



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 93/2019

In the matter between:

LESLIE BERGH

BULL'S EYE CONSULTING

BENGUELASOFT

TIM PAUW

NAOMI HAVENGA

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

FOURTH APPELLANT

FIFTH APPELLANT

and

THE AGRICULTURAL RESEARCH COUNCIL

FIRST RESPONDENT

Neutral citation: *Bergh and Others v The Agricultural Research Council* (Case no 93/2019) [2020] ZASCA 30 (1 April 2020)

Coram: Navsa, Wallis, Van der Merwe and Schippers JJA and Mojaelo AJA

Heard: 28 February 2020

Delivered: 1 April 2020

Summary: Copyright – computer program – claim based on authorship and on s 5(2) of the Copyright Act 98 of 1978 – claim not proved – court below failed to provide reasons for order – deplorable – bringing administration of justice into disrepute.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Kose AJ sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court below is set aside and substituted as follows:
'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Navsa JA (Wallis, Van der Merwe and Schippers JJA and Mojapelo AJA concurring):

[1] This is an appeal against an extensive order granted by the Western Cape Division of the High Court, Cape Town (Kose AJ), in favour of the respondent, the Agricultural Research Council (the ARC), a juristic person established in terms of s 2 of the Agricultural Research Act 86 of 1990 (the Act). The order against six respondents followed on a claim of breach of copyright and unlawful competition in relation to BeefPro, a computer program that serves as a cattle or herd management tool. Five of those respondents are the present appellants. The sixth, the South African Stud Book, is an animal improvement voluntary association (Stud Book) and

also a 'registering authority' in terms of the Animal Improvement Act 62 of 1998 (the ANI Act). Stud Book did not participate in the appeal. We were informed by counsel for the ARC that no relief had ultimately been sought against Stud Book and that before the application was finalised, the case against Stud Book was withdrawn.

[2] The order reads as follows:

'1. The respondents are

1.1. interdicted and restrained from infringing the copyright in the BeefPro computer program, also known as BenguFarm, including the modules developed from and adaptations of BeefPro ("the program") by performing, or causing to be performed, any of the following acts:

1.1.1. reproducing the computer program in any manner or form;

1.1.2. making adaptations of the computer program;

1.1.3. letting or offering or exposing for hire by way of trade, directly or indirectly, a copy or an adaptation of the computer program;

1.1.4. selling, letting, or by way of trade offering or exposing for sale or hire, or distributing in the Republic for the purpose of trade, copies or adaptations of computer program,

1.2. ordered to deliver up to the applicant all copies and adaptations of the computer program in their possession;

1.3. are interdicted and restrained from competing unlawfully with the applicant by:

1.3.1 representing that any of the respondents own or authored BeefPro or that they are entitled to adapt, distribute or sell copies thereof;

1.3.3 using, in relation to BeefPro, the term BenguFarm or any other term; and

1.3.4 excluding the applicant and the national database, INTERGIS, from the flow of data uploaded by the users of the BeefPro program to Logix, the database administered by the sixth respondent.

2.1 an enquiry is to be held for purposes of determining reasonable damages and royalties to be paid by the respondents' infringement of the ARC's copyright in the computer program.

2.2 The following directions are given regarding the said enquiry:

2.1 The applicant is to deliver a declaration within 20 days hereof.

2.2 Thereafter the Uniform Rules of Court applicable to trial actions shall apply.

2.3 No order as to costs is made in regard to the proceedings thus far.

3. The respondents are ordered, jointly and severally, to pay the costs of this application, including costs of counsel.'

[3] The order was issued on 8 August 2018, close to two years after oral argument had been presented by the parties. Repeated requests for reasons for the order were met with no response. Thus, this appeal has to be adjudicated, more than four years after oral argument was finalised, without the benefit of a judgment by the court below. This is a truly deplorable aspect to which I will revert later in this judgment. In the absence of a reasoned judgment it is necessary to set out the facts in greater detail than would otherwise be the case.

[4] The order, it will be seen, did not exclude Stud Book. This might be due to the lengthy passage of time before the order was issued. Although the relief claimed by the ARC was dependent on its claim to ownership of the BeefPro program, this appeal is not about the complexities of copyright law. Rather, it turns on what the evidence adduced in the court below reveals about the terms under which the BeefPro program was commissioned and whether a basis existed for the ARC to claim ownership thereof.

[5] The ARC operates within a legislative framework. The relevant parts of the legislation under which it conducts operations and the factual background culminating in the present appeal are set out hereafter.

[6] The objects of the ARC are set out in s 3 of the Act:

‘The objects of the ARC are, through research, development and technology transfer, to promote agriculture and industry and thereby to contribute to the improvement of the quality of life of the people of the Republic, and having regard to the protection of the environment to perform such other functions as may be assigned to the ARC by or under this Act.’

[7] The relevant parts of s 4(1) and s 4(2) deal with the powers, functions and duties of the ARC and read as follows:

‘4(1) In order to achieve its objects, the ARC may-

(o) as an end-product of research, development and technology transfer undertaken or caused to be undertaken by ARC-

(i) produce and sell reports, computer programmes and other intellectual property;

...

(iii) produce, process and sell products;

...

(q) do everything which in the opinion of the Council is conducive to the achievement of its objects or is calculated, directly or indirectly, to enhance or render profitable the value of the property or rights of the ARC.

4(2) The ARC shall, in addition to its functions in terms of this Act or any other law-

(a) and subject to its objects, undertake the investigations, research, development and technology transfer which the Minister may assign to it;

(b) advise the Minister on research, development and technology transfer in the field of agriculture; and

(c) co-ordinate on a voluntary basis information on agricultural research and development in the Republic by implementing and keeping a central register of agricultural research and development projects, and institute such measures as it may deem fit to achieve such goal.’

[8] Animal improvement is within the ARC's remit under the ANI Act. According to that Act 'animal improvement' means:

'[S]cientifically based identification of genetically superior animals by means of the integrated registration and genetic information system or in a manner approved by the registrar and the discerning use thereof to improve the production or performance ability of the animal population in the interest of the Republic.'¹

[9] The ARC, in terms of its statutory mandate and powers, operates an 'integrated registration and genetic information system' dubbed INTERGIS. It is a computer system commissioned and developed by the State, to integrate the pedigrees and performance data of animals as envisaged in the ANI Act.

[10] In fulfilling its statutory role, the ARC utilises, inter alia, a Microsoft Windows based cattle or herd management system, the aforesaid BeefPro computer program, which, it is claimed, *it* developed and introduced to the market in 2005. The ARC conducts that system on the INTERGIS platform. The ARC's complaint, which formed the basis of its approach to the court below for the order set out hereinbefore, was the 'misappropriation' of BeefPro by the appellants, which it alleged the appellants were utilising for purposes of conducting a parallel system to INTERGIS, called Logix. The appellants, so the ARC claimed, were employing BeefPro for financial benefit and consequently undermined the ARC in the performance of its statutory duties. All the more so, it was contended, because cattle farmers presently supplied data that ought

¹ Definition of 'animal improvement' in s 1 of the ANI Act.

to be destined for the INTERGIS system to the appellants, which the appellants then use in their Logix system, rendering INTERGIS redundant.

[11] In the ARC's view, the exclusion of INTERGIS in the manner described in the preceding paragraph detrimentally affects the national interest. Furthermore, since BeefPro, which the ARC is adamant it authored and developed, qualifies as a work in terms of the Copyright Act 98 of 1978, the appellants, by misappropriating it in the manner described above, were guilty of copyright infringement or engaged in unlawful competition, and the ARC was thus entitled to seek an interdict in the terms granted by the court below.

[12] It was contended on behalf of the ARC that the appellants had misrepresented to the public that *they* had developed BeefPro, thereby causing users searching for BeefPro to be diverted to BenguFarm, a website conducted by the third appellant, Benguela Soft CC, a close corporation (Benguela). That, according to the ARC, was but one instance of unlawful competition.

[13] The professed interrelated aims of the litigation, initiated by the ARC in the court below, were said in the founding papers by the ARC to be: First, to protect the intellectual property rights (including copyright) vesting in BeefPro through an interdict and delivery up of the infringing works and damage; second, to restore, as far as possible, the ability of the ARC to properly fulfil its statutory duties in respect of animal recording and improvement in the national interest; third, to protect the ARC against unlawful interference with those duties by the appellants; and lastly, to protect the ARC from unlawful competition by or at the instance of the appellants.

[14] In addressing the importance of the INTERGIS system in relation to the ARC's statutory obligations, more particularly in contributing to animal improvement by the collection and collation of relevant data, it was explained by the ARC that genetically superior animals could only be identified through a process of recording their pedigree and performance. This was essential to the improvement of animal management.

[15] The ARC referred to the Animal Improvement Schemes established by the Minister, on 5 January 2007, which imposed a system for animal recording and submission of the recorded data to the INTERGIS platform. The ARC contended that the schemes made it obligatory for participants to submit recorded data to INTERGIS.

[16] The applicable legislation, so it was asserted on behalf of the ARC, sets a framework that contemplates only one national databank, namely, INTERGIS, established with the cooperation of the Department of Agriculture, Forestry and Fisheries. Emerging farmers who stood to benefit from the schemes are entitled to participate in the schemes which, as stated above, were intended to regulate and improve animal breeding.

[17] According to the ARC the scope of the Act and the associated regulations as well as the AI Schemes dictate that only one national databank is recognised, namely INTERGIS. Once an animal is recognised as part of a breed, or considered suitable to be a donor animal, or for importation or exportation, the statutory framework makes it obligatory for its details to be registered on INTERGIS.

[18] There are two streams of data that feed into INTERGIS. One from herd management programmes, such as BeefPro, and the second, from data submitted by registering authorities provided for in the ANI Act. BeefPro can operate as a standalone programme but was developed to be compatible with and integrate with INTERGIS.

[19] In seeking the interdictory and associated relief granted by the court below, the ARC described what it considered to be the infringing conduct of the appellants. The first appellant, Mr Leslie Bergh, is an erstwhile senior employee of the ARC, having held the title, of amongst others, Assistant Director: National Beef Recording and Improvement Scheme. His contract of employment with the ARC was terminated on 11 September 2013. Mr Bergh had been employed by the ARC and its predecessors for approximately 32 years. He now consults to the agricultural industry through Bull's Eye, the second appellant.

[20] According to the ARC, Mr Bergh's employment was terminated after a disciplinary hearing at which he was found guilty of acting in conflict with the ARC's interests and misappropriating ARC property for his personal benefit. This included, the ARC said, his development of adaptations of Beefpro, more particularly an adaptation referred to as SheepPro. The sanction of dismissal was apparently upheld by the CCMA.

[21] According to the ARC it is clear from Mr Bergh's website that he:

- is registered as a professional scientist with the South African Council for Natural Science Professions;

- is a member of the South African Society for Animal Science;
- has 32 years' experience in animal recording, performance testing, genetic evaluation, selection, breeding and related management aspects of beef cattle;
- has in-depth knowledge of Stud Book as well as of the animal recording systems Logix and INTERGIS;
- was and is the "driving force" in the development, marketing, support and training of BenguFarm livestock management software since its inception in 2005.
- published numerous articles, presented many lectures and talks, conducted many training courses and served in an advisory capacity on the boards of several breeders' societies.

[22] Mr Tim Pauw is the sole and managing member of Benguela. The ARC claimed that Bull's Eye, Benguela and Mr Pauw were all infringing its copyright in BeefPro by making, adapting, selling and distributing copies thereof under the name BenguFarm. The fifth appellant is Ms Naomi Havenga, also a former senior employee of the ARC. It was claimed that she assisted Bergh and Benguela in their infringing conduct by taking responsibility for data bureau services and that she administers BeefPro under the name of BenguFarm. It is uncontested that Mr Havenga and Mr Bergh are well known to cattle breeders.

[23] Against the background sketched above, the ARC was emphatic that the creation and development of BeefPro, an original work, requiring knowledge of animal science, was at its instance and under its control and that it was thus the author.² It is a computer program, requiring technical skill to write the source code, and it

² 'Author' is defined in the Copyright Act, in relation to a computer program, as 'the person who exercised control over the making of the computer program'. Section 2(1)(i) of that Act makes computer programmes eligible for copyright.

incorporated literary works in the form of tables and compilations of data. Thus it was a work worthy of copyright protection. The ARC sought to pre-empt any suggestion by Mr Pauw and/or Mr Bergh that they had authored the program by stating that, in the event of such an assertion, Mr Bergh could only have done so in the course of his employment with ARC and that Mr Pauw could only have acted under his instructions and control, with the result that copyright vested in the ARC, in terms of s 21(1)(d) of the Act.³

[24] Furthermore, the ARC contended that in the event of a claim of joint ownership by Mr Bergh and Mr Pauw, its consent for the use, distribution and sale of BeefPro would nevertheless have been required. That was not provided and would not be forthcoming.

[25] The complaint by the ARC about infringement of copyright and unlawful competition on the part of the appellants, as asserted above, included complaints about the use of SheepPro and an allied program called GenePro, which the ARC claimed was developed at its instance and under its control.

[26] The ARC, in applying for the interdict it obtained, also alleged that shortly after Mr Bergh left the ARC's employ he and Mr Pauw diverted the administration of BeefPro from the ARC to Stud Book and with the co-operation of the other appellants promoted Bull's Eye as a provider of consultation services in relation thereto, including recording

³ Section 21(1)(a), under the heading 'Ownership of copyright', provides that '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'. Section 21(1)(d), on the other hand, provides that in the case of a work that is made 'in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4'.

and performance testing, dealing with breeding values, selection and related management. According to the ARC, Bull's Eye was promoted as offering training in relation to BeefPro and data recording and also in relation to GenePro services. In advertising such services it was claimed that Ms Havenga had joined the team and that she would be instrumental in setting up and maintaining services such as data capturing, the submission of data to Stud Book and administering BeefPro. Benguela announced that BeefPro was being rebranded and the product offering would take place under the BenguFarm name. Benguela offered an introductory course in relation to the product, formerly known as BeefPro. Mr Bergh, Ms Havenga and Bull's Eye offered training courses and continued to do so.

[27] The ARC also accused Stud Book of acting as an agent for the sale and activation of BenguFarm software, which included the rebranded BeefPro adaptations. In this regard, the ARC pointed to the service agreement it once had with Stud Book, for the latter to administer and operate INTERGIS. A few months after the departure of Mr Bergh and Ms Havenga, Stud Book cut off the ARC's access to INTERGIS and appropriated collected data to itself by using the benefits of BeefPro and operating the new database under the Logix system. By doing so it had deprived the ARC of data that the latter contended it was solely entitled to. Breeders could now access Logix to gainfully use the gathered data. Breeders began sending their info to Logix rather than to the ARC as they were obliged to. This meant, so the ARC said, that it was cut off from data which it has a statutory right to gather and hold. Stud Book was reaping commercial benefits by subverting the ARC's national database.

[28] As to its entitlement to an interdict, the ARC summarised the position as follows:

(a) The appellants were unlawfully and without permission, licence or authorisation, using BeefPro to infringe the ARC's intellectual property rights, in contravention of provisions of the Act and were engaging in unlawful competition.

(b) The appellants were undermining the ARC's statutory role and functions, interfering with its relationships with its clients, more particularly, breeders' associations, and influenced them to cancel their agreements with the ARC and transfer their business to Stud Book.

(c) That it had provided proof of the injury suffered in relation to the loss of business and loss of income from the sale of BeefPro and concomitant services as well as loss of goodwill and reputation and an interdict was its only effective remedy.

[29] In addition to interdictory relief the ARC had sought an order in terms of s 24(1B) of the Copyright Act, namely, an enquiry into past losses that it had sustained. As is apparent from the order set out above it obtained the additional relief sought.

[30] As stated above, the appellants were accused of collaborating with Stud Book in order to divert data to Logix and it was claimed that with Stud Book they flagrantly impinged upon the Arc's intellectual property rights. Notwithstanding the ARC's withdrawal of its claims against Stud Book, the latter's response to those claims provides historical as well as legislative context and provides insight into the approach to court for interdictory relief. As the claim against Stud Book was withdrawn after it had filed its response it formed part of the record before us.

[31] Stud Book, in resisting the relief sought by the ARC, described its own history in relation to legislative enactments, its interaction with the ARC and the termination

of that relationship. It explained that it was established as a voluntary organisation in 1905 by a number of stud breeders, with the aim of organising the breeding industry in South Africa and that it started recording the births and pedigrees, being the particulars of the sires and dams of every stud or 'pure bred' animals of various breeds in so-called stud books. Recording was done in this manner up to book 30, which was published in 1953. A predecessor of the Act⁴ had given some structure to the identification, breeding and ownership particulars that were required to be recorded.

[32] Stud Book explained that with the beginning of the computer era the data referred to above was captured on servers. Initially, the State allowed Stud Book the use of its mainframe. The State became concerned about this data being captured together with sensitive State data on the mainframe and this led to then Department of Agriculture funding a project that saw Stud Book participating in the development of a computer system for the recording of the relevant information. When that did not progress as anticipated, it led to the purchase of a computer program developed by CR Delta in Holland to serve as the basis of the development of a world class recording system. This developed into the INTERGIS system. The project was funded on the basis that the system would be developed, managed and operated as a joint venture between Stud Book and the Department. To this end a written joint venture agreement was concluded during July 1999. As the recording system was developed it was realised that more details than merely the pedigree had to be recorded to evaluate an animal's genetic potential. This led to the recording of two legs, namely, registration recording (births, parentage and ownership) and production performance recording

⁴ The Registration of Pedigree Livestock Act 22 of 1920.

(weight, growth rate, milk production, etc), so that the data could be effectively utilised by breeders.

[33] The Livestock Improvement Act 25 of 1977 came into operation on 1 May 1979. In that legislation Stud Book was recognised as the entity responsible for the registration and publication of data concerning the pedigrees of farm livestock. The ANI Act came into operation on 21 November 2003 and referred to ‘animal’ rather than ‘livestock’ in order to include other species not provided for under the latter term.

[34] An important change brought about by the ANI Act is that Stud Book was no longer the only entity that could register animals for the purposes envisaged by the ANI Act. That statute now provided that a breeders’ society or a group of such societies could apply to the Registrar of Animal Improvement to become its or their own registering authority, without making use of Stud Book as a registering authority. In terms of s29(3)(a) Stud Book is:

‘deemed to be a registering authority which is registered in terms of s 8(7)(a)(ii) of this Act and which has the power of a registering authority with reference to any kind of animal’

[35] Stud Book pointed out that, in the normal course, recording of animal data is not compulsory in South Africa. Some breeders’ associations made it compulsory for members to record certain data and others not. Consequently, one will find some breeders recording production data and others not. It is correct, though, that when a farmer makes a decision to become a breeder of registered animals of a specific breed he is required, in terms of the ANI Act, to become a member of the specific breed’s breeders’ society. The society must then allocate him a herd designation mark, which

is unique. When an application to become a breeder is submitted to a registering authority that registering authority must, on behalf of such a breeder, register a prefix or a suffix on the INTERGIS with the ARC. That prefix/suffix is also unique across all breeds and has to be recorded on a central database to prevent duplication. The breeder can then record the birth of his or her animals with the registering authority.

[36] In relation to performance data the Minister has, in terms of s 20 of the ANI Act, established schemes for various species. There are specifications, rules and fees connected to the State's established schemes, which are managed by the ARC. When a breeder participates in these schemes he or she is obliged to provide their collected performance data to the manager of INTERGIS, which presently is the ARC. The scheme relevant to the present case is the Beef Recording and Improvement Scheme, clause 13 of which provides that all beef farmers, stud breeders, commercial and emerging farmers may participate in the scheme. Participation is optional and not obligatory, as suggested by the ARC.

[37] In terms of s 8(1)(b)(vii) of the Regulations under the ANI Act, a registering authority is authorised to operate an independent performance and testing scheme. To enable it to do so all it was required to prove is that the data recording and processing system it utilises complies with international standards. Stud Book described how, after the development of INTERGIS as a joint venture, its servers were housed in the Stud Book building in Bloemfontein. The management and operation was done by Stud Book's IT team, in terms of a separate operational agreement with the ARC. It provided for the ongoing development, data capturing and processing of the information provided to INTERGIS.

[38] Since 2008, according to Stud Book, it started receiving complaints from breeders, breeders' societies and performance test advisory committees about vacancies at the ARC not being filled and about a deterioration of production recording by the ARC. Stud Book requested a meeting with the ARC's Chief Executive Officer. The meeting took place on 1 April 2009. The CEO admitted that the ARC was experiencing difficulties in meeting its obligations in respect of the recording of data, due largely to a shortage of funds. At Stud Book's request a professional organisation prepared a business plan for the ARC. After two years of interaction no solution was reached. There was no improvement in the services rendered by the ARC. The ARC unilaterally terminated the operational agreement with Stud Book and took a decision to relocate INTERGIS to Pretoria. That took place and Stud Book claimed monies it said the ARC owed for services rendered and for rent. Notwithstanding the termination of the operational agreement, the ARC had continued to submit data to Stud Book. A dispute concerning the continued existence of the joint venture referred to earlier was referred to mediation, during 2011. In light of what is set out above Stud Book considered the ARC as having repudiated the joint venture agreement and terminated the relationship. Because the monies owing by the ARC had not been paid Stud Book ceased all data recording services it had previously rendered to the ARC.

[39] Thereafter, Stud Book obtained its own server and other technical equipment and transferred a complete copy of the INTERGIS system onto its own new system, which it considered it was entitled to do as an erstwhile party to the joint venture. It consequently started to render a one-stop service to breeders, including registration and production recording from 1 January 2012. It called its new system Logix.

[40] A significant number of breeders' societies started utilising Stud Book's services. Stud Book recruited the staff necessary to provide the aforesaid services, such as animal scientists, technical advisors and the like. In resisting the relief sought by the ARC, Stud Book acknowledged that Mr Pauw, a private programmer, had been requested by the ARC to develop a modern beef farm management program. Stud Book played no part in the development of such a program and does not have access to its source code. BeefPro was introduced to the public during 2005 by the ARC. Whenever a copy of BeefPro was sold to a farmer all Stud Book did was load the program, which Mr Pauw had installed onto its system. Stud Book is adamant that it does not market or sell BeefPro.

[41] Stud Book was aware of the rebranding of BeefPro as BenguFarm-Beef. According to Stud Book, farm management software is merely a convenience, as data can be submitted by farmers of breeders' associations by email which can then, just as easily, be loaded onto Logix. BeefPro provides users with a choice to submit to any of INTERGIS, Breedplan or Logix. The farmer has this choice. Stud Book never doubted Mr Pauw's authorship of the BeefPro or BenguFarm program. It was of the firm view that he had developed the program. It is apparent from the description of the Stud Book's defence that on many issues there were fundamental disputes between it and the ARC, which, for present purposes, need not be dealt with.

[42] I now turn to the defence put up by the other respondents in the court below, the present appellants, principally through Mr Pauw, a software developer. During 2004 he was introduced to Mr Thinus Viljoen, who was employed by the ARC in

Stellenbosch. Mr Viljoen knew of Mr Pauw's work in creating a cattle management program for dairy farmers and informed him that the ARC was looking to develop a software program for beef cattle farmers and that it had approached a number of software developers. In 2005 he was contacted by Mr Bergh who asked him to travel to Pretoria to explore the possibility of developing a software program for beef cattle management. He met with Mr Bergh and Dr Van der Westhuizen, representing ARC, and informed them that he was eager to develop such a program and had the necessary expertise to do so.

[43] The ARC was unable to finance the development of the envisaged programme. Mr Pauw was adamant that he had made it clear to the ARC that a great deal of time, effort and skill would have to be expended to develop such a program and that he was willing to undertake it, but only on the understanding that copyright in the program and any adaptation would vest in him. Mr Pauw insisted that Mr Bergh and Dr Van der Westhuizen on behalf of the ARC agreed to this, with further discussion to ensue on the nature and content of the program. The risk of failure, in attempts to develop a viable program, considering the time and effort required, was entirely his. This was especially so since it was agreed that he would not be remunerated at all. The benefit for the ARC of such an arrangement was that the bureaucratic constraints of seeking approvals and acquiring funding did not apply. Furthermore, the ARC did not have staff with the necessary skills and experience to develop such a program.

[44] It was agreed, so said Mr Pauw, that Mr Bergh would be the contact person at the ARC with whom he would liaise in order to develop the program. It was contemplated that the program would be sold for an annual licence fee, as this would

incentivise Mr Pauw as the developer to continue improving the program. Mr Pauw, consequently registered Benguela as the corporate vehicle through which he would conduct his relationship with the ARC. Mr Bergh was advised of this. After Benguela was formed it would acquire Mr Pauw's rights and obligations.

[45] Mr Pauw set out the material terms of an oral agreement that he had reached with the ARC, represented by Dr Van der Westhuizen and Mr Bergh, as follows:

- (a) the parties undertook to execute and complete a project for the development of a beef cattle herd management computer program;
- (b) the ARC would develop marketing material for the program and carry the costs in relation thereto, unless Benguela agreed to do so;
- (c) the ARC would supply Benguela with the relevant specifications, technical detail and other relevant information in order for Benguela to create and develop the program;
- (d) the ARC would manage the collection and administration of the selling price and annual software licence fees in relation to the program and pay the agreed percentage of eighty five percent of those fees to Benguela;
- (e) the ARC would bear all costs for market research, the development and registration of the name and logo of the program, the development and printing of marketing material, training of ARC employees (to install, train and deliver after sales service to clients), administration and record keeping;
- (f) Benguela would supply the necessary hardware and software for development and maintenance of the program;
- (g) Benguela would be responsible for the development and creation of the program;
- (h) Benguela would retain the copyright in the program and its adaptations and improvements for the duration of Benguela;

(i) Benguela would bear all costs for the development, alterations, enhancements, improvements and extensions of the program and the registration, development and maintenance of the program's website as requested by the ARC.

[46] According to Mr Pauw, there was a sense of urgency on the part of all concerned to ensure that the program was developed as soon as possible so as to beat any competitor in bringing a Windows based program for beef cattle management to the market. Thus, the work was carried out with some expedition. Mr Pauw was provided with an office at the ARC's premises in Irene, with the only financial contribution made by the ARC being an amount of R9 000 towards his rental for the time he spent in Pretoria. He did not work under supervision and was not subject to any working conditions at all. Mr Pauw also provided a written document in terms of which he assigned his rights to Benguela.

[47] Mr Pauw described in detail the work that he had done in developing the BeefPro program and described how the program functioned. Mr Pauw stated that in the last month prior to BeefPro's release to the public it was not uncommon for him to spend between 16 to 18 hours a day working on it, almost every day of the week. The initial programs and adaptations and improvements all constituted copyright protected works. The ARC had no interest in how he went about developing the program. The name BeefPro was arrived at after suggestions were solicited from interested parties, including farmers and members of breeders' societies. Since its release to the market in August 2005, BeefPro has continued to undergo further developments to enable it to remain competitive, which Mr Pauw was responsible for. He expended time, energy and skill in doing this.

[48] Mr Pauw explained that the agreement concluded in March 2005, set out in para 44 above, regulated the relationship between him and the ARC. The first written record of the agreement occurred in October 2005, when Mr Bergh sent him a document recording the parties' respective obligations. The document provided that the ARC would render assistance in further development of the program by providing necessary information and that it would assist in the sale and distribution of the program, collect licencing fees and pay a percentage to Benguela. Importantly, the document noted that copyright in the program would be retained by Benguela.

[49] After receiving the document from Bergh, Pauw responded by email that he agreed with the terms set out therein, with one alteration, which for present purposes is immaterial. The agreement was not signed. Mr Pauw contended that even though the agreement had not been signed the material terms were adhered to by Benguela and the ARC and that was how the relationship continued to be regulated.

[50] During March 2007 Mr Bergh sent Mr Pauw another draft agreement. Although more detailed than the first, it was in essence the same. Mr Pauw responded by email accepting the material terms. Once again, the relationship continued as before. It was in their mutual interests that BeefPro continued to be marketed and developed on an ongoing basis. In the latter part of 2009, the ARC sought to renegotiate the agreement but Mr Pauw was not receptive to the idea. In seeking a new agreement, Dr Greyling, on behalf of the ARC, raised the question of the transfer of intellectual property in relation to BeefPro. I pause to record that Dr Greyling was employed as Research Team Manager of the ARC's Beef Cattle Improvement Program on 1 January 2009, some four years after the arrangements had been made in relation to the development

of BeefPro. An exchange of emails demonstrates, so Mr Pauw contended, that the ARC accepted that there was an existing arrangement in place. Mr Pauw was emphatic that the ARC was never the holder of copyright in BeefPro, nor had it ever historically claimed that right.

[51] In its replying affidavit the ARC relied on s 5(2) of the Copyright Act⁵ and stated that any work made under the direction and control of the state vested in the state. Thus, it submitted, copyright in BeefPro belonged to it. The ARC pointed to the draft agreement provided by Mr Pauw, in terms of which Benguela undertook to provide the ARC with the source code for BeefPro. Furthermore, the ARC referred to a draft agreement, sent by Mr Bergh and not disclosed by Mr Pauw, in terms of which copyright in relation to BeefPro was claimed by the ARC. The relevant clause (referred to as para 9) of that agreement reads as follows:

‘Any Intellectual property generated in terms of this agreement will vest in the ARC as per Section 24 Agricultural Research Act, 86 of 1990, which IP is held on behalf of the Minister of Agriculture and will be managed by the ARC in terms of the guidelines provided by the national Department of Agriculture to the ARC from time to time.’

[52] Mr Pauw responded to that document by email, dated 26 January 2006. The relevant parts of that email read as follows:

‘1. Par 4.2, p5 [Payment] en ook par 3.1, p12: Ek sien hier staan betaling aan die LNR?
2. par 9, p13 [Intellectual Property] Ek het met jou voorheen hieroor gepraat. Dit lyk hier of BeefPro die LNR se intellektuele eiendom is? Ek sou dit anders wou hê indien moontlik. Dit

⁵ Section 5(2) provides:

‘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 organisations as may be prescribed.’

gaan hier oor as ek in die toekoms die besigheid, nl BenguelaSoft, of enige gedeelte (lees BeefPro) daarvan sou wou verkoop. Ons het gesê in so 'n geval moet die ooreenkoms tussen BenguelaSoft en die LNR net so na die derde party oorgedra word. Die derde party neem dus BenguelaSoft se pligte ten opsigte van die LNR oor en die LNR se verpligtinge ten opsigte van BenguelaSoft gaan oor na die derde party.

As die program die LNR se intellektuele eiendom is, dan moet daar, en ek dring in elk geval daarop aan, dat die LNR se verpligtinge, nl die persentasie van aankope en jaargelde aan BenguelaSoft betaalbaar, in die kontrak gestippuleer word. Ek vertou jou 100% Leslie, maar ek moet myself beskerm in die geval wat jy weggaan of iemand hoër op sê dinge kan nie so gebeur soos tans nie. Met 'n kontrak wat gelde betaalbaar aan BenguelaSoft spesifiseer, sal ek wel die besigheid van die hand kan sit en myself beskerm teen moontlike toekomstige probleme.'

[53] The ARC relied on yet a further email by Mr Pauw, dated 9 March 2006, in relation to a draft agreement sent to him, in which he said the following:

'Leslie, ek hoop dit is reg. Baie van die goed waaroor ons gister gepraat het, het jy in elk geval by die betrokke party se verpligtinge bygesit. Die veranderinge is in rooi. By 3.2.1.13 en 3.2.1.14 net "BeefPro" bygesit, anders raak ek geregtig op al die LNR se inkomste! Is 3.2.2.7 [nie] teenstrydig met 3.2.2.11 nie? Groete Tim'

It is necessary to have regard to clauses 3.2.1.13 and then 3.2.1.14, which is referred to in Mr Pauw's email. They read as follows:

'3.2.1.13 To manage the collection and administration of the moneys received by the ARC from selling BeefPro and to pay 85% (eighty five percent) of these moneys (VAT excluded) to BenguelaSoft within 30 days after the applicable invoice was received and provided that the invoiced service has been delivered satisfactorily to the ARC.

3.2.1.14 To manage the collection and administration of the moneys received by the ARC from the agreed upon annual BeefPro license fees (R500.00, VAT included) and to pay 85% (eighty

five percent) of these moneys to BenguelaSoft within 30 days after the applicable invoice was received and provided that the invoiced service has been delivered satisfactorily to the ARC.'

[54] It was contended on behalf of the ARC that the emails by Mr Pauw, referred to in the preceding paragraphs, gives a lie to his assertion of copyright vesting in him. It was submitted that if he had indeed authored the BeefPro program free from the control and supervision of the ARC, he would not had been negotiating about the ownership or transfer of copyright in the work.

[55] Dr Greyling accused Mr Pauw of not disclosing the emails referred to in paras 51 and 52 above. He did not, however, explain why he or the ARC had made no reference in their founding affidavits to the emails by the ARC and the associated draft agreements that Mr Pauw disclosed in his answering affidavit. Nor did he explain why, after these two emails were exchanged, drafts sent to Mr Pauw on 9 March 2007 and 16 March 2007 reverted to the original terms that provided that copyright in BeefPro vested in Benguela.

[56] This appeal does not concern the rights of the ARC as against farmers and breeders, in relation to data and the submission thereof, obligatory or otherwise. This appeal is also not about whether the ARC is entitled to a monopoly in respect of certain data, which it seems to be suggesting. The parties were agreed that a finding on entitlement to copyright is dispositive of the appeal. The ARC sought relief on the basis that it owned the copyright in BeefPro. The question to be addressed is whether it discharged the onus of proving its ownership.

[57] Insofar as the ARC's claim to copyright based on an employment contract with Mr Bergh is concerned, the problem is that it is clear that Mr Bergh did not develop the program. He was emphatic in his support of Mr Pauw's assertion of how the latter had developed the program, based on his skill and experience, as was Dr Van der Westhuizen. No proof was provided by the ARC of any employment relationship with Mr Pauw. No evidence was adduced by the ARC in relation to any remuneration paid to Mr Pauw. He, on the other hand, was emphatic that he had received no remuneration and that only R 9 000 was paid in respect of certain rental because, in developing the program, he was required to be present in Pretoria.

[58] In relation to the ARC's claim of copyright based on s 5(2) of the Act, Dr Greyling stated, in general terms, that BeefPro was 'created for and at the instance of ARC' and that the knowledge of the employees of ARC was essential to its creation. Later, Dr Greyling said the following:

'The computer code for BeefPro was written by Pauw, acting on instructions and according to detailed specifications provided by Bergh who, in turn, was acting in his capacity as employee of ARC and as directed by it.'

Dr Greyling also stated that Mr Bergh was a 'project leader' in relation to the development of BeefPro.

[59] As stated earlier, the Copyright Act defines the 'author' of a computer programme as: 'the person who exercised control over the making of the computer program'⁶. The onus to prove that it exercised control over the making of BeefPro rested on ARC. Roux de Villiers, in an article entitled 'Computer programs and

⁶ See s 1 of the Copyright Act.

copyright: The South African Perspective,⁷ identified three situations in relation to a computer program:

‘Three possible situations can be identified: a programmer writes a program while not being under any obligation to a third party to do so; a programmer writes a program in fulfilment of his or her obligations under an employment contract (*locatio conductio operarum*); or a programmer writes a program in fulfilment of his or her obligations to do so under a commission or contract for work (*locatio conductio operis*).’

[60] The author of the aforesaid article then goes on to deal with each situation in turn:

‘In the first situation, where the programmer is under no obligation to write the program, the programmer is apparently in control of the making of the program and will be the author thereof as well as the first copyright owner. In the second situation, where the programmer is employed, it is generally not decisive who the author of the program is, because the first ownership of copyright in the work will tend to vest in the employer of the programmer irrespective of who the author is. It is extremely likely that in most cases the employer will, in any event, be the author of the program, since it would be exercising “control” over the employee’s actions as part of the employment relationship. The real problem arises in the third situation, where the programmer is commissioned to write the program, which also happens to be the situation that occurs most often in practice.’⁸

[61] In the present case, it is common cause that Mr Pauw was commissioned by the ARC to write the BeefPro program. What has to be determined is whether the ARC proved that it exercised control over the development of BeefPro. In *Haupt t/a Soft*

⁷ R de Villiers ‘Computer programs and copyright: The South African Perspective’ (2006) 123 SALJ 315-317 at 320.

⁸ At 320. (Citations omitted).

Copy v Brewers Marketing Intelligence (Pty) Ltd and Others [2006] ZASCA 40; 2006

(4) SA 458 (SCA) this court had occasion to consider the meaning of ‘control’ in relation to the definition of author of a computer program as provided for in s 1 of the Copyright Act. Streicher JA said the following:⁹

“Control” in the definition must therefore have been intended to have a wider meaning than “control” in the employment situation, that is, a person may, because of his control over the making of a computer program, be the author of that program even if the creator of the program is an independent contractor. According to *The Shorter Oxford English Dictionary* “to control” means “to exercise restraint or direction upon the free action of” and “control” means “the fact of controlling, or of checking and directing action”. In this case Haupt instructed Coetzee as to the end result that was to be achieved, Coetzee then did the technical work required to achieve that end result and, from time to time, effected improvements. However, Coetzee was, all along, in constant contact with Haupt and he accepted and executed detailed instructions from Haupt. As he progressed, he submitted his work to Haupt for it to be checked and approved by him. In the properties section of the Data Explorer program, Coetzee indicated that the copyright was owned by Soft Copy, the name under which Haupt was trading. The allegation by Haupt in his founding affidavit that it was always agreed between the parties that Haupt was the owner of the program was not disputed. This being the understanding between the parties, Haupt could, at any time, direct in which direction the development of the program should proceed, or could terminate further development if he wished to do so. Haupt was, therefore, in a position of authority over Coetzee insofar as the development of the program was concerned. He was in command and Coetzee subjected himself to such command. It is true that Haupt was in no position to instruct Coetzee as to how, technically, to achieve his requirements, but I agree with the High Court that one does not need to be a computer programmer to be able to control the writing of a computer program. For these reasons I am

⁹ At para 41. (Citations omitted.)

of the view that Haupt controlled the writing of the computer programs written after 31 July 1998.'

[62] The fundamental problem for the ARC is that the principal actors in relation to the commissioning of BeefPro, namely Mr Van der Westhuizen, Mr Bergh and Mr Pauw provided first-hand evidence as to how it came about and as to its terms. They all stated that Mr Pauw had developed the program, working independently and bringing his own skills and experience to bear, only seeking certain information from the ARC in order to ensure that the program served its purpose. He did not follow instructions from, or work under the supervision of Mr Bergh, or anyone else at the ARC. As the independent developer of the program he did not have to obtain, on an ongoing basis, the approval of anyone at the ARC. The technical aspects of his work did not have to be checked by someone in authority at the ARC.

[63] The present case is markedly different from *Haupt*. Mr Pauw did not take detailed instructions from Mr Bergh or anyone else at the ARC. His work was not subject to checking and approval and he was not being paid for his efforts. The program reflected Benguela as the copyright owner, in line with what was asserted by Mr Bergh, Mr Pauw and Dr Van der Westhuizen. I agree, in general, with the view expressed in the De Villiers article, that the mere provision of functional requirements and a periodic review of progress being made in the development of the program and testing it finally to see if it met its purpose, without more, does not establish control over the making of it or vest authorship therein.

[64] Furthermore, Mr Pauw was adamant that an oral agreement had been concluded in terms of which he reserved ownership of the program. Mr Pauw's assertion that the ARC could not finance the development of the program, is not in contestation. Mr Pauw's claim to copyright is substantiated by the fact that the draft agreements, latterly disclosed by the ARC in the replying affidavits, provide for Benguela, to receive 85% of the income from the sale of each BeefPro program and the ARC undertook to pay the annual licence fee to Beguela in relation to paid up registrations of BeefPro software. The agreements also provided expressly that the copyright in BeefPro vested in Benguela. The agreements also made provision for the source code to be made available to the ARC. The latter's reliance on the source code to BeefPro being provided to it does not, in the circumstances set out above, assist it in its claim to copyright.

[65] Dr Greyling, the principal deponent on behalf of the ARC, was unable to provide first-hand countervailing evidence. Nowhere in his affidavit does he state that he has personal knowledge of material events in relation to the development of BeefPro. The ARC's reliance on the emails by Mr Pauw, referred to in its replying affidavit, in terms of which he sought to negotiate terms in relation to the transfer of intellectual property, is of no assistance. He was not writing as a lawyer, but as a software developer seeking to ensure that he retained his source of income derived from the sale of the program he had developed. If anything, the exchange of emails and the contents of the draft agreement prepared by the ARC, referred to in paras 51 to 53, give a lie to the ARC's contention that it is the owner of BeefPro. In light of what is set out above, it is clear that the ARC failed to discharge the onus in relation to its claim of copyright. It failed to show that in developing the program, Mr Pauw acted under its control. In

the circumstances set out above there can be no question of joint ownership as contended for, in the alternative, by the ARC.

[66] The ARC's reliance on s 5(2) of the Copyright Act is misplaced. The ARC is a juristic person established in terms of the Act. It is controlled by a 'Council', constituted in terms of s 9 of the Act. It is not the state. Even if it could be contended that it is the state because of the funding it receives and because of the powers of the relevant Minister in relation to its activities, the problem for the ARC is that it is clear from what is set out above that it failed to discharge the onus of showing that Mr Pauw acted under the control of the ARC or under the direction of any other entity. The appeal must thus succeed.

[67] Finally, it is necessary to return to an aspect referred to briefly at the commencement of this judgment, namely, the failure by Kose AJ to provide reasons for the order. In *A A Maake v Director of Public Prosecutions*¹⁰ this court said the following:

'It is not only a salutary practice but obligatory for judicial officers to provide reasons to substantiate conclusions. The magistrate did not do so in respect of the maximum sentence imposed by him. In an article in *The South African Law Journal* entitled "Writing a Judgment" former Chief Justice M M Corbett pointed out that this general rule applies to both civil and criminal cases. In civil cases it is not a statutory rule but one of practice. In *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27H-28A, this court held that in an opposed matter where the issues have been argued litigants are entitled to be informed of the reasons for the judge's

¹⁰ *A A Maake v Director of Public Prosecutions* [2010] ZASCA 51; 2011 (1) 263 (SCA) para 19. (Footnotes omitted).

decision. See also in regard to the obligation to provide reasons *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 171E-172C.’

[68] In the article by the late Chief Justice referred to in the preceding paragraph, the following is stated:

‘In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.’¹¹

[69] In the present case it cannot be emphasised enough that it is indeed deplorable that the litigants were made to wait for approximately two years for an order to issue, at which point no reasons were supplied and requests for reasons were met with no response. This can only bring the administration of justice into disrepute. It is hoped that this court will in the future not have to deal with circumstances such as these.

[70] The following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court below is set aside and substituted as follows:

¹¹ M M Corbett ‘Writing a judgment’ (1998) 115 SALJ 116 at 117.

‘The application is dismissed with costs, including the costs of two counsel.’

M S Navsa

Judge of Appeal

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