



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE**

REPORTABLE

CASE NO: 23368/12

In the matter between:

MEDIA 24 BOOKS (PTY) LTD

Applicant

And

OXFORD UNIVERSITY PRESS SOUTHERN AFRICA (PTY) LTD

Respondent

JUDGMENT DELIVERED 21 APRIL 2015

GAMBLE, J:

INTRODUCTION

[1] The Respondent (“OUP”) is a South African publisher of a variety of literary works including dictionaries, in this case for use by school learners. Its parent company in the United Kingdom is the publisher of one of the world’s most recognised set of dictionaries: a dictionary that is a household name and, further, which is often consulted in litigation where the meaning of words is sought or explored.

[2] The Applicant (“*Media 24*”) is the print media arm of a large listed media company, Naspers Limited. Media 24 publishes, inter alia, dictionaries for the local market through one of its trading arms known as “Pharos Dictionaries”. Pharos’ list of titles includes monolingual Afrikaans dictionaries, as well as bilingual Afrikaans–English/English – Afrikaans dictionaries, also for use by school learners.

[3] In 1993 Tafelberg Publishers Limited, the predecessor of NB Publishers Limited, published a bilingual dictionary for use by school learners called the “*Tweetalige Aanleerderswoordeboek*”. This was followed by a revised edition in 1998 under the Pharos title and another edition in 2006 which was re-packaged as the Pharos “*Learner’s Dictionary for Schools*”.

[4] In 2007, OUP published its “*Afrikaans-English/ English-Afrikaans School Dictionary*”, whose front cover incidentally contains the by–line “*the world’s most trusted dictionaries*”.

[5] In October 2011 NB Publishers Limited (as Tafelberg was then known, and an entity ultimately subsumed in the corporate structure of Naspers) began work on a new Pharos bilingual Learner’s Dictionary. In that process, it says, it discovered that OUP had apparently copied certain of its earlier titles, thereby breaching its rights of copyright under the Copyright Act, 98 of 1978 (“*the Act*”). OUP disputed that claim and Media 24 then approached this court on application for interdictory relief restraining OUP from infringing its copyright in its Afrikaans English Learner’s Dictionary for Schools by making any reproductions and/or adaptations thereof, in particular, by the publication and/or sale of its Oxford Afrikaans-Engels/

English/Afrikaans School Dictionary. OUP denies that it is in breach of copyright as alleged.

[6] At the hearing of this matter, Media 24 was represented by Advs. AR Sholto-Douglas SC and BJ Vaughan, while Advs. WRE Duminy and A Erasmus appeared on behalf of OUP. The court is indebted to counsel for the detailed heads of argument and presentations in court, which have facilitated the preparation of this judgment.

THE REQUIREMENTS FOR FINAL INTERDICTORY RELIEF

[7] Media 24 has adopted a fairly bold stance in this application. While it is evidently intent on later pursuing a claim for damages against OUP for breach of copyright it seeks interdictory relief in the meanwhile. This it does by way of an application for final relief (launched in 2012) rather than an interim interdict *pendente lite*, which is the more customary route. I need not speculate as to the basis for this tactical decision other than to surmise that it possibly perceived that it would have had difficulty in establishing the requirements of a satisfactory alternative remedy and/or the balance of convenience that are necessary for success in applications for temporary relief.

[8] In seeking a final interdict Media 24 must establish a clear right. This it does by asking the court to make a final determination , firstly , of its rights of copyright in relation to its work , and , secondly , of a breach thereof by OUP.¹ Having

¹ Apleni v Minister of Law and Order and Others 1989(1) SA 195 (A) at 201 A-D

chosen to do so by way of application it is bound by the well known approach set out in Plascon-Evans read with Zuma.²

[9] In Plascon-Evans Corbett JA reformulated the correct approach thus at 634 H-I:

“It is correct that , where in proceedings on notice of motion disputes of fact have arisen on the affidavits , a final order , whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine, or bona fide dispute of fact (see in this regard Room Hire Co(Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T) at 1163-5; Da Mata v Otto NO 1972(3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g).....and the Court is satisfied as to the inherent credibility of the applicant’s factual averment , it may proceed on the basis of the of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks.....Moreover, there may be exceptions to this general rule , as for

² Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A); National Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA).

example , where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...”

[10] And, in Zuma Harms DP concisely stated the approach as follows at 290D:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s...affidavits , which have been admitted by the respondent..., together with the facts alleged by the latter, justify such an order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[11] In the context of the case at hand, Media 24 asserts copyright in its work under the Act. As will be demonstrated hereunder, that claim is admitted by OUP insofar as the Pharos work is manifestly an original work of compilation attributable to Media 24. However, Media 24’s claim for final relief is challenged by OUP on two levels. Firstly, there is a general denial that it has directly copied Media 24’s work. Secondly, it says that Media has failed to establish the originality of its entire work, on the basis that, like OUP, it has sourced the meaning and definition of some words and example sentences in other reference works to which both may have had access in

the process of compilation, or that example sentences chosen by it are common practice and/or common explanations over which Media 24 cannot claim exclusivity.

[12] A creditworthy denial by OUP as regards plagiarism is, however, not the end of the enquiry because, as will be demonstrated later, the ultimate determination as to whether copying has occurred is the function of the court upon consideration of all the material fact and circumstances.

[13] There are 2 further requirements which the court must consider before it may grant Media 24 final relief. In the first instance, Media 24 must establish on a balance of probabilities what is customarily referred to as an “injury” which has been committed by OUP. This is to be understood as an infringement of its copyright with resultant prejudice – either actual or potential.³

[14] Then Media 24 must demonstrate that it has no adequate or alternative remedy available to it. It is established law that a party who might obtain adequate redress through an action for damages may not be entitled to an interdict.⁴

[15] Finally, it is said that once the aforementioned three requisites are met, the court’s discretion to refuse a final interdict is very limited and will depend ultimately on the availability of an alternative remedy.⁵

³ LAWSA (2nd ed.) Vol 11 at 415 para 398

⁴ Fourie v Uys 1952(2) SA 125 (C) at 128; Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 (2) SA 459 (C); Nampesca (Pty) Ltd v Zaderes 1999 (1) SA 886 (C) at 901.

⁵ Setlogelo v Setlogelo 1914 AD 221 at 227.

THE REQUIREMENTS FOR RELIEF UNDER THE ACT

[16] As just stated, to obtain interdictory relief in this matter Media 24 must firstly establish copyright in the “*Learner’s Dictionary for Schools/ Die Aanleerders Woordeboek vir Skole*” (herein after referred to as “*the Pharos work*”) pursuant to the provisions of Section 2(1) (a) read with the definition of “*literary work*” in Section 1 of the Act. Given that part (d) of that definition includes a ‘*dictionary*’, there is no issue that the Pharos dictionary is indeed a literary work.⁶

⁶ **2.Works Eligible for Copyright**

(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright-

(a) Literary works;

1.Definitions

In this Act, unless the context otherwise indicates-

...“**literary work**” includes, irrespective of literary quality and in whatever mode or form expressed –

- (a) ...
- (b)
- (c) ...
- (d) Encyclopaedias and dictionaries;”

[17] Then, Media 24 must show that it is the owner of such copyright⁷. Subject to the contention already mentioned that the Pharos work lacks originality in certain respects, this issue is not in dispute either.

[18] Finally, Media 24 must establish, on a balance of probabilities, that OUP has unlawfully reproduced and/or adapted the Pharos work (or a substantial portion thereof), in compiling its Oxford Afrikaans- Engels/ English-Afrikaans School Dictionary.⁸ For the sake of convenience, I shall refer to the latter publication as “*the OUP work*”. It is this aspect, (unlawful reproduction/adaptation) which really is at the core of the dispute between the parties.

[19] There is also a procedural objection taken by OUP in which it claims that Media 24 cannot succeed by way of notice of motion. It says that the nature of the enquiry and the assessment of the expert evidence put up by the parties is of such a

⁷ **21. 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)

(c) ...

(d) ...Where in 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.

⁸ **Infringement**

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

nature that the matter cannot be properly decided without careful and thorough interrogation under cross-examination. Given that Media 24 was advised of this stance prior to the filing of OUP's answering affidavit, and given further that it ignored the invitation to convert the application into action proceedings, OUP says that the application falls to be dismissed without more.

THE APPROACH IN COPYRIGHT INFRINGEMENT CLAIMS

[20] Counsel were in agreement that the judgment of Corbett JA in Galago Publishers⁹ is the leading authority on copyright infringement in our law. At 280 B-D the learned Judge of Appeal observed that:

“Consequently it is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced. To “reproduce” within the meaning of the Act means to copy and in order for that to have been an infringement of the copyright in an original work it must be shown (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or copy of the latter; and (ii) that the original work was the source from which the alleged infringing work was derived, i.e. that there

⁹ Galago Publishers (Pty) Ltd and Another v Erasmus 1989 (1) SA 276 (A)

is a causal connection between the original work and the alleged infringing work, the question to be asked being: has the defendant copied the plaintiff's work, or is it an independent work of its own?"

[21] At 285 B-E Corbett JA deals with the concept of "*the reproduction of a substantial part*" by referring to the speech of Lord Reid in the House of Lords in Ladbroke¹⁰:

"As to what is meant by the reproduction of a substantial part of the plaintiff's work, I would simply refer to what was stated in the Ladbroke case supra by Lord Reid (at 469):

"If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is novel or striking, or is merely a commonplace arrangement of ordinary words or well-known data. So it may sometimes be a convenient shortcut to ask whether the part taken could by itself be the subject of copyright. But in my view, that is only a shortcut, and the more correct approach is first to determine whether the plaintiff's work as a whole is "original" and protected by copyright, and then to enquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff's work and

¹⁰ Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 ALL ER 465 (HL)

asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind, it does not follow that because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, 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 decisive element in deciding whether the work as a whole is protected by copyright.”

[22] As far as the causal connection requirement referred to in the first passage is concerned, a court considering the claim for copyright infringement must draw an inference from all the facts before it, and the absence of a cogent explanation for the objective similarity between two works can lead to a strong inference that there has been copying, be it conscious or subconscious.¹¹

THE COMPILATION OF A DICTIONARY

[23] Dictionaries are compiled by lexicographers¹² who customarily work in teams. In the case of Media 24 it made use of a number of in-house personnel while OUP used freelance staff. In the answering affidavit Ms Megan Hall, OUP’s publishing manager for dictionaries, describes in considerable detail how the mammoth task of compiling the Oxford school dictionary was undertaken. Firstly, Ms Hall visited OUP in

¹¹ Dean, Handbook of South African Copyright Law 1-42 B.

¹² The Wikipedia On-line Encyclopaedia defines “practical lexicography” as “*the art or craft of compiling, writing and editing dictionaries*”

England in November 2003 to research, study and discuss with various experts the compilation of both monolingual and bilingual dictionaries. Then, in 2004, she set about identifying, testing, and briefing freelance personnel to fill a variety of roles on the compilation team. Ms Hall says, too that in this preparatory phase a conscious decision was made by OUP to publish a bilingual dictionary to compete with the Pharos work.

[24] During 2004 Professor Daan Prinsloo, an expert in corpus-based lexicography at the University of Pretoria was briefed by OUP to provide the Afrikaans and English “*headword*” list. A headword¹³ is the word which appears in alphabetical order in a dictionary and in respect of which a definition and/or translation is given. Prof Prinsloo was responsible for drawing up two headword lists (one in each language) which then formed the language database (also referred to as a “*corpus*”) for each side of the dictionary. It is said that Prof Prinsloo’s work enabled OUP to include a range of school subjects, something that was novel in the South African school dictionary market. Ultimately, about 5000 headwords were selected on each language side of the dictionary.

[25] From November 2004 the freelance personnel went about compiling and developing the entries for the dictionary. They made use of innovative software programmes, which have since become standard software for dictionary compilation, both in South Africa and internationally. I shall deal with the work of these compilers in a little more detail below, since it is at this level that Media 24 ultimately suggests that the plagiarism probably occurred.

¹³ In Afrikaans “*n lemma*”

[26] Once each compiler had completed her/his work it was returned to OUP whereafter it was submitted to a translator. When the translation was complete, the work was checked and edited. Ms Hall says that she identified the need for lexicographic expertise to edit the compiler's work and Dr Phillip Louw, a co – editor at the monolingual “*Woordeboek van die Afrikaanse Taal*” with a doctorate in lexicography, was approached in October 2005 to assist, initially on a freelance basis and later as a full-time employee of OUP.

[27] In the first half of 2006 OUP submitted a final draft version of the dictionary to eight of the nine Provincial Education Departments in South Africa for evaluation. All eight Provinces approved of the dictionary and orders from them came in towards the end of 2006. In November 2006, the unpublished dictionary was reviewed both externally and internally, in the latter instance by Ms Hall herself who effected final corrections. The completed work was published in January 2007.

[28] Dr Wanda Smith, who deposed to the founding affidavit on behalf of Media 24, is also a lexicographer with many years experience- she has worked for Media 24 for more than 15 years. She explains that the Pharos work was first compiled in 1993 under the auspices of Tafelberg who employed Ms Madaleine du Plessis to undertake the task. As such, copyright vested in Tafelberg, given that the work was an original. As I have already demonstrated, through a series of corporate takeovers and restructuring exercises, it is undisputed that such copyright now vests in Media 24.

[29] Dr Smith says that in October 2011 Pharos began compiling a new edition of the work and in the process discovered , so Media 24 alleges, that large portions of the work had been copied by OUP in the compilation of its dictionary. This discovery was made after, *inter alia*, OUP's dictionary had been reviewed by the compilers of the Pharos work: as will be seen later, it is evidently common practice for lexicographers to consult competing titles when compiling a new work.

[30] Dr Smith refers to four relevant terms in dictionary compilation. In addition to "*headwords*" and "*headword lists*", there are "*example sentences*"¹⁴, and "*sense distinctions*".¹⁵ These can be illustrated by looking, for example, at the word "*judge*" in the OUP work.

" **judge** noun, verb.

Noun (**judges**)

1. Regter

- The **judge** sentenced the criminal to ten years in prison

Die regter het die misdadiger tot tien jaar tronkstraf gevonnis.

2. Beoordeelaar.

¹⁴ "Voorbeeldsinne "

¹⁵ "Betekenisonderskeiding"

- Who will be the **judge** at the fashion show?

Wie sal die beoordeelaar by die mode parade wees?

Verb (**judging, judged**)

1. Uitspraak doen.

Hy het uitspraak oor hom in die hof gedoen.

[31] The word “**judge**” is the headword taken from the headword list under the letter “**j** “. “ *The judge sentenced the criminal to ten years in prison* “, is the example sentence, and, the distinction between a judge in a court of law and a judge in a fashion show demonstrates the various sense distinctions (primary and secondary) in which the noun can occur.

[32] For the sake of completeness, I point that on the Afrikaans side of the OUP work one finds;

“**regter**” naamwoord (**regters**) judge.

- Die regter moet beslis of die man skuldig is of nie.

The judge must decide whether the man is guilty or not.

“**Beoordeel**” werkwoord (*het beoordeel*) judge.

- Ons skoolhoof gaan die kompetisie **beoordeel**.

Our principal is going to judge the competition.

- Hulle het die inskrywings baie streng **beoordeel**.

They judged the entries very strictly...

[33] I would add in passing that, given that neither “**judge**”, “**regter**” nor “**beoordeel**” were considered by Media 24 to be sufficiently relevant or interesting to learners to be included in the work, there can manifestly be no question of plagiarism in that regard.

ALLEGATIONS BY MEDIA 24 OF COPYING

[34] In the founding affidavit, Dr Smith explains how Media 24 set about analysing OUP’s work once it formed the view that plagiarism had occurred. It appointed Dr Anton Prinsloo, an independent lexicographer and language consultant to compare the competing works. Dr Prinsloo, firstly, drew random samples of headwords from both dictionaries. The criteria for the randomness of the samples were in turn monitored and verified by Prof Martin Kidd , a statistician from the University of Stellenbosch.

[35] Secondly, Dr Prinsloo compared headwords beginning with the letters “B”, “D”, “I” and “S” only on both sides of each dictionary. The comparison was

limited to these four letters because it was considered impractical to review the entirety of the various headwords, said to number about 5000 per language entry.

[36] Making use of various coloured high-lighter pens Dr Prinsloo then considered the following;

36.1 Common headwords (which he marked in green);

36.2 Alleged similarities in sense distinction and the sequence (primary and secondary etc) in which these were set out (marked in orange);

36.3 Alleged similarity in regard to example sentences (marked in pink); and

36.4 The alleged absence of similarity in definitions and example sentences with common headwords (marked in yellow).

[37] This expert refers the court to the word “*baie*” and says that in the Pharos work the example sentence is “*daar is nie baie melk oor nie*”, while in the OUP dictionary it is “*daar is nie baie sap oor nie*”. It is implied that direct copying has occurred in the OUP example sentence, save that the noun has been changed from “milk” to “juice”.

[38] Dr Prinsloo thereafter drew up extensive lists of the allegedly-copied example sentences in relation to the headwords listed under each of the four letters referred to above. These were provided to Prof Kidd for statistical analysis as to the co-incidence of comparison between the two works. In coming to his conclusions, Prof

Kidd was told to ignore any coincidence in the choice of headwords, or the sequence of translations and to focus solely on the similarities in example sentences.

[39] Prof Kidd came to the conclusion that the coincidence of similar example sentences in the OUP work was of the order of 20% when compared with the Pharos work, and about 22% in the Pharos work when compared with the OUP work. Comparison of the English words in the Pharos work on a non-random basis with the OUP work was found to be of the order of 17% and about 23% in respect of the Afrikaans side of the Pharos work when compared with the OUP dictionary. Prof Kidd says that the degree of similarity (generally then at around 20%) is too obvious to be classified as merely coincidental.

[40] Dr Smith goes further than the comparison of just example sentences. She points out that there are also incidents of the copying by OUP of poor grammar and the incorrect classification of words, which are lexicographically errant on the side of Media 24. I shall cite just one of the several examples discussed by her in which she stresses the importance of translating a verb with a verb and a noun with a noun.

[41] Pharos translates the headword “*diefstal*” firstly as “stealing” and then “theft”. Dr Smith says that this is grammatically unsound as “stealing” is a verb and should not be used to translate a noun, which “*diefstal*” is. She says that the only translation for “*diefstal*” is the noun “theft”. The repetition of these mistakes in OUP’s work, says Dr Smith, is therefore not mere coincidence, but clear evidence of copying by OUP.

[42] In September 2012, OUP also published a monolingual Afrikaans School Dictionary to compete with Pharos' similar title. Here too, says Dr Smith, is persuasive evidence of plagiarism. I return to the headword "baie". The Oxford Monolingual Afrikaans dictionary repeats the earlier example sentence with reference to "*nie baie sap nie*" which it used in the OUP work. This is said to demonstrate the persistence of plagiarism.

[43] Finally, Dr Smith says that sales of the Pharos work dropped markedly after 2007 and she attributes this directly to the emergence of the OUP dictionary. For that reason, she says that Media 24 intends claiming damages from OUP, but in the interim, it seeks a final interdict to limit the on-going breach of its copyright by OUP.

OUP'S RESPONSE TO THE CLAIMS

[44] OUP denies outright that it is guilty of copying or reproducing any parts of the Pharos work. It emphasises that, in light of the nature of the literary works involved, some degree of similarity might be expected and that evidence thereof would not necessarily sustain a claim of plagiarism.

[45] OUP relies heavily on expert opinion in its endeavour to rebut Media 24's assertions. Firstly, there is Prof Prinsloo to whom reference has already been made. Then there is a detailed affidavit by Dr Michael Rundell, an expert lexicographer and consultant from the United Kingdom, who is, *inter alia*, the Editor-in-Chief at Macmillan Dictionaries in London, and a visiting professor at various universities around the world. Thirdly, OUP has called into service Prof Tim Dunne, a statistician from the University of Cape Town with more than 30 years' experience.

There are further expert reports by Prof Elsabe Taljaard, a lexicographer from the University of Pretoria, and Dr Philip Louw.

[46] Dr Rundell observes that both works are relatively small dictionaries, each with about 5000 words per side. They are said to be pedagogical dictionaries for use by second language learners and contain relatively low levels of language proficiency. Importantly, says the expert, both works are reference materials, unlike, for example novels or songbooks. And, as already noted, both aim to attract the interest of the same target market. Dr Rundell is of the view that repetition by OUP is often based on the selection of similar headwords for which the most common example sentences have been chosen. I will cite just two of his explanations.

[47] The headword “*broom*” has the following example sentence in the Pharos work: “*Doreen, please take the broom and sweep out the kitchen*”. In the OUP work the example is “*Take the broom and sweep the floor, please*”. In respect of each of these headwords, there is only one example sentence. As Dr Rundell points out “*Both [example sentences] refer to using a broom to “sweep”: this is what brooms are for.*”

[48] Then, there is the headword “*spring*”. In the Pharos work there is only one example sentence in respect of “*spring*” used as a noun: “*spring is the season between winter and summer.*” In the OUP work, “*spring*” is cited both as a noun and a verb. And, in respect of the noun there are three example sentences one of which also reads “*spring is the season between winter and summer*”. As to this obvious similarity, Dr Rundell holds the view that “*in many monolingual English dictionaries*

this precise formula is used as a definition of “spring”, the clear implication being that this example sentence, if it has been copied, may have been sourced in a work other than the Pharos work. And, it may be that Pharos, too, consulted the same source material as OUP.

[49] The other example sentences for “*spring*” in the OUP work are “*a spring is usually made of metal*”, and “*we get water from the spring on the farm*”. I shall revert to the use of multiple example sentences, later but merely observe at this stage that it does appear in a number of instances that OUP employs the technique of the use of multiple example sentences more often than Pharos. Finally, in several of the instances of plagiarism complained of by Dr Smith, the allegedly similar example sentences presented by OUP are located amongst a number of others which are entirely different.

[50] Prof Dunne issues a warning regarding the use of what he calls “*after-the-fact determinations of statistical causality*”. The process of analysis, he says , “*needs to take into account all plausible factors that could have affected the data, including those factors that might easily be overlooked.*”

[51] In relation to the coincidence of similar headword use, Prof Dunne makes a number of observations. Firstly, he says he found, with reference to the letters B, D, I and S that 712 headwords were common to the Afrikaans side of each dictionary. Then he found at least 589 headwords that were unique to the Afrikaans side of the OUP dictionary and 349 headwords, which were unique to the Afrikaans side of the Pharos work. From a percentage point of view, Prof Dunne found that 54,

7% of the OUP headword list was shared while at least 45% of the list was unique to OUP. Conversely 67, 1% of the Pharos headword list was shared with OUP while at least 32, 9 % of the list was unique to OUP. It seems as if this view of Prof. Dunne lead to Pharos reconsidering reliance on plagiarism in respect of headword lists, something with which Dr Smith dealt fairly extensively in the founding affidavit.

[52] Commenting on this, Prof Dunne highlights the following aspect:

“82. This level of uniqueness in the Afrikaans/English (B D I S) sides of the two dictionaries has to impact upon the levels and extent of any plagiarism mooted. The question is why would a system that can construct at least 589 words completely absent from the Aanleerderswoordeboek bother with selection of 712 words out of 1061, and then painstakingly obscure matchings of example sentences, but nonetheless leave matchings of some 212 of these 712 allegedly stolen entries open to designations of [similarity].”

[53] This reasoning seems to me to be quite persuasive. I need, however, say no more in regard to the allege copying of headword lists since it was common cause during argument that Media 24 no longer relied on any claims of plagiarism in that regard..

[54] As already suggested, at the heart of Media 24’s complaint in the founding affidavit was the alleged copying of its example sentences. This copying was said to consist of two distinct components: firstly, exact copying of the relevant example sentence (as one sees in the “spring” example referred to in para 48 above) and, secondly, substantial copying of the Pharos work but with the substitution of

different words chosen by OUP. One such example appears in the “*melk*” and “*sap*” examples already referred to above.

[55] For purposes of discussion and evaluation, Prof Dunne refers to the similarities identified by Dr Prinsloo as the “*Prinsloo- similarities*” and that those of Prof Kidd as the “*Kidd-similarities*”. Prof Dunne draws attention to the fact that, in the main, the OUP work has close on two example sentences per headword in comparison to Media 24’s single example sentence:

“86 *I note that the number of example sentences per headword within the Oxford Skoolwoordeboek entries appears from a cursory inspection to be plausibly close to two on average, in contrast to 2601 Afrikaans-English and 2400 English-Afrikaans example sentences for 1680 and 1426 B D I S entries respectively in the Aanleerderswoordeboek, which therefore have lower averages of example sentences per headword, in the order of 1.6 or larger*

87 *The effect of any multiplicities of example sentences is a substantial decrease in the probability of zero matches (dissimilarity) within a chosen headword, and a marked increase in the prospect of Kidd- or -Prinsloo similarities. This increase will occur but be due only to the multiplicities; even if random matches are plausible as in the circumstances outlined... [above]”.*

An example of what Prof Dunne is referring to is to be found in relation to the headword “*spring*” referred to in para 48 above.

[56] Reverting to the example sentences in respect of “*baie*”, in the Pharos work the word has been referred to as a noun (with 5 senses and 10 example sentences), an adverb (with 5 senses and 5 example sentences) and a numeral with 1 example sentence. The OUP work distinguishes only an adverb and a numeral. The OUP adverbs define 4 senses with 8 example sentences, and the numeral, 3 senses with 5 example sentences. There are therefore 16 example sentences under “*baie*” in the Pharos work, and 13 in the OUP work.

[57] In the founding papers Dr Anton Prinsloo refers to 4 such example sentences in aspect of the headword “*baie*”.

57.1 Firstly, “*I like Theo very much: he’s a nice chap*” in the Pharos works is compared with OUP’s quote “*I like him very much*”. This is said by Dr Prinsloo to be an example of a direct copy, whereas it appears to be a sentence wherein the subject is changed but the gist of the sentence remains the same.

57.2 Secondly, it is correctly pointed out that “*thank you very much for your help!*” in the Pharos work is taken up identically in the OUP work.

57.3 Then “*daar is nie baie melk oor nie*” in the Pharos work is said to be identical to “*daar is nie baie sap oor nie*” in the OUP work; and

57.4 Finally, Pharos' "*sy het op haar verjaarsdag baie presente gekry*", is said to be identical to the OUP's "*Nkosinathi het baie presente gekry*"

[58] Assuming for the purposes of argument that all 4 OUP example sentences are indeed identical (which quite arguably they are not), the fact remains that only four of Pharos' 16 example sentences have been copied by OUP. This appears to equate to 25% of the Pharos work in respect of the headwork "*baie*".

[59] Prof Dunne offers the following initial comments in this regard.

"19... It is feasible that many similarities emerge, because it is an intention of dictionaries to reflect common usage. Some of these similarities might be more striking than others. Such extreme coincidences may admit several possible single or multiple causative explanations. These explanations may involve prior occurrences, including but not limited to frequency of usage, context of usage, common source corpora, commonly used expressions, or indeed copying.

20. Identical entries appeared to constitute a minimal subset within the reported similarities. This limited extent obviates against inferences of simple lifting of text from one source to another.

21. *Similarities, as subjectively perceived will admit the same prior single or multiple causative explanations as are applicable to extreme coincidence, such as in happenstance identical entries.*

22. *Any vagueness of similarity criteria will involve or permit intrusion of retrospective elements driving towards subjective declarations of near equivalence. Where the retrospective criteria are unspecified or implicit rather than explicit and specific, they may be difficult to detect, communicate, replicate and verify.*

23. *The criteria are the collective set of features whose presence within both dictionaries' entries for the same word may lead an interested party to report either a similarity or dissimilarity.*

24. *Different parties may adopt distinct criteria and their contrasting views of the same objective data source will lead to distinct subjective overviews and inferences. To explore data appropriately it is not sufficient to examine number and count alone, but also the criteria by which element of the count was derived, and the connection of that element with the reality of its putative source."*

[60] And in conclusion, Prof Dunne offers his evaluation (from a purely statistical perspective) of the likelihood of plagiarism by OUP or not :

"90. Further similar remarks apply to English-Afrikaans as to Afrikaans -English structures. Firstly, both dictionaries have substantially

sized bodies of unique headwords. The limited common internal structures and the various identified school-oriented purposes may give rise to natural similarities in the common segments. This natural emergence of similarities will be exacerbated and appear more frequent than it really is if the analysis ignores the multiplicities of senses for a single headword that necessarily reduce the probability of no-match outcomes.

91. At face value the two B D I S analyses suggest strong parallels of the two language sides, with respect to unique and common parts. If plagiarism is to be sustained as an inference, there will also need to be a plausible single explanation for plagiarism across both these B D I S sides in their entirety. The explanation will have to deal with the current inherent two-fold exaggeration of percentages for headword similarities arising from multiple entries, and with the elimination of unique headwords from discussion. The explanation will have to robustly defend the criteria of a very weak form of observable similarity (i.e. Prinsloo- similarity) as an unassailable artefact of plagiarism alone, and the exaggerative effects of such loose criteria on the associated counts and percentages reported.

92. Such an explanation will need to address issues of motive, generality of alleged artefacts across compilers, conspiracy to plagiarise, conspiracy to obscure plagiaristic forms of identical entries through deliberate reduction of common headword entries towards

mere similarities, and establish plausibility of these activities in both language directions. It will have to perform these functions against a host of more compelling professional and societal factors which apparently constitute far more plausible contending explanations for the same data.

93. *None of these conditions has been satisfied yet and there is no statistically sound basis for selecting plagiarism as the only or the most probable or even a likely explanation”.*

[61] In his affidavit Prof Dunne also discusses the choice of random and non-random sampling used by Media 24. It appears that the random choice employed by Prof Kidd was a random choice of page numbers in the works using a computer-based spread sheet programme and then 4 locations on each of the chosen pages. Prof Dunne expresses some reservations about this process but appears, in the main, to be satisfied with the integrity thereof. The non- random sampling appears to be the work of Dr Anton Prinsloo and is the choice of headwords commencing under the letters B, D, I and S . Prof Dunne refers to these as the “Prinsloo – similarities”.

[62] Prof Dunne makes the following general observations in relation to the similarities identified by Prof Kidd and Dr Anton Prinsloo.

“52. *The frequency of Kidd-or Prinsloo-similarities does not warrant an inference of plagiarism. While plagiarism, if and when it occurs may give rise to very strong forms of Kidd-or Prinsloo- similarities, the converse, from particular to general, does not necessarily apply.*

53. *On the basis of these arguments, Prof Kidd's analysis may be internally consistent. However, its relevance to any claim of plagiarism has to rest completely on the validity of either the Kidd-or-Prinsloo- similarities as substantive and conclusive evidence for that purpose of eliminating all explanations other than plagiarism for the shared headwords. The presence and the counts of headwords that are unique to each dictionary will also have to be explained within an invocation of plagiarism. I deal with this issue in the next section."*

[63] Prof Dunne further called for a third dictionary to be compared as part of his analysis and was furnished with a spread sheet analysis relating to the Longman Handboek vir die Afrikaanse Taal ("*the HAT*"), a far larger monolingual Afrikaans dictionary with 14503 entries. His assessment was that there were in fact more similarities in the Pharos than the OUP work when these works were compared to the HAT. Having assessed the HAT also, Prof Dunne concluded as follows:

"62. *Given the larger word count of the Oxford Skoolwoordeboek, the modest frequencies of Prinsloo-similarities, the softness of those criteria, the unspecified nature of the Kidd- similarities, and the necessities for dictionaries to address common word usage and common target users, there appears to be very little statistical evidence in favour of even a loose definition of plagiarism at work in this state of affairs."*

ASSESSING THE EXPERT EVIDENCE.

[64] In the recent judgment in the National Potato Co-Operative case¹⁶ the Supreme Court of Appeal revisited, *inter alia*, the function of the expert witness in litigation, and the manner of evaluating such evidence. The court stressed, with reference to Gentiruco¹⁷ and Coopers¹⁸ that such evidence is admissible when the court is able to avail itself of “*appreciable help*” from an expert where such person by reason of specialist knowledge and skill, is better qualified to draw inferences from the proved facts than the trial judge.

[65] In Coopers, Wessels JA observed as follows at 370 G-H:

“There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted and others upon which it could come to some form of independent conclusion, but the help of an expert would be useful.”

[66] Both Professors Kidd and Dunne are highly qualified and experienced in the field of statistics. The real purpose of the statical evidence in this case is not to afford the statisticians an opportunity to express a view as to whether OPU has breached Media 24’s copyright by plagiarising its work (for that is pre-eminently the terrain of the lexicographer and the linguist), but rather to give the court some idea of

¹⁶ Pricewaterhousecoopers Inc. and 4 others v National Potato Co-Operative Ltd and Another [2015] ZASCA 2 [4 March 2015]

¹⁷ Gentiruco AG v Firestone SA Pty Ltd 1972 (1) SA 589 (AD)

¹⁸ Coopers (South Africa) Pty Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung MBH 1976 (3) SA 352 (A)

the numerical percentage of the incidence of such alleged copying in the instant case. After all , it cannot be expected of the court to trawl through more than 20 000 entries (5 000 per side in each dictionary) to assess the similarity between example sentences and senses. The task would simply be too immense. Indeed, it is so immense that neither party has tendered evidence from a lexicographer who has done just that. The sampling of similarities by Prof Kidd and Anton Prinsloo, and the statistical recurrence thereof was seen by Media 24 as the most suitable and reliable way of establishing the extent of the alleged copying in its founding papers.

[67] Inherent in the approach adopted by Media 24 to litigate by way of application is the limitation imposed on the court through the receipt of such evidence: ordinarily a court would want to enjoy the benefits of such a witness being cross-examined by the opposing camp and answering questions in clarification of the court's own difficulties in adjudicating the dispute. Very often, that exercise would demonstrate whether the expert is truly independent rather than being the proverbial "hired gun" , and , most importantly permit the court to grapple , first hand as it were, with the issues it was being asked to resolve.

[68] At an early stage of these proceedings before the filing of an answering affidavit, OUP's attorneys suggested to their opponents that the matter be sent to trial with the founding papers to stand as a simple summons with a declaration to follow. However, Media 24 dug in its heels and insisted on the matter proceeding by way of application. The consequences of the matter proceeding thus is that the court is confronted by two sets of opinion evidence each based on the facts put up by the applicant as synthesised (and amplified) by the facts put up by the respondent.

Where those expert views are based on sound reasoning and are equipoised how is the court to determine preference applying the approach laid down in the Potato Board case?. Most certainly, the rule in Plascon- Evans should not be applied, for that approach is to determine disputed facts not opinion.

[69] While much of what Prof Dunne has said is not disputed in reply, and while many of his conclusions make eminent sense and follow logically, I am nevertheless reluctant to decide this matter of the strength of expert opinion. The case involves technical issues of lexicography and the statistical relevance (or irrelevance) of that science of coincidences and similarities in the content. There are a number of issues, which I would prefer to be clarified before expressing a definite preference for an opinion one way or the other. For example, how similar linguistically and lexicographically are the “*melk*” and “*sap*” examples? And how can one determine without proper interrogation through questioning of the experts how much of the Pharos work was procured lawfully from the same source as the OUP work. These are trenchant questions which remain unanswered and which undoubtedly will be considered when the trial for damages proceeds.

[70] In the result I have come to the view that, given the technical nature of the issues involved, it would not be appropriate for the court to decide the case on the strength of the expert reports on affidavit. The matter must accordingly be determined in accordance with the Plascon-Evans rule with due regard for the onus which Media 24 has attracted by moving for final interdictory relief.

SUFFICIENT OBJECTIVE SIMILARITY?

[71] In the passage in Galago to which I have already referred, Corbett JA stressed that it was for the party claiming copyright protection to persuade the court that there was “sufficient objective similarity” between the alleged infringing work and the original , or more specifically, that “a substantial part” of the Pharos work has been copied by OUP. But, how much is required for the plagiarism to be regarded as “substantial”? Prof Kidd’s evidence suggests a coincidence of example sentences at around 20%. That implies that one in every five example sentences in the OUP work is the same (or substantially similar) to the Pharos work. However, as Prof Dunne suggests the selection criteria for similarities relied upon by Prof Kidd may be flawed: it is certainly open to criticism, as Prof Dunne has purported to do.

[72] In his objective evaluation, Dr Rundell seems to have conceded a similarity ratio of around 7%. In such circumstances, is the repetition of every 14th example sentence then “substantial”? And, even if it is substantial is it as a consequence of copying by OUP’s lexicographers or is there some other similarly feasible explanation? After all, as the leading authority¹⁹ in the English law of copyright points out, one is concerned here with the quality or importance of copying rather than the quantity thereof.

¹⁹ Copinger and Skone James on Copyright (16th ed, 2011) at 441.

[73] It is common cause that when preparing a new work lexicographers will have regard to a variety of other dictionaries as source or reference material. In my view it is critical in this case to bear in mind, also, that we are dealing here with a reference work for use by the general public, and in particular school learners, and that there would therefore exist a fairly well defined body of knowledge (from traditional works to on-line publications and computer software) available to be utilized by the compilers.

[74] On this score Mr Duminy SC referred the court to a conference paper written by John Williams, a freelance lexicographer attached to the Open University at Milton Keynes in the United Kingdom, entitled “*The Question of Plagiarism and Breach of Copyright in the Dictionary-making Process (with Particular Reference to the UK)*”²⁰ The paper is manifestly not intended to be a legal treatise on the topic. Rather, it serves to highlight the ethical and very real practical problems confronted by practitioners in this important area of learning, while touching upon aspects of the English law of copyright. What the paper demonstrates is that at least 20 years ago the question of plagiarism in respect of the compilation of dictionaries was anything but settled law in the United Kingdom. And, given that neither party to these proceedings was able to adduce any subsequent authority relating to the unlawful copying of dictionaries in either the United Kingdom or South Africa, I must accept that the position today is no different to what it is was in 1992. I shall quote extensively from the paper since it places the conundrum in its true perspective.

²⁰ The paper was published as part of the Euralex 1992 Proceedings at p 561-70. EURALEX is the acronym for the European Association for Lexicography which holds its conferences every 2nd year throughout the Continent (see www.eurolex.org)

[75] In the opening section of his paper Williams sets the scene as follows:

“1. POSING THE PROBLEM

The question of plagiarism or infringement of copyright poses particular problems in dictionary publishing, distinct from those faced by the general publisher. Personnel at all levels of the dictionary-making process from the company's lawyers to project managers and even low-level freelance compilers- may from time have to make decisions as to what constitutes, and what does not constitute, an unacceptable degree of copying from previously published dictionaries. Prima facie cases of plagiarism may manifest themselves in many different aspects of the dictionary text: conventions of presentation, the headword list, definition style, not to mention the actual content of particular definitions, examples, translations, and illustrations.

The core of the problem resides in the fact that all lexicographers working in a given language (or between two given languages) are covering essentially the same body of knowledge. Given that this body of knowledge is itself linguistic in nature, and that it is usually incumbent upon the lexicographer to produce a text which documents often by way of example typical meanings and usages, it is probably inevitable that dictionaries of broadly similar scope and aims will contain comparable stretches of text that

*show a degree of similarity unacceptable in other areas of publishing. Off course, some leeway is provided by the fact that dictionaries come in different shapes and sizes with different markets in mind, and each will carve out its own particular section of **langue** appropriate to its own purposes. However, the problem becomes particularly accute when a publisher sets out to produce a direct competitor to an already existing dictionary in terms of size, number of headwords, and general focus of coverage.*

Given that most working lexicographers continually consult other dictionaries as a matter of routine it is important that all personnel involved in the dictionary-making process should be in a position to decide, on some kind of systematic and uniform basis, what kinds of copying, if any, are acceptable, and which are not. This is desirable not only in terms of the strict legal requirements of copyright, but also on professional and ethical grounds. As a freelance lexicographer who has worked for a number of different companies, it is my suspicion that, at present, no such basis for a common practice exists among publishers of dictionaries in the UK. This paper will set out the results of my attempts to test that assumption, and it is hoped that this may provide some pointers towards establishing an agreed set of ground rules determining the extent to which dictionary publishers may legitimately “borrow” from each other’s publications without fear of litigation or professional acrimony.”

[76] In his discussion of the applicable law in England Williams relies extensively on Copinger et al.

“The vital question remains of what constitutes quality in dictionary-making. The only commentator who comes near to tackling this question is Skone James, who includes dictionaries in the category of “compilations”, along with gazetteers, arithmetical tables, lists of football results, etc. Skone James recognises that similarities between such works cannot be judged in the same way as similarities between, say, “original” works of literature. In the case of such compilations, similarity is not in itself proof of breach of copyright, though it may be used to allege such a breach. The onus would then be on the defendant to show that this similarity was not the result of copying; evidence might be adduced from textual detail, or from the circumstances in which the text was produced. A successful defence might be that the similarity was due to coincidence or “sub-conscious copying”, though the law is undecided on the latter.

The key criterion throughout appears to be whether or not the copier has unfairly appropriated the labour, energies and resources of the compiler of the source material “...the principle is that if one person has, with considerable labour, compiled the work from various sources which he has digested and arranged, then a defendant who instead of taking the pains of researching

the common sources and obtaining his subject matter from them, simply makes use of the other's labour and adopts his arrangement perhaps with only slight variations, thus saving himself the pains and labour which the other used, this will be an illegitimate use."(Skone James 1991, 187)

The precise implications of these legal principles for working lexicographers are not immediately clear, since none of the commentators addresses problems that are specific to dictionaries such as words that occur in restricted environments, words or set phrases with a single standard translation, etc. However, one might hazard a few tentative conclusions. Firstly, that definitions, examples, translations, etc which "spring readily to mind", casual phrases used to fill out examples and standard conventions of presentation would probably not be subject to copyright protection, whereas, for example, more "difficult" definitions and translations and more innovative types of presentation probably would. Secondly, as the above quotation makes clear, that minor variations and otherwise plagiarized text could not be used to refute allegations of breach of copyright. Thirdly, that the practice routinely adopted by working lexicographers of having the dictionaries of our competitors open in front of us makes it more likely that a prosecution for breach of copyright would be successful.

The above remarks, however, probably beg more questions than they answer; the fact that dictionaries do not figure at all prominently in legal text concerned with copyright is a serious handicap to anyone wishing to formulate a legally watertight set of guidelines for dictionary-makers.”

As I have said, the Williams paper was not intended to contribute to legal writings on the topic, but it does, nevertheless, neatly sum up the legal and ethical dilemmas confronting lexicographers in the preparation of new competing works.

[77] Applying the issues raised by Williams by way of a general approach to the case at hand, the sort of questions that arise include the following:

- How many of the example sentences in the OUP work (which are claimed to be direct copies of the Pharos work) are the only plausible or (possible examples) for those headwords?
- Is the switching of sentence structure, or the substitution of words (be they nouns , adjectives or adverbs), in an example sentence a lazy attempt to copy or a deliberate distinction made by the lexicographer to avoid a complaint of plagiarism?
- Does the deliberate use of such distinguishing words/phrases deprive the second work of originality?

- If so, is it within the tolerable limit of reproduction mooted by Williams?
- Does the use of just one copied phrase in the second work constitute similarity where the headword in question in that second work has been given a number of other example sentences that are original?
- How much of the Pharos work was copied from other dictionaries by its compilers, and, therefore, how much of the Pharos work claimed to have been copied by OUP is the product of original thought and industry on the part of Pharos?.

[78] Our law requires a court determining an alleged copyright infringement to adopt a common sense approach in evaluating the question of similarity²¹. In Copinger et al²² the authors, in remarking that the question involves the application of not all together precise legal standards to a combination of features of varying importance , postulate the approach thus:

“The issue of substantial part is a mixture of law and fact in the sense that it requires the court to apply a legal standard to the facts as found. It is a matter of degree in each case and has to be considered having regard to all the circumstances. In the end it is often a matter of impression, in the sense that it generally involves taking into account a number of factors of varying degrees of importance and deciding whether they are sufficient to bring the whole within the legal description

²¹ Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd 1988 (2) SA 965 (sca) AT 972 H-973 E

²² 440, 7-30

of “substantial part”, as to which it may be difficult to give precise reasons for arriving at a conclusion one way or the other. There are always borderline cases over which reasonable minds may differ.”

[79] Having observed then that the “substantial part” test varies from case to case and will largely depend on the type of work involved, they authors list a dozen or so general propositions to be considered.²³ In my view, relevant to this matter are the following:

“(a)

(b) *The quality or importance of what has been taken is much more important than the quantity. The issue thus depends not just on the physical amount taken but on its substantial significance or importance to the copyright work, so that the quality, or importance, of the part is frequently more significant than the proportion which the borrowed part bears to the whole. In this context, expressions such as “quality” or “importance” need to be properly understood. ...Quality and importance must therefore be understood in terms of the features of the work, which made it an original work in the first place. It follows that the quality relevant for the purposes of substantiality in the case of a literary work refers to the originality of that which has been copied. In the case of an artistic work, it is the originality of the artistic expression of that which has been copied....*

²³ 441 et seq

(c) *Depending on the circumstances, the question may depend on whether what has been taken is novel or striking or is merely a commonplace arrangement of words or well-known material. In this respect, it may be a helpfull shortcut to ask whether the part taken could itself be the subject of copyright, although this should not be used as a substitute for the proper and full test of substantial part...*

(f) *In general it is wrong to dissect the claimant's work, taking each part which has been copied and asking whether each part could be the subject of copyright if it had stood alone: "...it is wrong to take the parts of the original copyright work that have been copied in the alleged infringing work, to isolate them from the whole original copyright work and then to conclude that a substantial part of the original copyright work has not been copied because there was no copyright in the copied parts on their own." It is the work as a whole which must be considered particularly where the originality of the work lies in the creation of the work as a whole. If there is no originality in the creation of the work as a whole, for example, where the work is simply a collection of subsidiary works assembled without any sufficient skill or labour, the proper analysis is that there is not one work but rather a number of works. In such a case, it would be proper to take each subsidiary work by itself. But this is not a question of substantial part but of identifying the real copyright work or works in issue. A claimant cannot divide "the work" into small sections, so as to improve his case by arguing that a substantial part of a small section has been taken.*

(j) *If what has been taken from the claimant's work is material which was not original to the maker of the work, because for example it was copied from another work, then it should be disregarded in deciding this issue. If, however, part of the originality of the claimant's work consisted of the choosing and collecting of unoriginal material, and the defendant has made unfair use of this labour and skill, then the test would be satisfied. This can often be seen in compilation cases but other types of works will also often contain elements taken from earlier works but combined in a new way.*

(k) *Although statements to precisely the opposite effect can be found, the relevant question is not whether the part which has been taken forms a substantial part of the defendant's work but whether a substantial part of the claimant's work has been taken. Indeed, whether the part taken forms either a small or a substantial part of the defendant's work is irrelevant....*

(l) *In the case of some works such as works of reference, it may be that a greater amount of copying is permissible than with other works such as novels. This is on the basis that one of the purposes of the author was to add to the stock of human knowledge, so that there may be attributed to him an intention that the material in his work, if it is not to become sterile, may be used by the reader that with the consequence that the law will allow wider use of such a work."*

[80] It is not insignificant, I believe, that when Copinger *et al* deal with the categories of literary works comprising that are termed “*compilations*”²⁴, the authorities relied on in respect of dictionaries, encyclopaedias, etc refer to 19th century English cases dealing with educational books. The earlier comment regarding the absence of any cases of copyright involving dictionaries *per se* therefore appears to be correct.

[81] One might ask whether this is because publishing houses are reluctant to litigate, or whether there is some other plausible explanation. Given that the general practice is that in compiling new work lexicographers, as a matter of course, consult a variety of other reference works, including competing dictionaries, it may be that the role players do not regard the consideration and use of the sample sentences of others to be offensive. This in turn maybe because the creator of the alleged original work (as with Pharos here) has, similarly made use of earlier reference works and dictionaries²⁵ in an endeavour to enhance the “*stock of human knowledge*”.

REVIEWING THE COMPETING WORKS

[82] I have perused both dictionaries in this matter and make the following observations. Firstly, the page layout and references are completely different as annexures “A” (Pharos) and “B” (OUP) to this judgment demonstrate. There can certainly be no question of copying in that that regard. Secondly, as far as the headwords are concerned, while there are some similarities there are also major

²⁴ p457 *et seq*

²⁵ See para (j) referred to in the extract from Copinger in para 79 above.

distinctions. And, as I have said, Media 24 no longer relies on any copyright in respect of its corpus or headwords.

[83] Turning to the example sentences, I make the following observations. Firstly, there are some that are plainly identical:

83.1 “*South*” (adjective, adverb) – “*Namibia is **south** of Angola*” (OUP)
 “*Namibia lies **south** of Angola*” (Pharos)

83.2 In respect of “*suid*” Pharos repeats the Namibian example while OPU does not- it has, *inter alia*, “*the four wind directions are north, south, east, and west*” and “*the river flows from the south to the north.*”

[84] .There are further example sentences in respect of “*south*”, “*southern*,” “*suide*” and “*suid*” in both dictionaries, all of which are completely different from each other, save for the Namibian similarity. So, for example, Pharos, in addition to the Namibian example, has the following example sentences on the English side:

84.1 South

- *Port Elizabeth is in the **south** and Johannesburg in the north of our country;*
- *Mossel Bay lies on the **south** coast of our country.*

84.2 Southern

- *Port Elizabeth lies in the **southern** part of our country.*

[85] OUP, on the other hand, has only two entries on the English side, in addition to the Namibian example:

- Agulhas is in the **south** of the country.
- The **south** coast.

There are no example sentences in regard to *southern*.

[86] On the Afrikaans side Pharos has, in addition to the Namibian example, the following English example sentences:

86.1 Suide- South

- *Port Elizabeth lies in the **south** and Johannesburg is in the north of our country.*

86.2 Suidelike – Southern

- *Port Elizabeth lies in the **southern** part of our country.*

[87] OUP has the following entries on the Afrikaans side in addition to the “*wind directions*” example sentence referred to above:

Suid “South”

- *The river flows from the south to the north.*
- *The wind is from the south.*
- *The compass points due south.*
- *They live to the south of the airport.*

There is no example sentence provided by OUP in respect of “*suidelik*” which is just translated as “*southern*”.

[88] From these comparisons a number of observations can be made:

88.1 The compilers of OUP’s English side possibly copied the Angola/Namibia example sentence from the Pharos work either on the Afrikaans or English sides, or both.

88.2 On the other hand that compiler may have seen the same example sentence in another dictionary, which was consulted during the compilation processes, a dictionary that was also possibly consulted by the compiler(s) of the Pharos work. I would point out, however, that given that no particular allegation in regard to this example sentence is

made in OUP's papers, this is no more than judicial speculation in the exercise of the court's impression at this stage.

88.3 Certain of the example sentences are obvious in the circumstances eg the locality of Mossel Bay close to the southern most tip of Africa at Cape Agulhas is an example that anyone with a basic grasp of local geography might consider.

88.4 The majority of example sentences listed by OUP in respect of "south", "southern", "suid" and "suidelike" have no connection whatsoever with the Pharos work, can be considered to be original work and fall to be ignored for purposes of the plagiarism complaint.

[89] The limited coincidence of the example sentences to which I have just referred in respect of "south", "suid", "southern" and "suidelike" resonates throughout the OUP work as the earlier reference to "baie" suggests: one or two of the example sentences at most bear a similarity to those in the original work, while the bulk of them do not, with some being quite novel and distinct. And, to revert to an earlier theme, does the mere change of noun or object, ("*there isn't much milk left*" compared to "*there isn't much juice left*") suggest copying or intentional distinction?

[90] Ideally a court pondering these alleged similarities and claimed distinctions would wish to be assisted by both lexicographers and the statisticians as to the underlying assumptions made (eg copy or intentional distinction?) when drawing up the list of perceived similarities (in this case the so-called "Kidd similarities"). This all the more so because, when paging through the B D I and S

headwords of the OUP work , one is struck by the fact that the high-lighted phrases designated by Dr Anton Prinsloo as the alleged plagiarisms do not appear to be anything like one in every five example sentences, as the 20% figure presented by Proff Kidd suggests.

[91] But assuming that I am wrong in this regard and that there is in fact a fair degree of copying ²⁶ by OUP, the question that follows is how does such copying contribute qualitatively to OUP'S work, as we see in cases such as Galago and Ladbroke? On this important aspect of the case, Media 24 is surprisingly silent. Despite the plethora of opinions expressed on both sides, no one has come forward and explained to the court just how the alleged copying has advanced the OUP publication as a literary work at the expense of the Pharos work.

[92] In the founding papers Dr Smith makes certain bald allegations at the end of her affidavit, stating that since the publication of the OUP work in 2007 sales of the Pharos work have dropped drastically, and that Media 24 has continued to lose market share with regard to its Pharos dictionaries.

[93] Ms Hall deals thoroughly with these allegations in the answering affidavit, devoting some 20 paragraphs over 10 pages thereto. I do not intend to recite the full extent of her allegations herein. Suffice it to say, Ms Hall claims that the OUP work is a far more modern and up-to-date work than the Pharos dictionary. She claims that in respect of content the OUP work includes *“a wide range of vocabulary important to school subjects as expressed in the official curriculum documents or*

²⁶ The word being employed in its most flexible form as with the *“juice”* and *“milk”* examples

textbooks...” She points out also that the OUP dictionary has a completely different “*structure of entries*” to the Pharos work and that on this score the OUP work is more accessible to students and teachers since it follows the more traditional “*entry structure*” with which readers are familiar.

[94] As far as design and layout are concerned, says Ms Hall, the OUP work is more modern and appealing through its use , for example , of different fonts for the headword and the body of the entry, markers offering clear distinction, the placing of page numbers and the use of “*guide words*” at the top of every page (on the outside edge thereof, as opposed to the Pharos work which has the commencing and terminating “*guide words*” at the left and right top edges of each page.) Once again annexures A and B hereto demonstrate the distinctions. Also, the OUP work is said to have additional methods such as a “*study section*” and a “*reference section*”, and includes aspects from social media communications such as examples of letters, emails, SMS abbreviations and emoticons (“*smileys*”). Language , too, is evidently more contemporary in the OUP work, its publishers apparently having identified (through market research) the need for language associated with a more progressive society.

[95] Finally, Ms Hall says that OUP embarked on very active and intense sales and marketing campaigns to promote its new products, which were well received by the school sector and language communities. She indulges ultimately in an exercise in self-promotion by OUP in referring to the various prestigious awards and commendations which the Oxford Skoolwoordeboek has received since 2008.

[96] Applying the test in Galago it is evident that OUP devoted a significant amount of time, effort, expense and expertise in the compilation and publication of its new work, which took a number of years to complete. That approach, in and of itself, flies in the face of an allegation of unbridled plagiarism. It becomes all the more obvious, however, that wholesale copying has not occurred when one reads through the two works and considers the various example sentences which have been highlighted by Dr Anton Prinsloo under B , D , I and S : the number of directly copied example sentences is limited and the “Prinsloo-similarities” do not appear to be extensive either.

[97] What is more striking when undertaking such an exercise, however, is the difference between the two works. Not only in respect of headwords which do not coincide (and where there obviously cannot be plagiarised example sentences), but also in regard to the vast number of headwords where the example sentences in the OUP bear no resemblance whatsoever to the Pharos work. Indeed, those differences would certainly seem to give the OUP work a uniqueness when placed alongside the Pharos dictionary.

[98] Mr.Sholto-Douglas SC drew the court’s attention to certain concluding remarks in Dr Rundell’s affidavit. Having expressed himself fairly strongly against any plagiarism in respect of any headword lists²⁷ , Dr Rundell goes on to deal with the complaints in regard to OUP’s example sentences:

²⁷ “On the basis of what I **have** looked at, however, I conclude that any claims of plagiarism based on similarities and or overlap in the two headword lists is without foundation. If anything, the degree of

“25. With regard to example sentences, I have explained why dictionaries of this size will tend to pick the same contexts and exemplify the same word combinations. Annexure “MR5” shows many cases where other pedagogical dictionaries have made exactly the same choices. It is fair to concede that there are a few cases where the similarities cannot be entirely explained by the constraints on compilers to select the most frequent and typical scenarios: in the examples for “business”, “deal”, “direct”, “shelter” and “similar” one might have expected a little more contextual variation . These, however, are a small minority (no more than ten examples out of the 142 examples in annexure “NB8” I have seen), and I cannot agree with the Applicant’s conclusion in paragraph 57 of the founding affidavit that the similarities are “clearly too many and too noticeable to be coincidental”.

[99] Counsel for Pharos seized upon this apparent concession by Dr Rundell and suggested that copying by OUP was self-evident on the strength of their own expert’s opinion. I am not persuaded that there is merit in this argument. Assuming that these ten similarities out of 142 (of the order of 7%) are not the product of both sets of compilers having obtained information from an independent source (something which cannot be excluded as such), I remain of the view that Media 24 has not discharged the onus of demonstrating that the copying is sufficiently qualitative to meet the test in Ladbroke upon which Galago is based. Simply put, it has not

variation across these lists is greater than I would have expected in dictionaries with such similar goals.”

demonstrated a preference on the part of learners and/or teachers for the OUP work as a consequence of its alleged copying of some of Pharos' example sentences.

[100] The works in question here are compilation works of reference for general use in an endeavour to augment an existing reservoir of general knowledge for learners. Furthermore, and in any event, the dissimilarities in the competing works (from layout to typeface and example sentences) are so extensive that I have come to the view that any true copying by OUP of Pharos example sentences must be regarded as lacking in sufficient similarity to warrant interdictory relief.

[101] I am accordingly not persuaded that Media 24 has discharged the onus of establishing the requisite right, or the breach thereof, sufficient to entitle it to final relief at this stage. To do so, it must meet the test postulated by Harms DP in Zuma, demonstrate that there are no real factual issues and that the matter turns on a question of law only. In my view the denials put by OUP's management and confirmed under oath by the relevant compilers of the dictionary in question cannot be described as bald, unbelievable, patently fanciful or lacking in credibility. The denials are also supported, at least at a *prima facie* level, by an array of expert testimony.

[102] Moreover, to the limited extent that I am entitled to exercise a discretion to refuse final relief, it is material to note that there is no complaint in the papers by Media 24 that it will have difficulty in establishing its case when it seeks damages from OUP. On the contrary, it seems to be fairly confident of success in the regard. As against that, the OUP work has been in the public domain for more than 4 years now and to terminate the right to publish now when its denials are likely be fully ventilated

at trial, will be highly detrimental to OUP. I would therefore be inclined to exercise that discretion in favour of OUP.

Conclusion

[103] It follows in my view that the application must be dismissed with costs, such costs to include the costs of two counsel.

GAMBLE J.