

SOUTH AFRICA / JUDGMENT

Pulkowski v South African Broadcasting Corporation Ltd and Another [2008]

ZAGPHC 440; 96/06/01 (1 August 2008)

[2008] ZAGPHC 440

COURT
High Courts - Gauteng

BEFORE
NP Willis

CASE / FILE NUMBER
7996/06

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NOT
REPORTABLE
IN
THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND
LOCAL DIVISION)
JOHANNESBURG
CASE
NO: 7996/06

DATE:	2008-08-01
	In
	the matter between
	PULKOWSKI,
	CHRISTOPHER
	FRANK.....
	Plaintiff and
	SOUTH
	AFRICAN BROADCASTING
	CORPORATION
	LIMITED.....1
	st Respondent
	MSV
	PRODUCTIONS
	CC.....2nd
	Respondent

JUDGMENT

WILLIS, J:

The plaintiff has instituted an action against the defendant alleging copyright infringements which relate to musical work composed by him as the original theme tune and background music for all episodes of a television programme "Generations" performed for or originally broadcasted by the defendant over the period 8 February 1996 to April 2004. (This work has been described by the plaintiff in his Particulars of Claim as "the original work").

The plaintiff alleges that a valid copyright subsists in him in respect of all mechanical recordings and/or copies of this so-called

"original work". The plaintiff complains that without his consent or licence the defendant caused various copies of episodes of this "original work" as set out above to be made and to be sold to 12 countries outside the Southern African Development

Countries (SADC) region, to wit, Botswana, Ghana, Kenya, Malawi, Namibia, Nigeria, Seychelles, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

Plaintiff also alleges that on or about the end of July 2006 the defendant further and without his consent or licence caused various copies of "Generations" to be made and sold to Jamaica and North America.

Based on these allegations the plaintiff claims:

- a) An order restraining the defendant from infringing the plaintiffs rights in the copyright in the "original work" by

publishing or reproducing or copying or selling or broadcasting the "original work", or by selling, distributing or offering

for sale copies of the "original work"; and

- b) delivery up to the plaintiff of all copies of "original work" in the defendant's possession or under its control and of all video material used in the production and reproduction of the "original work", as well as payment of R13 075 758,51, being damages; alternatively reasonable royalties which would have been payable to the plaintiff; further alternatively compensation in accordance with the defendant's agreement with SARRAL and

costs of suit.

The third party has been joined in this matter by the defendant issuing a third party notice in which it contended that it was entitled to be indemnified by the third party in the event that it is found to be liable to the plaintiff. The third party has filed a plea. In its plea the third party makes it clear that it disputes that the plaintiff is entitled to the order sought in its amended Particulars

of Claim on the same grounds as set out in the defendant's plea. The third party furthermore denies that it is liable to indemnify the defendant in the event that the defendant is found to be liable to the plaintiff.

It is common cause that relevant to this entire dispute are two agreements which are currently extant. Indeed, the plaintiff himself

has relied on these agreements, as does the defendant and the third party. The first agreement is one concluded between the plaintiff and the South African Recording Rights Association Limited, referred as "SARRAL"; and the other an agreement that was concluded between SARRAL and the defendant.

At the commencement of the hearing today I was called upon to make an order for separation in terms of Rule 33(4). This order was made by me with the concurrence of all the parties before me.

This morning I was available for one day of hearing only before the end of the week's roll, as I am hearing appeals next week. The counsel for the respective parties came to see me in chambers and advised that there was a crisp issue known as a "focus stand? issue which they wished me to determine. In view of the time constraints it was agreed that the counsel would address me for a limited time each and that I would attempt to give my judgment in the matter today.

The defendant has sought that I make an order that the plaintiffs cause of action insofar as it relates to prayer C of its Particulars of Claim be dismissed. Prayer C is the claim for some R13-million as damages, alternatively reasonable royalties; that the plaintiffs

cause of action be dismissed insofar as it concerns any country other than the Seychelles and that the plaintiff be ordered to pay the costs of the trial on the separated issues and the application for separation of the issues in terms of Rule 33(4), including the costs consequent upon the employment two counsel.

The attitude crisply stated of the defendant with whom the third party joins hands is that it would be pointless to have a protracted and extremely expensive case on issues upon which the plaintiff could not ultimately succeed. Of course there is merit in adopting such an approach. There is no point in valuable Court time being taken up and in litigants being put to inordinate expense needlessly.

The argument crisply set out by the defendant is that the plaintiff in terms of his agreement with SARRAL, to which I have previously

referred, agreed as follows:

"SARRAL are hereby authorised to licence and collect all mechanical royalties in respect of all recordings and mechanical reproductions of all musical composition controlled by the owner (i.e. the plaintiff) for the territory of the world."

And:

"SARRAL are not authorised to grant permission for the use of any of the said works in motion picture soundtracks, except television films made by a licensed broadcaster without first obtaining written or cable permission from the owner (i.e. the plaintiff)."

The agreement between SARRAL and the defendant gives to the SABC a non-exclusive licence, inter alia to supply television programmes

incorporating musical works owned by its members to broadcasting organisations to certain countries. The attitude of the defendant is accordingly that the plaintiffs rights to royalties were vested in SARRAL and in turn the SABC has validly contracted with SARRAL to do the acts complained of by the plaintiff in his Particulars of Claim.

Mr Hoffman has made a concession in regard to the country Seychelles. I do not think it necessary to delve into this aspect of the matter, save to say that I am content that any order that I may make in this matter would not apply in respect of the action relating to alleged infringements of the copyright in the Seychelles.

At the outset I wish to record without having had the opportunity to give the matter detailed reflection, that I am not sure that to describe this as a locus standi point is correct. I fully accept, as was argued by Mr Sieberhagen, relying on the case of Klepp Valves (Pty) Ltd v Sanders Valve Co Ltd, 1987 (2) SA 1 (AD) 38F, that the owner of a copyright (which the plaintiff certainly is in regard to his musical compositions) retains certain residual rights in respect of that copyright which endure and which may even be reversionary in nature.

Therefore I shall proceed on the basis that the so-called locus standi point was misdescribed. This does not mean that it cannot be determined as the parties have requested me to do. The real issue is whether the plaintiff divested himself of his rights to pursue royalties as he has claimed, and accordingly whether there should be the enormous expense and inconvenience of a trial when, in the end, a simple determination of the matter by referring to the agreements applicable between the plaintiff and SARRAL on the one hand, and between SARRAL and the SABC on the other, would be dispositive of the issue.

The plaintiff has attempted to make much of the fact that clause 7 of the agreement applicable between SARRAL and himself provides as follows:

"Where necessary to protect, enforce, and/or collect mechanical royalties due to the owner, the owner shall cede transfer and assign his copyright to SARRAL for the sole purpose of instituting action for the necessary legal relief in SARRAL'S or it's nominee's name. In such event SARRAL shall bear all legal costs and disbursements in regard to the action brought. After the action referred to has been entirely disposed of, SARRAL shall cede, transfer and assign all or any rights it might have received in terms of this clause to the owner."

The plaintiff has referred me to a number of well-known cases relating to the question of cession, in particular the well-known case of Lief NO v Dettmann, 1964 (2) SA 252 (AD) at 275, to submit that cession is not merely contractual in nature and that there must be some or other act that gives rise to a conclusion that cession has taken place, and that in the circumstances of this particular case it is not established that there was indeed a cession.

In my view there is no merit in this point whatsoever. It is clear that in terms of clause 7 the plaintiff is required to cede his rights and cannot avoid doing so, and accordingly to get back to the principal issue before me, there seems to be no point whatsoever in adopting a nitpicking approach to this matter when it is clear that the plaintiff would be required to cede his rights and cannot avoid doing so.

Mr Sieberhagen also attempted to make much of the fact that the clause contains the words "where necessary". He said that that could operate in favour of his client. With respect, I do not think so. In fact, in my view the clause "where necessary" is a clause that inures to the benefit purely of SARRAL. In other words it has to mean that to the extent that it may be necessary for the SARRAL to obtain a cession for the purposes of protecting and enforcing the royalties to which this agreement relates, the plaintiff is required to comply.

Mr Sieberhagen also attempted to make much of the fact that the agreement between SARRAL and the defendant gave the defendant nonexclusive licence rights. Again, I see no merit in this point whatsoever. What it means is that the defendant does not have exclusive rights to do what it does and what it has been doing. Other entities, for example the British Broadcasting Corporation or some other entity, could be given similar rights.

The complaint of the plaintiff concerns what the defendant has been doing, and the defendant is not doing anything that it is not

permitted to do if the two agreements are read together.

Mr Sieberhagen also attempted to rely on the case of Louw v WP Kooperatief Bpk en Andere[1994] ZASCA 54; , 1994 (3) SA 434 (A). I really fail to see how this case can be of assistance to the plaintiff. On the contrary, if anything, it seems to come to the assistance of the defendant inasmuch as it clearly stipulates that where there is more than one agreement that applies to a particular situation one must look at the totality, look at all the agreements, and make sure that there is no absurd result.

If the two agreements are viewed together then it seems clear to me that insofar as the plaintiffs claim relates to "mechanical

royalties" the plaintiff cannot succeed.

I have applied my mind to the question of whether the agreement is so broad that it entitles the defendant to obtain the relief which it has sought and in terms as widely as they have been sought. It will be recalled that the defendant, except insofar as the action relates to the Seychelles, seeks an order that the plaintiffs cause of action relating to the claim for damages be dismissed and also that the remainder of the cause of action be dismissed.

It is important to bear in mind that the relevant clause relates to "all mechanical royalties". It seems to me that there may residually be something that inures to the plaintiff by way of copyright that falls outside the ambit of "all mechanical royalties". An immediate example which springs to mind would be, for example, the copyright that exists in the actual written musical composition, and in my view could also relate to live performances of the musical composition in various theatres and auditoria around the world.

I should also like to emphasise that in my view the very wording of clause 2 specifically provides by necessary implication that in respect of television films made by a licensed broadcaster, SARRAL may authorise the use of the works to which this application relates and, as has already been recorded in this judgment, SARRAL has in turn entered into a licensing agreement with the third defendant relating to these works.

I therefore am of a mind to grant, as I am entitled to do, lesser relief than that as widely sought by the defendant and the third

party. In other words I wish to make it quite clear that the order that I make relates only to so-called "mechanical royalties".

Prima facie it would seem that there would then not remain much left, if anything at all, of the plaintiffs claim. Nevertheless I cannot overlook the fact that the Particulars of Claim complain not only of transgressions in regard to mechanical recordings, but also transgressions relating to "original work".

In order to prevent any injustice, I shall not cast my order needlessly widely. I shall afford the plaintiff an opportunity to amend. Clearly this may have an implication insofar as costs are concerned, but I also wish to make an order that will cater for the event that if the plaintiff accepts that it is "the end of the day" the defendant and the third party will receive their costs.

The following order is made:

1. Insofar as the plaintiffs claim relates to "mechanical royalties" arising from the sale of copies of episodes of the television programme "Generations" it is dismissed.
2. This order shall not apply, however, to the plaintiffs cause of action insofar as it concerns the Seychelles.
3. The plaintiff is given 21 days in which to file amended Particulars of Claim.

4. In the event that the plaintiff files amended Particulars of Claim in accordance with paragraph 3 above, the costs of this application are reserved for determination in the continuing action, but shall in any event include the costs of two counsel and the costs of the third party.
5. In the event that the plaintiff does not file amended Particulars of Claim in accordance with paragraph 3 above, the plaintiff shall pay the costs of the defendant and the third party, which costs shall include the costs of two counsel.

NP WILLIS

JUDGE OF THE HIGH COURT

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COUNSEL FOR DEFENDANT: ADV GI HOFFMAN SC

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