

SOUTH AFRICA / JUDGMENT

## King v South African Weather Services (716/07) [2008] ZASCA 143; 2008 BIP 330 (SCA) ; 2009 (3) SA 13 (SCA) ; [2009] 2 All SA 31 (SCA) (27 November 2008) [2008] ZASCA 143

### COURT

Supreme Court of Appeal

### BEFORE

Harms, Cloete, Cachalia, Leach, Griesel

### CASE / FILE NUMBER

716/07

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THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

### JUDGMENT

Case No: 716/07

PIETER JOHANNES KING Appellant

and

THE SOUTH AFRICAN WEATHER SERVICE Respondent

Neutral citation: King v SA Weather Service (716/2007)

[2008] ZASCA 143 (27 NOVEMBER 2008)

Coram: Harms ADP, Cloete, Cachalia JJA, Leach and Griesel AJJA

Heard: 03 November 2008

Delivered: 27 November 2008

Updated:

Summary: Copyright; owner of copyright; work made in the course of employee's contract of employment is owned by employer; determination of whether work made in the course of employment.

ORDER

On appeal from: High Court, Pretoria (R.D. CLAASSEN J sitting as court of first instance):

The appeal is dismissed with costs

HARMS ADP, (CLOETE, CACHALIA JJA, LEACH AND GRIESEL AJJA concurring):

## Introduction

- [1] The appellant, Mr Pieter King, sought to enforce a copyright claim in computer programs against the respondent, the South African Weather Service, in the High Court, Pretoria. His claim on the merits of the case was dismissed. The trial court refused leave to appeal but it was subsequently granted by this Court. In the event, as will appear hereafter, we dismiss the appeal with costs on the ground that King was not the copyright owner.
- [2] Mr King was an employee of many years' standing of the Chief Directorate of the Weather Bureau ('the Bureau'), which at all relevant times was a division of one or other state department. The respondent, a juristic person, was formed in terms of the South African Weather Service Act 8 of 2001 and it took over all the functions of the Bureau and replaced it as from 15 July 2001. In terms of s 18(1), King automatically became an employee of the respondent. He was essentially a meteorological technical officer in charge of the Uppington office. A dispute arose concerning the source codes of computer programs developed by King, which he refused to hand over to the respondent. This led to his suspension and disciplinary steps on the ground of insubordination. He was subsequently found guilty at the disciplinary hearing and dismissed.
- [3] On 12 June 2002, which was during the period of suspension, King sought to draw to the respondent's attention the fact that the programs he had written prior to 7 June 2000 'were not written in the course and scope' of his employment or 'under [the employer's] supervision and control'; instead, he alleged, as the person who exercised control over the making, he was the author. However, on the assumption that he may have authorised the respondent to use his programs, he gave notice of the termination of any licence with effect from 30 June 2002. The respondent did not comply with his demand and about a year later he instituted action claiming an interdict and damages.
- [4] In the action, which is the subject of this appeal, King's case was in short that he had created a number of weather computer programs between 1980 and 2002; that they had been written in his own time, at home, to assist him personally in the performance of his duties as employee; that it had not been part of his duties as meteorologist to write computer programs; that he had authorised the respondent by means of a tacit licence to use the programs; that he had withdrawn the licence as from 30 June 2002; but that the respondent was nevertheless 'using' the weather programs to provide specialised weather forecasting and climate information and the like, and also reproduced or adapted them.

Basic copyright principles

- [5] Before turning to the particular it may be convenient to set out in general terms certain basic copyright principles because copyright cases are technical and those relating to computer programs notoriously difficult.<sup>1</sup> It is accordingly necessary, in enforcing any alleged copyright claim, to have regard to all 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.

- [6] 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.<sup>2</sup> 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.
- [7] 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.
- [8] 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 sv 'author').
- [9] 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': in this event the employer is 'the owner of any copyright subsisting in the work' (s 21(1)(d)). There is another relevant exception that concerns works which were made 'by or under the direction or control of the state' (s 5(2)) – ownership of any such copyright initially vests in the state and not in the author (s 21(2)).
- [10] '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)). (Secondary infringement is not in issue and need not be discussed.) 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.<sup>3</sup>
- [11] The issues in this case are many. In relation to the issue concerning the subsistence of copyright they concern authorship, originality, and ownership (whether belonging to the author, the employer or the state). In respect of infringement the questions are whether the

respondent had the consent (or licence) of the owner; the terms of the licence; the validity of the notice of cancellation; and whether King has established that the respondent had committed any infringing act since the date of revocation of the licence. In view of my conclusion it is unnecessary to resolve all of these issues.

Ownership of copyright: ‘in the course of employment’

- [12] For purposes of this appeal I shall assume that King authored, not only in the sense of compiling, but also in exercising control over the making of the weather programs on which he relied – in other words, that he was the author as defined in the Act. I shall furthermore assume that the state is not the owner of the copyright by virtue of the provisions of s 5(2) because the works had not been made ‘by or under the direction or control of the state’.<sup>4</sup> I accordingly proceed to consider whether, in terms of s 21(1)(d), the computer programs were authored by King ‘in the course of [his] employment by [the Bureau] under a contract of service’.

The inquiry is limited to the Bureau (as part of the state) because the works on which King relied were allegedly all made before the respondent had been constituted. In other words, if the works were made in the course of his employment with the Bureau and ownership in the works accordingly vests in the state, King had no rights to enforce against the respondent.

- [13] The wording of s 21(1)(d) can be traced back to at least s 5(1)(b) of the British Copyright Act 1911, which was incorporated into our Patents, Designs, Trade Marks and Copyright Act 9 of 1916 by means of a schedule, and which formed the basis of copyright law in the British Empire and subsequently in most Commonwealth countries. Except for a short hiatus, the phrase ‘in the course of employment’ has since remained part of our statute law.<sup>5</sup> It is a stock concept in employment law (formerly known as the law of master and servant). The term is unambiguous and does not require anything by way of extensive or restrictive interpretation. A practical and common sense approach directed at the facts will usually produce the correct result.
- [14] In the court below and, initially, in the heads of argument King submitted (although not necessarily in these terms) that the phrase meant that the work must have been authored ‘in terms of’ the contract of employment – in other words, unless the employee had to create the work in terms of the employment contract, ownership does not vest in the employer. The submission may have had some merit had the Act provided as s 39 of the British Patents Act 1977 provides, namely, that the employer is the owner of an invention made ‘in the course of’ the ‘normal duties’ of the employee. This provision changed the common-law test,<sup>6</sup> which does not refer to ‘normal duties’ but it retained the ‘in the course of’ requirement and did not supplant it with an ‘in terms of’ requirement.<sup>7</sup> Counsel, wisely, did not persist with the argument but, as will become apparent, King’s evidence was sculptured to fit the proposition.<sup>8</sup>

[15] Copyright law in the USA is somewhat different: it provides that the employer is considered to be the 'author' and in consequence the owner of a work made for hire. A 'work made for hire' is defined in terms that echo those used in s 21(1)(d) of the Act – it is a 'work prepared by an employee within the scope of his or her employment'.<sup>9</sup> The statute does not define 'scope of employment', but the US Supreme Court held in *Community for Creative Non-Violence v Reid* 490 US 730 (1989) that Congress incorporated common-law agency principles into the copyright statute and intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. Consequently, to show that the creation of a work was within the scope of the employee's employment, the employer has to establish that (a) the work was of the type for which the employee was hired to perform; (b) the employee's creation of the work occurred 'substantially within the authorized time and space

limits' of his post; and (c) the creation was 'actuated, at least in part, by a purpose to serve' the employer's

interests.<sup>10</sup> The court rejected other tests espoused by earlier courts namely whether the employer retained the right to control the product or actually wielded control over its creation.

[16] Counsel for the respondent relied heavily on US jurisprudence – and there are cases that are, on the facts, hardly distinguishable from those in this case<sup>11</sup> – but, as Michael D Birnhack recently pointed out, agency law principles, which were developed in the context of tort law, do not necessarily fit the copyright context.<sup>12</sup> The same may be said about the argument of the respondent that the tests developed in the framework of vicarious liability should apply. Again, it appears to be wrong to apply delictual 'principles' without more to determine questions of ownership in the arcane area of copyright especially since policy considerations must differ.<sup>13</sup>

[17] Having had regard to a number of judgments,<sup>14</sup> both local and from elsewhere, it appears to me to be dangerous to formulate generally applicable rules to determine whether or not a work was authored in the course of the employee's employment. It remains by and large a factual issue that depends not only on the terms of the employment contract but also on the particular circumstances in which the particular work was created.<sup>15</sup> I accordingly turn to a discussion of the salient facts.

## The facts

[18] It is convenient to begin with a discussion of the 'business' of the Bureau. By its very nature a weather bureau collects, processes, analyses and stores weather related data. To do this the Bureau developed a Microsoft based Windows automated weather system (WAWS), which contained a broad collection of computer program modules used to capture, process and store weather related data. It is common cause that all the 'infringing' programs were written to conform with and were incorporated into and became an integral part of the Bureau's WAWS. King's programs were, accordingly, directly related to the 'business' of the Bureau. They captured, rectified and transmitted weather data to head office. And, as he

reluctantly had to concede, the programs were to the advantage of his employer. Much, though, was made by King of the fact that the Bureau was not a commercial organisation and that the respondent, in terms of its governing Act, has to generate income. As I understand King's point, it is that his tacit licence did not cover commercial use of the programs by the respondent. The licence issue, however, arises only once the ownership issue has been determined.

- [19] Another important aspect to consider is the nature of King's duties in terms of the employment contract. In this regard the matter must be looked at broadly and not by dissecting the employee's task into its component activities.<sup>16</sup> His duties changed over the years but one would not ordinarily include computer programming as part of the duties of a meteorologist. However, that is not the full picture. As meteorologist King had to collect and collate meteorological data and transmit it to head office for analysis and storing. He developed his programs for this very purpose. Although he may have done it to make his own job easier, he did it because of his employment with the Bureau.
- [20] This leads to another and most significant factor. It is clear that but for his employment with the Bureau, King would not have created these works. There is, accordingly, a close causal connection between his employment and the creation of the programs. In other words, his employment was the *causa causans* of the programs. Some of the programs were specifically written for other weather stations of the Bureau at their request and for their use. They were not created for external use by others; instead, they were purely work related. Importantly, the Bureau prescribed the format of the programs and had to approve of them before they could be implemented and used in the system.
- [21] Reverting to King's evidence that he was the owner of the copyright because the works had not been prepared in the performance of his duties, the problem is that it is belied by the objective facts. For instance, King prepared quarterly reports about the performance of his duties. They dealt with his merits as employee and they stressed that the major component of his work was programming. A job evaluation investigation in April 2000, with which he agreed at the time, stated that he was responsible for system development and programming and calibration of the Bureau's automatic weather station network. The estimate was that he was, at the time, spending some 50 per cent of his time on system development and programming.
- [22] This also controverts his evidence that he had compiled the programs after hours. Although it must be accepted that his initial programming took place at home it is clear that as time passed he spent increasingly more of his office hours developing programs, to such an extent that he failed to give sufficient attention to his duties as head of the Upington office. In any event, the fact that an employee creates a work at home (or even during office hours at the premises of the employer) is but a factor that has to be taken into account in answering the question whether the work was made in the course of his employment.

[23] Mr King also relied on the Personnel Administration Standard, which contained a personnel standard for a meteorological technician. It did not list computer programming as part of the job description but the document in its terms was not intended to be all-embracing and anticipated that a fuller job description could be issued (as happened) and, as said before, a work may be created in the course of employment without having been created in terms of the contract. In addition, the scope of employment may change explicitly or by implication.<sup>17</sup> Lastly, he relied on an industrial settlement agreement, which provided that the April 2000 job evaluation would be cancelled. The meaning of the settlement agreement need not be considered as cancellation could not change ownership retrospectively.

[24] It is not necessary to deal with the evidence any further. The court below did a careful analysis of all factors relevant to the question and came to the conclusion that the works had been made in the course of King's employment. King's counsel was not able to show that the court below had erred. To the contrary, I am satisfied that the court did not. This conclusion obviates the need to consider the other issues<sup>18</sup> and the appeal stands to be dismissed with costs.

[25] The following order is made:

The appeal is dismissed with costs.

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L T C HARMS

ACTING DEPUTY PRESIDENT

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1 Memory Institute SA CC t/a SA Memory Institute v Hansen 2004 (2) SA 630 (SCA); Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd 2006 (4) SA 458 (SCA).

2 Section 41(4). Compare Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142; Butterworth & Co (Publishers) Ltd v Ng Sui Nam 1987 RPC 104 (Singapore High Court); Théberge v Galerie d'Art du Petit Champlain Inc 2002 SCC 34, [2002] 2 SCR 336.

3 Section 11B. ‘Nature of copyright in computer programs—Copyright in a computer program vests the exclusive right to do or authorize the doing of any of the following acts in the Republic:

- (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;
- (g) doing, in relation to an adaptation of the computer program, any of the acts specified in relation to the computer program in paragraphs (a) to (e) inclusive;
- (h) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program.’

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- (h) letting, or offering or exposing for hire by way of trade, directly or indirectly, a copy of the computer program.’

4 See *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 2002 (4) SA 249, [2002] 3 All SA 652 (SCA).

5 Discussed in *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 2002 (4) SA 249, [2002] 3 All SA 652 (SCA).

6 *Liffe Administration and Management v Pinkava* [2007] EWCA Civ 217.

7 Presumably the common-law approach still applies to South African patents since the current Patents Act 57 of 1978 does not deal with patents by employees. The Designs Act 195 of 1993 s 1(1) sv ‘proprietor’ is similar to the Copyright Act.

8 See *British Reinforced Concrete Engineering Co Ltd v Lind*

(1917) 34 RPC 101 (Ch).

9 17 USC § 201(b) read with § 101.

10 *Avtec Systems Inc v Peiffer*

[1995] USCA4 2513; 67 F3d 293, 38 USPQ 2d 1922.

11 *Genzmer v Public Health Trust of Miami-Dade County* 219 FSupp.2d 1275 and *Miller vCP Chemicals Inc* 808 FSupp 1238 are particularly instructive.

12 Michael D. Birnhack ‘Working Authors’ (October

2008) footnote 3. Tel Aviv University Legal Working Paper Series. [www.law.bepress.com/taulwps/fp/art97/](http://www.law.bepress.com/taulwps/fp/art97/) (accessed 4 November 2008).

13 See, in another context, *Ngubetole v Administrator, Cape* 1975 (3) SA 1 (A) 8G-9F. Also *Laddie, Prescott and Vitoria The Modern Law of Copyright and Designs* (2 ed) vol 1 para 11.37.

14 *Trewhella Bros (UK) Ltd v Deton Engineering (Pty) Ltd Stranex Judgments on Copyright* 57; *Stephenson Jordan & Harrison Ltd v Macdonald & Evans* (1952) 69 RPC 10 (CA); *Noah v Shuba* 1991 FSR 14 (Ch); *Morewear Industries (Rhodesia) Pvt Ltd v Irvine* 1960 Burrell’s PR 202 (Federation of Rhodesia and Nyasaland).

15 Compare *British Reinforced Concrete Engineering Co Ltd v Lind* (1917) 34 RPC 101 (Ch) 109.

16 Per Diplock LJ in *Ilkiw v Samuels* [1963] 2 All ER 879 (CA) quoted in *Bezuidenhout NO v Eskom* 2003 (3) SA 83,

[2003] 1 All SA 411 (SCA) para 21, both dealing with tort or delict.

17 *Noah v Shuba* 1991 FSR 14 (Ch).

18 It may, though, be noted that counsel was unable to point to any evidence which established an infringing act after the date on which the licence was supposed to have ceased. The only evidence related to the use of programs and even WAWS was no longer being used by the respondent at the time of the trial.

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