

**REPUBLIC OF SOUTH AFRICA
THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 13/23293

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

Date: 2 September 2016

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD Plaintiff

and

VIA VOLLENHOVEN & APPOLLIS INDEPENDENT CC	First Respondent
SYLVIA ELIZABETH VOLLENHOVEN	Second Respondent
CHAUCER PUBLICATIONS (PTY) LTD	Third Respondent
MARTIN SYLVESTER WELTZ	Fourth Respondent
MINISTER OF TRADE AND INDUSTRY	Fifth Respondent
and	
FREEDOM OF EXPRESSION INSTITUTE	Amicus Curiae

J U D G M E N T

NOWOSENETZ AJ:

[1] The applicant, the SABC, concluded a written Television Production Commissioning Agreement (the TPC agreement) with the first respondent, a close corporation conducting business as a film production house (VIA) in which it commissioned VIA to make two documentary film episodes called “Truth Be Told : Project Spear”. The second respondent Ms SE Vollenhoven (Vollenhoven) is a film

maker and member of the first respondent. The first and second respondents are for convenience referred to as the Respondents. The fifth respondent opposes the Respondents' constitutional challenge but no other relief is sought.

[2] The Applicant purchased the copyright in the films for the amount of R559 169 which was duly paid to VIA. One episode was broadcast on 28 October 2012 and the other entitled "Project Spear: - Stolen billions, spies and lies" (the work) has not been broadcasted by the applicant to date and is the subject matter of this dispute. The applicant seeks a final interdict against the first and second respondents from infringing the applicant's copyright in the work (distribution interdict) and delivery up of specified production materials (delivery interdict). It relies on the protection afforded under the Copyright Act 98 of 1978 (the Act) as well as the agreement. No relief is sought against the Third, Fourth and Fifth Respondents. Argument was addressed on behalf of the Fifth Respondent relating to the constitutional challenge. The amicus curiae withdrew from these proceedings and played no role.

The copyright dispute

[2] The applicant's founding affidavit, deposed to by Ms N Shoji, acting head of factual genre, the issue was described thus: During 2010 the applicant released a public Request for Proposals for the commissioning of television programmes to fit the channel and genre criteria of the applicant. The applicant represented its factual genre as an opportunity for ordinary South Africans to tell their story truthfully and honestly; that public broadcasting was crucial to a healthy broadcasting; to use story telling as a nation building tool; that controversy was embraced. The intention was to present a subject with in the security that the information has integrity to create empowerment of the audience. The evaluation criteria were for South African innovative and cutting edge material. In short an investigative documentary.

[3] Vollenhoven had certain reports which were in the public domain which she had researched and which revealed an intrigue regarding "lifeboats" ie illegal financial assistance given by the previous government through the South African Reserve Bank to major South African financial institutions. These advances had

allegedly never been or recovered by the new democratic government. This story formed the basis of the proposal made to the applicant and it was accepted.

[4] The TPC agreement was signed on 24 November 2011. Film production began about May 2012. Shozi was the commissioning editor and was involved in the management of this project. She states that she received a rough cut of the work only two days before receiving the final mix. By 3 September 2012 it is common cause that the Beta SP tape transmission master and FCC sheet was delivered to the applicant. It is also not in dispute that the applicant has paid the producer for the work.

[5] On 24 August 2012 Shozi confirmed the transmission date on 30 September 2012 for the work to Vollenhoven. On 4 September 2012 the first objection to the work was received by Vollenhoven from Shozi in a lengthy email. Her objections were based on the first viewing of the documentary. She found the work to be unacceptable in style and quality. She regarded the end product as deviating from the proposed product in the TPC. She expressed inter alia, reservations about unbalanced reportage, excessive reliance of material from Noseweek (the Third and Fourth Respondent being publisher and editor respectively), incrimination of certain public figures such as Mt T Manuel and Ms G Marcus without the right of reply and placing the applicant at risk of liability for defamation. Correspondence was exchanged by them with suggestions by Vollenhoven to implement changes.

[6] The matter was not resolved and was escalated to Mr G Pretorius, Programme Manager: SABC Television. On 11 October 2012 he wrote to Vollenhoven expressing enthusiasm for the work but describing it inter alia, as containing emotive and sweeping statements which are not necessarily 100% accurate. He stated that there are gaping holes in the film. He also was concerned about exposure of the applicant to litigation. He requested a fully annotated script and proof of sources for each statement of fact. Vollenhoven objected that a script was not a contractual deliverable and sought specific itemisation of the "gaping holes". She nevertheless complied with the request for the annotated script. An internal review of the work was held by the applicant and a Regulatory and Compliance Report was sent her on 15 October 2012. The report was also

enthusiastic about the film but concluded that it digressed from the guidelines of the editorial policy by which the applicant was bound. The review identified 16 critical points which it found problematic. The review required major changes to the film. On 16 October 2012 Ms V Barnard a compliance officer of the applicant wrote a lengthy comment about the film to Vollenhoven stating:

“Based on the EC Act, BCCSA Code of Conduct, SABC Editorial Policies and the ICASA CCC Code I am in agreement that this documentary goes against the SABC Editorial Policies, our mandate and our broadcasting legislation. She concluded thus:

“Given the absence of satisfactory truth or reasonableness, I conclude that the programme is defamatory of all accused parties. Legitimate public interest cannot save the programme. Given the obvious deficiencies (in the programme) I am, furthermore, of the view that the producer was negligent in having commissioned the programme.”

[7] In the interim the screening did not proceed and on 27 September 2012 the applicant announced in a media release that the work would be broadcast on SABC 2 on 4 November 2012. A private screening of the work was planned for 19 October 2012 but this did not take place. On 22 October 2012 Vollenhoven made proposals for a compromise which would involve the applicant meeting her half- way. On 29 October 2012 Mr Pretorius advised her on 29 October 2012 that the project would be escalated to the head of television for a final decision by the end of the week. No final decision was communicated to her by the applicant. The film was not broadcast on 4 November 2012. On 19 November 2012 Vollenhoven then wrote to Mr Pretorius that in view of the applicant not wishing to broadcast the film, she expressed interest in the producer buying the rights back from the applicant as there were some interested buyers to whom the maker could sell the work. On 29 November 2012 Mr Pretorius informed her that a business plan was being circulated for signature and Henk Lamberts will contact her to conclude. The applicant did not contact her at all.

[8] The applicant became aware that Vollenhoven intended to screen the work at the Franschhoek literary festival which took place on 18 and 19 May 2013. The

applicant's attorneys wrote to Vollenhoven and the producer claiming the applicant's copyright and seeking an undertaking from them not to screen the film. Such an undertaking was given and complied with. Vollenhoven also asked about the progress of the business plan of the applicant to finalise the buy back of the rights. It emerged that Noseweek was in possession of a final edit of the film and after a similar demand by the applicant's attorneys an undertaking was given by the fourth respondent and was honoured.

[9] In an interview on Talk Radio 702 on 20 May 2013 (702 interview) Vollenhoven stated: "We've been showing this to industry people to people involved with the documentary, to small private audiences." She went on further:

"So, when you say we're determined to get the story out there, yes, despite all of this and despite what the SABC has done this weekend, we are very determined to get this story out there, and I promise you, with the modern means of communication, the SABC is in such an old fashioned mode of thinking, it still thinks of Big Brother; they can decide what the South Africans can see. With modern means of communication that's just not the truth. We can get the story out there and we, and we will get it out there somehow. "

[10] In a letter dated 21 June 2013 the applicants attorneys wrote to the first and second respondents alleging that they were in breach of the agreement by not handing over all materials in respect of the work, by providing copies and other copyright materials to the fourth respondent and by threatening to broadcast the work in the 702 interview. The applicant also advised them that it did not intend to sell any of its rights in the work to them. It sought an undertaking by close of business on 26 June 2013 together with delivery up of specified materials failing which it gave notice of its intention to launch this application. The form of the undertaking sought was as follows "...never to broadcast and/or deal with the Production and related materials in any form or manner whatsoever or provide anyone with copies of the production and all materials created and/or acquired for the purposes of the production."

VIA's undertakings

[11] A similar letter was sent by the attorneys to the fourth respondent who gave an undertaking not to broadcast the work but he insisted on keeping the DVD explaining that one day he could show it to his grandchildren or use it when he wrote his memoirs. He admitted that he and the third respondent had a free showing of the work to a small audience of less than 100 Noseweek readers about a year previously. Vollenhoven responded after the expiry date of the applicant's ultimatum in an email dated 28 June 2013 sent at 1239. She gave following undertaking: "I hereby give you an undertaking never to broadcast the documentary "Project Spear" commissioned by the SABC nor to distribute it. She refused to give an undertaking never to deal with the "related materials" as she required clarity what this meant. She regarded research materials in her possession as being in the public domain. She further stated that undertaking not to deal with related materials would be gagging her and preventing her from doing her work as a journalist and was contrary to the Constitution. She did not deliver anything and insisted on retaining one DVD copy. She reiterated her resolve to get the story out there as it was important. She said " I give you my undertaking that not a single minute of the SABC footage will be used for the film that I am now planning and that the story will be considerably different to the one made for the public broadcaster."

Defences and counter-applications

[12] The first and second respondents have raised a number of defences and counter-applications: The defences are -

- (a) – the applicant has failed to establish a right entitling it to the distribution interdict.
- (b) – the applicant has failed to demonstrate a reasonable apprehension of irreparable harm.
- (c) – the applicant has alternative remedies to an interdict.
- (d) – the applicant is not entitled to the delivery interdict as Vollenhoven has tendered or returned the materials; the materials do not exist.
- (e) – properly interpreted the Act and/or the agreement entitles the producer to keep a single copy;
- (f) - The Act must be interpreted to imply an exploitation exception alternatively it is constitutionally invalid to this extent as a violation of freedom

of expression of the maker and an exploitation exception should be read into section 24 of the Act.

The counter- applications are -

(g) – a review is sought of the applicant's decision - (i) not to broadcast the work and (ii) not to negotiate the sale of the work to the maker, alternatively declaring that these decisions are in breach of the TPC agreement;

(h) – a contractual claim that if the plaintiff does not broadcast the work, it must negotiate in good faith to sell it to the producer.

The TPC agreement

[13] The salient features of the TPC agreement germane to the issues should be set out. The first aspect is ownership and copyright. Clause 8 vests ownership in the applicant of "all physical manufactured or acquired material in creating the programme" and clause 21 vests ownership in "all video material and material made by and/or recorded for the Production" and the copyright as well as an array of intellectual property rights therein. This repeated in Schedule V clause 2.1. The second aspect is editorial control. Clause 18 states: "The SABC shall have final editorial control over the Production and any episode thereof, if applicable, for production and broadcast. In the event that the production or any part of the production, ... in the exclusive opinion of the SABC , contravenethe SABC's broadcasting mandate, standard broadcasting rules, practices and procedures, then SABC may refuse to broadcast the Production" Clauses 18.1 and 18.2 obligated the applicant to consult with the Producer to establish the extent to which the scripts are defective and to give bona fide consideration to the views of the producer. Schedule V clause 1.1.1 provides that standard of technical and artistic acceptability is entirely within the discretion of the applicant to determine. Clause 19 provides: "In the event that the producer fails to implement the changes as requested by the SABC, the SABC shall not be obliged to either broadcast and/or pay for such production." Delivery is regulated under Schedule V clause 3.1: "The Producer shall deliver to the SABC a completed productand as part thereof also the final graded transmission prints, or were [sic] applicable, the final transmission tapes, the final mixed magnetic soundtracks of the Production, trailers (where applicable) the master negative or positive (where applicable) ... completed final control sheets, off cuts photographs and all relevant documentation required by the contract ... ". Schedule

V clause 2.8 requires the producer to furnish the applicant with copies of the music cue sheets, original consent sheets and licences. The resale of the work is contemplated under the circumstances in Schedule V clause 12. 7: “If, after two years calculated from the date of final delivery and acceptance of the production by the SABC, the SABC has not broadcast the production for reasons within the control of the SABC, then the Producer shall be entitled to enter into negotiations with regard to the Production. In such event the SABC shall negotiate with the Producer in good faith.”

Material provisions of the Copyright Act

[14] The statutory rights created by the Act and which are in issue, provide the following: Exclusive rights acquired in a cinematograph film are wide ranging and are explicitly listed in section 8 (1) of the Act. These include the right to reproduce the film, causing the film to be publicly shown, broadcasting, and make adaptations. Section 3(1)(b) confers copyright on an author who is a qualified person, which includes in the case of a juristic person, being incorporated under the laws of the Republic. Ownership of such copyright conferred in terms of section 3 vests in the author of the work. Section 1(d) defines the author in relation to a cinematograph film as “the person by whom the arrangements for the making of the film were made”.

[15] In *Nintendo Co Ltd v Golden China TV Game Centre & Others* 1995 (1) SA 229 (T) a manufacturer of video games sought to interdict the respondents from infringing its copyright. It was held that the video games were cinematograph films and that the applicant was the author. In reaching this conclusion the manner in which the games were developed was examined. A team of employees of the applicant designed and produced the games but some members of the team were employees of other Japanese companies commissioned to do that particular work. This case was confirmed on appeal in *Golden China TV Game Centre and Others v Nintendo Co Ltd* 1997(1) SA 405 (SCA).

[16] Section 21(1) provides that the ownership of any copyright conferred by s 3 (ie a qualified person) shall vest in the author. Section 21(1) (c) provides that where a person commissions the making of a cinematograph film and pays or agrees to pay for it in money or money’s worth , and the work is made in pursuance of that commission, such person shall be the owner of any copyright. Of critical importance is s 21 (e) which makes provision for excluding by agreement the effect of a

commission agreement contemplated by s 21(1) (c). In other words the Act only vests the commissioning party of a cinematograph work with copyright ownership in the absence the parties agreeing otherwise. Section 24 (1) provides that infringements of copyright shall be actionable at the suit of the owner of the copyright and contains the remedies and procedures in enforcement proceedings.

[17] The applicant is a juristic person incorporated in the Republic. It commissioned the producer to make a cinematograph film, ie the work, which was sold to the applicant who has paid the producer. On application of these principles, the statutory owner and author of the work is the applicant. The producer however can avail itself of the general exceptions to a copy right holders claims. The Act provides for general exceptions to protection of film copyright under the rubric of fair dealing: research and private study (s 12 (1) (a)); criticism or review of the work – s 12 (1)(b); for the purpose of reporting current events (s 12 (1) (c)); judicial proceedings (s 12 (2)); quotation (s 12 (3)); teaching (s 12 (4)). A general reproduction exception provides for where the reproduction of the work is permitted by regulation and is not in conflict with the normal exploitation of the work. The text of s13 reads:

“ In addition to reproduction permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.”

[18] The interdictory relief sought by the applicant is based on the Act and bolstered by the contractual rights emanating from the agreement.

The requirements for obtaining a final interdict are well known. All the elements must be established :

- (a) a clear right;
- (b) an actual or threatened injury or a reasonable apprehension of harm;
- and
- (c) the absence of an alternative suitable legal remedy.

The requirements of an interdict based on copyright infringement are the same as any other interdict. *Fax Directories (Pty) v SA Fax Listings* CC 1990 (2) SA 164 at 179 B – C.

[19] The applicant as owner of the work, prima facie has a right to seek relief by way of an interdict – s 24(1). This right is challenged by the respondents with the defences and counter- application which are now considered. The exploitation exception is based on the argument that the Act was never intended to prevent the distribution of a work when it will provide no benefit to the holder of the copyright. It was submitted that the applicant has no intention to exploit the work. This a factual issue. If it is found that the Applicant has an intention to exploit, the defence falls away but the intention to exploit issue also impacts on the contractual counter application.

Applicant's intention to exploit

[20] It is not in dispute that the work has not been broadcasted, adapted, licenced, sold or indeed used in any manner by the Applicant to derive a commercial advantage. I understand this to be the meaning of 'exploit' in this context. The applicant states that the work is incapable of being exploited in its current form but insists that it is not correct to assert that it does not intend to screen, use or exploit parts of it. In order to avoid wasteful expenditure it states that it is duty bound to adapt or amend parts of it wherever possible. It states that it is a common occurrence not to broadcast works it has commissioned, for a variety of reasons including poor journalistic quality. It is awaiting receipt of the raw footage in which it also has copyright in order to extract usable parts of this footage. Respondents contend that the raw footage is a separate copyright from the work and use of the footage is not exploitation of the work. This distinction is artificial as use of the raw footage is integrally connected to the work.

[21] The intentions of the applicant have been opaque in its communications with Vollenhoven about broadcasting the work. It did not respond to Vollenhoven's proposal to jointly modify the work. In her letter dated 22 October 2012 after not hearing from Mr Pretorius for a week she made her proposals on major changes. In that email she observed at the outset " From your silence I assume there is no

budget for the major changes you are suggesting.” In conclusion she stated “ Now all this will take time and money.” She ended on this note: “ (please lets talk about how we move forward with this. I am prepared to compromise but you have to meet me half way. ” No response was forthcoming to these proposals at all. Nor was there any communication to her as promised that the head of television would make the final decision whether the work would be broadcasted. After waiting for a response by 1 November 2012 she wrote to the applicant on 19 November 2012:

“Because I have heard nothing from you I am assuming that the SABC no longer wishes to discuss seriously as well as timeously the broadcast of this film” . Again on 28 June 2013 she wrote to the applicant: “ I would like to know if I can now assume that (a) the SABC has no intention of broadcasting this film and that (b) they do not wish to continue the discussion about the same. Clarity on this point would help me to plan the way forward. In the absence of any clarity I am going to assume that this film will never see the light of day at the SABC.”

[22] The applicant did not comment on the clarification sought by Vollenhoven but in its email to her dated 29 November 2012, Mr Pretorius stated: “ The Business plan for the sale of Project Spear is going around. Henk Lamberts will contact you to conclude.” She received no response. She reminded Mr Pretorius in an email on 19 March 2013 that she was awaiting a response and wanted to know when the process for the sale would be complete as she had clients who were interested in purchasing the rights. She received no response until the applicant’s attorney’s letter of demand dated 21 June 2013 indicting the applicant would not sell the work . This letter was a complete and unexplained about turn from its previous stance.

[23] In her email dated 28 June 2013 Vollenhoven explained that the raw footage was with the editor, Eileen de Klerk and the only reason it was not returned to the applicant was because the broadcast issue had been previously unresolved and the industry practise by producers was not to return rare raw footage as the archiving of the applicant was understood to be poor. Vollenhoven gave an assurance that the editor would make the raw footage available at the end of July 2013. By then these proceedings had been instituted.

[24] The applicant does not explain in its papers why it has not availed itself of Vollenhoven's offer to make the raw footage available and since July 2013 there is no evidence at all of any effort to retrieve this raw footage and to use it. Thus as at the date of the hearing, almost three years later, the status quo has not changed. The applicant has sought to distinguish its intention not to broadcast the work in its current form from its intention to adapt it. No specific plans have been revealed by the applicant for the contemplated use of the raw footage or the work. No budget has been mentioned nor any project contemplated to achieve this task. As at 29 November 2012 the applicant had no intention of exploiting the work as it declared that the business plan for the sale was being circulated. This stance changed in June 2013 when the applicant confronted the respondents regarding infringement of copyright in the letter of demand immediately prior to instituting these proceedings and advised that it was not prepared to sell the work. As stated, this change of stance is not explained. The applicant has not shown any commitment to exploit the work. Preparedness to sell the work to VIA is irreconcilable with an intention to exploit. The applicant's inconsistency, vagueness and lack of action to date persuades me that for all practical purposes, it does not have a bona fide intention to exploit the work .

Exploitation exception

[25] Since the coming into force of the Constitution the courts are bound to read legislative provisions through the prism of the Constitution. *Makate v Vodacom Ltd* 2016 (4) SA 121 at para 87. The Act does not contain an explicit exploitation exception. It was submitted on behalf of VIA that it should be read into section 24 (1) that any person attempting to enforce a copyright must establish that it intends to exploit the work. The second option, it is argued, is to regard the exploitation exception as a form of fair dealing. The respondents contended that the underlying purposes of the Act were to protect the personality right of authors; to ensure that the acquisition and use of intellectual property is fair; to promote the free spread of art, ideas and information, not to hinder it and to regulate copyright so as to enhance a vibrant culture in South Africa. Thus on a purposeful interpretation of the Act, so it is argued, it is not just to protect owners of copyright but to advance the public good: The general scheme of the Act does not grant absolute rights to holders of copyright.

Reliance was placed on *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1991 (3) SA 240 D per Booysen J at 245B-C:

“In general terms the principal purpose of copyright law is to advance public welfare by rewarding the talent of authors of original artistic or literary works with a limited monopoly over their works..., or to put it differently by enabling them to prevent others from copying and exploiting their work without their consent.”

There is nothing in this dictum to support the meaning of public good relied on by the Respondents. Their construction of public good or welfare is equated to dissemination of ideas and this is nowhere to be found or implied.

[26] Four traditional theories, it was submitted, undergird copyright: (a) personality; (b) fairness; (c) welfare; and (d) cultural. Justin Hughes ‘*The Philosophy of Intellectual Property*’ (1988) 77 Georgetown Law Journal 287. Emphasis was placed on the fairness theory which posits “no waste and no harm” as exceptions to copyright. Thus the argument is that the non exploitation by the applicant of the work constitutes a waste of the intellectual property and the use by VIA would not harm the applicant’s rights.

[27] The nature of copyright has been contested and criticised in legal scholarly writing. The following conceptions are in similar vein:

‘Copyright doctrine is informed by a commonly perceived, seemingly basic contradiction of purpose. On the one hand, copyright aims to promote public disclosure and dissemination of works of "authorship"; on the other hand, it seeks to confer on the creators the power to restrict or deny distribution of their works. American courts have conferred on copyright owners near-absolute power of control over unpublished works-no matter how newsworthy or germane to a would-be users' scholarly projects. In effect, the Courts are endorsing the use of copyright as a device to enforce private censorship in the name of "authorship."’

Peter Jasci 'Toward a theory of copyright: the metamorphoses of "authorship" ' Duke Law Journal Vol. 1991 p 455.

The notion below also has currency in the USA:

'Copyright law is a kind of giant First Amendment duty –free zone. It flouts basic free speech obligations and standards of review.'

Jed Rubinfeld '*The freedom of imagination* : Copyright's constitutionality (2003) 112 Yale Law 1.

In addition to these criticisms in *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* [2002]3 All SA 652 (SCA) at 659 Harms JA observed that South Africa has moved away from the continental approach emphasising the rights including moral rights of the author towards the to the Anglo-American model where commercial rights are dominant. He said:

'The definition of "author" in s 1 also covers a large number of persons who, in the ordinary sense of the word, are not authors but persons with financial interests in the end result. For instance, the author of a computer program is the person who exercised control over its making. One consequently does not have to be a cynic in order to be sceptical about the philosophical premise.'

[28] Caution should be exercised in elevating lofty pronouncements to guiding principles in ascertaining the intent and purport of the Act within our constitutional framework. In *Bertie van Zyl Ltd and another v Minister for Safety and Security and others* 2010 (2) SA 181 (CC) per Mogoro J at para 90 that the Courts must give effect to the to the fundamental values of the Constitution when interpreting legislation. Statutes must be construed contextually and, given section 39(2) of the Constitution, where possible, consistently with the Constitution. *Investigating Directorate Serious Economic offences and others v Hyundai Motor Distributors: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and others* [2000] ZACC 12;2001 (1) SA 545;2000 (10) BCLR was cited as the proper approach:

'[J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can reasonably be ascribed to the section.'

Mogoro J stated further:

‘A court may thus avoid unconstitutionality by ascribing a constitutionally compliant meaning to legislation, as long as that meaning can reasonably be ascribed to the provision; that is, the interpretation must not be “unduly strained”. ‘

[29] The notion that the owner’s copyright is conditional on exploitation is in principle unrelated to the main purpose of the Act which is to grant a qualified monopoly to the copyright owner and to reward the creator of the intellectual property. Unlike other forms of intellectual property such as trade marks, the Act does not prescribe at all how the owner should use or exploit the work. Can non exploitation or publication dilute the owner’s copyright or remedies for infringement? In *Salinger v. Random House, Inc* 811 F.2d 90 (2d Cir. 1987) the US Court of Appeal upheld the right of an author to prevent the publication of his private unpublished letters even though he had no intention of publishing . In this case his right to privacy was held to override fair use. There was no acknowledgement in this case of an exploitation exception.

[30] The view that copyright aims to promote public disclosure and dissemination of works cannot be regarded as a true reflection of the purpose or intent of the Act and is not part of our copyright law. The Respondents’ conception of the purposes of the Copyright Act is overbroad. The Act by no means purports to regulate or promote the free spread of ideas although it undoubtedly is a mechanism by which this result may be effected. It is straining the proper limits of the Act to find some kind of implied condition of dissemination in the conferral of copyright. In my view the “no waste no harm” principle finds no place in the Act. Copyright law has existed for several centuries in statutory form. It would be expected that a rich body of law would have crystallised by now, if not in South Africa then in other jurisdictions. No such authorities have been produced by the respondents and in our law none is to be found.

[31] South Africa is a signatory to the Berne Convention which standardises copyright law to a great extent. Article 14 of the Berne Convention – Paris text 1971 provides that the owner of copyright in a cinematographic work shall have same rights as the author of an original work and the rights of ownership shall be a matter for legislation in the country where the protection is claimed. This is precisely what section 21 of the Act achieves. The Act is in conformity with the obligations of South

Africa under international law in this respect. Thus historically, internationally and comparatively viewed, the Act is not out of kilter in not having an implied exploitation exception. The constitutionality of section 24 is dealt with further below.

[32] Creative work has indeed become commoditized. The concept of authorship has shifted with the advances in media technology and production management from the de facto author or creator to the entrepreneur as noted in *Biotech*. This has enabled the huge growth of the entertainment and computer software industry which has bestowed undeniable benefits on mankind which may not have been hitherto possible. This statutory shift of authorship of a film does not necessarily mean that the film maker cannot be the owner and enjoy the rewards as expressed the *Frank & Hirsch* case.

[33] The Act strikes a balance between the rights of the de facto author ie the creator of the work and the statutory author ie the copyright owner. VIA as creator sold its work to the Applicant for substantial material gain in a commission agreement. This is the quid pro quo upon which s 21 of the Act is premised. The parties may contract with each other to vary or exclude the ownership of the copyright vesting in the commissioning party under s 21(1) (e). The Act is therefore not the instrument by which the rights of the film maker are curtailed or excluded. It simply regulates the default rights of the parties absent an agreement to the contrary. Even then it does not *per se* limit freedom of expression as set out below. There is nothing in this arrangement which offends any constitutional value. The film maker thus has a choice in retaining its copyright and thereby exercising the rights of use or exploitation of the work that VIA claims. In similar manner an employee too can exclude the operation of the copyright ownership vesting in the employer by agreement. *Stiff v Reid Daly* 2004 BIP 240 W. An implicit exploitation exception is not required to give effect to the Act and does not exist.

Single copy and fair dealing

[34] The respondents' single copy exception argument is that that the non owner author of the work may keep a single copy of the film: It is part of the general right to fair dealing. This proposition requires qualification. No substantive single copy exception exists in the Act. Reliance was placed on s 13 read together with regulation 2 of the Copyright Regulations 1978 GN R2350 (22 December 1978).

These enactments are an application of the Berne Convention. The regulation contemplates the permitted reproduction of a reasonable portion of the work in such a manner that the exploitation is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright. This exception will depend on the facts and is based on the “Berne three step test” which also requires that the reproduction may only be permitted in special cases. Respondents argue that this is a special case: the applicant, a copyright holder does not wish to exploit the work but still wishes to prevent its distribution. Regulation 2 does not stand alone. When read with regulation 3 and 5, it does not expand the permitted scope of a reproduction or single copy beyond specified use by a library or archive and has no application in this case. There is simply no warrant under Act beyond the *numerus clausus* of permitted use, to infer a single copy exception. OH Dean: *Handbook of South African Copyright Law* (Juta) p1-95 states:

“Unlike the position in the United States of America, the Copyright Act provides for an express, finite list of fair dealing exceptions, and a defendant must bring itself within one of the stipulated exceptions.”

[35] Nor has VIA demonstrated that it qualifies to use a copy of the work or part thereof for a recognised category of fair dealing. It was sought to bring the showing of the work at the Franchhoek Festival within the purview of section 12, as a form of criticism or review. This is patently a sham. Vollenhoven’s intention is manifestly clear: It is to “get the story out there”. It was argued that Respondents had the right to fair dealing in reporting current events. Despite the high public interest of the film, it deals primarily with the management of public funds by the previous government and secondarily the response by the present government. Vollenhoven has stated “...there is not a single fact in this story that’s new”. Only the response by the present government has a element of currenthood but this is not the predominant or material subject of the work. Even this is tenuous. Many of the actions of the previous government are topics of controversy and high public interest which will have an impact on society which will be discussed for many years to come. The work cannot be conflated with current events.

[36] It was submitted that fair dealing was interpreted liberally in Canada *Society of Composers Authors and Music Publishers of Canada (SOCAN) v Bell Canada* 2012 SCC 36 para 10 -11 and in England *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 at 613. The term “fair dealing” has not received judicial interpretation in South Africa. Various factors have been identified in comparative jurisprudence. It was submitted that the following are included: the nature and purpose of the use; the nature of the copyright work; the amount and sustainability of the use; the effect on the market and the value of the work. These criteria are premised on bona fide use and without formulating a comprehensive meaning; the least that can be stated in this case is that fairness encompasses a genuine purpose and not a pretext for a purpose which is not contemplated under fair dealing such as dissemination to the public, even to restricted or selected audiences. In conclusion, no bona fides in dealing with the work has been established by the Respondents. No case for the statutory right to a single copy has been made. The Act does not provide this right and in any event there is no such reservation of ownership under the TPC agreement. On the contrary it clearly vests ownership in the applicant of all materials made in producing the work.

[37] Insofar as reliance was placed on s20 of the Act by VIA, it flows from the statutory shift in the definition of authorship of a cinematographic work that the author’s moral right under s 20 of the Act vests in the Applicant and not the Second Respondent. VIA cannot claim any rights as author. There is no residual category of authorship available to it under the Act.

Constitutional invalidity

[38] The Respondents invoke freedom of expression under s16 (1) of the Constitution, specifically subsection (b) freedom to receive or impart information or ideas and subsection (c) freedom of artistic creativity. It is contended that the exclusion of an exploitation exception in the Act unjustifiably limits these rights and that an exploitation exception should be read into s 24. The respondents say the applicants are violating Vollenhoven’s freedom of speech by not allowing her to show or distribute her own documentary. This is disingenuous. Vollenhoven in her letter dated 28 June 2013 said:

“ I have told you before that I think this is an important story and I will do my best to get it out there. My legal advice is that the SABC cannot stop me from pursuing a current version of the story because the Corporation own only a Documentary film made for them not the whole story and everything related to it, in perpetuity”.

[39] The applicant concedes readily that the respondents have right to tell the story in a different work and have not attempted to stifle this form of expression. In truth the respondents' freedom of speech is not impinged at all. What is impinged is the use of the work which the respondents sold to the applicant and were substantially rewarded monetarily. The copyrights are vested by law in the applicants. This cannot be conflated with an infringement of freedom of speech. Vollenhoven shows that she is alive to the distinction between the work and the underlying story or idea and does not shirk from asserting her rights to exploit the story as she is well entitled to do.

[40] The proposed wording of the Respondents' reading is as follows: “No owner is entitled to enforce its copyright if the owner has no intention to exploit that copyright, either commercially or otherwise, unless the owner is the author”. An alternative formulation is “No owner is entitled to enforce its copyright against the author if the owner has no intention to exploit that copyright, either commercially or otherwise”. Both these proposals run foul of the statutory definition of authorship. VIA has no claim to be an author or co-author.

[41] The Respondents do not challenge the constitutionality with s 21 of the Act and acknowledge the choice that VIA exercised in selling the rights of copyright ownership to the Applicant. Their complaint is the limitation of VIA's rights of freedom of expression under the Act, no matter how the Applicant acquired those rights. This position ignores the very basic constitutional right which underpins the Act which is the right of property in s 25 of the Constitution. Although intellectual property rights are not recognised as a separate category in the Bill of Rights the courts have accepted that intellectual property rights indeed are contemplated by s 25(4) (b) of the Constitution. *Laugh it Off Promotions CC v South African Breweries International*

(finance) *BVt/a Sabmark International* 2006 (1) SA 144 para 43. It may be remarked in passing, in that case the court was concerned not with impugning the Trade Marks Act as unconstitutional but with a weighing of conflicting rights ie freedom of expression v intellectual property rights in adjudicating a defence to trade mark infringement. This case is on an entirely different footing as the respondents impugn the Act in principle as curtailing freedom of expression.

[42] In saying that the contractual option under s21 is beside the point and does not render the Act free of unconstitutionality, the respondents' stance is untenable and in bad faith. They seek to be indemnified from the consequences of alienating the work and the rights thereto but simultaneously accept the quid pro quo under the TPC agreement. They are asking for the Act to be read or amended to override their own consensual arrangements in the event that the applicant does not exploit the work – a condition that could have been but was not stipulated. This undermines the sanctity of contract - *pacta servanda sunt*. It negates the *caveat subscriptor* rule. *George v Fairmead* 1958 (2) SA 465 A. Limitation of freedom is irreconcilable with the right of choice. For this reason alone the constitutional challenge is misconceived and should fail. The Respondents could have reserved exploitation rights in the work within the four corners of the Act without requiring any amendments at all, by contractual arrangements to retain co-ownership or by a licencing agreement. The submission of the Fifth Respondent that the Copyright does not infringe s 16 of the Constitution is based on this reasoning and is upheld.

[43] Even if my finding that the Act does not limit the rights under s 16 of the Constitution is incorrect, I am of the view that the Act undoubtedly balances freedom of expression under section 16 with proprietary rights under s 25 of the Constitution. The Act strikes an appropriate balance and is justifiable as a law of general application as contemplated under s36 of the Constitution. No reading in of s 24 of the Act is required.

The review

[44] The respondents apply in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for a review of the Applicant's decisions (i) not to broadcast the work and (ii) not to negotiate the sale of the work to the Second Respondent. The

applicants contend that the decisions do not constitute administrative action. Section 1 of PAJA in its definition of administrative action contemplates that the decision maker may be either an organ of state (subsection 1(a)) or

‘a natural or juristic person, other than an organ of state , when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect ... ‘

[45] The applicant is a State owned public company regulated under the Charter of the Corporation contained in the Broadcasting Act 4 of 1999. By definition the applicant is a provider of a public broadcasting service. Section 6 (4) provides that the programming must advance the national and public interest. The objectives of the applicant are inter alia under s 8(g) to provide radio and television programmes and under s 8(i) ‘to commissionaudio visual material as may be conducive to any of the objects of the Corporation.’ The objects are wide ranging going far beyond broadcasting. These include under s 8 (j) establishing and maintaining libraries and archives of materials and to make these available to the public and under s 8 (o) to develop, purchase, acquire, use, sell or dispose of sound recordings films and materials.

[46] Thus the business of commissioning the work and deciding whether to broadcast such work are inextricably bound with the exercise of the applicant’s public functions in terms of the empowering provisions of the Broadcast Act. However not all decisions which exercise public functions or powers constitute administrative action. There is no simple formula. The definition of a decision in PAJA is of little assistance as the examples enumerated in sub-sections (a) to (g) of the definition are illustrative and not a *numerus clausus*. In *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ). Claassen J said at para 8: “ “What kind of action will constitute a decision, will depend on the circumstances of each case”. Various tests have been formulated. In *Sokhela v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal)* 2010 (5) SA 574 (KZP) Wallis J said at para 61

“There is accordingly no mechanical process by which to determine whether a particular exercise of a public power or performance of a public function will

constitute administrative action. There will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose.”

[47] It is argued by the applicant that it was acting in terms of its editorial policies in deciding not to broadcast the work and that it is not uncommon for programmes commissioned by the applicant not to be broadcast. Furthermore the applicant expressly reserved the right not to broadcast the work under clause 18 of the TPC agreement which bound VIA. The TPC agreement also conferred physical ownership of the work and the related materials as well as copyright. VIA thus had no rights in the work under the TPC agreement. It was further argued that the decision not to broadcast did not adversely affect the rights of VIA and this excluded the decision from the scope of administrative action. This is indeed so.

[48] The source and nature of both decisions sought to be reviewed are within the purview of the contractual provisions of the TPC agreement, ie clause 18 and Schedule 5 clause 12.7. The processing of the Request for Proposals and the selection of the proposal certainly constituted administrative action by the applicant. From the stage of commissioning VIA and the signing of the TPC agreement, the subsequent production relationship between the parties, the supervisory powers exercised by the applicant and the pursuant decisions are no longer administrative but contractual acts. In my view the applicant was exercising its contractual rights in making both decisions. The correctness of the decisions do not play any role in determining the question whether they constitute administrative action. It is accepted that the documentary is of public interest but this does not somehow transform the decision not to broadcast or sell, into administrative action cognisable by PAJA. The decisions of the applicant and the remedies of the aggrieved party lie fairly and squarely within contract.

[49] Furthermore the actions of the applicant in respect of both decisions are outside the arena of its exercise of powers and functions as an authority in relation to a subordinate party or the public. The applicant in this context is a private contractor on equal terms with VIA, the other private contracting party. This is illustrated by

Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others 2001 (3) SA 1013 (SCA) para 18:

‘The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was, therefore, not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not by virtue of its being a public authority, find itself in a stronger position, than the position it would have been in, had it been a private institution. When it purported to cancel the contract, it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. S 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers not with the public administration acting as a contracting party from a position no different from what it would have been in, had it been a private individual or institution.’

See also *Government of the RSA v Thabiso Chemicals* [2009] All SA 249 (SCA) para 18.

[50] The decisions sought to be reviewed are therefore not administrative actions under PAJA and this counter-application must fail.

The distribution interdict

[51] The applicant has established a right to the distribution interdict. It must satisfy the requirement of a reasonable apprehension of irreparable harm and having no alternative remedy, both of which are disputed by the respondents. They contend

that Vollenhoven has not infringed the copyright and has given an undertaking, as mentioned above. Had the matter ended there the outcome may have been different. However subsequent to judgment having been reserved on 25 May 2016, the applicants filed an interlocutory application for leave to file a supplementary affidavit. It was unopposed and leave to file was granted in an order dated 24 June 2016 .

[52] The affidavit reported new facts and evidence which came to light after the matter had been argued. The deponent, Mr DS Vilakazi, the acting legal services manager reported that on 25 May 2016 he became aware of a video link on Vollenhoven's Facebook page of the work. On 30 May and 1 June 2016 both he and Ms Mabaso of the applicant's attorneys of record were able to click on and actually view the video of the work on her Facebook page. Mabaso filed a confirmatory affidavit. He also found on You Tube an internet video site that the work was posted on it in December 2013 being after the undertaken by Vollenhoven on 28 June 2013. An urgent application for an interim interdict pending this judgment was brought by the applicant and was granted by Wepener J on 7 June 2016 (case no 2016/18766). The interdict restrained the respondents from broadcasting, reproducing, publicly showing, adapting and letting or selling the work pending this judgment.

[53] The respondents did not oppose the interdict and filed a Notice to Abide. However Vollenhoven filed an affidavit explaining that she did not place the video on You Tube and she denied that the work could be accessed from her Facebook page. She avers that the deponent and the attorney could only have seen a screen shot and it was impossible to see the video itself. An adverse inference is drawn from her failure to oppose the urgent application since her affidavit is inconsistent with abiding by the interdict. Credibility issues are not lightly made in motion proceedings but due weight must be placed on corroboration by the applicant's attorney, as an officer of this court. It is accepted that "it would play" means exactly that. As a professional film producer it is also somewhat unlikely that Vollenhoven would lack the expertise and skill to ensure compliance in totally removing the work from social media. The version of the applicants is accepted. No reliance can be placed on the undertaking given by Vollenhoven who has subsequently been shown to be unreliable. The harm is in the intrinsic infringement of the applicant's lawful copyright in the work and in

the contractual breach by the respondents. Damages are not appropriate as a remedy in this situation. No commercial loss is involved.

The delivery interdict

[54] The applicant's claims for delivery of a variety of production materials is based on the Act and the TPC agreement. It concedes that Vollenhoven has already delivered to it one TX Master Tape, one DVD of TX Masters and one FC sheet. It claims delivery of (a) one copy of these items (b) two protection masters, (c) two music cue sheets, (d) cost reports and (e) all raw footage. The respondents dispute some of these items and it is necessary to resolve which items the applicant has made out a case for an interdict. Several disputes are raised. The Respondents deny that they have in their possession any further copies of items (a). This is not challenged by the applicants. The respondents say that there is no obligation to provide protection masters and that they are no longer needed as the footage is in digital format. The applicant insists on them for reasons of storage space. The Respondent say that the music cue sheets are also unnecessary as the music is not subject to intellectual property rights. Only stock and specially composed music was used. The applicant says it requires these to know what music was used, deal with queries by the composer and royalty issues. In respect of (d) Vollenhoven sent a cost report in an email dated 28 March 2013. The applicant says it is inadequate but is vague as to the queries that the applicant required to be addressed. This is insufficient reason in my view. The respondents tendered to provide the raw footage in the papers but at the time of the hearing had not yet done so. The disputes in respect of (b) and (c) cannot be resolved on the papers. The first time the applicant requested delivery of items (a) to (d) was in the letter of demand prior to instituting these proceedings. Prior thereto it paid in full for what it now complains is incomplete delivery. This inconsistency also weighs with me in exercising my discretion against an interdict for (a) to (d) and (f). An interdict should be granted only in respect of the raw footage (e).

The contractual counter application

[55] Having found that the applicant has no actual intention of exploiting the work clause 12.7 of Schedule V of the TPC agreement must be considered. Two years

have elapsed since the work was delivered. The applicants contend that this did not constitute final delivery because delivery was incomplete. However the applicant accepted this delivery, as stated above by making full payment and this argument is rejected. The clause provides that the reasons for not broadcasting the work should be within the control of the applicant. The respondents have shown that Vollenhoven offered to co-operate with the applicant in implementing the changes it required in terms of clause 19 which states

“ In the event that the PRODUCER fails to implement the changes as requested by the SABC, the SABC shall not be obliged to either broadcast and/or pay for such PRODUCTION and /or episode or programme as the case may be”.

[56] It was within the power of the applicant to ensure that the changes were made to its satisfaction and the respondents cannot be held responsible for the changes not being implemented which led to the applicant failing to broadcast the work. The applicant had final editorial control. Thus the conditions for the applicant to negotiate in good faith with VIA have been fulfilled. The clause does not stipulate that the negotiations should be specifically based on the applicant selling the work and its rights to VIA. This is undoubtedly included in the intent of the clause but is not exhaustive. The parties may agree on a licencing arrangement or any other commercially sound quid pro quo. The purport of the clause is sufficiently clear and does not fall foul of the caveat sounded in *Southernport Developments (Pty) Ltd v Transnet Ltd* [2005] 2 All SA 12 (SCA) that a promise to negotiate which is too illusory, vague or uncertain cannot be enforced.

[57] The issue is whether the agreement to negotiate (pactum de contrahendo) is enforceable absent a deadlock breaking mechanism in the TPC agreement. There have been conflicting decisions. In *Premier Free State and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 SCA it was held at para 35 that the parties had an absolute discretion to agree or disagree and an agreement to negotiate to conclude an agreement could not be enforced. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) Moseneke DCJ for the majority of the court remarked obiter at para 72:

“ Were a court to entertain Everfresh’s argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.”

[58] In *Makate v Vodacom Ltd* 2016 (4) SA 121 para 100 Jafta J after considering both these judgements said that this issue remained a grey area in our law. However the respondents do not seek a deadlock breaking mechanism or that a substantive agreement must necessarily eventuate. They content themselves with an open ended process of negotiation in good faith by the applicants as contemplated in clause 12 (7). The reasoning in *Everfresh* is compelling, and even though obiter, it is of highly persuasive value in this court. It is unequivocal as to how the common law of contract should be developed under the Constitution. I find myself constrained to follow this approach and the respondents’ counter application should succeed.

Costs

[59] Both the applicants and the first and second respondents have been partly successful and neither party has conducted itself in a blameless manner. They should bear their own costs. The fifth respondent sought no costs order.

The order

[60] The following order is made:

1 The first and second respondents are finally interdicted from infringing the applicant’s copyright in the cinematographic film called “TRUTH BE TOLD: PROJECT SPEAR” (the work”) by:

1.1 broadcasting the work;

1.2 reproducing the work in any manner or form including making a still photograph therefrom;

1.3 causing the work to be seen or heard in public;

1.4 causing the work to be transmitted in a diffusion service;

1.5 making an adaptation of the work; and

1.6 letting or offering or exposing for hire or sale by way of trade, directly or indirectly, a copy of the work.

2 Directing the first respondent to deliver to the applicant within 14 days of receipt of this Order, the raw footage in relation to the work.

3 Directing the applicant within 14 days of receipt of this order to initiate and enter into negotiations in good faith with the respondents pursuant to Schedule V clause 12.7 including but not limited to the sale of the work.

4 Each party shall pay his/her/its own costs.

L NOWOSENETZ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of hearing: 23, 12, 1 May 2014

Date of judgment: 2 Sept 2016

