



28/97

***THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

Case No 339/95

In the matter between

PIPPA SKOTNES

APPELLANT

and

SOUTH AFRICAN LIBRARY

RESPONDENT

CORAM: MAHOMED CJ et VIVIER, MARAIS, SCOTT,
ZULMAN JJA.

HEARD: 11 March 1997

DELIVERED: 26 March 1997

J U D G M E N T

VIVIER JA:

The appellant is an artist, a lecturer in fine art and a publisher of fine prints and hand-made books through a printing press, Axeage Private Press, owned and operated by her. The respondent is a legal deposit library in terms of the Legal Deposit of Publications Act 17 of 1982 ("the Act"). During 1991 the appellant produced a work "Sound from the Thinking Strings" of which a total number of sixty-five specimens were produced ("the work" or "the works"). After she had refused to comply with the respondent's demand to furnish it with a free copy of the work, the latter instituted an action in the Magistrate's Court for an order pursuant to sec 2(1) of the Act compelling her to do so. The action was defended and at the conclusion of the trial it was dismissed with costs. The respondent's appeal to the Cape Provincial Division succeeded with costs and an order was

substituted for that granted by the Magistrate directing the appellant to supply the respondent with a free copy of the work and to pay the costs of the action. With the leave of the Court *a quo* the appellant now appeals to this Court.

Sec 2(1)(b) of the Act provides that one copy of every publication published in the Republic shall within the period specified be supplied by the publisher thereof to every legal deposit library free of charge if copies of that publication are intended to be sold in the Republic to members of the public. Sec 2(2)(a) provides that a copy of such publication shall be supplied to a legal deposit library "within 30 days after the publisher commenced distributing, selling or supplying such publication to members of the public ...".

In sec 1 of the Act the word "publication" is defined to include "a printed book, newspaper, magazine, periodical,

journal, pamphlet, brochure, sheet, card or portion thereof or any other similar printed matter". The word "copy" is not defined in the Act.

It was not in issue in this Court that the work was a printed book. The first issue was whether it was a "printed book" within the definition of "publication" in the Act. The second issue was whether "copies" of the work within the meaning of that word in sec 2(1)(b) of the Act ever came into existence. The third issue in the Courts below, ie whether the appellant intended to sell the works to members of the public in this country, was conceded in this Court by counsel for the appellant. In my view this concession was correctly made.

In conception, structure, production and presentation the work is clearly a printed book. According to the appellant, she conceived the idea of producing a book which would be, as she

described it, a visual, literary, archaeological and historical interpretation of the final years of the extinct Southern or Cape Bushmen, the /Xam, after reading recorded interviews with some /Xam people in the archives of the University of Cape Town. She said that the book was intended as part of a research project towards her PhD degree for which she had received a study grant from the University. She commissioned a poet, Stephen Watson, to interpret and rewrite some of the recorded interviews. An archaeologist, John Parkinson, and an historian, Nigel Penn, were commissioned to contribute essays. Her own contribution consisted of three colour and seventeen monochrome etchings. The appellant described the end product as "... an interdisciplinary book. The poems, the images, the historical and archaeological essays create links with each other, each adding something to the understanding of the others ...".

The work comprises of a foreword written by Stephen Gould, a table of contents, a bibliography and poems and essays which are interspersed with the appellant's etchings. The textual material runs to over one hundred pages and the etchings are distributed over some forty pages.

As to the printing process involved in the production of the works, the appellant testified that individually produced sheets of paper made from linen or cotton were used to produce all 65 specimens. A silk-screen process instead of the more commonly used letterpress or photo-lithographical means of printing was used to print the text. It was conceded that screen-printing involved mechanical means of reproduction although the press was operated by hand. Some pages were blind-embossed using copper plates cut into the required shapes and line-printed, without the use of ink, through an etching press which left the impressions of these

shapes in the paper. The etchings were all printed from copper plates. These were first coated with different types of gummous compositions made from acid resistant resins or waxes. Drawings were then made on the plates and the drawings exposed to acid which etched the drawn areas creating indentations in the plates. The appellant explained that once an etching was completed it would be printed by first covering the plate with ink, then wiping the ink off the surface of the plate, leaving ink in the indentations. The plate would then be placed on the printing paper and rolled by hand through the etching press so that the paper impressed itself into all the etched areas, transferring the ink from the grooves onto the paper. In the case of the colour etchings two copper plates were used for each series of etchings. Each print was signed and the copper plates destroyed. Both text and etchings were thus reproduced by printing using a mechanical method of printing.

For all that counsel for the appellant submitted that the work was not a "printed book" as defined in the Act. He sought to rely on the *eiusdem generis* rule and submitted that the words which follow "printed book" in the definition clause ie "newspaper, magazine, periodical, journal, pamphlet, brochure, sheet, card" restrict the meaning to be given to "printed book". The submission was that these items were all mass produced, inexpensive, machinery produced publications involving essentially commercial printing by means of which a large number of identical copies came into existence. Counsel submitted that the works were not of such a kind. In *Tillmans and Co v S S Knutsford Limited* [1908] 2 KB 385 at 403, Farwell LJ said that "unless you can find a category there is no room for the application of the *eiusdem generis* doctrine". In my view the words newspaper etc do not sufficiently clearly point to any *genus* of

material which might, through the application of the *eiusdem generis* rule, serve to confine "printed book" to some species of that genus. (Cf *Secretary for Inland Revenue v Charkay Properties (Pty) Ltd* 1976 (4) SA 872 (A) at 879 A.) It is, moreover, difficult to formulate with anything approaching reasonable precision the limitation contended for. In *Rennie NO v Gordon and Another NNO* 1988 (1) SA 1 (A) at 22 Corbett JA quoted with approval the following passage from the judgment of Trollip J in *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557 E-G.

"Moreover, a strong factor militating against the implication of any such limitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious ... I think that the same must apply to implying a term in a statute, for the process is the same ..."

In the present case there is no determinable limitation to the

words "printed book" to be found in the context. To mention only two vague and uncertain aspects of the suggested limitation: when does a printed book become mass produced or inexpensive? With regard to the submission that only inexpensive "copies" were intended to be hit by the Act I should point out that sec 2(4)(d) of the Act expressly provides that the obligation to supply a free copy to the respondent extends to a de luxe edition of a publication.

There is no warrant for a restrictive interpretation of the words "printed book" to be found in the scope and purpose of the Act either. It was not in issue that the Legislature's intention in passing the Act was to build up a national collection of books providing a record of cultural and scientific activities. To this end legal deposit libraries were empowered to collect, preserve and index published material as fully as possible and make it available for study and research purposes in order to enrich the cultural and

scientific life of the present and future generations of South Africans with specific reference to literature. By using the word "publication" in sec 2(1) of the Act as opposed to "book" in the corresponding sections of the previous statutes dealing with legal deposit (sec 150 of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 and sec 46 of the Copyright Act 63 of 1965) the Legislature, in my view, clearly intended to widen the ambit of the requirement that free copies be supplied to legal deposit libraries.

Counsel for the appellant submitted that the words "printed book" should be given the restrictive interpretation contended for since a grammatical construction of these words would lead to a result which was so clearly unjust, unreasonable and absurd that it could never have been contemplated by the Legislature. He submitted that there may be cases where only one or two specimens

of a book are published and offered for sale in the Republic and that it would be unreasonable and absurd to require the publisher to supply one free specimen to the legal deposit libraries. The Act, however, provides for exemptions from the obligation to supply free copies and for exclusions from the operation of the Act. Sec 3(1)(a) provides that if the Minister is of the opinion that the publisher of any particular publication will, owing to the high cost of the publication, suffer serious financial hardship if he supplies a free copy to every legal deposit library, he may exempt such publisher from the obligation in respect of such legal deposit libraries as he may specify. In terms of sec 3(1)(b) the Minister may not so exempt a publisher from the obligation in respect of the respondent. In terms of sec 3(2) a legal deposit library is itself empowered to grant exemptions from the said obligation. Sec 4(1)(c) of the Act provides that the Minister may by notice in the

Gazette exclude from the operation of the Act any publication or publication belonging to any category of publications. There is no provision similar to sec 3(1)(b) limiting the Minister's power under sec 4(1)(c) to legal deposit libraries other than the respondent. It would thus be open to him, should he consider it to be justified, to exclude from the operation of the Act a publication of which there are so few that it would be unreasonably burdensome to require a free copy to be supplied.

In terms of sec 2(1)(b) of the Act a publisher only has to supply a free copy if more than one copy are intended to be sold. In the case of the publication of a single specimen of a book postulated by counsel for the appellant the obligation cannot therefore arise.

I am accordingly unable to agree with the submission that a literal interpretation of the words "published book" will lead to a

result which is absurd or unreasonable. In my view no reason exists for not giving the words their ordinary grammatical meaning.

I turn to deal with the issue whether "copies" of the work within the meaning of that word in sec 2(1)(b) of the Act ever came into existence. Counsel for the appellant submitted that despite the fact that the etchings were reproduced by printing from copper plates by means of a mechanical process, no "copies" were created since each of the printed etchings was an individual and original work of art. He submitted that the making of each etching required the artist's artistic skill, imagination and expertise. The appellant's evidence was that her aim was to obtain as close a likeness as possible between the prints taken from one plate, but that in the event no one etching was identical to any other.

I accept that the making of each print required the artist's artistic endeavour and I further accept that each etching was a work

of art. The fact, however, that a particular publication may contain printed works of art or may be a work of art is immaterial and does not prevent it from being hit by the Act which draws no distinction between publications which are works of art and those which are not. Furthermore, even if each etching can be termed an "original", as indeed each is in the art world, despite the fact that all the etchings from one plate were essentially replicas of one another, this does not assist the appellant. The use of the word "copies" in this legislation obviously does not imply the existence of an "original". What copy of a newspaper is the original? In my view the word "copies" should bear its ordinary meaning which includes "each of the written or printed specimens of a work or publication". (The New Shorter Oxford English Dictionary on Historical Principles, Vol I p 509. See also The Oxford English Dictionary, second ed, Vol III p 915.) The word "eksemplaar"

in the Afrikaans text of the Act expresses this meaning more clearly. In the present case each of the printed etchings is such a specimen of the corresponding etchings in the other works. And each work is such a specimen of the other works. I therefore conclude that "copies" of the work were created within the meaning of that word in sec 2(1)(b) of the Act.

In the heads of argument submitted on behalf of the appellant it was contended that sec 2 of the Act was in conflict with the appellant's fundamental rights under the Constitution of the Republic of South Africa, Act 200 of 1993. The trial in the present matter commenced and was completed before the Constitution came into operation, and this case must therefore be disposed of without applying Chapter 3 of the Constitution (*S v Mhlungu and Others* 1995 (7) BCLR 793 (CC) at 813 J - 814 B). In the light of this and other decisions of the Constitutional Court

counsel who appeared for the appellant at the hearing of the appeal in this Court did not attack the constitutionality of the Act. Moreover, it cannot be said that this is one of those exceptional cases where the enforcement of previously acquired rights would, in the light of present constitutional values, be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis. See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 866 E-G and *Key v Attorney-General, Cape Provincial Division, and Another* 1996 (4) SA 187 (CC) at 192 D-H.

It was finally submitted by counsel for the appellant that in the event of the appeal being dismissed a special order as to costs was justified. He suggested that the respondent be ordered to pay the appellant's costs in this Court and in the trial Court or at least that there be no order as to costs. It was submitted that instead

of instituting an action against the appellant in the Magistrate's Court the respondent should have followed the simple and inexpensive procedure provided by sec 5 of the Act. This section provides that if a publisher fails to supply a copy of a publication to a legal deposit library in accordance with sec 2, the library may by written notice demand that it be supplied with a copy within a specified period of not less than 30 days, and if upon the expiration of that period the copy has not been received, the library may forthwith purchase or otherwise acquire a copy or cause a reproduction to be made and recover the cost thereof from the publisher.

It is clear, however, that even if the respondent had followed the sec 5 procedure, litigation to establish that it was entitled to a free copy of the work in terms of sec 2 of the Act in order to recover the cost referred to in sec 5, was unavoidable. By the time

the respondent decided to institute the present action the appellant had refused the respondent's demand to be supplied with a free copy of the work and had adopted the unequivocal attitude that the respondent was not so entitled. The failure to invoke sec 5 therefore provides no justification for any special order as to costs. It was suggested that this was in the nature of a "test case" and that this justified a departure from the usual costs orders. Unsuccessful litigants cannot escape liability for costs by labelling the litigation as a "test case" when it is clear that a resort to litigation was the only way in which the successful party could obtain delivery of that which the unsuccessful party unlawfully refused to deliver.

In the result the appeal is dismissed with costs, such costs to include the costs of two counsel.

W VIVIER JA.

Mahomed CJ)
Marais JA)
Scott JA)
Zulman JA) Concurring.