

SOUTH AFRICA / JUDGMENT

Philanthropic Collection (Pty) Ltd v Girls & Boys South Africa (3029/2017) [2017] ZAGPJHC 302; 20197 BIP 143 (GJ) (15 February 2017) [2017] ZAGPJHC 302

COURT

South Gauteng High Court, Johannesburg

BEFORE

L T Modiba

CASE / FILE NUMBER

3029/2017

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THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 3029/2017

Not reportable

Not of interest to other judges

Revised.

15 February 2017

THE PHILANTHROPIC COLLECTION (PTY) LTD Applicant

and

GIRLS & BOYS SOUTH AFRICA Respondent

JUDGMENT

MODIBA J:

[1] This application was brought on an urgent basis in terms of rule 6(12) of the Uniform Rules of Court for an order in the following

terms:

[1.1] Dispensing with forms and service provided for in the uniform rules of Court, enrollment of the application and hearing of the application as one of urgency.

[1.2] Interdicting and restraining the respondent from reproducing, adapting, accessing or using the database of donors and participants of the 2015 CEO SleepOut event (the database).

[1.5] Costs of suit, including the costs of counsel.

[1.4] Following delivery, deletion of all copies of the database from the respondent's computer systems or otherwise in its possession or under its control

[1.3] Immediate delivery by the respondent to the applicant of any copies of the database regardless of the format in which they are stored.

[2] The facts relied on by the parties are largely common cause. The applicant is an organizer and promoter of the CEO SleepOut Event (the event). The event was established to raise funds towards various charitable causes. It challenges South African business leaders to experience the plight of homeless people, by spending a night on the street in the middle of winter without any comforts, with a view to entice them to make charitable donations towards social relief programs for the homeless. The respondent was the sole beneficiary of the first event held in June 2015. CEOs of business entities, business leaders, and members of the public made donations towards this initiative. Through this event, more than R26 million was donated. Save for 5% paid to the applicant as commission, the funds raised were paid solely to the respondent.

[3] To participate in the event, every participant and donor was required to register on the applicant's website by completing an on-line form. Personal data inputted on the form was automatically transferred to an electronic database which could only be accessed through the back end of the website. The website had a credit card payment functionality through which donors donated funds in respect of the event. During the registration process, it transpired that business entities who desired to donate substantial amounts of monies were reluctant to do so by credit card. They preferred to do so by electronic funds transfer (EFT). However an EFT functionality was not built into the website. To accommodate this cohort of donors, Samuel Thomas Louis Veldman (Mr. Veldman) an employee of the respondent drafted a form, which was accepted by the applicant and beautified by the entity commissioned by the applicant to design the website. It was then loaded on the website for downloading by entities who desired to pay by EFT. They would complete the form manually and send it to Veldman at the respondent by fax together with proof of EFT. Veldman would then manually input the personal information of these donors onto the electronic database generated automatically from the website when donors who paid by credit card registered their donations.

[4] When the first event was organized in 2015, the applicant did not have a public benefit organization status. Therefore it did not have a tax exemption status in terms of section 1BA of the Income Tax Act 58, of 1962. The respondent has such a status. A tax exemption status is an important allurements for donations because it allows a donation recipient to issue a donation certificate in terms of section 18A of the Income Tax Act. The certificate qualifies the donation as a deductible expense, affording a donor a tax saving. Lack of a section 18A

tax exemption status potentially thwarts donations because the donation will not be allowed as a tax deduction. To get around this the parties, agreed that donations made towards the event will be paid directly into the respondent's bank account. The respondent's accounting system is set up in such a way that donation receipts are issued automatically in respect of donations paid into the respondent's bank account. This way, the respondent issued section 18A certificates to all persons and entities that made donations towards the event. To do so, it used both the database generated automatically in respect of credit card donations, and the information added manually to that database by Veldman in respect of donors who paid by EFT.

- [5] The event was held again in 2016 . The respondent was not a beneficiary of the event in 2016. It is also not the beneficiary of the 2017 event. On 23 January 2017 , Darren Olivier (DO), one the trustees of the CEO SleepOut Trust whose phone number appears on the database as that of his brother, Grant Olivier (GO), received a call from one Grace Ntshangase (Ms. Ntshangase), an employee of the respondent who works out of the respondent's KwaZulu Natal office, soliciting a donation. DO made a donation towards the 2015 event on behalf of GO; hence his phone number appeared on the database. The applicant has annexed a transcribed recording of the telephone conversation between DO and Ms. Ntshangase to its founding papers. That conversation precipitated this application.
- [6] Planning for the 2017 event is due to commence in March 2017. This is the factor the applicant relies on for urgency. Although the respondent opposed urgency in its papers, the respondent's counsel did not argue the point, probably due to a perception that the court's prima facie view was that there is a basis for dealing with the application as an urgent one. In my view, the precipitant

planning of the 2017 event renders the application urgent.

- [7] The following excerpt from the conversation between DO and Ms. Ntshangase is worth quoting:

Darren: Hello Grace: Hello good morning sir Darren: Hi Grace: Can you hear me now? Darren: Sorry, didn't catch you. What did you say? Grace: Okay, I'm calling from an organisation called Girls and Boys Town Darren: Yes Grace: Yes you participated last year on the CEO SleepOut. Darren: Yes Grace: Yes so we would like to attempt you if you could make another donations, okay Darren: Okay so what must I do? Grace: Okay this year it's not about the campaign but we would like to attain for a donation, I can send your information via email. Just so you have a look on what we are about and what we do and then you have all the information regarding how you can donate as well. Darren: Okay, what campaign are you talking about? Grace: No no at this stage we do not have a campaign sir. But we did have a campaign last year, The CEO SleepOut, where you participated. I don't know if you remember, so it doesn't show whether it was you who participated or your company. Darren: Okay, was that your campaign? Grace: No it was for all charity organisations but our organisation was a beneficiary for that particular campaign Darren: I see, okay. And now you want me to fund you directly, correct? Grace: Okay we need funds, we

need funds for the current year and we are contacting all the people who have supported us previously. It's just an appeal; this is just a proposal if you will be willing to support children once again. Darren: Okay are you contacting all the people who donated to you? Grace: We are contacting everyone who has donated because it's just our way of making some appeals because we depend on funds that get donated even if we do not have the campaign going on. That's how we survive. Darren: How do you know that I was participating in the CEO SleepOut? Grace: We got a database of all the CEOs who have participated. We've got cell phone numbers and information of what was donated or how much was donated. S you are on our database as well. Our head office has got that information. Darren: And so is that a separate database from your usual database? Grace: I beg your pardon Darren: Is that a separate database from your other donators? Grace: Yes yes it is separate. This is from the campaign and from the CEO SleepOutr campaign. Darren: I see. And so you are contacting, how many people have you contacted so far? Grace: I do not have their numbers. Okay so far personally I've contacted quite a number of people, it should be over 50 people that I've spoken to, but I do not have the entire database with me to say how many people did take part.

[8] The applicant contends that the respondent is not entitled to use the database because it solely belongs to it. It seeks the relief set out in paragraph 1 on under the following grounds:

[8.1] Copyright infringement in terms of the Copyright Act 98 of 1978 (the Act).

[8.2] Infringement of an undertaking.

[8.3] Unlawful competition in terms of common law.

[9] The respondent denies that it is not entitled to use the database as alleged by the applicant. It contends that the parties own the database jointly; therefore it is entitled to use it. It further contends that the determination of ownership is fundamental to the relief sought by the applicant. This issue is in dispute between the parties. The respondent alleges that the dispute is incapable of resolution on the papers. It seeks dismissal of the application or referral to evidence or to trial.

[10] The applicant's success on any of these grounds is dispositive of the application.

[11] When I heard the application, I expressed a prima facie view that the applicant is likely to succeed on the copyright infringement ground. I therefore requested counsel for the parties to confine their argument to the issues that arise in respect of this ground. After both counsel made submissions, I reserved judgment without hearing argument on the other ground because in my view, the applicant had made out a case for the relief sought to be granted on the basis of copyright infringement. I set out my reasons below.

[12] To succeed on the ground of copyright infringement, the applicant has to establish that the database qualifies for protection under the Act and that the respondent has carried out an act in respect of which the applicant as owner enjoys an exclusive right in terms of the Act.

[13] Therefore there are only two issues for determination namely:

[13.1] whether a dispute of facts that is incapable for resolution on the papers exists between the parties on the question of ownership.

[13.1] whether the applicant is the sole owner of the database.

[14] I disagree with the respondent that the question of ownership of the database is incapable of resolution on the papers. I am of the view that for the purpose of determining the infringement of a copyright, the question of ownership is capable of resolution on the papers.

[15] The database is a literary work as defined in the Act. The Act defines a literary work to include tables, 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 program. To qualify for protection under the Act, the literary work must be original.[1] The Act does not define the word 'original'.

[16] In terms of the Act, the author of a work is absent assignment, the owner of it. In relation to literary work which is computer

generated, the author is the person by whom arrangements necessary for the creation of the work were undertaken.

[17] The facts of this case require that the element of originality as well as the element of ownership be examined together. Whether the work is original depends on when the work was created and who created it. The arrangements necessary for the creation of the database are the following: (a) the organization of the event, (b) the creation of the website for purpose of interfacing with donors and participants and (c) the creation of a manual process for EFT payments.

[18] There is no doubt the database was created in 2015 specifically for the 2015 event. The personal information of the donors or participants of the 2015 event may have existed in various components prior to then. However it was created in the database form whose ownership is disputed in 2015 specifically for the 2015 event. Prior to then, the database did not exist. There is no dispute that the event was created by the applicant. Without the event, there would not be any database in the format that forms the subject of the dispute between the parties.

[19] The applicant made the arrangements for the creation of the website. The website served as a window through which the applicant interfaced with the donors and the participants. The database was automatically generated when participants and donors registered for the event by completing the on-line form. The form for donors paying by EFT, although created by Veldman was loaded on the applicant's website. It is ancillary to the applicant's creation. But for its incorporation on the website, the respondent would not have had the means to collect the data it claims to have collected in the manner that it collected it. For that reason it would be absurd to separate the manual from the website.

[20] In *Klep Valves (Pty) Ltd v Saunders Value Company Ltd*, [2] the court held that for the purposes of copyright, originality refers not only to "originality of either thought or the expression of thought, but to the original skill or labour in execution. All that is required is that the work should emanate from the author himself and not be copied..." In *Moneyweb (Pty) Ltd v Media 24 Ltd and another*, [3] the court found that there must be sufficient application of the author's mind to produce a work that could be judged to be 'original'. In *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd and Others* [4] it was held that a work was considered to be original if it had not been copied from an existing source and if its production required a substantial degree of skill, judgment or labour. The creation of the form by Veldman fails to meet the test for originality established in these cases. The form Veldman claims to have created is, barring the inclusion of information for the EFT as well as details where the form should be sent, substantially the same as the on-line form completed by donors paying by credit card. Veldman is not the originator of the EFT form. There is no substantial degree of skill, judgment or labour or original skill or labour in execution that Veldman employed to create the form.

[21] Veldman may have innovated the idea of EFT payments which was not envisaged when the website was created. This innovation does not elevate the respondent to the status of a person who made arrangements necessary for the creation of the website. To upload the form on the applicant's website and to include the respondent's details on the form so that those who complete it can send it to the respondent, the respondent needed the concurrence of the applicant. Without such concurrence, the respondent would not have been able to collect the data it claims to own.

[22] The purpose of the EFT innovation was very specific: to make it possible for donors to make EFT payments directly to the respondent

and for the respondent to issue section 1BA certificates for which the respondent required the donors' personal information. It was not for any other purpose. Certainly it was not for the purpose for which the respondent now seeks to use the information.

[23] To accord Veldman, and through him the respondent, the status of an author on the basis of the data manually added to the database

automatically generated from the website would give the definition of author an overbroad interpretation. The definition of author has to be considered in the context of the whole event, the role of the parties during the event, the innovation and its purpose. I have dealt with the event in paragraph 5 and 17 above.

[24] I have also dealt with the purpose of the innovation and its purpose in paragraphs 19 and 20 above. The purpose of the innovation was not to create a database for the respondent for the purpose of soliciting donors. It was to add to the applicant's database donors who paid by EFT solely for the purpose set out in paragraph 20 above. There is no basis for the respondent's claim to retain the database or to use it for any other purpose.

- [25] The respondent was the beneficiary of the 2015 event. Its claim to be a partner of the 2015 event is a red herring. For this contention it relies on the use of the word 'partner' in the undated heads of agreement concluded between the parties. Several other stakeholders in that document are referred to as partners. None of them claim ownership of the database. Actually it is absurd that the respondent only claims joint ownership of the database and not of the event. There was no agreement to share in the losses of the event. The respondent would only benefit from the event. It would only pay the applicant 5% of the monies donated. If the applicant's expenses towards the event exceeded 5% and it incurred a loss, the applicant would have no basis for insisting that the respondent share in the loss. The undated termination agreement concluded by the parties evidences this. It only deals with the respondent's entitlement to the donations received and obligation to pay the applicant 5% commission. It makes no mention of the respondent's right of ownership of the database. It was concluded in full and final settlement of the issues between the parties arising from the 2015 event. The respondent's contention to have the right to use the database on the basis that it is the applicant's partner stands to be rejected.
- [26] In the premises, I find that the applicant is the sole owner of the database. I also find that the applicant has established that the database qualifies for protection under the Act and that the respondent has carried out an act in respect of which the applicant as owner enjoys an exclusive right in terms of the Act.
- [27] In the premises, the applicant has made out a case for the relief sought in the notice of motion.
- [28] Therefore the following order is made:

ORDER

- [1.1] The forms and service provided for in the Uniform Rules of Court are dispensed with. This matter is enrolled and heard as one of urgency in terms of Rule 6(12).
- [1.2] The respondent is interdicted and restrained from reproducing, adapting, accessing or using the database of donors and participants of the 2015 CEO SleepOut event (the database).
- [1.3] The respondent shall immediately deliver to the applicant any copies of the database regardless of the format in which they are stored.
- [1.4] The respondent shall immediately delete the database from the respondent's computer systems or otherwise in its possession or under its control
- [1.5] The respondent shall pay the applicant's costs of suit, including the costs of counsel.

L T MODIBA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARENCES:

Applicant's Counsel: Mr GD Marriot

Instructed by: Keith Sutcliffe & Associates Inc

Respondent's Counsel: Mr GI Hoffman SC

Instructed by: Fasken Martineau (Incorporated as Bell Dewar Inc)

Date heard: 8 February 2017

Date delivered: 15 February 2017

[1] Works eligible for copyright.

(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright-

(a) literary works;

[1] Works eligible for copyright.

(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright-

(a) literary works;

[2]

[1986] ZASCA 157; [1987] 4 ALL SA 147 (AD) at para 27.

[3] 2016 (4) SA 591 (GJ) para 150-E.

[4]

[2006] ZASCA 40; 2006 (4) SA 458 (SCA) at para 35.

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