

SOUTH AFRICA / JUDGMENT

Heald v Combined Artists CC

(68766/2012) [2014] ZAGPPHC 439;

2013 BIP 353 (GNP) (24 January 2014)

[2014] ZAGPPHC 439

COURT

North Gauteng High Court, Pretoria

BEFORE

Prinsloo

CASE / FILE NUMBER

68766/2012

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IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 68766/2012

DATE: 24 JANUARY 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN

DR GEOFFRY RONALD

HEALD.....PLAINTIFF

AND

COMBINED ARTISTS CC.....DEFENDANT/
EXCIPIENT

JUDGMENT

PRINSLOO. J

- [1] At issue is an exception noted by the defendant against the plaintiffs particulars of claim on the basis that the particulars do not disclose a cause of action.
- [2] Before me. Ms Fisher SC, assisted by Ms Southwood, appeared for the excipient (to which I will refer as "the defendant") and Mr Morley SC appeared for the plaintiff.

Brief

introduction

- [3] Roughly during the period 1998 to 2011, the plaintiff wrote two books respectively dealing, broadly speaking, with the constitutional negotiations leading up to the transition to a new democratic dispensation and South Africa's surrendering of its nuclear arms capacity.
- [4] The plaintiff claims ownership of the copyright subsisting in these books and alleges that the defendant, during the period
- 20) 1 to 2012, made a film constituting an adaption or reproduction of the books without the plaintiffs authority as the proprietor of the copyright. The plaintiff alleges that the conduct of the defendant constitutes an infringement of the copyright in the books as contemplated in sections 6 and 23 of the Copyright Act 98 of 1978 ("the Act").
- [5] The plaintiff claims appropriate relief consisting of, broadly speaking, declaratory relief, delivery up of all alleged infringing material, damages, interest and costs.
- [6] In its rule 23 exception, as I have indicated, the defendant claims that the particulars of claim do not disclose a cause of action and the defendant asks for the exception to be upheld and the particulars of claim to be struck out.
- [7] Where the particulars of claim form the subject of this enquiry, it is useful to quote the relevant paragraphs for illustrative purposes:

"3.

3.1 At all material times hereto, valid copyright subsisted in an original literary work entitled 'Learning Amongst Enemies: a Phenomenological Study of the South African Constitutional Negotiations from 1985 to 1988' ('Learning Amongst the Enemies') and 1South 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'). The plaintiff tenders inspection of the works pursuant to the provisions of rule 35(12) of the Uniform Rules of Court by appointment with the plaintiffs attorneys.

3.2 Both 'Learning Amongst the Enemies' and 'South Africa's Voluntary Relinquishment' are original literary works (collectively the 'Literary Works') subject to copyright in terms of the Copyright Act 98 of 1978 ('the Act') and were written down, recorded and produced to the material form during the periods from 1998 to 2006 and 2006 to 2011 respectively.

3.3 The plaintiff is the author of the Literary Works, he having made and created them. At the time when each of the Literary Works was made, the plaintiff was a South African citizen and he was resident in South Africa. The plaintiff is, accordingly, a qualified person as defined in the Act and the ownership of the copyright subsisting in the Literary Works vests in him.

3.4 The creation of each of the Literary Works involved considerable independent skill, knowledge and effort. The Literary Works were not copied from any other source and each of the Literary Works is an original literary work.

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 adaption (as contemplated in the Act) and/or reproduction (as contemplated in the Act) of the Literary Works.

5.

The plaintiff tenders inspection of the cinematograph film pursuant to the provisions of rule 35(12) of the Uniform Rules of Court by appointment with the Plaintiffs 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 as an annexure to these particulars of claim.

7.

The aforesaid conduct by the defendant was not authorised by the plaintiff as the proprietor of the copyright subsisting in the Literary Works.

8.

In the premises- the conduct of the Defendant constitutes an infringement of the copyright in the Literary Works as contemplated in section 6 and section 23 of the Act.

9.

The plaintiff has suffered damages as a result of the defendant's unlawful conduct, the amount of which the plaintiff is presently unable to quantify. The plaintiff is presently unable to exercise an election as to whether to recover damages or alternatively, in lieu of damages, to claim a reasonable royalty calculated on the basis of the reasonable royalty that would have been payable by a licensee in respect of the Literary Works."

[8] Then follows the paragraphs dealing with the relief claimed including damages, a possible inquiry in terms of section 24(1B) of the Act, delivery up, interest and costs.

The so-called "particulars of infringement" referred to in paragraph 6 of the particulars of claim

[9] The contents of paragraph 6 have been quoted.

[10] The summons was issued in November 20)2. In February 2013. these particulars of infringement referred to in paragraph 6 were delivered to the defendant's attorney in terms of rule 35(12) and in response to a rule 35(12) notice delivered by the defendant.

[11] It is convenient to quote the wording of rule 35(12):

"Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."

The plaintiffs Rule 35(12) notice of 5 February 2013 simply reads as follows:

"Be pleased to take note that the document furnished in the particulars of the infringements referred to in paragraph 6 of the Plaintiffs Particulars of Claim is attached hereto marked 'A'."

I will refer to this document, for the sake of brevity, as "annexure A".

[12] Annexure "A" is a lengthy affair. It runs into some 38 pages, mainly in single spacing. It has no formal heading or proper introduction, barring a reference to abbreviations that will be used in the document.

It simply starts off, out of the blue as it were, as follows:

"1.1 Reference to the exact location on the DVD of the Offline Cut Miracle Rising South Africa 21 May 2012 where material is contained in the Offline Cut will always be expressed in terms of the time-count register on the DVD."

From the very tenor of this opening paragraph, such as it is, one gathers the impression that one is dealing with material that has to be tested in evidence and cross-examination. The same applies, in my view, to the rest of annexure A which consists of extracts from the books ("Literary Works") versus the film Miracle Rising (also described by counsel as "the documentary") in an effort to show similarities between the two and to support the plaintiffs case that the documentary is an adaption or reproduction of the Literary Works, as pleaded.

Another example can be found in paragraph 2.8 of annexure "A" where the author says: ...

"Lotriet's statement thus links the documentary film to Learning Amongst Enemies through the Baas and Neef story of learning the language of the enemy." The author then carries on by quoting a number of examples from the documentary where the same theory was raised, for example in paragraph 2.15 he states: 'Peter Gabriel in the Offline Cut Miracle Rising South Africa 21 May 2012 of the cinemagraphic film, at 22 minutes and 15 seconds comments: 'Mandela was smart enough to learn Afrikaans - not only stand in the shoes of his enemy but say it in their language and their voice'."

[13] This is the pattern throughout: random notes, roughly divided into some eight sections, illustrating similarities between the Literary Works and the documentary in support of the case that the latter is an adaption (as contemplated in the Act) and/or reproduction (as contemplated in the Act) of the former.

It appears as if the notes were made by someone working his or her way through the Literary Works and the documentary, recording the perceived similarities. The document is not without grammatical imperfections. It ends as bluntly as it started with the following paragraph 8.4:

"Charles Viila-Vicencio at 12 minutes and 33 seconds in Offline Cut ...: 'human beings have a tremendous capacity to be reasonable to be compassionate even in the most extreme situation and say Ok let's move on'."

Annexure "A" is not endowed with any closing remarks or, for example, a summary of submissions as to what it is all about. There is no name or signature identifying the author. I will be most surprised if annexure "A" was crafted by a member of the plaintiffs legal team.

[14] In my opinion, annexure "A" cannot be described as a pleading by any stretch of the imagination, I make this remark, and have to deal with it further, because it was argued on behalf of the respondent that annexure "A" became part of the pleadings when it was referred to in the particulars of claim. Indeed, the exception is based on annexure "A" and not on the particulars of claim.

[15] Where it is the pleading as it stands that has to be considered for purposes of deciding an exception of this nature, I have to consider the aforesaid contention of the respondent in some detail:

1. There is a concise (and in my respectful opinion an accurate and up to date) statement of the law relating to exceptions to be found in Erasmus Superior Court Practice (service issue 40, 2012) at B1-151 to B1-152 (I do not quote all the authorities listed in the footnotes):

"An exception is a legal objection to the opponent's pleading.

It complains of a defect inherent in the pleading: admitting for the

moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue - except in the case of inconsistency - and no reference may be made to any other document. This is precisely the difference between exceptions on the one hand and pleas in bar, dilatory pleas and pleas in abatement on the other hand: the latter usually introduce fresh matter which requires to be proved by evidence. In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document on which it is based, can reasonably bear, no cause of action or defence is disclosed; failing this, the

exception ought not to be upheld."

At B1 -152A it is stated:

"In so far as there can be an onus on either party on a pure question of law it rests upon the excipient who alleges that a summons discloses no cause of action or that a plea discloses no defence; the excipient has the duty to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it. The pleading must be looked at as a whole. Where there is uncertainty in regard to a pleader's

intention an excipient cannot avail himself or herself thereof unless he or she shows that upon any construction of the pleadings the claim is excipiable."

At B1-157 it is stated:

"If evidence can be led which can disclose a cause of action alleged in a pleading, that particular pleading is not excipiable. A pleading is excipiable only on the basis that no possible evidence led on the pleadings can disclose a cause of action."

2. I state in passing that, in my view; the particulars of claim as they stand, and as quoted, and on the test to be found in Erasmus, supra, are not excipiable. I am of the view that they disclose a cause of action. I also consider them to be, broadly speaking, in harmony with the precedents proposed on the subject in the authoritative work by Harms. Amler's Precedents of Pleadings 6th edition p 1 13 and 7th edition pi 31.
3. With reference to the test in Erasmus, supra, which I raised with counsel during the proceedings before me, I was referred, by defendant's counsel, to the case of Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of South Africa 2006 1 SA 461 (SCA) as authority for the proposition that "there is a movement away from the employment of an overly technical approach to

determining exceptions". At 465H. paragraph [3]. the learned Judge of Appeal say s the following:

"Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An ovcr-technical approach destroys their utility ..."

At 467G-I. paragraph [10]. the following is said:

"Counsel for the plaintiff strenuously objected to our having regard to the totality of the pleadings and wish to confine the court to a consideration of the facts alleged in the body of the particulars of claim in isolation. Ilis objection was ill-founded. Pleadings must be read as a whole and in deciding an exception a court is not playing games, blindfolding itself. In any event, as will become apparent, these allegations, even if meritorious, make no difference to the case."

It appears that in Telematrix the complaint was aimed at taking into account the "totality of the pleadings". In the present case, the only pleading, in my opinion, is the particulars of claim. As I read Telematrix. it does not deal at all with the trite principles (as per the statement in Erasmus) to be applied when deciding an exception. The subject does not feature in the head note or in the

final order that was made. Tele matrix does not feature in the 2012 statement of the law by Erasmus, made six years after i'elemaínx was reported. What does appear from Telemairix, is that the parties evidently agreed that the ASA's Code of Advertising Practice and Procedural Guide could be taken into account for purposes of deciding the exception, even though it did not form part of the pleadings - see the judgment at 465D-F. This is something which I have to take into account for present purposes and I will revert to the subject. Generally speaking, however, it seems to me that a plaintiff, for example, will normally be slow to allow other documents to be thrown into the equation when the plaintiff is armed with the trite authorities that the pleading must be looked at as it stands and. what is more, it must be accepted that everything stated in the pleading is true.

4. Rule 18 deals with rules relating to pleadings generally. Rule 18(4) reads as follows:

"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

[16] In commenting on this subrule, the learned author, Erasmus, says the following at B1-130 to B1-130A:

"Facts and not evidence must be pleaded, and the subrule makes it clear that material facts only should be pleaded. The distinction between *facta probanda* (the facts that had to be proved) and *facta probantia* (the facts that would prove those facts) should be kept in mind. For the sake of clarity it is sometimes necessary to plead history, but this should be done with caution and unless the history is clearly severed from the cause of action the pleading may be rendered vague and embarrassing."

I do not refer to all the authorities listed in the footnotes, but it is useful to have regard to what is stated in *Nasiona/e Aartappel Koopcrasic Rpk v Price Waterhouse Coopers Inge/yf* 2001 2 SA 790 (T) at 798B-G, and the authorities there referred to.

[17] In my view, the *facta probanda*. as pleaded, and for the reasons mentioned, disclose a proper cause of action. It passes muster when tested against the trite legal principles. What is stated therein must be accepted to be true for purposes of deciding the exception. It must be considered as it stands. The Literary Works and the documentary do not come into the equation at all. neither were they before me during the proceedings.

[18] What is stated in annexure "A", introduced in response to a rule 35(12) notice three months after the summons was issued, can be nothing more, if anything at all than *facta probantia*. They have to be proved in evidence, during which exercise a consideration of the Literary Works and the documentary, as a whole,

must also come into play.

[19] On this basis. I am of the view that annexure "A" cannot be employed to attack the particulars of claim, by way of exception, as disclosing no cause of action. For this reason alone. I am of the view that the exception must fail.

[20] Nevertheless, it appears that annexure "A" was introduced by agreement between the parties for consideration for purposes of these exception proceedings. As I pointed out. something akin thereto appears to have happened in Telematrix, supra. when the parties agreed that regard could be had to the Code of Advertising Practice and Procedural Guide although it did not form part of the pleadings.

When I discussed the status of annexure "A" with Mr Morley. he conceded that it formed part of the *facta probantia*. This is in contrast with an earlier submission by Mr Morley. if I understood him correctly, that annexure "A" can be regarded

as part of the pleadings. For all the reasons mentioned. I cannot, with respect, agree with that submission. However, where counsel from both sides based their arguments on annexure "A", I will deal with the exception on that basis as well, although not without a measure of reluctance.

The exception

[21] According to the formal document, the defendant excepts to the particulars of claim as disclosing no cause of action on the following grounds:

"1. The plaintiff pleads the particulars of the alleged copyright infringement relied upon by him in a document to which reference is made in paragraph 6 of the particulars of claim.

2. The particulars of the infringements so pleaded, or any of them:

2.1 do not. in the identification therein of the material alleged to have been copied, plead any matter and/or concepts and/or ideas which is/are capable of being protected in terms of the Copyright Act 98 of 1978;

2.2 do not. in any event, disclose a sufficient degree of objective similarity between the material so pleaded and the cinematograph film in issue, such as would be necessary to establish a cause of action;

2.3 given the nature, form, subject-matter and content of the cinematograph film (which is a documentary based on historical events and comprised essentially of filmed interviews with public figures and archival film, photographs and sound recordings of real events, as well as some music) do not disclose the required causal connection between such film and the material pleaded, either with reference to such infringements complained of by the plaintiff, or at all."

The defendant then prays for the exception to be upheld with costs and the particulars of claim to be struck out.

[22] I will deal with the exception on the basis that annexure "A" was "pleaded" by the plaintiff as alleged, although I have already found that it was not.

[23] In their comprehensive heads of argument, counsel for the defendant presented a summary of the eight discernable points made in annexure "A" as suggesting areas of similarity, adaption, reproduction and so on which the plaintiff appears to rely on in support of his case. I take the liberty to adopt this summary for illustrative purposes although Mr Morley argued, correctly in my view, that the matter should go to evidence when these points may be expanded, limited or amended and new arguments may be introduced:

1. the documentary is predicated on the second proposition of the so-called "falsification thesis" found at p74 of *Learning Amongst Enemies*, namely, that the negotiated outcome (the constitutional negotiations resulting in South Africa's first democratic election in 1994) was a miracle or a fluke;
2. the documentary contains the story of the late President Mandela instructing inter alia Mr Mac Maharaj to learn Afrikaans, "the language of the enemy", a story which is also related in *Learning Amongst Enemies* through the "Baas and Neef story";
3. the documentary contains a re-enactment which indicates that in April 1977 the KGB discovered a nuclear silo at Vastrap in the Kalahari Desert, events which are referred to in *Learning Amongst Enemies* by means of a quotation from an interview given by Pik Botha;
4. the documentary has adopted the "poisoned chalice" question which appears in *Learning Amongst Enemies*, namely whether South Africa's possession of nuclear weapons would have undermined Mr Mandela's stature as a leader;
5. the documentary includes film material showing Mr F W de Klerk's speech and Mr Mandela's response at the opening of CODESA which led to the development of a new confidence in the negotiation process by the majority of black people in South Africa. This clash between the two leaders is also referred to in various interviews conducted for *Learning Amongst Enemies*;
6. The inclusion of interviews in the documentary which relate the effect which the Boipatong Massacre had on the constitutional

negotiations, which effect is also referred to in interviews conducted for *Learning Amongst Enemies*:

7. the inclusion of interviews with Gillian Slovo in the documentary allegedly on the basis of the commentary at pp 172-175 of *Learning Amongst Enemies* on Joe Slovo's design of the "Sunset Clause";
8. the inclusion of interviews in the documentary which tell the story of Mr Roelf Meyer and Mr Cyril Ramaphosa going fishing, a story which is also related in interviews conducted for *Learning Amongst Enemies*;

9. the selection of the Phil a Nd wand we story in the documentary which is set to correlate with Prof Charles Villa-Vicencio's notion of a Miracle expressed in the story of "The Colonel" which he related in an interview for Learning Amongst Enemies and which is quoted on pp231 -232 in Learning A mongst Enemies.

[24] I turn to some of the arguments presented on behalf of the respective parties.

(i)

Submissions

on behalf of the defendant

[25] At the outset, I was confronted with the request to view the documentary before hearing argument. This was, understandably, opposed by Mr Morley. I refused the request. I did so because of the trite principle, also stated by Erasmus, *supra*. that "it follows that where an exception is taken, the court must look at the pleading excepted to as it stands: no facts outside those stated in the pleading can be brought into issue - except in the case of inconsistency - and no reference may be made to any other document. This is precisely the difference between exceptions on the one hand, and pleas in bar, dilatory pleas and pleas in abatement on the other hand ..."

[26] I was reminded of the relevant authorities dealing with the two things that a plaintiff has to establish in order to prove copyright infringement by reproduction.

In *Galago Publishers (Pty) Ltd and Another v Erasmus* 1989] SA 276 (AD) the learned Judge of Appeal says the following at 280A - C :

"Consequently it is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced. To 'reproduce' within the meaning of the Act means to copy and in order for there to have been an infringement of the copyright in an original work it must be shown (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical work, but as a reproduction or copy of the latter; and (ii) that the original work was the source from which the alleged infringing work was derived, ie that there is a causal connection between the original work and the alleged infringing work, the question to be asked being: has the defendant copied the plaintiff's work, or is it an independent work of his own? ..."

See also *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd* [1997] ZASCA 109; 1998 2 SA 965 (SCA) at 972A-C.

I add that neither *Galago* nor *Jacana* involved matters decided in exception. In both cases evidence was heard in order to decide whether infringement of the copyright had been established. Given the nature of the present dispute, it is perhaps not inappropriate to mention that there are certain

similarities between the background of the case in Galago and the present matter. See the useful summary in the headnote of Galago at 277E-J. Two books were written about the same subject, namely the so-called Rhodesian bush war. The successful plaintiff in the trial court and respondent on appeal contended that 12 out of 17 chapters from the original work had been copied in the offending work.

[27] Before me, it was contended on behalf of the defendant that it will be "impossible" for the plaintiff to prove the following essential elements of his claim: that copyright subsists in the material alleged to have been copied (ie that the material copied is original)' that there exists a sufficient degree of objective similarity between the alleged original work and the alleged infringing work and, finally, that a causal connection exists between the plaintiffs and the defendant's works namely that the defendant's work had been derived from the plaintiffs work.

As to originality, it was argued that there is no copyright in ideas or thoughts or facts. As will be pointed out, this is not in line with what was held in Galago. It was argued that the historical facts and extracts from interviews mentioned in the Literary Works do not, by their nature, constitute the plaintiffs original material and thus cannot sustain a basis for a complaint of copyright infringement by the defendant. There is no application of skill or labour in verbatim recordings of statements made by others. The sections of the Literary Works quoted which constitute such recordings are not original and cannot sustain a claim for copyright infringement.

[28] As to objective similarity, it was submitted that the existence of historical subject-matter and common subject-matter can affect the ability of a plaintiff to establish objective similarity - see Jew am. supra, at 972C-D. The interviews in question relate to historical events or facts. The source, in each case, is the interviewee. The fact that there are alleged to be corresponding topics in the parties' respective works is merely a consequence of the subject-matter of the works being a common one, and the fact that some of the interviewees are common to both parties' respective works is a consequence of their being intimately involved in the events being narrated.

Counsel for the defendant sought to draw a comparison between the present case and the one decided in *Juia & Co Ltd and others v De Koker and others* 1994 3 SA 499 (T) where the works in issue were two text books on income tax in South Africa. Counsel pointed out that it was held in *De Koker*, inter alia at 505C-E, that the Income Tax Act is common property to all who may wish to write a treatise thereon and the legal principles therein

embodied. Similarity in the competing works cannot be dubbed as copying if they are but following the sequence and wording of the

Income Tax Act. In my view, the only observation I have to make, for present purposes, is that De Koker, like Jacana and Galago, was not decided on exception but after evidence was considered in application proceedings, I agree with repeated submissions by Mr Morley that this case cannot be decided on exception. The Literary Works and the documentary, *infer alia*, should be scrutinised in evidence and cross-examination in order to determine whether or not adaption and/or reproduction took place as intended by the provisions of the Act.

[29] As to causality, it was argued that other than a reliance on a similarity of ideas and historical facts, there is nothing in annexure "A" which indicates that the documentary referred to or relied on the Literary Works. This approach is simplistic and wrong. It ignores the allegations in the particulars of claim, paragraph 4, to the effect that the documentary is an adaption and/or reproduction as contemplated in the Act. Where the particulars of claim are under scrutiny for purposes of deciding this exception, there is no basis for ignoring its contents.

It was argued that where the interviewees are describing historical events, it is unsurprising that the same events are referred to in the parties' respective works.

(ii)

Submissions

on behalf of the plaintiff

[30] Mr Morley, correctly, in his comprehensive heads of argument restated the trite principles to be applied when deciding an exception as already quoted from Erasmus, *supra*, and the relevant authorities listed in the footnotes.

Correctly, he submitted that as this is an exception, all the allegations in the particulars of claim must be taken to be correct. It is also for the defendant to satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim. Correctly, he reiterates that no facts outside those stated in the pleading may be brought into issue and no reference may be made to any other document. In particular neither the Literary Works nor the documentary itself are part of the pleadings. The fact that they were referred to in the pleadings and tendered for inspection in terms of rule 35(12) does not make them part of the pleadings. I agree. What I do not understand, is why the same submission was not made in respect of annexure "A". Counsel does, however, in paragraph 10 of his heads of argument, and, correctly in my view, comprehensively deal with the true status of annexure "A". He refers to the "the Particulars" which can only be a reference to annexure "A" given the tenor of what he argues. I take the liberty to adopt the reasoning

of Mr Morley by quoting paragraph 10 of his heads of argument:

"It is submitted that the determination of the issues in this litigation cannot be determined on exception. As has been submitted above, the aforementioned paragraphs of the Particulars of Claim make out Dr Heald's cause of action. In reality, what Combined Artists are contending is

that paragraph 4 is not supported by the content of the Particulars. (My note: as I stated, paragraph 4 is the paragraph containing the allegation that the documentary is an adaptation and/or reproduction of the Literary Works as contemplated by the Act.) That cannot be determined without considering the Literary Works and the film as wholes in the context of all the evidence to be led at the trial. The Particulars are simply a succinct summary and/or reference

identifying parts of the Literary Works and the documentary, upon which evidence will be led in order for Dr Heald to prove his case. It is submitted that they cannot be construed as if they constituted the entire evidence on which Dr Heald will rely at the trial of this matter. The Particulars are provided so that combined artists are made aware of the case that it will be called upon to meet at the trial of this matter. It is submitted that there is a clear distinction between what is pleaded and what is afforded by way of Particulars and that an exception cannot be grounded on the Particulars furnished by Dr Heald."

[31] In dealing with the defendant's arguments, counsel then turns to one of the main submissions made on behalf of the defendant, to which I have also referred, namely that there is no copyright in ideas or thoughts or facts. Counsel then refers rather extensively to Galago at 283J-285B. I quote some extracts from the passage:

"It has often been stated that there is no copyright in ideas or thoughts or facts, but only in the form of their expression; and if their expression is not copied there is no infringement of copyright ... (here follows a number of mainly English case references) ... as pointed out. however by Laddie, Prescott and Vitoria *The Modern Law of Copyright* at 31, this pithy statement is liable to lead to confusion. The authors continue: '... in the case of a book the ideas it contains are necessarily expressed in words. Hence, if it were really true that the copyright is confined to the form of expression, one would expect to find that anyone was at liberty to borrow the contents of the book provided he took care not to employ the same or similar language. This is not so. of course.'" (My note: in argument before me. Mr Morley argued that on the stance adopted on behalf of the defendant, 'no one can have copyright in a history book'. He reminded me that copyright is generally claimed by authors of books on historical events. He referred me, for example, to books on the boer war by authors such as Pakenham. Farwell and Deneys Reitz. My Afrikaans translation of Pakenham's *Die Boere* (Jorlog contains the following inscription: "Kopiereg C 1979 Thomas Pakenham ... Kopiereg in Afrikaanse Vertaling C 1981 ... Alle regte voorbehou. Geen gedeelte van hierdie publikasie mag in enige vorm of op enige wyse, elektronies, meganies, deur foto kopiëring, opnames of andersins gereproduseer. in 'n herwinning stelsel gebêre of oorgesein word sonder toestemming van die kopiereg houers nie." Similar warnings are found in my edition of Pakenham's *The Scramble for Africa* and *Commando* by Deneys Reitz.)

I continue to quote extracts from what the learned Judge of Appeal stated at 284C and further:

"And. at 33. the authors sum up the present law in England as follows: 'Ideas, thoughts and facts merely existing in a man's brain are not "works", and in that form are not within the Copyright Act: but once reduced to writing or other material form the result may be a work susceptible of

protection. Given that there exists a good copyright in a work, the law does not protect the general idea or concept which underlies the work, nor any one fact or piece of information contained therein. However, a more detailed collection of ideas, or pattern of incidents, or compilation of information may amount to such a substantial part of the work that to take it would be an infringement of the copyright, although expressed in different language or other form, it being a matter of fact and degree whether the dividing line has been impermissibly crossed.'

There appears to be ample support for these views in the English case law. In the recent *Ravenscroft* case *supra* (my note: *Ravenscroft v Herbert and New English Librai y Ltd* [1980] RPC 193 at 203) BR1GHTMAN J emphasised (at 204) that: 'Copyright protects the skill and labour employed by the plaintiff in production of his work. That skill and labour embraces not only language originated and used by the plaintiff, but also such skill and labour as he has employed in selection and compilation.'

And later in his judgment he said (at 206): 'It is I think clear from the authorities that an author is not entitled, under the guise of producing an original work, to reproduce the arguments and illustrations of another author so as to appropriate to himself the literary labours of that author.'

[32] At 285C-F. the following passage can be found from an extract quoted by the learned Judge of Appeal from the English case of *Ladbroke (Football) Ltd v William hlll (Football) Ltd* 11964] 1 Ali ER 465 (FIE) at 469:

"A wrong result can easily be reached if one begins by dissecting the plaintiffs work and asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind, it does not follow that because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skill and judgment had been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright."

These remarks were obviously quoted with approval by the learned Judge of Appeal, CORBETT JA, as he then was.

[33] In my view, it is obvious that all these issues cannot be decided on exception but have to be tested by the trial court. What the defendant wants me to do, is to decide the issue without even having regard to the Literary Works and the documentary, let alone hearing evidence, cross-examination and argument on the contents thereof. In my view, to do so, or to attempt to do so, would be inappropriate and wrong in the circumstances of this particular case. For this reason, too. the exception should fail.

The order

[34] I make the following order:

1. The exception is dismissed.
2. The defendant is ordered to pay the costs which will include the costs of senior counsel.

WRC PRINSLOO

JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 5 SEPTEMBER 2013

FOR THE PLAINTIFF: G E MORLEY SC

INSTRUCTED BY: SPOOR & FISHER

FOR THE EXCIPIENT: D C FISHER SC ASSISTED BY F SOUTH WOOD

INSTRUCTED BY: SIM AND BOTSI ATTORNEYS INC

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