

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

663

Case no 663 of 1992

In the matter between:

WAYLITE DIARY CC

Appellant

and

FIRST NATIONAL BANK LTD

Respondent

Court: Corbett CJ, Smalberger, Kumleben, Nienaber and Hams JJA Heard: 25 August 1994

Delivered: 27 September 1994

JUDGMENT

HARMS JA: This appeal relates to the subsistence of copyright in the appointment pages of a diary.

The appellant (the applicant in the court below) is a close corporation carrying on business as a designer and producer of diaries. During the course of 1987 it approached the respondent bank ("FNB") with a view to providing the latter with diaries for the following year. In the event an agreement was reached in terms of which the appellant was to supply FNB with, inter alia, so-called "field diaries" for its managers. A field diary is a pocket diary intended for the use of FNB's bank managers when not at the office. A field diary was then designed (by whom is in dispute) and about 3 000 for 1988 were in due course supplied by the appellant to FNB. FNB's managing director was very pleased with the work and the appellant was commissioned to produce similar field diaries for 1989, 1990 and 1991. During the course of 1991, it seems, FNB invited tenders for the supply of

field diaries for 1992. The appellant submitted a tender, at the same time pointing out that the diaries had been designed by the appellant and claiming that copyright in the diaries vested in it. FNB ignored the implied warning and awarded the tender to another printing concern. The format of these field diaries was, to all intents and purposes, identical to that printed by the appellant.

Relying on its alleged copyright, the appellant applied during March 1992 to the Witwatersrand Local Division for an order interdicting FNB from infringing its copyright, not in the diary as such, but in respect of the appointment pages only. (The prayer for the delivery for destruction of all the field diaries in FNB's (or their managers') possession was abandoned.) The application was dismissed by Stegmann J in a judgment reported at 1993 (2)SA 128 (W). It was in his view not necessary to consider the conflicting allegations relating to authorship; he assumed that the

appointment pages were either artistic or literary works; but he concluded that the work in designing, drawing and composing the pages in which copyright is claimed was not original (within the meaning of that word as used in sec 2(1) of the Copyright Act 98 of 1978 ("the Act")) since it did not have the "quality of meritorious distinctiveness" (at 136C). He refused leave to appeal but leave was granted in consequence of a petition to the Chief Justice.

The field diary in issue is vertical in layout. On the title page FNB's logo is printed in so-called corporate colours, with the year and the words "field diary" and "velddagboek". On its reverse side appears a claim that it had been "designed and produced by the WAYLITE Diary Co.", the latter's telephone number is given and there is a copyright claim. The next page is entitled "Identification/Identifikasie" and has space for the insertion of personal information. Subsequent pages provide lists of public holidays and

school terms, some conversion and distance tables, calenders for the current and following year, the year "at a glance" and space for important dates and notes. The last few pages make provision for the following year "at a glance" and leave space for telephone numbers. As indicated, the appellant (for no given reason) did not claim copyright in any or all of this.

The format of the appointment pages in which copyright is claimed, consists of pairs of facing pages, each pair dealing with a particular week, beginning on a Monday. The left hand page furnishes on the first line the name of the month in English and Afrikaans and also the number of the week. The days of the week are then listed (also in both languages) and dated on the same page, with four horizontal lines of writing space for weekdays and two horizontal lines each for Saturday and Sunday. The right hand page has a number of lines for the making of notes and at the foot a calendar consisting of the current and the two succeeding months. The

colours and typeface used were standard in terms of FNB's corporate identity specifications.

Mr Cianfanelli, a member of the appellant and the alleged author of the appointment pages, stated in the founding affidavit that, as far as he could recall, he had spent about twelve hours before arriving at the "preferred layout and format". This involved preparing a sketch on tracing paper and erasing and adding indicia to try out numerous different formats and layouts. He did not, he said, base his design on any existing diary and had only utilised his own skill, knowledge and expertise.

The types of works listed in sec 2(1) of the Act are "eligible for copyright" provided they are "original". The categories relevant to this case are artistic and literary works. The subsection presupposes, as a general rule, two different inquiries: first, whether the work relied upon falls within one of

the categories and, if so, whether it was original. But, as pointed out by Blakeney and McKeough, Intellectual Property, Commentary and Materials, 1987, at p 27:

"To some extent the concept of what constitutes a 'work' within the Act and the concept of originality are intertwined. It is difficult to discuss what amounts to a 'work' without discussing originality, since without a sufficient degree of 'originality' a 'work' will not come into existence."

Counsel for the appellant submitted that this statement is incorrect because

it does not take account of the fact that the question of whether a work is,

say, an artistic work is an objective question, whereas originality involves

a subjective inquiry. I am not convinced that the latter part of the

submission is correct. While it is true that the actual time and effort

expended by the author is a material factor to consider in determining

originality, it remains a value judgment whether that time and effort produces something original.

To illustrate the point reference may be made to *Francis Day and Hunter Limited v Twentieth Century Fox Corporation Limited and Others* [1940] AC 112 (PC)¹. The copyright in the title of a song (written and composed by Fred Gilbert) called "The Man Who Broke the Bank at Monte Carlo" was an issue in the case. The title was subsequently used by the defendants for the name of a film. Lord Wright stated in this regard (at 123):

"As a rule a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied. . . .

¹Also reported at [1939] 4 All ER 192.

But this could not be said of the facts of the present case. There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title, though it is of the most obvious. To "break a bank" is a hackneyed expression, and Monte Carlo is, or was, the most obvious place at which that achievement or accident might take place. The theme of the film is different from that of the song, and their Lordships see no ground in copyright law to justify the appellants' claim to prevent the use by the respondents of these few obvious words, which are too unsubstantial to constitute an infringement, especially when used in so different a connection."

It is implicit in this statement that whether an alleged work is proper subject-matter for copyright protection involves an objective test, both in respect of originality and "work"; also that the two inquiries can become entwined. And the last sentence quoted indicates that in assessing whether a work is entitled to protection, it is permissible to have regard to the

consequences of the recognition of copyright in a work of doubtful substance.

It was submitted on behalf of the appellant that the sketch prepared by Mr Cianfanelli of the appointment pages is an "artistic work" as defined by sec 1 (1) of the Act, because it is either a "drawing" or a "chart". The subsection, as far as is relevant, provides that an artistic work "means, irrespective of the artistic quality thereof - . . . drawings" and the term "drawing" is defined to include any diagram or chart. Reliance was in this connection placed on certain dictionary meanings of the words "drawing" and "chart". In regard to the use of dictionaries generally, and more particularly counsel's reliance on them, it may be useful to refer to a dictum of Margo J in *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council* 1972 (1) SA 88 (W) at 94G that "(d)ictionary definitions serve to mark out the scope of the meanings available for a

word, but the task remains of ascertaining the particular meaning and sense

of the language intended in the context of the statute under consideration."

The Oxford English Dictionary ("OED") gives as one meaning for "drawing", "(t)hat which is drawn; a delineation by pen, pencil, or crayon; a representation in black and white, or in monochrome; a sketch". Applying this definition, counsel submitted that the lines and the layout of the appointment pages form a drawing which is, on the facts of this case, an "artistic work". Under "layout" counsel meant the positioning of the words and numbers on the pages, the spacing of the lines, their colours and the font selected. It was also argued that a single line or the lines on a exercise book's pages could similarly be artistic works. I am of the view that this submission is not correct.

The court in *Page v Wisden* (1869) 20 LTR 435 at 436 was more forthright when it stated that "to say that a particular mode of ruling a book constituted an object for a copyright is

absurd." The OED's definition must be read in context. It is followed by a number of examples of the use of the word in the defined sense, all dealing with drawings in the nature of paintings or sketches.

This does not mean that a drawing must, for the purposes of the Act, be similar to a painting or sketch. A simple drawing may, obviously, be the subject of copyright, provided it can "fairly be called ... a drawing of any kind" (per Megarry J in *British Northrop Limited and Others v Texteam Blackburn Limited and Another* [1974] RPC 57 (Ch D) at 68 1 41). The learned Judge was there dealing with engineering drawings of parts of weave looms. Some he said, were simple, but they were all carefully drawn to scale with precise dimensions. He was of the *prima facie* view that they were therefore artistic works because, fairly speaking, they were drawings. Can it fairly be said that these appointment pages are drawings? On any common-sense approach to the matter and having regard

to the ordinary accepted meaning of the term, I think not. (Cf the approach adopted by Whitford J in *J & S Davis (Holdings) Limited v Wright Health Group Limited* [1988] RFC 403 (Ch D) 410 1 26-50 with regard to the meaning of "sculpture" and at 412 1 30-35 in relation to "simple" drawings.)

The submission that these pages constitute a "chart", was solely based on the OED's definition no 3a namely "(a) sheet bearing information of any kind arranged in a tabular form". Once again, the examples given by the OED do not support the submission. They all relate to titles of works such as the "Historical Chart of the Sovereigns of England". The effect of the argument would be to blur the distinction between artistic and literary works in the light of the definition of the latter (also in sec 1 (1) of the Act) which encompasses "tables and compilations". I do not accept that,

fairly speaking, it could be said that the works in issue are charts (cf *Hollinrake v Truswell* [1894] 3 Ch 420 (CA)).

In relation to literary works reference was made, once again, to the OED, this time for the proposition that "literary" means, among others, "(p)ertaining to the letters of the alphabet". There is an annotation against this entry to the effect that the meaning was obsolete. On the other hand, it must immediately be conceded that the word is not used in its ordinary meaning in the Act, a fact amply borne out by what the Act includes under this term. In *University of London Press Limited v University Tutorial Press Limited* [1916] 2 Ch 601, Peterson J had to consider whether papers set by examiners were literary works. He said (at 608):

"In my view the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems

to be used in a sense somewhat similar to the use of the word

'literature' in political or electioneering literature and refers to written or printed matter."

This dictum, read in its context, does not say that anything written or

printed is a literary work. Had the position been otherwise, there would not

have been any need for the Legislature to list anything from novels to

compilations. It is not necessary for the purposes of this case to define a

"literary work" any closer since I have not been persuaded that these pages

are covered by that term. A similar conclusion was reached by the Court

of Appeal in *Frank Smythson Ltd v GA Cramp & Sons Ltd* and *The*

Surrey Manufacturing Co [1943] 1 All ER 322.- The Court was there

also concerned with the layout of the body of a diary and found that that

part of it was not in any sense a literary work to which copyright could be

attributed.

²Also reported at [1943] 1 Ch 133.

It was argued, seemingly in the alternative, that these pages are a literary work because they consist of a "compilation". What was compiled, according to the submission, was the selection of the days of the week represented on the one page and the decision to place an abbreviated calendar of three months at the foot of the next page. It seems to me implicit in the argument that a layout and a compilation are the same, a point of view rejected rather laconically by Lord Denning in *William Hill (Football) Limited v Ladbroke (Football) Limited* [1980] RPC 539 (CA) at 545 1 5. In any event, the information "compiled" for the 1988 diary could not be the same as that "compiled" for the 1992 diary. The dates had all to be compiled afresh. The effect of the argument would be that, having regard to the fact that copying can be indirect and that an adaptation of a work is an infringing act, anyone who sees the field diary and who wishes to produce a diary having the basic layout of two facing pages, the one for

daily entries and the other for notes, will infringe copyright - a result so far-fetched that the Legislature could not have contemplated it.

The Frank Smythson case went on appeal to the House of Lords.³ At that stage the author had abandoned any further reliance on the appointment pages of the diary in issue. What remained in contention was the claim to copyright in a collection of tables at the beginning of the diary. The author was unsuccessful. Viscount Simon LC came to the conclusion (at 335) that "there seems to be nothing that can properly be described as an 'original literary work' in grouping together this information" and Lord Macmillan (at 337) pointed out that not every compilation can claim to be an original literary work "even in the pedestrian sense attributed to these words by the law".

³G A Cramp & Sons Limited v Frank Smythson Limited 1944 AC 329; [1944] 2 All ER 192.

These dicta appear to me to be germane to the facts of this case. Counsel

was unable to distinguish them, nor was it submitted that the case had been decided incorrectly. It also appears to be in

consonance with other English case law which, in the absence of local authority, is of considerable persuasive

force. For instance, in *Leslie v J Young and Sons* [1894] AC 335 (HL), Lord Herschell said (at 340):

"The mere publication in any particular order of the timetables which are to be found in railway guides and the publications of the different railway companies could not be claimed as a subject-matter of copyright. Proceedings could not be taken against a person who merely published that information which it was open to all the world to publish and to obtain from the same source."

And at 341-342 he drew this contrast:

"But there is another part of the case which strikes me as of a very different character. ... It appears to me the only part

of the work which can be said to indicate any considerable amount of independent labour. I refer to the part . . . containing the information with regard to excursions. It seems to me that this was a compilation containing an abridgment of information of a very useful character . . ."

In other words, and relying once again on Lord Denning, for a compilation

to be the subject of copyright, it must not be a commonplace selection

(William Hill case, supra at 546 1 7-8). (This case was decided in 1962 but

was first reported in 1980. His decision that copyright subsisted in the

football coupon reproduced at 542 of the report was upheld in *Ladbroke*

(*Football*) Ltd v *William Hill (Football) Ltd* [1964] 1 All ER 465 (HL).)

In my judgment the so-called compilation was clearly commonplace.

To sum up, I am of the view that the appellant has failed to establish that the appointment pages are either artistic or

literary works for purposes of the Act. It is accordingly unnecessary to consider separately whether they

were original. The other issues raised during argument also fall away. In consequence the appeal must be dismissed

and the order is:

"The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel."

LTC HARMS JA

CORBETT CJ,

SMALBERGER JA,

KUMLEBEN JA and

NIENABER JA agree.