holster's operation set out above becomes clear once regard is had to the drawing, Figure 2, annexed to the patent and reproduced below:

Annexure "POC-1" - Copy of ZA98/6778

1. FRANCO RESCA
2. ENRICO CUPIDO

7 SHEETS
SHEET NO. 2

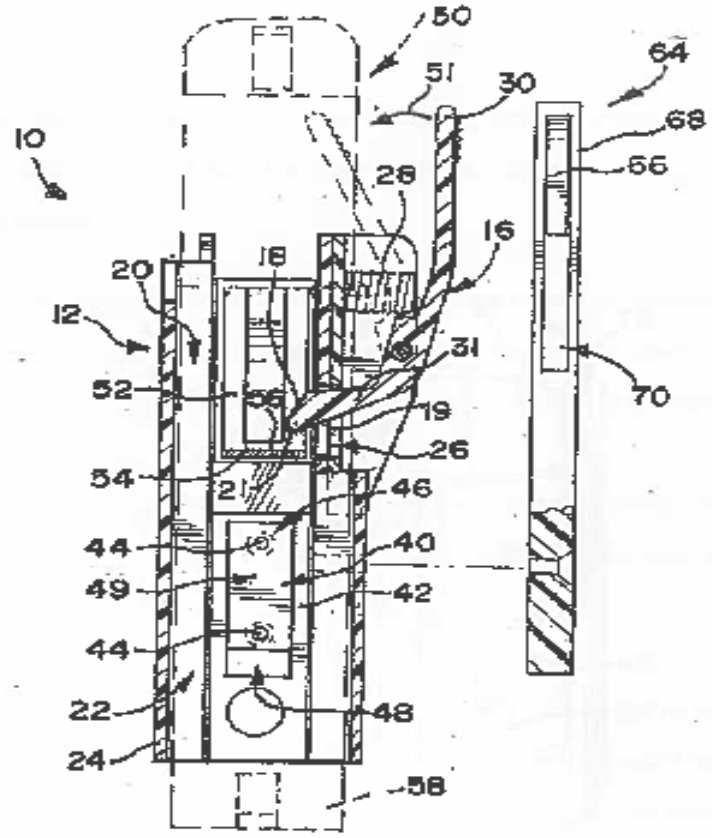

FIG 2

[9] In this figure, numeral 10 generally indicates a holster broadly in accordance with the invention. The working of the invention is further described in the specification in terms similar to those already quoted above:

‘The holster 10 has a body 12 and a locking member in the form of a latch 16 mounted on the body 12.

. . .

The latch 16 is pivotally mounted on an outer surface 17 of the body 12 for limited pivotal translation about a pivot axis defined by a pivot pin 26. The latch 16 is in the form of a first order lever and includes an effort arm 30 and a working arm 31 positioned on opposite sides of the pivot axis. A biasing spring 28 is positioned in compression between the effort arm 30 of the latch 16 and the body 12, biasing the effort arm 30 away from the body 12 into a locked or fire-arm retain position of the latch 16 (shown in solid lines in Figure 2), in which a portion of the working arm 31 protrudes into a trigger guard passage interfering position in the trigger guard retaining region 20 of the cavity 14. Two angularly spaced camming surfaces namely, a first camming surface 18 and a second camming surface 19 are provided on that portion of the working arm 31 which, in the locked or fire-arm retaining position of the latch 16 protrudes through the aperture 26 into the trigger guard region 20.

. . .

In Figure 2, reference numeral 50 generally indicates a fire-arm. The fire-arm 50 has a muzzle 58 and a trigger guard 52 having a leading or outer edge 54 and a trailing or inner edge 56.

. . .

In use, when the fire-arm 50 is inserted into the holster 10, the camming surface 18 of the latch 16 is engaged by the leading edge 54 of the trigger guard 52, cam-follower fashion, urging the camming surface 18 outwardly and causing the latch 16 to pivot in the direction of arrow 51 against the bias of the spring 28, to permit the passage of the trigger guard 52 past the working arm 31 into the trigger guard retaining region 20. When the trigger guard 52 has passed the camming surface 18 into the trigger guard retaining region 20, the latch 16 snaps

back under the influence of the spring 28 into a locked position behind the trailing edge 56 of the trigger guard 52, thereby retaining the fire-arm 50 within the holster 10.

Attempted withdrawal of the fire-arm from the holster cavity 14 without releasing the latch 16, i.e. displacing the latch towards its displaced position, results in the trailing edge of the trigger guard bearing against the second camming surface 19 thereby exerting a moment around the pivot axis 26 of the latch 16 which serves to urge the latch 16 into a more firmly locked position. This action is assisted by the inclination of the second camming surface 19.

In order to remove the fire-arm 50 from the holster, the latch 16 is manually displaced, against the bias of the spring 28, in the direction of arrow 51 to its released position (shown in broken lines in Figure 2) in which the latch is clear of the trigger guard. This displacement past the trigger guard is assisted by the radiussed portion 21 of the camming surface 19. In this position, the working arm 31 is clear of the trigger guard 52 permitting the fire-arm 50 to be drawn from the holster 10.' (Emphasis provided.)

[10] More simply put, the specification describes that on insertion of a firearm into the holster its trigger guard, when coming into contact with the spring mounted latch on its camming surface 18, forces it out of the way towards the body of the holster. As the weapon is inserted deeper into the holster and the trigger guard passes its tip, the latch springs back behind the trigger guard, effectively locking the firearm into the holster. In order for the firearm to be withdrawn from this locked position, the latch has to be manually displaced. But should an attempt be made to withdraw the firearm without doing so, due to its angle of inclination and the curved shape of its camming surface 19, on coming into contact with the inside edge of the trigger guard, the latch will be

forced deeper into the cavity behind the trigger guard and lock the weapon more firmly into place (this being the function emphasised in the specification as quoted above).

[11] That then is the description of the invention as set out in the specification of the patent. I turn now to deal with the claims 'pegged out' by the patentee.[4] There are ten claims set out in the patent, only two of which – claims one and seven – were relied upon by the respondents. In turn, claim seven is in itself, wholly dependent upon claim one. Consequently, both sides are agreed that if claim one of the patent has not been infringed, neither has claim seven.

[12] The parties are also agreed that the integers of the first claim of the patent are the following:

'(a) A lockable holster which includes

(b) a moulded holster body within which part of a fire-arm having a trigger guard is receivable,

(c) the holster body having walls defining a cavity for receiving at least part of the fire-arm including at least a portion of the trigger guard and

(d) an aperture in a wall of the holster body at a location corresponding to a trigger guard retaining region of the holster body,

(e) first locking means on the holster body

[4] I plagiarise the phraseology used in *Marconi's Wireless* quoted in para 3 above.

(f) which has a releasable biased locking member which is displaceable between a locked position towards which it is biased and a released position, whereby the fire-arm is releasably locked in position in the holster body,

(g) in which the locking member is in the form of a first order lever which is pivotally mounted on an outer surface of the holster body

(h) with a finger engaging effort arm and a working arm which protrudes through the aperture and into the cavity when the locking member is in its locked position

(i) and whereon angularly spaced apart first and second camming surfaces are provided,

(j) wherein when the locking member is in its locked position the first camming surface is engageable, cam-follower fashion, by the trigger guard of the fire-arm upon insertion of the fire-arm into the holster

(k) to displace the locking member away from its locked position to permit the trigger guard to pass the locking member and to permit the locking member to return to its locked position once the trigger guard has passed and

(l) the second camming surface is engageable by the trigger guard to inhibit unauthorised withdrawal of the fire-arm from the holster, and

(m) the holster body being configured such that when the fire-arm is locked in position in the holster body a slide of the fire-arm is accessible and displaceable to permit a round of ammunition to be chambered.'

[13] The crucial question is whether the appellants' swivel holster infringes this claim. In order to determine whether an alleged infringement of the patent has been proved in a case such as this, it is necessary to compare the allegedly offending article (the swivel holster) against the words of the claims set out in

the patent.[5] In this inquiry, the language of the claim is to be purposively construed in order to establish what were intended to be the essential elements of the claim, regard being had to the context of the invention as a whole.[6]

[14] The allegedly offending holster is illustrated below to facilitate the comparison that has to be made between it and a device envisaged by the language of the patent (the diagram was attached to the heads of argument of respondents' counsel):

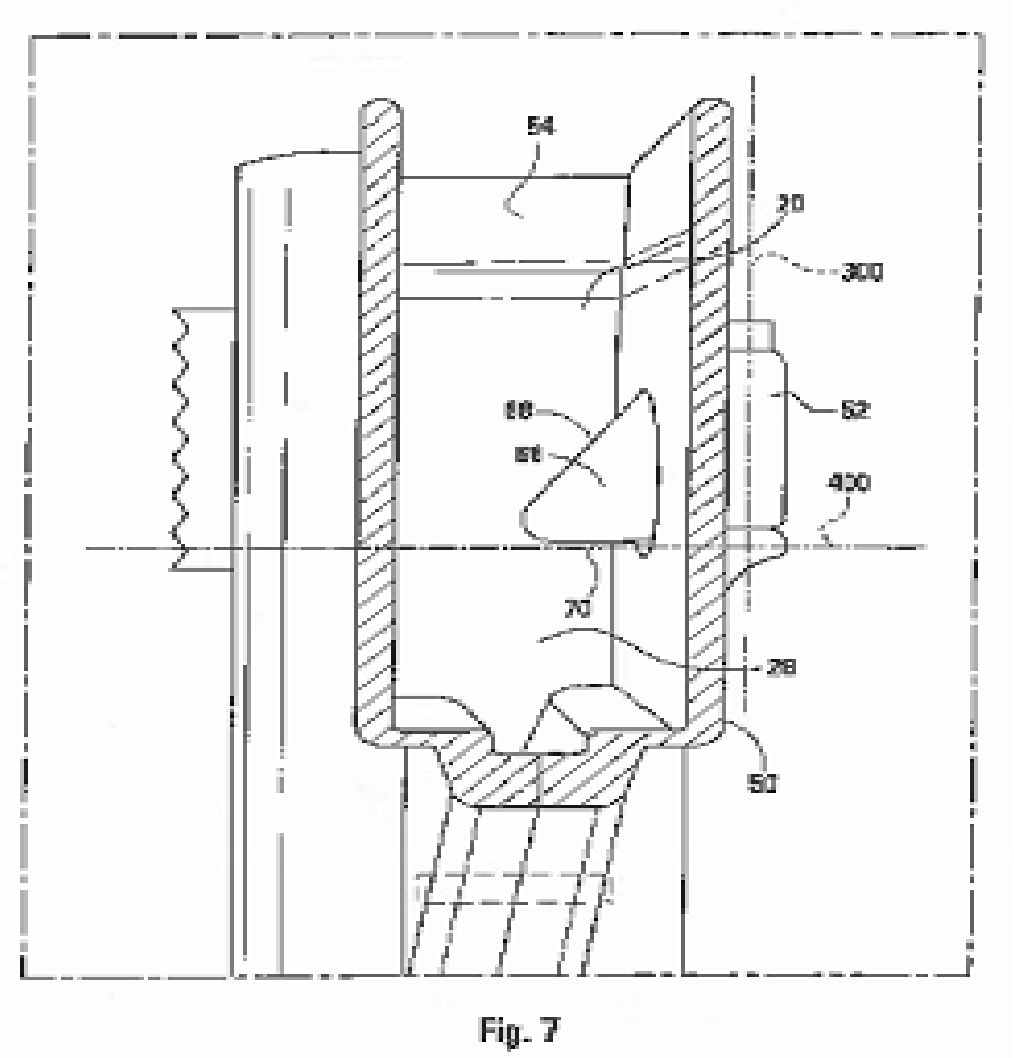

Fig. 7

[5] *Aktiebolaget Hässle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 7 and the authority there cited.
[6] *Aktiebolaget* paras 7-9.

[15] It is apparent from this that what is described as the 'locking lug 66', at the end of the locking member 52, operates as a locking mechanism in a manner similar to that of the spring-mounted latch (or 'locking member' as defined in the claim) in that, upon a firearm being inserted into the holster the trigger guard, engaging with the angled surface 68 of the locking lug, will force it out of its path against the spring loaded arm towards the body of the holster until, after the trigger guard has passed beyond the nose of the lug, the latter snaps back into place to secure the firearm in a locked position within the holster. And, as in the case of the patent, the lug 66 has to be manually disengaged from that locked position to allow the weapon to thereafter be withdrawn from the holster.

[16] The parties are therefore agreed that the surface 68 is a 'camming surface' as envisaged by the patent and that the appellants' swivel holster satisfies the integers [j] and [k] of the first claim. The primary dispute between them, however, is whether it also contains integer [l], namely, a second camming surface 'engageable by the trigger guard to inhibit unauthorised withdrawal of the firearm from the holster'.

[17] On this issue, the court a quo was persuaded that the nose of the locking lug on the swivel holster, which is shaped as it is so as to allow the trigger

guard to pass easily over it and move the locking lug out of the way when a firearm is either inserted into or withdrawn from the holster, constituted part of the surface 70. It found accordingly that surface 70 was to be construed as a second camming surface as envisaged by integer [l].

[18] In my view, whilst it can be accepted that the radiused nose is indeed designed to facilitate the trigger guard passing the locking lug once the locking member is manually released, the court a quo erred in concluding both that it is part of surface 70 or that it satisfies integer [l].

[19] The patent teaches that when the locking member is in its locked position with a firearm in the holster, the second camming surface is to be 'engageable by the trigger guard to inhibit unauthorised withdrawal of the firearm'. This is achieved by the curved shape of the second camming surface and the acute angle at which it is inclined in relation to the trigger guard, the effect of which in the case of an attempted withdrawal without releasing the locking member is to urge the locking member into an even more firmly locked position.

[20] In this regard it differs from the appellants' swivel holster. In the case of the latter, when in the locked position, the radiused nose of the locking lug is orthogonal (at a right angle) to the trigger guard and extends well into the cavity of the holster. As a result, and due to its radiused form, the nose of the lug will

not engage the trigger guard should there be an attempt to remove the firearm (it will only do so once the locking mechanism is released and the firearm partially withdrawn.) Instead such an attempt would result in the flat bottom surface 70 of the lug resisting the movement of the trigger guard rather than converting it into a movement displacing the locking lug away from the trigger guard. Thus the flat surface of the locking lug, when in its locked position, cannot be construed as being a camming surface. This alone distinguishes the appellants' holster from a holster envisaged by integer [l]. Moreover, I can see no reason to regard the radiused nose of the locking lug, designed to facilitate the lug's easy movement over the trigger guard when a firearm is being either inserted or withdrawn, as part of the flat surface designed to prevent withdrawal when the holster is in a locked position.

[21] Counsel for the respondents sought to meet this by arguing that as the flat surface 70 of the locking lug was the site upon which motion was imparted by the trigger guard when the locking member was released, it performed a camming function during that operation and was, consequently, a camming surface in that context. He argued further that integer [l] did not require the second camming surface to perform a camming function at the time of an attempted unauthorised withdrawal, and that as long as surface 70 was a camming surface at some stage it was to be regarded as the second camming surface envisaged by integer [l].

[22] In support of the argument that integer [l] did not require the second camming surface to perform a camming function at the time of an attempted unauthorised withdrawal, counsel emphasised the teaching in integer [j] that the first camming surface is to be 'engageable, cam-follower fashion, by the trigger guard of the firearm' on its insertion whereas no mention is made in integer [l] of the second camming surface having to be engaged in a similar fashion on its withdrawal. Thus, so the argument went, if the flat surface of the locking lug performs a camming function in another context it should be regarded as a camming surface at all times envisaged by the patent. And as it performs a camming function once the locking mechanism is released, it falls within what is to be regarded as a second camming surface for purposes of integer [l].

[23] As was pointed out by this court in *Aktiebolaget Hässle*[7] the language of the claim must be construed purposively in order to extract from it the essence for the essential elements of the invention, 'rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge'.[8] And as was made clear in *Ausplow v Northpark Trading*[9] it is necessary when interpreting a patent to construct rather than deconstruct a text of the claim to arrive at an

[7] *Aktiebolaget Hässle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para 8.
[8] *Catnic Components Ltd and another v Hill & Smith Ltd* [1982] RPC 183 (HL) at 242 cited in *Aktiebolaget Hässle* para 8.
[9] *Ausplow (Pty) Ltd v Northpark Tradng 3 (Pty) Ltd & others* 2011 BIP 12 (SCA); [2011] 4 All SA 221 (SCA)..

interpretation which is technically sensible. A claim is not to be considered in isolation but, as was held by this court in *Vari-Deals,*[10] recourse should be had to the full context and background including the specification to decide what a person skilled in their art would have understood the claim to mean.[11]

[24] The essence of the patented invention is that an unauthorised withdrawal of a firearm results in it being secured more firmly in the holster. This purpose is achieved by way of the camming effect caused by the trigger guard of the firearm engaging the second camming surface. Bearing that in mind, and applying a purposive construction to the language used in integer [l], having regard to the context in which that integer appears in the patent – including the vital function of the second camming surface 19 as illustrated in figure 2 of the patent to force the latch deeper into the cavity behind the trigger guard to lock the weapon more firmly into place should there be an attempted unauthorised withdrawal – the language used, properly construed, conveys clearly that integer [l] requires the second camming surface to function in that way in order to inhibit an unauthorised withdrawal. The respondents' argument to the contrary effect cannot be accepted. It would render superfluous the use of the phrase 'second camming surface' in the integer.

[10] *Vari-Deals 101 (Pty) Ltd t/a Vari-Deals v Sunsmart Products (Pty) Ltd* 2008 (3) SA 447 (SCA) para 11.
[11] See further: *Kirin-Amgen Inc & others v Hoechst Marion Roussel& others* [2005] 1 All ER 667 (HL) para 44 and *Monsanto Co v MDB Animal Health (Pty) Ltd (formerly MD Biologies CC)* 2001 (2) SA 887 (SCA) para 8.

[25] One final issue needs to be discussed. As a last ditch stand, it was argued on behalf of the respondents that if sufficient force was applied to the appellants' swivel holster in an attempted unauthorised withdrawal of a firearm without releasing the locking mechanism, the holster could be sufficiently deformed to the extent that its body could be twisted sufficiently so as to be no longer orthogonal to the locking lug. In that event, so the argument went, the lug could no longer be at a right angle when engaged by the trigger guard and could act as a second camming surface. Indeed, and surprisingly, much of the evidence of the trial related to the question of whether in this instance the appellants' swivel holster's locking mechanism was capable of in fact performing the securing function of the patent ie urging the locking lug into a more firmly locked position when an attempt was made to withdraw the weapon without first releasing the locking mechanism, similar to the way the patented holster operates.

[26] Whilst the ingenuity of counsel never ceases to amaze, this is a red herring. There is no suggestion that the appellants' swivel holster is designed to deform in any way, let alone in a manner that will cause the locking lug to be forced into a more firmly locked position during an unauthorised attempt to withdraw a firearm. The expert called on behalf of the appellants, Mr Kiesling, testified that the flat surface of the locking lug would remain orthogonal to the direction of the gun barrel and the engaging surface of the trigger guard, even if

there was a deformity of the holster. It seems to me to be unnecessary to decide whether his view or that of the respondents' expert, Mr Resca, who opined that a withdrawal could cause a degree of rotation of the locking lug due to a deformation around the pivot axis of the pivot point thereby causing the locking lug to act as a cam, needs be accepted. If, through the application of an extraordinary force, a holster deforms causing a part not designed as a camming surface to impart motion upon another part due to the deformation, this seems to me to be irrelevant in the process of interpreting the patent to decide whether that part should be viewed as a camming surface. The issue is whether the holster as designed infringes the patent, not how the individual parts of the holster might operate should it be deformed through extraordinary force.

[27] Consequently, in my view, surface 70 of the locking lug 66 of the appellants' swivel holster is not to be construed as a second camming surface as envisaged by integer [l] of the first claim in the respondents' patent. It is designed to block motion and not to convert motion from the trigger guard into motion in another direction. That being the case, the respondents failed to show that the appellants' holster included integer [l] of the first claim in the patent.

[28] As already mentioned, the claims in a patent define the exclusive right of the monopoly that rests in the patentee. Infringement of a patent thus involves taking of the invention as set out in the claims. The fact that there are clearly in

this case considerable similarities between the apparatus envisaged by the patent and the appellants' swivel holster is insufficient to establish an infringement. In order for that to be the case::

'The patentee must show that the defendant has taken each and every one of the essential integers of the patentee's claim. Therefore if, on its true construction, the claim in a patent claims a particular combination of integers and the alleged infringer of it omits one of them he will escape liability.'[12]

Thus in *Rodi & Wienenberger AG v Henry Showell Ltd* 1966 RPC 441 (CA) at 467, a passage cited with approval by this court, inter alia, in *Raubenheimer & another v Kreepy Krauly (Pty) Ltd & another* 1987 (2) SA 650 (A) at 656I-657B, it was stressed that if the language the patentee has used:

'. . . specifies a number of elements or integers acting in a particular relation to one another as constituting the essential features of his claim, the monopoly which it obtains is for that specified combination of elements or integers so acting in relation to one another ─ and for nothing else. There is no infringement of his monopoly unless each and every one of such elements is present in the process or article which is alleged to infringe his patent and such elements also act in relation to one another in the manner claimed.'

[29] As integer [l] of the first claim is not present in the appellants' holster, the court a quo therefor erred in concluding that the patent had been infringed. Consequently, the respondents' claims relating to the alleged infringement – set out in para (c) of the order a quo – must be set aside. However, paras (a) and (b)

[12] *Populin v H B Nominees* (1982) 41 ALR 471 quoted by Harms op cit at 263.

of that order which relate to the counter claim and the validity of the patent were not challenged on appeal and must stand.

[30] In regard to costs, the appellants have been successful and are entitled to their costs of appeal. In respect of the costs in the court below, each side has ultimately enjoyed a measure of success – the appellants have successfully resisted the relief the respondents sought against them while the latter successfully defended the validity of their patent. As suggested by counsel for the appellants, an order that the parties should bear their own costs is appropriate in these circumstances.

[31] It is therefore ordered as follows:

1 The appeal succeeds, with costs.

2 Para (c) of the order of the court a quo is set aside and is substituted with the following:

'(c)(i) The plaintiffs' claims flowing from an alleged infringement of South African Patent ZA 98/6778 are dismissed.

(ii) The parties are to bear their own costs.'

_____

L E Leach

Judge of Appeal

Appearances:

For the Appellant:	A J Bester SC
Instructed by:	Spoor & Fisher, Pretoria
	Phatshoane Attorneys, Bloemfontein
For the Respondent:	G D Marriott
Instructed by:	Adams & Adams, Pretoria
	Honey Attorneys, Bloemfontein