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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 52684/2021

In the matter between:

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHER JUDGES: No
- (3) REVISED: Yes

Date of judgment: 16 September 2025

PIXEL KOLLECTIVE (PTY) LTD

Plaintiff

and

NTANDO DUMA MTHOMBENI

First defendant

MSL, A DIVISION OF MMS COMMUNICATIONS

Second defendant

SOUTH AFRICA (PTY) LTD

SIMBA (PTY) LTD
defendant

Third

JUDGMENT

COWEN J:

Introduction

[1] Pixel Kollektive (Pty) Ltd (Pixel), a photography, videography and content production agency, is claiming damages from social influencer Ms Ntando Duma Mthombeni, for breach of copyright in respect of a photograph. The photograph in issue is a medium close-up image of Ms Duma at a social event called the Breakfast Club held during the evening of 23 May 2021 (the disputed photograph). That evening, an employee of Pixel, Mr Kgomotso Mapholo, took the disputed photograph, and other photographs, and later sent the photographs of Ms Duma to her so that she could post them on her Instagram account.

[2] Pixel was at the Breakfast Club as the event organizer, Homecoming Events, had commissioned it to capture photographs of the event. Pixel's photographers took some 2000 photographs of guests that night. There were about 8 photographs of Ms Duma.

[3] The disputed photograph was subsequently used by Simba (Pty) Ltd (Simba) as part of a commercial social media campaign, without Pixel's consent. This came about in circumstances where the second defendant, MSL, a division of MMS Communications South Africa (Pty) Ltd (MSL) had concluded an influencer services agreement with Ms Duma in terms of which she was appointed to influence social media users for and on behalf of Simba. This was to be by way of a social media online campaign to run over May and June 2021, whereby Ms Duma would assist Simba to

take advantage of social networking to increase its brand exposure and broaden its customer reach. As one of the various deliverables under the influencer services agreement, Ms Duma was to supply MSL with “1 image usage rights”. As it transpired, the disputed photograph is what came into Simba’s hands to that end and was used on its social media.

[4] Under the Copyright Act¹ (the Act), “artistic works”, if original, are eligible for copyright.² An “artistic work” is defined to include photographs and a work qualifies as artistic “irrespective of the artistic quality thereof”.³ A “photograph” is defined to mean “any product of photography or of any process analogous to photography, but does not include any part of a cinematograph film.”⁴

[5] Under section 7 of the Act, copyright in an artistic work vests in its author the exclusive right to do or to authorize the doing of various acts in South Africa including reproducing the work in any manner or form, making an adaptation of the work and reproducing an adaptation of the work.⁵ An ‘author’ in relation to a photograph means “the person who is responsible for the composition of the photograph.”⁶

¹ Act 98 of 1978.

² Section 2(1)(c).

³ Section 1.

⁴ Id.

⁵ “Nature of copyright in artistic works

Copyright in an artistic work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

(a) reproducing the work in any manner or form;

(b) publishing the work if it was hitherto unpublished;

(c) including the work in a cinematograph film or a television broadcast;

(d) causing a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;

(e) making an adaptation of the work;

(f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (d) inclusive.”

⁶ Section 1.

[6] Where ownership of copyright of a photograph will often vest in its author, that is not always so. Section 21(1) regulates ownership of copyright.⁷ Thus, section 21(1)(c) vests ownership of copyright in a person who commissions the taking of a photograph and pays or agrees to pay for it in money, and the work is made in pursuance of that commission. The operation of section 21(1)(c) may be excluded by agreement, by virtue of section 21(1)(e). Moreover, where a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person is the owner of the copyright, by virtue of section 21(1)(d).

[7] Under section 23(1), copyright is infringed by any person not being the owner of a work, who, without the licence of the owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise.⁸ Copyright infringements are actionable at the suit of the owner of the copyright, who may institute an action, amongst other things, for damages.⁹

⁷ "Ownership of copyright

(1)(a) Subject to the provisions of this section, the ownership of any copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.

(b) Where a literary or artistic work is made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording 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, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.

(d) Where in a case not falling within either paragraph (b) or (c) a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

(e) Paragraphs (b), (c) and (d) shall in any particular case have effect subject to any agreement excluding the operation thereof and subject to the provisions of section 20."

⁸ Infringement

"(1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorize."

⁹ "Action by owner of copyright for infringement

[8] The issues that arise for decision in the case are:

- a. Whether Pixel is the owner of the copyright in the disputed photograph in circumstances where Pixel had been contracted by Homecoming Events to take photographs of the event and paid for these services. In this regard, the defendant relies on section 21(1)(c) of the Act;¹⁰
- b. In any event, whether Mr Mapholo can be said to be the author of the disputed photograph in circumstances where Ms Duma says that she was responsible for its composition;
- c. If so, whether the disputed photograph is an original work;
- d. If so, what are Pixel's damages.

The facts and evidence

[9] The matter came before me on the civil trial roll on 20 May 2025. Three witnesses testified. Two witnesses testified on behalf of the plaintiff: Ms Kelly Yuve, Pixel Konnektiv's founder, managing director and senior producer and Mr Sivuyile Matshilisa, Pixel's co-founder and lead photographer. Ms Duma testified on her own behalf.

[10] As it transpired, there is very little that is in dispute. Nonetheless, as there are aspects of the evidence which require consideration and evaluation, I deal briefly with the witnesses' testimony.

"(1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights."

¹⁰ See above n 6 and para 6.

Ms Yuve

[11] Ms Yuve's testimony established that she and Mr Matshilisa founded Pixel in March 2018. They have commercial clients (including blue chip clients) and marketing clients, which focus on brands. They also have individual clients who engage them for weddings and parties. They charge their individual clients significantly less than their commercial or marketing clients: where individual clients usually distribute their work privately, often amongst families, their commercial clients use their work for their own financial gain. Mr Makholo, who took the disputed photograph, was an employee of Pixel at the time of the Breakfast Club event, at which Pixel was commissioned to take photographs.

[12] Ms Yuve testified about several photographs of Ms Duma:¹¹ one is a full body image of Ms Duma and another photograph, the disputed photograph, is a medium close-up image of her. These photographs appeared on Ms Duma's Instagram social media account after the event crediting Pixel as the photographer. To reflect this, the words Pixel Kollektive appear next to a small image of a camera near the photographs (the camera image).

[13] Ms Yuve also testified about the photograph that appeared on Simba's social media account. She testified that it was the same image of Ms Duma as the medium close-up image but with the background altered. She described this photograph as "deep edged". Pixel had not been responsible for the alteration.

¹¹ At A22.

[14] She testified that she was not aware of Simba's use of the photograph. She had become aware of it only when Home Coming Events' social media manager sent her the image and asked if Ms Duma had asked for permission. She testified that she had no knowledge of the Simba campaign and that, to her knowledge, they had not been approached by anyone for permission and had at no stage given a license to use the photograph for this purpose. She testified further that, as far as she was aware, Simba compensated Ms Duma for the use of the image.

[15] After Ms Yuve became aware of the use of the photograph, she contacted their legal team. They sent Ms Duma a letter of demand seeking R200 000 in damages. She testified that no payment had been received and she explained how she had computed the damages.

[16] Ms Yuve's cross examination was brief. It was focused, firstly, on whether there is a difference between a photograph as an image or "containing" an image. She accepted that the photograph contained a necklace, a white top, a jacket, sun-glasses and a hairstyle. Although with an element of puzzlement, she accepted that the photograph can be characterized as comprising various items put together. She was asked about what creative direction the plaintiff had over the photograph. She testified that a photographer's input has different aspects, including whether a picture is in or out of focus, lighting, background and location, and which way to face. In short, she testified that a photographer has a large role to play in the overall composition of a photograph. She accepted that Pixel had no role to play in Ms Duma's choice of sunglasses, shirt, jacket, make-up or hairstyle. Regarding the equipment used for the photograph she could not speak to the lighting, but could testify that the photographer used a C-stand, a

light box and an umbrella. She explained that “deep edging” involves an alteration of the image by manipulation of the background. The result is that Simba used the same original image with a changed background. Moreover, the image was “punched in”, or “zoomed in”. When pressed on whether Pixel used Ms Duma’s image and likeness, over which they had no control, she emphasized firmly that without Pixel there would be no photograph. She also emphasized that no one can take exactly the same photograph. On whether the differences in a photograph would be material to an ordinary observer, she explained that it is possible an ordinary observer might not notice differences but that the overall imagery all comes down to and is determined by the skill of the photographer.

[17] She was cross-examined on the manner of computing the damages amount, to which I return below.

[18] Finally, she explained Homecoming Events’ use of the photographs they are commissioned to take. She explained that they publish the photographs and give attendees access to the images. Photographs are used for social media surrounding an event. However, only they can use the photographs. If someone else wants to use the photographs then they must ask permission from Pixel, who will charge a fee.

[19] Ms Yuve was a believable witness. Her demeanour was open and candid and she presented herself with humility and caution. She remained comfortable, if appearing a little puzzled at times, during her cross-examination. There was no re-examination.

Mr Matshilisa

[20] Mr Matshilisa is the head photographer at Pixel, with about ten photographers working under him. He is involved in editing and post-production work.

[21] Like Ms Yuve, Mr Matshilisa confirmed the publication of Mr Mapholo's photographs on Ms Duma's Instagram account, ultimately not in dispute. He was asked to explain the camera image, which appears where Pixel is credited. He explained that this is understood as an accreditation for photography. This is important, he explained, because it refers to Pixel as "the creative". He testified that this works for both parties: on the one hand, the photographer is recognized and on the other, the influencer gets exposure through their social media profile.

[22] He described the picture on Simba's Instagram account as a "superimposed" or "rendered" image from one of those that Mr Mapholo took: The background had been changed.

[23] Mr Mathilisa testified in some detail about the social media coverage generated in connection with the photographs. In respect of Ms Duma's page, which credited Pixel, he testified that well known persons had commented on the photographs, including actor and celebrity J Nkosi and influencer Celest Ntuli. He explained that where a celebrity "likes" a picture, this gives traction to the post, and it will pop up on others' feeds. It will thus be shared more widely.

[24] Mr Matshilisa also testified about a WhatsApp message exchange between Mr Makholo and Ms Duma that ensued the evening of the event. At 20:38, Ms Duma sent Mr Makholo a WhatsApp message saying: "Khomotso; Don't forget me bro". At 20h52, Mr Makholo responded saying "Hey Ntando, sure thing. I just got home rn, I'll jump into

the edits soon.” At 21h25, he sent a link to the images with a note reading: “When posting on social media please credit @[...]”. At 21h25, Ms Ntando responded: “These are sooooo dope! Thank you so much!”, to which Mr Makholo responded: “Shout out, thank you so much for letting me take these! You killed it with the poses.”

[25] Mr Matshilisa was asked why Mr Makholo had indicated that Pixel should be credited. He explained that they always ask to be credited. He could not recall any benefit that had accrued as a result of the crediting in this instance.

[26] Cross examination was brief. Mr Matshilisa was asked about the number of photographs taken at the event, some 2000 images. He accepted that the time taken to edit the photographs of Ms Duma was limited, probably about 18 to 20 minutes. He indicated that this would have been possible as he had already created various “presets”, which would have enabled a quicker editing process than editing from scratch. He was asked about the comment: “You killed it with the poses.” He explained that a photographer usually gives direction but in this case the defendant posed well herself and it was probable that Mr Makholo did not have to give direction himself.

[27] He confirmed that Pixel was paid by Home Coming events and not by Ms Duma. He accepted that Pixel would have received advertising from the crediting of the photograph. He also accepted that Pixel would have received exposure through the endorsement of the photographs by celebrities. He testified that he was not present for any conversation between Mr Makholo and Ms Duma and accordingly could not testify about whether she was informed that the copyright belongs to Pixel.

[28] In re-examination, Mr Matshilisa referred to the standard quotation Pixel sends to its customers which was discovered by Ms Duma and which contained the following:

“[Pixel], unless expressly agreed or bought, holds the right to all images and videos produced. A usage fee will apply in instances where the images and or video captured by [Pixel] are used in advertising campaigns and any other promotion activities. The onus is therefore on Client(s) to fully disclose the proposed use of the images, videos or other rendered services. The produced visual content is subject to copyright and may not be reproduced in whole or in part without the written permission from Kelly Leeuw on behalf of [Pixel].”

Ms Duma

[29] Ms Duma testified on her own behalf. She recalls the event of 23 May 2021. She had been booked as an influencer by Diajio for the brand Origin. She had been invited and at a point bumped into ‘a guy’ who wanted to take pictures of her. He had suggested a location whereafter she suggested a different location because of the lighting. He took various photographs, some with her sunglasses on and some with them off. She had posed as she wished as the photographer had said to her: “Do your thing”. Afterwards, she asked the photographer where she could get the photographs. The photographer told her that he would send them and that she must credit him. She testified that he did not mention anything about ownership of copyright.

[30] When asked about whether she attends events as an influencer, she answered: “A million times”: doing so was part of her profession. Asked whether photographers tell her that they own copyright, she answered that they do not. She confirmed the WhatsApp discussion with Mr Makholo. She had received eight photographs from him.

[31] When asked what “crediting” means, she testified that normally a photographer would want to collaborate with popular people because their work is not well known, so they ask the person photographed to credit them. She testified that she has 4.8 million followers and that at that time of the event, she had had between 2 and 3 million followers.

[32] She was asked about the nature of the legal relationship between herself and Mr Makholo. She testified that she didn’t think of it and that she thought the photographer had his own Instagram handle. She has been working in the industry for 15 years.

[33] When describing Mr Makholo’s photograph, she emphasized that she had had no assistance putting together her outfit and that she was wearing her own clothes, accessories and had done her own hair and makeup. She testified that when the photograph was taken there was no other equipment in the immediate vicinity, just the photographer and the camera, but this was not put to Ms Yuve.

[34] Ms Duma was cross-examined more extensively than the other witnesses. She reiterated that she will always credit a photographer when they ask to be credited or if they have a relationship. She described Mr Makholo as a random person only subsequently learning of Pixel. She said she had not asked for their Twitter handle but that Mr Makholo had given it to her: she credited them without checking their page. Asked about the camera image, she explained that the “emoji” means photo credit. She understood that she was crediting a random photographer.

[35] Ms Duma confirmed that the photograph on the Simba Instagram account was of her. She confirmed that Simba had a campaign with her as an influencer. When asked

about the contract deliverables, Ms Duma was unclear, indicating that she had posted a video and not a picture. She was shown a copy of her contract which recorded as a deliverable that an image was to be provided by the influencer. When asked if she provided a photograph, she explained that she had provided different photographs, but Simba had indicated that the photographs were too suggestive and revealing, Simba being a family brand. She then suggested that they go to her Instagram account and see what is suitable. That is where they found the disputed photograph. She accepted that it is the same photograph as from her Instagram account.

[36] She was asked whether she understood that permission must be obtained before using a photograph. She answered that she understands that to be the case when it is communicated. She was asked whether she had told her lawyers that she did not think she required permission. Ms Duma sought to rely on the permission Mr Makholo had given her.

[37] Asked about her WhatsApp conversation with Mr Makholo, she testified that “Don’t forget me bro” means: please don’t forget to send the photographs. On “please credit”, she understood it to mean “please credit Pixel”.

[38] She was asked whether as a media personality over 15 years she did not understand that one must get permission before using a photograph. She testified that she did not. She was told that it would be submitted that that was improbable. She did not want to comment further.

[39] She was then cross-examined about her contract with the second defendant, which contains a series of provisions that require observance with law and copyright.

[40] Her demeanour during cross-examination was generally open and candid. However, she displayed elements of condescension suggesting a dismissiveness towards others. She became evasive when pressed about the use of the photograph in the Simba campaign, continually asking for rephrasing of questions or clarification even when a question was clear. At a point, she did not answer a question and was visibly uncomfortable. She was emphatic that Simba, however, chose her photograph off Instagram. She confirmed nonetheless that that photograph was not credited to the plaintiff and that no consent was obtained to use it. Adverse aspects of her demeanour referred to above at times affected the credibility of her testimony.

[41] She confirmed that it was not in dispute that she was paid for the campaign with Simba. She confirmed too that it is not in dispute that the picture was taken by a Pixel employee.

[42] Her testimony on her understanding of copyright laws is that while one cannot use original works of others, she is not aware that she must get permission each time that a photograph is taken of her. She accepted that she did not take the photograph herself and did not credit Pixel, but she then testified that she believed that she contributed to the picture as she orchestrated the shoot.

[43] Asked whether they accepted that her use of the disputed photograph for a campaign in which she received R400 000 amounted to exploitation for financial gain, she answered that it did not as Simba terminated the contract and she was accordingly

not compensated. However, she confirmed that she would have been paid R400 000 if the campaign had run. However, she does not know whether that amounts to exploitation for financial gain. When it was put to her that she had earlier testified that she had been compensated, she answered that she was not asked that and when pressed she emphasised that she does not recall being asked that question. When asked why the contract was terminated, she explained that it occurred when Pixel had reached out to Simba. In this regard she confirmed that a legal letter to Simba caused the agreement to be terminated.

[44] Again pressed on whether she is aware that using a protected work without a license is an infringement of copyright law she answered: when communicated, yes. She was pressed on whether this could be her view given her experience of 15 years as a personality and she maintained her position. It was put to her that it will be argued that it is improbable that she would not know you need permission, she answered that she would reserve her comment. She smiled when giving this testimony. This is an aspect of her evidence in respect of which her evidence lacked credibility.

[45] She was pressed on the reasons Simba terminated the contract and that she did not take issue with it. She answered that Simba gave her no platform to fight and had taken a decision.

[46] In re-examination she re-iterated that Simba used the photograph in question because of how she was dressed.

Did any copyright vest in Homecoming Events in light of section 21(1)(c) of the Act?

[47] The first issue raised during argument was whether Pixel is the owner of any copyright in the disputed photograph in circumstances where Pixel had been contracted by Homecoming Events to take photographs of the event and had paid for these services. In this regard, the defendant relies on section 21(1)(c) of the Act.¹² It may be noted that the issue was not pleaded but I deal with on the assumption (and without deciding) that due to the incidence of the onus it may be ventilated.

[48] In my view, this submission must nevertheless fail as the evidence demonstrated that any copyright probably remained with Pixel notwithstanding its contractual relationship with Homecoming Events. First, that copyright vested with Pixel accords with how Ms Yuve explained Pixel's approach to contracting in her evidence. It is moreover supported by Ms Yuve's evidence about how she learnt of the alleged infringement, through Homecoming Events, whose representative sought to ascertain whether their consent had been obtained for use by Simba. This reflects how they understood the vesting of copyright as between themselves. Moreover, Ms Duma produced in discovery a Pixel quotation, albeit with another contractor, which demonstrates its usual terms and conditions, which entail that copyright remains with them. That was put to Mr Matshilisa in re-examination in response to questioning about the fact that Pixel had paid Homecoming Events.

[49] In the circumstances, Pixel has, in my view, demonstrated that it retained ownership in copyright notwithstanding the provisions of section 21(1)(c), by virtue of section 21(1)(e).

¹² See above n 6 and para 6.

[50] Moreover, I am of the view that, contrary to Ms Duma's approach, she was probably aware that copyright vested in others, whether Pixel or another. She specifically credited Pixel, and the evidence shows that the request to do so was expressly made on two occasions. She is an experienced influencer and frequently photographed, and she was probably aware that copyright probably vested with others. She made no attempt to obtain consent and the obvious point of enquiry to obtain consent would have been Pixel, whom she had credited on her Instagram account. She was, furthermore, insistent that it was ultimately Simba who located the photograph on her Instagram account. The manner in which this evidence was given struck the Court as an attempt to shift responsibility for a known breach.

Is Mr Mapholo the author of the photograph?

[51] As set out above, under section 1 of the Act, an "author" in relation to a photograph means "the person who is responsible for the composition of the photograph." The plaintiff contends that it is the author as it took the photograph (through its employee) contributing Mr Mopholo's skill and know-how as a photographer, the equipment and performing the editing process. Ms Duma contends that she is the author as she is responsible for its composition, specifically her attire, look, make-up, hair, her pose and her proposal (though somewhat unexplained) regarding location.

[52] The identification of an author is a question of fact.¹³ Moreover, copyright is concerned with the expression of ideas; put differently, the author is the person who gives effect to the idea.¹⁴

[53] When interpreting legislation, meaning is given to words used considering, amongst other things, the language used, the context in which the provision appears and the apparent purpose to which it is directed.¹⁵ The process of interpretation is objective not subjective.¹⁶ That the Act refers to the person responsible for the “composition” of the photograph is not without significance. Had the legislature intended to make the taker of the photograph its author, it would surely have said so.¹⁷ Viewed in this way, the “composition” of a photograph may mean something different to the taking of a photograph. However, the reference is to composition “of the photograph”. In my view, those words suggest that the author is the person or persons concerned with composing the photograph rather than its scene or object. In turn, that would mean that it will usually be the taker of the photograph who, whether alone or with others, is responsible for its composition. Even on the limited evidence before Court, that process included not only taking the photograph, with the attendant choices on matters such as angle, focus, timing and lighting, but editing the photograph to completion as a digital image.

¹³*Pan African Engineers v Hydro Tube and another* 1972(1) SA 470 (W) (*Hydro Tube*) at 472B-C; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987(2) SA 1 (A) at 36D-E.

¹⁴ *Hydro Tube*, above n 12 at 472B-C and 472E.

¹⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) para 18.

¹⁶ *Id.*

¹⁷ Cf the Nigerian Copyright Act section 51(1) (Copyright Act Cap C28 Laws of the Federation of Nigeria 2004). For a comparison see Ncube CB and Oriakhogba DO “Monkey Selfie and Authorship in Copyright Law: The Nigerian and South African Perspectives” PER/ PELJ 2018(21).

[54] In my view, context and purpose support that conclusion as a work is an artistic work irrespective of the quality thereof. If the Act seeks to protect an endeavour irrespective of its quality, it would be self-defeating if authorship is lost because another contributed to its quality. An interpretation that focuses on the composition of the scene of a photograph would also render the protection afforded to photographers arbitrary as, for example, a photographer of a natural scene would be protected whereas a photographer of people may lose protection. It would also introduce great uncertainty as many scenes that are photographed are created in part by others, for example, photographing a theatrical production or concert, even a garden.

[55] This does not mean that there may not be cases where the creation of the scene may be integral to the composition of the photograph at least through co-authorship, but it is not necessary to decide that issue.¹⁸ It was not contended that there was any co-authorship in this case.

[56] In any event, on the evidence before me, I am unpersuaded that any contribution made by Ms Duma to the photograph entailed its composition as contemplated by the Act. Indeed, save regarding her attire and look, the evidence was sparse as to how she contributed to the photograph. I am of the view that her choice of attire and look did not result in her being responsible for the “composition of the photograph” properly interpreted.

Is the work original?

¹⁸ Cf *Peter-Ross v Ramesar and another* 2008(4) SA 168 (C) at 176C-E.

[57] For a work to be protected by copyright it must be an original work.¹⁹ Originality does not require creativity,²⁰ and “a work is considered to be original if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.”²¹ In my view, the requirement of originality is easily met in this case.

Damages

[58] In the result, copyright infringement is established and the question is what damages are payable. A plaintiff is entitled to recover normal delictual damages, in other words, its patrimonial loss or the amount by which Pixel’s patrimony was diminished as a result of the conduct.

[59] During the course of evidence, much was made of the fact that Ms Duma was not informed that Pixel held copyright in the work. Under section 24(2) of the Act, a plaintiff is not entitled to damages where, at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates. This was not pleaded. Nonetheless, to the extent the issue may be regarded as fairly and duly raised, on the evidence before me, I have concluded that Ms Duma was probably aware that copyright subsisted in the work, because of her extensive experience as a social influencer, the terms of her own influencer contract, the circumstances in which it came about that Simba acquired access to the disputed photograph and, moreover, the evasive and overall manner in which she answered questions on and related to the issue under cross-examination.

¹⁹ Section 2(1) of the Copyright Act.

²⁰ *Haupt t/a Soft Copy v Brewers Marketing Intelligence* 2006(4) SA 458 (SCA) para 35.

²¹ *Id.*

[60] The plaintiff has claimed R200 000 damages on the basis of what Pixel pleads it would have been entitled to charge Ms Duma for the photograph. This is pleaded to include various items including a production manager fee (including administration, coordinating tasks and responsibilities, the tracking of deliverables, including data backup and digital storage for a year) – R4500; the use of a photographer, lighting director and edit of images (R14 600), a gear fee including the usage of a Nikon D850 DSLR Camera Kit (R22 366), total production value (R41 466) Agency fee (25% of production value) (R10 366, 50); advertising usage for website purposes only (15% of production value) (R12 439.80), internet advertising (R29 026.20, usage across Africa (125% of production value) (R51 832.50); damages and legal fees (R54 869). As indicated above, Ms Yuve testified about the manner in which damages were calculated. In doing so she focused on the scale of the campaign when an influencer acquires photographic services, mentioning the need for a production manager and lighting director, various lenses, makeup artists, wardrobe attendant and a hairstylist. Ultimately, however, the testimony was given with reference to the pleadings. Cross examination focused on the fact that Home Coming Events reimbursed Pixel for most of these charges and that Pixel did not use most of the itemized gear when taking the disputed photograph. Pixel was thus constrained to contend that the amounts represent what they would have charged for a shoot of the nature Simba would have required. In other words, the damages are based on what Pixel, hypothetically, would have charged for the photograph.

[61] In my view, it is open to Pixel to calculate its damages based on what it would have been able to charge for the photograph. However, it has not proven the full

damages claimed. First, an item of R54 869 is included which represents damages and legal fees which stands to be excluded. Secondly, the amounts appear inflated to represent more of a wish list than a fee that could be commanded. According to the evidence, Pixel's own contract contemplates that where photographs are used for advertising campaigns or other promotional activities, a usage fee is charged. This suggests that its own fee structure for the use of a photograph in a case such as this differs from and is probably less than the cost independently of generating the photograph on a separate campaign. As intimated in cross-examination this is because the photograph has been generated and paid for by way of a separate contract, here with Homecoming Events. That is so, even if one accepts, as I do on the evidence in this case, that that would be based on a proportion of the cost of an independent campaign, possibly a material portion. In the absence of more pertinent cross examination on the issue, I accept that a percentage of the claimed amounts are proven. Thirdly, it is improbable that Pixel would charge the full gear fee when the photograph in question required limited gear and the full gear was already in use for the event. Fourthly, the evidence did not go far enough to explain the inclusion of each of the itemized costs, for example, the agency fee, advertising usage for website purposes fee, internet advertising fee and usage across Africa fee. Fifthly, damages are ultimately in respect of enabling Simba's use of only the disputed photograph for commercial purpose without Pixel's consent. Pixel, through Mr Mopholo, either authorized Ms Duma to use the photographs on her Instagram account or led her to believe she was so authorized. In context of the facts of this case, the items that in my view have been sufficiently proven as damages for the commercial use of the disputed photograph are

limited to a fee comprising one third of the following fees a production manager fee (R1 500), the usage of a photographer, lighting director and edit of images (R4 867) (it was conceded under cross-examination that there was no need for a lighting director), one third of the gear fee (R7455) and the production value (R13 822), totalling R27 644. In this regard, I accept that a commercial photography outfit may charge materially less or more than this amount for a photograph of this sort. Nonetheless, I am confined by the limited evidence before me.

Costs

[62] Although the plaintiff has not proven all of its damages, the plaintiff has succeeded in its claim, which is of importance to it and understandably brought before this Court. It is entitled to its costs. In my view costs are warranted on Scale B.

[63] The following order is made:

1. The first defendant is liable to pay damages to the plaintiff in the amount of R27 644 and costs of suit on Scale B.

SJ Cowen

Judge of the High Court

Gauteng Division,

Johannesburg

Dates of hearing: 20 & 22 May 2025

Date of judgment: 16 September 2025

Appearances:

For the plaintiff: MT Matlapeng instructed by Molai Attorneys

For the first defendant: M Matlala, Matlala & Associates