REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG SOUTH LOCAL DIVISION, JOHANNESBURG

CASE NO: 35355/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

SIGNATURE ..... DATE 10/04/14

In the matter between:

GERT HENDRIK VAN ZYL	1st Applicant
ABASERVE CC	2nd Applicant

and

MEAT MATRIX SOFTWARE (PTY) LTD	1st Respondent
DEON SNYMAN	2nd Respondent

JUDGMENT

SWARTZ AJ:

[1] The first and second applicants instituted application against the first and second respondents seeking, inter alia, interdictory relief against copyright infringement. The respondents gave notice of their intention to oppose the application on 17 October 2013 and filed their answering evidence on 25 November 2013. On 12 March 2014, the respondents proceeded to set the application down for hearing. On 8 May 2014 the applicants gave notice of their intention to withdraw the application in terms of Rule 41, tendering the respondents' costs of the application. I was called upon to decide only in respect of the scale of the costs to be paid by the applicant. The respondents contend that the applicants must pay its costs on the attorney and client scale.

[2] The first applicant is the owner of the copyright subsisting in the Abaserve computer program, which is a data capturing and management system used by abattoirs. The program is a computer program as defined in section 1(1) of the Copyright Act, Act 98 of 1978 (The Act). The second applicant, with the consent of the first applicant commercially exploits the program and the compilation for the benefit of both the first and second applicants. The applicants maintain that the respondents marketed and sold a product entitled Meat Matrix, in competition with the applicants. The Meat Matrix program and the Meat Matrix compilation, respectively, according to the applicants constitute a reproduction or adaptation of a substantial part of the Abaserve program and compilation. It is alleged that this reproduction and or adaptation was made by the respondents without the authority of the first applicant, which conduct amount to copyright infringement. On the advice of senior counsel the main application was instituted, seeking inter alia, interdictory relief against the respondents. The main application was based on the copyright subsisting in the Abaserve computer program. The application was instituted on 9 September 2013 and the respondents answering evidence was filed on 25 November 2013. Prior to the filing of the answering evidence

the parties were involved in disputes, inter alia, pertaining to discovery in terms of Rule 35.

[3] The applicants' attorney, Ms E De Kock filed an affidavit in support an application for leave to withdraw the main application, which was initially opposed, in which she states that at the time of the filing of the respondents answering evidence it was close to the festive season and senior counsel employed at that time was unavailable to attend to the matter until well into the new year. In early 2014 the services of a new senior counsel was obtained in order to consider the answering evidence filed by the respondent. Senior counsel advised it was not feasible to pursue the main application for a variety of reasons and he advised the withdrawal of the main application and the institution of an action based on the copyright infringement. A summons and particulars of claim have been drafted and issued by the applicants to be served on the respondents as defendants in that action. The applicants served a notice of withdrawal of the application on the respondents and tendered their taxed costs.

[4] The parties agreed eventually to the withdrawal of the application and it was submitted on behalf of the applicants that it was not necessary for a punitive costs order. The applicants have acted on legal advice obtained from senior counsel, firstly in instituting the application and secondly, in withdrawing the application. It was contended that the applicants had not acted recklessly or in abuse of the courts process. The applicants did not contest that the respondents are entitled to be awarded the costs of the main application.

[5] The basis in which the respondents seek a costs order on a punitive scale is because of the unexplained and undue delay in the launch of the application. The respondent submits that there was a near

decade-long delay by the applicants to launch the main application, despite threats to do so early in 2006. The respondents avers that its computer application of which the applicants complain is an independent work that is in no manner a reproduction or an adaptation of any work of the applicants. There were no attempts whatsoever made to resolve the decade-long dispute. On the contrary, it was submitted that the respondents had to contend with numerous and frequent allegations by the first applicant of alleged copying and even fraudulent and criminal activities. After filing of the answering affidavit, the applicants lapsed into complete inactivity and did absolutely nothing to move the application forward to finality. The first reaction of the applicants came with the service of the notice of withdrawal of the application after the application had already been allocated for hearing on 15 May 2014. It was submitted on behalf of the respondents the main reason why the applicants did not persist with the application was specifically because the application was fatally defective and that it had no prospects whatsoever of success. The notice of withdrawal of the application was made at a very late stage when the respondents had already been put through unnecessary expense and ordinary party and party costs would not completely recompense the respondents.

[6] It was further submitted on behalf of the respondents that the applicants failed to found a case on infringement of copyright and the misuse of confidential information.

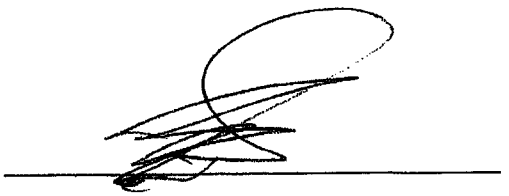
[7] As the parties had agreed to the withdrawal of the application, I agree with the submissions made by counsel on behalf of the respondent that the applicants waited until a very late stage to withdraw the application, irrespective of the reasons advanced for the decision to withdraw the application. The application could have been withdrawn much sooner and not at the eleventh hour when the matter had already been allocated to me. An award of an

attorney and client costs is not lightly granted by a court and the court leans against awarding attorney and client costs. Such costs are only granted on rare occasions and normally only where special grounds are present. Although the applicants were misguided by senior counsel whose services were engaged and who settled the papers, it still does not explain the inexcusable lengthy delay in the withdrawal of the application. The respondents are entitled to costs on the attorney and client scale.

[8] The respondents have not filed a notice of counter application. There is no separate heading in this regard in the answering affidavit filed on behalf of the respondents. The only reference to an interdict being sought is in the answering affidavit where it is stated that, "in the premises, I respectfully say that I am entitled to an interdict restraining the First Applicant from making threats and dissimulating untruths about and concerning the respondents and their software. I will seek such relief at the hearing of this application." A notice of counterclaim is not necessarily required. It is preferable. Such a counterclaim should be embodied in a separate part of the document. The authors in **Herbstein & Van Winsen, The Civil Practice of the High Court of South Africa (5th Edition) at 667** stated the following: "Where the counterclaim arises out of the same facts that constitute the defence to the claim in convention it is usual practice for the Defendant to refer in the counterclaim to the facts set out in the plea and to incorporate them by reference into the counterclaim. Apart from this, a Defendant who intends filing a counterclaim should not embody the subject-matter of the counterclaim in the plea. The fact that the rule allows the counterclaim to be set out in a caution of the document containing the plea does not mean that the averment in the plea should be allowed to become mixed up with those in the counterclaim." I agree with the submissions of the applicants' counsel that there is no counter application in respect of which an interdict can be granted

Order:

The applicants are ordered to pay the respondents' costs of the application, such costs to be taxed on the attorney and own client scale and to include the costs occasioned by the employment of senior counsel.



SWARTZ AJ

ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Counsel for the Applicant: Adv R. Michau

Instructed by: De Kock Attorneys

Counsel for the Respondent: Adv B. Bester SC

Instructed by: Rossouw And Prinsloo Inc

Date of Hearing: 15 May 2014

Date of Judgment: 10 June 2014