

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2023-114791

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
1/11/2024	
DATE	SIGNATURE

In the matter between:

MARK PHILLIPS

Applicant

and

ALLCOPY PUBLISHERS (PTY) LTD

First Respondent

JURGENS BASSON

Second Respondent

JACO ODENDAAL

Third Respondent

CONRAD BOTHA

Fourth Respondent

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on Case Lines. The date and time for hand-down is deemed to be 10H00 1 November 2024

JUDGMENT

MYBURGH, AJ:

Introduction

- [1] This matter concerns copyright in certain literary works.
- [2] The applicant in the main application, Mr Phillips, is an author of mathematics textbooks and related teaching aids. The first respondent, ("Allcopy") is a publisher. Messrs Basson and Odendaal are or were maths teachers. As appears more fully hereunder, they collaborated with Mr Phillips in creating the works which are the subject matter of these proceedings. I will refer to them collectively, either as "the other authors" or as "the co-authors".
- [3] The relief sought in the main application, as against the first to third respondents, is in essence, an interdict and delivery up of what are alleged to be infringing copies. No relief was sought against the fourth respondent, Mr Botha, who was cited purely on account of any interest he might have had in the proceedings.
- [4] The application is opposed by the first to third respondents who effectively made common cause.

The facts

- [5] Although the facts were not dealt with in any detail in the founding papers, it appears that Mr Phillips had, by approximately the end of June 2014, written a number of chapters which he intended to be included in certain mathematics textbooks and related teacher aids which he intended to have published.
- [6] In the period which followed he approached the other authors with a view to having them write or assist him in writing the remaining chapters. The approach was well received, and the parties set about creating a series of books and related publications, including E-publications, teacher aids and workbooks.
- [7] During June 2016 Mr Phillips concluded a distribution agreement in respect of the grades 8 and 9 textbooks, teacher guides, power point presentations and E-publications with Allcopy. Somewhat curiously, the only parties to that agreement were Mr Phillips and Allcopy – although the agreement did provide

for the overall royalty of fifteen percent of the value of sales (excluding VAT) to be split between the three authors according to an agreed formula. The period of that agreement was five years – i.e. it would expire in June of 2021.

[8] As to the books, it appears that the authors together produced a series covering several grades. These were referred to in the papers as the "Mind Action Series" ("MAS" for short). It was common cause on the papers that Mr Phillips played the lead role and was the sole author of the majority of the chapters comprising the books in issue. Other chapters were authored by Messrs Odendaal and Basson. The common intention at all times was that the chapters would be incorporated in a single book (per grade) and that the book, rather than the individual chapters, would be offered for sale. Indeed, that is what occurred. In each case the cover of the book declares the authors to have been Messrs Phillips, Basson and Odendaal. The books (and presumably also the aids) were also translated into Afrikaans.

[9] The relationship between the parties began to sour during the course of the agreement – this, or so it would seem, primarily because Mr Phillips decided that he would like to publish his own books and to market them in competition with Allcopy. Mr Phillips accordingly gave notice to Allcopy during 2020 that he did not intend to renew the license agreement. This gave rise to some consternation. Messrs Basson and Odendaal, understandably, wanted the arrangement to continue – as did Allcopy. After an exchange of correspondence, which endured for some time, Mr Phillips agreed to extend Allcopy's right to publish and distribute the works and, to that end, an addendum was entered into. The parties to the addendum were the parties to these proceedings - i.e. they were not limited to the parties to the original license agreement.¹ The effect was to extend the arrangement to 29 February 2024, save that the authors (which included Mr Botha) were permitted to publish and market their own books in competition with one another and Allcopy.

¹ The reason appears to have been that Botha had been a party to a separate agreement or set of agreements, which presumably related to works other than those which formed the subject matter of the June 2016 agreement between Phillips and Allcopy however, nothing turns on this.

[10] Trouble again arose between parties during the latter part of 2023. Mr Phillips, who had by then written and published his own series of books, made it clear that he did not intend to agree to a further extension of the arrangement. The first to third respondents, for their part, asserted that they were entitled to continue to continue publishing and distributing the works notwithstanding Phillips's lack of consent and indicated that they intended to do so. Exchanges followed between the parties and their respective attorneys, but no resolution was reached. A deadlock accordingly ensued. As a result, Mr Phillips launched this application. That was in November 2023.

[11] The relief that was sought in terms of the notice of motion read as follows:

- 1 "Interdicting the First Respondent from making reproductions of, or selling, offering for sale, distributing or publishing English and Afrikaans Grade 8 and 9 Mathematics text books, Teacher Guides and E-Publications, English and Afrikaans Grade 10 Mathematics text books, Teacher Guides and E-Publications, Grade 11 and 12 Study Guides in English and Afrikaans as well as Geometry work books in English and Afrikaans from Grade 8 to 12 which embody or contain the literary works identified in the founding affidavit of Mark Phillips and of which the Applicant is the copyright proprietor to schools, bookshops or to anyone else after 29 February 2024.
- 2 Interdicting and restraining the First to Third Respondent in terms of section 6 as read with 23 of the Copyright Act 98 of 1978 ("the Act") from infringing the Applicant's copyright in the literary works identified in the founding affidavit of Mark Phillips by making, or causing to be made, unauthorised reproductions or adaptations or translations thereof, including selling, or causing to be sold, or offering, or causing to be offered, for sale any book or publication which contains or embodies such literary works after 29 February 2024.
- 3 Interdicting and restraining the Second - Third Respondents from aiding and/or abetting and/or causing the First Respondent to make reproductions of, or sell, or offer for sale, distribute or publish English and Afrikaans Grade 8 and 9 Mathematics text books, Teacher Guides and E-Publications, English and Afrikaans Grade 10 Mathematics text books, Teacher Guides and E-Publications, Grade 11 and 12 Study Guides in English and Afrikaans as well as Geometry work books in English and Afrikaans from Grade 8 to 12 which embody or contain the

literary works identified in the founding affidavit of Mark Phillips and of which the Applicant is the copyright proprietor to schools, bookshops or to anyone else after 29 February 2024 or to infringe the Applicant's copyright in the literary works identified in the founding affidavit of Mark Phillips by making unauthorised reproductions or adaptations or translations thereof, including selling or offering for sale any book or publication which contains or embodies such literary works after 29 February 2024.

- 4 The First - Third Respondents are ordered to deliver up to the Applicant all copies of the copyrighted works identified in the affidavit of Mark Phillips in their possession or under their control on 1 March 2024.
- 5 Costs of suit against the First - Third Respondents to be paid jointly and severally, the one paying, the other to be absolved.
- 6 Further and/or alternative relief."

[12] The first to third respondents reacted by delivering an application to stay these proceedings pending the outcome of an application to be made to the Copyright Tribunal² for the issue of a compulsory license. That application was initially framed on the basis that the application to the Tribunal would be made within 60 days of the grant of a stay; however, the first to third respondents thereafter proceeded to lodge an application with the Tribunal. The result was that the application for the grant of a compulsory license was pending before the Tribunal when the matter came before me.

[13] The respondents also delivered an answering affidavit on the merits. The main argument which was advanced was that the application was defective in that the applicant, Mr Phillips had failed to aver, let alone seek to establish that he was without an adequate alternative remedy in law. The respondents also asserted that the applicant was indeed possessed of an adequate alternative remedy or remedies – viz, damages, alternatively, a royalty, as provided for in section 24 of the Copyright Act.

² The Tribunal and its powers are contained in Chapter 3 of the Copyright Act 98 of 1978 ("Copyright Act").

- [14] Although the relief sought in the notice of motion covered books from grade 8 to grade 12, the issues became narrowed, and Mr Phillips's claims came to be confined to the grades 8 and 9 books and the related teacher guides and E-publications.
- [15] At the hearing of the matter Mr Sholto-Douglas SC, who appeared for the first to third respondents in the main application, argued that the application for a stay of proceedings should be dealt with first and, indeed, that the proceedings for that day should be confined to a hearing of the stay of that interlocutory application. Mr Michau SC, who appeared for Mr Phillips, argued that I should deal with both the main and interlocutory applications together. He also contended that if a stay was not ordered, then the main application fell to be granted.
- [16] While I accept that Mr Sholto-Douglas's position was sound in principle, the reality is that the issues in the main and interlocutory applications are interwoven. I was also concerned that a dealing with only the interlocutory application would potentially result in an inefficient use of judicial resources. I accordingly ordered that both the main and interlocutory applications be argued together.

The application for a stay of proceedings

- [17] It is settled law that a stay of proceedings should only be ordered in exceptional circumstances. Counsel for the parties were also *ad idem* in that regard.
- [18] Mr Sholto-Douglas's argument was that the very fact that the Copyright Act makes provision for the granting of a compulsory license constitutes an exceptional circumstance. He also contended that it had to be accepted that his clients had some prospects of success in respect their application to the Tribunal, which application would effectively be rendered academic if a stay were not granted.
- [19] Mr Michau argued, with reference to authorities drawn from other branches of the law, that a stay ought not to be granted as such an order would have the effect of legitimising unlawful conduct. He also made mention of the lengthy

delays which have become inherent in the court system and argued that the grant of a stay would have the effect of denying Mr Phillips his right.

[20] Given the view which I have arrived at in relation to the application for a stay, I do not intend to say much about the merits. Indeed, I do not think that would be appropriate as the merits may, in due course, come before another court.

[21] That said, I do think it appropriate to say that the argument based on an entitlement, as of right, to an interdict was misguided. The reason is twofold. The first is that an interdict is an extraordinary remedy, and one which is discretionary in nature. The second is that one of the requirements which an applicant seeking an interdict must establish is the absence of a satisfactory alternative relief in law.³ In *casu*, the applicant did not, in its founding papers even assert that it did not have a satisfactory alternative remedy. What is more, it is beyond question that it does indeed have alternative remedies available to it – i.e. damages or a royalty. In this regard, it falls to be borne in mind that the very *raison de etre* for copyright is to monetize the distribution of copies of works which form the subject of copyright.⁴

[22] Something else that concerned me in this regard is that it was common cause on the papers that the works in question were purchased or prescribed by educational authorities. It was thus apparent on the papers, and specifically alleged by the respondents that the educational authorities in question and potentially also learners stood to be affected by the relief sought in the main application. The applicant's answer to this was that it would be open to those authorities to purchase or prescribe other mathematics textbooks. The respondents stated that the problem could not be solved that easily as the authorities in question planned their curricula and prescribed reading materials years in advance with the result that they could not, in the ordinary course, make such a big change without adequate notice. While I do not intend to make any finding in this regard, I have to say that common experience suggests that the problem is more complex than the applicant suggested and that I would not easily

³ See *Setlogelo v Setlogelo* 1914 AD 221. See generally Prest: *The Law of Interdicts* (Juta & Co Ltd, Cape Town 1987).

⁴ *Dean Handbook of South African Copyright Law* 1 ed (Juta & Co Ltd, Cape Town 1996).

have been persuaded to grant the relief sought without having afforded the authorities in question an opportunity to be heard. In this regard it is to be borne in mind that the right to basic education is an entrenched right in terms of section 29 of the Constitution⁵ and also that the vast majority of learners in the affected grades would be children.

[23] These things being so, I would not readily have been persuaded to grant an interdict having immediate effect on the papers as they stood.

[24] I would add also that the claim for delivery up was also not without its difficulties. I refer to the fact that Allcopy had enjoyed a license to make copies of and distribute the works. Copies made prior to the expiry of the license would accordingly not have constituted infringing copies. The applicant's papers were also silent on the number and value of the copies which it sought to have delivered up. Indeed, Mr Phillips's position appeared to be that he was entitled, as of right, to delivery up of whatever works were in the possession of the respondents. I do not think this can be correct; however, I will not say any more on this issue – this for the reason already mentioned.

[25] Having reflected on this matter for some time, I am in agreement that the existence of the remedy of a compulsory license renders this matter exceptional. Indeed, I cannot think of any other field or branch of law in which a comparable remedy exists. The effect of the remedy, as I understand it, is that the tribunal has the power to override the wishes of an owner of copyright such as Mr Phillips instead, to award a license authorising that which would otherwise be unlawful.

[26] There is very little authority on the reason for the existence of this remedy and there is equally little authority as the basis on which the tribunal exercises its powers. It is however evident from the language of the section is that the test to be applied is one of reasonableness.⁶ Thus, an application for a compulsory license will fail to be granted if the Tribunal is satisfied that refusal to grant the relevant license was unreasonable.

⁵ Act 108 of 1996

⁶ Section 33 (3)(a) of the Copyright Act.

- [27] I would add that it seems to me that the section may well have been drafted with circumstances such as those of this case in mind. After all, the effect of Mr Phillips's refusal to sanction the making or distribution of further copies of the works would, but for this remedy, have the effect of denying his co-authors the fruits of their labours. What is more, and as I have already pointed out, persons other than the parties to these proceedings stand to be adversely affected by preventing the first respondent from continuing to print and distribute the works in question – a consideration which I the tribunal may well attach some weight to.
- [28] I am thus inclined to think that the first to third respondents would have at least reasonable prospects of success in their application to the Tribunal.
- [29] Given these considerations, I am of the view that it is appropriate that these proceedings be stayed pending the determination of the first to third respondents' application for a compulsory license.
- [30] Mr Michau argued that I should, in considering whether or not to grant a stay, have regard to the fact that the waiting times for hearings (especially in Pretoria, which is where the tribunal sits) are much longer than they were in the past – so much so that the main application could, or so it was contended, become academic. While I appreciate all too well that the system is creaking at the seams, I do not think that I can properly have regard to that fact in the present context. I say this for two reasons. In the first instance, it will be open to Mr Phillips to apply for an early hearing date before the tribunal. Secondly, I do not think that it would be appropriate to have regard to this type of consideration in deciding whether or not to grant what amounts to interim relief. Indeed, if one were to adopt that approach then courts would, by extension, be considerably slower than they have been in the past to grant interim interdicts and a considerable body of jurisprudence would, in the process, be affected. While I accept that a time may come for our courts to reconsider the approach to be adopted in deciding whether or not to grant interim relief, bearing in mind the time that it now typically takes to bring a matter to trial, I do not think that it would be appropriate for me to strike out on such a drastic course in this matter.

[31] I accordingly make the following order -

Order

- 1 The main application is stayed pending the determination by the Copyright Tribunal, of the first to third respondents' application for a compulsory license.
- 2 The applicant in the main application is ordered to pay the costs of the application for a stay of proceedings, such costs to include the costs of two counsel, counsel's costs to be taxable according to scale C.
- 3 Costs in respect of the main application are reserved.


G S MYBURGH
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES:

For the Applicants:

A Sholto-Douglas SC & LG Kilmartin

Instructed by:

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For the Respondents:

R Michau SC & CW Pretorius

Instructed by:

Hirschowitz Flionis Attorneys

Date of Hearing:

22 July 2024

Date of Judgment:

1 November 2024