IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 24570/2018

Heard on: 28 November 2018

Date of judgment: 30 January 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

30/1/19
DATE SIGNATURE

In the matter between:

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	**First Applicant**
STATE INFORMATION TECHNOLOGY AGENCY SOC LTD	**Second Applicant**
and	
FORENSIC DATA ANALYSTS (PTY) LTD	**First Respondent**
INVESTIGATIVE SOFTWARE SOLUTIONS	**Second Respondent**

JUDGMENT

SWANEPOEL AJ:

[1] On 12 April 2018 Applicants launched an urgent application seeking an order restoring the First Applicant's ("SAPS") possession of, and access to SAPS' Firearm Permit System ("FPS system"), the Property Control and Exhibit Management System ("PCEM"), and the Visual Analysis Matrix Intelligence Solution ("VA-AMIS").

[2] Respondents are related companies, and share a sole director, Mr. Keith Keating. First Respondent ("FDA") brought a counter-application, also to be heard urgently, for the following relief:

2.1 That Second Applicant ("SITA") be ordered to comply with its contractual obligations in respect of the FPS system, in accordance with an agreement allegedly entered into between FDA and SITA during November 2017, by making payment of an annual license fee of R 9 144 736.85, and a monthly maintenance and support fee of R 931 409.37;

2.2 That SITA be ordered to comply with its contractual obligations in respect of the PCEM system;

2.3 Alternatively to the above, that Applicants be interdicted and restrained from infringing the FDA's copyright in the FPS and the

PCEM systems, and that Applicants deliver all copies of the systems to FDA;

2.4 Costs, including the costs of two counsel.

[3] SAPS' technicians re-instated its access to the FPS system and the PCEM system on 9 April 2018. The VA-Amis system was restored on 14 May 2018. As a result, before the matter could be heard, applicants withdrew their application. Respondents persisted in seeking the relief sought in the counter-application, and on 25 May 2018 that application was heard by De Vos J. The counter-application was struck off for lack of urgency. Notwithstanding that the counter-application was struck off, De Vos J took the view that applicants' conduct (which I will deal with fully hereunder) was so reprehensible that they should bear the costs of the application, and he made an order accordingly.

[4] On 21 May 2018 SAPS launched an application for a review of the PCEM contract. No review application has as yet been launched in respect of the FPS systems contract. FDA set the matter down for consideration of the counter-application on 21 August 2018. On that date Tolmay J took the view that because of the pending PCEM review application, and the complexity of the matter, the application should be postponed. Costs were reserved.

[5] On 2 November 2018 SAPS and SITA brought an interlocutory application seeking the following:

5.1 That an order be granted in terms of rule 33 (4) of the Uniform Rules of Court, and that the following issues be heard separately, before FDA's entitlement to payment was decided:

5.1.1 Whether a contract was concluded between FDA and SITA during November 2017, on the terms set out in Annexure "KK 14";

5.1.2 Whether FDA is entitled to its alternative claim for interdictory relief.

[6] The interlocutory application also sought other relief, which ultimately became redundant, and is irrelevant to these proceedings. When the matter came before me, the parties had agreed that the only issues to be determined were whether FDA was the owner of the copyright in the FPS system, and whether it was entitled to interdictory relief. The issue of the validity of the agreement allegedly entered into in November 2017 is to be postponed *sine die*. I will now deal with the background to the matter.

BACKGROUND

[7] SITA is the organisation tasked with providing information technology to State entities, which includes SAPS. FDA, and Second Respondent ("ISS") have, for a number of years, provided various services and computer programs to SAPS.

[8] When the Firearms Control Act, Act 60 of 2000 came into operation, it imposed certain obligations on SAPS in respect of the control of firearms. FDA had developed a program which would allow SAPS to fulfil those obligations, and during 2005 FDA licensed a company called Waymark to resell the program to SAPS. In a letter dated 26 September 2005, Waymark wrote to SAPS stating that:

"After careful investigation into the market for a suitable product that would assist WAYMARK in delivering to the SAPS requirements set out in letter referred to in paragraph 1.1 only one supplier and product (Firearms Permit System-FPS) from Forensic Data Analysts (FDA) made the grade, as it currently addresses 99% of the requirement. The other 1% is minor configuration changes, which can be completed within the timeframe."

[9] The aforesaid correspondence culminated, during September 2005, in an agreement between SAPS and Waymark ("the Waymark agreement"). I will deal with the agreement later in this judgment. The Waymark agreement allowed the SAPS access to the FPS system which enabled it to do the following:

9.1 Mark all firearms with unique identification codes allowing a firearm to be tracked every time it is logged into the system, and to store the ballistic characteristics of firearms;

9.2 Log and track firearms that are issued to police officers;

9.3 Control the issuing of temporary permits for the use of firearms by SAPS members.

[10] During the period between 2005 and 2012 the FPS system was provided to SAPS by Waymark in accordance with the 2005 agreement. The Waymark agreement was terminated by SAPS on 30 August 2012. In the letter of termination SAPS firstly requested proposals for the successful completion of the FPS system (or firearms control system as it was then referred to), secondly, it recorded that Waymark had been unable to finalize the development of the system in the eight preceding years, and finally, it urged Waymark to find a solution to the defects in the program. It is important to note that at the termination of the Waymark agreement, SAPS was using version 1.0.0.47 of the FPS program.

[11] During mid-2015 SAPS requested FDA to submit a proposal in regard to the future use of the FPS system, and on 24 June 2015, whilst the proposal was being prepared, one Colonel Nita Geldenhuys specifically asked FDA to provide a letter confirming that FDA was the holder of the intellectual property in the FPS system. FDA did so. It is evident that at that stage SAPS was of the view that the intellectual property in the FPS system resided in FDA.

[12] FDA's proposal was accepted and the parties subsequently entered into an oral agreement in terms of which FDA supplied SAPS with the 1.0.0.50 version of the program, and with ongoing maintenance services. On 4 November 2015 SAPS issued a written order to FDA for services to be

rendered on a month-to-month basis. The services that FDA were to provide were referred to in the order as follows:

"Support and maintenance, firearms permit system SAPS month to month basis

Annual enterprise software licence fee for the firearm permit system"

[13] The *status quo* continued until 23 August 2016 when SITA advised FDA that it was in the process of renewing the "current enterprise software licences and [for] the maintenance and technical support of the Firearms Permit System for the South African Police Service (SAPS), which expires on 31 August 2016..."

[14] The renewal process culminated, on 2 December 2016, in the signing of a written agreement between SITA and FDA ("the 2016 agreement"). The agreement was valid for one year.

[15] The 2016 agreement terminated automatically on 31 October 2017. During the course of 2017, further negotiations were held with a view to renewing the contract. On 31 October 2017 SITA addressed a letter to FDA notifying it that the contract had been awarded for a further three years. The first paragraph reads:

"This serves as notification that your company has been awarded SS 1691-2017 ***the enterprise software licence fee*** *and support services for Firearm*

Permit System for South African Police Service (SAPS as follows:……."

(Court's emphasis)

[16] The contract price is set out in the letter, and is broken down into two components, one being the amount paid for maintenance and technical support, and the other the amount paid for the annual enterprise licence fee. On 1 November 2017 SITA sent a written contract to FDA, with exactly the same terms as the 2016 contract. It contains the same clause 10 as the 2016 agreement. FDA was requested to sign the agreement, which it did, whereafter the agreement was returned to SITA for signing. SITA has not signed the agreement.

[17] During late 2017 allegations (of unknown origin) were made that the FDA contracts were the result of corruption. Hearings of the Standing Committee on Public Accounts ("Scopa") were held to investigate the allegations. Scopa took the view that SAPS should make no future payments in terms of the agreement, and it recommended to SAPS to stop further payments. Although SAPS was not bound by Scopa's findings, the result was that SAPS terminated all payments to FDA. Notwithstanding the fact that it has not paid FDA since December 2017, SAPS has continued to use the FPS system to this day.

[18] During April 2018 FDA took the view that SAPS was in breach of its obligation to pay the licensing and maintenance fees, and on 3 April 2018 FDA addressed a letter to SAPS in which FDA advised that SAPS' access to the FPS would be suspended at midnight on 4 April 2018.

[19] On 6 April 2018 SAPS' attorneys wrote to FDA's attorneys. They recorded that FDA had suspended SAPS' access to the system, which they regarded as a breach of FDA's obligations to SAPS. They also alleged that SAPS's access to the system was governed by the Waymark agreement which had allegedly conferred a "permanent, non-expiring licence to use the FPS and to make sufficient copies for backup purposes." Significantly, there is no suggestion in the letter that SAPS held copyright in the program by virtue of section 5 (2) of the Copyright Act, Act 98 of 1978 ("the Act"). SAPS demanded that it be given access to the software system by 16h30 on the same day. It was FDA's failure to restore access that resulted in the launching of the urgent application, which, as I have stated, was withdrawn when SAPS managed to restore access to the systems.

[20] It is within the above context that the parties' claim to copyright should be considered.

COPYRIGHT

[21] Both SAPS and FDA claim copyright in the FPS system. In the alternative, SAPS claims that it has a perpetual non-expiring licence to use the FPS system which, it alleges, is derived from the Waymark agreement. Further in the alternative, should it be found that SAPS does not have copyright in the program, and that it does not have a perpetual licence to operate the system, then it is claimed that SAPS and SITA are licenced to use the system as a result of the 2016 agreement.

[22] In support of its claim to have copyright over the FPS software, SAPS alleges that the program was developed with SAPS' involvement and under its direction, with the purpose of meeting SAPS' specific requirements. It claims to have obtained copyright by virtue of the provisions of section 5 (2), read with section 21 (2) of the Act.

NATURE OF THE WORKS

[23] A computer program is defined by section 1 of the Act as "*a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result*". Section 2 (1) (i) of the Act specifically provides that computer programs are eligible for copyright, on condition that the material is original.

[24] Although the Act does not define the term "original", it was held in **Haupt t/a Soft Copy v Brewers Marketing Intelligence 2006 (4) SA 458 (SCA) at 472 G to 473 B** that a work is considered to be original when it has not been copied from an existing source, and its production was the result of a substantial or at least not trivial degree of skill, judgment or labour. In **Haupt** (*supra*), the Supreme Court of Appeal adopted the *dictum* in **CCH Canadian Ltd v Law Society of Upper Canada** [2004] 1 SCR 339 at para [25]:

> *"[A]n original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise. While creative works will by*

definition be "original" and covered by copyright, creativity is not required to make the work original."

[25] It is not in dispute that the FPS system is eligible for copyright, that it is an original work, and that FDA was the author thereof. The dispute is who owns the copyright.

OWNERSHIP OF COPYRIGHT

[26] Section 21 (1) (a) and (2) of the Act provides as follows:

"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).....

(e).....

(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international organisation concerned, and not in the author."

[27] Section 5 (1) and (2) of the Act provides as follows:

"***5. Copyright in relation to the state and certain international organisations***

(1) This Act shall bind the state.

(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organizations as may be prescribed.

(3)....."

[28] In summary therefore, the author of a work is generally also the holder of the copyright therein. The question is whether the FPS system was authored by FDA under the direction or control of the State, in which case, although FDA might have been the author, copyright in the FPS system would vest in the State.

HEARSAY EVIDENCE

[29] Before the evidence is analysed, it is perhaps important to first deal with the FDA submission that the deponent to the founding affidavit does not have personal knowledge of the facts to which he has deposed, and that his evidence is of little or no value. The deponent, Vincent Tendani Mphaphuli, states that he is the head of legal services for SITA. He alleges that he has personal knowledge of the facts deposed to in his affidavit. His affidavit is supported by a confirmatory affidavit by Lieutenant General Mfazi, the Deputy National Commissioner: Management Advisory of SAPS. It is unclear what

Mfazi's post entails, and what personal knowledge he might have regarding the history of the matter, specifically of the development of the FPS system.

[30] FDA took issue with Mr. Mphapuli's evidence, alleging that he did not have personal knowledge of the facts of the matter. In reply Mr. Mphaphuli states that he has personal knowledge of the facts, by virtue of the fact that he has been making submissions to the Standing Committee on Public Accounts ("Scopa") since the latter part of 2017. Save for Mr. Mphaphuli's averment that he has knowledge of the facts by virtue of his briefing of Scopa, there is no basis to find that he would have knowledge of the history of the matter, the computer programs and their development, and the negotiations that have occurred between the parties over the last thirteen years.

[31] It is so that in certain circumstances hearsay evidence will be admitted. In **Hewan v Kourie 1993 (3) SA 233 (TPD) at 237 I – J**, however, it was held:

> *"Apart from the lack of opportunity to test hearsay evidence through cross-examination, there clearly are further reasons for the exclusion of such evidence both by common law and in terms of s 3 (1) of the Act. This much is illustrated by the fact that, both before and since the enactment of s 3 (1), hearsay evidence on affidavit was and is inadmissible."*

[32] Applicant has not made out a case why the evidence of Mr. Mphapuli, which is in my view hearsay as regards the period before 2017, should be admitted under any exception to the hearsay rule.

[33] In contrast to the evidence presented by SAPS and SITA, FDA has filed affidavits by the persons who were intimately involved with the development of the computer program, being Keith Keating a director of FDA and ISS, and Johan Lamprecht, the senior developer of the FPS system. There is no doubt that these two witnesses have first-hand knowledge not only of the development of the computer system, but also of the contracts and the correspondence between the parties. I take into consideration the test in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 620 (AD) at 634 I**, that I have to consider the facts alleged by applicant (respondents in this instance), which are admitted by respondent (applicants herein), together with the facts alleged by respondent, and come to a determination based on those facts. That, however, presupposes that the evidence of the applicant is within the deponent's knowledge in the first place. Although the applicants' heads of argument make the point that there is allegedly a dispute of fact between the parties, Mr. Kennedy SC for applicants did not persue that submission, nor am I of the view that any real dispute of fact exists. The evidence of Mr. Mphaphuli is of limited value, and I will evaluate the totality of evidence on that basis.

SAPS' COPYRIGHT

[34] SAPS alleges that it has obtained copyright of the FPS program. Its contention is based solely upon the following statement in the founding affidavit:

"Although the programming code of the FPS was not written by SAPS itself, it was developed with its involvement, and under its direction with the purpose of meeting its specific requirements. ***I refer in this regard to the contents of pages 4 and 5 of Annexure FA 6, identified below.***" (my emphasis)

[35] Annexure FA 6 is a submission by SAPS to Scopa dated 28 February 2018. There are five statements on pages 4 and 5 of Annexure FA 6 that are relevant to the averment quoted above. They are the following:

35.1 *"The Firearm Control System (FCS) was procured following an open bidding process through SITA on 30 September 2004 and awarded to Waymark Info Tech (PTY) (sic)."*

35.2 *"In the period of the dispute, no payments were made to Waymark Info Tech (PTY) Ltd. However SAPS continued to utilise the FPS until it was notified that FDA owns the Enterprise Software Licence."*

35.3 *"Subsequent to this information, SAPS contracted FDA for a period of 12 months for maintenance and support, as well as an annual enterprise software licence from October 2015 to October 2016."*

35.4 *"SITA established a contract with FDA for a period of one year from October 2016 to 31 October 2017 for maintenance and*

technical support of FPS, which is accessed through the SAPS/SITA Service level Agreement: Managed Application."

35.5 *"A new request by SAPS dated 14 June 2017 was sent to SITA for a three year maintenance and support and software licence contract....."*

[36] It is questionable how Mr. Mphaphuli would even know how the program had been developed some thirteen years before, as he purportedly only has knowledge of the facts by virtue of having briefed Scopa since late 2017. That can hardly mean that he has knowledge of what happened in the period before 2017. Furthermore, the submission to Scopa does not provide support for Mr. Mphaphuli's contention that the program was developed under the direction of SAPS, but in fact contradicts that version. If SAPS held the copyright in the program by virtue of section 5 (2) of the Act, it would not have had to enter into a licencing agreement with Waymark. Further support for the contention that FDA developed the program is found in the Waymark letter of 26 September 2005 to which I have referred above. That letter unambiguously states that, as it stood, the program that FDA had developed provided for 99% of SAPS's needs, and the other 1% could be rectified.

[37] In **Biotech Laboratories (Pty) Ltd v Beecham Group PLC and another 2002 (4) SA 249 (SCA)** the Court considered whether a medicine package insert had been made 'under the direction or control of the State'. It was held (at 261 H – 262 A) that the insert was not made under the 'direction' of the State as it had not initiated its making and had not prescribed the manner and

means of its creation. As regards the concept of "control' it was held (at 262 C) that it was a factual question, rather than a legal one, whether the state had controlled the making of the insert. In approving of the approach in **Ricketson's** (The Law of Intellectual Property: Copyright, Designs and Confidential Information para 14.180), Harms JA held (at 263 A to C):

> *"...the production of the work needs to be the principal object of direction and control, and not merely an incidental or peripheral consequence of some generalised governmental licensing or monitoring power; the direction and control should be directly and specifically expressed with respect to the work in question and should not be inferred from the fact of some residual or unlimited government veto."*

[38] Whatever level of direction and control there has to be in order for the State to establish copyright in terms of section 5 (2), in this case there is no evidence that the state exercised any direction or control at all over the creation of the program. It is not sufficient to make a bald allegation that the program was created at the direction and under the control of the State. Some facts supporting that averment must be placed before the Court. I am of the view that it has not been established that SAPS obtained copyright of the program by virtue of it having been written under its direction or control. The evidence shows that in fact the program was written by FDA and provided to SAPS in completed form. In the circumstances I find that FDA holds the copyright in the FPS system.

THE WAYMARK AGREEMENT

[39] SAPS has averred, in the alternative, that it obtained a perpetual licence by virtue of the Waymark agreement. It is alleged that SAPS paid a once-off licence fee for the right to use the program. The averment is based upon the wording of clause 6 of the Waymark agreement. Clause 6 reads as follows:

> *"6. COMMENCEMENT AND TERMINATION*
>
> *6.1 This agreement will commence on the Date of Signature and will be in force for a period of one (1) year calculated from the Date of Signature. Termination in terms of this Clause by the Licensee does not affect the Licensee right to use the Firearms Permit System.* (sic)
>
> *6.2 This agreement is renewable on an annual basis, with a written notice period of (30) thirty days.*
>
> *6.3 Support services are renewable yearly in advance starting from one calendar year after sign off of this agreement.*
>
> *6.4 Without prejudice to any remedies which any of the Parties may otherwise have in terms of this Agreement or at law, either of the Parties shall be entitled to terminate the agreement by written notice*

to the other in the event that either of the Parties commits a breach of this Agreement and fails to remedy such breach within seven (14) days (sic) after receiving written notice from the other Party and claim all damages that it might have suffered as a result of that breach.

6.5 *The termination of this Agreement, for whatever reason shall not affect the rights of either of the Parties that may have accrued before the termination of the Agreement or which specifically or by their nature survives the termination of the Agreement."*

[40] The above clause should be read within the context of the rest of the agreement. Clause 1.1 provides that FDA has granted Waymark the right as licensor to licence and resell the "*Firearms Permit System (Software) in its totality to SAPS*". The *"licence"* is defined as a non-transferable and non-exclusive right granted to SAPS to use the system and to make sufficient copies thereof for back-up purposes. The use of the licence is restricted by clause 4 of the agreement, and SAPS is precluded from:

40.1 Modifying the Firearm Permit System;

40.2 Decompiling, disassembling or reverse engineering the system;

40.3 Disclosing the source code or information provided in terms of the agreement.

[41] If the intention of the agreement was to confer a perpetual licence on SAPS, the agreement would no doubt have said so expressly, and would not have imposed limitations on SAPS' use of the system.

[42] On a superficial level, clause 6.1, which allows for the continued use of the system after termination, is in conflict with clause 10, which clearly reserves the rights to the system for the licensee.

[43] The relevant portion of clause 10 of the Waymark agreement reads as follows:

> *"10 INTELLECTUAL PROPERTY RIGHTS*
>
> *10.1 All rights, title and interest in all Intellectual Property relating to any products owned by the parties, their vendors and/or suppliers and the firearms Permit System used to implement such products shall at all times remain the sole property of such parties, their vendors or suppliers.*
>
> *10.2 .....*
>
> *10.3 The licensee acknowledges that any and all of the Intellectual Property rights used or embodied or in connection with the Firearms Permit System are and*

will remain the sole property of the Licensor or its successor in title.

10.4 Licensor retains all title to the Firearms Permit System, and all copies thereof and no title to the Firearms Permit System, or any intellectual property therein is not transferable to the licensee." (sic)

[44] Mr. Kennedy has argued that the Waymark agreement conferred a perpetual licence on the applicant, by virtue of the provisions of clause 6.1. However, should clause 6 be read in context with the rest of the agreement, it is clear that this contention cannot stand.

[45] The agreement was to terminate automatically after one year. The words contained in clause 6.1, *"termination in terms of this clause by the licensee"*, can only refer to termination by SAPS in accordance with clause 6.4, in terms of which the agreement could be terminated should the licensor breach the terms of the agreement. In my view, such termination would allow SAPS to continue to use the system after termination, but only for the remainder of the one-year period whereafter the agreement would have lapsed in any event by effluxion of time. Any other interpretation would be contrary to the provisions of clause 10, which reserved the intellectual property rights for the person who was the holder thereof before the agreement was signed. The Waymark agreement is devoid of any reference to a perpetual licence, and the allegation that it conferred a perpetual licence on SAPS to use the system, is in my view contrary to the entire tenor of the agreement.

[46] On 30 August 2012 SAPS wrote to Waymark and recorded that:

46.1 The agreement had come to an end on 31 March 2011;

46.2 SAPS wished to terminate the relationship between it and Waymark;

46.3 SAPS would pay for services rendered after expiry of the agreement.

[47] The agreement was not terminated by SAPS as provided for in clause 6.1, read with clause 6.4, due to a breach of the agreement. It terminated by effluxion of time, and there is in my view no basis to find that the licensing agreement survived the termination of the agreement. I therefore find that SAPS does not have a perpetual licence to the FPS system by virtue of the Waymark agreement.

[48] I must point out that FDA has conceded in its papers that SAPS might have obtained a perpetual licence to use the 1.0.0.47 version of the program, which was the applicable version at date of termination of the Waymark agreement. FDA has tendered the reinstatement of that version, but it points out that the 1.0.0.50 version which it reinstalled in 2015, upon the resumption of its relationship with SAPS, is a much different version to the 1.0.0.47 version.

[49] In argument Mr Michau SC, acting for respondents, made the submission that the above concession should not have been made, and I believe that he

might well be correct in that regard, as the Waymark agreement did not grant a perpetual licence to use the program after termination thereof. However, in view of the order that I grant hereunder, the tender to restore the 1.0.0.47 version is important.

THE 2016 SITA/FDA AGREEMENT

[50] For a period of one year, from 2015 to 2016, FDA provided the Firearm Permit System to SAPS on a month to month basis. On 4 November 2015 SAPS produced a written order which clearly differentiated between the monthly maintenance and support component on the one hand, and the annual software licence fee for the FPS system on the other hand. On 14 October 2016 Keating wrote to SITA requesting feedback on a proposed FPS system's contract between FDA and SITA. He pointed out that the licence fees for the use of the program had been due by 1 September 2016, and that the SAPS's continued use of the program was unlicensed. SITA merely replied that the matter had been escalated to its Head of Procurement. SITA did not deny that licence fees were due in respect of the use of the program.

[51] On 2 December 2016 FDA and Sita entered into a written agreement ("the 2016 agreement") in terms of which FDA undertook to provide maintenance and technical support of the FPS system for SAPS for a period of one year. In terms of the 2016 agreement SITA would pay FDA R 20 297 345.03 for the services. The "services" are defined as the services described in annexure C to the agreement. Annexure C does not mention a licensing fee. The rest of the agreement also does not expressly refer to a licensing fee.

Mr. Kennedy has made the point that the 2016 agreement does not contain any provision for the licensing of the program, and on a superficial reading of the agreement he is correct.

[52] Clause 10 of the 2016 agreement reads as follows:

> **10 *OWNERSHIP OF INTELLECTUAL PROPERTY rights* (sic)**
>
> *10.1 Any Intellectual Property created and all Intellectual Property rights acquired prior to the commencement of this agreement shall vest exclusively with the Party or Parties who created same. Any Intellectual Property derived, produced or developed by the Service Provider after the commencement date expressly and exclusively for SITA shall vest in SITA.*
>
> *10.2 SITA acknowledges that all Intellectual Property rights used or embodied in or in connection with the software are and will remain the sole property of the Service Provider and that SITA only has a licence to use the said software.*
>
> *10.3 The parties agree that SITA may require that the source code of such software be disclosed to it, should the Service Provider not be in a position to continue licensing or supporting the software as provided for in this agreement. The Parties agree that*

the source code in respect of the software shall be in escrow in accordance with a separate Source Code Escrow Agreement to be concluded between the Parties within agreed timelines.

10.4 *The Service Provider warrants that, to the best of its knowledge, the software does not infringe upon or violate any patent or copyright of any third party and indemnifies SITA from any claim of any third party for copyright or patent infringement.*

10.5 *Upon termination or cancellation of any licence agreement relevant to the software, SITA will, at the Service Provider's option, destroy and in writing certify destruction, or return to the Service Provider all copies of the software, the licence for which has been so terminated or cancelled and any other related Intellectual Property in SITA's possession including Intellectual Property incorporated in other software or writing.*

10.6 *Upon termination of this Agreement, each party will promptly return to the other party all documents, diskettes, drawings and any other medium containing the information of the other Party, as well as copies, notes or reproductions thereof, and delete and*

remove information from its electronic databases and deliver to each Party a certificate from an authorised representative of such party that it has done so.

10.7 This clause 10 shall survive termination or cancellation of this Agreement; endure a further period of two (2) years after the termination or cancellation."

[53] FDA was the service provider referred to in the agreement, and clause 10.2 is consequently clear: the intellectual property rights in and to the software reside in FDA. That this was also the view of SITA is borne out by its lack of response to Keating's letter in which he complained that the software was being used even though the licencing period had expired. The 2016 agreement might not have expressly stated that SITA was granted a licence to use the program, but that was in my view clearly the intention of the parties. Upon the agreement terminating by effluxion of time in November 2017, SITA and SAPS were under an obligation to stop using the FPS system, and to return all copies of the program to FDA.

[54] My view is further strengthened by the agreement that SITA proposed in 2017 ("the 2017 agreement"). On 31 October 2017 SITA wrote to FDA notifying it that FDA had been awarded the contract for the "***enterprise software licence fee*** *and support services for the Firearm Permit System for South African Police Services (SAPS)....." (my emphasis)*

[55] The letter contains a schedule of services and payments totalling R 69 499 999.81, which includes the sum of R 9 144 736.85 per annum for the "*Annual enterprise licence fee for Firearms Permit System*". The contract price clearly included a licencing component, even though the contract is silent about a licence. The 2017 agreement is identical to the 2016 agreement (save for the contract price), and it contains the same clause 10 as quoted above, thus reserving the intellectual property rights for FDA.

[56] Even though the 2017 agreement was never signed by SITA, the evidence is in my view overwhelming that when SITA drafted the proposed agreement, SAPS and SITA were *ad idem* that the intellectual property rights to the FPS system resided in FDA.

[57] Mr Kennedy argued that the 2016 agreement created an ongoing licence in favour of SITA and SAPS, enabling them to use the system. I disagree. In my view the 2016 agreement in fact provides that SAPS and SITA were only entitled to the use of the system whilst they were licenced to do so. Mr. Kennedy urged, that if I were to find his contention to be incorrect, to then find that the Waymark agreement, alternatively the State's copyright allowed for the continued use of the system. In my view none of these submissions have any merit. Mr. Kennedy's contention that neither SITA nor SAPS realized, before this application was launched, that the State held the copyright in the program, alternatively, that it held a perpetual licence to use the program, also cannot stand.

[58] Mr. Kennedy's submission would mean that when SAPS originally entered into the Waymark agreement, it mistakenly believed that FDA was the owner of the copyright. During negotiations in respect of three subsequent agreements, allegedly, neither SAPS nor SITA realized that it was not necessary to obtain a licence for the use of the FDA system. That would imply that SAPS and SITA (the latter by definition being responsible for the sourcing of information technology for the State) were so inept, that for some thirteen years they did not realize that FDA was not the owner of the intellectual property in the FPS system and that copyright in fact vested in the State. This contention is, in my view, so unlikely that it must be rejected.

[59] It is common cause that the 2016 agreement terminated by effluxion of time. On the applicants' version, the 2017 agreement never came to fruition as it was never signed by SITA. The provisions of clause 10.6 of the 2016 agreement should therefore be applied, resulting in SITA and SAPS having an obligation to return all documents, diskettes, drawings and any other medium containing the FPS program, and all copies, notes or reproductions thereof to FDA. The continued use of the FPS system by SAPS without a licence is unlawful.

REQUIREMENTS FOR A FINAL INTERDICT

[60] In order to succeed with its application, FDA has to show:

60.1 The existence of a clear right;

60.2 An injury actually committed or reasonably apprehended;

60.3 No adequate alternative remedy.

(See Setlogelo v Setlogelo 1914 AD 221)

[61] I have already found that FDA is owner of the copyright, and it thus has a clear right to prevent the unauthorised use of the FPS system. The second requirement for an interdict is that there has been an injury actually committed or one that is reasonably apprehended. FDA must show that the ongoing infringement of its copyright constitutes an injury that justifies the granting of an interdict.

[62] **V & A Waterfront Properties (Pty) Ltd and another v Helicopter & Marine Services (Pty) Ltd and others [2004] 2 All SA 664 (C)** concerned an application for an interdict, restraining the respondent from using an allegedly unairworthy helicopter at premises that respondent was renting from applicant. The use of the helicopter in an unairworthy state was contrary to the lease agreement between the parties. The High Court found that although the use of an allegedly unairworthy helicopter was contrary to the terms of the lease, the applicant's concern that the helicopter might crash and cause harm was not reasonable, and that applicant had therefore not established that it had a reasonable apprehension of actual harm.

[63] The judgment of the High Court was overturned on appeal. The SCA in **V & A Waterfront Properties (Pty) Ltd and another v Helicopter & Marine Services (Pty) Ltd and others [2006] 3 All SA 523 (SCA) at par. 20 to 22 (2006 (1) SA 252 (SCA) at 257 E to 258 A)** held as follows:

"[20] The respondents contended nevertheless that breach did not constitute "injury" for purposes of the second essential requirement for final interdict relief which was expressed in the classic formulation as "injury actually committed or reasonably apprehended". The argument was that "injury" in that phrase had necessarily to entail physical harm or pecuniary loss. The appellants had consequently to show, so the contention proceeded, that the helicopter was unairworthy and that its operation involved risk to life and property.

[21] The argument is founded on neither authority nor principle. The leading common-law writer on the subject of interdict relief used the words "eene gepleegde feitelijkheid" to designate what is now in the present context, loosely referred to as "injury". The Dutch expression has been construed as something actually done which is prejudicial to or interferes with, the applicant's right. Subsequent judicial pronouncements have variously used "infringement" of right and "invasion of right". Indeed, the leading case Setlogelo (supra) was itself one involving the invasion of the right of possession. Of course it is hard to imagine that a rights invasion will not be effected most often by way of physical conduct but to prove the necessary injury or harm it is enough to show that a right has been invaded. The fact that physical means were employed or physical consequences sustained is incidental.

[22] In the present case therefore the threatened invasion of the first appellant's rights under the lease constituted proof of reasonably

apprehended injury. It was not necessary for the appellants' success to show that the helicopter was unairworthy or what the chances were of a fatal or destructive crash."

[64] It is therefore sufficient for the applicant in an interdict to show that the infringing behaviour constitutes a breach of its rights arising from an agreement. The infringement of FDA's rights in this instance lies in the fact that, contrary to SITA's contractual obligation to return all copies of the program in accordance with clause 10.6 of the 2016 contract, SITA and SAPS are continuing to make use of the FPS system despite the fact that the licence has expired and that no payment is being made for the use of the program. FDA obviously does not allege that it is suffering physical harm. It is suffering pecuniary harm, but more importantly, its copyright and its rights under the 2016 agreement, to have the program and all related material returned to it, are being infringed. In my view that is sufficient to establish that applicant is suffering a continuing injury, satisfying the second leg of the test for an interdict.

[65] The third leg of the enquiry is whether FDA has an alternative remedy to an interdict. The Court will not, in general, grant an interdict when adequate redress can be obtained by an award for damages. **(Fourie v Uys 1957 (2) SA 125 (c) at 128; Van der Merwe v Fourie 1946 TPD 389 at 392)**

[66] In **Reserve Bank of Rhodesia v Rhodesia Railways 1966 (3) SA 656 (R) at 658 E** the Court held as follows:

"As Sir James ROSE-INNES, C.J., pointed out in the leading case of Setlogelo v. Setlogelo, 1914 A.D. 221 at p. 227, it is one of the essential prerequisites to the granting of an interdict that "no similar protection by any other ordinary remedy" is open to the applicant. Nathan, in his well-known work on Interdicts, states the position as follows, on p. 32—

'Lastly, as van der Linden says, there must be no other ordinary remedy by which the applicant can be protected with the same result. We have seen the examples he gives (Chap. II, above). The most familiar example, however, which comes to a lawyer's mind is that of damages. It is clear that if the applicant will have adequate compensation by the award of damages, he will have another ordinary remedy. There are, however, two limitations upon this: (1) The respondent is not entitled to say, 'I am going to keep the thing or the shares you are trying to vindicate, and you should be satisfied with damages, which I am well able to pay'—this the Court will not allow; (2) nor will the Court, where property has been taken or detained by the respondent, regard damages as a sufficient remedy where the respondent is clearly in bad financial circumstances, 'a man of straw'.

Generally speaking, however, the fact that the applicant has a remedy open to him by way of an action for damages is sufficient to bar an application for an interdict where the interference or breach of right is capable of measurement in money.'

The operative part of that quotation, in fact the essence of it, really, is that there is an existing remedy for the protection of the applicant 'with the same result', as the learned author says, and if that is the situation then, so it seems to me, the interdict should be refused."

[67] The right that FDA seeks to protect is its copyright to the FPS system. It may be so, as Mr. Kennedy argued, that the interdict was merely a method used to force SITA and SAPS into paying for the use of the program. That however, does not change the essence of the relief being sought: the protection of FDA's intellectual property. FDA's motive is not relevant: what is relevant is whether the requirements for an interdict have been met.

[68] Mr. Kennedy argued that FDA had the alternative remedy to sue for damages, or for royalties by virtue of section 24 (1A) of the Act. Mr. Michau on the other hand argued that the infringing conduct was ongoing. He submitted that should an interdict not be granted, a message would be broadcast all and sundry that the State was entitled to use any intellectual property as it pleased, without paying for the use thereof. I agree with Mr. Michau that this Court cannot be seen to condone the State's behaviour. It is unacceptable to simply use another person's intellectual property without effecting payment to the owner of the copyright.

[69] In **Chapman's Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O'Hagans [2001] 4 ALL SA 415 (C)** the Applicant had sought an interdict to restrain a neighbouring restaurant from using a timber deck that had been erected in conflict with the zoning scheme rules, and

without the requisite building permission. The complaint was that the deck would result in an escalation in the number of patrons using the premises, resulting in an overspill into applicant's parking area. The respondent argued that an alternative remedy was available, i.e. that applicant could appoint a guard to prevent respondent's customers from parking in applicant's parking. The High Court agreed with respondent and refused the interdict.

[70] On appeal, a full Court held (at paragraph 27) that the refusal of an interdict amounted to the condonation by the court of criminal behaviour. The Court consequently upheld the appeal. *In casu* the refusal of an interdict would allow SITA and SAPS to continue to infringe on FDA's copyright, which, although not a criminal offence as in **Chapman's Peak Hotel (supra)**, would still amount to allowing an ongoing wrong.

[71] In **Hotz and others v University of Cape Town [2016] 4 ALL SA 732 (SCA)** the court dealt with an application to interdict a number of students from entering onto the premises of the University of Cape Town, and from committing certain acts of violence. The University had experienced a prolonged period of violence during which students committed various acts of civil disobedience. It was suggested that the University had alternative remedies available to it, for instance by laying criminal charges against the students, by engaging in dialogue with them, or by entering into mediation. The Court held (at paragraph 39) as follows:

> *"[39] This understanding of the nature and purpose of an interdict is rooted in constitutional principles. Section 34 of the Constitution*

guarantees access to courts, or, where appropriate, some other independent or impartial tribunal, for the resolution of all disputes capable of being resolved by the application of law. The Constitutional Court has described the right as being of cardinal importance and "foundational to the stability of an orderly society" as it "ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes without resorting to self-help". It is "a bulwark against vigilantism, and chaos and anarchy". Not only is the Constitution the source of the university's right to approach the court for assistance, in doing so it is exercising a right that the Constitution guarantees. In granting an interdict the court is enforcing the principle of legality that obliges courts to give effect to legally recognised rights. In the same way the principle of legality precludes a court from granting legal recognition and enforcement to unlawful conduct. To do so is 'the very antithesis of the rule of law'." (footnotes omitted)

[72] A party is entitled to protect its rights. In my view, where the infringement is ongoing, a Court would lean towards the granting of an interdict. SAPS and SITA have been using the FPS system unlawfully for more than a year. They clearly have every intention of continuing to do so, thereby prolonging their unlawful conduct. To refuse an interdict, thereby allowing the perpetration of an ongoing wrong, is anathema to the principle of legality. Even though FDA has a claim for damages (or royalties), resulting from the infringement of its copyright, such remedy would not correct the wrong that is being perpetrated, namely the ongoing infringement of FDA's copyright.

COURT'S DISCRETION

[73] Once all the requirements for an interdict have been established, a Court still has a discretion whether to grant the interdict or not. However, it was held in **Francis v Roberts 1973 (1) SA 507 (RA) at page 513 H** that it is a discretion that must be judicially exercised. What should be weighed up is the prospective harm for the party seeking the interdict, as opposed to the result for the interdicted party should the relief be granted.

[74] On the one hand, the harm for FDA is that should the interdict not be granted, its copyright would still (continued to) be infringed and it would not be paid licence fees. On the other hand chaos could result from the granting of an interdict. SAPS would not be able to fulfil its obligations to keep track of firearms in the country. However, the imperative that State entities should not be seen to be acting in a lawless fashion should be added to the equation. A Court cannot simply sit by and allow the State to continue acting in contravention of the law, the upholding of which is the State's principal obligation, and to flagrantly invade the rights of a contracting party that the State must respect and protect in terms of section 7 (2) of the Constitution. The Court has an obligation to ensure that the principle of legality is upheld, and to prevent a gratuitous infringement of the law.

[75] Earlier in this judgment I alluded to the judgment of De Vos J in the urgent application. In that application SAPS and SITA did not pursue their application, the SAPS technicians having restored access to the various

programs. FDA's application was struck off for lack of urgency. Nevertheless, SAPS and SITA were ordered to pay the costs of the application.

[76] In his judgment, De Vos J pointed out that although the Commissioner of Police corresponded with Scopa on 28 January 2018 regarding the alleged invalidity of the 2017 agreement, payment for the FPS system had in fact already been terminated in December 2017. At that stage there were no facts to show that FDA had been involved in any underhanded activities. In fact, the evidence is that applicants' legal representatives advised applicants that they should continue to pay FDA's charges. Nevertheless, SITA and SAPS simply stopped paying for the FPS system. De Vos J described their approach as "reprehensible", hence the costs order. I respectfully share his view of the applicants' conduct.

[77] I have had the opportunity of reading the conditional review application, which was filed (unsigned) as part of SITA and SAPS' application for a separation of issues. I have not dealt with the latter application, which has become moot. However, in the conditional review application SAPS and SITA try to make out a case that the 2017 agreement, if it had in fact been concluded, was unlawful as it was allegedly not cost-effective as required by section 217 (1) of the Constitution. In my view, the review application is so devoid of merit that it justifies the view of De Vos J that the SAPS and SITA's conduct was utterly reprehensible. As a result of the view that he had taken, De Vos J mulcted the applicant with costs.

[78] I am well aware of the effect that the granting of an interdict might have on the functioning of the SAPS's firearms system. FDA has tendered to re-instate the 1.0.0.47 version of the FPS system on the SAPS's computer systems, against payment of an annual licence fee. This is the version that the SAPS was using in 2012 when it terminated its relationship with Waymark. This system, although criticised by SAPS at the time, seems to have functioned for some seven years before the Waymark agreement was terminated. In my view, should the aforesaid version be reinstated, it would ameliorate the effect of the interdict on the FPS system.

[79] The reinstatement of the old system was not addressed in argument, and therefore I asked the parties to submit supplementary heads of argument. The parties were specifically asked to address the following:

> *"In the event that the Court was to find that respondents should be granted the relief that they seek:*
>
> 1. *What are the parties' submissions regarding the implementation of the 1.0.0.47 version ("the old version") of the FPS system as tendered by first respondent?*
> 2. *What technical difficulties may be encountered in the implementation of the old version?*
> 3. *What timeframe do the parties envisage would be required for the implementation of the old version?*

4. *Do the parties have any other submissions regarding first respondent's tender to assist with the re-implementation of the old version?"*

[80] I am grateful to counsel for submitting heads of argument at very short notice. On behalf of SAPS and SITA it was submitted that they should not, by making their submissions in regard to the reinstatement of the old version, be regarded as having conceded that respondents are entitled to any order. I accept that that is the case. They further submit that by making the tender, FDA is not seeking to enforce its purported copyright in the old version of the program. I do not understand the tender in those terms. FDA has tendered the use of the program against payment of an annual licence fee. FDA has not abandoned its copyright in the program. Applicants submit that they anticipate significant negative operational effects as a result of having to use the 1.0.0.47 version, which difficulties will continue until an alternative to the old system is procured or developed. Applicants foresee that the implementation of the system would take eight weeks. They request an opportunity to approach Court should difficulties arise with the implementation of the system. Applicants will only require an executable unlocked copy of the program on a disk or hard drive to implement the system, but will not require any further assistance from FDA.

[81] Mr Michau submitted that FDA could not address possible technical and time frame difficulties. However, FDA stands by its tender as made in the papers. FDA submits that the implementation can be attained within five days. It tenders its resources on a "time and material basis" to assist applicants in

the reinstatement of the system, if required. I find this time estimate to be extremely optimistic given the fact that the system is used countrywide. Finally, Mr. Michau submits that should an interdict be granted, it should take immediate effect, and should applicants not comply timeously, a contempt application may be brought.

[82] In my view applicants should be granted an opportunity to reinstate the 1.0.0.47 version. I say this, mindful of the serious harm that may result should the FPS system not be available at all. However, in view of my finding that neither SAPS nor SITA have a perpetual licence to use the system, FDA still has copyright in the system, and should be compensated for the use thereof. Therefore I propose to grant applicants an opportunity to elect whether to take up FDA's tender, against payment of a licence fee that is agreed between the parties.

[83] In **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T) at page 347** it was held that a Court does not have a general discretion to defer the operation of an interdict. Such a discretion would only arise in exceptional circumstances. In this matter there is a substantial public interest in the proper working of the FPS system. It is imperative that SAPS be allowed to fulfil its obligation to mark firearms, and to track and monitor the possession thereof. In those circumstances I may, in my view, exercise a discretion to defer the operation of the interdict in order to allow SAPS to reinstate an alternative system. I have no doubt that it will take time for the SAPS to replace the present system with the 1.0.0.47 version.

Therefore I propose to suspend the interdict for a period of 60 days from date of judgment.

[84] Finally, something should be said about costs. In the counter-application respondents seek a costs order "on the appropriate scale". In their heads of argument respondents make the submission that applicant's conduct justifies a costs order on a punitive scale. I take note of the fact that an attorney and client costs order is not granted lightly. The following *dictum* is found in **Zodin Investments (Pty) Ltd v Kemp 1983 (4) SA 438 (C) at page 486:**

> *"Now, that attorney and client costs of an appeal can be awarded admits of no doubt, see Herold v Sinclair and Others 1954 (2) SA 531 (A); Ward v Sulzer 1973 (3) SA 701 (A). Costs, whether party and party or attorney and client, are matters for the discretion of the Court, to be exercised judicially upon a consideration of all the facts; as between the parties it is a matter of fairness to both sides. Attorney and client costs may be awarded when unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant has burdened his opponent with attorney and client costs. Ethical considerations too may influence the exercise of the Court's discretion to award such costs. But the examples given above as to when attorney and client costs may be awarded are certainly not exhaustive and such costs may indeed be awarded whenever special considerations or special circumstances exist justifying the grant of such an order, see Pieter Bezuidenhout-Larochelle*

Boerdery (Edms) Bpk 1983 (2) SA 233 (O) at 237."

[85] Applicants stopped paying FDA for its services for no discernable reason. They were warned by their legal representatives that they should continue to pay for the use of the FPS system, advice which they ignored, forcing respondents to approach the Court for relief. Despite De Vos J warning applicants that their conduct was reprehensible, they have continued to put up a frivolous defence. In my view, the facts of the matter justify a costs order on the attorney and client scale.

[86] In the circumstances I make the following order:

86.1 Applicants are interdicted and restrained from infringing the copyright of the first respondent in the computer program relating to the Firearm Permit System.

86.2 Applicants shall return to first respondent all documents, diskettes, drawings and any other medium containing information in respect of the Firearms Permit System, as well as copies, notes, adaptations or reproductions thereof.

86.3 Applicants shall deliver to FDA a certificate by an authorized representative, certifying that all copies of the 1.0.0.74 version, and notes or reproductions thereof, have been removed from their databases.

86.4 The orders in paragraphs 86.1, 86.2 and 86.3 above are suspended for a period of 60 days from date of this judgment.

86.5 Applicants may elect to reinstate the 1.0.0.47 version of the Firearm Permit System ("the old version"). Upon first respondent being advised that applicants have elected to reinstate the old version:

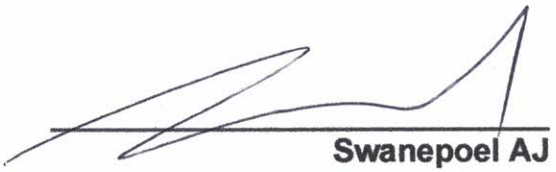
86.5.1 The parties shall endeavour to agree on a market related licence fee for the use of the system;

86.5.2 Upon agreement being reached regarding the licence fee, FDA shall provide an executable, unlocked copy of the old version to applicants.

86.6 In the event that applicants elect to reinstate the old version of the FPS system, either party may approach the Court for further direction, on the same papers duly supplemented, should difficulties arise during the implementation process.

86.7 Prayers 2 and 3 of the counter-application are postponed *sine die*.

86.8 Applicants shall pay the respondents' costs on the attorney and client scale, including the costs of 21 August 2018, which costs shall include the costs of two counsel.



Swanepoel AJ
Acting Judge of the High Court,
Gauteng Division, Pretoria

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Date of judgment:	**30 January 2019**