

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2008/42000

In the matter between:

TECHNICAL INFORMATION SYSTEMS (PTY) LTD

Plaintiff

and

**MARCONI COMMUNICATION (SOUTH AFRICA)
(PTY) LTD**

First Defendant

TELKOM (SOUTH AFRICA) LTD

Second Defendant

SUMMARY

SPILG, J:

ISSUES:

Court a quo had granted a final interdict on motion for copyright infringement but dismissed the relief to hold an enquiry into damages under the Copyright Act (The Cadac case in SCA subsequently held that such relief was competent) .

The Defendants abandoned their appeal before the SCA. Plaintiff then instituted action proceedings for damages relying on the court a quo's findings in granting the interdict. Both parties raised issues based on the consequences of the previous proceedings. The Plaintiff sought a separation of these and certain other issues.

COPYRIGHT- DEFENCE OF ABUSE OF COPYRIGHT

- *Since claim is not based on unlawful competition Defendants not entitled to rely on abuse of copyright as an absolute defence to debar a damages claim. Damages claim based on statutory liability under the Copyright Act which established the breach and breach confirmed by Court a quo. Only question is the appropriate determination of damages having regard to the extent of the infringement*

JUDGMENT- RES IUDICATA, ISSUE ESTOPPEL AND “ONCE AND FOR ALL” RULE;

- Court a quo's decision to dismiss enquiry into damages not res iudicata;
- “Once and for all rule” did not preclude Plaintiff from subsequently claiming damages in a separate action.
- A claim for damages is available even if the injured party sought protection against the breach or invasion of the right in separate motion proceedings. . Procedural limitations should not deprive a party of obtaining effective and timeous redress; namely to interdict by way of motion and separately sue by way of action for damages arising from that breach or invasion.

Minister of the Interior and Another v Harris and Others 1952(4) SA 769 (AD).applied Consol Ltd t/a Consol Glass v Twee Jong Gezellen (Pty) Ltd and another (2) 2005 (6) SA 23 (C) distinguished

- Plaintiff precluded from recovering in present action as damages (based on legal costs incurred in mitigating loss) the attorney and own client costs incurred in the earlier proceedings. They remain a costs issue and the Plaintiff had sought and recovered party and party costs in those proceedings;
- Defendants precluded by res iudicata from raising the following defences that had been rejected by the court a quo; Defendants’ denials of copyright infringement including a denial of substantial reproduction/adaptation and also their claim to a licence from the Plaintiff to reproduce;
- The statutory “fair use” defences were not raised in earlier interdict proceedings but can be raised now. Had an enquiry into damages proceeded under the earlier case then no reason why an amendment would not have been allowed. No prejudice to Plaintiff. Aside from being raised as an absolute answer to the claim it may also affect the issue of damages, an issue that was not adjudicated upon.