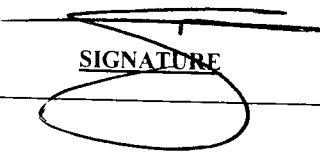


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
☒ REVISED. ✓	
25/8/2015 DATE	 SIGNATURE

25/8/15
Case Number: 28205/2014

In the matter between:

PHUMELELA GAMING AND LEISURE

LIMITED

1st Excipient/First Defendant

GOLD CIRCLE PROPRIETARY LIMITED 2nd Excipient/Second Defendant

and

THE KWAZULU-NATAL BOOKMAKERS'

SOCIETY

Respondent/Plaintiff

JUDGMENT

POTTERILL J

- [1] The first and second defendants excepted to the plaintiff's particulars of claim contending that the particulars are vague and embarrassing. For ease of reference I refer to the excipients as the defendants and the respondent as the plaintiff. The plaintiff did not in terms of Rule 23 remove the cause of complaint as filed by the defendants. The first and second defendants excepted to the identical paragraphs; paragraphs 8, 10 and 12 of the plaintiff's particulars of claim.
- [2] The plaintiff's claim is found on copyright infringement of the plaintiff's copyright pertaining to *"Original literary works consisting of written bookmaker odds including the starting prices, for certain horseraces, alternatively a table or compilation of written bookmaker odds, including the starting prices, for certain horseraces"* (paragraph 8). These odds were distributed to subscribers of the plaintiff's service loosely called the *"Bookmaking Odds Data Dissemination Service (BODDS)"* (paragraph 6).
- [3] In paragraph 8 the plaintiff claims ownership of copyright in *"broadcasts"*.

The first exception

[4] Paragraph 8 has the heading *“Copyright in the BODDS BROADCASTS”* and reads as follows:

“At all times material to this action the Plaintiff was and still is in (sic) the copyright owner of certain broadcasts, consisting of signs or symbols in the form of data being bookmakers odds, including the starting prices, for certain horse races for the purposes of BODDS.

Particulars

8.1 *The Plaintiff was at all times material to this action was (sic) a qualified person within the meaning of Section 3(1) of the Copyright Act.*

8.2 *As the first broadcaster and author, (within the definitions “author” and “broadcaster” in Section 1(1) of the Copyright Act), the Plaintiff undertook the broadcasting of its aforesaid determination of bookmakers odds for the purposes of and as an essential element of BODDS.*

8.3 *Such broadcasts fell within the definition of “broadcast” within the meaning of the definition of “broadcast” in Section 1(1) of the Copyright Act.*

8.4 *Such broadcasts were made from at least 2004 and took place as a consequence of the Plaintiff’s skill and effort and were not copied from any other sources.*

8.5 *The said broadcasts for the purpose of BODDS were original within the meaning of Section 2(1) of the Copyright Act.*

8.6 *In the premises copyright in each of the broadcasts as aforesaid, vests in the Plaintiff by reason of the facts pleaded in paragraphs 8.1-8.5 above and by reason of Sections 1 (Definition of "author", "broadcast" and "broadcaster"), 2(1)(f), 3(1), 10 and 21(1)(a) of the Copyright Act."*

[5] The defendants argued that paragraph 8 itself is vague and embarrassing because they are unable to determine what the broadcasts are. The reasons for this are as follows:

5.1 The broadcasts are only referred to as "*signs or symbols*" and not what the broadcasts consist of. A symbol is not covered by the definition of the Copyright Act, 98 of 1978 ("the Act") of a broadcast.

5.2 ... "*In the form of data being bookmakers odds, including the starting prices* ... " is vague because what else does the data include? The vagueness further is expounded because "*for certain horseraces*" does not tell the defendants for what horseraces the broadcasts were.

5.3 Paragraphs 8.2 and 8.6 refer to the "*plaintiff undertook the broadcasting of its aforesaid determination of bookmakers odds for the purposes of an essential element of BODDS*". This can only refer to paragraph 8 which cannot withstand scrutiny because it does not clarify any vagueness.

- 5.4 The defendants don't know where the broadcasts occurred.
- 5.5 Paragraph 8.4 only identifies the period as "*from at least 2004*", but is silent as to whether the broadcasts were for instance daily, hourly, once a month or otherwise.
- 5.6 The defendant does not know how the broadcasting occurred; for instance by television broadcast or otherwise.
- 5.7 The defendants have no idea who the recipients are.
- 5.8 Paragraphs 8.3 and 8.5 plead conclusions and do not set out the factual premises as to why the broadcasts are as defined by the Act and qualify for protection under the Act. The defendants need to know this because sections 2A and 12 set out exceptions to copyright protection for broadcasts and literary works respectively.
- 5.9 The plaintiff's argument that the reference to "*broadcasts as aforesaid*" refer to paragraph 6 is to be rejected because broadcasts do not correlate to "*written bookmaker odds*" as referred to in paragraph 6. In paragraph 6 detail is provided, for instance: each horse in each race versus the bald and vague statement in paragraph 8 for "*certain horseraces*". Reliance therefore cannot be placed on paragraph 6 of the particulars of claim because it is at odds with paragraph 8. A reference to "*broadcasts as aforesaid*" can only relate to paragraph 8 because one cannot cross-reference to a void.

5.10 In the particulars of claim in paragraph 6 the plaintiff tendered inspection of the literary works, but do not tender inspection of the broadcasts in paragraph 8.

- [6] It was argued that the defendants thus simply cannot plead, except for a bare denial. This would render the defendants' pleas excipiable and I was referred to *Trope v South African Reserve Bank and Another and Two Other Cases* 1992 (3) SA 208 (T) at p211 where the court found the following:

"Thus is may be possible to plead to particulars of claim which can be read in any one of a number of ways by simply denying the allegations made; likewise to a pleading which leaves one guessing as to its actual meaning. Yet there can be no doubt that such a pleading is excipiable as being vague and embarrassing – see Parow Lands (Pty) Ltd v Schneider 1952 (1) SA 150 (SWA) at 152F-G and the authorities there cited."

- [7] It was argued that the particulars of claim lacks particularity to the extent that it is vague and the vagueness causes embarrassment of such a nature to the defendants that they are prejudiced.

- [8] The plaintiff cannot in answering the exception, rely on the fact that apart from the allegations in the summons the defendants are aware of the case that they are

required to meet and the facts are particularly within their own knowledge. Even if this is so it does not disentitle the defendants to a summons with particulars of claim with reasonable distinctness – *Boys v Piderit* 1925 EDL 23 at 24.

[9] On behalf of the plaintiff it was argued that the defendants' premise is wrong because the defendants are nit-picking at certain paragraphs instead of reading the particulars of claim as a whole. Paragraph 8 can never be vague and embarrassing as it must be read in conjunction with paragraph 6. There is accordingly no embarrassment causing prejudice to the defendants. The plaintiff refers to and relies on the definitions of "*literature works*" and "*broadcasts*" within the meaning of section 1 of the Act and the plaintiff can thus plead thereto taking cognisance of these definitions.

[10] In deciding whether a pleading is vague and embarrassing a court must first find whether the pleading lacks particularity to the extent that it is vague. The question is thus whether paragraph 8 read with the other particulars of claim defines a clear meaningful statement.

[11] I am satisfied that paragraph 8 of the particulars of claim is vague. Paragraph 8 can never be cleared up by reading paragraph 6.

- 11.1 This is simply so because paragraph 6 relates to the infringement of copyright relating to written bookmaker odds, whereas paragraph 8 refer to certain broadcasts consisting of signs and symbols. In paragraph 6 facts are set out; odds computed for each horserace, employees doing so acting within the course and scope of their employment and for each horse in each race; these facts in paragraph 8 are non-existent.
- 11.2 Paragraph 8 relates to the second cause of action being infringement by the defendants of the ownership of the plaintiff's broadcasts. A broadcast can conceivably be based on a literary work as set out in paragraph 6, but paragraph 8 denounced any assertion or argument that paragraph 6 must be read in as the *"aforesaid determination of bookmakers odds"*. This is so as paragraph 8 differs in setting out facts relating the BODDS with that set out in paragraph 6. In paragraph 8 very little factual basis is given except for setting out *"certain broadcasts"* to which the plaintiff lays claim as well as to *"certain races"*. Paragraph 8 is thus in contradistinction to paragraph 6 and the argument on behalf of the defendants that one cannot cross-reference to a void is thus correct.
- 11.3 Furthermore, a written bookmakers odds is not a sign or a symbol.
- 11.4 Upon a normal reading of a paragraph and its sub-paragraphs *"aforesaid determination of bookmaker odds"* in paragraph 8.2 would be read with reference to paragraph 8 and not a preceding paragraph relating to another act of averred infringement of copyright. Perhaps if paragraph 6 set out that

paragraph 6.1 and 6.3 is the subject matter of both infringements and then paragraph 8 set out how the written format was broadcast a cross-reference could be made, but absent this paragraph 8 is clearly vague.

[12] Paragraph 8 lacks such particularity that the reader cannot distil a clear meaning. In ***King v South African Weather Service 2009 (3) SA 13 (SCA)*** at paragraph [6] the court found that a copyright claimant must clearly identify the work or works that were infringed. In the matter at hand the plaintiff does not tender inspection of the broadcasts so there is no other procedure open to the defendants set out in the summons that can clarify the vagueness.

[13] I am satisfied that the defendants will be substantially embarrassed by the lack of particularity. The defendants cannot plead to paragraph 8, except for a bare denial. Pleading a bare denial is in itself excipiable and defeats the purpose of defining the issues in the pleadings – see ***Trope v South African Reserve Bank and Another 1992 (3) SA 208 (T)*** at p211.

[14] The prejudice to the defendants herein thus speaks for itself in that they do not know what case it is they have to meet and cannot plead to paragraph 8. The exception pertaining to paragraph 8 must accordingly be upheld.

- [15] I find it pragmatic to deal with the exceptions against paragraphs 10 and 12 of the particulars of claim simultaneously. Once again both defendants' exceptions attack the same lack of particularity of the particulars of claim as being vague and embarrassing. Both paragraphs 10 and 12 relate to the averred infringement of the copyright of the plaintiff of the literary works and the broadcasts by the defendants. I don't find it necessary to replicate paragraphs 10.1, 10.2, 10.3, 12.1, 12.2 and 12.3 because it is common cause that these paragraphs parrot section 6 of the Act.
- [16] The plaintiff in paragraph 10 sets out that the defendants reproduced or adapted the literary works in South Africa and supplied such reproductions or adaptations to the third parties including, but not limited, to a concern known as Satellite Information Systems who were not entitled to receive such. The defendants broadcasted and caused the literary works to be transmitted in a diffusion service from South Africa to third parties including Satellite Information Systems who were not entitled to receive broadcasts for such transmissions.
- [17] In paragraph 12 the plaintiff pleads that the defendants directly or indirectly reproduced the plaintiff's broadcasts, rebroadcast the broadcasts and caused such broadcasts to be transmitted in South Africa in a diffusion service to third parties including Satellite Information Systems who were not entitled to such.

[18] The defendants argued that the plaintiff only pleaded conclusions and set out no facts to establish the acts of infringement. The defendants don't know how, when, where they infringed, how the broadcasts took place and who the third parties were. They don't know how the literary works were adopted. None of the technical aspects of what elements constituted the infringement are pleaded. The plaintiff must plead the similarity between the alleged infringed works and broadcasts and the plaintiff's claimed original works. The court was referred to *Buchner and Another v Johannesburg Consolidated Investment Co Ltd* 1995 (1) SA 215 (T) at 216:

"The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based"

“... An opinion or conclusion as to what the parties’ liabilities are, even if disputed, does not become a statement of fact and failure to dispute the conclusion is of no consequence.” (p217)

[19] It was thus the argument on behalf of the defendants that they cannot from the pleadings ascertain as to how the infringement of the copyright took place, are embarrassed and cannot plead to conclusions. The defendants are prejudiced because the plaintiff’s claim is so vague they cannot ascertain whether the general exceptions from protection of literary works in terms of section 12 of the Act is applicable or not.

[20] On behalf of the plaintiff it was argued that the plaintiff pleaded according to the Act and the defendants would know how they infringed the plaintiff’s copyright. The court was referred to **Harms Amler’s Precedents of Pleadings** 7th Edition wherein the requirements for setting out a cause of action were set out and the plaintiff adhered thereto. I was also referred to the matter of **Dr GR Heald v Combined Artists** case number 50872/14 dated 17 July 2015 wherein Hiemstra AJ dismissed an exception. The court was urged to follow this approach. I was also referred to the matter of **Heald v Combined Artists CC 2013 BIP 353** wherein a Full Court also dismissed an exception and I was urged to follow the same route.

[21] The two held matters referred to *supra* applied the general trite principles relating to pleadings and exceptions and I am accordingly not bound by any new principles not expressed in the case law. The matter at hand is wholly distinguishable from the two *Heald* matters because even upon a cursory reading of the particulars of claim a reader immediately understands what copyright was infringed:

- “4. *During the period September/October 2011 to November 2012, the defendant created a cinematograph film (as contemplated in the Act) entitled “Miracle Rising, South Africa” (“the cinematograph film”) which cinematograph film is an adaptation (as contemplated in the Act) and/or reproduction (as contemplated in the Act) of the literary works.*
5. *The plaintiff tenders inspection of the cinematographic film pursuant to the provisions of rule 35(12) of the Uniform Rules of Court by appointment with the plaintiff’s attorneys.*
6. *The plaintiff also tenders a copy of a document prepared by him, which furnishes particulars of the aforesaid infringement, but is too bulky to incorporate in an annexure to these particulars of claim.”*

In *casu* there is no factual basis set out for the infringement and nothing to compare it to. It is trite that evidence need not be pleaded, but factually informing the defendants how they infringed is required. In the *Heald* matter before the Full Court the court found that the defendants could ascertain what infringement it was, but that on exception a court will not decide whether the particulars of claim are true or not; the trial court must decide that.

[22] The reference to **Harms Amler's Precedents of Pleadings** 7th Edition is also not helpful to the plaintiff as the author set out that besides alleging and proving infringement of copyright, the copying of the plaintiff's works entails a causal connection between the plaintiff's and the defendants' work as well as a sufficient degree of similarity. Where the defendants are left in the dark and cannot ascertain from the particulars of claim whether there is a causal connection or similarity the defendants are embarrassed and prejudiced in that they can only plead a bare denial.

[23] I am satisfied that the plaintiff has only pleaded conclusions pertaining to their infringement and that the exception must be upheld.

[24] On behalf of the plaintiff it was argued that the defendants would not be entitled to the costs of two counsel. The defendants however argued that the matters involved are intricate and that there is no reason not to award costs for two counsel. I am

satisfied that the defendants were entitled to engage two counsel given the nature of the matter. Mr. Morley SC, himself in his heads of argument, requested the costs of two counsel where applicable.

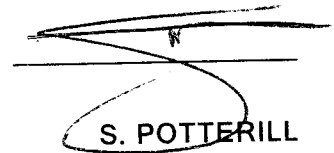
[25] I accordingly make the following order:

25.1 The exceptions of both defendants are upheld with costs.

25.2 The costs to include the travelling costs of the legal representatives from Kwazulu Natal.

25.3 The costs are also to include the costs of two counsel where applicable.

25.4 The plaintiff has 20 (twenty) court days to amend its particulars of claim.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 28205/2014

HEARD ON: 20 August 2015

FOR THE 1st Excipient/1st Defendant: ADV. A. COCKRELL SC

ADV. P. CIRONE

INSTRUCTED BY: Roodt Inc

FOR THE 2nd Excipient/2nd Defendant: ADV. M.D.C. SMITHERS SC

INSTRUCTED BY: Barkers Attorneys

For the Respondent/Plaintiff: ADV. G.E. MORLEY SC

INSTRUCTED BY: JH Nicolson Stiller & Geshen

DATE OF JUDGMENT: 25 August 2015