REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

..... 23/12/2020

SIGNATURE DATE

CASE NUMBER: 2019/40177

In the matter between:

PETA ATTORNEYS **APPLICANT**

And

PROVISION RESEARCH AND EVENTS CC **FIRST RESPONDENT**

ARUSHA DASRATH **SECOND RESPONDENT**

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application for a final interdict. It is alleged that the first and second respondents infringed the applicant's copyright in a literary work.

[2] The requirements for granting a final interdict are trite: namely a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. The second and third requirements are not in dispute. The only issue that needs to be determined is whether the applicant had established a clear right.

BACKGROUND FACTS

[3] Ms Peta is an attorney and the sole director of the applicant, Peta Attorneys. The first respondent, Provision Research and Events CC, is a training service provider. It provides training to corporate companies on compliance topics as well as skills development for employees. It hires trainers to conduct courses.

[4] During the course of 2017, the second respondent, Ms Arusha Dasrath ("Ms Dasrath"), the sole member of the first respondent, and the applicant had an arrangement, whereby as and when required, and on conclusion of an agreement, the applicant would facilitate training on behalf of the first respondent at a fee. For each training session the applicant would develop a training outline for the purposes of marketing the training. On the first respondent securing the delegates for attendance of the training, the applicant would then develop training material which Ms Peta would present and conduct training on.

[5] On 12 July 2019, the respondents requested the applicant to conduct training on the subject of social and labour plan drafting. The applicant developed a training outline and sent it to the respondents in order to market the training to be offered by

the first respondent. On or about 16 September 2019 Ms Dasrath requested the applicant to provide the training and the applicant sent her a quotation. On 17 September 2019 Ms Dasrath contacted Ms Peta's business partner, a certain Ms Kunene, by email to enquire whether she could conduct the said in-house training. Attached to the email was a training outline, which, save for a couple of minor changes, was the exact same one the applicant had sent Ms Dasrath the day before.

[6] On becoming aware of this, the applicant wrote a letter to Ms Dasrath, accusing her of wrongful and unethical conduct and theft of intellectual property. Ms Dasrath responded and stated that she is referring the matter to her lawyers and to the Legal Practice Council.

[7] It is common cause that the training did not take place and the training material was never provided to the respondents.

[8] The applicant submits that the respondents' conduct is unfair, unlawful, prejudicial and more particularly in contravention of the provisions of the Copyright Act 98 of 1978 ("the Act"). The applicant seeks an order in the following terms:

1. The respondents be interdicted from unauthorized use of literary work authored by the applicant in order to solicit business;
2. The respondents be interdicted from distributing the applicant's literary work for the purposes of trade and any other purpose to the extent that the applicant as the copyright owner is prejudicially affected;
3. The respondents be ordered to pay damages for the infringement of the applicant 's copyright;
4. The respondents be ordered to account for the profits made in respect of the infringed copyright;

5. The respondents be ordered to pay the costs of this application on a scale as between attorney and client.

[9] The prayer for damages is not proceeded with in this application.

[10] Ms Peta is a qualified South African mining law attorney who provides specialist advice and training in the aforementioned field of law. The applicant submits that in developing the training outline on behalf of the first respondent, Ms Peta invested her skill, knowledge and experience in the field of mining law, as is therefore an author of literary work as defined in the Act. It is further submitted that the applicant, as the owner of the copyright, is entitled to enjoy the full benefit of its own work and the protection thereof as contemplated in section 24 of the Act. It is contended that if the order is not granted, the respondents will continue to wrongfully benefit from the literary work authored by Ms Peta.

[11] The respondents contend that only a generic outline was sent to them, listing the areas that the applicant would cover for the training. It is submitted that the training outline and materials referred to are not the applicant's own work as they are an abstract from the governmental plans or regulations relating to the Social and Labour Plan ("SLP") in the mining industry and are published on the Department of Mineral Resources' website. The generic outline is publicly available and contains generic words that are contained and abstracted from other literary sources. It is further submitted that the generic outline provided by the applicant was never used for any further training by the respondents and the respondents have not in any way, financially or other, benefitted from using the applicant's generic outlines as the training did not take place. The respondents therefore deny that their conduct was unlawful, unfair and prejudicial.

EVALUATION

[12] Originality is a requirement for copyright in any work.[1] The Act therefore only protects literary works from copyright infringement if it is original and has been reduced to material form.[2] There is no definition for "original" in the Act.

[13] "Literary works" is defined in section 1 of the Act to include amongst others, novels, dictionaries, reports, memoranda and speeches. Protection is granted "irrespective of the literary quality" of the work and in whatever mode or form.[3] Even examination papers,[4] a football pool coupon,[5] a spare parts catalogue,[6] and salary forms[7] have been considered as literary works worthy of protection.

[14] In its answering affidavit, the respondents do not dispute that it used the training outline the applicant had sent them in sourcing a trainer or that it is a literary work as defined in the Act. The respondents' only defence is that the outline is a reproduction of the Department of Mineral Resources material, and is not an **original** literary work entitled to be protected, as contemplated in the Act (my emphasis). The applicant denies that the training outline developed by Ms Peta is a generic outline or an abstract of government regulations.

[15] In determining whether a literary work is entitled to the protection of the Act, Harms JA held in *Waylite Diary CC v First National Bank*,[8] (a matter dealing with copyright to a diary), that *"whether an alleged work is proper subject-matter for copyright protection*

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[1] Copyright Amendment Act No 56 of 1980.
[2] Section 2(1) and (2) of the Act.
[3] Section 1 of the Act. See also *Klep Values (Pty) Ltd. v Saunders Value Company Ltd* [1987] 4 All SA 147 (AD) at
[4] *University of London Pres Ltd v University Tutorial Press Ltd* (1916) 2 Ch. 601.
[5] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* (1964) 1 WLR 273 (HL).
[6] *Payen Components SA Ltd v Bovic CC* 1995 4 SA 441 (A).
[7] *Kalamazoo Division (Pty) Ltd v Gay* 1978 2 SA 184 (C).
[8] 1995 (1) SA 645 (A) at 649H.

involves an objective test, both in respect of originality and work" and while *"it is true that the actual time and effort expended by the author is a material factor to consider in determining originality, it remains a value judgment whether that time and effort produces something original"*. The learned Judge remarked that in assessing whether a work is entitled to protection, it is permissible to give regard to the consequences of the recognition of copyright in a work of *"doubtful substance"*.

[16] The question that this court must determine is whether the training outline is in fact 'original' as that concept is understood in copyright law. In *Kalamazoo Division (Pty) Limited v Gay and Others,*[9] De Kock J described originality in the context of copyright as follows:

> "*Originality in this regard refers to original skill or labour in execution, not to original thought or expression of thought. What is required is not that the expression of thought must be in an original or novel form, but that the work must emanate from the author himself and not be copied from another work. The question that then arises is what degree of labour or skill will suffice to create copyright in an original work. It is clear that it must be shown that some labour, skill or judgment has been brought to bear on the work before copyright can be claimed successfully for such work. The amount of such labour, skill or judgment is a question of fact and degree in every case. As was said by Viscount Simon LC in Cramp & Sons case supra at 94:*
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> > ``*Nobody disputes that the existence of sufficient 'originality' is a question of fact and degree. Lord Atkinson's observations in delivering the judgment of the Judicial Committee in MacMillan & C v Cooper lays down the law on the subject in terms which are universally accepted. He said at 125:*
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> > > `*What is the precise amount at the knowledge, labour, judgment or literary skill or taste which the author or any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act 1911 cannot be*

[9] 1978 (2) SA 184 (C) at 190 A-D.

defined in precise terms. In every case it must depend largely on the special facts of that case and must in each case be very much a question of degree.'

[17] In *Kalamazoo,* the court held that copyright existed in three business forms namely an "employee's earnings record", a "time and weight register", and a "pay advice slip" because considerable time skill and labour had been expended by the author during the creation of these forms, despite the fact that the information contained therein was fairly commonplace and readily available to a person who wished to devise a similar form.[10]

[18] Whether sufficient labour or skill has created copyright in a particular original work is therefore a question of fact.[11] If the outline authored by Ms Peta is compared to the Department of Mineral Resources' SLP titled *"The guideline for the submission of a social and labour plan"* attached to the second respondent's answering affidavit, it is clear that the outline includes additional subjects which are not contained in the guideline. In particular, the work is different from the SLP contents in that reference is made to the following subjects:

1. Regulatory framework — discussion of the legislative requirements for a SLP;
2. Overview of mining right application / amendment;
3. Document structure;
4. HRD programme objectives and discussion of the contents of each HRD plan;
5. Local economic development programmes;
6. Mine closure;

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[10] See in this regard the comments made by Le Roux J in *Accesso CC v Allforms (Pty) Ltd and Another* [1996] 4 All SA 655 (T) at 666d-667b.
[11] *The Law of South Africa*, Volume 5 at par 343.

7. Enterprise and supplier development and contributions by foreign suppliers under financial provisioning for SLP;
8. Supporting documents / appendices to attach to SLP; and
9. Submission process and DMR templates.

[19] Further thereto, the respondents used the training outline in its marketing material as if developed by first respondent. In particular use of the phrases *"Timelines for implementation of mine community development", "Salient information on the application", "Who is responsible to make known the social and labour plan to the employees,* and *"Who must be contacted for follow ups, requests, reports, queries, enquiries and discussions."*

[20] In *Klep Valves supra*, the court had to determine whether engineering drawings were original and deserving of copyright protection under the Act. The court held that it made no difference *per se* that the drawings were team efforts in that the engineering designs emanated mainly from others and held that copyright would subsist in the drawings made by the draughtsmen provided the drawings themselves were original. The court also held that it mattered not that earlier drawings were followed provided that the draughtsmen contributed sufficient skill or labour to the present drawings.

CONCLUSION

[21] It is not disputed that the applicant's training outline is a literary work as contemplated in the Act. It is also not in dispute that the applicant's training outline was used to source a quotation from Ms Kunene. The only question that needs to be answered is whether the applicant's work as a whole is 'original' and protected by copyright.

[22] Originality is determined by weighing up all relevant considerations and making a value judgment. Although the time and effort spent by the author is a material consideration in determining originality, it must involve more than a mechanical, or slavish, copying of existing material.[12]

[23] The respondent submits that the applicant has not demonstrated that sufficient effort or skill have been expended in giving the SLP a new original character and that the applicant failed to place sufficient evidence before the court to support the relief sought. I disagree. In the founding affidavit the applicant gave a brief synopsis of the skill, effort and judgment used in the development of the training outline. In the replying affidavit, the applicant elaborated on how much time and effort was put into the development of the work. In *Ravenscroft v Herbert and New English Library Limited*[13] Brightman J emphasized that: *"Copyright protects the skill and labour employed by the plaintiff in production of his work. That skill and labour embraces not only language originated and used by the plaintiff, but also such skill and labour as he has employed in selection and compilation."* In *Galago Publishers (Pty) Ltd. and Another v Erasmus,*[14] the Supreme Court of Appeal, with reference to *Lad-broke (Football) Ltd v William Hill (Football) Ltd.*,[15]stated that it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.

[24] In comparing the training outline with the SLP it is clear that the training outline comprises of a compilation of the subjects of the social and labour plan and additional

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[12] *Haupt t/a Soft Copy v Brewers Marketing Intelligence Pty Ltd and Others* 2006 (4) SA458 (SCA) at para 35.
[13] [1980] RPC 193, 22 at p 204.
[14] [1989] 1 All SA 431 (A).
[15] [1964] 1 All ER 465 (HL).

topics Ms Peta included, which was clearly done based on her skill, knowledge and expertise of the subject matter. I agree with counsel for the applicant that the very reason that the respondents were prepared to source a quotation from the applicant was the fact that it acknowledged that the work produced by the applicant went beyond a mere mechanical slavish reproduction of the statute in question.

[25] On the facts presented to this court, I am satisfied that enough labour and skill has been expended by the applicant in the development of the training outline for it to be considered as an original literary work within the meaning of the Act.

[26] In the result, the applicant has established all the requirements of a final interdict. In exercising my discretion, I am satisfied that the applicant is entitled to the relief sought. An order is granted in the following terms:

1. The respondents are interdicted from unauthorized use of literary work authored by the applicant in order to solicit business;
2. The respondents are interdicted from distributing the applicant's literary work for the purposes of trade and any other purpose to the extent that the applicant as the copyright owner is prejudicially affected;
3. The respondents are ordered to pay the costs of this application.

L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement 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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 December 2020.

APPEARANCES

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Attorneys for respondent:	Sikunyana Inc Attorneys
Date of hearing:	8 September 2020
Date of judgment:	23 December 2020