

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA (COPYRIGHT TRIBUNAL)

Case Number: 00001/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

In the matter between:

ALLCOPY PUBLISHERS (PTY) LTD

First Applicant

JURGENS JOHANNES BASSON

Second Applicant

JACO ODENDAAL

Third Applicant

and

MARK PHILLIPS

Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 26 May 2025.*

Summary: Application for leave to appeal. Where the relief sought will have no practical effect or results, leave to appeal ought not to be granted since such an appeal will be dismissed by a Court of appeal. The applicant bears no prospects of success on the alleged application of the doctrine of self-help. There was no dispute that the applicant refused to grant the publisher and other authors a copyright licence. This Tribunal has found that the refusal was unreasonable and exercised its wide powers in terms of section 33(5) of the Copyright Act, 1978. There are no prospects that a Court of appeal will

interfere with the exercise of wide powers to grant the compulsory licence with retrospective effect. An appeal does not lie against the reasons but the order. The applicability or non-applicability of section 9A of the Act relates to reasons as opposed to the impugned order. Held: (1) The application for leave to appeal is dismissed with costs.

JUDGMENT-LEAVE TO APPEAL

MOSHOANA, J

Introduction

[1] This is an opposed application for leave to appeal. The application is launched in terms of section 17(1) of the Superior Court Act (SCA)¹. The legislated test to grant leave to appeal is by now trite and requires no repetition at every turn. This Tribunal has issued an order granting the respondent in the present application, a compulsory licence, which is to expire at the end of December 2025. The applicant is disenchanted by the order and now impugns the order on principally two grounds, namely; (a) this Tribunal ought to have found that the applicant was a victim of self-help, the respondent having taken the law into its hands by using the copyright without being licenced; (b) the Tribunal was not empowered to order the granting of the licence with retrospective effect. Allied to these two grounds emerged the issue whether the relief sought will have practical effect, owing to the common cause fact that by the time the appeal is heard, the impugned order would have expired.

[2] The applicant contends that should its relief be upheld by the appeal Court (that the application for the grant of compulsory copyright licence be refused), such an order shall pave way for a potential damages claim that shall arise from the usage of the copyright without a licence. On the other hand, the respondent contends that

¹ Act 10 of 2013 as amended.

no practical effect shall be achieved since the Tribunal has effectively ordered a reasonable order for the compulsory licence with royalties being paid over the period of usage.

[3] Regard being had to the above, this judgment shall confine itself to the issues highlighted above. For avoidance of doubt, those are, (a) applicability of the self-help doctrine); (b) the retrospectivity of the compulsory licence; (c) the practical effect of the relief sought. Given the view this Tribunal takes at the end, it shall be more convenient to address the practical effect issue first.

The practical effect of the appeal.

[4] As indicated above, the lifespan of the order made by this Tribunal is limited to end of December 2025. Both parties are in agreement that, even if leave to appeal is granted by this Tribunal, that is, if this Tribunal is of the opinion that the legislated threshold has been met, by the time the appeal is heard, the relief sought will have no practical effect. What will impel a Court of appeal to dismiss the appeal will not be that it lacks merits, but that the relief sought will have practical effect. Undoubtedly, the relief that the applicant shall seek on appeal is one of refusal of a compulsory licence. Indisputably, by the time such a relief sought is granted, the time-period of the compulsory licence would have expired.

[5] Section 16(2)(a)(i) of the SCA provides that when at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. This Tribunal does accept that the discretion to dismiss an appeal lies with the Court hearing the appeal. However, at the stage of application for leave to appeal, this Tribunal is entitled to form an opinion as to whether the issues are of such a nature that the decision sought will have no practical effect or results. Differently put, it is against the doctrine of effectiveness for a Tribunal to grant leave in order for the Court of appeal simply to exercise its discretion to dismiss.

[6] The section concerns itself with the decision (relief) sought as opposed to a decision a party may sought. The practicality or results relate to the decision sought.

This Tribunal takes a view that the decision sought (refusal of the grant of compulsory licence) will provide the applicant with any practical effect or result, in the circumstances where the impugned order would have vacated. The applicant contends that the effect of the decision sought is that the claim for damages would become available and such is a practical result since the applicant has an option to claim damages or accept reasonable royalties. For reasons to be outlined below, this Tribunal disagrees with this contention.

[7] Damages are awarded to a claimant if there is a legal basis to do so, for instance, a delict having been committed or a contract having been breached. In this particular instance, section 23(1) of the Copyright Act provides that a copyright shall be infringed by any person, not being an owner, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has exclusive right to do or to authorise.

[8] Accordingly, where any person, who is without the licence does any act which the owner has exclusive right to do or authorise, that person is said to have infringed a copyright. That which the copyright vests exclusive right to do and authorise, is specified in section 6(a)-(g) of the Copyright Act. In order to succeed in an infringement claim, a copyright owner need to allege and prove commission of any of the acts specified in the section. It is not only a without licence that is determinative of an infringement. A party is still required to allege and prove the commission of the acts specified. Section 23(2)(a)-(d) of the Copyright Act creates a legal basis for infringement. As at the time of hearing this application, infringement proceedings were stayed, pending the outcome of the proceedings before this Tribunal. Now that the proceedings before this Tribunal has been finalised, the applicant may, if so advised, proceed with his infringement proceedings.

[9] The infringement proceedings did not serve before this Tribunal and those proceedings could not serve. However section 24(1) of the Copyright Act, avails to the copyright owner all reliefs by way of damages, interdict, delivery of infringing copies or plates used. The damages claim is already availed to the applicant. As such, the question whether the applicant is entitled to damages, may still be determined by a Court in the pending infringement proceedings. Certainly, damages

claim have not as yet been determined by a Court. This Tribunal had no powers to determine whether the applicant is entitled to damages and or in *lieu* thereof reasonable royalty be awarded.

[10] *Apropos* the appeal sought, the Court of appeal shall not be empowered to concern itself with the practical effect or results of an award of damages, in the circumstances where the questions whether damages or reasonable royalties in *lieu* may or may not be awarded by the Court seized with the pending infringement action. As pointed out earlier, it is the decision sought by an appellant that must have practical effect or results. Dismissal of the request for a compulsory licence within the contemplation of section 33(3) of the Copyright Act, will not *per se* pave way for an award of damages. It is indeed so that usage of a copyright without a licence may give rise to an action contemplated in section 24. However, it cannot guarantee an award for damages. Accordingly, to my mind, no practical effect or results may arise should the appeal be decided by a Court of appeal.

[11] The conclusion to reach is that it is inappropriate to trouble a Court of appeal to decide issues which will have no practical effect or results to the applicant. For this reason alone, the application for leave to appeal must fail.

The doctrine of self-help

[12] With considerable regret, it is apparent that the applicant and his legal team has a different understanding of the doctrine of self-help. Howbeit, a difference of understanding of a settled principle of law is not a compelling reason for an appeal to be heard. In his understanding, what clearly appears to be an infringement in terms of section 23(1) of the Copyright Act, constitutes self-help. In *Public Servants obo Ubogu v Head of Department of Health, Gauteng and others (Ubogo)*², the Constitutional Court explained the doctrine thus:

“[66] ... Self-help, as this Court held in *Chief Lesapo*, “is inimical to a society in which the rule of law prevails, as envisaged in section 1(c) of our

² [2017] ZACC 45

Constitution. Although there may be circumstances when good reasons exists – justifying self-help³...

[67] By aiding self-help, the impugned provisions allows the state to undermine judicial process – which requires disputes be resolved by law as envisaged in section 34 of the Constitution...”

[13] In *Ubogo*, in considering section 38(2)(b)(i) of the Public Services Act, 1994 (PSA), the Labour Court had found that the section, by allowing a state to deduct from a salary of a public servant, who was wrongly paid, without resorting to a judicial process amounted to self-help. That finding received an imprimatur of the Constitutional Court. In comparison to the present instance, the respondents did not take the law into their own hands. On the version of the applicant, they infringed the copyright. In other words, if their action is in *contra flagrante delicto* such would perhaps have allowed the applicant to dispossess them immediately and such would have been a justifiable self-help. In the circumstances, no Court would come to a different conclusion than the one reached by the Tribunal. Even if the hearing of the appeal would yield practical effect or results, the applicant lacks prospects of success on appeal on this ground. For that reason, application for leave to appeal falls to be dismissed.

Retrospectivity of the granting of compulsory licence

[14] Section 33(5) of the Act specifically provides that the applicant is entitled to a licence on such terms and conditions. Those terms and conditions are to be determined through an order to be made by the Tribunal. As prescribed by subsection (5)(b) the determination ought to be reasonable in the circumstances. Generally, terms and conditions refers to rules, guidelines and obligations outlined in a document, for an example a contract. Section 33(5) contains wide powers that a Tribunal, guided by reasonableness, may exercise when ordering the granting of a licence. With such wide powers, retrospectivity is part of the terms and conditions

³ For instance, when there is an immediate dispossession of a thief of stolen goods when he is caught where self-help concerns *contra flagrante delicto* (in the act of committing an offence)

that are reasonable, in the circumstances where the refusal to grant a licence was made by the copyright owner unreasonably.

[15] The Supreme Court of Appeal in *SAMRO* judgment has already demonstrated that a retrospective order may be made by a Tribunal. Accordingly, another Court would not reach a different conclusion than the one reached by this Tribunal. Such prospects are not only slim but they are non-existent.

Conclusions

[16] Much was made by the applicant that the Tribunal relied on section 9A with regard to royalties, when the section only applies to sound recordings as opposed to literary work. It is by now trite law that an appeal lies against the order and not reasons. The Tribunal referenced section 9A when it rejected a submission that payment of royalties by the respondent amounted to self-help or an act of unlawfulness. There is no reasonable prospect that another Court would interfere with an order made by this Tribunal simply because, when reasoning its order in the manner outlined above referenced a wrong section of the Act. Context is everything. The section was referenced in the context of rejecting an invalid legal submission on self-help.

[17] On account of all the above reasons, the following order is made:

Order

1. The application for leave to appeal is dismissed.
2. The applicant for leave to appeal is directed to pay the costs of this application on a party and party scale, which costs include the costs of employment of two counsel to be taxed or settled on scale C.

JUDGE GN MOSHOANA
COMMISSIONER OF PATENTS
HIGH COURT GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Respondents:

Instructed by:

Mr A Sholto-Douglas SC and Ms L Kilmartin SC

Von Seidels, Cape Town

For the Applicant:

Instructed by:

Mr R Michau SC and Mr C W Pretorius

Hirschowitz Flionis Attorneys, Johannesburg

Date of the hearing:

23 May 2025

Date of judgment:

26 May 2025