



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED:
Date: Signature: <i>P. J. Mene</i> 27/08/2021	

CASE NO: 8931/2020

In the matter between:

MOKOENA, DIROETLENG DAVID
MOKOENA, NOMBUSO

First Applicant
Second Applicant

and

MINISTER OF TOURISM
GAUTENG TOURISM AUTHORITY
KUNJALO CENTRE FOR DEVELOPMENT

First Respondent
Second Respondent
Third Respondent

Coram: Terner AJ

Heard on: 12, 13 and 14 April 2021 (on virtual platform)

Delivered: 27 August 2021 (electronically by uploading to Caselines platform)

JUDGMENT

TERNENT, AJ:

INTRODUCTION, AMENDMENT AND THIRD RESPONDENT

- [1] From the outset this opposed application was beset with hurdles for the applicants. The applicants' counsel accepted that the application had not been served on Kunjalo Centre for Development ("Kunjalo"), the third respondent, and that unless service was effected in accordance with the Rules and via the Sheriff of the Court, the application could not proceed. Having initially sought that the matter be removed from the roll, relief which was opposed by the first and second respondents, it then became apparent that the interdictory relief sought in paragraph 1 of the Notice of Motion may well be moot.
- [2] This defence was raised for the first time by the first and second respondents' counsel, who submitted that due to the long duration of the proceedings in this matter, (there having been an earlier application premised on essentially the same facts and parties, under case number 24086/2018), that the 3 year tender contract which had been awarded to Kunjalo had come to its natural end. I called for an affidavit detailing when the contract had terminated and whether there was merit to this point.
- [3] The matter was adjourned, on the first appearance before me on Monday 12 April 2021, until Tuesday 13 April 2021 in order to afford an opportunity to the first and second respondents to file this affidavit.
- [4] An affidavit was delivered and uploaded to Caselines, deposed to by a Mr Mbuyi Kona, of the second respondent. Attached to the affidavit was the service level agreement concluded between the second respondent and Kunjalo, which reflected the signatures of the respective representatives, Mr Dumisani Hlophe on behalf of Kunjalo and, Mr Sipiwe Ngwenya for the second respondent, who appeared to be signing in his capacity as its Chief Executive Officer. Notably, the date on which the agreement was signed was not completed, although there was a typed reference to the year 2018.

- [5] The service level agreement expressly provided that the Tourism Safety Monitors Project would commence from the date of the last signature of the signing of the agreement and would endure for a period of three years. I was assured by the first and second respondents' counsel that the contract had come to an end. What was clear from the affidavit was that the national initiative to provide tourism safety monitors in densely visited tourist areas had come to an end. The 3 year period would have coincided with the national lockdown, due to COVID19 which commenced on 27 March 2021, and tourism was directly affected as a result of the lockdown restrictions imposed.
- [6] As such, the applicants' counsel accepted that the interdictory relief sought was moot and that the relief as sought against Kunjalo, primarily related to the interdict (also the basis for the amendment sought below) The applicant's counsel accepted that this relief was no longer possible.
- [7] It was in these circumstances, that the applicants' counsel then moved for an amendment to the Notice of Motion to clarify that the relief sought in paragraphs 2 and 3 of the Notice of Motion would not be pursued against Kunjalo, as it had not received notice of the application but more importantly because the relief sought, as submitted to me, was ill-founded in relation to Kunjalo. The amendment sought to tailor the relief to refer only to the first and second respondents. In effect, the word "*respondents*" referring to all three respondents was amended to "*the first and second respondents*".
- [8] The first and second respondents' counsel opposed the amendment submitting that this embarrassed the first and second respondents' defence, to the extent that such a defence existed.
- [9] The matter stood down briefly in order to afford the first and second respondents' counsel an opportunity to take instructions in this regard. He was instructed to persist with the objection to the amendment.
- [10] Having heard the argument, I granted the amendment and informed the parties that I would give my reasons therefor simultaneously with this judgment. In a nutshell, the amended relief sought to simply remove the third respondent from the picture. The relief as against the first and second respondents, who had delivered their answering affidavits and were ready to argue the opposed application, remained

extant. As a consequence, the case which the first and second respondents were called upon to meet was tailored, insofar as interdictory relief could not be obtained, an issue of which they were well-aware, as the national initiative had come to an end. The remaining relief in paragraphs 2 and 3 of the notice of motion had not changed one iota and, accordingly, no prejudice arose.

- [11] In these circumstances, the first and second respondents' counsel having informed me that he was ready to argue the application, the matter could then proceed.
- [12] Both counsel argued until the lunch adjournment and informed me, as I had allocated another matter for 14h00 that day, that it suited them better to not appear later that day. As such, I stood the matter down until Wednesday 14 April 2021, at 14h00, when the argument on the merits, which had been touched upon by both counsel, would be fully argued together with the *in limine* points raised by the first and second respondents.

THE APPLICATION

- [13] The applicants instituted these proceedings against the first and second respondents for infringing, since July 2017, their copyright over what they termed their literary works titled "*Tourism Safety Monitors and Tourist Ambassadors*". The literary work referred to was attached to the founding affidavit. In this regard, the document commences at page 11 and ends at page 16. Pages 1 to 10 of the document are missing. Accordingly, the document upon which the applicant's rely for their copyright is incomplete. The five pages, tendered into evidence, are typed and there is a reference heading "*Draft Tourism Safety Framework*", on the left hand top corner of each page. There is, in the absence of the complete document/work, no reference to the title as contended for by the applicants.
- [14] The applicants contend for an infringement (as contemplated by section 23 read with section 6 of the Copyright Act 1978 (Act 98 of 1978 as amended) ("*the Act*")), when the second respondent used the ideas/concepts/ proposals contained in the document, their literary work, "*Tourism Safety Monitors and Tourist Ambassadors*", without their permission or authority, and published a tender request for proposals titled "*Terms of reference*" for the appointment of a project manager responsible for the day to day running of the Tourism Safety Monitors Programme for 36 months, Bid No. GTA/VIS/01.

THE APPLICANTS CASE

- [15] The applicants ran a neighbourhood watch in the Vilakazi Precinct incorporating Vilakazi street and the Hector Petersen memorial area since 2004. They received recognition for their efforts and, in January 2006, were material in apprehending a Mr Daniel Mokoena who was later charged with murder.
- [16] It was during this time when they met Mr Morgan Mabaso, a tourism safety officer, who it is common cause was appointed by the second respondent. They interacted with him as they had set up community patrols and the patrollers/ tourist guides wore reflective vests, carried torches and whistles, batons and other implements. The priority was to secure the area for tourists so that they felt safe, maintain law and order and prevent crime. It is not disputed that Mabaso had to set up a tourism safety framework in Gauteng, create a tourism safety program and that he was required to engage with various stakeholders in the tourism sector, in the course of his mandate.
- [17] The applicants say it was during 2004 that they shared their "idea" of the tourism safety program with Mabaso. Mabaso signed a confirmatory affidavit confirming the aforesaid. This was not disputed by the first and second respondents. The document (of which the Court only has an incomplete copy), which the applicants say embodied the safety program was handed to Mabaso. The applicants do not state when this occurred.
- [18] Mabaso introduced the applicants to Mr Kona, who was the senior manager at the second respondent and then later to a Mr Jacques Scholtz who succeeded him.
- [19] The applicants were looking for finance as they sought to turn their neighbourhood watch which had evolved over time into a commercial exercise. This created a stumbling block because they were unable to do so.
- [20] The applicants contend that the second respondent then advertised for the tender proposals referred to above. The tender application document was also attached to the founding affidavit and was issued by the second respondent. It made provision for a briefing session on 17 July 2017 and all bids and/or submissions had to be made by 11 am on 27 July 2017. In effect, bidders sought appointment as a service provider to assist with the project management of the Safety Monitor Programme undertaken by the second respondent. The successful bidder would be required to

work with the Gauteng Tourism Authority Project Management Team and would be responsible for the day to day running of the project for a period of three years. As it turned out, Kunjalo was appointed.

[21] The applicants attended the tender briefing but chose not to bid primarily because they believed that they had been side-lined and that their ideas/ concept had been unlawfully used by the second respondent in the tender request for proposals. They also could not finance the project, if it were awarded to them, had they successfully tendered for the work.

[22] This is the sum total of the applicants case.

THE MERITS

[23] Having chosen motion proceedings, it is trite that the affidavits not only take the place of pleadings in a trial action but also of the essential evidence which would be led at a trial. As such the deponents to the affidavits are in effect "*testifying in the motion proceedings*".¹

[24] Furthermore, all of the necessary allegations and facts upon which the applicants rely must appear in the founding affidavit and cannot be supplemented by adducing facts in the replying affidavit.²

[25] It is also clear that the onus rests upon the applicants to:

25.1 establish their reliance on copyright; and

25.2 the respondents' infringement thereof.

¹ **Hart v Pinetown Drive-In Cinema (Pty) Ltd** 1972 (1) SA 464 (D) at 469C-E; **Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd** 2016 (1) SA 78 (G) at 86A

² **Mauerberger v Mauerberger** 1948 (3) SA 731 (C) at 732; **Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd** 1974 (4) SA 362 (T) at 368-9

THE LITERARY WORK RELIED UPON

[26] Section 2 of the Act is clear that copyright will exist in a literary work if it is :

26.1 original;

26.2 has been recorded in some form, and

26.3 its author was a citizen of South Africa at the time the work was made.

[27] It was not disputed that the document / work was authored by the applicants. To the extent that 5 pages of a document were proffered in evidence, the work contended has been recorded in a written form. The first and second respondent's, however, denied that the requirement of originality had been satisfied.

[28] In order to establish originality, it is not necessary that the work be creative. As long as it has not been copied and the work required "*a substantial (or not trivial) degree of skill, judgment or labour.*"³ that will suffice.

[29] In this regard, Nugent J in ***Pyromet (Pty) Ltd v Bateman Project Holdings Limited & Another***⁴ set out the test to be applied, as follows:

"An artistic work is eligible for copyright if it is original. The following passage from Copeling Copyright and the Act of 1978 at p 15, which was cited with approval in Klep Valves (Pty) Ltd v Saunders Valve Co Ltd [1987] (2) SA 1 (A) at 22H – 23A, conveniently summarises what is meant by that concept:

"To be original a work need not be the vehicle for new or inventive thought. Nor is it necessary that such thoughts as the work may contain be expressed in a form which is novel or without precedent. 'Originality',

³ ***Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd 2006 458 (SCA)*** at 473A – B, para 35

⁴ 2000 BIP 355(W) at 357G to 358C

for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill or labour in execution. All that is required is that the work should emanate from the author himself, and not be copied. . . ."

'The requirement that the work should emanate from the author himself and not be copied must not be interpreted as meaning that a work will be regarded as original only where it is made without reference to existing subject-matter. Indeed, were this so the great majority of works would be denied the benefit of copyright protection. It is perfectly possible for an author to make use of existing material and still achieve originality in respect of the work which he produces. In that event, the work must be more than simply a slavish copy; it must in some measure be due to the application of the author's own skill or labour. Precisely how much skill or labour he need contribute is difficult to say for much will depend upon the facts of each particular case.'

[30] Further,

"It should also be noted that a determination of originality applies to the work as a whole, and not to select parts:

*'Under the Act the inquiry is whether the work was original. The inquiry is not whether its parts are original.'*⁵

[31] As referred to in **Biotech Laboratories**:

"[9] The argument can be disposed of by means of an extract from Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 All ER 465 (HL). Lord Reid said (at 469B - E):

'Broadly, reproduction means copying, and does not include

⁵ **Moneyweb (Pty) Ltd v Media 24 and Another** 2016 (4) SA 591 (GJ) and **Biotech Laboratories (Pty) Ltd v Beecham Group Plc and Another** 2002 (4) SA 249 SCA, para 8 at 257H

cases where an author or compiler produces a substantially similar result by independent work without copying. If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is novel or striking, or is merely a commonplace arrangement of ordinary words or well-known data. So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. But, in my view, that is only a short cut, and the more correct approach is first to determine whether the plaintiff's work as a whole is "original" and protected by copyright, and then to inquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on.[my emphasis] To my mind, it does not follow that, because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.'

- [32] As stated above, the document upon which the applicants rely as being the literary work subject to copyright is incomplete. Allegations were made that the completed document was delivered by the applicants to representatives of the second respondent, one Linda Mlaba and Tshepo Diale, in 2016, who took the original document and never returned it to them, save for the 5 pages tendered in evidence. It further appears that these pages/the incomplete document was returned to the applicants although no explanation is furnished as to who sent or returned the document to them or what they did to obtain the missing pages. It was submitted to me by the applicant's counsel that the document had been stolen by the second respondent. There was no suggestion of this in the affidavits on behalf of the applicants.

- [33] Of concern, is that no attempt seems to have been made by the applicants, to the extent that they did not have a master copy of the literary work on which they seek to rely, to obtain the missing ten pages. The Court is left in the dark as to what efforts were made to obtain the first ten pages and, more importantly if the document was of such value, why a master copy had not been retained by the applicants. The document was typed and it appears that whoever did so would have had a master copy. There is no explanation furnished by the applicants as to the content of the missing pages. Not a shred of evidence is placed before this Court. Furthermore, it does not appear that any attempts were made to obtain the missing pages nor was there an attempt by the applicants to utilise the provisions of Rule 35(13) and (14) to secure the document, it clearly being a material document which underpins the establishment of the copyright. It does not suffice to simply attach a portion of the document as a substantial amount of evidence is missing and absent that evidence weakens the applicants' ability to establish the work, and so their copyright and discharge their onus.
- [34] It is clear to this Court that the subsistence of the copyright has not been proved, because the literary work in which it is vested, is not before this Court. The applicants have materially failed to demonstrate the idea/ concept/ proposal that was reduced to a material form and supposedly contained in the document.
- [35] Even if the applicants had crossed this hurdle, the infringement, i.e. copying, or adaptation has not been proved. The relief sought seeks to find that the first and second respondents have copied and/or adapted the applicants' concept as set out in the incomplete work furnished to this Court. Yet, not an iota of evidence is placed before this Court in support of either copying and/or adaptation.
- [36] Similarly, and even if the work had been established as deserving of copyright, (which they have not) they also fail in their attempts to establish that the copyrighted works were infringed.
- [37] At best, there is an allegation that the Minister of Tourism used the literary works *"as part of their terms of reference when the first respondent launched and awarded a tender with reference number GTA/VIS/01"*. The further allegation is that *"the website of the GTA (the second respondent) then published a request for proposals to project manage our concept which we had proposed to them. This was in 2017. A copy of the RFP is attached hereto marked Annexure "ODM5". We were*

extremely shocked and demoralised to learn this. We attended the tender briefing but did not submit the tender. Second applicant and I were recently surprised to learn that the "Tourism Safety and Monitor Programme" was being implemented by the GTA without our involvement whose birthchild it was and for which the GTA did not deserve to credit them". Unfortunately, there is no evidence placed before this Court as to the manner in which the applicants' copyright was allegedly infringed.

[38] During the course of argument the applicants' counsel asserted, given the paucity of evidence in the applicants' affidavit that the infringement constituted the use of the words "*Tourist Safety Monitors*" and "*Tourist Ambassadors*", in the call for tender proposals. These titles, the applicants say they had provisionally patented under Registration No. 2017/04644. It was common cause that the patent had lapsed. The applicants counsel accepted that these words referred to job titles, and as such did not advance the applicants case. There was no effort to demonstrate to the Court that the first and/or second respondents had in any way copied or adapted the concept evidenced by the literary work contended for (to the extent that it was placed in evidence before the Court given that much of the substance of the document was missing).

[39] As emphasised by Corbett JA in ***Galago Publishers (Pty) Ltd and Another v Erasmus***⁶ in order to prove copyright infringement by reproduction the applicant must establish two distinct things namely:

"(i) *that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, 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 casual 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*

⁶ 1981 (1) SA 276 (A) at 280B-D

work of his own?"

- [40] In considering the first element, it is also instructive to refer to **Laubscher v Vos and Others**⁷ where Nicholas J observed that in the case of artistic works a mere comparison usually provides a ready answer whereas the answer may not be so readily reached if the copyright and the alleged infringing works have a common source. Importantly, Schutz JA in **Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd**⁸ says at page 129:

"The importance of the plaintiffs identifying those parts of his work which he alleges have been copied is made clear by Millett J in a case where a "Dog-N-Boots" design was alleged to be a reproduction of a "Puss-N-Boots" design. The case was Spectravest Inc v Aperknit Ltd [1988] FSR 161. The relevant passage appears at 170:

"Accordingly, where the reproduction of a substantial part of the plaintiffs' work is alleged, a sensible approach is first to identify the part of the plaintiffs' work which is alleged to have been reproduced and to decide whether it constitutes a substantial part of the plaintiffs' work. The test is qualitative and not, or not merely, quantitative. If it does not, that is an end of the case. If it does, the next question is whether that part has been reproduced by the defendant. Reproduction does not mean exact replication. A man may use another's work as an inspiration to make a new work of his own, treating the same theme in his own manner; but he is not entitled to steal its essential features and substance and retain them with minor and inconsequential alterations. The question is whether there is such a degree of similarity between the salient features of the two works that the one can be said to be a reproduction of the other. In considering whether a substantial part of the plaintiffs' work has been reproduced by the defendant, attention must primarily be directed to the part which is said to have been reproduced, and not to those parts which have not."

- [41] The applicants have not done so. The applicants must stand and fall by their

⁷ 3 JOC (W) at 6

⁸ 1998 (2) SA 965 (CSA)

affidavits.

- [42] In all of the circumstances, the applicants have materially failed to make out a prima facie case for the relief sought.
- [43] That is the end of the matter.
- [44] Although this is so, I will briefly deal with the first and second respondents *in limine* points, all of which in my view were ill-founded, and took the case, to the extent there was a case to meet, no further.
- [45] The first point *in limine* was based on the principle of *lis pendens*. An earlier abortive application had been instituted by the applicants against the first and second respondents on the basis that the applicant's had patented their idea.
- [46] A notice of withdrawal of that application was served on the first and second respondents and uploaded to CaseLines on 12 March 2020. Much was made by the first and second respondents' counsel of the fact that there had been no tender for costs. To my mind, the failure to do so does not impinge on the withdrawal of the application. As such, there was no pending litigation before this Court and the point was without merit.
- [47] It was also contended that the first and second respondents' affidavits established a material dispute of fact, also because of the repetitive allegations now framed in this application (as evidenced in the withdrawn application), which had been addressed already. I was requested to grant a dismissal on that basis alone.
- [48] The affidavits filed by the first and second respondents did little to demonstrate a version let alone a defence. The deponent to the affidavit, Mr Mlabe, had on his own admission limited dealings with the applicants. If a case had been made out by the applicants, I would have had to find that the affidavit provided no assistance to the above Honourable Court and contained empty denials. The first and second respondents misconstrued the nature and the extent of the copyright contended for, albeit not established, but importantly placed no evidence before me which demonstrated a dispute. The affidavits sought to deny allegations, for what it was worth and make conclusions which were not underpinned by any factual matrix. As

such, no dispute of fact was established by the first and second respondents. This point too held no merit.

- [49] The first and second respondents also implausibly contended that there had been a material non-joinder in that the SAPS had not been joined to the application. Again, SAPS was not an interested party and had nothing to do with the request for tender proposals which the applicants sought to underpin as the source of the infringement. As such this point must fail too.
- [50] The remaining points that were made were not points *in limine* and went to the merits of the application. Given my findings that the applicants did not make out a *prima facie* case and failed to discharge their onus, it is unnecessary for me to deal with these submissions, as they take the case no further.

COUNTER-APPLICATION

- [51] The second respondent counter-applied in terms of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 for an order declaring the applicants to be vexatious litigants. It seeks a costs order against the applicants on the attorney and client scale. The second respondent did not file a further affidavit and relied on the answering affidavit filed in opposition of the main application. The applicants did not file an opposing affidavit.
- [52] Mr Linda Mlaba, the deponent to the second respondent's answering affidavit, vaguely contends that the application launched by the applicants is "*ill-conceived and vexatious*". In support of the allegation of vexatiousness, he says that:
- 52.1 the applicants have not established a tourism business in implementation of their safety and tourism concept and, accordingly, have never been in competition with Kunjalo; and
- 52.2 the applicants failed to bid /tender, an indication albeit vaguely alleged that they were not interested in the first and second respondents assistance.
- [53] Neither of these points, to my mind, demonstrate vexatious conduct.

[54] In the course of argument the respondents' counsel sought to also raise the following points:

54.1 Because the application, set down by the respondents had never been served on Kunjalo, this indicated that the applicants were litigating vexatiously, as the matter was now in the opposed court. The failure to do so, ultimately had no impact on the arguing of the application, as the applicants conceded that they could not proceed against Kunjalo, which had not been served but also because the lapse of time had rendered the interdict moot. This did not affect the respondents' ability to present and argue its case against the remaining relief;

54.2 This application was a regurgitation of the first abortive application, albeit now framed under copyright. The first application had been withdrawn without a tender for costs, and this application should be dismissed too as the applicants were simply clogging the Court system and putting the first and second respondents to great time and cost, involving taxpayer funding, in opposing an application which lacked merit.

54.3 In addition, it was submitted that the events commenced as far back as 2004 and that the time that had elapsed, without result, did not justify the relief sought.

[55] This Court enjoys at common law an inherent power to strike out claims that are vexatious by which is meant "*frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant*".⁹

[56] Furthermore, under section 173 of the Constitution of the Republic of South Africa 1996, this Court has the inherent power to protect and regulate its own process and to prevent an abuse of such process.

[57] In ***Beinash v Ernst & Young***¹⁰ the Court set out the purpose of the Vexatious

⁹ ***Fisheries Development Corporation of SA Ltd v Jorgensen*** 1979 (3) SA 1131 (W) at 1339E-F; ***Bisset v Boland Bank Ltd*** 1991 (4) SA 603 (D) at 608B-E; ***Cohen v Cohen*** 2003 (1) SA 103 (C) at 108D-H

¹⁰ 1999 (2) SA 116 (CC) at 112F-H

Proceedings Act 3 of 1956 as follows:

"This purpose is "to put a stop to persistent and ungrounded institution of legal proceedings." The Act does so by allowing a court to screen (as opposed to absolutely bar) a "person [who] has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court". This screening mechanism is necessary to protect at least two important interests. These are the interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings."

- [58] Section 2(1)(b) of the Act confers a discretion upon the Court whether to make an order that the applicants are vexatious.
- [59] I have considered the submissions made by the first and second respondents and the conduct of the applicants. It cannot be said that the applicants have litigated prolifically. In the **Ernst & Young** matter the applicants had instituted 45 different proceedings of which 27 had been unsuccessful, 1 had been an application for leave to appeal which had succeeded and 17 of which had not been completed at the date of the judgment.¹¹
- [60] Here, the applicants appointed a new legal representative, Ramantse Attorneys, which attended to the drafting and settling of the founding and replying affidavits. To the extent that the founding affidavit has failed to establish a *prima facie* case, that responsibility cannot be attributed to the applicants. Their erstwhile attorney of record, Mr O M Ntimbane Attorneys represented them in the abortive proceedings which were withdrawn. I am not of the view that the applicants are *mala fide* or that there is any ulterior motive or absence of *bona fides* on their part, in bringing this second application.
- [61] Intellectual property and copyright law is a complex area of the law. It requires a keen and experienced legal mind to assist parties in formulating a proper and well-

¹¹ **Ernst & Young and Others v Beinash and Others** 1999 (1) SA 1114 (W)

founded case supported by relevant evidence. These are not issues which lay people such as the applicants can grapple with. They have approached attorneys to represent them and it is only reasonable to accept that they sought and relied upon the legal advice which has been furnished to them. The affidavits filed by the applicants are devoid of malice.

[62] I am not of the view, as set out in *Beinash v Wixley*¹², “that an abusive process has taken place so that “the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”.

[63] Yes, the first and second respondents have been put to trouble in a second unsuccessful application, and there have been delays in the prosecution of the application, but it cannot be said to be vexatious. Having said so, I caution the applicants to carefully consider their options should they wish to prosecute this claim further.

[64] In all of the circumstances, the second respondent has not established that the applicants have conducted themselves in a manner which is vexatious and, accordingly, the relief cannot be granted.

COSTS

[65] As I have already stated, the applicants' case is fatally flawed by the lack of evidence required to discharge the onus which is upon it. There is no suggestion that the applicants are *mala fide* or vexatious in bringing these proceedings. As such, I am of the view that the costs must, in accordance with the general principles, follow the result.

[66] Insofar as the counter-application is concerned, the applicants did not file an opposing affidavit and, accordingly, were not put to any additional trouble in the launching of the application. The second respondent also relied on its answering affidavit in founding its counter-application. I am aware that the second respondent is frustrated that this is the second unsuccessful application launched by the applicants. I am also aware that taxpayers fund their costs. As a consequence, I am

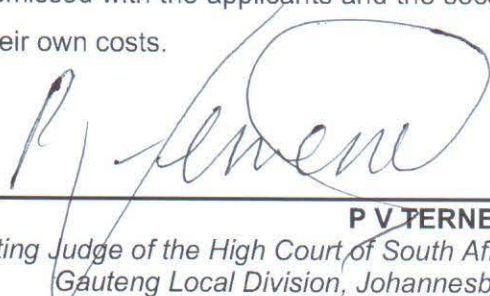
¹² 1997 (3) SA 721 (SCA) at 734

of the view that insofar as the counter-application is concerned, the applicants were not put to much trouble or expense and it would be fitting to order that each of the parties bear their own cost, in relation to the counter-application.

[67] In the circumstances, I make an order in the following terms:

ORDER

- 67.1 The main application is dismissed.
- 67.2 The applicants are ordered to pay the first and second respondent's costs jointly and severally, the one paying, the other to be absolved.
- 67.3 The counter-application is dismissed with the applicants and the second respondent ordered to pay their own costs.



P V TERNENT
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	12 April 2021, 13 April 2021 and 14 April 2021
DATE OF JUDGMENT:	27 August 2021
FOR THE APPLICANTS:	Mr Nkosinathi Mkhize
INSTRUCTED BY:	Ramantsi Attorneys Mr T Ramantsi
FOR THE RESPONDENTS:	Mr S Chitando
INSTRUCTED BY:	The State Attorney Ms M Mathe