

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION Appellant

and

DAVID GEORGE POLLECUTT

Respondent

CORAM: CORBETT, CJ, E M GROSSKOPF, F H GROSSKOPF,

HARMS, JJA et SCOTT, AJA

HEARD: 11 SEPTEMBER 1995

DELIVERED: 21 SEPTEMBER 1995

J U D G M E N T

HARMSJA/..

HARMS JA:

This appeal relates to some of the intellectual property rights in the television production Shaka Zulu. The question for decision is the contractual liability of the appellant, the South African Broadcasting Corporation ("the SABC"), for payment of certain licence fees to the respondent. The respondent is a musician by occupation - he composes, performs and conducts music.

It seems that the SABC commissioned the production of Shaka Zulu during the latter part of 1984. On 27 November 1984 it entered into three agreements relating to the music for this production. Two were concluded with a company, D & L Pollecutt Music and Publicity Agency (Pty) Ltd ("the company"), represented by the respondent. The third was with the respondent personally. Nothing much turns on the identity of the contracting party and I shall assume for purposes of this judgment, as was done in the pre-trial minutes, that the contracts are all binding on the respondent personally. These are the agreements:

[1] An appointment of the respondent as the composer and musical director for the production of Shaka Zulu. He was to be responsible for all work defined by custom and practice to be associated with the duties of a composer and musical director on a production of this nature and scale. What the duties of a musical director are, was not explained in evidence. It was a term of the appointment that the respondent would retain ownership of all his copyright in and to all music composed by him, but he granted the SABC "the perpetual right to broadcast the music and to licence the broadcast of the music by third parties without further compensation". The total remuneration was to be R 30 000.

[2] A commission to provide the music for the production. The respondent had to deliver to the SABC on a master tape music for ten episodes of the production. The music had to have an average length of 35 minutes for each episode. His duties included the recording and mixing of the music in 56 sessions of three hours each. For this purpose he had to employ and

remunerate, i a, a number of orchestras and a choir. His agreed fee was R 47 032. Of special importance to the litigation is clause 6 and it reads as follows:

"Insofar as their contributions may constitute a performing right, you [the company] hereby consent on behalf of all the performers mentioned in clause 2 [the members of the different orchestras and the choir] hereof that the SABC may record, broadcast and commercially exploit their contributions to the PRODUCTION [i e the television production .Shaka Zulu] without any further payment being made to you or any of the said performers."

I shall in due course return to this clause. The company undertook further to obtain the respondent's signature to the next document.

[3] A "composer's release form" was signed by the respondent. In it the respondent in his capacity as composer granted to the SABC the right to record, broadcast and commercially exploit the production without any further payment.

It will be immediately apparent that in circumstances like these there are a number of different and distinct intellectual property rights that have to be taken into account. The first is the copyright of a composer in his musical work (s 6 Copyright Act 98 of 1978). The second is the copyright of the author

of the lyrics in his literary work (also s 6). Then there is the copyright in the

sound recording, that is the recording as embodied on the master tape (s 9).

There is also the copyright in the cinematograph film (s 8) and that includes the

sounds embodied in the associated sound-track (s 1 s v "cinematograph film").

In the final instance there are the rights of the performers involved, in this case

the musicians and (presumably) the conductor. The rights of performers are

created and protected by the Performers' Protection Act 11 of 1967.

Shaka Zulu was a great success, not only as a television series but its music struck a sweet chord. As a

result of this the respondent during May 1986 entered into two further agreements:

[4] The first was dated 3 May 1986 and was with Angela Music Publishing Company (Pty)

Ltd ("Angela"). In it the respondent assigned his literary copyright in the title and lyrics ("words") as well as his

musical copyright in his compositions. They were identified in the assignment with reference to the sound-track of

Shaka Zulu. An addendum, called a rider, was entered into some five months later. It recorded that one Barry Leitch had been

a co-writer of the music of 28 of the compositions concerned and that the royalties in respect of them would be split equally between the two writers. It may be noted that the respondent was not the author of the title theme We are Growing.

[5] Shortly afterwards the respondent signed a document on a letterhead of the SABC entitled Consent. It is on this document that the respondent's cause of action in this case was based. Its terms are material and are thus quoted in full:

"CONSENT I,

THE UNDERSIGNED,

DAVID GEORGE POLLECUTT

IN MY CAPACITY AS MUSICAL DIRECTOR/ARRANGER/ARTISTE OF THE MUSIC FOR THE TV SERIES 'SHAKAZULU' (EXCLUDING THE TITLE THEME 'WE ARE GROWING') HEREBY GIVE MY UNCONDITIONAL CONSENT TO THE SABC ATTENDING TO THE MARKETING AND DISTRIBUTION OF THE MECHANICAL PHONOGRAPHIC LICENCES OF:

CASSETTES, SINGLE OR LONG-PLAYING VINYL RECORDS, COMPACT DISCS, VIDEO DISCS, VIDEO TAPES OR ANY FUTURE FORMAT.

THIS CONSENT IS SUBJECT TO THE PROVISION THAT I SHALL RECEIVE FROM THE SABC A ROYALTY OF 10% (TEN PERCENT) OF 90% (NINETY PERCENT) OF THE RETAIL SELLING PRICE WORLDWIDE OF ANY SUCH AFOREMENTIONED RECORD SOLD."

It was common cause that this document reflected the terms of an agreement between the SABC and the respondent. Although the SABC, through its legal representatives, during the course of the trial feigned ignorance about the subject matter of this agreement, it was common cause during the appeal that it concerned the respondent's rights as performer of the music of the original production of Shaka Zulu. It was also agreed between counsel that, contrary to the SABC's plea, the agreement did not deal or purport to deal with copyright whether in the musical work or in a sound recording. The importance of this will become apparent in the course of this judgment.

Subsequent to the consent agreement [5], the SABC entered into an agreement with BMS Publication (Pty) Ltd ("BMS") on 20 October 1986. It licensed BMS to manufacture and sell in all countries (excepting France) records derived from the master tape of Shaka Zulu, in other words, records containing

the original music as performed in terms of the commission agreement [2]. The agreement with BMS stipulated that BMS was to be solely responsible for the fulfilment of all copyright obligations arising out of the manufacturing and selling of the licensed records; and BMS had to calculate and pay out all performers' or other royalties. The respondent was not a party to this agreement.

He in fact objected to the appointment of BMS as licensee, but was overruled by the SABC. His concern proved to have been well founded because BMS in due course floundered and failed to make payment to him or the SABC of the amounts due in terms of the consent agreement [5]. The SABC initially recognised the respondent's entitlement to payment, but reneged when it realised that the amount of its indebtedness to the respondent could not be recovered from BMS. Hence the action by the respondent. His claim for an account and for payment of the agreed royalties was upheld by Leveson J in the Witwatersrand Local Division. After the trial judge had refused leave to appeal, leave was granted by this Court pursuant to a petition for leave.

Leveson J gave six judgments in the course of the proceedings. He first dismissed an exception raised by the SABC at the beginning of the trial. The SABC then applied for a postponement in order to file a new plea. That was refused. The trial Judge was then required to consider two special pleas and they were dismissed. All this took place on 4 August 1992. The SABC subsequently amended its plea and after hearing some mainly inconsequential evidence, the court on 6 August 1992 upheld the claim and ordered payment of part of the royalties (R 37 635,34) and the delivery of an account in respect of the balance. Thereafter the parties settled the accounting. This produced a further R 195 727,13 in royalties due. Leveson J made the settlement an order of court and, after having considered an application for a special order as to costs, ordered the SABC to pay party and party costs. This occurred on 25 November 1992. The sixth order was the refusal of leave to appeal on 15 September 1993. In its petition to this Court for leave to appeal, the SABC did not disclose the existence of the judgment and order of 25 November. It only applied for leave in respect of the dismissal of the special pleas on 4 August and

the partly interim order of 6 August. As a result, the leave that was granted, was leave against these two orders only. It is not clear whether this limited appeal can affect the order of 25 November. It is also not clear whether it is competent to appeal against an order that has, in effect, been superseded by a later order. Since these matters were not argued and in the light of my conclusion that the appeal can, in any event, not succeed, I shall assume that there is a proper appeal before this Court.

As indicated, the respondent's cause of action was the consent agreement [5]. In the particulars of claim reference was also made to an antecedent oral agreement but I am unable to perceive a difference between the terms of the oral and those of the written agreement. The argument that the respondent should have been non-suited because he had not given evidence relating to the oral agreement, has no substance. The same applies to the argument that he should have replicated to the SABC's pleaded interpretation of the admitted written contract. As I read the pleadings, it was common cause that document [5] was the sole memorial of the parties' contract.

It was also submitted on behalf of the SABC that the consent agreement [5] did not reflect any positive obligation to pay royalties but that it was simply a conditional consent. I disagree. The document states explicitly in its first paragraph that the consent was being given unconditionally. The use of the phrase subject to in the last paragraph may be indicative of a suspensive condition but that is not necessarily so (cf *Pangbourne (Pty) Ltd v Gill & Ramsden (Pty)Ltd*)¹ In the present instance the intention of the parties is clear: the consent was given to enable the SABC to attend to the marketing of licences for sound recordings. Once licences had been entered into, the sale of recordings would have followed. Royalties were payable on the retail selling price of every record sold. It makes commercial nonsense of the agreement to argue that, in these circumstances, the consent was conditional upon the receipt of royalties and that, if the SABC had failed to pay the agreed royalties, the consent would have fallen away and that the respondent had then to rely on his intellectual property rights and not on the agreement. It may also be mentioned

¹An unreported judgment of this Court delivered on 21 September 1995.

in conclusion on this aspect of the case that this argument flies in the face of an express admission in the plea namely that the SABC had undertaken, in return for the licence, to pay the agreed royalties.

I have mentioned the fact that the consent agreement dealt with the performing rights of the respondent in the sound-track of the original production. It is common cause that he had acted as conductor and also as a musician in the production of the music. The Performers' Protection Act provides, i a, that a performer of a literary or musical work must consent to the making of a fixation of his as yet unfixed performance (s 5(1)(b)). He must also consent to the making of a reproduction of a fixation of his performance if the reproduction is made for purposes other than those in respect of which he had given his consent originally (s 5(1)(c)(ii)).

The two remaining defences to the respondent's claim as argued before us are in part based upon the provisions of this Act. The first defence is the alleged invalidity of the consent agreement [5] because of the failure of a common assumption. The second and alternative defence is the exceptio non

adimpleti contractus. The basis for these defences is, according to the argument, that the respondent was, when this agreement was being concluded, not possessed of any performer's rights which could have formed the subject of the grant of a licence. That was not the basis of the defences as reflected in the plea as amended in the course of the trial or considered by the trial Judge. In

the plea in its final form it was alleged (a) that the copyright in the sound recordings referred to in the agreement had vested at the relevant time in either the SABC or in Angela; (b) that the agreement had been entered into under the common assumption that that copyright had vested in the respondent; (c) that because the assumption was false the agreement was void; and (d) that, in the alternative to (b) and (c), it had been the contractual obligation of the respondent to grant to the SABC a licence, but, due to (a), it had failed to do so. If my understanding of the SABC's new case is correct, these defences remained intact at the appeal stage save that the reference to copyright has to be replaced with a reference to a performer's rights under this Act. No amendment of the plea was moved to reflect the new case. The presentation of a case on appeal in this

manner is, to say the least, to be deplored (AJ Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk 1985 (1) SA 399

(A)).

Before considering these defences any further, it is convenient to deal with the reasons proffered by the SABC as to why the respondent had no residual rights to dispose of by way of a licence agreement. The first argument on behalf of the SABC in this regard was that in clause 6 of the commission agreement [2] the respondent had given his consent to the fixation of his performance. The sale of phonograms containing the music so performed and fixed was covered by the terms of that consent. Accordingly, so the argument went, the respondent had no residual performer's rights that could have formed the subject of a licence.

The quoted clause 6 of the commission agreement contained a consent relating to the recording, broadcast and commercial exploitation of the performers' contribution to the production. I have pointed out that the production was the television series Shaka Zulu. It contained nearly six hours' music. The purpose of the consent was to enable the SABC to screen on

television that audio-visual production. Its purpose was not to enable it to market recordings of music. It had evidently not been contemplated at the time of the commission that the series would be such a success that a demand would have been created for recordings of the music on the sound track. In other words, with regard to the wording of s 5(l)(c)(ii), the reproduction of the music for the purpose of the sale of records is a reproduction of the fixation of the performance for a purpose other than the purpose that had been the subject of the consent contained in the commission agreement.

It is also not clear whether clause 6 applied to the respondent's personal performance. That depends on whether he had been a performer "mentioned in clause 2" of the agreement. There was no evidence coupling his performance to clause 2. In an attempt to meet this problem, reference was made on behalf of the SABC to s 6(1) of the Performers' Protection Act. It states that where several performers as a group take part in the same performance, it suffices if the consent required under s 5 is given by, say, the manager of the group. This section does not provide an answer because the

consent given in clause 6 was not unqualified. It had only been given on behalf of the performers mentioned in clause 2 and not on behalf of any other performer.

All this is not the end of the inquiry. The Performers' Protection Act provides for exceptions to s 5, namely for instances where the consent of a performer is not required for the fixation or the reproduction of a fixation of his performance. There is a fair deal provision, e.g. the use of a fixation for purposes of private study (s 8(2) and (4)). Special arrangements are made for the SABC (s 8(3)), but they have no application in this case. The most far reaching exception is to be found in s 8(1). It states that if a performer consents to the incorporation of his performance in a visual or audio-visual fixation, s 5(1) "shall cease to apply in respect of the performance so fixed". The simple and attractive argument of the SABC in this regard took as a starting point the fact that the respondent had consented to the incorporation of his performance in an audio-visual work namely the television series *Shaka Zulu*. His consent was thus not required for the reproduction of his performance because s

5(1)(c)(ii) had ceased to apply in respect of this performance. He consequently had no remaining rights to license.

S 8 is not easy to understand. Ss (4) appears to be tautologous in the light of ss (2). Taken literally, ss (1) does not make sense, especially if read with s 5(1)(b). It is only after a consent in terms of the latter provision had been given to the fixation of a performance in a visual or audio-visual work that the former comes into operation. Stated slightly differently, s 8(1) has as its starting point the consent of the performer to a fixation given in terms of s 5(1)(b). How it can cease to apply, I fail to understand. Nor can s 5(1)(c)(i) and (iii)² cease to apply if a consent as understood by s 8(1) has been given. Both these paragraphs can only apply if a fixation was made in accordance with any

²These read:

"Subject to the provisions of this Act, no person shall without the consent of the performer —

(a)

(b)

(c) make a reproduction of a fixation of a performance of such performer —

(i) if the original fixation, other than a fixation excluded by section 8 from the necessity for obtaining the consent of the performer, was itself made without his consent; or (ii) ...; or

(iii) if the original fixation was made in accordance with the provisions of section 8, and the reproduction is made for purposes not covered by those provisions."

sub-section of s 8 (and not only ss (2) and (3) as was argued). As far as the present proceedings are concerned, I shall assume that as a result of s 8(1) the respondent's consent was not required for the reproduction of his performance fixed in the television production. That leaves for consideration whether the records contemplated by the consent agreement [5] were reproductions of that performance. I think not. It was for instance common cause between the parties that the original sound-track of the production had been mixed stereophonically for the purposes of the recordings. The undisputed evidence of the witness O'Hara was further that one had to edit and remix the original music made for the television series in order to make a commercially viable gramophone record. It would therefore seem that the performance as fixed originally was not the subject of the agreement (s 5(1)(c)(iii)). S 8(1) would then not be of application. I do realize that this interpretation may, to an extent, emasculate s 8(1). It is, however, a provision which must be interpreted restrictively because it limits the rights granted to performers under s 5. In the

case of a conflict with s 5, it must yield to the clear wording of s 5, especially that of s 5(1)(c)(iii).

There appears to be another reason why s 8(1) is not germane to the issues in this case. It is subject to the overriding provision of s 13 which recognises the supremacy of the freedom to contract. According to it a performer may, notwithstanding the provisions of the Act, enter into any contract with any user or prospective user of his performance in respect of the use of his performance. If it is assumed that the respondent had no residual rights by virtue of s 8(1), it remained permissible for him to enter into the consent agreement [5] which gave him rights not recognised by s 8(1). This agreement would then by implication have returned to him what had been taken away by the commission agreement and by s 8(1). That is permitted by s 13.

Consideration must next be given to the interaction between the Performers' Protection Act and the Copyright Act. This arises because of yet another argument of the SABC as to why the respondent had no performer's rights to license. According to this submission the SABC was the owner of the

copyright of the sound recording. (The special plea and other parts of the main plea had it differently - according to these it was Angela. That is neither here nor there.) It had, as a consequence, the exclusive right to make or authorize the making of a record embodying the sound recording (s 9 of the Copyright Act). The recognition of the respondent's right to his performance will nullify that right. The Copyright Act is of a later date than the Performers' Protection Act and it has, in the result, impliedly repealed the rights of performers as set out in the latter Act. I consider the argument to be specious. It was agreed, according to the pre-trial minutes, that although the SABC had been at the relevant time the owner of the master tape itself, it had not been the owner of the "copyrights" in and to the production. Ownership of a tape and ownership of the copyright in what has been recorded on the tape are separate and distinct rights. There was also no evidence that Angela had any sound recording rights. Its agreement [4] with the respondent certainly did not relate to such rights. That ought to put to rest the factual basis of the argument.

Its legal foundation is also without any redeeming features. The Performers' Protection Act provides in s 2 that the rights created by the Act in no way restrict or affect the rights provided for by any other law relating to copyright in literary and artistic works. These are defined in s 1 to include musical, dramatic and dramatico-musical works. A sound recording does not fall within either category. When this Act was enacted, copyright was regulated by the Copyright Act 63 of 1965. It recognised copyright in sound recordings (s 13). In essence the protection under the 1978 Copyright Act is the same. The only difference is one of legal philosophy. Under the 1978 Act copyright is defined as an exclusive right to do or authorize others to do certain acts. Under the 1965 Act copyright restricted others from doing those self same acts. I fail to understand how a change in legal or legislative philosophy can, on its own, repeal a different statute.

The reason why the Performers' Protection Act does not refer to sound recordings in this respect, may have to do with its genesis. Copyright is regulated by the Berne Convention for the Protection of Literary and Artistic

Works. It does not accord copyright to sound recordings. Our legislature has, on the other hand, done so since the promulgation of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916 (3rd Schedule par 19). The Performers' Protection Act was intended to give effect to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting

Organizations of Rome. See s 4. It had no need to deal with phonograms because the Copyright Act had already catered for them. S 2 of the Performers' Protection Act was based upon art 1 of the Rome Convention. This article states that protection granted under the Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. The Convention does not define these terms and may either have left it to domestic law to circumscribe or may have intended to give the terms their meaning as defined in the Berne Convention. The recognition of the rights of performers may, in the absence of such a provision, cause a tension between the rights of the persons whose works are being performed and those who perform them. The copyright in the literary or artistic work precedes the performance and any

rights that can arise from it. The right of the performer can also not exist without the literary or artistic work. The same applies to the rights (copyright or otherwise) of the producer of a sound recording or phonogram. That is why the rights of the Rome Convention are sometimes called neighbouring or secondary rights. The rights of the producer of a phonogram are, similarly, dependent upon the rights of the performer because without the performance there can be no phonogram.

It follows from this excursion that the SABC has, in my view, failed to establish that the respondent had no right to license.

As far as the defence of common assumption is concerned, the SABC had to prove counsel's new allegation that both parties had entered into the agreement on the common assumption that the respondent was the owner of the performer's right when the consent agreement was concluded. No evidence was led at the trial by any party relating to any assumption on the part of any of the parties. In spite of this, and ever hopeful, counsel submitted that the common assumption was apparent from the words of the agreement itself. I am

not persuaded. The terms of the agreement do not justify, on a balance of probabilities, the conclusion that it had been concluded on that or any other assumption. It may be that it had been concluded because the parties were uncertain as to the scope of their rights. It may also be that they had wished to amend the effect of the commission agreement especially in the light of the unexpected commercial success of the production. It may also have been the result of a unilateral mistake. Each of these possibilities is at least as probable as the assumption postulated by counsel.

In relation to the *exceptio non adimpleti contractus* it was the case of the SABC at the appeal stage that the consent agreement had placed an obligation upon the respondent to grant to the SABC a licence in respect of his performer's rights. Since he had not in law been possessed of them, he had been unable to comply with his part of the bargain and he could, in the result, not claim performance from the SABC. The argument is based upon a misconception relating to the terms of the consent agreement. It placed one duty and one duty only upon the respondent and that was to give his consent.

That he did by signing the document. He had no other obligation relating to a prestation and it seems to me that the appeal to the principles of the exceptio is totally unfounded.

This means that the appeal has to be dismissed. Respondent's counsel asked for a special order as to costs namely on the scale of attorney and client. The same request was made in the court below. Leveson J, on this aspect of the case made some pointed remarks about the conduct of the SABC in the proceedings. Prior to the litigation it had recognised its liability but informed the respondent that everything possible would be done to extend the date for payment. It seemed to the learned Judge that in some respects the conduct of the SABC had been "wilfully obstructionist" and "high-handed". He nevertheless refused to comply with the request. In order to be able to interfere with his discretion it was necessary for the respondent to cross-appeal and to show that the discretion had not been exercised properly. Neither had been done and the scale of the costs order must remain as it was.

I wish to say something in conclusion about the record. It contains a large number of inconsequential documents. There is, for instance, the record of an application for discovery. There are discovery affidavits and other formal documents. There are pleadings which have been replaced and had nothing to do with the case. The application for leave to appeal appears in three forms. The six judgments were bound in at random. The unacceptable habit of producing a bundle of documents for the trial court without establishing its status and then reproducing it for no good reason for purposes of appeal, is amply exemplified by this record. I have already referred to the misleading petition for leave to appeal. This must serve as a warning to those who are responsible for the preparation of records on appeal that orders de bonis propriis may follow if the interests of the Court and of their own clients are not served because of the failure to file acceptable and sensible records.

The appeal is dismissed with costs.

L T C HARMS
JUDGE OF APPEAL

CORBETT, CJ)
EMGROSSKOPF, JA) Agree
FHGROSSKOPF, JA)
SCOTT, AJA)