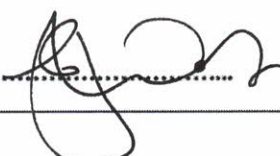


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 2021/41676

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
21/09/2021	
	

In the matter between:

THE TASKFLOW (PTY) LTD

Applicant

and

ALUXIUM (PTY) LTD

First respondent

ANDRE DE KOCK

Second respondent

CHRISTIAN DAVIS FRISCHE

Third respondent

JUDGMENT

van der Westhuizen, J

- [1] The applicant approaches this court on a semi-urgent basis for interdictory relief premised upon the alleged breach of copyright, alleged unlawful competition and the alleged breach of fiduciary duties owed towards the applicant.

- [2] It is alleged that the second and third respondents were former shareholders and directors of the applicant. However, the second respondent emphatically denies that he was an employee of the applicant. The second respondent was the technical director of the applicant. The relationship of the second and third respondents with the other directors of the applicant became acrimonious during March 2020 resulting in the dismissal of the second and third respondents whereupon a complaint was lodged with the CIPC.
- [3] The second and third respondents have formed a new company, the first respondent, which is a competitor of the applicant. The first respondent was established during 2020 and the second and third respondents utilised it after their departure from the applicant in October 2020. At the time of the second and third respondents' departure, the existence of the first respondent was known to the applicant.
- [4] It will be prudent to deal with the issue of alleged urgency upfront, although I shall consider the application as a whole and rule upon the basis of the application and the relief sought therein.
- [5] The provisions of rule 6(12)(b) of the Uniform Rules of Court requires compliance with two pertinent requirements,¹ namely:
- (a) The applicant is obliged to set out explicitly the circumstances which it avers renders the matter urgent; and
 - (b) The reasons why the applicant claims that the applicant could not be afforded substantial redress at a hearing in due course.

¹ See *Luna Meubel Vervaardigers v Makin et al* 1977(4) SA 135 (WLD)

- [6] In the present matter, the applicant allegedly became aware of the respondents' alleged indiscretions during June 2021, although it was acutely aware of the fact that two of its clients had already "jumped ship" in February and March 2021 respectively and commenced making use of the first respondent's services. The said two clients have deposed to affidavits relied upon by the respondents to the effect that they had departed from the applicant's services due to dissatisfaction and that they had taken the initiative of obtaining the services of the first respondent. No claim was made by the applicant of the respondents filching its clients. The applicant emphatically states that it became aware that its code was being utilised by the first respondent on or about 3 March 2020, although it alleged that the "proof" thereof was only determined on or about 22 June 2021.
- [7] Following on a letter of demand to the respondents to cease and desist from their alleged infringement upon the applicant's "source code", the applicant thought it fit to obtain an Anton Pillar order. The applicant could only "access" the front-end of the code used by the first applicant which is the "user face" part of the first respondent's "source code". The intention with the Anton Pillar order was presumably to preserve evidence of the backend of the respondent's code which was not accessible to the applicant.
- [8] The applicant alleged that it was obliged to first follow that route, prior to it commencing action proceedings for the alleged infringement of the applicant's copyright. The applicant further alleged that it was a requirement of the Anton Pillar order that an action was to be instituted within 3 weeks of obtaining the Anton Pillar order. In this regard, it is common practice that the applicant for an Anton Pillar order provides the court with a *pro forma* draft order setting out the content of the order sought. It is further common practice to include in that *pro forma* draft order the obligation of instituting action proceedings, as the purpose of the Anton Pillar order is to preserve evidence of untoward conduct. That

preserved evidence is required for proving the plaintiff's claims of alleged impropriety.

- [9] On 29 July 2021, the applicant launched its Anton Pillar application, more than thirty days after it had obtained "proof" of the respondents' indiscretions. The applicant then launched its action proceedings on or about 19 August 2021. It launched this application on or about the same time as the action. However 60 days had lapsed since it found alleged "proof" of the respondents' untoward conduct. It was held, as far back as 1991, that a six weeks delay in launching an urgent application for relief in respect of alleged infringement of intellectual property rights, constituted "tardiness".² It was held that the delay was an important consideration in deciding whether to grant the relief sought in that application.
- [10] The respondents submitted that the founding affidavit of the present application is virtually a "carbon copy" of the founding affidavit utilised for the Anton Pillar application. One that was deposed to during the latter part of July 2021.
- [11] It appears that the applicant has taken a *laissez-faire* approach in protecting its alleged proprietary rights. In this regard: it becomes aware in March 2021 of the use of its code by a competitor, knowing that the second and third respondents were involved with the first respondent; it takes time to verify the alleged infringement of its code and does so during June 2021; only at the end of July 2021 does it launch the Anton Pillar application; commences the institution of action proceedings and this application towards the end of August 2021. That conduct smacks of an approach of following the handbook of litigation 101 meticulously and not acting with alacrity. The inference to be drawn from that approach is an intention to tie the respondents up in litigation rather than

² *Metpro Ontwikkelingsmaatskappy (Edms) Bpk v Allan Maskew (Pty) Ltd* 1991 BP; see also *Schweizer Reneke Vleismaatskappy (Edms) Bpk v Die Minister van Landbou en andere* 1971(1) PHF11 (T) where a delay of a month was considered unacceptable.

an intention to protect its proprietary rights as soon as possible. Since learning of the involvement of the respondents as competitor in March 2021, the applicant only commences proceedings in August 2021 to protect its alleged proprietary rights. It is to be noted that an Anton Pillar order is a preservation order, not a fact finding exercise. There is no reason why the Anton Pillar application, this application and the action could not have been issued, and served, simultaneously. Any urgency was self-created.

[12] Although the applicant is entitled to invoke various causes of action to protect its alleged proprietary rights, the premises of all those causes of action originate from one set of facts, namely alleged infringement of copyright. Once that infringement is determined, may the various causes of action be considered. The applicant relies on the following causes of action:

- (a) Alleged infringement of copyright;
- (b) Alleged unlawful competition; and
- (c) Alleged breach of a fiduciary duty.

[13] The relief sought in this application is to restrain the respondents from using the “*applicant’s source code*” in the software services rendering functionality in respect of CRM, Voice, Campaign helpdesk, QA, Iframe and SMS. The alleged *prima facie* right it seeks to protect is described in paragraph 55 of the founding affidavit as: “... *stems from its ownership of the source code and its right to trade and attract custom, without unlawful interference.*” That relief is identical to the relief sought in the action instituted.

[14] The applicant has clothed the relief it seeks in this application as interim relief. In that regard, it is obliged to satisfy trite requirements:

- (a) A *prima facie* right, although open to some doubt;
- (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and is ultimately successful in the main action;³
- (c) A balance of convenience favouring the grant of interim relief; and
- (d) The absence of any other adequate ordinary remedy.

[15] It is trite that the aforementioned requirements stand to be considered in conjunction with each other, and not in isolation. The court is to consider, where there is a dispute of fact, those facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute. That consideration is to be done having regard to the inherent probabilities. Where there is a dispute in respect of legal issues, the same considerations apply.³

[16] In *King v South African Weather Service*⁴ the Supreme Court of Appeal held that regard is to be had to all the relevant statutory requirements necessary to establish a copyright claim in the name of the particular claimant. Only thereafter can it be determined whether infringement thereof has occurred. In this regard, that court held that:⁵

- (a) Copyright is a creature of statute and to be found within the four corners of the statute, namely the Copyright Act, 98 of 1978 (the Act);
- (b) The Act defines certain works that are eligible for copyright under the Act, which includes computer programmes;

³ *Big Catch Fishing Tackle Proprietary Limited v Kemo* 2019 JDR 0891 (WCC) [16] – [24]

⁴ 2009(3) SA 13 (SCA)

⁵ [5] – [10]

- (c) Section 2 of the Act requires that the work is original and has been reduced to a material form;
- (d) The copyright must have been conferred by virtue of nationality, domicile or residence, or as a result of first publication;⁶
- (e) Copyright infringement is actionable at the suit of the owner of the copyright.⁷ It is actionable only at the suit of the author, if the latter is also the owner thereof;
- (f) The word "author" has a technical meaning. It depends on the nature of the work. In the case of a computer programme, the author is the person who exercised control over the making of the computer programme;⁸
- (g) The author is usually the first owner.⁹ However, in respect of a computer programme, there is an exception. Where the computer programme is made in the course of the author's employment with another under a contract of service, in which event the owner is then the employer;¹⁰
- (h) In terms of the provisions of section 23(1) of the Act, the "using" of a copyright work does not amount to copyright infringement. Where the performance of an act in the Republic, to which the owner has the exclusive right to do or do authorise, copyright infringement may occur.

[17] The factual and legal disputes in this matter are vast. The onus rests upon the applicant to convince this court that the probabilities for the

⁶ Sections (3) and (4)

⁷ Section 24(1)

⁸ Section 1 sv "author"

⁹ Section 21(1)(a)

¹⁰ Section 21(1)(d)

granting of the relief sought favour the applicant. The important disputes include those which the court hearing the main action is to decide. It is both unnecessary and undesirable for this court to make findings of fact and legal principles which are better to be left for the court hearing the pending action.¹¹ However, it requires some consideration in determining the relevant strengths of the case of each party.

[18] In its founding papers, the applicant loosely deals with important concepts such as: the work; the eligibility thereof to copyright; and ownership. Further in this regard:

- (a) The applicant merely claims that it is the owner of the copyright in the source code, although conceding that it is based upon open source frameworks;
- (b) No claim is laid at originality of the work;
- (c) There is no claim that the work qualifies for copyright protection with reference to nationality, domicile, or residence of the alleged author, or by reference to the country of origin, i.e. that the work has been created by qualified person/s. The only claim made, is that its employees created the work. There is no claim that the employees did so under a contract of service.
- (d) The second respondent is referred to as being the technical director at the time. Whether it was made under his supervision is not clarified. The applicant alleged that the second respondent was an employee. No contract of service is provided, and the applicant was constrained to refer to documents after the fact to allegedly show that the second respondent was an employee. The applicant seeks that such

¹¹ *Beecham Group Limited v B-M Group (Pty) Ltd* 1977(1) SA 50 (T) at 55F-56A

an inference is to be drawn. The second respondent emphatically denied that he was an employee of the applicant.

- [19] In its replying affidavit, the applicant for the first time alleges that one Charl Naudé, an alleged shareholder of the applicant who resides in the United States of America, was in control of the development of the source code and that the second respondent acted on Mr Naudé's instructions in that regard. It would follow in that regard that Mr Naudé may have been the author. No contract of service is claimed to have existed in respect of Mr Naudé. In the absence of any claim of cession of ownership in the work to the applicant from Mr Naudé, puts paid to the claim to ownership in the work.
- [20] The Act defines a "computer programme as meaning *"a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result"*. In this regard, the applicant does not lay any claim that the work is in fact a computer programme as defined. It requires an inference to be drawn in favour of the applicant in that regard. The definition of a computer programme in the Act is limited and refers only to the finished product in the form of its source code and object code.¹²
- [21] The applicant readily conceded that the alleged source code has no functionality on its own and requires the presence/existence of other files to work. The applicant further conceded that it will only be able to demonstrate that its source code directs the operation of a computer to bring about a result when it obtains access to the backend to the first respondent's computer programme.

¹² *Haupt T/A Soft Copy v Brewers Marketing Intelligence (Pty) Ltd et al* 2005(1) SA 398 (C) at 410-411

- [22] There being no claim to originality, nationality, or residence or domicile, or as a result of first publication, it follows that the applicant has not shown that the work is capable of copyright protection.
- [23] Considering the issue of copyright infringement, the applicant has dismally failed to indicate a sufficient degree of objective similarity between the alleged work and the alleged infringing work on a qualitative level. The applicant's concession that it would only establish at the trial whether its work directs the operation of a computer to bring about a result, puts paid to showing a sufficient qualitative level of similarity.¹³
- [24] In respect of the claim of unlawful competition, the applicant has failed, in view of what is recorded earlier, to establish that it has any proprietary rights in its work which are confidential and constitutes a trade secret. In particular where there is a concession that the front-end of its work is based upon open source frameworks. Furthermore, the applicant published its front-end source code in correspondence exchanged with the respondents and attached to its papers. Consequently, the applicant can no longer claim confidential information or trade secrets therein. The proverbial horse has bolted as a result of its own doing.
- [25] Furthermore, the applicant has contended that by using the applicant's code, the first respondent has enjoyed a springboard advantage.¹⁴ There is no merit in that contention. The applicant's failure to clearly indicate and specify its alleged proprietary rights as recorded earlier, does not assist in determining whether any springboard advantage could have followed. Further, in view of the inordinate delay in calling the respondents to task, any springboard advantage has long since abated.
- [26] The applicant did not rely on any contractual restraints prohibiting the second and third respondents from engaging with it as a competitor. The applicant seems to rely on the allegation that it is the owner of the work

¹³ *Galago Publishers (Pty) Ltd et al v Erasmus* 1989(1) SA 276 (A) at 280B-D

¹⁴ *Schultz v Butt* 1986(3) SA 667 (A)

and that it was allegedly created *inter alia* by the second respondent and therefor the second and third respondents are duty bound, in terms of them being erstwhile directors of the applicant, to a fiduciary duty owed to the applicant. It is common cause that the first respondent, through the second and third respondents, commenced engaging as a competitor of the applicant. Where there is a dispute of fact as recoded above in respect of *inter alia* a work capable of copyright protection, ownership and alleged infringement of copyright, the applicant has failed to establish a claim for unlawful competition.¹⁵ In the absence of any proof of the use of confidential information or trade secret on the part of the respondents, it follows that the applicant has failed to establish a legal duty of care upon the first and second respondents in the context of Aquilian liability.

- [27] Serious doubt has been cast upon the applicant's alleged proprietary rights in and to the code. That being so, the applicant has not established a *prima facie* right worthy of protection.

- [28] The only irreparable harm that the applicant contended for, was that in the interim the respondents may possibly amass further clients of the applicant, and that damages cannot be determined with precision. In my view that contention is insufficient to weigh in favour of the applicant. Furthermore, the applicant has failed to show that it did not have an adequate alternative remedy. In this regard, the Act provides for an adequate alternative ordinary remedy, in the form of an inquiry into damages, or, in lieu of damages, a reasonable royalty.¹⁶

- [29] I am not satisfied that in view of the complexity of disputed facts and legal principles, I should make a finding on any of those merely on a *prima facie* basis to find in the applicant's favour on a balance of

¹⁵ *Da Silva et al v CH Chemicals (Pty) Ltd* 2008(6) SA 620 (SCA) [20]; see also *Big Catch Fishing Tackle, supra*, at [40] – [43]

¹⁶ Section 24

convenience. The balance of convenience is equally shared between the parties.¹⁷

[30] It is recorded that the applicant has not tendered payment of damages in the event that the interim injunction is granted, but the applicant is ultimately unsuccessful.¹⁸

[31] Furthermore, in view of the insurmountable hurdles recorded earlier, the applicant has not shown any basis upon which the interim relief it seeks should be granted. It follows that the application cannot succeed.

I grant the following order:

1. The application is dismissed with costs.


CJ VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

Date of Hearing:	14 September 2021
On behalf of Applicant:	E C Labuschagne SC V Mabusa
Instructed by:	Charl Naudé Attorneys
On behalf of Respondent:	Ms P Cirone
Instructed by:	Spoor & Fisher Attorneys
Judgment Delivered:	21 September 2021

¹⁷ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957(2) SA 382 (D) at 383C-F

¹⁸ *Ndauti v Kgama et al* 1948(3) SA 27 (WLD)