

SOUTH AFRICA / JUDGMENT

**National Soccer League T/A Premier
Soccer League v Gidani (Pty) Ltd (10/48519)
[2014] ZAGPJHC 33; [2014] 2 All SA 461 (GJ);
2014 BIP 426 (GJ) (28 February 2014)
[2014] ZAGPJHC 33**

COURT

South Gauteng High Court, Johannesburg

BEFORE

N F Kgomo

CASE / FILE NUMBER

10/48519

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

CASE NO:10/48519

DATE: 28 FEBRUARY 2014

In the matter between:

NATIONAL SOCCER LEAGUE

t/a PREMIER SOCCER LEAGUE.....Plaintiff

And

GIDANI (PTY) LTD.....Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The plaintiff instituted action proceedings against the defendant for infringing, since

December 2007, and continuing to infringe, its copyright in the annual and/or weekly soccer fixtures or lists, which infringement is as contemplated by section 23 read with section 6 of the Copyright Act 1978 (Act 98 of 1978) as amended (“the Copyright Act” or “the Act”) by using, without licence or permission or authority from the plaintiff, its weekly and/or annual fixture lists in its Sport Stake betting game or business.

[2] The defendant has defended the action.

[3] The specific allegations in the plaintiff’s particulars of claim are that –

3.1 Since the creation of the annual list in respect of the season commencing August 2007 and the weekly list since December 2007, the defendant has infringed, and continues to infringe, the plaintiff’s copyright in the annual list and/or the weekly list as contemplated by section 23, read with section 6 of the Copyright Act, by virtue of the following:

3.1.1 The defendant is not the owner or the licensee of the copyright in any of the lists.

3.1.2 The defendant has unlawfully reproduced – and continues to unlawfully reproduce – a substantial part of or make adaptations of the annual list and/or the weekly list and causes them to be published on the defendant’s internet website as part of its “Sport Stake” gambling game offering. The Sport Stake gambling game involves the correct prediction of the outcomes of several football matches. In particular, gamblers are required to predict the outcome of 12 pre-determined matches drawn from inter alia, South African professional soccer fixtures.

3.1.3 The defendant has caused to be published, its aforesaid unlawful reproductions and/or adaptations on a weekly basis during the soccer

season at various petrol stations and retail outlets in connection with its “Sport Stake” gambling game offering.

3.2 Since about December 2007 to date, the defendant has published, in the manner aforesaid, a reproduction and/or adaptation of a substantial

part of the plaintiff’s relevant annual and/or weekly list to a similar extent.

3.3 In the circumstances, the plaintiff:

3.3.1 is entitled, in respect of past infringement of its copyright, to payment of an amount calculated on the basis of a reasonable royalty

which would have been payable under the circumstances by a licensee in respect of the plaintiff’s copyright of 10% of the

defendant’s gross sales earned in betting revenue in respect of its “Sport Stake” gambling game, from December 2007 to date of any interdict made in this action directing the defendant to cease reproducing and/or making adaptations of any of the plaintiff’s lists; and

3.3.2 is entitled to the delivery-up by the defendant of all infringing copies of the annual lists and the weekly lists in its possession or control, as contemplated by section 24(1) of the Act; and

3.3.3 is entitled to an interdict, as contemplated by section 24(1) of the Act, to restrain the defendant from any future infringements of the plaintiff's copyright in the annual list and the weekly list; and

3.3.4 is entitled to additional damages from the defendant, as contemplated by section 24(3) of the Act, of R5 000 000,00.

[4] The plaintiff sought the following prayers, to be specific:

4.1 An order declaring that the plaintiff's annual fixture lists and weekly fixture lists are each subject to copyright protection as afforded by section 6 of the Act in favour of the plaintiff;

4.2 Payment of an amount calculated on the basis of a reasonable royalty which would have been payable under the circumstances by a licensee in respect of the plaintiff's copyright work of 10% of the defendant's gross sales earned in betting revenue in respect of its "Sport Stake" gambling game offering, from December 2007 to the date of any interdict made in this action directing the defendant to cease

reproducing and/or making adaptations of any of the plaintiff's lists;

alternatively

4.3 An enquiry as contemplated by section 24(1B) of the Act, and payment thereupon of such further and/or alternative amount as a reasonable

royalty as is found to be due by the defendant to the plaintiff; and

4.4 Payment of R 5 000 000,00, as contemplated by section 24(3) of the Act; and

4.5 Delivery-up of all infringing copies, reproductions or adaptations of all of the plaintiff's annual or weekly lists in the possession or under the control of the defendant; and

4.6 An interdict restraining the defendant from infringing the plaintiff's copyright in the annual and weekly lists of soccer fixtures by reproducing and/or making adaptations of the said lists or any part thereof in any manner whatsoever; and

4.7 Interest at the maximum prescribed rate a tempore morae to date of payment in full on:

4.7.1 any amount directed in consequence of prayers 4.1 or 4.2 above; and

4.7.2 the amount of R5 000 000,00, in consequence of prayer 4.3 above.

[5] In addition to a prayer for costs of suit, the plaintiff also asked for further and/or alternative relief.

[6] The parties agreed inter se that this trial be only in respect of the merits and that the rest of the issues be postponed die die. Their wish or request was granted.

[7] The parties were further ad idem that –

7.1 the plaintiff bears the onus to establish its reliance on copyright as well as the defendant's infringement thereof;

7.2 since a licence as contemplated herein is a pactum non de petendo, the onus to prove its need or necessity lies with the defendant; and

7.3 the plaintiff may not initially cross-examine on those aspects where the onus rests with the defendant until the defendant had led its evidence whereupon or whereafter the plaintiff may decide whether or not to lead further evidence in consequence of such defendant's evidence.

THE PARTIES

[8] The plaintiff, National Soccer League t/a The Premier Soccer League, is a universitas conducting its affairs, and having its principal place of business at PSL Place, 2 Winchester Road, Jan Smuts Avenue, Parktown,

Johannesburg, Gauteng Province ("the plaintiff").

[9] The defendant, Gidani (Pty) Ltd is a registered private limited liability company, duly incorporated as such in terms of the Companies Act, 2008, (Act 71 of

2008) as amended, with its principal place of business and head office situate at Gidani House, Stand 405, Halfway House Extension 2, Old Pretoria Main Road, Halfway House (Midrand), Gauteng Province.

[10] The defendant is the official National Lottery operator.

APPLICABLE PROVISIONS OF COPYRIGHT ACT RELIED UPON

[11] In terms of section 2 of the Copyright Act 1978 (Act 98 of 1978) as amended ("the Copyright Act" or "the Act") –

"2. Works eligible for copyright.

(1) ..., the following works, if they are original, shall be eligible for copyright -

- (a) literary works;
- (b) musical works;
- (c) artistic works;
- (d) cinematograph films;
- (e) sound recordings;
- (f) broadcasts;
- (g) programme-carrying signals;

- (h) published editions;
- (i) computer programmes.
- (2) A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been otherwise reduced to a material form.

(2A) ...

- (3) A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.”

[12] Section 23 of the Act deals with the infringement of copyright as well as the remedies therefor. It reads as follows:

“23. *Infringement.*

- (1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of the owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive rights to do or to authorise.
- (2) Without derogating from the generality of sub-section (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright, and at a time when copyright subsists in a work -
 - (a) ...
 - (b) sells, lets or by way of trade offers or exposes for sale, or hire in the Republic any article;
 - (c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected; and
 - (d) ...

if to his knowledge the making of such/that article constituted an infringement of that copyright or would have constituted such an infringement if the article has been made in the Republic.

- (3) The copyright in a literary or musical work shall be infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work : Provided that this subsection shall not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright.”

[13] Action likely to be taken by the owner of a copyright for infringement is governed by section 24 of the Act. Those subsections relevant to this action we are dealing with are the following:

Section 24 which reads as follows:

“(1) Subject to the provisions of this Act, infringement of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights.

(1A) In lieu of damages the plaintiff may, at his or her option, be awarded an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee in respect of the work or type of work concerned.

(1B) For the purposes of determining the amount of damages or a reasonable royalty to be awarded under this section or section 25(2), the court may direct an enquiry to be held and may prescribe such procedures for conducting such enquiry as the court considers necessary.

(1C) Before the owner of copyright institutes proceedings under this section, he or she shall give notice in writing to the exclusive licensee or sub-licensee of the copyright concerned of the intention to do so, and the exclusive licensee or sub-licensee may intervene in such proceedings and recover any damages he or she may have suffered as a result of the infringement concerned or a reasonable royalty to which he or she may be entitled.

(2) Where in an action for infringement of copyright it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement.

(3) Where in an action under this section an infringement of copyright is proved or admitted, and the court having regard, in addition to all other material considerations, to -

(a) the flagrancy of the infringement; and

(b) any benefit shown to have accrued to the defendant by reason of the infringement;

is satisfied that effective relief would not otherwise be available to the plaintiff, the court shall in assessing damages for the

infringement have power to award such additional damages as the court may deem fit.

(4) ...”

[14] Section 25 of the Act deals with those rights that exclusive licensees and/or exclusive sub-licensees have, which is not material here as the defendant is neither licensee or sub-licensee.

[15] Section 9A deals with copyright relative to sound recordings vis-à-vis artists performing the works covered by copyright. The general principles therein set out are of equal application to other

copyrights.

[16] Section 9A(3) is in my view important and is hereunder set out in full:

“(3) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of the law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.”

COMMON CAUSE FACTS

[17] It is common cause that the defendant succeeded Uthingo (Pty) Ltd as the National Lotteries Operator in South Africa. Uthingo and the plaintiff had a contractual relationship in relation to the former's use or utilisation of the latter's fixture lists and a royalty was being paid to the plaintiff by Uthingo (Pty) Ltd (“Uthingo”) as agreed.

[18] The plaintiff engaged the defendant at the latter's principal place of business in Midrand, Johannesburg, Gauteng Province around December 2007 with a view to re-negotiating similar or comparable terms for the defendant's

use or continued use of its fixture lists without licence or permission or authority. According to the plaintiff the negotiations

or talks were inconclusive and the defendant promised to revert to them but never did. According to the defendant as gleaned from utterances by its counsel during the leading of evidence, there was and is still currently no justification for a royalty to be exacted from it by the plaintiff for the former's use of its football or soccer fixture lists. After several engagements a stalemate was reached.

[19] The above situation culminated in the plaintiff issuing, through its attorneys of record, Messrs Werkmans Attorneys, a letter of demand which is dated 5 September 2008.

[20] It is my considered view and finding that the contents of this letter of demand needs to be reproduced in full herein, which I hereby do. The material parts thereof read as follows:

“Dear Sirs,

PREMIER SOCCER LEAGUE (PSL)

1. We represent the Premier Soccer League, which instructs us as follows:-

1.1 each year our client compiles, by its skill, labour, time, judgment and ingenuity, a fixture list of football matches to be played during the year;

1.2 copyright in our client's fixture list vests in our client;

1.3 on 25 March 2008, you sent a proposal to our client regarding your use of its fixture list. Your proposal is still under consideration and no final decision has been made on it by our client;

1.4 on 19 August 2008 you addressed a letter to our client's chairman, Dr Irvin Khoza, in which you stated, amongst other things, that 'Gidani intends to include PSL fixtures in Sport Stake';

1.4 the Sport Stake website, which is compiled by you, states that 'the Sport Stake fixture Lists [which you define as the soccer fixtures which players will bet on during the week] ... '... will be available at the National Lottery outlets from a Monday. It will also be possible to obtain these through the media such as newspapers and TV';

1.5 our client has not authorised you to reproduce or distribute its fixture lists in any manner or form;

2. Any reproduction, adaptation or distribution of our client's fixture lists by you, will constitute an infringement of our client's copyright in its fixture lists.
3. Our client has instructed us therefore to demand of you, as we hereby do, that by no later than 12h00 on Tuesday 9 September 2008, you provide our office with a written irrevocable undertaking that you will not, in any manner or form, reproduce or distribute our client's fixture lists without its written authority. You are furthermore required, at the same time that you provide your written undertaking, to deliver to our office all copies in your or your agents' possession of our client's fixture lists reproduced or adapted by you.
4. If you do not comply with the demand set out in paragraph 3 above, our instructions are, without further delay, to approach the

Witwatersrand Local Division of the High Court, for the appropriate relief against you, which will include a claim for damages and costs.

5. Our client's rights are reserved."

[21] The defendant's response to the above letter of demand was penned by its attorneys of record, Messrs Spoor and Fisher, on 9 September 2008. A full re-gurgitation of its contents will in my view bring out its import and context.

[22] It reads as follows insofar as the material parts thereof are concerned:

"Dear Sirs

South Africa: Premier Soccer League (PSL) / Gidani (Pty) Limited – Fixture Lists

We advise that we act on behalf of Gidani (Pty) Limited. Your correspondence dated 5 September 2008 has been forwarded to us for reply.

Our client had determined that, as this is a business matter, there would be no need to involve attorneys. Our client has instructed us to record that it is only pursuant to your client instructing its attorneys to address a letter of demand to our client that our client has deemed it necessary to instruct Spoor & Fisher.

Our client has instructed us that, in fact, in 2007, your client approached our client with a view of developing a mutually beneficial

business relationship. On the basis of that approach, our client determined to refrain from including PSL matches in our

client's SportStake soccer pool. Our client had hoped that it could enter into a strategic alliance with your client along the lines set out in its proposal forwarded to your client under cover of our client's correspondence dated 25 March 2006. With that aim in mind, our client has had various meetings with your client and has addressed reminders to your client, all apparently in vain as your client has, to date, not reverted to our client, either accepting or rejecting our client's proposal.

We are instructed to respond to your correspondence as follows:

1. Ad paragraphs 1.1 and 1.2: Our client denies that the fixture list has sufficient substance to warrant being the subject of a work capable of copyright protection. The fixture list is common place, trite, trivial and our client denies that copyright can subsist in the fixture list.
2. However, and notwithstanding the foregoing, and as your client is asserting that it is the copyright proprietor of your client's fixture lists and that the fixture list is compiled each year by your client's

skill, labour, time, judgment and ingenuity you are requested to advise us:

2.1 The name of the individual/s who compiled the fixture list.

2.2 You are required to furnish us with the name, date of birth and place of residence of such individual/s.

2.3 Full details as to how the fixture list is created.

2.4 Full details of where the individual/s referred to in the previous subparagraphs are employed. In the event that they are employed by your client, our client will require a copy of their appointment letter.

3. Ad paragraph 1.3: Our client admits that it forwarded your client a proposal on 25 March 2008. However, the proposal was for a strategic

relationship between our respective clients to explore ways to promote the development soccer in the Republic of South Africa and to market the game. Our client did not seek your client's authority to reproduce your client's fixture list as:

3.1 our client has never intended reproducing your client's fixture list; and

3.2 our client denies that copyright can subsist in the fixture list.

4. Ad paragraph 1.4: Our client admits that on 19 August 2008, it addressed further correspondence to your client. However, our client denies that it has advised your client that our client intends using your client's fixture list. In fact, what our clients stated was that it intends to include PSL fixtures (PSL soccer games) in our client's SportStake.
5. Ad paragraph 1.6: Our client denies that it is reproducing your client's fixture list. Our client obtains details regarding the soccer matches to be included in the SportStake, amongst others, newspaper reports, the AOL online website, the Football 365 website and Sport24 website, to name a few. This information has been obtained from the public domain. Furthermore, should our client determine to include PSL soccer matches in our client's SportStake our client will use no more than 4 matches a week. Hence, your assertion that our client is reproducing your client's fixture list is diametrically opposed to the true situation.
6. Ad paragraph 2: The fixture lists released by your client to the media (including but not limited to the newspapers and wbsites) are released in order to enable members of the public (including our client) to be aware of the soccer matches taking place during the course of the soccer calendar. In releasing these fixtures to the press and various other publications, your client is authorising the public to use the fixture list and, therefore, even should your client's assertions regarding the placement of the fixtures on our client's SportStake be correct and that this would constitute a reproduction of your client's fixture list (all of which is denied by our client) then our client contends that it is authorised to do so due to the fact that your client has released the fixture list to the public as set out above.
7. Ad paragraph 3: Notwithstanding the foregoing, we have been instructed by our client to furnish your client with an undertaking to the effect that it will not use any fixtures of PSL league matches prior to the end of the month. The undertaking given, however, is given on the basis that our client expects your client to revert to our client regarding the aforementioned business proposal.

All our client has required from your client is the courtesy of a response. With this in mind, our client suggests, once again,

that a meeting be held with your client as soon as possible in order to establish whether or not it is possible to develop a mutually

beneficial business relationship with our client.

Our client's failure to deal with any of the assertions or allegations contained in your correspondence under reply must not be regarded as an admission thereof and all our client's rights are reserved."

EVIDENCE LED

[23] The plaintiff led the evidence of two witnesses originally, namely, Mr Derek Blanckensee and Prof Ronald “Ronnie” Schloss in support of the two primary issues it relied upon, namely:

23.1 the subsistence of copyright; and

23.2 its (copyright’s) infringement.

It testified first because it bore the onus.

[24] The defendant initially called no witnesses of its own in rebuttal of those two issues but later called two witnesses, Messrs Wiseman Ntombela and Sibusiso Simelane, in support of its claim of alleged non-exclusive implied licence.

In rebuttal of this latter evidence the plaintiff re-called Prof Ronnie Schloss and further called Ms Sisanda Qumsa.

EVIDENCE OF MR BLANCKENSEE AND PROF SCHLOSS

[25] Both Mr Blankensee and Prof Schloss confirmed that they were South African citizens for purposes of section 3(1)(a) of the Act. Both further confirmed that they are and were also at all relevant times hereto, employees of the plaintiff when especially ownership of the copyright vesting in the plaintiff in terms of section 21(1)(d) of the Act is anything to go by.

[26] They both confirmed the existence and validity of the plaintiff’s Constitution. In Article 2 of that Constitution it appears that the plaintiff –

“... is a legal personality endowed with rights sand duties distinct from the individuals who comprise it; has perpetual succession and is capable of owning property apart from its constituent members, the clubs ...”

[27] Mr Blanckensee testified that he has been employed by the plaintiff since November 2010 to date as its general manager : football. His duties entailed, insofar as this case is concerned, to prepare the plaintiff’s fixture lists for soccer fixtures. His experience in the compilation of fixtures started well before November 2010, from the times he was the president of the Southern Transvaal Football Association between 1987 and 1992. He also did the same job in his capacity as the general manager of Wits University Football Club between 1998 and 2006 as well as in this capacity as chief executive officer of the same club between 2006 and 2008.

[28] Prof Schloss in turn testified that he had been the plaintiff’s chief operating officer since

2006. He is currently semi-retired. Just like Mr Blanckensee, he also had been involved in soccer administration virtually his whole adult life. He had been involved in the preparation of fixture lists since, at the earliest, the beginning of the 2007 soccer season which commenced in August that year. He did the same for the seasons 2008 and 2009. The actual compilers of the fixtures at plaintiff’s, Messrs Dan Leboa and Ace Ngcobo, during the 2008/2009 seasons reported to him. He supervised the preparation of the fixtures, generally keeping an eye in that regard. During the season commencing August 2010 he, along with

his son Jonathan as well as Messrs Van Wyk and Siem, were all jointly authors of the fixture lists. All the abovementioned persons were employed by and at plaintiff. All were South African citizens except Mr Siem who, although he was a permanent resident of South Africa, was nevertheless a foreign national employed on contract by the plaintiff.

- [29] Both Messrs Blanckensee and Prof Schloss confirmed in evidence that the fixture lists in issue were of two kinds : annual lists and weekly lists. The annual lists was prepared at the beginning of the season, which was a composite list of all fixtures expected for that season, which started in August of a particular year and ended in May the following year. The weekly list was published each week during the season. It is essentially the fixtures for the week in question appearing in the relevant week contained in the annual list, together with any changes to those fixtures which may have become necessary since the publication of the annual list.
- [30] Mr Blanckensee further confirmed that he was responsible for each weekly list since his employment with the plaintiff in November 2010 to date, and for each annual list from the season commencing August 2011 to date. Prof Schloss was overall in charge, in a supervisory capacity, of the annual lists for the seasons commencing August 2007, August 2008 and August 2009 together with all weekly lists produced for those seasons as well as being the co-author of the annual list for the season commencing August 2010 as well as all the weekly lists thereunder. According Prof Schloss further, the authors of the lists from August 2007 to the season commencing August 2009 were Messrs Dan Leboa and Ace Ngcobo who, as indicated above, are South African citizens and employees of the plaintiff. According to Prof Schloss, Ace Ngcobo regularly needed more supervision and guidance by him as he was not as experienced as Dan Leboa.
- [31] Prof Schloss identified the annual lists compiled and published under his supervision for the seasons August 2007, August 2008 and August 2009.[1] He also identified to this Court the annual list for the season August 2010 of which he was a co-author.[2] The weekly lists he identified appear in Exhibit “E” at pages 79 to 197.
- [32] Mr Blanckensee identified an extract from the annual list for the season August 2010 to May 2011 of which he was a co-author[3] as well as a weekly list for that period.[4] He also identified an extract from the annual list for the season August 2013[5] as well as a weekly list for that period.[6]
- [33] Both testified to the manner in which the fixture lists were prepared: IT went like this : Since the season commencing August 2007, a computer programme had been used in the preparation of the fixture lists. Mr Blanckensee was the writer of this programme. It was called “Fixtures”. It was one of the three programmes he created comprising a suite called “soccer software”. These programmes were used or utilised at plaintiff. As Mr Blanckensee pointed out, although he was not employed by the plaintiff prior to November 2010, he was nevertheless called in by the plaintiff now and then since at least August 2007 to assist those preparing the fixture lists with the use of his “fixtures” programme. Consequently, so

testified Mr Blanckensee, even though he did not himself compile the fixture lists during that period, he nevertheless knew what the compilers were doing as they used his brain child.

[34] Before “fixtures” came into use the fixture lists were prepared differently according to these two witnesses: Mr Blanckensee stated that they were done on “bits of paper”. According to Prof Schloss “a large piece of paper” was utilised to prepare the fixtures on, in addition to a computer programme. The advent of “fixtures” only served to streamline the process. The programme was aimed at aiding in the presentation of the fixture lists and to enable corrections to be done more easily to the fixtures comprising it. It did not itself produce fixture lists by imputing data. It was used as a tool to assist in the task of presenting the lists. This process was repeated or done each football year. During the 2012/2013 season Mr Blanckensee wrote a document titled “fixture planning process” to further facilitate the process.

[35] Prof Schloss confirmed that the process contained in the “fixture planning process 2012-2013” was in general the process which was followed prior to Mr Blanckensee’s arrival at plaintiff. He indicated that although

no public draws were conducted during those previous years, the principle detailed in the “fixture planning process 2012-2013” document was followed and that some computer programming process similar to Mr Blanckensee’s software was also used.

[36] These two witnesses’s testimony corroborated each other in all respects.

[37] Mr Blanckensee expatiated on the “fixture planning process” 2012-2013 as entailing the following:

37.1 An overall process consist of three distinct stages: first, an overall schedule containing fixture block dates; second, a refinement of the block dates through an extensive consultation process; and third, a random draw and the application of the “fixtures” software to produce an annual list.

37.2 In the first stage, according Mr Blanckensee, a white board[7] was used. According to Prof Schloss during his times previously no white boards were used; however, the same information as that

appearing in the white boards was presented on pieces of paper stapled together to form one big piece.

37.3 What both witnesses agreed on is that the first step was aimed at blocking out certain dates on which fixtures could not be played, such as Fifa-sanctioned match dates, CAF match dates and certain public holidays like Christmas Day for example. Thereafter certain Cup competition dates like the MTN 8, Telkom Knock-out, Nedbank Cup and all their qualifiers had to be blocked out. Mostly the Cup competitions and their qualifiers required a number of weekends as well as mid-week fixtures.

37.4 At the end of the above process the remaining fixture dates would be used to schedule Absa Premiership games.

37.5 These fixture weekends are called “blocks” and normally 30 are required for the Absa Premiership.

37.6 This case revolves around the Absa Premier League fixtures.

37.7 The “fixtures” programme was used to mechanically allocate thirty (30) blocks of fixtures one after the other with no consideration for anything.

37.8 The fixture blocks arrived at by the process this far are then converted into spreadsheets for purposes of the consultation process, using the Excel computer programme. Such consultation process entails a to-and-from interaction with the South African Football Association (“SAFA”) (soccer controlling body in South Africa), sponsors, broadcasters and other affected stakeholders to ascertain their individual

preferences. During this consultation process, at times a revision of the previously arrived at fixture blocks take place.

37.9 Thereafter the revised fixture blocks go back to plaintiff’s management for approval and then to plaintiff’s executive committee for verification. Other revisions can take place during this process.

37.10 Individual fixtures within the blocks need then to be arrived at. During this phase the teams or clubs themselves are consulted with a view of obtaining their inputs. Those inputs may include preferred venues, preferred kick-off times and whether the fixture is a day-time or night one. These inputs or preferences are assessed in the light of broadcasting times and requisites. A balancing act must be done by those involved in the compilation to ensure fairness to all concerned. What is important is that the compilers of the lists are not beholden to what those giving inputs want or wish for. Then follows the fixture draw process.[8] Part of this entails the application of the English Football Association formula of identifying what is called “opposites”. Where teams are scheduled or allocated as “opposites” they should not or will not play “at home” together in the same block. This process of identifying “opposites” is done manually. The allocation of “opposites” is required where, for example, two teams share the same venue[9] or for other reasons.[10] The idea is to produce a pairing of teams as “opposites” available for a random draw followed by a draw for the individual matches. Thereafter the plaintiff will attempt to accommodate the teams’ inputs or preferences in terms of weekends and weekdays, time of day or night, etc. while also taking into account other stakeholders’ requirements, such as those of broadcasters, while all the time striving to ensure fairness to all concerned.

37.11 It is at this stage, just prior to the random draw, that the “fixtures” programme or software is used: Team names, block dates, special dates and other relevant considerations are fed into the computer. After the software had captured the outcome of the above process (random draw) the teams’ and broadcasters’ preferences or inputs are fed into the system. Then follows an extensive process of manual checking for anomalies such as for example, matches being held too close to

one another such that one team is required to play another team too soon after another match thus affording it insufficient rest time or double-booking of venues or over-use of venues to mention a few as examples. Any anomalies are resolved manually.

37.12 The fixtures are then forwarded to the broadcaster(s) for perusal and further inputs. Such inputs may entail the availability of its resources such as broadcasting trucks and satellite bookings; the fact that the Absa Premiership game clashes with its already

scheduled European Champions League fixture or that the venue of a fixture is not conducive for a night or rainy-day game due to the absence of adequate floodlights. All these requirements must be addressed by dealing with them manually and effecting changes to the fixture lists in the computer software where necessary.

37.13 The teams then come up with their further inputs, followed by the broadcasters having a re-look at the fixtures if they have changed

between then and their last peek at them.

37.14 By the exercise of “skill and judgment” the annual lists are then produced.

37.15 The weekly lists are then produced. Weekly lists are partly a confirmation of the fixtures appearing in the annual lists. However,

they also serve to incorporate any supervening changes that might need to be effected at that stage, i.e. weekly. Such changes may be occasioned as a result of changes requested by the clubs for reason, say, of a stadium no longer being available; or for logistic reasons such as the team playing elsewhere in a different competition – as was the case in the near past where Orlando Pirates had to play African Champions League game in the Democratic Republic of Congo and Egypt. It may be the result of a request from the plaintiff itself, such as where a pitch at a scheduled stadium is not in an acceptable state, say after the stadium was used in a political rally or a music festival.

37.16 Any such changes are approved by the plaintiff’s football departments and the weekly lists are issued.

[38] Prof Schloss testified further that the process of fixture list compilation is a laborious one that takes many hours and/or weeks. The plaintiff held extensive consultations with clubs, sponsors and broadcasters so as to achieve the balance and fairness-to-all stated hereinbefore. The process is not easy as everybody wants something that suits him or it. Each fixture in each block must be gone through in order to achieve this. Furthermore, the process is not “mechanical at all”. It needs a lot of thought, hard work, innovativeness and discretion. At times there is a need to liaise with rugby authorities whenever the bigger rugby stadiums are required.

[39] Both witnesses testified to the discretionary nature of the preparation of the fixture lists. Prof

Schloss in particular confirmed that it was totally impossible simply to carry over the previous season's fixture list into the following soccer season. The reason can be for example, that the dates differ as a consequence of the problems introduced by the Gregorian calendar, teams may not be the same as some of them could have been relegated and others promoted from lower divisions during the previous season, there may be new tournaments introduced or others discontinued. Mr Blanckensee agreed with Prof Schloss: He made mention of Fifa dates changing, actual dates of the months not being the same and so on. Both agreed in their testimonies that each year's list was always new. There is no question of copying from past lists.

[40] The name of the league, the number of teams in the league, the number of times the teams play each other, the earliest and latest allowable kick-off times and the preferred kick-off times are some of the additional data that must go into the mix when the fixture list is compiled.

[41] Cross-examination of these two witnesses was long and incisive. However, at the end of it all, their

testimonies remained intact. However, the defendant's counsel raised a number of issues during cross-examination that need to be mentioned in this judgment. Among others he put it to the witness that:

41.1 there was no seeding of teams and no assessment made of their relative strengths at any time;

41.2 the clubs were the choosers of the venues and the plaintiff only checked that the grounds are of acceptable standard;

41.3 the business of the defendant was not the reproduction of fixture lists but only selected games for its Sport Stake game;

41.4 the witnesses could not say whether the defendant consulted other sources than the plaintiff's fixture lists in compiling its Sport Stake games;

41.5 the formula was developed by the English Football Association and that it was part of the operation of the software;

41.6 the sponsors of cup competitions decided or fixed the dates of the final and the plaintiff then is compelled to work backwards in order to accommodate the other fixtures in that competition;

41.7 the Professional Soccer League (the plaintiff's league) is the showpiece of South African professional football and forms an important part of the lives of ordinary South Africans;

41.8 the unreliability of the annual fixture lists is such that weekly lists are used to correct anomalies;

41.9 the fixture lists are usually out there in newspapers and also advertised on bill-boarded in taverns as a means of disseminating them as widely as possible, with a multiplicity of interest groups freely using them without recriminations from the plaintiff; thus they being in the public domain;

41.10 no marketing agreement was required or necessary before the defendant can use or utilise the plaintiff's fixture lists;

41.11 Prof Schloss was not authorised or permitted by the Chief Operations Officer of the plaintiff to engage in the compilations of the lists.

[42] There were answers to the above questions as well as to others which in my view precipitated a state

of affairs after the witness's testimonies that their versions remained unshaken.

[43] The witnesses were adamant that there were no "givens" in the process of compiling the fixture lists. Mr Blanckensee further dismissed suggestions that blocks of fixtures could not be manipulated, within constraints, to make the league exciting. He insisted that there were times when broadcasters' preferences were not accommodated to maintain peace amongst the plaintiff's clubs.

[44] It is the plaintiff's submission that despite many constraints – some fixed like

Christmas and some public holidays and others variable like Cup games – there remains a very large creative margin to the fixture compiler in the preparation and finalisation of each annual list. It further submitted that the manner in which that creative margin is interpreted to and applied in the annual list – taking into account the many and varied and often competing interests of the clubs and stakeholders – give rise to the originality of the fixture list as a literary work in which copyright subsists. The weekly list also has copyright attaching to it as it is also an original literary work. According to the plaintiff further, should the weekly fixture list be a pure copy or extract of the relevant portion of the annual fixture list, i.e. where no changes to the annual list have not been effected, it then remains an original literary work to the same extent as that portion of the annual list is an original literary work.

[45] However, should it consist of the relevant portion of the annual list after changes have been effected

due to supervening considerations, it will remain an original literary work to the same extent as the original annual list, save

that it may contain additional elements of originality to the extent of any of those changes.

[46] Plaintiff further contended that since it was the owner of the copyright by virtue of its being the employer of the various authors of the fixture lists it is entitled to protecting and that since the defendant had previously published and is still publishing to date in an ongoing manner, despite demand that it stops doing so or until such time that it regularises the situation by agreeing to pay for it, the plaintiff should succeed in its claim.

EVIDENCE OF THE OTHER WITNESSES

[47] Ms Susanda Qumze's evidence did not advance either party's case. She was a secretary at plaintiff whose duty entailed sending weekly lists to people or instances on a mailing list at plaintiff's offices. The

defendant was on that mailing list. What she did was a continuation of what her predecessor, one Ms Thwala, did before her.

[48] Mr Wiseman Ntombela started work at the defendant in November 2007 as a brand manager for, among others, Sport Stake, which was launched in that month. He stated that that first Sport Stakes game did not include the plaintiff's game.

[49] During August 2008 he was instructed by his employers to include two PSL games or fixtures for a Sport Stake game, which he did. He was then inexplicably told to desist from using plaintiff's fixtures but without explanation again ordered to use six such fixtures. On his own initiative he approached Zanele Thwala at the plaintiff to place him on the mailing list, which the latter did. He is presently employed at the South African Broadcasting Corporation ("SABC"). Before joining the SABC he owned or ran a tavern in Soweto where fixture lists of the plaintiff were openly displayed. His clients used the fixtures to play the Sport Stake.

[50] He was referred by the counsel (defendant's) leading him to four draws, namely, numbers 145, 188, 184 and 185.[11]

[51] The modus operandi he followed was first, to gather together all the fixtures of a particular day from a number of websites. From the web-pages he printed out the fixtures of the relevant leagues from which he was to make his twelve selections. He would then check the fixtures on the various websites, including the plaintiff to verify the home and away teams and the kick-off times for instance. He confirmed that the pages in respect of the four draws mentioned above were the defendant's records that he could locate. He had never met Ms Thwala face to face and had asked to be placed on the plaintiff's mailing list as he wanted to receive data "from the horse's mouth". He stated that he thought there existed an agreement between the plaintiff and his employer to use the former's fixture lists. He was not aware of any negotiations that may have been underway between them then and now.

[52] Mr Sibusiso Simelane is a manager at the defendant who succeeded Mr Ntombela when the latter resigned. He is currently the branch manager at the Sport Stake division. He testified that he grew the Sport Stake game to where it is today

where it generates between R240 and R255 million per annum. Retailers of Sport Stake coupons as well as those who cashed winning bets received 6.1% commission for each of the two options, otherwise his testimony echoed that of Mr Ntombela.

[53] He stated during cross-examination that in addition to the PSL game fixture list he received and utilised in the compilation of the Sport Stake he also used other websites.

RELEVANT LEGAL PRINCIPLES INVOLVED

[54] The Copyright Act (“the Act”) protects certain defined classes or categories of works provided that they meet certain conditions. The starting point is for one to establish whether the item over which copyright is claimed is eligible for copyright.

[55] The plaintiff contends that its fixture lists are literary works within the meaning of section 1(1) of the Act.

[56] The material part of the definition of “literary work” in section 1(1) of the Act reads as follows:

“‘Literary work’ includes irrespective of literary quality, and in whatever mode or form expressed –

(g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer;

but shall not include a computer programme.”[12]

[57] Coppinger and Scone James on Copyright[13] describes what constitute a table or a compilation as follows:

“A dictionary definition of a table in an arrangement of numbers, words or items of any kind, in a definite and compact form, so as to exhibit some set of facts, or relations, in a distinct and comprehensible way. A dictionary definition of the verb ‘to

compile’ is to construct a written or printed work out of materials collected from various sources. Whilst the two terms clearly overlap, and the term ‘compilation’ is often used in this work to cover both the essential characteristic of a table lies in what determines the arrangement between the items contained in the table, that of a compilation lies in the gathering together of the items ... As a matter of terminology, a data-base will almost inevitably also be a table or compilation. But a table of compilation requires that there has been some tabulation or compiling, respectively. The mere coming together of items will not be enough ... The items which are arranged together in a table or assembled in a compilation may, individually be entitled to copyright; such individual copyright remains independent of the separate copyright in the table or compilation.”

[58] From the above definitions it is clear that tables and compilations include databases.

[59] The European Community have adopted a so-called “Council Directive on the Legal Protection of Databases”.[14] This database directive broadly defines a database as –

“... a collection of independent works, data or materials arranged in a systematic methodical way and individually accessible by electronic

or other means.”[15]

[60] The authority, Dean : Handbook of South African Copyright Law[16] states as follows:

“This definition is a broad one, and comments itself as a suitable description of what is generally accepted as constituting a database. Computer programmes used in the manufacture or operation of databases are specifically excluded from protection under the database directive and this approach corresponds with the definition of ‘literary work’ in the South African Act.”

REQUIREMENT OF ORIGINALITY

[61] Original literary works, which include tables and compilations, are eligible for copyright protection in terms of section 2(1)(a) of the Act. Such copyright protection vests initially in its author or authors[17] but, where the work in question has been made “... in the course of the author’s employment by another person under a contract of service or apprenticeship ...”, that other person shall be the owner of the copyright subsisting in the work.[18]

[62] “Original” or “Originality” is not defined in the Act. The Supreme Court of Appeal interpreted the term(s) in its acceptance of the ruling in CCH Canadian Ltd v Law Society of Upper Canada[19] in Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others.[20] The first-mentioned case deals with the terms in the following manner:

“[A]n original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise. While creative

works will by definition be ‘original’ and covered by copyright creativity is not required to make a work ‘original’.”

[63] Under certain circumstances, extensive effort in making a compilation may be enough to render it original,

even where there may be less skill involved. Accordingly, there is merit in the submission (by plaintiff) that where enough effort has been put in compiling a work, that is sufficient to make the work original and susceptible to copyright protection. As stated in Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd and Another:[21]

“It was further argued that there was no ‘originality’ displayed in compiling the list of numbers in the plaintiff’s

price list. It may not have required a great deal of judgment to develop and list all the parts, but it certainly required a great

deal of effort to compile the list of numbers, in the same way as compiling a street directory. Such work and effort the courts will protect. (Copeling : Copyright Law at 68-69.)”

[64] Equally, where a directory had been compiled of users of telefax equipment by means of obtaining lists of purchasers of such equipment from distributors and also by canvassing such users telephonically, it was accepted that copyright subsisted in the directories thus produced.[22] Similarly, where the Practice Code Numbering System (PCNS) allots numbers or codes to healthcare providers in South Africa – and the PCNS comprises a set or compilation of numbers or codes based on the provider’s personal particulars and preferred payment method – it has been held that the PCNS was an original literary work in the form of a compilation in which copyright subsisted.[23]

[65] In English law copyright was extended even more liberally. The learned authors Cornish, Llewelyn & Aplin[24] put it as follows:

“... copyright has been allowed in such mundane compilations of information as a timetable index, trade catalogue, examination papers, street directories, football fixture lists, a racing information service and the listing of programmes to be broadcast ...”

[66] The learned authors go on to point out the following at 11-09:

“The strictly limited level of ‘original’ achievement that is required in order to attract literary copyright can be explained in two ways. First, it reduces to a minimum the element of subjective judgment (and attendant uncertainties) in deciding what qualifies for protection. Secondly, it allows protection for any investment of labour and capital that in some way produces a literary result: this is true equally of the compiler of mundane facts and of the deviser of a football pool form whose real effort is in the market research determining the best bets to combine.”

[67] The above talk to the requirements of section 2(1)(a) of the Act which decrees that for copyright to subsist in a work, that work must fall within the definition of “a literary work” and be “original”.

[68] Whether an alleged work is a proper subject for copyright protection involves an objective test, both in respect of originality and the work itself.[25] How much skill or labour is necessary for copyright to attach to the work depends upon the facts of each particular case. [26]

[69] The court sounded a word of caution in *Occular Sciences Ltd v Aspect Vision Care Ltd*[27] when it stated the following:

“A court ... has to exercise a value judgment on whether the material in which copyright is claimed constitute a ‘work’

or is too trivial to merit protection. Once it has decided that a ‘work’ has been created, the further enquiry is whether

it is of so commonplace a nature that it does not attract copyright. This is an objective test but a court must also consider what the consequences would be of awarding copyright to a particular work.”

OWNERSHIP OF COPYRIGHT

[70] As regards ownership of a copyright, where reliance is placed on section 21(1)(d) of the Act, i.e. where it is alleged that the plaintiff is the owner by virtue of the fact that the work was made by the author under a contract of service or employment with the plaintiff, as is the case in this case, it is sufficient if there was –

“some form of contract even if it were an implied or tacit one between the applicant and its staff or employees.”[28]

Failing that, section 26(3) of the Act provides that where the literary work is anonymous or pseudonymous and was first published in the Republic (RSA) and that a name purporting to be the publisher appeared on copies of the work as first published, then, unless the contrary is shown, copyright shall be presumed to exist in the work and the person whose name so appeared shall be presumed to have been the owner of the copyright at the time of publication.[29]

[71] The two main witnesses for the plaintiff herein, Mr Blanckensee and Prof Schloss had valid contracts

of service with the plaintiff which were never disputed by the defendant.

[72] Where only part of a work is claimed for copyright the law does not disallow such a claim. Originality

still remains the key concept. The claimant must however clearly identify that part of the work for which the copyright is

claimed.[30]

REPRODUCTION OF WORK WITH COPYRIGHT ATTACHING

[73] Copyright is infringed by anybody who, not being the owner or not holding a licence from the owner, does or causes another to do in the RSA any of the acts restricted to the owner[31] or utilises same without consent or authority. In the case of a literary work, such restricted acts include the reproduction of the work in any form,[32] the publication of the work if hitherto unpublished[33] and the making of an adaptation of the work.

[74] The word, “reproduction” as used in the Act includes “... a reproduction made from a reproduction of the work ...”.[34] It therefore makes no difference in an action for infringement of copyright whether the work reproduced is an original or a copy thereof. A copy of either is a reproduction for purposes of infringement.

[75] There is a fundamental difference between “use” and “reproduction”. The former is not an infringement of copyright, whereas the latter is. This distinction was well illustrated in Copinger and Skone James in their work, Copyright[35] as follows:

“A person may therefore use a work such as a directory to contact the listed names as many times as he wishes. If however, in the course of doing so or afterwards he writes down or makes some other record of the substantial amount of the information obtained from the plaintiff’s work, then he is liable to infringe.”[36]

- [76] The issue relating to computers need to be clarified. When a computer has been used to produce the work in question, our law draws an important distinction between the work as being “computer generated” or “computer aided” or “computer assisted”. [37] A work is regarded as “computer generated” if –

“... it was created by a computer in circumstances where there is no human author of the work. If there is a human author, the work is computer assisted and not computer generated.”[38]

A computer assisted work is one where the work is –

“... made by an individual using a computer as a tool or instrument. In a computer assisted work, the computer in essence plays the role of a sophisticated writing or drawing instrument.”[39]

- [77] Reproduction or copying for purposes of section 23 is satisfied whenever there has been a substantial copying of the work in question. [40] By “substantial” is meant that –

“... quality not quantity takes the test. It has repeatedly been held that ‘substantial’ in this context or connection relates much more to the quality of what has been taken than to the quantity ... Thus, if so much is taken that the value of the original is sensibly diminished, or that the labours of the original author are substantially, and to an injurious extent, appropriated by another, that is sufficient, in law, to constitute a piracy pro tanto. In deciding questions of this sort, regard must be had to the nature and objects of the selection made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, direct or indirect, or supersede the objects of the original work. It may be relevant to consider whether there has been an animus furandi on the part of the defendant in the sense of an intention on the part of the defendant to take for the purposes of saving himself labour. Many mixed ingredients enter into the consideration of such questions. In short, the question of substantiality is a matter of degree in each case and will be considered having regard to the circumstances. Generally, it is not useful to refer the particular decisions as to the quantity taken.”[41]

- [78] The authors of the latest issue of Copyright put it as follows at 7-28:

“The test (for ‘substantial part’) has been put in a number of similar ways. Has the infringer incorporated a substantial part of the independent skill, labour, etc contributed by the original author in creating the copyright work? Has there been a substantial appropriation of the independent labours of the author? Has there been an appropriation of part of the work on which a substantial part of the author’s skill and labour was expended? Has there been an over-borrowing of the skill, labour and judgment which went into the making of the claimant’s work? Has the defendant made a substantial use of those features of the claimant’s work in which copyright subsists?”

- [79] In the 16th Edition of Copyright at 7-30, page 441 the authors continue to expatiate on the meaning of the expression “substantial” copying as follows:

“The quality or importance of what has been taken is much more important than the quantity. The issue thus depends therefore not just on the physical amount taken, but on its substantial significance or importance to the copyright work, so that the quality, or importance, of the part is frequently more significant than the proportion which the borrowed part bears to the whole ... Quality and importance must therefore be understood in terms of the features of the work which made it an original in the first place. It follows that the quality relevant for the purposes of substantiality in the case of a literary work refers to the originality of that which was been copied.”

[80] As confirmed in several judgments,[42] in general terms, what is worth copying is prima facie worth protecting. In the Payen Components case (supra) the Appellate Division, as it then was, concluded that copyright existed in the plaintiff’s Payen Code” which was a code consisting of five digits, the first two whereof being letters and the other two, numbers, and that the defendant, who had used the code for identifying and listing gaskets in South Africa, had copied it and had infringed the plaintiff’s

copyright in it.[43] English law follows a similar approach.[44]

[81] Where the literary work consists of multiple entries however, such as the directory of telefax users which was the subject of the proceedings in the Fax Directories case, the question would be whether the owner of the copyright had proved the necessary element of “substantial copying”. In that case, the directory consisted of 11 000 entries of which the applicant had shown only 28 or 29 instances of copying. This the applicant did by putting into evidence only the fictitious entries deliberately placed by the applicant into the directory so as to check more easily whether copying had indeed occurred or to put it simply, to trap prospective copiers. The respondent therein argued that this limited number of instances of copying shown refuted suggestions of wholesale copying. The court quoted with approval the following passage from *Ladbroke (Football) Ltd v William Hill (Football) Ltd*[45] which passage has been referred to and quoted with approval by Corbett JA (as he was then) in *Galago Publishers (Pty) Ltd and Another v Erasmus*[46] and by Harms JA (as he was then) in *Biotech Laboratories (Pty) Ltd v Beecham Group Plc and Another*: [47]

“If he does copy the question whether he has copied a substantial part depends more on the quality rather than the quantity of what has been taken. One test may be whether the part which he has taken is novel or striking, or is merely a common-place arrangement or ordinary words or well-known data. So it may sometimes be a convenient short-cut to ask whether the part taken could by itself be the subject of copyright. But in my view, that is only a shortcut, and the more correct approach is first to determine whether the plaintiff’s work as a whole is ‘original’ and protected by copyright, and then to enquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff’s work and asking, could section A be the subject of copyright if 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 have 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.”

[82] Just like in the Fax Directories case (*supra*) at 178E-F, the court in the above case concluded as follows at 178F-I:

“On the facts of the present case the inference is inescapable that the 28 or so instances mentioned above were copied directly or indirectly from the applicant's works, most of them probably from the first edition but at least one from a subsequent edition. It is inconceivable that the respondent could only have selected these 28 or 29 cases to copy. The probabilities are overwhelming that there must have been many more entries that were simply copied.”

Mr Levinsohn was quite right when he argued that it is impossible to determine what the extent of the copying was. I do not think,

however, that it is necessary for the applicant to show the exact extent of the copying, provided that he does show that the copying

was not insubstantial.

Having regard to the nature of the work in question, a directory, which must by its nature aim to be as complete as possible, a deletion of 28 entries therefrom would in itself render the work substantially less valuable. (The fact that in *casu* the 28 entries are in any event fictitious or erroneous is not the point. I am attempting to demonstrate that 28 entries alone can be a substantial part of the whole.) And if one considers that this is only the tip of the iceberg, as it were, then the inference is well-nigh inescapable that what was copied was substantial even if the precise extent thereof is not known.”

[83] The English Courts also had the opportunity of deciding issues similar to the one we are dealing with in a case of *Football League Ltd v Littlewoods Pools Ltd*[48] where the Chancery Division had occasion to consider whether the reproduction by Littlewoods Pools (for purposes of betting on the results of matches) of the Football League's soccer fixtures was actionable as an infringement of copyright.

[84] After considering how the author went about preparing the list of soccer fixtures, the Chancery Division found that these (the fixtures) were subject to copyright. It proclaimed so in the following words:[49]

“Every case must depend on its own facts. It is perfectly true that Sutcliffe was not employed to produce a work of art per se nor even a work primarily as a book of reference, such as a directory or a railway guide, but he was employed to produce the best possible programme of fixtures. Of necessity however, that programme had to be reduced to writing. The League's duty is to arrange the best possible programme of games to please the football public in general and the clubs' finances in particular, and they can only do so by producing a list or lists of those games. If, as a result of prolonged cogitations, Sutcliffe reaches a conclusion that it will be best if, for example, Arsenal plays Manchester City at Highbury on September 20, 1958 (as the programme provided), he is doing so no doubt primarily because that is best from the point of view of league football, but if, as a result of the whole of his prolonged and skilled cogitations, he produces in a particular form the season's list containing 2028 matches or thereabouts, in my judgment he or the League (who have, by direct assignment, any

copyright which might otherwise vest in him) are entitled to claim that the chronological list is produced as a result of the entire skill, labour, time, judgment and ingenuity of the League, their servants and agents. In my judgment, on the facts of this case, it is not open to the defendants to try and dissect and break down the efforts of Sutcliffe in the way suggested. Accordingly in my judgment, the plaintiffs are entitled to copyright in the chronological list."

[85] As to whether or not an infringement had occurred, the learned judge, Upjohn J, went to find as follows at pages 657 to 658 of the same judgment:

"The undisputed facts fundamental to my decision in this case are that the chronological list itself is taken by the defendants and used by them line by line and division by division in exactly the same order as the plaintiffs for the preparation of each of their coupons week by week throughout the season (except for a few, cup-tie weeks, which together with a few league match changes, as I have already pointed out, may be regarded as de minimis) and they do this deliberately and under a claim of right to do so ... What in fact the defendants have done each week is in substance to copy exactly the League list for that week throughout the season.

I find some assistance on this point from the *Cate v Devon & Exeter Constitutional Newspaper Co* (1889) 40 ChD 500; 5 T.L.R. 229. In that case the plaintiff published weekly a list of bankruptcies, bills of sale, and so on, the names being listed by counties. The defendants took week by week such names for the county of Devon. The relevant entries pirated formed naturally a very small part of the whole. That case, while not on all fours with the present, has, however, a strong family resemblance. North J said:

'Then there is a further point raised by the defendants that the amount that has been taken from the copyright publication is very small. In one paper I think out of the three weeks papers which have been put up in evidence there was only one entry taken; in another there were, I think, four; in the third only a small number; but in considering these it must be borne in mind that all that is material for the defendants for the purpose of their newspaper has been taken, and that it is taken entirely – copied exactly, from the paper – taken regularly, systematically, every week, and published for the purpose of giving information to the very persons to whom the plaintiffs intend their publications to give that information; and, what is more important still, the defendants now claim to do it as of right; and that of itself is quite sufficient to put them in the wrong in the action and get over any question as to the amount of the matter actually taken from the particular publication which is in evidence. It seems to me, therefore, that the defendants have been wrong throughout : they had no right to take this matter in which the plaintiffs have copyright, and the action is well founded.'

Upon the whole, I have come to the conclusion that this systematic pirating by the defendants work week by week throughout the season of that part of the League's list which is relevant to that week deliberately and (by their defence of this action) under a claim of right amounts in the end to a reproduction of the plaintiff's compilations and infringes accordingly."

[86] It should be mentioned that the above expositions of English law on copyright infringement is as the law was before the situation was changed through Directive 96/9 of the European Parliament which was implemented into English law by the adoption of the Copyright and Rights in Databases Regulations 1997[50] which came into force in England on 1 January 1998. The effect of that Directive is to alter the law as it was in terms of the

judgment

of Upjohn J in the Little Pools case to the effect that soccer fixture lists are no longer protected, in consequence of the Directive.[51]

[87] It is my finding that because South Africa cannot be or is not affected by the above Directive, the law as laid down by Upjohn J is still good law, based as it is on the English Copyright Act from where our law is derived, without influence from the European Parliament's Directive. Consequently the defendant's argument that international developments should be looked into as they may be a helpful guide to this Court in exercising its value judgment here cannot stand.

[88] The plaintiff's witnesses, Mr Blanckensee and Prof Schloss were the only witnesses on the issue of infringement. Both were able to show that the defendant copied annual lists and corresponding weekly lists. Mr Blanckensee testified to the infringement in the above manner for the 2012-2013 and 2013-2014 lists or fixtures. Prof Schloss's testimony proved the infringements in respect of the 2008-2009, 2009-2010 and 2010-2011 seasons. In all the above respects the defendant used the copied fixtures or lists in their Sport Stake games.

[89] The defendant attempted to prove alleged implied non-exclusive licence to make use of the plaintiff's

lists. It tendered evidence purporting to contain a schedule of the plaintiff's fixtures selected by it (defendant) between the period 30 August 2008 and 28 November 2010, all in all amounting to 293 fixtures copied and/or used. This was out of a total of 517 weekly fixtures or lists for the period 30 August 2008 to 10 November 2010 and annual lists from 13 November 2010 to 28 November 2010. Percentage wise, it boils down to the defendant having used 56,67% of the plaintiff's fixture lists or contents thereof during the period mentioned above.

[90] The plaintiff also managed to prove that the defendant was continuing to copy and use its lists and/or fixtures to date. They thus managed, in my view, to prove that from a qualitative point of view, there is little doubt that the fixtures taken by the defendant for purposes of its "Sport Stake" are substantially significant[52] to the whole list. It is clear or common cause that the integrity of the list would be compromised by the exclusion of the fixtures copied by the defendant, i.e. the list would be incomplete to such a degree that its very reliability as a fixture would be at stake were the copied fixtures excluded from it.

[91] In addition to the plaintiff having shown that the defendant infringed its copyright, it is my further

view and finding that this infringement is occurring up to this moment on an ongoing basis.

[92] It is our law that it is not incumbent on a plaintiff to establish each and every infringement. In casu, the probabilities are in my view clear-cut in favour of the conclusion that the examples shown establish an existing trend that

points towards the so-called “tip-of-the-iceberg” as found by our courts if the Fax Directories judgment[53] is anything to go by.

[93] The testimony of Mr Sibusiso Simelane who was called by the defendant to substantiate its defence of alleged non-exclusive implied licence in my view and finding confirmed that the “Sport Stake” list was published twice a week.

NON-EXCLUSIVE IMPLIED LICENCE

[94] The plaintiff dealt with this defence fully in its heads of argument, not knowing that the defendant would abandon it during argument. The defendant did deal with it (defence) in its heads of argument. Even though interesting points were raised by both parties around this defence, the fact that the defendants decided not to proceed with it makes it unnecessary for me to deal with it.

CONSTITUTIONAL LIMITATIONS OR IMPERATIVES

[95] It is trite that a statute should be interpreted in the context of constitutional imperatives. In the judgment of *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SAB Mark International (Freedom of Expression Institute as amicus curiae)*[54] the Constitutional Court commented about this aspect as follows:

“[18] The SCA correctly held that s 34(1)(c) must be construed in the light of the Constitution and applied in a manner that does not unduly trample upon freedom of expression. This approach would necessitate the weighing up of the constitutional safeguard of free expression of the unauthorised user against the right to intellectual property of the trademark owner and where appropriate the owner’s freedoms of trade, occupation for profession.”

[96] The above judgment dealt with trademarks. I agree with suggestions that it is of equal application in copyright cases.

[97] Section 16(1) of the Constitution of the RSA defines “freedom of expression” as follows:

“(1) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research.”

- [98] The defendant relies mainly on section 16(1)(b) above, i.e. freedom to receive or impart information or ideas.
- [99] My understanding of section 16(1) of the Constitution is that although information in general comprises facts, the section also protects, not only the imparting or receiving of the factual empirical content of expression but also the elements of expression which may be novel, controversial or which involve creativity.[55]
- [100] The defendant submitted the following on this aspect or point : The Copyright Act is on all constructions meant to bear a meaning which is the least destructive of free expression rights. That in this case, protection is sought for a literary work consisting on a compilation, i.e. database from which an annual fixture list is printed out, which has nothing meritorious about it. Its very purpose, according to the defendant further, is to inform a wide public interested in South African football of the games to be played. That at the end of the day, the fixtures are –

“... the results of the efforts of the plaintiff in organising the league fixtures to be played. And it is for this very purpose of organising

the league fixtures to be played for the foremost league in South Africa that the plaintiff exists. Its very purpose is to arrange the matches to be played by the leading football teams in South Africa and to inform the public of the details of when and where each match is to be played.”[56]

- [101] That may be so. However, the defendant goes on to state the following:

“... Once the interested public have been informed of the fixture lists to be played, the fixture list has served its purpose. It is untenable that thereafter copyright should be abused so as to prevent the use of the disseminated information by the public.”[57] (my underlining)

- [102] I do not think the defendant is justified to equate itself with members of the public in this sense. The injunction to construe statutes consistent with the Constitution in my view means that where reasonably possible the court is obliged to promote the rights entrenched by the Constitution. The court is obliged to balance out the interests of the plaintiff as owner of the copyright against the claim of free expression for purposes of determining the scope of the plaintiff's right to prevent the reproduction, adaptation of information contained in the plaintiff's fixture lists, among others.[58] In balancing the rights afforded by the Copyright Act as against the imperatives of the Constitution in order to determine the scope of rights of copyright one must have regard to the purpose underlying copyright in compilations.
- [103] The defendant further rubbishes the plaintiff's copyright infringement allegations by stating among others that the plaintiff's claim of right is not as protected as was the case in *Bosal Afrika (Pty) Ltd v Grapnel* (supra); *Payen Components SA Ltd v Bovick CC*[59] and/or *Board of Healthcare Funders v Discovery Health*.[60] It (defendant) argued and submitted that in our present case, the fixtures or lists or the databases concerned and the information

contained in those databases do not constitute valuable property in themselves on an ongoing basis, where the appropriation of the information in those databases would cause substantial harm. It (defendant) reiterates several times that the use of the information

contained in the databases and the reproduction thereof in the “Sport Stake” game do not cause the plaintiff, in this case harm and that neither does it do harm to the works in question which are of short-lived duration. In short, the defendant was saying that the plaintiff had imparted information and the public at large, including itself in that definition of “public”, are within their rights to use it including commercial use of it.

[104] The defendant as a National Lottery Operator cannot be considered to be “the press” or “other media”. It is also not an information provider. It is a company which runs a commercial gambling business. Furthermore, the

defendant’s business is not “to receive or impart information or ideas”. It is run as a business. What it is doing is not receiving or imparting information or ideas, but rather publicising its gambling game in the form of “Sport Stake”. Publishing one’s business for commercial gain is not the receipt or imparting of information or ideas. The defendant consciously, knowingly and deliberately copied and is still copying selections from the plaintiff’s fixture lists specifically for purposes of operating its Sport Stake gambling game. This “selection” cannot be considered on any basis to be to inform the public of the fixtures.

[105] It is not gainsaid that the fixture lists are the plaintiff’s property. The plaintiff’s property rights are also entrenched and protected in the Constitution. Section 25(c) of the Constitution reads as follows:

“Property.

25.(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

[106] In *Laugh It Off v SAB International* [61] it was held among others that in the related but by no means identical field of trademark protection, the anti-dilution provisions

contained in section 34(1)(c) of the Trade Marks Act 194 of 1993 should be construed in the light of the freedom of expression provisions contained in section 16 of the Constitution. The court should investigate whether there is “unfair advantage” or “unfair detriment” shown. In turn, what must be considered (in the context of the trademark in question in that case) is whether the offending use of the mark “would be likely (to) be hurtful in the economic and trade sense, to the repute of the marks ...” What must be shown is “... material harm in the commercial sense” or “substantial economic detriment”. [62]

[107] The form of freedom of expression invoked by the defendant is parody. The relevant conduct in the present matter

is commercial exploitation by the defendant of the defendant's fixture lists. As stated above, according to the defendant's

witness Mr Ntombela, the "Sport Stake" revenue went up to R243 million per annum. According to Mr Simelane, also a witness called by the defendant, the revenue varied between R240 million and R300 million per annum.

[108] When one examines the form of the defendant's conduct to determine whether any infringement of the plaintiff's copyright may be justified under section 16(1) or (b) of the Constitution, one finds that the defendant's conduct is not a form of speech or expression identified for protection by the Constitution. On the contrary all indications or pointers point or lead to the appropriation of an intellectual property asset belonging to the plaintiff, not for purposes of parody or lampooning or for other social purposes, but is instead for no purpose other than to generate commercial gain for itself.[63] Section 16(1)(a) or (b) of the Constitution on any construction does not permit commercial exploitation of another's intellectual property under the guise of supposedly informing the public.

[109] It is my finding that the defendant here seeks, not to inform the public, but to profit from the public by inviting it to participate in its gambling game of "Sport Stake".

[110] The history of these fixtures lists is also revealing. There is uncontroverted evidence that the plaintiff had previously licensed its fixture lists to the defendant's immediate predecessor, Uthingo. The defendant itself half-heartedly started engagements with the plaintiff aimed at obtaining permission or licence to use the fixture lists : When Mr Ntombela was in the witness stand, correspondence exchanged between the plaintiff and the defendant was laid bare. In a letter from the plaintiff's attorneys addressed to the defendant's chairman and chief executive officer dated 5 September 2008 it transpired that on 25 March 2008 the defendant sent a proposal to the plaintiff regarding this issue of licence to used the plaintiff's lists. In the same letter mention is also made that on 19 August 2008 the defendant's chairman intimated to the plaintiff's chairman among others that it was the defendant's intention to include PSL[64] fixtures in "Sport Stake". The plaintiff's response to this is contained in paragraph 1.6 of this letter dated 5 September 2008 in which the defendant was advised that the plaintiff –

"... has not authorised you to reproduce or distribute its fixture lists in any manner or form ..."

The advice proceeds in paragraph 2 of the letter wherein the following stands:

"... any reproduction, adaptation or distribution of (the plaintiff's) fixture lists by (the defendant would) constitute an infringement of (the plaintiff's) copyright in its fixture lists."

[111] The defendant simply went ahead and infringed that copyright despite the above warning.

[112] All the above extracts from mutual correspondence is common cause or uncontradicted by the defendant.

[113] It is therefore my finding that reliance on the protection of section 16 of the Constitution by the defendant is misplaced in the peculiar circumstances of this case. The conduct of the defendant in reproducing the plaintiff's fixture

lists for no purpose other than the generation of revenue for itself without the plaintiff enjoying any part of that revenue through its Sport Stake gambling game is not only likely to be commercially harmful to the plaintiff, but is also indeed causing commercial harm to it.

[114] The defendant attempted to mitigate or ameliorate the impact of its conduct by stating that 34% of its "Sport Stake" revenue is for "good causes". It is in my finding also misplaced. According to Mr Simelane's evidence, the defendant is contractually bound to pay a certain fixed percentage of its revenue to the Government through the National Lottery Distribution Trust Fund. It is a *causa causans* for the granting by the Government to it of a licence or tender to operate the lottery. Even if its claim was true, there is no basis in law for supposed and/or self-determined "good causes" to serve as a basis to limit copyright recognition or otherwise excuse copyright infringement. The Act in question makes no provision for this or in this regard.

[115] After analysing all arguments and submissions from both sides and considering the matter, it is my considered view and finding that the plaintiff should succeed in its claim to the extent of its amended prayers herein.

[116] As regards costs, both parties were *ad idem* that costs should follow the suit. They also are agreed that the costs to be awarded should include the costs consequent to the employment of two counsel. I agree. The complexity of issues raised and dealt with in this matter justifies the employment of two counsel. Furthermore, irrespective of the parties' agreement that costs should follow the suit, I have myself applied my mind to the question as to whether this general rule relating to the awarding of costs is the appropriate costs order to grant or not.

[117] I am mindful of the fact that the court has a wide discretion when it comes to the awarding of costs at the end of a trial. I am satisfied that costs should follow the suit in this case.

ORDER

[118] The following order is made/issued:

118.1 It is hereby ordered and declared that the plaintiff's annual fixture lists and weekly fixture lists are each subject to copyright

protection as afforded by section 6 of the Copyright Act in favour of the plaintiff;

118.2 The defendant is ordered to deliver-up all infringing copies, reproductions and/or adaptations of all the plaintiff's annual

and/or weekly lists in its possession or under its control;

118.3 The following declarator is issued:

“The plaintiff’s copyright in its annual and/or weekly soccer fixture lists from the 2008/2009 South African soccer season to date has been infringed by the defendant to the extent to which any soccer fixture in the aforesaid or relevant season to date appears in the defendant’s ‘Sport Stake’ product offering.”

118.4 The defendant is ordered to pay the costs of the action, which costs shall include the costs consequent upon the appointment or use of two counsel.

N F KGOMO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

FOR THE PLAINTIFF

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ASSISTED BY

ADV K SPOTTISWOODE

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DATE OF HEARING

18 NOVEMBER 2013

DATE OF JUDGMENT

28 FEBRUARY 2014

- [1] They appear as Exhibit “E” in the paginated papers herein at pages 17-32, 33-47 and 48-62 respectively.
- [2] Exhibit “E” pages 63-79 of the papers herein.
- [3] Appears in Exhibit “A” at pages 448-449 of paginated record.
- [4] Exhibit “A”, page 450 of paginated record.
- [5] Exhibit “A”, page 406A.
- [6] Exhibit “A”, page 406B.
- [7] Photographs thereof appear in Exhibit “A”, pages 405 and 406.
- [8] This process is set out in a slide played to the court as well as in the “Draw for the fixtures of the Absa Premiership 2012-2013” document Exhibit “C” at pages 12-34.
- [9] Such as Ajax Cape Town and Santos in Cape Town and Mamelodi Sundowns and Supersport United in Pretoria.
- [10] Such as Orlando Pirates and Kaizer Chiefs never having to play one another midweek at night for safety and security reasons.
- [11] Draw 145 is at Annexure “C” 174(a) to (i); Draw 184 is at C175(a) to 175(g); Draw 185 is at C177(a) to (n) and Draw 188 is at C175(a) to (g).
- [12] See *Accesso CC v Aliforms (Pty) Ltd and Another*
- [1996] 4 All SA 655 (T) at 666d-667b.
- [13] Sweet & Maxwell, 16th Edition at para [3-24].
- [14] Per Council directive 96/9 dated 11 March 1996.
- [15] Article 1(2) of the Council Directive.
- [16] Juta, at page 1.10 paragraph 2.4.9.
- [17] Section 21(2)(a) of the Act.
- [18] Section 21(2)(d).
- [19] 2004 SCC 13; [2004] 1 SCR 339 at para 25.
- [20]
- [2006] ZASCA 40; 2006
- (4) SA 458 (SCA) at [35] to [37].
- [21] 1985
- (4) SA 882 (C) at 893C.

- [22] Fax Directories (Pty) Ltd v S A Fax Listings CC 1990
- (2) SA 164 (D).
- [23] Board of Healthcare Funders v Discovery Medical Scheme and Others (Unreported judgment of Kollapen J in North Gauteng High Court dated 15 November 2012 under Case No 35769/2010) at paras [2],
- [6] to [18], [29] to [32].
- [24] Intellectual Property : Patents, Copyright, Trade Marks and Allied Rights, 7th Ed, 2010.
- [25] Waylite Dairy CC v First National Bank Ltd
- [1994] ZASCA 135; 1995 (1) SA 645 (AD) at 650D-E.
- [26] Appleton and Another v Harnischfeger Corporation and Another
- [1994] ZASCA 141; 1995 (2) SA 247 (AD) at 262E; Klepp Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (AD) at 22H to 23B.
- [27] [1997] RPC 289 (ChD) 428-430.
- [28] Fax Directories (supra) at 175C-D.
- [29] Fax Directories (supra) at 175I.
- [30] Insamcor (Pty) Ltd v Maschienenfabriek Sidler AG t/a Sistag 1987 (4) SA 660 (W) at 663H-I and 664C; Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd
- [1997] ZASCA 109; 1998 (2) SA 965 (SCA).
- [31] Section 23(1) of the Act.
- [32] Section 6(a) of the Act.
- [33] Section 6(b) of the Act.
- [34] Section 1 of the Act.
- [35] Supra, 16th Ed, 2011 at 3-147.
- [36] See Board of Healthcare Funders (supra) at [39].
- [37] Payen Components SA Ltd v Bavic CC and Others
- [1995] ZASCA 57; 1995 (4) SA 441 (A) at 450E; D H Dean : Copyright at 1-36 para 4.8.
- [38] Haupt t/a Soft Copy (supra) at [31].
- [39] O H Decan : Handbook of South African Copyright Law (supra) at para 4.8 page 1-36.
- [40] Payen Components (supra) at 451D.

[41] Copinger and Skone James (supra) at 8-26 and 8-27 as quoted in Payen Components (supra) at 451J-452C; see also Copyright (supra) at 7-28.

[42] University of London Press Ltd v University Tutorial Press Ltd

[1916] 2 Ch 601 at 610 (quoted with approval in Payen Components (supra) at 482D; Fax Directories (supra) at 177I.

[43] Payen Components (supra) at 446A-B, 451B and 452I.

[44] Cornish, Llewelyn & Aplin (supra) at 12-06.

[45] [1964] 1 All ER 465 (HL).

[46] 1989

(1) SA 276 (A) at 285C-E.

[47] 2002

(4) SA 249 (SCA) at para [9].

[48] (1959) Ch 637 (ChD).

[49] At 655-656.

[50] SL 1997, No 3032.

[51] Football Data Co Limited and Others v Brittens Pools Limited and Others, C-604/10 (a judgment of the Court of Justice of the European Union dated 01 March 2012.

[52] i.e. within the meaning of those words as used by the learned authors of “Copyright” at 7-30.

[53] Supra.

[54] 2006

(1) SA 144 (CC).

[55] Woolman et al : Constitutional Law in South Africa, 2nd Edition, Vol 3 at 42-33(c).

[56] Defendant’s Heads of Argument, paragraph 34 at page 13 thereof.

[57] Paragraph 35 thereof.

[58] Laugh It Off v SAB International (supra) at para [44].

[59] 1995

(4) SA 441 (A).

[60] Supra.

[61] Supra at paras [45], [49] to [50].

[62] Ibid at [51] and [56].

[63] Separate but concurring judgment of Sachs J in *Laugh It Off v SAB International* at [85].

[64] Professional Soccer League.

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