

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20736/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<i>Keightley</i>	<i>15/10/2021</i>
SIGNATURE	DATE

In the matter between:

FORENSIC DATA ANALYSTS (PTY) LTD

First Applicant

INVESTIGATIVE SOFTWARE SOLUTIONS

Second Applicant

And

**NATIONAL POLICE COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICE**

First Respondent

**STATE SECURITY INFORMATION
TECHNOLOGY AGENCY SOC LTD**

Second Respondent

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. The present application started life as an urgent matter. It was instituted on 28 April 2021. The applicants, Forensic Data Analysts (Pty) Ltd (FDA) and Investigative Software Solutions (Pty) Ltd (ISS), sought wide-ranging relief. The relief included prayers for finding the first respondent, the National Commissioner of the South African Police Service (the SAPS), in contempt of a number of orders granted by this Court; punitive relief arising from the alleged contempt; delivery up by the SAPS of certain computer programmes for destruction; an alternative prayer for interdictory relief and, as the applicants termed it, “Anton Pillar-type relief” albeit on notice.
2. The second respondent in the application is the State Information Technology Agency Soc Ltd (SITA). It is a public company and is tasked with providing information technology services to various organs of state, including the SAPS.
3. The founding affidavit was some 98 pages long and, with annexures, stretched to almost 500 pages. The respondents were given until 7 May 2021 to file their answering affidavits. Only the SAPS opposed the application, filing an initial answering affidavit on or about 12 May 2021. The answering affidavit, with annexures, was lengthy, as was the replying affidavit. It was quite obvious that the matter should never have been enrolled as an urgent matter in terms of the Practice Directive of this Court in view of its length. The parties, correctly, subsequently sought an allocation by the Acting Deputy Judge President of the matter as a special motion. When it became clear that this was the path that was to be followed, the SAPS filed a supplementary answering affidavit, and the applicants a supplementary replying affidavit. The papers before me are thus well over 1000 pages in length.

BRIEF FACTUAL BACKGROUND

4. The core of the applicants' case is that the SAPS has infringed the copyright the applicants hold in two computer systems it developed, and previously licensed, to the SAPS. These are the FPS and the PCEM systems, being software platforms and their various components. The systems enable the user to register and manage objects, create and manage physical locations and record the movement of these objects between authorised SAPS personnel, all on a computer-based platform.
5. The FPS system was developed and used by the SAPS to register and manage the movement of firearms, firearm permits and related components. The PCEM system was used to register and manage the movement of police exhibits, Forensic Science Laboratory (FSL) case files, fingerprints and other property items. In simple terms, the systems enabled the SAPS to manage these items on a computer-based platform as opposed to a manual platform. The programmes provided both track-and-trace capabilities, as well as chain-of-custody capabilities for use by the SAPS for purposes of criminal prosecutions.
6. Quite obviously, this capability greatly enhanced the SAPS' ability, and particularly that of the FSL, to carry out its constitutionally mandated functions. Not surprisingly, the applicants were able to demand substantial compensation for the licences granted to the SAPS to use the systems, and for ongoing maintenance contracts. The SAPS says that over the years that it has had a contractual relationship with FDA (it would seem from sometime after 2008), it has paid the company close to R1.2 billion either directly or indirectly. It is common cause that the current estimated value of the systems is over R500 million.
7. In more recent years the parties have been at loggerheads about their ongoing relationship. There has been litigation, including the litigation resulting in the four

orders that the applicants initially contended that the SAPS had breached, copious exchanges of communications between the parties' lawyers, and a series of face-to-face meetings between high ranking SAPS officers and representatives of the applicants.

8. According to the applicants, the impasse commenced in 2017 when the SAPS ceased paying the applicants under the existing contracts. Negotiations went nowhere and the applicants terminated the SAPS' use of the system in April 2018. After much litigation, and a number of orders against the SAPS, negotiations recommenced in September 2019.
9. Part of these negotiations included what the applicants say was a binding oral agreement between them for the purchase by the SAPS of the applicants' intellectual property in the systems. The applicants sent a letter of demand to the SAPS on 8 February 2021 averring that a verbal agreement to this effect had been reached in January 2020. The alleged contract price was an amount of R460 million, together with an amount of a further R120 million for a maintenance and support services contract of 2 years. In the letter of demand, the applicants gave notice that they intended to institute legal proceedings against the SAPS to enforce the alleged contract.
10. For whatever reason, no contract was ever formalised. The SAPS says that any contract arising from the negotiations conducted would have constituted a serious breach of the procurement provisions that bind it as an organ of state. It is not difficult to accept the credibility of this statement. However, whether or not there was a valid contract is not something I need to determine.
11. The applicants finally deactivated the PCEM and FPS systems on 13 June 2020, albeit that ongoing negotiations (and litigation) between the parties continued. From

19 November 2020 a task-team comprising representatives of both parties undertook phase one of the de-commissioning process. In terms of this process, the applicants' source codes and the remainder of its copyrighted material were extracted from the SAPS platform, and handed to the applicants on a separate hard drive. It is common cause then that the SAPS has had no authorised access to the applicants' systems for some time.

12. The SAPS says that while all the negotiations were taking place in 2020, it instructed SITA, as part of a parallel process, to develop a separate computerised track and trace programme for use in the FSL administrative system. This was a precautionary measure in case the ongoing negotiations between SAPS and the applicants came to nothing. Presumably the SAPS did not want to find themselves in the position that they no longer had a computerised means of managing the FSL's operations.
13. The SAPS contends that it was well within the capability of SITA to develop the computerised capabilities required, particularly in view of the fact that prior to the applicants being contracted to provide their software to the SAPS, SITA had taken substantial steps to assist the SAPS to develop computer-based systems for the FSL. The SAPS says that when it instructed SITA in 2020 to start work on new programmes to replace the PCEM and FPS systems, SITA did not have to start from scratch, but could build on what had been developed historically prior to the applicants' involvement. The computerised models that were ultimately developed by SITA and the SAPS after 2020, and which are the target of the applicants' complaint, are the FEM module and the FPCS system. Phase 1 of the FEM module came into operation between March and April 2021. It seems the FPCS system has not yet been activated.

14. The SAPS denies that the FEM module infringes the applicants' copyright. It says the module was developed by SITA based on the FSL's Standard Operating Procedures and requirements, data that has historical existence, and a pre-existing track and trace module that was developed for the SAPS by another company before the applicants' involvement.
15. The applicants launched their urgent application after they got wind of the FEM system being in operation. According to them, they were alerted to what they say is the SAPS' infringement of their copyright when they saw a screenshot of a computer screen operating the FEM system which resembled screens used in the PCEM system. This provided justification for the applicants' case that the SAPS had obtained unauthorised access to their FPS and PCEM systems, and had adapted or copied them in developing the FEM module.
16. The applicants contend that while there is nothing to stop the SAPS working with SITA to develop its own computer-based track and trace systems now that they no longer have access to the PCEM or FPS systems, they cannot do so in a manner that infringes the intellectual property of the applicants. They say there is sufficient evidence to establish that this is precisely what the SAPS has done.

REDUCED AMBIT OF RELIEF

17. As I indicated earlier, the applicants initially sought urgent relief of an extensive nature. However, by the time the matter was called for hearing, the applicants indicated that they no longer persisted with most of the grounds of relief originally identified. The applicants conceded that they would not be able to succeed on the basis of the affidavits filed for orders declaring the respondents to be in breach, and in contempt of the four court orders identified in the notice of motion. This meant, too, that certain other prayers had to fall off the table, given that they were

dependent on the breach/contempt grounds. The “Anton Piller-type relief” was also taken off the table in view of some sort of accommodation reached between the parties.

18. In fact, the only issue that remained for determination was whether the applicants were entitled to an interim interdict in the terms prayed. The prayer for an interim interdict is somewhat unusually stated. What the applicants seek is an order directing the respondents:

“... to cease any further use or development of the FEM Module and the FPCS System, pending the finalisation of this application or an action to be instituted on such terms as the above honourable Court may determine.”

19. The application for an interim interdict does not follow the usual part A and part B format used for such relief in this Division. It was also accepted by the applicants that they would not be able to succeed in obtaining final relief, even interdictory relief, on affidavit, in view of the obvious and numerous factual issues upon which the parties are in dispute. The applicants accept that it would not be possible to show, without expert evidence, that the SAPS has in fact infringed its copyright as it claims. Clearly, this is not something that can be determined in application proceedings, particularly in view of the fact that the expert evidence required undoubtedly must involve complex explanations of computer software technology.
20. In addition, the applicants eschewed a suggestion by the respondents that the matter be referred to oral evidence for determination, on a final basis, of whether the applicants are entitled to an interdict. The applicants elected instead to press on with their quest for an interim interdict on the basis that they contend that the evidence establishes *prima facie* that the SAPS has infringed their copyright.

21. One of the difficulties the applicants face, of course, is that it is not clear what the pending condition would be of any interim interdict that might be granted. Would it be a possible action by the applicants? For what relief? When is it to be instituted? Counsel for the applicants suggested at the hearing that the interim interdict would remain in effect pending an application for a final interdict. Once again, though, this presents difficulties in that it is quite clear that any interdictory relief in a case like this one would have to involve oral evidence. The disputes in issue are simply not capable of being determined (for purposes of final relief) on affidavit. In any event, as I have already noted, there is no pending part B before the Court. This means that the interim interdict would remain in place pending some unspecified future court process for a final interdict.
22. These difficulties highlight that the case as it now stands bears all the hallmarks of litigation that was instituted on an urgent basis without due consideration being given to whether the wide relief sought is actually suited to the nature of proceedings chosen. I will refer to this issue once more when I consider the balance of convenience and the availability of alternative relief.

PRIMA FACIE RIGHT OR GROUNDS FOR AN INTERDICT

23. It is trite that an interdict will be granted if the court is satisfied that the applicant has a right which the respondent has invaded or has threatened to invade. In the case of interim interdicts, a court will grant an interdict on a degree of proof that is less exacting than that required in the case of a final interdict. Generally, this is referred to as a *prima facie* right, or *prima facie* grounds for an interdict, or a *prima facie* right though open to some doubt.
24. The test developed by our courts is the following. A court is required to consider the facts set out by the applicant, together with any facts set out by the respondent

which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if they throw serious doubt on the applicant's case then temporary relief should be denied. However, if the respondent sets up only a mere contradiction, or gives an unconvincing explanation, the matter should be left to trial and the rights of the applicant protected in the interim.¹

25. The applicants' case is that under s 11B of the Copyright Act² they have the exclusive right to reproduce the work in any manner and form or to make "an adaptation" of it. They point out that under the definition of "adaptation" it does not matter that an alleged infringing programme is written in a different computer language. Even if it is a version of the copyrighted programme in a different language, it may still be regarded as an adaptation. The applicants' point is that it does not assist the SAPS to assert that their FEM module uses a different computer language to that used in the FDA's systems.
26. The applicants accept, based on the recent Supreme Court of Appeal judgment on infringement of copyright in *Quad Africa Energy (Pty) Ltd v The Sugarless Company (Pty) Ltd*,³ that in order to found a case for infringement, they must show an objective similarity between the applicants' FPS and PCEM systems and the respondents' modules. The applicants also accept that as they do not have copies of the latter, they are cannot make the necessary comparison to ascertain whether or not the programmes are objectively similar so that it can be concluded that the SAPS

¹ The test laid down in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, as refined in *Gool v Minister of Justice* 1955 (2) SA 682 at 688 D0E

² Act 98 of 1978

³ [2020] ZASCA 37 at paras 19-33

programmes are an adaptation of the applicants' programmes. They rely instead on factual averments that they say leads to this inference.

27. The second leg of the infringement inquiry involves establishing whether or not there is a causal connection between the alleged infringing computer systems, and the applicants' systems. In other words, the question is whether applicant can show that the respondents had access to the copyrighted work.⁴
28. In respect of both legs of the infringement inquiry, the applicants contend that they have established at least a *prima facie* case of infringement by the SAPS in the development of the FEM and FPCS systems. In their founding affidavit, the applicants say that the respondents "*have continuously, on an unauthorised basis and unlawfully gained access to, and copied, adapted and/or reverse engineered*" their two systems in the development of the FEM module and FPCS system. In one of their replying affidavits, they contend that they have tangible evidence to this effect.
29. The founding affidavit set out in detail a wide range of facts the applicants aver demonstrate the infringement of their copyright. These included the alleged overwhelming similarity between screenshots of the user interface screens displayed for the FEM module, compared with those screens used for the applicants' systems; similarities in the column names between the two systems; similarities between the four primary functionalities identified in the PCEM system and the FEM module; the alleged tampering by the respondents with the evidence bag containing the hard drive onto which the applicants' source code was transferred and handed to the applicants during the decommissioning process in November 2020; and an

⁴ Dean Handbook of South African Copyright Law, para 8.6

alleged 5000 instances of unauthorised access to the FPS and PCEM systems recorded in the log audit transactions between June and July 2020.

30. The applicants contended in the founding affidavit that the number, nature and extent of the identified similarities between the systems belied SAPS' contention that it had developed the FEM module independently. They submitted instead that it could be reasonably assumed from the similarities that the SAPS and SITA had copied or adapted the applicants' systems in developing the FEM module.
31. In its two answering affidavits the SAPS dealt in substance with all of these averments. For example, the SAPS explained that the user interface screen in the FEM module are not only similar to those in the PCEM system, but in fact are the same as the user interface screens adopted under the SQL*LIMS system that had been partly developed prior to FDA being contracted to develop the PCEM and FPS systems. The functionality similarities were also explained in some detail. The SAPS pointed out that the functionalities, such as the "registration of object" and "handover of objects" functionalities are based on the SAPS' existing processes in the FSL, which preceded the FPS and PCEM systems by many years.
32. The SAPS also countered the allegations that there had been tampering with the evidence bag containing the hard drive. Furthermore, an explanation was provided in the SAPS supplementary answering affidavit for the 5000 alleged instances of unauthorised access to the applicants' systems. The SAPS said that this came about because of a flaw in the system that effectively registered an access each time a computer re-booted.
33. It is fair to say that the applicants did not agree with the SAPS' responses to these factual averments, and questioned the correctness and plausibility of some of them. Despite this, however, when it came to the hearing, the applicants elected no longer

to rely on these identified indications of the SAPS' alleged infringements. Instead, counsel for the applicants submitted that they would rely instead on four alleged indicators of infringement which the SAPS had not countered in its answering affidavits.

34. The first of these is the applicants' averment that the team working on the development of the SAPS systems had intimate knowledge of the applicants' systems and thus the technical expertise to copy or use them. Also, that because of this intimate knowledge it would be impossible for the SAPS/SITA team members to divorce themselves from it when working on the new programmes being developed for the SAPS. In other words, the contention is that the SAPS/SITA team members are "tainted", and that this provides a reasonable basis to infer that that they have crossed the infringement line in developing the FEM module.
35. The second indication of infringement relied on by the applicants has to do with the "wireshark" software monitoring tool that was discovered to have been installed on the applicants' system. The discovery was made during the decommissioning process that commenced on 19 November 2020. The applicants explain that an application like "wireshark" is a "wire-sniffing tool". They say that by combining the monitoring of a target system, together with access to the source code, with a wire-sniffing tool, "it is reasonably possible to dissect and reverse engineer (thereby adapting) complete applications." The applicants say that their inspection showed that the wireshark tool was used in at least July 2019 to access the applicants' source code.
36. The third indication of infringement relied on by the applicants is do with the Direct Link Library (DLL). The averments made by the applicants in this regard are highly technical. In simple terms, it appears that the DLL is a shared repository of data for

two separate, but linked computer applications, in this case FPS and PCEM. The effect is that the shared software service must be active for full functionality of each system. In order to obtain functionality of only one programme, for example, the PCEM system, it would be necessary to decouple the other system from the shared software service, and then recompile the DLL files for PCEM so that it could operate separately.

37. The applicants say that when they carried out their decommissioning inspection on 19 November 2020, they discovered that in July 2019 the SAPS had tampered with the authorisation of the FPS and PCEM systems in an effort to decouple them. The applicants aver that it must be assumed that this was to obtain full functionality of the PCEM system.
38. The final indicator of alleged infringement relied on by the applicants relates to the absence of any system/development specifications issued by SAPS to SITA for purposes of the development of the FEM module. The applicants say that development specifications are typically required whenever SITA is instructed to undertake a project of this nature. In a letter addressed to the SITA in early January 2021, the applicants demanded the production of the government order issued by SAPS to SITA, including the development specifications. This did not produce the desired results. In their founding affidavit the applicants also invited the SAPS to attach the development specification instructions to SITA to their answering affidavit. The SAPS did not do so.
39. The applicants say that if the SAPS was indeed involved with SITA in a legitimate development of the systems as it contends (as opposed to merely adapting or copying the applicants' systems), then the relevant documentation should have been attached to the answering affidavits. However, no documentation to support

the averment that the development of the FEM and FPCS was lawful is before court, despite the applicants inviting the SAPS to produce it. The implication of these submissions is that the specification documents don't exist because there was never an instruction to SITA to carry out an independent development of systems. Instead, SITA and SAPS are simply proceeding to adapt or copy the applicants' systems.

40. It is so that the SAPS did not respond, in its answering affidavits, directly to any of these four categories of factual averments. As such, with reference to the test to be applied for purposes of determining whether the applicants have established a *prima facie* right to the relief they seek, one needs to consider whether, on these facts, and taking into account their inherent probabilities, the applicants should obtain final relief at the trial.
41. In my view, it does not follow from the fact that the SAPS and SITA officers involved in the FEM module development have the technical expertise and in-built knowledge of the applicants' systems to enable them copy or adapt it that this is what they have actually done. Obviously, something more is needed to show that they have copied or adapted the applicants' systems. Does the wireshark issue assist the applicants in this respect?
42. The SAPS does not deny that this software tool was installed. In fact, it is dealt with in a memorandum from the decommissioning task team dated 15 December 2020 under the heading "concerns" that were raised by the applicants (who formed part of the decommissioning team). The report notes that: "The analysed packet data was also found on the server indicating exactly what was analysed which revealed only the relevant data between the client and the server was captured."
43. This seems to have been the end of the matter, and the applicants signed off on the memorandum. It is not clear from the applicants' affidavits and from this

memorandum what data it was that the wireshark tool actually analysed. It is also not clear what use the SAPS made of the data. While the applicants' point out what it can be used for in theory, and they aver that theoretically it can be used to gather information that might be useful for copying or adapting an existing computer system, there is no evidence that it was used for this purpose by the SAPS. What is more, the applicants say that their investigation showed that it was used in at least July 2019. This is some time prior to when the SAPS and SITA were instructed to commence developing an alternative computer system to those provided by the applicants, which took place in 2020.

44. For similar reasons, the applicants' reliance on the DLL averments also falls short. The applicants expressly assume that the attempted decoupling that they discovered was for the purpose of obtaining full functionality of the PCEM system. However, there is no evidence that it was indeed for this purpose. Even if the assumption is taken into account, in order to support the applicants' thesis a further assumption is required, viz. that the SAPS wanted to obtain full functionality of the PCEM system in order to enable them to copy or adapt it unlawfully for purposes of developing its own computer system with SITA. Once again, however, the alleged decoupling was found to have occurred in July 2019, long before the FEM and FPCS development was initiated.

45. Finally, it is a leap too far to say that because the SAPS has not produced the design specifications it gave to SITA for the development of the FEM and FPCS systems it inevitably follows that the FEM module is simply a copy or adaptation of the PCEM system. There could be a myriad of reasons why the SAPS and SITA have not acceded to the applicants' demands or invitations to produce design specifications. Not least of which is the urgency with which the applicants launched their application. Simply because the respondents have not produced the documentation

the applicants have demanded does not inherently lead to the inference that the respondents are guilty of infringement, even on a *prima facie* basis.

46. It is apparent from the affidavits filed by the applicants that they are deeply suspicious of the SAPS and SITA and that the trust between them has long since broken down. The incidents relied on by the applicants no doubt served to fuel their suspicions. However, the test is not whether the applicants' suspicions are such that in their own minds they are certain that the respondents have infringed their copyright. The test is whether these unchallenged factual averments would entitle the applicants to final relief at trial. For the reasons discussed, they would not, either on their own or taken together as a whole: four weak factual averments do not make a strong overall case.
47. It is telling too that these were the only averments the applicants elected to rely upon to establish their *prima facie* right. The outcome might have been different had SAPS not challenged the other factual averments the applicants originally made in their founding affidavit. However, a determination on those issues would not have been possible on the affidavits alone, which is no doubt what led the applicants to elect to present a more limited, and ultimately insufficient, case.
48. Even if I am wrong in my conclusion that the applicants have failed to pass the first leg of the test for determining a *prima facie* right, it would still be necessary to consider the facts set up in contradiction by the SAPS, and to consider whether they throw serious doubt on the applicants' case.
49. The SAPS denies that the FEM module is an adaptation of the PCEM and FPS systems and it denies that it infringed the applicants' copyright in developing the system. In its answering affidavit, the deponent, Ms Lovric, explains the history behind the adoption of a computerised track and trace system for police forensic

data. This process started prior to FDA coming on board. Prior to computerisation the FSL used manual registers to track and trace exhibits and related items. The track and trace systems employed, even from the early manual days, were based on the operational requirements of the FSL. The SAPS initially developed a computerised system, call the FSL Admin system as early as 1991. This was a basic computerised record-keeping system that did not capture the custodial trail of exhibits.

50. In about 2000 SAPS instructed SITA to obtain an expanded system with the capability for a computerised custodial trail of exhibits. This resulted in a tender awarded for the development of what was called the SQL*LIMS system by Unisys. FDA was not involved at that stage. In parallel, SITA developed standards for bar-coding of exhibits, but this was not finalised. Nor was the SQL*LIMS system finalised. For unknown reasons, it was halted when it was 95% complete.
51. It was at this stage that another tender went out for the development of an enhanced system in place of the halted SQL*LIMS system. FDA were brought on board by the successful tenderer and, over the years this relationship was extended. Ultimately, FDA was contracted in its own right and the PCEM and FPS systems were developed by it and provided to the SAPS for over a decade.
52. Ms Lovric avers that when the relationship between FDA and the SAPS broke down, the SAPS instructed SITA to develop an interim track and trace module for use as part of the existing computerised FSL Admin system developed by the SAPS years before. The FSL Admin system had been updated over the years and continued to be in use. Ms Lovric says that the development of such a module was well within the capabilities of the SITA particularly because it had the 95% SQL*LIMS system still at its disposal. She says that this historical development, together with the

existing FSL Admin system provided the base for the FEM module, and not the PCEM and FPS systems. She says, in a nutshell that: *“The FEM functionality is not a separate programme but was built by enhancing certain of the existing FSL Admin system functions and certain new functions that were created.”* She says that although the end result may appear similar to the PCEM system from the screenshots and functionalities, the actual computer programme used is not a copy. She says the similarities are the result of the underlying FLS operational requirements for exhibits, which she says explains why the screenshots from the early SQL*LIMS system, the PCEM and FPS systems and the FEM module all look the same.

53. Of course it will take expert evidence ultimately to establish whether, as a matter of fact, the computer programme used in the FEM module is indeed independent and not an adaptation. I have no doubt that this will involve a complex inquiry. That is not something that can be decided on what I have before me. The applicants criticise Ms Lovric’s averments on a number of fronts. They say the averments are vague. They say that it took the applicants more than 15 years to perfect its systems and that it would be impossible for SITA and the SAPS to have developed the FEM module in so short a time without copying or reverse engineering the applicants’ systems.

54. Despite these criticisms, the SAPS explanation does not strike me as unconvincing. It is common cause that steps had been taken prior to FDA’s involvement to develop a computer-based track and trace system for exhibits in the FSL based on the FSL’s operational requirements. Although it may well be, as the applicant’s assert, that these processes were flawed and were not fully implemented, it cannot be gainsaid that SITA had a baseline off which to work, independent of the applicants’ systems, when it commenced development of the FEM module and FPCS. The SAPS does

not claim that this system is as sophisticated and problem-free as the applicants' systems, and it is common cause that only phase 1 of the module has been implemented thus far. Despite the applicants' criticisms it does not strike me as being beyond reasonable comprehension that SITA has been able to develop an independent first phase FEM module.

55. I conclude in this regard that, even if I am wrong on my first finding, and it can be accepted that the applicants' uncontroverted averments would entitle them to final relief at trial, this will not win the day for the applicants. In my view, for the reasons I have stated, the contradictory version averred by the SAPS is sufficient to place serious doubt on the applicants' case that the FEM module is a copy or adaptation of the PCEM and FPS systems and hence constitutes an infringement of the applicants' copyright. It follows that on the second leg of the inquiry too the applicants have failed to establish that they have a *prima facie* case for an interim interdict.

BALANCE OF CONVENIENCE AND RELATED ISSUES

56. As the applicants have not met the first requirement for an interim interdict it is not, strictly speaking, necessary for me to consider the remaining requirements. However, as a cautionary measure, and in the event that I may be found to have erred in my decision on the requirement of a *prima facie* right, I proceed to consider them nonetheless.
57. It is common cause that the effect of an interim interdict would be that the SAPS would be prohibited from using the FEM module it currently uses to track and trace police exhibits in order to establish a chain of custody for purposes of court proceedings. The SAPS would have to resort to a manual method of operating this obviously critical function. The SAPS says that an interdict would affect this core

functionality of the FSL administrative system, and that the effect would be to place the criminal justice system in an extreme state of emergency.

58. However, the applicants beg to differ. They say that when they shut down the SAPS' access to its systems in mid-2020, the SAPS resorted to the manual system, at their own election. They say that the Commissioner told Parliament that despite this the system was still functioning. The applicants' assertion, then, is that there is no reason why SAPS should not again be forced to resort to a manual exhibit tracing system, and for this reason, the balance of convenience favours the applicants.
59. The applicants' assertions do not fully appreciate the prejudice to the public at large if the SAPS is prohibited from using the FEM module on an interim basis. The SAPS has a constitutional duty to enforce law and order and to bring offenders to book in the interests of public safety and security. The negative implications of an interdict for the proper functioning of our criminal justice system appear to me to be self-evident. While the SAPS might have functioned on a manual basis when the applicants closed access to their systems, forcing them again into that position is not something that should be done lightly. There can be no question that were an interdict to be granted, this would inevitably result in, at best, considerable delays in criminal cases and, at worst, offenders going free, if SAPS were limited to resorting to a manual system.
60. As the Constitutional Court held in *National Treasury v Opposition to Urban Tolling Alliance*:⁵

“It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlogelo* test, as adapted by case law, continues to

⁵ 2012 (6) SA 223 (CC)

be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution. ... when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.”⁶

61. This finding by the Constitutional Court is directly relevant to the present case. What the applicants want this Court to do is to order an interdict regardless of the obvious impact this will have on the ability of the SAPS to comply with its constitutional duties. Furthermore, they do so in circumstances where it is not entirely clear what form the final relief is that the applicants intend to seek, or when they intend to institute proceedings in pursuit of it.
62. Of course I must weigh against this, the prejudice to the applicants in the event that I refuse to grant an interdict and they subsequently succeed in establishing that the SAPS indeed infringed their copyright. The applicants will not be without an alternative remedy in those circumstances. It is common cause that a market-related value has already been placed on the applicants' copyright in its systems. The parties have previously discussed and negotiated the costs of a continuation of the working relationship between them. Although this did not reach fruition, my understanding is that numbers were placed on the table and discussed to the point

⁶ At paras 45-6

that the applicants claim to have concluded a verbal agreement with the SAPS. My point is that this is not a case where an alternative claim in damages, coupled with a permanent interdict is not feasible. The applicants would have an effective remedy if they prevail finally at trial.

63. It is clear to me for these reasons that the balance of convenience obviously favours the SAPS. They must be permitted to continue to use the FEM module that they have developed pending whatever final relief is sought by the applicants. Should they be found ultimately to have infringed the applicants' copyright in that development, they will no doubt have to pay a heavy price. However, this should not outweigh the obvious prejudice to the public that would flow from permitting an interdict against the use of the FEM module in the interim.
64. For these reasons, too, I find that the applicants do not meet the requirements for the grant of an interim interdict.

CONCLUSION AND COSTS

65. It follows that the application must be dismissed.
66. I was pressed by the applicant nonetheless to award some costs in its favour on the basis that the Anton Piller-type of relief had become unnecessary because the SAPS had indicated a willingness to share information with them. The applicants submitted that this was a significant victory for them. I do not agree. The Anton Piller-type relief was, to put it benignly, somewhat novel. It may be that the SAPS acted pragmatically in offering to share information with the applicants, but this is hardly a basis on which to call a resounding victory for the applicants. The fact of the matter is that the applicants proceeded on urgency, with substantial founding papers and on short time frames. They placed the respondents in a difficult position

in putting them under time pressure to file their answering affidavits. Then, at the hearing the applicants indicated that they no longer intended to proceed with almost all of the relief they had originally sought. In my view, the costs of the matter should simply follow the result.

ORDER

67. I make the following order:

“The application is dismissed with costs, such costs to include those of two counsel, including senior counsel.”



R KEIGHTLEY

**JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

ELECTRONICALLY SUBMITTED

This judgement 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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 October 2021.

Date Heard (Ms teams):	24 August 2021
Date of Judgment:	15 October 2021
On behalf of the Applicant:	Advocate R Michau SC Advocate CP Wesley
Instructed by:	Charl Rossouw Attorneys
On behalf of the First & Second Respondent:	Advocate B Roux SC Advocate M Rip SC
Instructed by:	Cliffe Dekker Hofmeyr Incorporated