

SOUTH AFRICA / JUDGMENT

Emisha Software (Pty) Ltd v Servsol Software Solutions CC and Others (2023/069011) [2024] ZAGPPHC 615 (6 June 2024)

[2024] ZAGPPHC 615

COURT

North Gauteng High Court, Pretoria

BEFORE

Ntlama-Makhanya

CASE / FILE NUMBER

2023/069011

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FLYNOTES:

INTELLECTUAL

– Copyright – Computer program – Applicant having paid respondent to do coding for program – Discovered that new clients loaded without its consent – Alleging infringement of copyright in program – Respondent has not satisfied requirements of co-ownership – Originality of program attributable to applicant as its first author – Overall function of program was done and decided at instruction of applicant – Interdict granted – Relief relating to audit of respondent's systems not justified – Copyright Act 98 of 1978.

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO: 2023/069011
(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 06 June 2024

SIGNATURE:

In the matter between: EMISHA SOFTWARE
(PTY) LTD
Applicant
And
SERVSOL SOFTWARE
SOLUTIONS CC
First Respondent
IMALISOFT (PTY)
LTD
Second
Respondent
INTUITIVE (PTY)
LTD
Third
Respondent
INVESTA FINANCIAL
SERVICES (PTY) LTD
Fourth Respondent

Delivery: This judgment is
issued by the Judge whose name appears herein and is submitted
electronically to the parties /legal representatives
by email. It is
also uploaded on CaseLines and its date of delivery is deemed 06 June
2024.

Summary: Interdict - copyright infringement of
the IGS computer program. Urgency of the application. Requirements -
clear right, potential
suffered and no prospects for alternative
remedy. Copyright Act- protects ownership of the author –
originality of the work and not the developer of the program. Urgency
- matter before the ordinary
motion court and no satisfaction of the
requirements. Settled law on jurisdiction - Supreme Court Act 10 of
2013- not to refuse
cases properly brought before the courts.

JUDGMENT

NTLAMA-MAKHANYA AJ

- [1] This is an application for an interdict, alternatively an interim relief regarding the infringement of a copyright of the computer program; Insurance Guard System (IGS), which the applicant alleges, it has exclusive ownership. The applicant sought an order for the delivery of the IGS program; an order for an enquiry on the damages suffered or reasonable royalty to which it is entitled because of the unlawful infringement of the copyright and an order that an expert be appointed to conduct an audit on the respondent's system that it no

longer stored or transferred program to other devices.

- [2] The respondent vehemently denied that the applicant has exclusive ownership of the IGS program and the application itself is based on a lie and is disputed by the facts herein because the respondent is the co-owner of the said program.
- [3] In general, the substance of this application is designed to what the applicant perceives to be an infringement of its IGS computer program and sought the delivery of the original and copies of the program in the possession or control of the respondents to the applicant as a legitimate and lawful copyright owner.
- [4] The crux of the dispute and the legal question to be answered in this matter is about the determination of the basic principles relating to the exclusive right of copyright entitlement as envisaged in the Copyright Act 198 of 1978 (Copyright Act) and its balance with the alleged opposing claim for co-ownership of the IGS program.
- [5] It is also imperative that this Court situates the determination with the background to the cause of the dispute to examine the principle of 'ownership' and its linkage to 'originality' in copyright infringement allegations. For ease of reference, I will address this matter by referring to the first respondent as inclusive of the second to the fourth respondent.

Background:

The applicant's case

- [6] The parties, with no service level agreement between them, but a mutual relationship of over 14 years that turned sour were in an informal agreement for the development of the computer program: Insurance Guard System (IGS program) wherein the first respondent was paid for the professional services rendered upon the applicant's instructions in the development and management of the said program for a fee of R6 million rand over a seven (7) year period. As argued before this Court, the IGS program is a software program that is exclusively owned by the applicant which hosts insurance products and serves as a 'Credit Guard' for the consolidated credit life insurance products that is made available to debt counsellors for their clients. It was designed to conduct business in the field of debt counselling for the purpose of the National Credit Act 34 of 2005 (NCA). The IGS program calculates insurance quotes, manages, and issues policies, manages bulk policy replacements, and allocates and manages premiums on behalf of the insurer in accordance with the regulatory requirements. The system hosts all client's data and is integrated with the Intuitive Front End (IFE) system used by debt counsellors. Ultimately, it is a set of instructions fixed or stored in a way, when used, (in)directly in a computer, directs its operation to bring about a result. It accordingly constitutes a computer program as defined in the Copyright Act 198 of 1978 (Copyright Act). As presented before this Court, the IGS program was first released towards the end of the year 2016 and the developer, (First Respondent) does not own the copyright but rather the applicant who has exclusive rights to reproduce; adapt and broadcast it. The applicant has since discovered the new activity and

clients being loaded in the IGS program without its consent. The applicant has also discovered that it lost access to the IGS program in June 2023 whilst still paying the first respondent approximately R60 000 per month.

- [7] The applicant acknowledged that the gist of the application is copyright ownership and whether the first respondent or Visagie is/are joint owners thereof. It is also disputed whether if it is found that the first respondent or Visagie are not co-owners that there has been an infringement of the IGS copyright program.
- [8] The applicant pleaded for the urgency of the matter in that the:
- (i) value of software in the insurance industry is short lived;
 - (ii) the applicant is in a process of negotiating a large transaction with Hollard Insurance and is unable to provide the needed critical documents;
 - (iii) the applicant has already lost clients to the respondent; and
 - (iv) the applicant will be unable to quantify the damages should the unlawful conduct persists.
- [9] In essence, the applicant counter-argued that the urgency is not self-created by outlining time frame and sequence of events from 19 June 2023 until the serving of this application on 14 July 2023. The said time frame was meant to indicate the loss of access to the IGS program with implications for the Hollard Insurance deal falling through due to the non-provision of the required documentation.
- [10] It was the applicant's case for an interdict on an urgent basis against the respondents for the copyright infringement of the IGS program and that it not be removed from accessing the various platforms; JIRA; IFE; IGS Program; iPDA; Slack including their history and for an audit be conducted of the respondent's systems to ensure the IGS program is no longer stored on any platform or cloud or anywhere where it may be accessible to the respondents and for any respondent opposing this application to pay the costs of this application to include the costs consequent to the employment of two counsels jointly and severally.

The respondent's case

- [11] The respondents denied the exclusive ownership of the applicant's IGS program as non-existent. The first respondents refute the application as based on a lie in that there are various factors that support its contention that the applicant has not provided a cogent reason why the matter was not presented before the ordinary course of action and not as an urgent motion action. The quest for an interdict is in effect final and the Plascon Evans Rule ought to apply in settling the dispute which cannot be successful. The first respondent is not the owner but the co-owner of the copyright in the IGS program and is paid on a regular basis by the applicant. There has been no copyright infringement and does not use the IGS program let alone the second to fourth respondents and the program has since become dormant.

- [12] The respondent has filed for condonation of the supplementary affidavit to refute some of the allegations that were made by the applicant in its founding affidavit regarding the alleged new discovered activities, which the respondent alleged, it did not respond in its main affidavit due to an oversight and picked it up on the applicant's replying affidavit. As stipulated in the answering affidavit, the jurisdiction is not of concern to the second -third respondents in that they do not utilize the IGS system and have never infringed any of the applicant's copyright. The first respondent resides in the Western Cape and the second to third respondent were solely joined for this Court's jurisdiction without which, the applicant would not have the basis to lodge this matter before this Court without the established jurisdiction. Therefore, this Court does not have jurisdiction but the Western Cape High Court.
- [13] The respondent also rejected that the application is urgent and claimed self-created urgency by the applicant. It substantiated its reasons by unearthing the basic principles regarding urgency which require the applicant to show cause of the potential not receiving substantial redress in the ordinary hearing in due course. The further contention was that the applicant did not invoke the provisions of Rule 41 before launching this application which could have enabled the resolve of the matter in an amicable way including the provision of the assistance that could have been required. The loss of clients, the Hollard deal and the calculation of damages suffered, and their continuation did not justify the urgency of this application as it was self-created.

Analysis of the

submissions

- [14] This analysis starts with the difficulty associated with copyright infringement of computer programs complaints such as in this matter because of the technicality involved in the application of the basic principles that enable the determination of the rationality of the alleged claim. I am motivated by Harms ADP of the Supreme Court of Appeal in *King v South African Weather Services* (716/07)
- [2008] ZASCA para 5 that 'in enforcing any copyright claim it is necessary to have regard to the relevant statutory requirements necessary to establish a copyright claim in the name of a particular claimant, and to determine whether or not copyright infringement had taken place'. Of particular importance, which is of direct application in this matter, was Harms ADP's further contention that:

Copyright is a creature of statute and has to be found within the four corners of a statute, in particular the Copyright Act 98 of 1978. Certain defined works (of which computer programs are one) are eligible for copyright under the Act. This assumes, however, that the work concerned is 'original' (s 2(1)) and has been reduced to a material form (s 2(2)). In addition, copyright must have been conferred by virtue of nationality, domicile or residence or as a result of first publication (s 3 and 4). It is accordingly of the utmost importance for a copyright claimant at the

outset to identify the work or works which are said to have been infringed by the defendant. ... Copyright infringement is (subject to an irrelevant exception) actionable 'at the suit of the owner of the copyright' (s 24(1)). It is only actionable at the suit of the author if the author is also the owner. ... The word 'author' has a technical meaning; and the author is not necessarily the person who first makes or creates a work. It depends on the nature of the work. In the case of a computer program, the author is 'the person who exercised control over the making of the computer program' (s 1 s v 'author'). ... The author of a work that attracts copyright is usually the first owner of the copyright (s 21(1)(a)) but that need not necessarily be the case. An exception, which applies to computer programs amongst others, concerns the case of a work 'made in the course of the author's employment by another person under a contract of service': ... 'Using' a copyright work does not amount to copyright infringement. Primary infringement consists in the performance of an act, in the Republic, which the owner has the exclusive rights to do or to authorize without the latter's consent (s 23(1)). ... The exclusive rights of the owner depend on the nature of work. In the case of computer programs the important

rights are those of reproduction, adaptation and rental, (paras 6-10 and all footnotes omitted).

[15] In addressing the problems associated with computer programming, the Copyright Act as adapted by Act 125 of 1992 defines a computer program to include:

(1)(d)(i) a version of the program in a programming language, code or notation different from that of the program; or

(ii) a fixation of the program in or on a medium different from the medium of fixation of the program.

This definition is also linked to the definition of the 'author' of the program as (i) 'the person who exercised control over the making of the computer program'. It is critical to acknowledge the distinction on the development of the computer program which may be based on an idea that is pitched by, as in this case, the applicant as opposed to the developer (respondent) who designed the said program and not necessarily becoming the owner. In this instance, this may relate to a workplace environment where a person is employed to perform the associated task as per the scope of his or her employment and cannot claim ownership of the program on resignation or leaving his or her original work. In this regard, the applicant is a private company that was initially incorporated as an entity to develop software and computer program solutions for insurance brokers which would enable them to host their products. On the other hand,

the first respondent is a close corporation that is a software development company. It is in this context, of the pitching of an

idea and for the other party execute it on behalf of the 'pitcher' that is critical for this Court to determine the substance of ownership within the framework of the Copyright Act.>

[16] In the present matter, as stipulated in the Notice of Motion, the applicant applies for an interdict that is meant to restrain the respondent from infringing its exclusive copyright ownership of the IGS program whilst the respondent claims to be the co-owner of the said program. This matter also contains disputed facts about the gist and content of the alleged copyright claim.

[17] In the Replying Affidavit, the applicant endorsed the main contention of this application in that 'its purpose is to interdict the respondents from infringing the copyright in a computer program, of which the applicant is the copyright proprietor. The applicant also seeks the delivery of the original computer programs and all thereof in the possession or control of the respondents'.

[18] In addressing this matter, the foundation for a successful interdict based on copyright infringement is the establishment of:

- (i) a clear right to the alleged copyright infringement;
- (ii) whether the conduct of the respondent constitutes the copyright infringement as claimed; and
- (iii) having no other alternative remedy to satisfy the claim, (*Mokoena AJ in Claasen v TEC Novation Solution (Pty) Limited* (2017/40521)

[2018] ZAGPPHC para 7).

[19] As Harms ADP noted above that the point of departure in copyright infringement claims is to locate the foundations of protection in the statute, Copyright Act. Such location will be of direct link to the satisfaction of the claims for interdictory relief regarding the dispute in question. In this matter, the core content of the dispute is first linked to the nature of copyright in computer programs which entails the exclusive right to do or authorise the doing of the following acts in the Republic as provided in 11B which entails:

- (a) reproducing the computer program in any manner or form;
- (b) publishing the computer program if it was hitherto unpublished;
- (c) performing the computer program in public;
- (d) broadcasting the computer program;
- (e) causing the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster;
- (f) making an adaptation of the computer program.

[20] The applicant, in the Founding Affidavit acknowledged that it was not the company that writes company coding but exercised the control over the making of the computer program that makes up the IGS program. Thus, it utilised the services of the first respondent to do the

actual coding on its behalf and the said work was always done at the instructions and control of the applicant. The overall function of the IGS program was done and decided at the instruction of the applicant. As reinforced in the Heads of Arguments, the claim of copyright subsistence follows the:

- (i) originality of the work produced;
- (ii) recorded as such and
- (iii) the author was a South African citizen at the time the work was made.

[21] It is acknowledged that the principle of 'originality' is not defined in the Copyright Act, but the protection of any work is guaranteed irrespective of any form, which in this instance, the protection of the IGS program. The nature of the elements of the copyright is of direct link to the elements that characterise the originality of the work produced. This brings to question the contention herein about the exclusive ownership or co-ownership of the IGS program as a concept of 'originality' through the lens of the Copyright Act. Simply put; is the applicant eligible as a sole owner of the IGS program as envisaged in section 2(1) of the Copyright Act or the first respondent the co-owner of the said program?

[22] In this case, the question raised about ownership is protected in section 21 of the Copyright Act which reads as follows:

(1)(a) Subject to the provisions of this section, the ownership of any copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the coauthors of the work.

[23] The first respondent admits that it is not the owner and does not have any right in the IGS program and is paid on a regular basis due to the co-ownership status and the applicant was never denied any access to the various platforms for the program use. Since this case was founded on an informal agreement without detailing what would be the terms of the co-ownership, the specific responsibilities of each of the parties are left to dry in the air in that there is no determination and framework for the sharing of roles regarding the adaptation; broadcast and marketing of the IGS program. These basic principles relating to the core content of copyright relationship could not have been left as 'mere' informal roles of each party due to the nature of the needed responsibility to exercise caution in protecting infringement claims as evidenced by this matter.

[24] The first respondent alleges that it is not in use of the IGS program and the second to fourth respondents are not in possession of the program and the applicant has never made any request for access to the various platforms that it sought access and relief from. This means that the first respondent appears to be the 'eagle' that understands the functionality of the IGS program as its developer and 'waters down' the relief sought by the applicant that could have been resolved by a 'mere asking' approach without burdening this Court with this matter.

- [25] Thus, this Court is of the view that the first respondent has not satisfied the requirements of co-ownership in that there is no legal basis upon which co-ownership could be claimed. As expressed by Ngcobo J in *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005
- (6) BCLR 529 para 108 that ‘the law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly’, (footnotes omitted). In this case, it is not for this Court to be placed in a position to assume what could have been what type of a relationship that could have regulated the alleged co-ownership or the ownership itself regarding the IGS program. It is not for this Court to determine this matter based on a technicality but on an informed basis that could have stated with certainty the intention of the parties in the regulation of their joint ownership of the IGS program. Particularly with the disputed facts in this matter that placed this Court in an insurmountable position. The first respondent’s deponent filed Annexure RJH5 as a proof of co-ownership which is an invoice that is indicative of the services to be paid for by the applicant. An invoice (Annexure RJH5) is not a formal agreement that determines the roles and responsibilities of each party to the relationship. I also find it striking that the first respondent would be paid an amount of R50 000 a month plus VAT and 3% of premiums administered through the program due to its co-ownership of the IGS program whilst the basis of joint ownerships is the sharing of responsibilities regarding the joint entity, in this instance, the IGS program.
- [26] This case is grounded on the intersectionality of the principle of ‘originality’ and ‘ownership’. If there was no original conception of the idea for a computer program, the second leg of ownership could not have followed. The applicant’s deponent states that ‘it was the applicant’s team that used the skill and knowledge and was subject to the control and his management as an employee of the applicant’. This Court is not to further repeat the applicant’s contention which was not disputed by the first respondent that the IGS program was done on the instructions of the applicant. In addition, the first respondent highlighted that the applicant was not competent to administer the IGS program and could have just provided the needed information if it was asked by the applicant. The first respondent, as a developer of the program does not have the claim to the originality’ of the IGS program which infuses the principles of co-ownership if it could have simply provided the needed information. As a co-owner, carrying the interests of the co-ownership agreement, the first respondent was required to further the interests of the venture and use his or her skills in protecting their program against interference. I am finding it difficult that the first respondent could relegate the sensitivity

of administering a computer program to what I have already referred to as a ‘ask me approach’. Considering the sensitivity that is required of this Court to develop a body of jurisprudence that may have the potential to enrich the copyright laws of the Republic, the ‘ask me approach’ has no legal basis.

- [27] It is my considered view that the first respondent has not satisfied this Court about his co-ownership of the IGS program. The originality of the program is attributable to the applicant as its first author. The conduct of the first respondent, by his own admission, and ability to access the IGS program and other various platforms is indicative of what appears to be reflective of dominance over the program use by virtue of having developed it. If the first respondent can boldly state that it can easily access and such access to be made available to the applicant on request, leaves this Court with doubt about the quality of the future protection of the IGS program. It raises a question whether it could not be made available by the first respondent to other parties without the applicant's consent if it can simply provide the information if asked. It is evident that the first respondent is advocating for a 'brotherhood' approach in a matter that has the potential to place this Court in a precarious position on the exercise of its discretion regarding the legitimacy of the co-ownership claim.
- [28] The first respondent dismisses this application as entirely based on a 'lie' with no substance of the 'truth'. As expressed in Claassen, para 15 in that the 'evidence presented must prove that the work that requires protection was made by an eligible person, which means the author of the IGS program, that entails the 'originality' to enable the court to determine with certain the nature of the needed protection specifically whether the author is a 'qualified person' and the work is original'. In this instance, the applicant as envisaged in section 24 of the Copyright Act being the owner of the IGS program by conceptualizing the idea of the IGS program, section 26(12)(a) requires the proof of:
- (i) the subsistence of the copyright in that work; or
 - (ii) the title of any person in respect of such copyright, whether by way of ownership or licence, may be adduced by way of affidavit, and the mere production of such affidavit in such proceedings shall be prima facie proof of the relevant facts.

This is the fact and in law that is not disputed by the first respondent that the applicant is the originator of the IGS program for its debt counselling business in compliance with the National Credit Act 34 of 2005. The first respondent's attestation to co-ownership validates the contention herein that the applicant originated the production of the IGS program. This brings to the fore the requisites of section 23(1) which protect copyright infringements which states that 'copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise'. This Court is not to refrain from raising a concern over the potential of copyright infringement if the party can boldly, with an affirmation of his skills and attributes, at the mere asking, could easily provide the information. This Court is of the considered view and not to misplace the glaring infringement with a lack of certainty for the future protection of the IGS program, if the first respondent could easily make the information available, not to find the co-ownership claim lacking substance that ought to be rejected and reinforce the applicant's copyright infringement claim.

[29] The applicant's sought relief for an audit of the first respondent's system to ensure the IGS program is not stored anywhere in its system is also more of a poaching on the business and or economic interests of the first respondent. The first respondent may not interfere with the functioning of the IGS program relating to the economic activity of the applicant. The first respondent, as the developer of the software, with the acquired skills, has a potential to undermine the furthering of the business interests which could have huge implications for other business entities. However, no business entity or individual has a monopoly not just on the computer program but any program that is meant to ensure a healthy competitive business. I am not satisfied that this relief is justified. This is the case with the damages and of importance is interdicting the first

respondent not to unlawfully access and use the program without authority and consent of the applicant if they so wish to re-build

their relationship. An interdict is the immediate stoppage of any interference which meant that an audit would be a fruitless exercise

because even if the IGS program is stored elsewhere, the first respondent will not be able to use it. Such use will be a compromise

of the Constitution and the entire judicial system regarding the delivery of just and equitable orders. The applicant's sought

relief for an audit and determination of damages is not justified and dismissed.

Urgency and jurisdiction

[30] The applicant applied for the matter to be considered urgently due to the short-lived status of computer programs within the insurance industry and the fact there was an insurance deal from Hollard (Annexure: FA23) deal that it was likely to lose due to the failure not to provide the necessary documentation, having lost clients and would be unable to quantify the damages if the unlawful conduct persists. On the other hand, the first respondent dismissed the quest for 'urgency' in that it was self-created which goes back to what I have referred to as the 'ask me approach'.

[31] The first respondent relied on Rule 41 as a response to the applicant's anxiety over the copyright infringement in that it could have just 'asked'. The substance of Rule 41 entails the engagement in mediation efforts before litigation which can easily resolve the dispute in question. Spilg J in Kalagadi Manganese (Pty) Ltd v Industrial Development Corporation of South Africa Ltd [2021] ZAGPJHC para 24 gave substance to mediation in that it is:

- (a) a voluntary non-binding non-prescriptive dispute resolution process;
- (b) the terms of the process to be adopted are those agreed upon by the parties;
- (c) the mediation facilitates the process to enable the parties to themselves find a solution and makes no decision on the merits nor imposes a settlement on them; and

- (d) the process is confidential.

The Judge went on to state that in para 30:

- (a) Mediation is encouraged as a form of alternative dispute resolution. The only sanction for a failed mediation is the possibility of an adverse costs order;
- (b) Mediation is entirely voluntary and if the parties, or only two of them, are so minded they are at liberty to agree on such terms of mediation as they wish;
- (c) an unwilling party cannot be compelled to mediate. The furthest a court can go is to direct a litigant “to consider” mediation;
- (d) Even if some of the parties agree to mediate other parties in the same litigation are not obliged to fall in line. They must simply wait out the period while litigation is stayed;
- (e) Thirty days is a reasonable time to expect a mediated result failing which the parties must go back to litigation, unless the court extends the time on “good cause” - which is likely to occur where the parties, or court, believe that given more time mediation may prove successful; and
- (f) Save in limited circumstances which may be provided under law, a court cannot be informed of any of the mediation proceedings prior to the final outcome of litigation. Even if settlement has been reached it is unnecessary for the court to be informed of the terms (although exceptions are conceivable). It is only if a part of the case is unresolved through mediation that the court is to be informed of the issues which have been resolved- but this is really a matter of case management or housekeeping so that the court will proceed to determine only the outstanding issues. I believe that on their own the highlighted portions of the Rule reveal as much.

[32] In this case, it was clear that the application of Rule 41A which could have enabled an amicable resolution of the dispute through mediation could not have succeeded. I am of the view that the setting of the scene for mediation being founded on a formal communication in a letter dated 21 July 2023, which I find to be carrying a clear intention to negotiate in good faith for mediation, was a fit for purpose approach. However, the applicant refused to engage through this process and of particular concern to me was the first respondent’s Voice Note of a WhatsApp message (16.2 of the Replying Affidavit), which the first respondent finds justifiable, as not a credible framework for the amicable resolution of the dispute. I also find it difficult to negotiate a huge and sensitive claim in copyright relationships through a voice note, particularly with parties that are at ‘legal loggerheads’ regarding the niche application of the law in copyright infringement. The 21 July 2023 letter, I still find as a justifiable form that could have served to attain the resolution of the dispute harmoniously. However, Spilg J in para 31 stated that ‘If a party is not obliged to mediate then it is difficult to appreciate how under the rule a party who submits to mediation is obliged to undertake mediation in a particular way. The only sanction in terms of Rule 41A is if the party has abused mediation to delay the litigation’. Herein, the matter is distinct in that the applicant

was not persuaded to mediate due to the concerns raised about his views regarding the urgency of the matter. This puts this Court in a position of being unable to determine how the process could have unfolded.

- [33] In this case, I am not to further exhaust the quest for Rule 41A in that the matter is before this Court for determination and I am also not satisfied that the applicant has met the requirements for urgency. The requirements for urgency are similarly situated as those for interdictory relief and I also need not repeat them herein. Thus, this Court acknowledges that urgency is of direct substance to the enforcement of the principles and content of the right to access justice as envisaged in section 34 of the Constitution 1996 which states that ‘everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’. Similarly in *Standard Bank of SA Limited v Thobejane; Standard Bank v Gqirhana*, [2021] (6) SA 403 (SCA) Sutherland AJ para 49 held that ‘care must be taken not to impose on s 34 work that it is not designed to perform. Its role is that of a grundnorm and does not implicate the peculiar organisation of a litigation system in which respect for this value must exist. The guarantee is solely that there must be a forum with competence to address any and every dispute about a legal right and it must be presided over by persons who can render a fair process’.
- [34] Since the present matter was enrolled and removed from the urgent roll on 22 August by mutual agreement between the parties and set down for hearing for 29 August 2023 until the final notice on 06 September for the sit down for the hearing on 06 November 2023 which was finally held on 10 November 2023 due to the request from the Counsels, gives substance to the Thobejane contention that of importance is a forum with competence to determine the dispute. Further, the timeline is indicative of an ordinary course of events which showed lack of urgency and the applicant has not shown any irreparable harm to be suffered as the matter was only heard on 10 November in the normal motion court roll. The re-enrolling and re-filing of this matter for hearing again on 10 November 2023, I am also persuaded to echo the sentiments expressed by Opperman J in *Mantsopa Local Municipality v Inzalo Management Enterprise Systems (Pty) Ltd and Others* Case No 3832/2023 paras 11-12. In that case Opperman J held that ‘this case is a reminder that the rules of courts may not be utilised to play litigatory games that delay justice and cause costs and procedural misery. Litigation must be proper and timeous and may not cause trials or hearings to become chaos. Courts may also not be held hostage by the reliance on section 34 of the Constitution. Litigation and access to courts are constitutional rights that may not be trampled and ridiculed; it must be conducted with the utmost decorum and respect for the rule of law ... careless litigation cannot be cured by an urgent application especially if the prejudice to the other party and administration of justice is clear. The law is well known’. Makaula J in *Molosi v Phahlo Royal Family* (CA 07/2021) [2022] ZAECMHC 10 para 13 held ‘that the court has to exercise the discretion to determine the urgency of matter with reference to rule 6(12) (a) that, in urgent applications, the court or a judge “may dispense with the forms and service provided for in the rules and may dispose of such matter at such time and place and

in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it seems meet". In this case, the foundations of urgency should not be based on contracts that a party is likely to conclude or loose but ensuring

the determination of the clear right to a harm likely to be suffered with no prospects for any other alternative remedy. It is not for this Court to be overburdened by the economic interests of the party but the quality of the protection that is accorded by the legal framework in resolving each matter. The matter of urgency in this case is therefore dismissed.

[35] Another contentious issue was the jurisdiction of this matter regarding the joiner of the first respondent who is the main subject of the dispute with principal place of business in Cape Town. The second to fourth respondent as being brought in for convenience so that the applicant could have access to the first respondent. Broadly, the first respondent dismissed that this Court has jurisdiction over this matter in that it is the Western Cape Division that has jurisdictional competence to resolve this dispute and no other. I am again persuaded by Harms ADP on his 'statute creature approach' in that section 21(2) of the Superior Court Act 10 of 2013 lays the framework for the joiner of the parties in other jurisdictions and provides that 'a Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice, becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division. This provision eliminates any potential for 'forum shopping' and the associated risks which could comprise the quality of the protection accorded in section 34 of the Constitution as noted above. As expressed in Thobejane para 25 -31

... litigation begins by a plaintiff initiating a claim. Axiomatically, it must be the plaintiff who chooses a court of competent jurisdiction in just the same way that a game of cricket must begin by a ball being bowled. The batsman cannot begin. This elementary fact is recognised as a rule of common law, founded, as it is, on common sense. ... , our law does not recognise the doctrine of forum non conveniens, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction'.

It is in this context that the question of the lack of jurisdiction is found to be without merit as the applicant brought this case properly and in a correct forum that serves as the 'cornerstone of legal certainty in the interpretation and application of the law' with the sole purpose of advancing the prescripts of the new dispensation, (Adams J in Dynamic Sisters Trading (Pty) Limited v Nedbank Limited (018473/2023) [2023] ZAGPPHC 709, para 18). This ground for the rejection of the application as lacking jurisdiction is dismissed.

[36] This application was based on the alleged copyright infringement of the IGS program. Its substance was the infringement of the copyright regarding the exclusive ownership of the IGS program. The outright rejection of the claim as based on a lie is without merit. The first respondent, claiming co-ownership of the IGS program is also without substance. Of interests, being the developer and co-owner with no legal responsibilities regarding the role

in the joint venture, the IGS program, the first respondent cannot claim the right that he is not deserving of protection by this Court. The computer program, as a niche area of the law, its information regarding its adaptation and broadcast could not be made available at the 'tip of the finger' by mere asking which leaves certainty about its future protection.

[37] Accordingly, I make the following order:

[37.1] The application for an interdict is granted.

[37.2] The costs of this application are granted on a party and party scale.

N NTLAMA-MAKHANYA

ACTING JUDGE, HIGH COURT

GAUTENG, PRETORIA

Date Heard: 10 November 2023

Date Delivered: 06 June 2024

Appearances:

Applicant: Van Heerden Troskie Inc 3 Bauhinia Street Centurion 0046 Respondents: Du Plessis Mundt Attorneys 47 Dawn Crescent Stellenbosch

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