

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2017/40521

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

16/2/2018

DATE

MOKOSE SNI

16/2/18

In the matter between:

ELDERIE CLAASEN

First Applicant

ASP SCHOOL PROJECTS (PTY) LIMITED

Second Applicant

and

TEC NOVATION SOLUTION (PTY) LIMITED

First Respondent

(Reg No 2015/080758/07)

GARY ANTHONY ZWANEOEL

Second Respondent

JUDGMENT

MOKOSE AJ

[1] An application was made by the applicant for an order interdicting and restraining the respondent from *“using”* what the applicant claims to be *“the first applicant’s proprietary education material comprising school project material in encyclopaedic format, exam papers, practice exam papers and study guides in PDF and/or other format.”* It is further claimed that the copyright is inclusive of *“textbook type educational material and study notes”*.

[2] It is alleged that the respondents proceeded, after a mutual termination of an agreement, to host and administer a business website on behalf of the applicants, to keep the website active for third parties to access the copyrighted material, thereby infringing the applicants’ protectable rights.

[3] The respondents have taken the view that the applicants had not made out a case that required the filing of an answering affidavit. However, a notice in terms of Rule 6(5)(d)(iii) was filed by the respondents. Rule 6(5)(d)(iii) of the Uniform Rules of Court provides as follows:

“(d) Any person opposing the grant of an order sought in the notice of motion must –

(iii) if he or she intends to raise a question of law only, he or she must deliver notice of his or her intention to do so, within the time stated in the preceding subparagraph, setting forth such question.”

[4] The respondents raised the following questions of law:

Whether the allegations made by or on behalf of the applicants are sufficient to underlie a claim for copyright infringement, as provided for in terms of the Copyright Act 1978 and the relevant authorities, specifically:

1. Whether the applicants have shown that copyright subsists in the works to which the application relates;
2. Whether the applicants have shown that the first applicant is the owner of such copyright as is relied upon;
3. Whether the applicants have shown that the conduct of each of the respondents relied upon constitute an infringement of such copyright as is claimed to exist.

SUBSISTENCE AND OWNERSHIP OF COPYRIGHT

[5] Copyright law in South Africa is embodied in the Copyright Act 98 of 1978 ("the Act"). It governs the right to control the use of and distribution of artistic and creative works. Section 41(1) of the Act provides that no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.

[6] Copyright is a very technical subject with specific requirements. Harms JA in the matter of *Memory Institute SA (CC) t/a Memory Institute v Hansen* 2004 (2) SA 630 (SCA) said:

"Copyright, it has been said, is a technical subject and the claimant is obliged to provide evidence to cover the technical points necessary to establish the claim to copyright. Technical or not, any claimant must prove the facto probanda, whether prima facie for an interim order or on a balance of probabilities."

[7] For a court to grant a final interdict against the respondents, the court must find on the evidence presented that:

- (i) the applicants have established a clear copyright in respect of the works relied upon;
- (ii) the respondents have infringed upon that right; and

(iii) the absence of a similar protection by any other remedy.

**Tele Atlas Africa (Pty) Limited and another v Afrigis (Pty) Limited [2011] ZAGPPHC
162 dated 13 May 2011.**

[8] Section 2 of the Act provides that certain works are eligible for copyright protection if they are original works. These include literary works, musical works, artistic works and cinematograph films.

[9] The documents in the matter on hand may best be described as a literary work as defined in the Act. It includes, irrespective of literary quality and in whatever mode or form expressed –

- (a) novels, stories and poetical works;
- (b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
- (c) textbooks, treatises, histories, biographies, essays and articles;
- (d) encyclopaedias and dictionaries;
- (e) letters, reports and memoranda;
- (f) lectures, speeches and sermons; and
- (g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, but shall not include a computer program.

[10] The first applicant, in her founding affidavit, described the works as follows:

- (i) *“proprietary education material”*;

- (ii) *"a large volume of educational material being available to subscribers on our websites totalling more than 9 000 individual files";*
- (iii) *"Proprietary exam papers";*
- (iv) *"Personally and originally devised, sourced, developed and compiled school educational training facts, content and study material (complete with visual images, sketches, graphs, illustrations and photos); school project encyclopaedic information as well as educational exercised in the form of proforma or practice exam papers to aid learners in test and examination preparation, conformant with school education curricula.....[including] text book type educational material and study notes";*
- (v) *"9 000 individual files".*

[11] The respondents were of the view that the applicants had failed to clarify what works the applicants claim copyright in. No files or examples of such files were attached to the founding affidavit in support thereof. Furthermore, there is no indication that the materials in the form of *"9000 individual files"* were original and qualify as literary works as described in the Act.

[12] The dictum of Southwood J in the matter of **Tele Atlas Africa (Pty) Limited and another v Afrigis (Pty) Limited (supra)** was brought to the court's attention. Southwood J said:

"[12] In order to establish a clear right, the applicants first had to identify the maps or digital maps which are alleged to be the subject of their copyright..."

[16] *The applicants' difficulties start with the identification of the subject of copyright. The second applicant's main deponent Mr Grobben alleges that it is the owner of a copyright in a number of printed maps and map data relating to sub-Saharan Africa which "qualify as literary works (consisting, at the very least, of a compilation of an enormous amount of information) and artistic works in terms of the Act.*

[13] The Applicants, on the other hand, are of the view that evidence to prove copyright in a work is adduced by way of allegation in the form of an affidavit and the mere production of such affidavit is prima facie proof of the relevant facts. They referred to Section 26 (12) (a) which provides as follows:

“(a) In any proceedings by virtue of this Chapter relating to the infringement of the copyright in a work, evidence to prove –

(i) The subsistence of the copyright in that work;

(ii) The title of any person in respect of such copyright whether by way of ownership or licence,

may be adduced by way of affidavit and the mere production of such affidavit in such proceedings shall be prima facie proof of the relevant facts.

(b) The court before which an affidavit referred to in paragraph (a) is produced, may in its discretion order the person who made the affidavit be subpoenaed to give oral evidence in the proceedings in question, or may cause written interrogatories to be submitted to such person for reply, and any reply purporting to be a reply from such person, shall likewise be admissible in evidence in such proceedings.”

[14] In application proceedings the affidavits take the place of not only of the pleadings but also of the essential evidence which would be led at a trial.

Absa Bank v Kernsig 17 (Pty) Limited 2011 (4) SA 492 (SCA) at 499A-D

[15] Copyright is conferred by Section 3 of the Act upon a work of which the author is at the time the work is made, “a qualified person.” Furthermore, Section 2 of the Act requires the work to be “original” in order for it to be eligible for copyright protection. The court is, on the documents before it, unable to ascertain the nature of the documents seeking protection specifically whether the author of the works is “a qualified person” and whether the work is “original”. The applicants have failed to

identify in respect of each work the type of work it is alleged to be, when the work was authored and how it was authored.

- [16] Further in their submission, the applicants claimed that the subsistence of the copyright had been "*expressly acknowledged*" in an agreement between the Second Applicant and the first Respondent. No evidence of an oral agreement nor a written agreement between the parties formed part of the papers. The agreement the applicants sought to place their reliance on is an agreement between the second applicant who is not the alleged owner of the copyright and the first respondent.
- [17] The totality of the evidence provided in the affidavits fails to support a claim to copyright to discharge the onus showing the subsistence and ownership of the copyright as claimed.

INFRINGEMENT OF COPYRIGHT

- [18] As stated above that the works are literary works, Section 6 and 7 of the Act set out the restricted acts in respect of literary works. They are acts which are reserved for the owner of the copyright in a particular work, or someone who has been licenced to perform a particular act in respect of the copyright work. The relevant acts include reproducing work in any manner or form, publishing the work if it was hitherto unpublished, performing the work in public and even making an adaptation of the work.
- [19] Section 23 of the Act defines which acts will amount to an infringement of copyright. It provides as follows:

"23 Infringement

- (1) The copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any*

other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorise.

(2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsist in a work-

(a) import an article into the Republic for a purpose other than for his private and domestic use;

(b) sells, lets, or by way of trade offers or exposes for sale or hire in the republic any article;

(c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; or

(d) acquires an article relating to a computer program in the Republic,

if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic."

[20] In terms of the Notice of Motion, the conduct the applicant seek to prevent has been described as, *inter alia*, using any of the First Applicant's proprietary education material.....for the purpose of utilising such for gain or otherwise all of displaying same on the Studyhall website and/or platform, on any other website, and/or platform or at all, restraining the respondents from uploading, imparting, donating or disposing in whatever manner, the applicants' proprietary education material and preventing the respondents from representing in the course of trade or otherwise, that it is associated with or has obtained the legal right and exclusive use of the first applicant's proprietary education material.

[21] The acts complained of and sought to be prevented as contained in the Notice of Motion do not fall within the acts as described in the Act. Corbett JA in the matter of **Gallago Publishers Limited and another v Erasmus 1989 (1) SA 276 (A) at 280 B**

– D said the following in order to prove copyright infringement by reproduction:

- “(i) *that there is sufficient objective similarity between the alleged infringed work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical work, but as a reproduction or copy of the latter; and*
- (ii) *That the original work was the source from which the alleged infringing work was derived i.e. that there is a course or connection between the original work and the alleged infringing work, the question to be asked being: Has the Defendant copied the Plaintiff's work or is it an independent work of its own?”*

[22] Millet J In the matter of **Spectravest v Aperknit Limited [1998] FSR 161 at 170** made clear the importance of the plaintiff identifying those parts of work which he alleged to have been copied by the defendant.

[23] The applicants have failed to identify the works which they alleged have been copied by the respondents. They have merely been described as “*proprietary education material*”, “*a large volume of educational material being available to subscribers on our websites totalling more than 9 000 individual files*”, “*Proprietary exam papers*” and “*9 000 individual files*” inter alia.

[24] The applicants have failed to furnish copies of the copyright works they have relied on. As such, it cannot be established whether that which the applicants claim to have been copied constitutes a substantial part of the works which qualifies for

copyright protection. There is no manner in which the court is able to determine the originality of the works nor is it able to compare the alleged original work and that which is alleged to be infringing.

[25] The applicants have, in their supplementary heads of argument, asked that the court considers granting an interim interdict. No such relief has been sought in the Notice of Motion. No prima facie right for the purposes of such relief have been submitted. Furthermore, the applicants have failed to bring to the court's attention the irreparable harm they will suffer in the event of the relief not being granted.

[26] As such the following order is granted:
The application is dismissed with costs.



MOKOSE AJ

Acting Judge of the High
Court of South Africa
Gauteng Division,
Pretoria

For the Applicants:

Adv F Slabbert instructed by
Struwig Attorneys

For the Defendant:

Adv I Joubert instructed by
Waldick Jansen Van Rensburg Inc

Date of Hearing: 7 February 2018

Date of judgement: 16 February 2018