

SOUTH AFRICA / JUDGMENT

Heald v Combined Artists (50872/14) [2015] ZAGPPHC 852 (15 July 2015)

[2015] ZAGPPHC 852

COURT

North Gauteng High Court, Pretoria

BEFORE

Hiemstra

CASE / FILE NUMBER

50872/14

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

28/7/15

Case

Number: 50872114

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

Dr

GEOFFRY RONALD

HEALD PLAINTIFF/RESPONDENT

and

COMBINED

ARTISTS DEFENDANT/EXCIPIENT

JUDGMENT

HIEMSTRA AJ

[1] This is an exception against the plaintiff/respondent's amended particulars in this matter. In what follows, I paraphrase the

particulars of claim and have left out allegations that are not pertinent to the exception.

1. The plaintiff, Dr Geoffry Heald, is the author of two literary works entitled Learning Amongst the Enemies: A Phenomenological Study of the South African Constitutional Negotiations from 1985 to 1988 (Learning Amongst the Enemies) and South Africa's Voluntary Relinquishment of its Nuclear Arsenal and Accession to the Treaty on the Non-Proliferation of Nuclear Weapons in terms of International Law (South Africa's Voluntary Relinquishment). They are referred to in this judgment as "the literary works".
2. The literary works are subject to copyright in terms of the Copyright Act 98 of 1978.
3. The plaintiff submitted the literary works as theses to the University of Witwatersrand (the University) on 5 October 2006 and 2 June 2011 respectively.
4. The plaintiff carried out research for the literary works, wrote, and created them under the supervision of Professor Louise Whittaker and Professor Jonathan Klaaren respectively, both employees of the University.
5. At the time that the literary works were created, the plaintiff was a South African Citizen, resident in South Africa. He was therefore a qualified person as defined in the Copyright Act 98 of 1978 (the Act).
6. The copyright subsisting in the literary works vested in the University by virtue of its "Research Policy Ownership of Intellectual Property" (IP Policy). The following extracts from paragraph 4.1.1 and following of the IP Policy are pertinent:

"4.1.1 Employees

Subject to paragraph 4.3 the University owns all IP originated or developed by its employees in the course and scope of their employment other than private work carried out by the employee under the University's rules governing private work The employee may enter into an agreement with the University to manage the commercialisation of IP arising out of private work.

4.1.6 Students (including Teaching, Research and Graduate Assistants)

4.1.6.1. The same provisions regarding the ownership of IP made or created in the course of their employment by the University as apply to other employees of the University apply to students enrolled at the University.

4.1.6.2. The University owns any IP devised, made or created by any student carrying out research under the supervision of any employee of the University. The provisions of clause 3 apply to any income arising out of the commercialisation of such re- search.

4.1.6.3. The University does not claim ownership of any IP devised, made or created by a student who is not carrying out research under the supervision of an employee of the University.

2. ...

3. The University does not claim ownership of the copyright in books, plays, musical scores and lyrics and artistic works other than those it has specifically commissioned.

7. The plaintiff declared in writing, in terms of clause 7.7 of the University's document entitled "Final Submission of Thesis, Dissertation or Research Report/Project" , that:

"I have noted the rules relating to intellectual property and acknowledgement of the award of the degree as shown in the General Rules of the University and the University's Intellectual Property Policy. Insofar as I hold intellectual property rights in my dissertation or research/project re- port or thesis, and to that extent only, I agree that the University and its agents may archive and make accessible to the public, upon such conditions as the University may determine, my dissertation or research/project or thesis in its entirety in all form of media, now or hereafter known."

8. The plaintiff became the owner of the copyright by virtue of assignment agreements between the plaintiff and the University. The effective dates of the assignments are 5 October 2006 and 2 June 2011 respectively. Both assignment agreements were concluded on 9 June 2014. Copies of the assignment agreements are attached to the particulars of claim.

9. In terms of clause 3 of each assignment agreement the University ceded to the plaintiff the claims which it had in relation to the infringement.

10. With effect from 9 June 2014 the plaintiff became entitled to enforce the rights of copyright assigned in terms of the agreements.

11. During the period September/October 2011 to November 2012, the de- fendant created a cinematograph film, as contemplated by the Act, enti- tled "Miracle Rising, South Africa", which film is an adaptation, as contem- plated by the Act, of the literary works. This, according to the particulars of claim, constitutes an infringement of the plaintiff's copyright, and before the assignment agreements, the University's copyright, as contemplated by s 6 and s 23 of the Act.

12. Prior to 9 June 2014 the University suffered damages as a result of the defendant's unlawful conduct and after 9 June 2014 the plaintiff suffered damages and continues to do so.

13. The plaintiff claims damages or a reasonable royalty.

- [2] In order to avoid confusion, I shall refer to the respondent in this matter as the plaintiff, and to the excipient/defendant as the excipient.

THE GROUNDS OF EXCEPTION

- [3] The excipient raised nine grounds upon which it is alleged that the particulars of claim are vague and embarrassing and one ground upon which it is alleged that they disclose no cause of action. I shall first deal with the grounds upon which it is alleged that the particulars of claim are vague and embarrassing. Before dealing with each ground, it is apposite to restate the fundamental principle relating to an exception where it is alleged that a pleading is vague and embarrassing: It is not directed at particular paragraphs within a cause of action: it goes to the whole cause of action which must be demonstrated to be vague and embarrassing.[1] In my view the excipient in this matter focusses on particular paragraphs, and even particular words that, according to the argument, are vague or ambiguous, instead of on the particulars of claim as a whole. The particulars of claim are clear and unambiguous.

The alleged ambiguities pointed out by the excipient are not real and can only be regarded, if at all, as ambiguous on interpretations of particular allegations made by the plaintiff.

- [4] On a conspectus of the particulars of claim, the cause of action appears crystal clear. It is alleged:
1. that the plaintiff is the author of the literary works;
 2. that the University had acquired ownership of the copyright in the literary works by virtue of its IP Policy, the terms of which the plaintiff had accepted;
 3. that the University assigned ownership of the copyright to the plaintiff in terms of assignment agreements;
 4. that the excipient infringed the copyright that subsisted in the literary works by creating a cinematograph film entitled "Miracle Rising", which cinematograph film is an adaption (as contemplated in the Act) and/or reproduction (as contemplated in the Act) of the literary works.
 5. that the University suffered damages as a result of the infringement during the time that it owned the copyright, and that the plaintiff suffered damages and still does, as from the time that he acquired the copyright; and
 6. that the University ceded its claims arising from the alleged infringement to the plaintiff.
- [5] One may quarrel over the manner in which certain paragraphs are formulated, but the essence and meaning of the particulars of claim remain clear. One may also quibble over the question whether, in view of the IP Policy, the University automatically became the owner of the copyright, or whether the plaintiff had assigned the copyright to the University. In my view it does not matter. The consequence of the policy is that the University became the

owner of the copyright and it could validly assign it to the plaintiff. One may also analyse the assignment agreements and argue that they are ambiguous in certain respects. However, that is a matter for the trial court.

[6] I now turn to the specific grounds of exception.

Ground 1

[7] According to the excipient the literary works are books, while the University does not claim ownership of copyright in books.[2] This, so goes the argument, is inconsistent with the allegation that the plaintiff had effectively assigned the copyright in the literary works to the University.

[8] The plaintiff nowhere said that the literary works are books. That is a submission of the excipient. The excipient is free to plead that the literary works are books and that the University does not claim copyright in books. Whether they are indeed books, and whether the University claimed copyright therein, are matters for evidence.

Ground 2

[9] The excipient claims that the particulars of claim are inconsistent with paragraph 4.4 of the IP Policy. This clause provides that a student may under certain stated circumstances publish for financial gain at any time within twenty-four months (or such period as the student may agree with the University) of his or her having lodged the thesis with the University library in accordance with the University rules, policies and procedures governing research work for a post graduate degree.

[10] It appears that there may be an inconsistency between clauses 4.1.1 and 4.1.6, on the one hand, and clause 4.4 of the IP Policy, on the other hand. In terms of 4.4.1 and 4.1.6 the University owns all IP originated or developed by employees and students other than private work. Clause 4.4.1 provides that for a period of 24 months from lodging a thesis at the University library, a student may publish his or her thesis for financial gain. If the student has not published his or her thesis within that period, or a period agreed with the University, then the student assigns his rights of copyright to the University.

[11] Mr G.E. Morley SC, appearing for the plaintiff, submitted that the interpretation of the contract is a matter for the trial court and not a matter to be decided on exception. I agree. In interpreting a contract, regard must be had to, inter alia, "the context in which the provisions appears, the purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors." [3] The context in which the provisions appears, the purpose to which it is directed and the material known to the authors of the IP Policy cannot be established on exception. Oral evidence is required.

Ground 3

- [12] The excipient argues that the particulars of claim are vague and embarrassing inter alia in that the plaintiff relies on the IP Policy as it pertains to employees and students, but does not plead that he is either a student or a lecturer.
- [13] While the plaintiff did not explicitly state that he is a student, this is apparent from the fact that it is pleaded that he had submitted the literary works, in the case of South Africa's Voluntary Relinquishment for degree purposes and in respect of both the literary works that he had conducted his research and wrote the literary works under the supervision of professors employed by the University.

Ground 4

- [14] In paragraph 3.10 of the particulars of claim it is alleged that the plaintiff had "effectively" assigned his copyright in the theses to the University. The excipient argues that the word has different meanings. On the one construction "the assignment occurred as a matter of fact, but not formally acknowledged". The excipient does not suggest any other meanings of the word.
- [15] The Concise Oxford Dictionary defines the word "effective" as "Having an effect; powerful in effect; striking, remarkable; coming into operation; actual, existing, actually useable, equivalent in its effect." All these definitions indicate that [the assignment] is unequivocal, effective and real.
- [16] The Thesaurus of the MS Word Program provides several synonyms, one or two of which may have a slightly different meaning, such as "essentially", and "for practical purposes". However, whatever meaning is ascribed to the word, the excipient should have no difficulty pleading to the allegation.

Ground 5

- [17] The complaint under this ground appears to be that it is unclear to the excipient whether the plaintiff relies only on unlawful

infringement of his copyright, or also on some additional unlawful conduct.

- [18] The excipient is conjuring up confusion where none exists. This case concerns alleged infringement of copyright and nothing else.

Ground 6

- [19] This ground is the same as ground 5. The excipient argues that it is unable to discern which form of unlawful conduct it has to plead to. The plaintiff alleges only that the defendant has infringed its copyright and nothing more.

Ground 7

[20] The plaintiff pleads that he is unable to quantify the damages. The excipient argues it is unable to discern whether the inability relates to the plaintiff's damages, or to the University's damages or to both.

[21] The particulars of claim state in paragraph 9.1:

"Prior to the 9th June 2014 the University suffered damages as a result of the defendant's unlawful conduct and the plaintiff [him]self continued to suffer damages thereafter, the amount of which he is presently unable to quantify." The plaintiff mentions the damages suffered by the University and himself in one sentence. It cannot be suggested that the pleading is unclear as to whether the plaintiff is unable to quantify the damages of the University, or of himself or both.

Ground 8

[22] The complaint under this ground is similar to the one under the previous ground. The excipient complains that the plaintiff does not make it clear whether he is unable to exercise an election whether to recover damages or claim a reasonable royalty in respect of the damages suffered by the University or by himself or of both.

[23] The plaintiff obviously refers to the damages suffered by the University until 9 June 2014 and his damages since that date.

Ground 9

[24] This is a further extension of the complaint under grounds 7 and 8. The plaintiff seeks an enquiry in terms of s 24(1B) of the Act for the purposes of determining the amount of damages or a reasonable royalty to be awarded. According to the excipient it is not clear whether the enquiry is meant to determine the damages or royalty to be paid to the University, or to the plaintiff or to both. As I have already found, there is no confusion.

NO CAUSE OF ACTION

[25] The excipient argues that the plaintiff pleads that after 9 June 2014 he suffered damages and continues to do so. However, the alleged infringement occurred during the period September/October 2011 to November 2012. The plaintiff took assignment of the copyright with effect from 9 June 2014. The plaintiff therefore did not plead that his copyright has been infringed.

[26] The answer to this submission is simple. The plaintiff pleads that he continues to suffer damages as a result of the unlawful

conduct/infringement as pleaded. The plaintiff claims that the University suffered damages when the infringement was committed and continued to suffer damages until it assigned the copyright to the plaintiff. All successors in title could similarly suffer damages. The damages are ongoing and the excipient cannot be absolved from the ongoing damages it caused merely because the copyright and claims in respect of the infringement had been assigned and ceded.

[26] I therefore find that the plaintiff has disclosed a cause of action for the damages, if any, that he personally suffered after 9 June 2014.

CONCLUSION

[27] I find that the particulars of claim are neither vague nor embarrassing and that they disclose a cause of action.

I make the following order:

1. The exception is dismissed;
2. The excipient is ordered to pay the plaintiff's costs, including the costs of senior counsel.

J HIEMSTRA

ACTING JUDGE OF THE HIGH COURT

Date heard: 1 June 2015

Date of judgment: 15 July 2015

Counsel for the defendant/excipient: Adv. D.C. Fisher, SC Adv. F. Southwood

Attorney for the defendant/excipient: Sim & Botsi Attorneys Inc

c/o Macrobert Inc

MacRobert Building

1062 Jan Shoba Street

Brooklyn Pretoria

Tel.: 012 425 3400

Fax: 012 425 3600

Ref.: E. Ward/EW/2036366

Counsel for the plaintiff/respondent: Adv. G.E. Morley SC

Attorney for the plaintiff/respondent: Spoor & Fisher

Building No. 13, Highgrove Office Park Oak Avenue

Centurion

Ref. HL3001132/HUGH MELAMOWITZ

Email: h.melamowitz@spoor.com

Tel.: 012 676 1222

Fax: 012 676 1100

c/o Van Zyl Le Roux Inc

First Floor, Monument Office Park, Block 3

Cm Steenbok Avenue and Elephant Street

[1] Jowell v Bramwell-Jones 1998 (1) SA 836 CJV) 899G; Venter & Others NNO v Barritt: Venter & Oth- ers NNO v Wofsberg Arch Investments 2 (Ply) Ud 2008 (4) SA 693 (C) 644

[2] Paragraph (4).3 of the Research Policy Ownership of Intellectual Property

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262 (SCA) at para 18

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Prepared on 11 October 2026 · Esheria