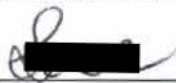


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA (COPYRIGHT TRIBUNAL)

Case Number: 00001/2024

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
7/3/25	
DATE	SIGNATURE

In the matter between:

ALLCOPY PUBLISHERS (PTY) LTD

First Applicant

JURGENS JOHANNES BASSON

Second Applicant

JACO ODENDAAL

Third Applicant

and

MARK PHILLIPS

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 07 March 2025.

Summary: Application in terms of section 33(3) of the Copyright Act, 1978. A copyright holder refused or failed to grant the licence to a Publisher and co-authors. For a considerable number of years, the copyright holder had granted

the licence to the Publisher. At the end of February 2024, the copyright holder decided not to extend the granting of the licence agreement. The Publisher and the co-authors claim that they require the licence until the end of 2025. Further, they contend that the refusal to grant the licence is, in the circumstances, unreasonable, and as such, the copyright holder is compelled by law to grant them the licence. In terms of section 33(5) of the Copyright Act, if the tribunal is satisfied that the claim of the applicant is well-founded, it shall make an order declaring that the applicant is entitled to a licence on such terms and conditions.

When a tribunal is faced with an application in terms of section 33(3) of the Copyright Act, it must be established before it that (a) a person claims that he/she/it requires a licence; (b) a copyright holder has refused or failed to grant the licence; (c) the circumstances dictates that it is unreasonable that the licence should not be granted. Once the above is established, the tribunal must be satisfied that the claim by the person who claims that he/she/it requires a licence is well-founded, then the tribunal shall make an order declaring that the person (applicant) is entitled to a licence.

In *casu*, the tribunal is satisfied that the requirements were established by the applicants and it is also satisfied that their claim is well-founded and deserving of an appropriate declaratory order. Held: (1) The application is granted with costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The present application epitomises, what this Tribunal characterises as, avariciousness by one author in a literary work that was allegedly jointly co-authored. This type of a bun fight has never, in the past, been presented to the Copyright Tribunal. Under the repealed 1965 Copyright Act, a section 28(3)(a) application was

presented in 1969, in the only reported matter of *The Johannesburg Operatic and Dramatic Society v Music Theatre International and Others (JODS)*.¹ To this day, *JODS* is the only reported authority that sought to interpret section 28(3) of the 1965 repealed Act, which section was worded similar to section 33(3) of the current Act.² It suffices to mention that no other authority was unearthed by counsel who appeared for the parties in this Tribunal that interpreted section 33(3) of the current Act. This Tribunal too, deployed its own research efforts but failed to source any reported judgment regarding this section. Unlike in the present application, *JODS* involved musical work and performance. The present application involves literary work. An issue that pronounces itself prominently in the present application, which this Tribunal decidedly is not ruling on, relates to the issue of who the true author of the literary work is. In terms of section 1 of the current Copyright Act, an author in relation to literary work means the person who first makes or creates the work. The present application oscillates on a narrow issue of failure or refusal to grant a licence and a need for a compulsory licence. Thus, it shall be obsolete for this Tribunal to resolve, what appears to be a bun fight amongst the authors of the publications relevant to the present application.

[2] Stating the above, in relation to the interpretation of section 33(3), is of significance, in that, in the current dispensation, every legislation, must be interpreted within the prism of the Constitution of the Republic of South Africa (Constitution). As an opening gambit, this Tribunal does appreciate that the current Copyright Act, predates the Constitution. Also, the Tribunal does appreciate that the copyright holder enjoys the monopoly rights, which is protected in terms of section 25(1) of the Constitution.³

[3] The above said, before me is an application launched in terms of section 33 of the current Copyright Act. As a judge of the High Court, I sit as a Commissioner of

¹ 1969 (1) PH Weekly Legal Service Vol. 93 Miscellaneous Judgments at 69 (24 May 1969).

² Copyright Act 98 of 1978.

³ Copyright amount to an intellectual property. In terms of section 25(1) of the Constitution, no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The Copyright Act is the law of general application. It has not been suggested that section 33(5) of the Copyright Act, which effectively empowers this Tribunal to compel a licence (act of deprivation) constitutes an unreasonable and unjustifiable limitation contrary to section 36(1) of the Constitution.

Patents in terms of section 8 of the Patents Act.⁴ Regulation 23 of the regulations published in accordance with the provisions of the current Copyright Act,⁵ provides that every party originating proceedings in terms of section 33 shall give notice by advertisement in the Gazette. Regulation 24 requires service of the application on all parties mentioned in the advertisement. The contemplated advertisement was issued in the present application. The present application is launched by three applicants, namely; Allcopy Publishers (Pty) Ltd (Allcopy)⁶; Mr Jurgens Johannes Basson⁷; and Mr Jaco Odendaal⁸. The application is brought against Mr Mark Phillips (Mr Phillips), the copyright holder. Mr Phillips opposes the application.

The relevant factual matrix

[4] Although the facts of this application make an interesting and captive reading, if a full rendition of those facts is detailed herein, such will not serve a useful purpose, but only to elongate this judgment. I take a view, at this embryonic stage of this judgment, that the facts relating to the concerns and frustrations of the joint authors are not relevant to the determination of issues in the present application. As such, those facts shall be omitted from the recount herein. The relevant factual matrix may be summarised as follows. Mr Phillips is an author, copyright holder and a businessman. The relationship between Mr Phillips and Allcopy spans a period of about 15 years.

[5] The onset of the relationship was ushered by a written agreement concluded between him and Allcopy on or about 9 June 2016. The essential terms of that written agreement were that Mr Phillips, in his capacity as an author, granted Allcopy exclusive licence to print, market and distribute, in the Republic of South Africa, textbooks; PowerPoint presentations; and E-Publications in English and Afrikaans, in respect of Grades 8 and 9 mathematics subject. This initial agreement was to endure for a period

⁴ Act 57 of 1978.

⁵ Copyright Regulations, GN R2530 GG 6252, 22 December 1978.

⁶ A Publishing company.

⁷ Author.

⁸ Author.

of five years. The five year period elapsed in 2021. For the duration of the agreement, Allcopy enjoyed exclusive licence to print, market and distribute in the whole country, the said literary work of Mr Phillips. Undoubtedly, Allcopy made profits out of this arrangement between it and Mr Phillips.

[6] Over a period of time, Mr Phillips, recruited other authors in the name of Mr Jurgens Basson; Mr Jaco Odendaal; and Mr Conrad Botha. It is unnecessary for the purposes of this judgment to narrate how and on what terms these authors were recruited. It suffices to mention that the authors collaborated with Mr Phillips regarding literary work.

[7] Ultimately, on or about 1 October 2020, another written agreement dubbed “Addendum to exclusive licence, marketing and distribution agreements in respect of Grades 8, 9 and 10 mathematics publication” was concluded between Allcopy and Mr Phillips as well as the recruited authors. The essential terms of that agreement were that the duration of the initial agreement between Allcopy and Mr Phillips was extended until 29 February 2024. The extension was on the same terms and conditions of the initial agreement. Other additional terms were agreed upon, which are not relevant for the purposes of the present application.

[8] Owing to the conclusion of the Addendum, Allcopy continued to enjoy the exclusive licence and to make profits out of that contractual arrangement. Whilst the parties were under the two mentioned contracts, the relationship between Allcopy and Mr Phillips as well as the recruited authors began to show undesirable cracks. Mr Phillips developed a different attitude and began to demonstrate intentions to vacate the relationship with Allcopy and the recruited authors. That notwithstanding, amid those cracks, the Addendum was concluded, the conclusion of which financially benefited Allcopy and the authors.

[9] Matters came to a head on or about 27 September 2023, when Allcopy corresponded with Mr Phillips and made him aware that it came to the attention of Allcopy that he had begun to inform schools that the relationship between it and him was coming to an end – expiry of the Addendum. Allcopy made it abundantly clear that it was its intention to continue supplying the textbooks after March 2024. To this correspondence, Mr Phillips enlisted the services of attorneys. The attorneys

corresponded with Allcopy, wherein, amongst others, it was mentioned that Mr Phillips afforded Allcopy and the authors sufficient time in which to phase out the publications. The attorneys demanded an undertaking that Allcopy would not continue with the relevant publications after 29 February 2024, of which failure to give such an undertaking would lead to an application for an interdict.

[10] When such an undertaking was not forthcoming, on 3 November 2024, an infringement application was launched by Mr Phillips in the High Court Division of Johannesburg. On 29 November 2023, Allcopy, having enlisted the services of its attorneys of record, corresponded with Mr Phillips and demanded another extension of the licence for a period of 24 months, as well as a stay of the infringement application pending the completion of the present application. Of course, Mr Phillips refused to stay the infringement application, and such refusal culminated in an application for a stay launched by Allcopy on 19 December 2023. In the meanwhile, the Addendum terminated by effluxion of time. On 28 March 2024, the present application was initiated. On 22 July 2024, the infringement application together with the stay application were enrolled before Acting Judge Myburgh.

[11] On 1 November 2024, Myburgh AJ, in a written judgment, granted the stay of the infringement application. Disenchanted by that decision, Mr Phillips launched an application for leave to appeal the judgment of Myburgh AJ. As at the time of this judgment, the outcome of the application for leave to appeal was still pending.

Evaluation

[12] As indicated at the dawn of this judgment, the only time a Commissioner of Patents expressed an opinion on a similarly worded section was about 55 years ago. At that time, the present constitutional era was 25 years in the offing. It is therefore apposite for this Tribunal to provide, as it were, an interpretation of section 33 within the prism of the Constitution. Before such an exercise is attempted, it is appropriate to deal with the preliminary issues raised by Mr Phillips.

[13] It must be pointed out that those preliminary issues were not raised in the answering affidavit, but only in the heads of arguments and oral submissions made on

behalf of Mr Phillips. This Tribunal must remark though that in terms of regulation 31, evidence before the Tribunal shall be given orally, and if the parties agree, by way of an affidavit. By agreement, evidence in this application was delivered by way of affidavits. It is trite that affidavits, when used in any proceedings, serve two purposes. First, as pleadings (issues in the proceedings) and secondly, as evidence. Preliminary issues of law, often referred to as points in *limine*, ought to be raised in the pleadings. This, to avoid an ambush of the other party. Having not pleaded these preliminary points, Mr Phillips, in my view, ambushed the applicants, something this Tribunal does not countenance. At a hearing, this Tribunal is empowered by regulation 27 to regulate the procedure before it in accordance with the provisions of the Uniform Rules.

[14] The above notwithstanding, the applicants did not register any protest to the effect that the preliminary points were only raised in the heads of argument and oral submissions. Rule 6(5)(d)(iii) of the Uniform Rules specifically provides that if a person intends to raise a question of law only, they must deliver notice of intention to do so. Prudent and responsible pleading demands upfront disclosure of legal points to be advanced at the hearing of a legal dispute.

The Tribunal cannot condone self-help

[15] Mr Phillips contends that compulsory licence provisions clearly seek to prevent self-help. It is further contended that the applicants are seeking an authorisation from the Tribunal to use the copyrighted work of Mr Phillips without his consent and such, in essence, condones self-help. Even during oral submissions, I failed to understand the legal construct and or the proposition made by Mr Phillips in this regard. The concept of self-help simply entails that in the face of available legal mechanisms to address grievances, a person ignores those legal mechanisms and takes the law into his or her hands. Differently put, instead of approaching a Court of law to afford him or her legal remedies, a person approbate to himself or herself those legal remedies. As held in *Chief Lesapo v Northwest Agricultural Bank and Another (Chief Lesapo)*,⁹

⁹ 2000 (1) SA 409 (CC) at para 11.

taking the law into one's hands is inconsistent with the fundamental principles of our law.

[16] The grievance of the applicants in this Tribunal is that they claim the need to be licenced, yet Mr Phillips refuses to licence them as he did for the past years. There is no evidence that the applicants gave themselves the required licence. On the contrary, they are before this Tribunal seeking an order to be licenced. It seems that the real gripe of Mr Phillips, which sadly does not amount to self-help, is that, after the lapse of the Addendum, the applicants continued with the publication in contravention of his copyright. That is an entirely different point from self-help. During argument, counsel for Mr Phillips suggested that because it was submitted by counsel for the applicants that it continued and will continue to pay royalties, such a submission is an indication of unlawful use and it constitutes self-help. With considerable regret, I disagree. Payment of royalties is regulated by the provisions of section 9A of the current Copyright Act. Section 9A(1)(b) specifically provides that the payment of royalties shall be determined by an agreement. Clause 8 of the expired agreement only sets out the percentage to be paid and how it is to be distributed. Nothing more and nothing less. To the extent that the applicants are willing to continue paying royalties that does not imply unlawful use. Far from it. To the contrary, this submission gives credence to the applicants' claim that they need the licence.

[17] Mr Phillips, in an attempt to protect his rights, deployed the provisions of section 23 of the Act. In terms of section 23(1) of the Act, an infringement entails doing or causing another person to do any act which the owner has exclusive right to do or to authorise. There is no evidence before this Tribunal that an infringement is occurring or has occurred. The alleged infringement is a subject of pending litigation.

[18] With sufficient perspicacity, and with reference to *JODS*, it was submitted that in order to avoid the alleged self-help, the applicants were obliged to launch the present application before the expiry of the licencing agreement and obtain a compulsory licence within the tenure of the agreement. There is no merit in this submission. There is no time period prescribed as to when the present application must be initiated. The trigger is the claim for the need for a licence. During the tenure of the agreement, there can be no need for a licence, let alone the refusal or failure to

grant same. Approaching the Tribunal during the tenure of an agreement will not only be inappropriate, but it will also be premature.

[19] Accordingly, for all the above reasons, the legal point of alleged self-help stands to be rejected out of hand.

The clean hands principle

[20] Allied to the self-help argument, emerged the clean hands principle during oral submissions. The suggestion was that, because the applicants had already infringed the copyright, they must be non-suited. Equally, there is no merit in this suggestion. The allegation whether or not the applicants have infringed is still, as the saying goes, *sub judice*. That being the case, for the purposes of these proceedings, the applicants are innocent until proven guilty of infringement. The clean hands principle finds no application in the present instance. This is not the situation governed by the doctrine of *ex turpi causa non oritur actio* (out of an illegal act there is no action in law). The applicants are not yet found guilty of an illegal act. Equally, this Tribunal is unable to non-suit the applicants for this reason.

The merits of the application

[21] As confirmed in *JODS*, the purpose of this Tribunal is to avoid abuse of monopoly rights. That is also the general purpose of the current Copyright Act. This must mean that the Tribunal is purposed to avoid a situation where an author is seeking, in unreasonable circumstances, to exercise absolute control of the right to produce his or her work. Regard must, in my view, be had to the fact that an author is not necessarily born with copyrights. He or she is conferred copyrights by legislation. Differently put, in the absence of legislative provisions, the claimed monopoly cannot magically emerge.

[22] In *Smith, Kline & French v Attorney General of Canada (Smith)*¹⁰, the Federal Court of Canada grappled with the question whether granting of a compulsory licence,

¹⁰ 1985 CanLII 5509 (FC)

in a context of a patent, amounts to an unconstitutional deprivation of property. Strayer J, considered the purpose of the Patent Act and echoed the following sentiments, which this Tribunal makes common cause with. He stated: -

“With respect to the stated purpose of the legislation, it appears to me clear from the subsection itself that Parliament’s object was to *deny a monopoly* with respect to inventions of medicine or of processes for preparation or production of medicine *where there is a willing applicant who seeks a licence ...*”

[23] Strayer J, with admirable sagacity, went further and said: -

“In summary, therefore, the apparent *object is to make such compulsory licences readily available*, and on terms which emphasizes a lowering of price of the drug with some consideration of compensation for the patentee with respect only to its research leading to the particular invention.”

[24] Strayer J also went further to conclude that there is no common law right to a patent.¹¹ He stated that the right is created by an Act of Parliament and it was appropriate for Parliament to restrict the extent of the monopoly granted. To my mind, same sentiments are apposite with regard to the Copyright Act. Section 6 of the Copyright Act creates a regime where copyright in a literary work vests the exclusive right to do or to authorise the doing of a number of acts outlined in the section. Section 2(1)(a) provides that subject to the provisions of the Act, literary works shall be eligible for copyright. Section 3(1)(a) of the Act provides that copyright shall be conferred on every work eligible for copyright, to a South African citizen. Section 21(1)(a) provides that ownership of any copyright conferred by section 3 shall vest in the author, and in case of work of joint authorship, in the co-authors of the work.

[25] When proper regard is had to the above statutory provisions, it cannot be correct, as argued, that Mr Phillips has absolute control of his works, such that, he can do what he wishes without any form of control. This is a legislatively conferred right and not an innate right or common law right. In terms of the Constitution, section 25(1)

¹¹ See *Commissioner of Patents v Farbwerke Hoechst Aktiengesellschaft Vormals Meister Lucius & Bruning* [1964] S.C.R. 49.

thereof authorises deprivation in terms of law of general application. In *Smith*, it was confirmed that: -

"The effect of a determination that the conditions prescribed ... for the issue of a compulsory licence have been met is to thereby permit the impairment of the initial monopoly. To give the *Canadian Bill of Rights* the liberal interpretation advocated by the plaintiffs, and which I think is correct, *it is appropriate to regard this as a "deprivation of property"*.

[26] The Copyright Act grants monopoly for a period of 50 years plus. If the Act was to be interpreted to mean that others must wait for a period of 50 years plus before they could have a share of the market, then an untenable situation would arise. In *Smith*, the following apt remark was made: -

"If one takes the approach of the plaintiffs, one could equally argue that the whole Patent Act is invalid because the normal effect of granting a patent and creating a monopoly in the patentee is to give the patentee nearly *carte blanche* with respect to price because he is protected from any competition for 17 years. That is clearly untenable."

[27] Jacket P in *Hoffman-La Roche Ltd v Bell-Craig Pharmaceuticals Division of L. D. Craig Ltd (Hoffmann)*¹², had the following to say: -

"In my view, the objective of the provision is to bring about competition. On balance, in most fields, competition is regarded by Parliament as being in the public interest because competition regulates prices in the public interest and also because competition tends to bring about greater efficiency, better service, and further research. The monopoly granted to an inventor is an exception to this general principle in our law. Section 41(3) was passed because, in the field to which it applies "the specific public interest in free competition" was deemed to be more important than the maintenance of the patentee's monopoly rights."¹³

¹² [1965] 2 Ex C.R. 266 at 282

¹³ On appeal, the Supreme Court of Canada [1966] S.C.R 313 at 319, per Abbott J stated that "In my view the purpose of s. 41 (3) is clear. Shortly stated it is this. *No absolute monopoly can be obtained in a process for the production of food or medicine.* On the contrary, Parliament intended that, in the public interest, *there should be competition in the production and marketing of such products produced by a patented process*, in order that as the section states, they may be "available to the public at the lowest possible price consistent with giving the inventor due reward for the research leading to the invention".

[28] Similar sentiments were echoed with sufficient sagacity and perspicacity by Pigeon J in *Eli Lilly and Co. v S. & U. Chemicals Ltd (Eli)*¹⁴ and he said: -

“... The legislative policy behind compulsory licencing namely, *to avoid any practical monopoly of the manufacture of drugs by patented process and to foster competition.*”

[29] As it shall be demonstrated later, this Tribunal is statutorily empowered to deprive a copyright owner of full enjoyment of his copyright ownership by licencing the use by another person. An analogy may be drawn from the Prevention of Illegal Evictions and Unlawful Occupation of Land Act (PIE).¹⁵ Section 7 and 8 thereof, exist to limit the right of ownership for a limited duration.¹⁶

The approach to be adopted in section 33 applications

[30] In my considered view, in order to succeed in an application initiated in terms of section 33(3) of the Act, an applicant must establish the following factors or requirements: -

- (a) A person (applicant) must claim that he requires a licence;
- (b) A copyright holder must have refused or failed to grant the licence; and
- (c) The established circumstances dictate that it is unreasonable that the licence should not be granted.

[31] This Tribunal shall consider the above factors or requirements against the factual matrix of the present application.

A claim that a licence is required

[32] Before the common cause facts of the present application are considered, it is apposite to consider the provisions of section 22 of the Act. The section creates a regime by which a copyright owner may share in his or her conferred rights. Section

¹⁴ [1977] 1 S.C.R 536 at 545

¹⁵ Act 19 of 1998.

¹⁶ See *Msibi v Occupiers of Unit 6 [...]* C[...] C[...] T[...] Road, Ormonde, Ext 28 and Another [2025] ZAGPPHC 100.

22(4) provides that a non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct and may be revoked anytime: Provided that such a licence granted by contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract. This section has, in my view, far-reaching implications. The implications are that, once such a licence is granted, a person who granted the licence, in this instance Mr Phillips, shall not easily revoke the licence except as the contract may provide.

[33] In law, revocation is an act of recall or annulment. Regard being had to the manner in which a non-exclusive licence may be afforded – inferred from conduct, it cannot, in my view, be easily stated that a mere effluxion of time automatically leads to revocation. In some instances, contracts may, for instance, provide for an automatic extension or a right to an extension. Not forgetting, of course, a case for legitimate expectation of renewal. Howbeit, the fact that for 15 years or so, Mr Phillips had granted a licence, can only support the claim by Allcopy that it requires the licence in order to conduct its business that it had conducted for the past 15 years. The fact that Mr Phillips now contends that he had given the applicants sufficient time to phase out the publication does not gainsay the fact that until end of December 2025, the applicants require the licence.

[34] On the conspectus of the evidence before this Tribunal, it must be concluded that the applicants, as it was done for 15 years, require a licence. As such, this Tribunal is satisfied that this factor or requirement has been established.

Copyright owner refused or failed to grant a licence

[35] It is common cause that Mr Phillips has refused or failed to grant a licence after 29 February 2024. The reason for that is simply that Mr Phillips does no longer want anything to do with the applicants and has given them sufficient time to phase out the publications. This, in my view, is nothing but an abuse at the altar of exclusive rights conferred. These types of unjustified refusals agitate, in my considered view, the granting of a compulsory licence. The relationship between Mr Phillips and Allcopy began to show cracks, on the available evidence, since 2016, yet the agreement was

not terminated prematurely on account of those relationship difficulties. On the contrary, the licencing was extended for a further period. Article 5A(2) of the *Paris Convention for the Protection of Industrial Property (PCPIP)*, 1883, had sufficient foresight and provided that each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licences to prevent the abuses which might result from the exercise of the exclusive rights conferred. As indicated earlier, Mr Phillips was not born with copyrights, ownership thereof was conferred to him through legislation. Therefore, in my view, he has no untrammelled legal grounding to refuse the granting of the licence, otherwise, such constitutes an abuse of exclusive rights conferred upon him by legislation.

The established circumstances dictates that it is unreasonable that the licence should not be granted

[36] The refusal of Mr Phillips happens in the circumstances where, regard being had to his past conduct, the applicants must have had a legitimate expectation of renewal of the licence. This, in the circumstances where the co-authors may have acquired exclusive rights due to joint ownership of the work. There is insufficiently contested evidence that in the circumstances where the licence is not granted, the joint owners shall not be prejudiced. Additionally, the refusal happens in the face of the recordal in the Addendum to the following effect:

“Jurg, Jaco, Mark and Conrad were co-authors of the relevant Publications that were the subject matter of the Agreements and as such *are each a holder of copyright in the relevant Publications.*”

[37] The Addendum defines Publications to mean collectively, the Grades 8 and 9 Publications. To my mind, the prescribed unreasonableness in the section is not directed to the conduct of a copyright owner. It does not necessarily equate intransigency. In *JODS*, it was found that although due weight must be given to the copyright owner's attitude and the reasons given for refusing a licence, such was not decisive. In other words, a Tribunal should not refuse to grant a compulsory licence simply because of the attitude and reasons displayed and given by a copyright owner. As a matter of fact, the main reason and attitude of the copyright owner, would

indiscriminately be that he or she has exclusive rights conferred to him or her by the Act. If this main reason is upheld or given priority, then the purpose of Article 5A(2) of the *PCPIP* shall be thwarted and rendered nugatory. And the entire purpose of the current Copyright Act shall be defeated effortlessly. To my mind, the reasons and attitude of the copyright owner recedes to the background when considering applications of this nature. In fact, the granting of a compulsory licence is not necessarily a full deprivation, but a necessary limitation of rights in an open and democratic society¹⁷. In echoing almost similar sentiments Thurlow J in *Hoffman-La Roche Ltd v Frank W. Horner Ltd, Attorney-General of Canada Intervenant (La Roche)*¹⁸ stated the following: -

“What a patentee has, therefore, from the time of issue of his patent *is not an unassailable, complete monopoly right*. His patent does indeed purport to give a monopoly of his invention but it is a monopoly which, because of s. 41, *is subject to the right of anyone who can comply with the section to obtain the right to use the invention notwithstanding the patent*. Such monopoly is therefore not capable of affording a foundation upon which a massive commercial enterprise, not by itself capable of being monopolized, may be built and afforded monopoly protection.”

[38] The uncontested evidence before me is that Mr Phillips may continue to fairly compete with the applicants. What section 33(3) of the Copyright Act contemplates, in my considered view, is an investigation of the prevailing circumstances as opposed to the conduct of a copyright owner. If the circumstances, like in the present application, dictate that it shall be unreasonable not to grant the licence, then the compulsory licence must be granted.

[39] Ordinarily, those circumstances are to be presented by the applicant or by having regard to the position of the applicant as opposed to that of the copyright owner. This view, is unashamedly buttressed by a contextual, literal and purposive read of section 33(5) of the Act. Amongst others, the section provides that:

“(5) ... and if the *tribunal is satisfied that the claim of the applicant is well-founded*.”

¹⁷ In *Smith*, a similar issue of deprivation of rights arose and the Court said: “I therefore find subsection 41(4) of the Patent Act to be *intra vires* the Parliament of Canada.”

¹⁸ (1970), 64 C.P.R. 93 (Ex. Ct), at 107.

[40] It must be remembered that the claim of an applicant under section 33(3) is that he or she requires a licence. It cannot be gainsaid that in order for the applicants to continue with the much needed publications, regard being had to the number of schools supplied, and in order to avoid infringement of the copyright, they require a licence. Counsel for Mr Phillips argued that the applicants ought to have joined to the Tribunal proceedings the schools that will allegedly be impacted. I am not persuaded by this argument. Regard being had to the undisputed facts, it must, axiomatically, without conduce of additional evidence, follow that non-publication by the applicants, which publication has been happening countrywide for the past 15 years, will impact the schools that were serviced over the years. It requires no rocket scientist to reach this conclusion. On application of the doctrine of *res ipsa loquitur* (the facts speak for themselves), this Tribunal must accept that the schools will be affected. It is no answer that the schools may suddenly look up to other Publications, which ironically include the Publications owned by Mr Phillips. Even if, as speculatively submitted by counsel for Mr Phillips, the impact is a meagre 10%, it remains an impact. The issue of the impact on the schools is one of the key and impactful circumstances that dictates that it shall be unreasonable not to grant the licence. Even if the instance of onus does not necessarily arise on this issue, the evidentiary burden must lie on Mr Phillips to demonstrate that schools may accept a sudden change, which change, carries with it price increase. In my view, Mr Phillips failed to accomplish such a burden.

[41] A well-founded claim is one that is predicated on good evidence or reasons. The applicants, in particular Allcopy, in their founding affidavit, provided good evidence and reasons why they claim that they require a licence. The antithesis of well-founded is ill-founded. Ill-founded simply means not based on fact or reliable evidence. It certainly does not equate the idiosyncrasies of individuals. A factual inquiry is required in order to support ill-found.

[42] To determine what is reasonable is a difficult pony to ride. It is for that reason that many legislative provisions couch the word in the negative terms. What is often found in the majority of legislations is the word 'unreasonableness' as opposed to reasonableness.¹⁹ Reasonableness is about the soundness or goodness of reason

¹⁹ See Brynard "Justifying administrative action for reasonableness. A quest for accountable public administration" (2013) Vol 21 *Administratio Publica* 69 at page 70.

and judgment.²⁰ Unreasonableness arises in circumstances where whatever is being done is not guided by or based on good sense. In law, the term refers to any action or result that exceeds a reasonable expectation. It refers to anything beyond what would be considered as common sense.²¹ Thus, the question whether an unreasonableness has reared its ugly head, is one that involves an investigation into the facts, and it ultimately involves making a value judgment. This exercise does not involve an exercise of discretion by the Tribunal. Mr Alan Jonker, the director of Allcopy testified that:

“91 The Publications are not defective in any way, and *there is an ongoing demand for them from schools*. The commercial reality is that *most schools in South Africa cannot afford to buy new textbooks and materials every year, and most do so on a 3 or 5 year cycle*. It would be unfair (and unreasonable) to discontinue supply of the Publications, simply at the whim of one author, where some *schools would be unable to replace them*.”

[43] The above prevailing circumstances, if taken into account, and applying to them a value judgment, it must be accepted that it would defy logic and common sense if a licence should not be granted. For avoidance of doubt, those circumstances are (a) ongoing demand for the Publications from schools; (b) most schools in South Africa cannot afford to buy new textbooks and materials every year, and most do so on a 3 or 5 year cycle; and (c) most schools will be unable to replace them. The most telling part with regard to these circumstances is that Mr Phillips does not dispute that they exist and prevail. In *lieu*, he testified as follows:

“Ad paragraph 91

My conduct is not at a “*whim*”. The formal licence agreement came to an end. *That is all*. And I *don’t want to continue*. All of the Applicants have known for many years that I *no longer want to be part of them*. Yet they have done nothing to arrange their affairs accordingly.

²⁰ Id at page 69.

²¹ Sourced from Wex, the Legal Information Institute's community-built, freely available legal dictionary and legal encyclopedia (05 March 2025) available at

<https://www.law.cornell.edu/wex/unreasonable#:~:text=The%20term%20%E2%80%9Cunreasonable%E2%80%9D%20refers%20to,of%20the%20prosecution%20or%20the>

[44] Properly analysed, this testimony of Mr Phillips, with respect, smacks of arrogance and is a clear demonstration of an abuse of an exercise of existing conferred rights. This palpable sheer abuse tunnels this Tribunal to a granting of a compulsory licence and no other place. This, in the circumstances where the claim of the applicants is well-founded.

Consequences of having established the factors or requirements in section 33(3)

[45] The Tribunal is a creature of a statute, and as such, it must exercise powers conferred upon it by the statute that gave birth to it. I have already indicated that the Tribunal is purposed to stamp out abuse of monopoly rights. What should happen, as prescribed in section 33(5) of the Act, is that, if the Tribunal is satisfied that the claim of the applicant is well-founded, it shall make an order declaring that the applicant is entitled to a licence.

[46] Counsel for Mr Phillips passionately argued that if the Tribunal were to order that a compulsory licence be retrospective from 29 February 2024, the Tribunal would thereby be legitimising and or authorising an unlawful use of the copyright. With considerable regret, this Tribunal is unable to agree. Firstly, the purpose of ordering a compulsory licence is to prevent an infringement. Applicants who approach a Tribunal for a compulsory licence do so with the sole intention of avoiding infringement. It is, for that reason, that one of the jurisdictional requirements is that a copyright holder refuses or failed to grant a licence. Such that if an applicant approaches a Tribunal for a compulsory licence in the absence of a refusal or failure, then the Tribunal must, in my considered view, refuse to exercise its jurisdictional powers.

[47] Secondly, in the present instance, there is no doubt that in November 2023, months before the expiry of the agreement, Allcopy expressly placed the following request, which fell on deaf ears:

“21 Should your client refuse to agree to an extension of the current licence agreement, we hold instruction to apply to the Copyright Tribunal for a compulsory licence...”

[48] Assuming that Mr Phillips heeded this request in November 2023, the jurisdictional requirements to engage the Tribunal would have been absent. A refusal or failure, in my view, *prima facie* entitles, as it were, an applicant to a compulsory licence. It becomes only a matter of time with regard to when, ultimately, the Tribunal makes its declaration. The applicants made their application a month after the refusal. It must follow that section 35(5) contemplates a declaratory order of some sort. Such declaration must mean that the refusal amounts to an abuse and ought not to have been made. As such, the effect of the declaratory order must be that as at November 2023, Mr Phillips ought to have agreed to an extension, given that the prevailing circumstances, which were already spelled out to Mr Phillips in the letter of 29 November 2023, were suggestive of the unreasonableness that a licence should not be granted. The fact that this Tribunal declares the legal position contemplated in section 33(3)(a) of the Act at a later stage would not suggest that the legal position did not obtain earlier. A declaratory order is nothing but confirmation of existing but disputed rights.

[49] Differently put, as at November 2023, the situation prevented by section 33(3)(a) of the Act had obtained. Legally, it must mean that, as at November 2023, reasonableness dictated that Mr Philips should have granted the licence. This is fortified by the phrase “*should not be granted*”. In other words, in the absence of abuse of monopoly, the licence should be granted. Therefore, it is my considered view that the declaration contemplated in section 33(5) is retrospective in nature.²² Once a compulsory licence is declared to be granted, it must take effect from the date of the refusal and the failure to grant. In this particular instance, the licence will be operative from 1 March 2024. An analogy may be drawn from section 172(1)(a) of the Constitution. Probably, if the power in section 33(5) existed under the constitutional dispensation, it would have resorted under section 172(1)(a) of the Constitution. In *BW Brightwater Way Props (Pty) Ltd v Eastern Cape Development Corporation (Brightwater)*,²³ the SCA confirmed that a contract which has no force and effect is necessarily void *ab initio*.²⁴ In *Brightwater*, a lease agreement concluded some years

²² See *SAMPRA v Foschini Retail Group (Pty) Ltd* [2016] 2 All SA 40 (SCA), where the SCA made a declaration with retrospective effect.

²³ 2021 (6) SA 321 (SCA).

²⁴ *Id* at para 29 with reference to *Wilken v Kohler* 1913 AD 135 at 143.

ago, contrary to the legal prescripts, was declared to have been invalid in terms of section 172(1)(a) of the Constitution.

[50] Similarly, declaring that the applicants are entitled to a licence, equates a declaration that the conduct of Mr Phillips in refusing or failing to grant licence, in the circumstances where it was unreasonable to have done so, is invalid *ab initio*. I hold a firm view that since legislation must now be interpreted within the prism of the Constitution, constitutional imperatives feature prominently since the conferment of copyright ownership is a matter of statutory public law and not pure contractual law. As such, absent statutory control, abuse becomes inherent. Statutory control is what the *PCPIP* propagated. Regard being had to sections 231(4) and (5) of the Constitution, the *PCPIP* is law in South Africa. Section 233 impels this Tribunal, when interpreting any legislation, to prefer a reasonable interpretation consistent with international law over any alternative interpretation that is inconsistent with international law.

[51] The Canadian authorities reviewed above confirmed that patent rights and also copyright ownership are not rights of common law. Howbeit, in my view, even if it could be argued that they equate common law rights, in terms of the Constitution development of common law rights must happen within the prism of the fundamental rights guaranteed in the Constitution by promoting the spirit, purport and objects of the Bill of Rights²⁵.

Conclusions

[52] In summary, this Tribunal is satisfied that the applicants have established the requirements in section 33(3) of the Act. Having done so, this Tribunal is satisfied that the claim of the applicants is well-founded and deserves a declaration that a compulsory licence must be granted. With regard to costs, section 29(2) empowers the Tribunal to make an order as to costs. Both parties are in agreement that costs should follow the result, which costs will include the costs of the employment of two counsel to be settled or taxed on scale C. I have no reason to be averse to such.

²⁵ Section 39(2) of the Constitution.

[53] For all the above reasons, I am constrained to make the following order:

Order

1. It is declared that the First, Second and Third Applicants are entitled to a compulsory licence to continue printing, marketing and distributing the following co-authored Publications for Grades 8 and 9 Mind Action Series ("MAS") Mathematics Textbooks, which include chapters and materials that were authored by the Respondent:
 - 1.1 Mathematics Textbooks;
 - 1.2 Teacher Guides;
 - 1.3 PowerPoint Presentations; and
 - 1.4 E-Publications (English and Afrikaans).until **31 December 2025**.
2. It is declared that the refusal of the Respondent, Mr Mark Phillips, to extend the licence which has been in place since 7 June 2016, per the written agreements concluded on 7 June 2016 and 1 October 2020 respectively, and which terminated on 29 February 2024 was, in the circumstances, unreasonable.
3. Save for the period of duration, the compulsory licence is granted on the same terms and conditions as before the termination on 29 February 2024.
4. The Respondent is directed to pay the costs of this application on a party and party scale, which costs include the costs of employment of two counsel to be taxed or settled on scale C.



JUDGE GN MOSHOANA
COMMISSIONER OF PATENTS
HIGH COURT GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicants:

Mr A Sholto-Douglas SC and Ms L Kilmartin SC

Instructed by:

Von Seidels, Cape Town

For the Respondent:

Mr R Michau SC and Mr C W Pretorius

Instructed by:

Hirschowitz Flionis Attorneys, Johannesburg

Date of the hearing:

25 February 2025

Date of judgment:

07 March 2025