

**Accesso CC v Allforms (Pty) Ltd and another
[1998] 4 All SA 655 (T)**

Division: Transvaal Provincial Division
Date: 5 October 1998
Case No: 2798/96
Before: Le Roux J
Sourced by: M Snyman and D Cloete
Summarised by: S Moodliar

[. Editor's Summary .](#) [Cases Referred to .](#) [Judgment .](#)

Competition - Unlawful - Party which owns copyright in a work cannot compete unlawfully by selling such work.

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Contract - Assignment - Consensus - Order form issued by party containing condition on the reverse thereof that copyright in material ordered would vest in such party - Court finding that no consensus ad idem between the parties and no valid assignment.

Contract - Interpretation of - Where ambiguity in contract cannot be resolved by linguistic treatment, a court may have reference to the surrounding circumstances and, as a last resort, to the negotiations between the parties - Party alleging contract bear onus of proving such evidence.

Copyright - Authorship - Meaning of "author" - Issue of fact.

Copyright - Literary work - Compilation - Scope of - Whether material falls within meaning of "compilation" - Factors to be considered and test to be applied - Layout of form can also attract copyright.

Editor's Summary

The Applicant brought an application to restrain the Respondents from infringing its copyright by reproducing a specified medical account form. The form was annexed to the Applicant's papers as "VH2" and adaptations of the form were annexures "VH3" and "VH4". The Applicant also sought the delivery of all copies of the infringing form as well as an order restraining the Respondents from competing unlawfully with the Applicant.

The Respondents raised the following defences: (i) no copyright existed in VH2 to VH4 as they were not original but were copied from existing medical account forms and that, in any event they were of so commonplace and mundane a nature that they did not merit the protection afforded by the Copyright Act; (ii) even if copyright did exist in VH2 to VH4, then such rights vested in the Respondents as the form VH2 was designed by an employee of the Respondents acting in the course and scope of her employment; and (iii) the Applicant had signed the order form which contained a standard condition that copyright in a form printed or designed by the first Respondent would vest in the first Respondent; and this constituted an assignment of the Applicant's copyright.

Held - With regard to the alleged assignment, the Court found that there was no consensus *ad idem* between the parties when the order form was signed in respect of the passing of ownership in the copyright of the form. The Court reached this conclusion on the following considerations: (i) There was never any serious intention to be bound to a possible assignment of future copyright as required by the law of contract, neither could it be said that the Respondents had any intention of receiving the copyright as the managing director of the Respondents had formed the view that no copyright existed in a form of that nature. (ii) Even if consensus could be implied by reason of the *caveat subscriptor* rule, such consensus would be invalid because there was a *justus error* and the assignor would not be bound.

The defence based on assignment could also not succeed because the words constituting the assignment contained a latent ambiguity which could not be resolved by "linguistic treatment" and resort had to be had to the surrounding circumstances and, as a last resort, to the negotiations between the parties. The Respondents, who bore the *onus* in this regard, had not tendered any such evidence in this regard and their contention that the term on their order form constituted an assignment had to fail.

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The Court then considered the issue whether the form VH2 qualified as a work to be protected under the provisions of the Copyright Act. The relevant subcategory in the Act was "written tables and compilations" under the category "literary work". The issue was whether the form fell within the scope of a "compilation". The Court considered the dictionary meaning of the word "compile" as well as various court decisions regarding compilations. The Court held that a court had to exercise a value judgment on whether the material in which copyright was claimed constituted a "work" (as contemplated in "literary work") or was too trivial to merit protection. Once it had been decided that a "work" had been created, the further enquiry was whether it was of so commonplace a nature that it did not attract copyright. This was an objective test but a court had to also consider the consequences of awarding copyright to a particular work; the difference between a compilation and the layout thereof: apart from the chosen material for the compilation, the actual arrangement of the material and the layout of the form could

attract copyright.

Applying these principles to the form VH2, the Court found that the form was far more informative and intelligible to a layman than its predecessors which were in common use prior to the creation of the VH2. Furthermore, the form had a separate existence apart from the computer package in which it was created. The consequence of awarding copyright to the form was not to preclude the Respondents from carrying on business or to preclude similar businesses from distributing forms.

The Court reiterated the point that a work could be original even if the author had drawn on knowledge common to himself and others or had used already existing material (without slavishly copying such material) provided he had spent skill, labour and judgment on it. The Act required a low standard of originality.

The Court concluded that the form VH2 qualified as a compilation for the purposes of the Act and merited protection under the Act.

On the issue of the authorship of the form VH2, the Court considered the definition of "author" in the Act (ie "the person who first makes or creates the work"). Whether or not a person was the author of a particular work was a question of fact: a person who reduced the work into its material form in a purely mechanical activity, eg a shorthand typist, was not the author but rather the agent of the author. In the instant case, both the Applicant and the Respondents had tendered evidence to show that they were the "author". The Court preferred the evidence of the Respondents to that of the Applicant. It found that the Respondents' employee was the author and that ownership of the copyright in form VH2 vested in the Respondents. The Respondents could not be said to be competing unlawfully with the Applicant by selling the forms in which they possessed copyright and the argument regarding unfair competition could not succeed.

With regard to costs, the Court found that, as both parties had achieved a measure of success, each party should be ordered to pay its own costs.

The application was accordingly dismissed, each party to pay its own costs.

Notes

For Competition, see *LAWSA Re-issue* (Vol 2, paragraphs 376-412)

For Contract, see *LAWSA Re-issue* (Vol 5(1), paragraphs 124-262)

For Copyright, see *LAWSA Re-issue* (Vol 5(2), paragraphs 1-103)

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Cases referred to in judgment

("C" means confirmed; "D" means distinguished; "F" means followed and "R" means reversed.)

South Africa

Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and others [1981 \(2\) SA 173](#) (T)

Bloom v The American Swiss Watch Company 1915 AD 100

Comcorp (Pty) Ltd v Quipmore CC, case no 7014/96, unreported, (D)

Conradie v Rossouw 1919 AD 279

Delmas Milling Co Ltd v Du Plessis [1955 \(3\) SA 447](#) (A)

Du Toit v Atkinson's Motors Bpk [1985 \(2\) SA 893](#) (A)

Fax Directories (Pty) Ltd v SA Fax Listings CC [1990 \(2\) SA 164](#) (D)

Frocks Ltd v Dent and Goodwin (Pty) Ltd [1950 \(2\) SA 717](#) (C)

George v Fairmead (Pty) Ltd [1958 \(2\) SA 465](#) (A)

Kalamazoo Division (Pty) Ltd v Gay and others [1978 \(2\) SA 184](#) (C) - F

Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd and another [1972 \(1\) SA 470](#) (W)

Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Ltd 202 JOC (N)

Schultz v Butt [1986 \(3\) SA 667](#) (A)

Waylite Diary CC v First National Bank Ltd [1995 \(1\) SA 645](#) (A)

United Kingdom

Donoghue v Allied Newspapers 1938 Ch 106

Hollinrake v Truswell (1894) 3 Ch 420

Ladbroke (Football) Ltd v William Hill (Football) Ltd 1964 1 AER 465 (HL) - F

Ocular Sciences Ltd v Aspect Vision Care Ltd (1997) RPC 289

University of London Press Ltd v University Tutorial Press Ltd 1916 (2) Ch 608

LE ROUX J

his matter started as an application to restrain the respondents from infringing the applicant's copyright in a specified medical account form, identified as annexure "VH2" to the founding affidavits of Vernon Herselman, by reproducing it in any manner or form, or by making an adaptation thereof or reproducing an adaptation, or by causing it to be reproduced or adapted. There is a further prayer for an order on respondents to deliver all infringing copies of the medical account form and plates used or intended to be used therefor to the applicant. A third prayer seeks to restrain respondents from competing unlawfully with the applicant by offering for sale, selling, distributing or otherwise dealing in medical account forms such as the one annexed to the founding affidavit by Vernon Herselman, marked "VH5" (this latter reference is clearly a mistake as VH5 is a deed of assignment. The reference should probably be to VH6). There is also a prayer for the costs of the application.

In the founding affidavit Vernon Herselman (to whom I shall refer as "Vernon") states that he is the sole member of the applicant which carries on business as a supplier and distributor of stationery in Pretoria. His company, Accesso CC, owns the copyright in certain medical account forms which is

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being infringed by the respondents by reproducing and selling them without applicant's permission. Even if respondents do not infringe applicant's copyright, it unlawfully competes with the applicant in selling and distributing these forms and should be restrained on this ground as well. Vernon states that respondents carry on the business of printing brokers of stationery including business forms and also medical account forms. Although the respondents do not conduct the actual printing of the forms, they subcontract it and give instructions to do so. The applicant is not sure what the relationship is between the first and second respondents and invites them to clarify it, although both may have an interest in the business of selling and distributing these forms.

The applicant's rights in these forms arose as set out hereunder. Vernon has a brother Roy Herselman ("Roy") who is an accountant with a Masters degree in Business Leadership. For a number of years Roy has been engaged in developing, installing and giving training on computerised patient accounting systems for the medical and dental profession. During 1989 he, in conjunction with his brother-in-law, one Jacques Mieny, an electrical engineer and computer programmer, developed a computerised accounting system for doctors and dentists which differs from previous systems in important respects, *inter alia* by catering for the requirements of medical aid schemes. Jacques Mieny ("Mieny") developed the computer programme (or "software") in collaboration with Roy who designed the form which represented the statement of account containing the data fed into the computer by the practitioner. The computer programme plus the form constituted a "package" known as the "Mass" package after the company Mass CC of which Roy and Mieny were members. Vernon was asked to market these forms and did so through the applicant.

The founding affidavit alleges that Roy produced an accurate sketch of the form after a great deal of creative effort had been expended on it. It was an original work and differed materially from any other form or statement on the market at that time. After drawing the sketch, Roy gave it to Mieny who wrote a software programme to fit the form. Roy approached the respondents and instructed them to produce the form in print. He handed the final sketch which he had drawn to an employee of the respondents, a Ms Jacqueline Barr ("Barr"). This sketch has since unfortunately disappeared and cannot be found. Barr has, however, attached virtually identical reproductions of Roy's original sketch to her affidavit in reply as the proofs JB1-5, which were later converted into VH2. VH2 differs from the original sketch, according to Vernon and Roy, only in the colour shading which was imposed on the white proof on Roy's instructions.

The applicant through Vernon ordered 100 000 of these forms (VH2) to be printed. It turned out, however, that these forms could not be used as they were a few millimetres too wide for the ordinary 80-column printers used by most medical practices and the batch had to be discarded. The applicant paid for his mistake and proceeded to reduce the width by leaving out one of the original columns entitled "benefit scale". After effecting some minor changes, the original sketch was reprinted (by another contractor) as VH3. Further minor changes were effected during 1993 to 1994 by Roy, and VH4 came into being, which for all intents and purposes was an identical reproduction of Roy's original sketch. Mass CC owns the copyright in this form VH2 with its reproductions and adaptations VH3 and VH4. In January 1996, Roy and Mass CC assigned their copyright to applicant by way of a written deed of assignment, signed by all parties to the assignment. On all three forms (ie VH2, VH3 and VH4) the following legend appears at the bottom of each form viz. "copyright

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- all rights (including distribution rights and design layout of this form) held by Mass CC".

Applicant now alleges that the respondents have copied and reproduced VH4 by printing, selling and distributing an identical form, VH6, save that the claim to copyright appearing on the forms has been omitted. It is this infringing form that applicant seeks to stop respondents from distributing in its application, although a reference is only made to VH2 in the prayers in the notice of motion. (During the course of the trial which followed on the application, counsel for the applicant applied to amend the original prayers by referring to VH6 as the infringing form. This was opposed by respondents' counsel on the grounds that the facts deposed to by Roy did not warrant this amendment and would in any event constitute a new case which they were not prepared to meet. I will deal with this application in due course.) The applicant further contends that the first respondent was contracted for the purpose of printing the form and was paid for the service, and is now reproducing this form and unlawfully competing with

applicant in selling it to its Mass package customers - hence the claim based on unlawful competition.

The respondents oppose the relief prayed for by the applicant on a number of factual and legal grounds. Their chief deponent is David Gordon Walshe ("Walshe") who is a director of both respondents. He explains the formation and present position of the respondent companies in his affidavit since the initial formation of Allforms (Pty) Ltd in 1982 till the present day. It appears that various changes of names occurred as well as an amalgamation with another company, Formcraft (Pty) Ltd. Eventually, the Formax Paper Group (Pty) Ltd was formed and acquired all the assets and liabilities of Allforms (Pty) Ltd. The latter then became dormant while the former ("Formax") is the active entity. Formax, however, still uses the trading name or style "Allforms" and conducts business as a designer and distributor of forms of all kinds for business purposes. It creates these forms to the specifications of clients, but does not print the forms themselves. The actual printing is sub-contracted to third parties.

The respondents raise two main defences to the applicant's claims, viz:- Firstly that no copyright exists in VH2 to VH4 as they are not original but were copied from existing medical account forms, and that in any event they are of so commonplace and mundane a nature that they do not merit the protection afforded by the Copyright Act. In this regard Barr has stated under oath that Roy never handed her an accurate drawing of VH2 but merely a rough sketch which was attached to Walshe's affidavit as DGW3. This rough sketch was drawn in the course of giving printing instructions to her and consists of twelve vertical columns drawn on a blank paper containing twelve headings in the Afrikaans and English languages. Both Walshe and Barr state that DGW3 does not constitute a "work" for purposes of attracting copyright. I may say that neither Vernon nor Roy claims copyright in DGW3 and says that this was simply one of many sketches drawn in the course of developing the accurate sketch which became VH2. They also deny that this sketch was ever handed to Barr and suggest that she must have taken it off Roy's table at a certain stage. Secondly, that in any event even if it is held that copyright does exist in VH2 to VH4, then such rights vest in the respondents as the form was designed by Barr acting in the course and scope of her employment with respondents.

A third defence is now raised, based on an order form of the respondents (DGW5) signed by Vernon for 100 000 forms to be supplied to the applicant, dated 25 October 1989. This order was for the abortive VH2 form. Above his signature on the order form the following words appear:

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"Approval of order/quotation subject to the standard trading conditions displayed on reverse."

On the back of the form 15 so-called "standard trading conditions" are listed. Condition no 15 reads:-

"Copyright: when Allforms prints or designs a form copyright will vest in Allforms ."

The respondents now submit that whatever the outcome of the dispute regarding the existence of copyright or the authorship of the form may be, Accesso has assigned its copyright to Allforms through Vernon Herselman and his signature on the order form which complies with the requirements of [section 22\(3\)](#) of the Copyright Act [98 of 1978](#). This subsection reads:

"(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicenser, as the case may be."

The signature by Vernon of the order form is said to constitute a written assignment. According to the submission by counsel for the respondents, the fact that applicant or Vernon was not the owner of the copyright at the time of signature of the order form is no obstacle to the validity thereof as [section 22\(5\)](#) of the Act applies. This section reads:

"(5) An assignment, licence or testamentary disposition may be granted or made in respect of the copyright in a future work, or the copyright in an existing work in which copyright does not subsist but will come into being in the future, and the future copyright in any such work shall be transmissible as movable property."

When this point was raised in the answering affidavits by the respondents, Vernon replied that he did not read the conditions when signing the order form nor was his attention drawn to it. Any copyright subsisting at the time belonged to his brother Roy and his company, Mass CC, and he (Vernon) had no intention of "signing away" his brother's copyright.

In their answering affidavits Barr, supported by Walshe, gave details of how she set about designing VH2. She says that during November 1989, Roy presented her with a rough sketch (DGW3) and requested her to design a medical account form for Mass CC. This was not a difficult task. She used the basic format for business forms commonly used at the time and added those headings required by the medical aid industry. She knew that most medical practices used the Epson FX80 printer which could accommodate 8.5 inches of print. At 16 characters per inch this would allow for 136 characters across the page. It turned out, however, that medical practices served by Roy generally could not utilise more than 8 inch forms in their printers and the total spread had to be reduced to 128 characters. Her form bore no resemblance to Roy's rough sketch (DGW3) which was at most his instructions in graphic form. The design of the form required almost no skill as examples of medical account forms were readily available and she simply copied these onto a spacing chart in producing VH2 and adapted it to Roy's needs as reflected on DGW3. If the negligible amount of skill required to produce VH2 does attract copyright, then she claims the authorship thereof. Roy only effected slight cosmetic changes to the proofs submitted by Barr, according to her affidavit.

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In his replying affidavit on behalf of the applicant Vernon states that a factual dispute concerning the authorship

of VH2 has arisen which can only be resolved by oral evidence, and he requests that this course be followed in respect of the two disputes raised in the answering affidavits. It is also categorically denied that DGW5 (the signed order form) constitutes a valid assignment of copyright to the respondents. He further denies that DGW3 is the only sketch handed to Ms Barr by Roy. It was not even a sketch representing a form but merely a character spacing diagram. He persists in his former statement that Roy designed an accurate drawing (with a special ruler lent to him by Ms Barr) of a form which had no previous existence by the use of his own skill and endeavour. In this way VH2, VH3 and VH4 came into existence of which Roy is the author. In any event, it would be impossible to design the form VH2 without having been aware of the capabilities and parameters of the software produced by Mieny which became the basis of the successful Mass package. According to Barr she never even consulted with Mieny.

When the application was first brought before court, counsel requested the learned Judge hearing the matter (Roos J) to refer the matter for oral evidence on the issue of authorship with the rider "if such is held to subsist". This order was made on 21 August 1996. At a pre-trial conference prior to the hearing of evidence, counsel agreed to request the court hearing the matter to decide the question of unlawful competition as well. This was done in order to save further expense and court time as the evidence presented in respect of the two main disputes would presumably also cover the issue of unlawful competition. I acceded to this request and if necessary will deal with this issue as well.

The matter commenced before me on 26 February 1997 and lasted off and on throughout the year. On the last day of argument during November 1997, just before the end of term, counsel for the respondents raised the question of an assignment contained in DGW5 for the first time, although the point had cropped up during the motion proceedings but had not been referred as a dispute to this Court. It was said that this was a purely legal argument and that no further evidence was necessary in regard thereto and that I can therefore deal with it simply on the basis of a defence. Counsel for the applicant requested time to reply to this new point which, if successful, would have made the whole trial unnecessary. Full written arguments were subsequently submitted by both parties.

I propose to deal first with the argument relating to assignment of copyright based on the signature of the order form because, if successful, it will render a consideration of the other disputes unnecessary.

The assignment point

In his oral evidence Vernon admitted signing the order form DGW5 on 25 October 1989, but stated that he took no heed of the "small insignia" (as he called it) appearing above his signature, nor did he even look at the back of the form. He was not aware of the condition relating to copyright but never intended "signing away his brother's copyright" (*sic*) to the respondents. I take it that the reference to the "small insignia" is intended to refer to the legend appearing above the space for the signature of the customer which I quoted above. Vernon also testified that the claim printed on the form VH2 at his request and subsequent versions thereof to the effect that copyright vests in Mass CC, would hardly make sense if he thought he might be transferring copyright to the respondents. This claim was printed on the forms at his specific request.

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It is common cause that if copyright existed in VH2 by virtue of Roy's efforts, it would vest in Mass CC and not in the applicant. This is so because copyright was only transferred to applicant, presumably for purposes of instituting the original motion proceedings, by the deed of assignment dated 8 January 1996. Counsel for the respondent now suggests that a claim to the copyright in the form was already made by Vernon in an instruction to his attorneys Messrs Adams and Adams during 1993. Although his claim to be the owner of the copyright as at the date of the letter namely 5 March 1993, cannot be correct, counsel now uses this and the answers given by Roy during cross-examination on this letter to support her argument that Vernon through the applicant, at all times acted as the agent of Roy and Mass CC in connection with its dealings with the respondents. She therefore submits that when signing the order form during October 1989, Vernon was acting as the agent of his brother Roy. Therefore, so the argument runs, although applicant had no claim to the ownership in the copyright of the form during 1989, the copyright passed to the respondents during January 1996 at the moment when applicant received the copyright from Mass CC by the written deed of assignment. Accordingly, the applicant has no *locus standi* to bring these proceedings and all the evidence regarding the question of the authorship of VH2 is irrelevant if this point is upheld.

Counsel for the applicant objects strongly to the manner in which this point was raised right at the end of a lengthy trial. He points out that the dispute regarding the transfer of ownership in the copyright was not one of the points referred to this Court for decision by Roos J, and the evidential aspects thereof were accordingly not properly canvassed during the evidence. Furthermore, in the motion proceedings the respondents admitted the validity of VH5, that is, the deed of assignment giving *locus standi* to the applicant. The respondent cannot now renege on this admission and is estopped accordingly from raising a previous assignment to it after admitting the last assignment to applicant. Should the court nevertheless allow the respondents to raise this argument, the applicant submits as follows:

1. As the words stand in condition 15 of the order form namely "when Allforms prints or designs a form .", this does not constitute a proper assignment in the present case. The reason is that the words "or designs" begs the question as it is clear that the designer of a work is the first author thereof. Accordingly, no question of assignment of copyright to that person is necessary. All that remains of the phrase is the word "prints". In this respect, says counsel, it is common cause that the first respondent was not a printer but in fact subcontracted the printing of forms to another contractor. The onus is therefore on the respondents to satisfy the court that the phrase indeed contains an assignment of copyright to it. This onus has not been discharged as no evidence was led in regard to the meaning of the word "print" in the phrase in question.
2. A second submission made by counsel for the applicant is that before an assignment can take place there must be a contract to assign where the parties must be *ad idem* in regard to the passing of rights and obligations comprising

copyright. [Section 22](#) of the Copyright Act does not alter the common law of contract and unless there is consensus between them and a meeting of minds as required by the law of contract, there can be no valid agreement to assign. In this case there was no such agreement as

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Vernon Herselman, acting on behalf of the applicant, had no knowledge of the alleged transfer of copyright to the respondents when ordering the forms, and his attention was certainly not drawn thereto. He accordingly had no idea that he could assign someone else's copyright which may devolve on him in future. On the other hand the respondents had no intention of receiving the copyright as it was Mr Walshe's clear view that no copyright existed in forms of this nature, and he still persisted in this view during the whole of the trial. Consequently, no contract of assignment ever came into being.

3. Even assuming that actual consensus between the parties did take place, that consensus is flawed because of the ignorance of the one party of the alleged offer to assign copyright in the form to another party (see *Bloom v The American Swiss Watch Company* 1915 AD 100). It is submitted that neither party at the stage when the order form was signed had any intention of entering into an agreement of this nature. Therefore no contract came into being.
4. It is further submitted that even if all these arguments are rejected the principle of *justus error* would apply in the present case firstly because a stipulation of this nature which the respondents now seek to enforce cannot normally be expected to form part of an order form (see *Frocks Ltd v Dent and Goodwin (Pty) Ltd* [1950 \(2\) SA 717](#) (C) at 725; *Du Toit v Atkinson's Motors Bpk* [1985 \(2\) SA 893](#) (A) where it was held by Van Heerden JA that a *justus error* can occur where an unusual stipulation appears in a contract and the attention of the contracting party whom it is now sought to hold liable to it has not been specifically drawn to that stipulation). A similar case occurred in *George v Fairmead (Pty) Ltd* [1958 \(2\) SA 465](#) (A) where Fagan CJ at 471 held that the failure to draw the attention of a guest to a condition in a hotel register in which he renounces his right to claim damages for loss of goods brought onto the hotel premises, was unenforceable if the attention of the guest had not been specifically drawn thereto. In this case counsel submits that Vernon Herselman's attention should have been specifically drawn to condition 15 on the reverse side of the order form before he can now be held bound to it.

In reply, counsel for the respondents submits firstly that the deed of assignment dated January 1996 was not admitted in all its terms but the existence only was noted. It was therefore competent for her to raise the question of an earlier assignment which had been agreed upon between the parties. In regard to the submissions in connection with consensus between the parties and the question of *justus error*, counsel for the respondents submits that these are irrelevant as [section 22\(3\)](#) of the Copyright Act merely requires a written document signed by the assignor for the validity of an assignment. She submits that this is not a bilateral contract but is in the nature of a testamentary disposition, and that the rules relating to consensus and *justus error* do not apply in this case. She does not deal with the argument that the phrase "when Allforms prints or designs a form ." does not constitute an assignment, as Allforms was not the printer and if he designs it then *cadit quaestio*.

This last submission made by counsel for respondents is clearly wrong. There are numerous examples of formalities prescribed by law where only the signature of the party who is to be held liable is required, e.g. the contract of suretyship or a negotiable instrument, or an assignment of copyright. The fact that the

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instrument in writing requires the signature of only one party does not mean that the agreement underlying the written instrument is not a bilateral one. The requirement of writing is to remove the danger of fraud or deceit and to facilitate proof. If any authority is needed for this self-evident proposition, reference may be made to the work of Dean, *Handbook of South African Copyright Law*, 1-53 sv "assignment", where the learned author says the following:

"The Act provides that no assignment of copyright, whether total or partial, will be effective unless it is in writing, and signed by or on behalf of the assignor. There must, however, be an agreement to assign or cede i.e. there must be a mutual intention to transfer the right by offer and acceptance. A verbal or tacit agreement purporting to assign copyright will be ineffective and invalid. An agreement can effect an assignment of copyright even though no specific mention of copyright is made in it."

[See also *Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Ltd* 202 JOC (N); *Comcorp (Pty) Ltd v Quipmore CC*, unreported, case no 7014/96, a judgment by McCall J delivered in the Durban Coast Local Division on 24 October 1997 in which the learned judge considered and applied all the rules relating to parol evidence and assent between the parties to an assignment of copyright.]

In regard to the present alleged assignment, I have formed a clear view that there was no consensus *ad idem* between the parties when the order form was signed during October 1989 in respect of the passing of ownership in the copyright of the form. I have reached this conclusion on various considerations. Firstly, it seems to me that there was never any serious intention to be bound to a possible assignment of future copyright as required by the law of contract (see *Conradie v Rossouw* 1919 AD 279). The applicant certainly, through Vernon Herselman, had no intention at that stage of assigning any copyright and his signature to the order form cannot in this case be taken as assent to condition 15 whatever it may mean in the context. Neither could it be said that the respondents had any intention of receiving the copyright in the form for the simple reason that Walshe, the managing director of the respondents, had formed the view that no copyright existed in a form of this nature. Accordingly, no agreement could ever come into being. Secondly, even if consensus could be said to be implied by reason of the *caveat subscriptor* rule, that consensus is invalid because there is a *justus error* which has crept into the proceedings and the assignor in my view would not be bound in this case on the authority of cases like *George v Fairmead (Pty) Ltd* (*supra*) and *Du Toit v Atkinson's Motor Bpk* (*supra*).

A further reason why this point cannot succeed is because the words constituting the assignment contain a latent ambiguity which cannot be resolved by so-called linguistic treatment [as defined *inter alia* in *Delmas Milling Co*

Ltd v Du Plessis [1955 \(3\) SA 447](#) (AD)], and resort must be had to the surrounding circumstances and, as a last resort, to the negotiations between the parties. No such evidence was tendered by the respondents who bore the onus in this regard and their contention that this term constituted an assignment must therefore fail. The point relating to assignment is accordingly dismissed.

Does copyright exist in the form?

The next question to be considered is whether the medical account form VH2 qualifies as a work to be protected under the provisions of the Copyright Act, 1978.

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The Act, in [section 2](#) thereof, lists a number of categories which are eligible for copyright, but it was common cause between the parties that the only category which can apply in the present case is that of a "literary work". The definition [in section 1(xxvii)] of a literary work includes the following subcategories of works:-

- (a) novels, stories and poetical works;
- (b) dramatic works, stage directions, cinematograph films scenarios and broadcasting scripts;
- (c) textbooks, treatises, histories, biographies, essays and articles;
- (d) encyclopaedias and dictionaries;
- (e) letters, reports and memoranda;
- (f) lectures, addresses and sermons; and
- (g) written tables and compilations.

Again it was common cause that only the last-mentioned sub-category can apply in the present instance.

What then is meant by "compilation"? The dictionary meaning of "compile" is

- "(1) to collect and put together (materials), so as to form a treatise;
- (2) to construct (a written or printed work) out of materials collected from various sources" (*Oxford English Dictionary* sv "compile").

In a leading case in the United Kingdom in recent years, viz *Ladbroke (Football) Ltd v William Hill (Football) Ltd* 1964 1 AER 465 (HL) the following descriptions and characteristics of compilations were described by the various judges involved in the judgment in that case:

". [the] putting together in writing (or print) of a number of individual items or components" (Lord Evershed at p 471F-G).

In the same case (at p 469I) Lord Reid said:

"It is not disputed that, as regards compilation, originality is a matter of degree depending on the amount of skill, judgment or labour that has been involved in making the compilation."

Lord Hodson in the same case (at p 475F-G) expressed it as follows:-

"The coupons are compilations, being derived from various sources . Thus commonplace matter put together or arranged without the exercise of more than negligible work, labour and skill in making the selection, will not be entitled to copyright."

Lord Pearce, in the same judgment (at pp 479-480), had the following to say about the subject:-

"The words 'literary work' include a compilation. They are used to describe work which is expressed in print or writing irrespective of whether it has any excellence of quality or style, or style of writing [Petersen J in *University of London Press Ltd v University Tutorial Press Ltd* 1916 (2) Ch 608]. The word 'original' does not demand original or inventive thought, but only that the work should not be copied and should originate from the author (*ibid*). In deciding therefore whether a work in the nature of a compilation is original, it is wrong to start by considering individual parts of it apart from the whole,

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as the appellants in their argument sought to do. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original . In such cases the courts have looked to see whether the compilation of the unoriginal material called for work or skill or expense. If it did, it is entitled to be considered original and to be protected against those who wish to steal the fruits of the work or skill or expense by copying it without taking the trouble to compile it themselves. So, the protection given by such copyright is in no sense a monopoly, for it is open to a rival to produce the same result if he chooses to evolve it by his own labours [see *Kelly v Morris* (1866) LR I E 697, 701]."

De Kock J in the case of *Kalamazoo Division (Pty) Ltd v Gay and others* [1978 \(2\) SA 184](#) (C) at 190, sets out the law applicable to compilations succinctly as follows:-

"It is a basic principle that a literary work (which includes compilations such as the applicant's forms) must be original in character to be the subject of copyright. Originality in this regard refers to original skill or labour in execution, not to original thought or expression of thought. What is required is not that the expression of thought must be in an original or novel form, but that the work must emanate from the author himself and not be copied from another work. The question that then arises is what degree of labour or skill will suffice to create copyright in an original work. It is clear that it must be shown that some labour, skill or judgment has been brought to bear on the work before copyright can be claimed successfully for such work. The amount of such labour, skill or judgment is a question of fact and degree in every case."

In that case the court held that copyright did exist in three business forms respectively referred to as "employee's earnings record, a time and wage register, and pay advice slip". The reason given was that considerable time, skill and labour had been expended by the author during the creation of these forms, despite the fact that the

information contained therein was fairly commonplace and readily available to a person who wished to devise a similar form.

In the case of *Waylite Diary CC v First National Bank Ltd* [1995 \(1\) SA 645](#) (A) the learned Judge of appeal held *inter alia* that the test involved in determining whether an alleged work qualifies for copyright protection, involves an objective test both as regards the originality of the work and the work itself. I understand by this latter remark (at 650D-E) that the learned Judge was referring to the question of the triviality of an alleged work in order to determine whether it can be said that "a work" had been created at all. In regard to compilations, the learned Judge held as follows (at 652):

"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) Ltd v Ladbroke (Football) Ltd* [1980] RPC 539 (CA) at 545, line 5."

The court then found that the subject-matter in this case was so commonplace that it did not attract copyright. In the course of the judgment it was further

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held that in assessing whether a work is entitled to the protection of the Copyright Act "it is permissible to have regard to the consequences of the recognition of copyright in a work of doubtful substance".

A court, therefore, has to exercise a value judgment on whether the material in which copyright is claimed constitutes a "work" or is too trivial to merit protection. Once it has been decided that a "work" has been created, the further enquiry is whether it is of so commonplace a nature that it does not attract copyright. This is an objective test but a court must also consider what the consequences would be of awarding copyright to a particular work.

A further aspect which must be taken into consideration is the difference between a compilation and the layout thereof. In the *Ladbroke* case, Lord Hodson at pp 475-476 underlined the distinction as follows:

"A significant feature of the respondents', or indeed of any other, coupon is the method of arrangement which has been described colloquially as the 'lay-out'. I prefer to use the word 'arrangement' which is relevant in considering labour involved in making a compilation. In *Lamb v Evans* a trades directory consisted of advertisements classified under headings denoting the different trades, composed by the plaintiff or persons found by him to compose them. The Court of Appeal, confirming Chitty J, held that the headings were the subject of copyright. Bowen LJ said:

'They are the result of literary labour, both as regards the composition of the headings themselves and their collocations or concatenation in the book.'

I would not therefore accept the submission of the appellants, which appears to have been accepted by the learned Master of the Rolls that, except where artistic merit is concerned, no question of 'layout' or, as I preferred to call it 'method of arrangement' is relevant. Moreover, in the case of the respondents' coupon the selection of headings showing the choice of bets offered by the respondents is itself shown to have been the result of skill and labour expended on them."

It would therefore appear that quite apart from the chosen material for the compilation, the actual arrangement thereof and the layout of the form can attract copyright.

In the case of *Ocular Sciences Ltd v Aspect Vision Care Ltd* (1997) RPC 289 at 428-430 Laddie J considered the meaning of the expression "commonplace". He said the following in this regard:

"Any design which is trite, trivial, common-or-garden, hackneyed or of the type which would excite no peculiar attention in those of the relevant art is likely to be commonplace. This does not mean that a design made up of features, which, individually are commonplace is necessarily itself commonplace. A new and exciting design can be produced from the most trite of ingredients. But to secure protection a combination must itself not be commonplace."

In this regard the evidence by Roy and by Ansie Badenhorst was that many hours were spent in designing the exact size of the columns, the placement thereof and that much labour and research went into determining the positioning of the various columns. It appears from the evidence of a witness called by the respondent, one Peter Charles Middleton, who is a design and printing expert, that he would classify the form VH2 as a fairly complex one which he

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said would deserve seven out of a rating of ten. Both Mr Walshe and Ms Barr were adamant, however, that the design of a form of this nature was a simple matter which would take them a few minutes to do on a spacing chart. Mr Walshe was of the view that should this type of form be accorded the dignity of copyright, it would be detrimental to his business and to the business of stationery purveyors in general. Walshe was at pains to point out that virtually all the headings and information contained in VH2 could be found in previous forms already on the market. He therefore said that in his view nothing new had been created and that all that had changed was that the address block had been moved down and the body of the form had been moved up which contained particulars relating to the service rendered and highlighting the amounts to be paid by the medical aid society and by the patient. He concedes that the columns inserted by Roy Herselman in regard to medical aid and the benefit scale are new columns which did not appear as such on previous forms.

In my view his evidence loses sight of the fact that the layout itself can attract copyright. In comparing VH2 and its successors VH3, VH4 and the alleged infringing form VH6 (which subsequently turned out to be not so) with the

previous forms of which a number have been attached to the papers of the respondents, I have formed the clear impression that the VH2 group is far more informative and intelligible to a layman than its predecessors, such as the Medsolve and Elite forms which were in common use prior to the creation of VH2. It has the advantage of printing all the information in a single line and not in separate little boxes spread all over the form. The headings are clear and precise and the amount owing by the recipient stands out clearly.

I considered the question whether this might not be a case falling within the parameter of *Hollinrake v Truswell* (1894) 3 Ch 420. In that case the plaintiff claimed copyright in a cardboard pattern sleeve containing upon it various figures and descriptive words for adapting it to sleeves of any dimensions. It was held that these words and instructions were not capable of copyright within the meaning of the then Copyright Act as it was part of the measuring apparatus and had no separate existence. In other words, it was a portion of a tool or a machine which was not separately published and could not stand on its own. The thought occurred to me that as form VH2 was inseparably bound to the Mass package and the computer programme, whether it might not be said that it did not have an existence of its own. On further reflection I have come to the conclusion, however, that the facts in that case differ completely from those in the present matter and that form VH2 does have a separate existence apart from the computer printout. The principle enunciated in that case, therefore, is not applicable here.

What are the consequences of awarding copyright to this form? Would it preclude the respondent from carrying on its business and similar businesses from distributing forms? On reflection I do not think so as the respondent is also a designer of customised forms and would in that capacity more often than not acquire the copyright in a form which it designs as I will attempt to show when dealing with the question of authorship.

Before concluding this part of the enquiry, it is worth repeating that a work may be original even if the author has drawn on knowledge common to himself and others or has used already existing material (without slavishly copying such material) provided he has spent skill, labour and judgment on it. The standard of originality required by the Act is a low one [see Copinger and Skone James, *Copyright* (13 ed) paras 3.28, 3.29 and 3.32]. A work need not be "novel"

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where the author has produced his result without reference to an existing work, even if someone else has produced a similar work, for then he does not copy but creates (*Copinger* par 3.33). Where he does make use of existing subject-matter the question to be decided is whether he has expended sufficient independent skill and labour to justify copyright protection.

In my view VH2 qualifies as a compilation for purposes of the Act, amounting to a rearrangement of existing material plus a few new columns. Applying the above-mentioned criteria, I have reached the conclusion that although the headings and typographical material on form VH2 is commonplace and would not attract copyright, the layout of the form has required skill, judgment and labour by the author and does merit protection under the Copyright Act.

Who is the author of form VH2?

The word "author" is now defined in the 1978 Act in relation to a literary work as "the person who first makes or creates the work". This definition appears to follow the judgment in the case of *Pan African Engineers (Pty) Ltd v Hydro Tube (Pty) Ltd and another* [1972 \(1\) SA 470](#) (W) at 472. Dean (*op cit* 1-16) describes the author of a work as the creator or maker of the work in its final and complete version which is ready for utilisation or commercial exploitation. Elsewhere in the same paragraph the learned author also says that

"the author of a work is the person who is responsible for the creation of the material embodiment of the work. This person may not necessarily be the person who conceived the idea which gave rise to, or which is embodied in the material work. Ideas as such are not protectable by copyright and therefore the originator of an idea cannot, *per se*, claim any right in his idea."

In the *Pan African Engineers* case (*supra*) at 472B, Boshoff J said the following in regard to authorship:

"In the case of *Nottage and Another v Jackson* (1883) 11 QBD 627 at p. 637, the view was expressed that an author is the man who really represents or creates or gives effect to the idea or fancy or imagination; a man who is most nearly the effective cause of the representation when completed."

The learned judge then stresses that whether a person is an author of a particular work or not is in the nature of things always a question of fact.

If the activity of the person who reduces the work into its material form is purely mechanical in nature, in the sense of a shorthand typist who takes down what is dictated to her and reproduces it in a written form, that person is not the author but rather the agent or amanuensis of the author (see *Donoghue v Allied Newspapers* 1938 Ch 106). I am not suggesting that this principle can be applied in the instant case. The respondents are independent contractors who clothe their clients' instructions in a material form.

In the case of *Fax Directories (Pty) Ltd v SA Fax Listings CC* [1990 \(2\) SA 164](#) (D) Hugo J accepted the respondents' submission that only a natural person and not a company can be the author of a literary work (p 174C). This assumption was based on the provision of [section 3\(2\)\(a\)](#) of the Act which provides that the term of copyright in a literary work was "the life of the author and fifty years from the end of the year in which the author dies ." In my view this assumption is with respect correct, but it does not preclude an artificial person from becoming the owner of copyright where the author created the work in the course of his or her employment with the company.

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Vernon Herselman admits that he had very little to do with the designing of the form and that he simply handled the business side of selling the Mass forms. Although he ordered the forms from the respondents, he did not give the instructions for printing. Those came from his brother Roy. Roy has testified that he spent many hours researching and designing the form by trial and error. He did so in conjunction with Mieny who designed his computer programme to fit the form. Roy testified that Ms Barr frequently visited their offices and kept on enquiring how the design of the form was progressing.

She even gave him graph paper on which to draw the form and a special white plastic ruler created for use in designing forms. After many hours of work and research, Roy says that he eventually created a form on blank paper which he handed to Ms Barr. His instructions were to print this as a form and to submit the proofs to him before the final printing of the full batch. After handing her this completed drawing there was nothing left for her to design except to prepare it for printing. The layout and use of the material which he found necessary to incorporate in the programme was purely his own idea and did not emanate from any other source. The computer programme was designed around the form and the form was adapted to it in the course of its development.

Ms Barr emphatically denies these allegations. She says that Roy approached her during 1989 and requested her to design a medical account form. He explained that they were writing a new computer programme for medical practices and that they had been marketing the so-called Elite form up to that stage, but that this was no longer adequate and that he required a new form that looked different. She asked him whether he had a printout of the programme available but he replied that it had not been finally settled. She thereupon asked him certain pertinent questions regarding his requirements and made notes of his replies. DGW3 was then drawn by Roy which gave the number of columns, the headings and the required spacing of the columns in the body of the form. She states that the rest of the form could *in toto* be obtained from existing forms especially the Elite form. She set about designing the required form by using a spacing chart and drawing on her experience of designing of forms. Roy's input was merely the arrangement of the columns and the headings as well as the width of each column. The only drawing she ever received from Roy was DGW3. She also denies lending him a ruler and she says he did not ask her for any paper. She denies having heard of a white plastic ruler used for designing forms. The only ruler she ever saw or used was a specially imported one made of steel which she handed in as exhibit 1. After she had designed the form she handed it to the printing house which printed a proof. She took this to Roy and discussed alterations to it with him. At least five proofs were printed by the setting house before Roy was satisfied and the final one was signed by him. This document has unfortunately been lost and could not be produced but the five proofs on which notes were made were submitted to the court. Ms Barr testified that once a block has been made by the printer the signed proof is destroyed.

These were the two main witnesses concerning the question of authorship of the form. There were two supporting witnesses, one on each side, namely Ms Ansie Badenhorst on the side of the applicant. She testified that she assisted Roy in designing the form, but significantly she did not describe the end product in any detail. All that she can remember is that on his instructions she kept on measuring with the ruler which was in her possession and "counting blocks", as she termed it. She said she kept on drawing lines and rubbing them out. She did not seem to have an overall impression of the work that was being carried out.

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On the side of the respondents there was Mr Charles Middleton, the designing and printing expert. He expressed the view that it would be almost impossible for a person to design an accurate form resembling VH2 without knowledge of the printing industry and without the use of a spacing chart. He said that designing a form of this nature requires a great deal of experience and expertise. Mr Walshe also testified that although a design of this nature did not require a great deal of labour on the part of an expert, knowledge of the printing industry was essential in order to create a successful business form. The printing industry was still committed to the use of imperial measurements and had not been converted to a use of the decimal system. Jacques Mieny was another witness who testified on behalf of the applicant. He said that it was not possible to create the form first and then design the computer programme around it. He said that the two had to be developed together and that this was an extremely involved and complex process which took a great deal of time to complete successfully. The two processes are inextricably bound together and the one cannot be separated from the other. They were therefore developed together.

The dispute regarding the creation of the form VH2 is obviously fundamental to the question of authorship. Roy Herselman claims that he designed a complete form ready for printing, whereas Ms Barr says he gave only rudimentary instructions which she converted into a printable form. If Roy's version is accepted, he is the author, and through him Mass CC (and subsequently the applicant) has become the owner of the copyright. If Ms Barr's evidence is accepted in preference to that of the applicant, she is the author and through her contract of employment, the respondent is the owner of the copyright. Both these version cannot be correct at the same time.

There are a number of indications which have led me to the conclusion that the respondents' evidence is to be preferred to that of the applicant's. Firstly, it seems clear that Roy knew very little about the exigencies of the printing industry - knowledge which was essential for the successful design of a form such as VH2. This was clearly demonstrated during his cross-examination. Secondly, he and Ms Ansie Badenhorst contradicted each other on the use of graph paper or plain paper for the drawing of the form. It became clear that Ms Badenhorst knew very little about the form in its final appearance and she could not give a description of what it looked like. Then there was the controversy surrounding the white plastic ruler. A number of plastic rulers were handed in as exhibits - none of them white. Both Walshe and Ms Barr were adamant that only the steel ruler (exhibit 1) was ever used by them or by anybody associated with their trade. There is the use (or failure to use) a spacing chart which all the expert witnesses for the respondent say is an essential tool. Roy did not use it, but only Ms Ansie Badenhorst's counting ability and the trial-and-error method around Mieny's printouts.

The main problem with applicant's version, however, is that the drawing in its complete form could not be produced for inspection in any form. Roy says it was handed to Barr who lost it. Barr says she never received it but only DGW3, which she kept in the "job bag" of the applicant and which she produced in court. Roy speculates that Ms Barr "took" the sketch DGW3 off his desk without his knowledge. One wonders why she would have done so if she had the perfect drawing in her possession from Roy himself. Roy says it was one of many such drawings but he could not produce any others. Again, if there was a perfect drawing of VH2, I would have expected the applicant to have kept a

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copy or at least to have moved heaven and earth to obtain the one which was handed over to the respondent, as this would have gone a long way towards proving the applicant's case on authorship. But no requests or applications for special discovery were launched.

The credibility of Roy Herselman is not untainted either. In Vernon's founding affidavit concurred in by Roy during the motion proceedings, he described the forms VH3 and VH4 as subsequent versions designed by him containing only minor or "polishing-up" changes, whereas in his oral evidence he described these changes as "substantial". This opened up new vistas and postulated a different case to the one made on motion, for if the new forms were substantially different, they would attract copyright in their own right and it was common cause that respondent had nothing to do with these designs. It also meant that the infringing form VH6 (or exhibit 1) were copies of VH3 or VH4 and not as originally stated, of VH2.

The probabilities overwhelmingly favour Ms Barr's version. I do not accept that she would "pilfer" DGW3 from Roy's desk merely to use as proof of her rudimentary instructions in a subsequent court case. She was the expert in designing forms and in formulating precise printing instructions, and I cannot see how an amateur like Roy could possibly design a perfect-ready-to-print drawing of the form. As pointed out by Mr Middleton, no self-respecting designer would accept a commission such as the one described by Roy Herselman.

It is not surprising to find that the applicant sought to amend its prayers at the conclusion of the evidence by including VH3 and VH4 as works in which it claimed copyright. Respondent objected strenuously to this amendment, pointing out *inter alia* that this would change the very foundation of the applicant's case in view of Roy's evidence regarding "substantial" changes and would deprive the applicant of *locus standi* as only the copyright in VH2 was assigned to it. After hearing argument by counsel, I dismissed the application to amend.

Under the circumstances I accept Ms Barr's evidence about the creation of the form and reject that of the applicant. It means that Ms Barr is the author and that the respondent is the proprietor of the copyright in VH2.

Unfair competition

It remains to deal with the argument relating to unfair competition by respondent in selling and distributing forms similar to VH2. This argument may be disposed of shortly. Although the idea for the arrangement or layout of VH2 emanated from Roy, respondent through Ms Barr gave material form to it and I have found that respondent owns the copyright. On the authority of cases like *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and others* [1981 \(2\) SA 173](#) (T) and *Schultz v Butt* [1986 \(3\) SA 667](#) (A), one of the basic requirements of the action based on unfair competition is that the act complained of must be unlawful. If the respondent is the lawful owner of the copyright as I have found, it cannot be said to be competing unfairly with the applicant if it sells the forms in which it possesses copyright.

It follows that the application cannot succeed. In regard to costs, however, a special order is called for as both parties achieved a measure of success in respect of the issues before court. Thus the applicant succeeded in having the point concerning assignment raised by respondents dismissed and the issue of copyright in the form was also decided in its favour. On the other hand, the crucial issue of authorship in the form and the question of unfair competition went in

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favour of the respondent. In my view and not to put too fine a point to it, each party should be ordered to pay its own costs.

The application is accordingly dismissed, each party to pay its own costs.

For the applicant:

O Salmon instructed by *Messrs Wentzel Viljoen & Swart*, Pretoria

For the respondents:

M Jansen instructed by *Messrs Spoor & Fisher*, Pretoria