

**Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and others
[2004] 4 All SA 67 (C)**

Division: Cape of Good Hope Provincial Division
Date: 13 August 2004
Case No: 4303/02
Before: HJ Erasmus J
Sourced by: C Webster and AD Maher
Parallel Citation: [2005 \(1\) SA 398](#) (C)
Summarised by: D Harris

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[1] *Civil procedure - Discovery of documents - Uniform Rules of Court - Rule 35(3) - Where a party is dissatisfied with the discovery of another party, it can seek discovery of documents "which may be relevant to any matter in question" - Matter in question is determined from the pleadings, and to decide the question of relevancy, the issues raised by the pleadings must be considered.*

[2] *Copyright - Computer programmes - Copyright Act [98 of 1978](#) recognises computer programmes as a specific and sui generis form of expression which can be the subject of copyright.*

[3] *Intellectual property - Computer programmes - An employee may not claim ownership of software produced in the course of his employment.*

[4] *Intellectual property - Computer programmes - Copyright Act [98 of 1978](#) recognises computer programmes as a specific and sui generis form of expression which can be the subject of copyright.*

Editor's Summary

Together with an Anton Piller order, the applicant had sought an interdict restraining the respondents from dealing with a computer programme in respect of which the applicant claimed copyright and ownership.

According to the applicant, he was the owner of the copyright in the computer programme in question, and the respondents were infringing the copyright in what amounted to unlawful competition. The respondents disputed applicant's ownership of the copyright.

Held - The Court began with a dispute between the parties, concerning the discovery of documents by the respondents. A transaction between the respondents and a third party led the applicant to request discovery of documents relating to the transaction in order to determine the effect of the transaction on the applicant. The respondents refused, on the basis that the transaction specifically excluded the computer programme in dispute.

Rule 35(3) of the Rules of Court provides that where a party is dissatisfied with the discovery of another party, it can seek discovery of documents "which may be relevant to any matter in question". The matter in question is determined from the pleadings, and to decide the question of relevancy, the issues raised by the pleadings must be considered. As the documentation which the applicant sought to be discovered was not relevant to any of the issues raised in the affidavits, the application for discovery was dismissed.

Before addressing the merits, the Court placed on record its assessment of the parties as witnesses. Both parties were shown to be manipulative of the facts, and their evidence had to be treated with circumspection.

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Turning to the merits, the Court noted that the Copyright Act [98 of 1978](#), as amended by the Copyright Amendment Act [125 of 1992](#), recognises computer programmes as a specific and *sui generis* form of expression which can be the subject of copyright.

In order to determine whether or not the Applicant could make any claim to the ownership of the software, it was necessary to ascertain what the legal relationship was between him and the respondents' company. Despite contrary allegations by the applicant, it was found that he was an employee of the company. As such, he could not have become the owner of any software which he may have produced in the course of his employment under a contract of service to the company. This dispensed with the allegations of infringement of copyright and unlawful competition.

The Court ended by explaining its reasons for having dismissed several points *in limine* raised by the Respondents.

Notes

For Copyright see:

- LAWSA Second Edition (Vol 5(2), paras 1-98)

Cases referred to in judgment

South Africa

Bank of Lisbon and South Africa Ltd v The Master and others 1987 (1) SA 276 (A)	89
Denel (Pty) Ltd v Vorster, unreported, case number 13/2003 (SCA)	92
Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd 1968 (1) SA 209 (C)	92
Francis v Sharp and others [2003] 2 All SA 201 (2004 (3) SA 230) (C)	81
Hart v Pinetown Drive-in Cinema (Pty) Ltd 1972 (1) SA 464 (D)	91
Lacfin (Pty) Ltd v Le Roux 769 JOC (O)	91
Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais 1998 (2) SA 450 (E)	90
Mears v Rissik, Mackenzie NO and Mears' Trustee 1905 TS 303	90
Memory Institute SA CC t/a SA Memory Institute and others v Hansen 2004 (2) SA 630 (SCA)	89
Muller v De Wet NO and others [1999] 2 All SA 163 (1999 (2) SA 1024) (W)	90
Muller v De Wet NO and others [2000] 3 All SA 620 (2001 (2) SA 489) (W)	90
Nieuwoudt v The Master and others NNO 1988 (4) SA 513 (A)	90
Northern Office Micro Computers (Pty) Ltd v Rosenstein 1981 (4) SA 123 (C)	77
Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd and another 399 JOC (T)	77
Payen Components SA Ltd v Bovic CC and others 1995 (4) SA 441 (A)	88
Pearson v Magrep Investments (Pty) Ltd and others 1975 (1) SA 186 (D)	91
Premier Hangers CC v Polyoak (Pty) Ltd [1997] 1 All SA 134 (1997 (1) SA 416) (SCA)	88
Prism Holdings Ltd and another v Liversage and others 2004 (2) SA 478 (W)	85
Road Accident Fund v Mothupi [2000] 3 All SA 181 (2000 (4) SA 38) (SCA)	83
Schultz v Butt 1986 (3) SA 667 (A)	87
Stewart v Schwab and others 1956 (4) SA 791 (T)	81

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Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others 1999 (2) SA 279 (T)	71
Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd 1991 (1) SA 412 (A)	87
The Concept Factory v Heyl 1994 (2) SA 105 (T)	87
Voget and others v Kleynhans 2003 (2) SA 148 (C)	90
Wackrill v Sandton International Removals (Pty) Ltd and others 1984 (1) SA 282 (W)	81

Europe

Flyde Microsystems Limited v Key Radio Systems Limited [1998] EWHC Patents 340	86
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United States of America

Lotus Development Corp v Borland International Inc 49 F 3d 807 (1st Cir 1995)	77
Feist Publications Ltd v Rural Telephone Service Company Inc. 449 US 340 (1991)	79

Judgment

ERASMUS J:

Introduction

On 13 May 2002 the applicant brought an application for an Anton Piller order, as well as an interdict restraining the respondents from in any manner dealing with a computer program in respect of which the applicant claims copyright and ownership. An order was duly made and a rule was issued returnable on 20 June 2002.

The respondents anticipated the return day and on 29 May 2002 an order was made by agreement between the parties. It was agreed that backup copies of the evidence preserved in terms of the Anton Piller order would be made and further so preserved. The rule *nisi* issued on 13 May 2002 was discharged as was the interim interdict granted on that date. Determination of the final interdict sought by the applicant was referred to trial. It was ordered that the affidavits were to stand as pleadings and that the Uniform Rules of Court pertaining to trial actions are to apply.

At the hearing, Mr JH Roux appeared on behalf of the applicant, and Mr RAJ Acton on behalf of the three respondents. The trial continued intermittently over a period of more than a year. In all, 33 days were spent in court.

The issues

The applicant's case is that -

1. he is the holder (owner) of the copyright that subsists in the computer program that forms the subject matter of the action;
2. the copyright is being infringed by the respondents, and
3. the conduct of the respondents amounts to unlawful competition.

The gist of the respondents' defence is that the applicant is not the holder (owner) of the copyright in the computer program in question, and that, accordingly, the question of alleged infringement does not arise for consideration by the Court.

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At the outset, Mr Acton on behalf of the respondents raised several points *in limine*. The points were argued on 20 and 24 February 2003. On 25 February 2003 I stated my conclusions on the points raised without giving reasons. I deal with the issues so raised at the end of the judgment.

The parties

The applicant

The applicant is Anton Charl Haupt. He and the second respondent are brothers-in-law, being married to two sisters. He was in the evidence often referred to as "Anton". He is an unrehabilitated insolvent. His insolvent state was the subject of one of several points raised *in limine* by the respondents.

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The first respondent

The first respondent is Brewers Marketing Intelligence (Pty) Ltd. The second respondent is at present the sole shareholder and director of the company. Through the years, the predecessors of the company went through various guises and there was some variation in the shareholding. A company styled Retel Film Productions (Pty) Ltd was established on 11 May 1989. The sole shareholder, holder of 300 shares, was one Frances Mary Lawler ("Lawler"). On 23 November 1990 the name was changed to Brewer Jones & De Greef (Pty) Ltd, the sole shareholder remaining being the said Lawler. On 10 May 1994 Mr JP de Greef resigned as a director of Brewer Jones & De Greef (Pty) Ltd and Lawler's 300 shares were transferred to second respondent and to Jones, 151 to the second respondent and 149 to Jones. After Jones emigrated to New Zealand, the name of the company was changed, on 21 February 1996, to Brewer & Haupt (Pty) Ltd. On 7 March 1996 the 149 shares owned by Jones were transferred to the second respondent who then held all the shares in Brewer & Haupt (Pty) Ltd. On 18 February 1997 the name of the company was changed to Brewers Almanac (Pty) Ltd. The first respondent, Brewers Marketing Intelligence (Pty) Ltd, was incorporated on 31 August 1998. On 1 March 1999 it was resolved by the sole director of Brewers Almanac (Pty) Ltd (the second respondent was the sole director) to sell the business including all assets and liabilities as a going concern together with all income earning activities to the first respondent. In the papers and in the evidence, the first respondent and its various predecessors were collectively referred to as "Brewers" or "Almanac" or "the company". I shall follow suit in this judgment and refer to "the company".

The second respondent

The second respondent is Christopher John Brewer who is, as I have indicated, the brother-in-law of the applicant. In the evidence he is often referred to as "Chris". He is British by birth but came to South Africa many years ago. He was for many years, and still is, involved in various capacities in the advertising industry.

The third respondent

The third respondent is Byron Coetzee. In the evidence he was sometimes referred to as "Byron". He is an expert computer programmer.

Discovery

Discovery turned out to be a "long and troubled process" (as it is called in the papers) but the disputes were resolved before the start of the trial. Any questions

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of costs which may arise from these disputes will, in so far as it may be necessary, be considered at the end of this judgment.

A further dispute regarding discovery flared up during the course of the hearing. On the morning of 27 October 2003 the applicant in terms of a notice under Rule 35(3) sought discovery of certain further documents. With reference to matter that had been published in the *Financial Mail* of 5 September 2003 and on the second respondent's

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website on 4 September 2003, the applicant sought discovery of documentation pertaining to a transaction entered into between the first and second respondent on the one hand, and Interactive Marketing Systems on the other, and documentation pertaining to a new company styled Brewers Interactive Market Systems (Pty) Ltd.

In the *Financial Mail* the transaction is described as follows:

Interactive Market Systems (IMS) has bought 100% of Brewers Market Intelligence. The new company will be called Brewers Interactive Market Systems.

In the website the transaction is described as follows:

Brewer's Marketing Intelligence and Interactive Market Systems (IMS) have concluded negotiations where IMS will acquire a 100% shareholding in Brewers and the combined assets of both companies will be amalgamated into a new company, Brewers Interactive Market Systems (Pty) Ltd.

Mr Roux submitted that the applicant needs access to the documentation in order to determine the effect of the transaction on the position of the applicant. The applicant, it was submitted, needs to know the fate of the first respondent, whether the applicant is now litigating against an empty shell and whether he needs to join another party to these proceedings.

Mr Acton described the request for further discovery as an attempt to uncover the financial dealings of the first and second respondents with a third party. He has offered to make available to the applicant a copy of the one clause in terms of which, he says, the computer program which is the subject of dispute in this matter, was expressly excluded from the transaction between first and second respondents, and Interactive Marketing Systems.

In the *Financial Mail* and in the website, the transaction is variously described as a purchase "of 100% of the first respondent", as an acquisition of a 100% shareholding in the first respondent, as a "buy-out", as a "takeover" and as a "merger". These various descriptions of the transaction do not emanate from lawyers, but from a financial journalist and from a businessman. Whatever the nature of the transaction between first and second respondent, and Interactive Marketing Systems, it did not affect the existence of the first respondent as a separate legal entity. As such, it remains a party to these proceedings. The position of the second respondent as a party to these proceedings also remains unchanged.

Rule 35(3) provides the procedure for a party dissatisfied with the discovery of another party. Under the sub-rule, a party can seek discovery of documents "which may be relevant to any matter in question". The "matter in question" is determined from the pleadings, and to decide the question of relevancy, the issues raised by the pleadings must be considered (*Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* [1999 \(2\) SA 279](#) (T) at 316J-317A). In this matter, the affidavits stand as pleadings - in other words, the issues between the parties are defined in the affidavits. The

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documentation which the applicant seeks to be discovered is not relevant to any of the issues raised in the affidavits.

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I accordingly dismissed the applicant for the discovery of the documentation.

The background

The advertising industry

The case has the advertising industry as background.

The South African Advertising Research Foundation (SAARF) was established in 1973. The establishment of SAARF arose from the need which was felt in the advertising industry for more sophistication in media planning. The Foundation is controlled by advertisers, the advertising industry and the media. The research undertaken by the SAARF is funded by way of a levy on advertisements placed in the printed and electronic media. The levy is paid to the Marketing Industry Trust (MIT). MIT utilises the funds so obtained to fund, *inter alia*, the research undertaken by or on behalf of SAARF.

SAARF publishes at regular intervals, three major research reports: the All Media Products Survey (AMPS), the Radio Audience Measurement Survey (RAMS) and the Television Audience Measurement Survey (TAMS). The contract for conducting the research which underlies the research reports is put out to tender. During the period covered by the events in dispute in this matter, the research was done by AC Nielsen & Co ("AC Nielsen").

This case is principally concerned with AMPS, which is the most important of the research reports. An updated version of AMPS appears every six months. AMPS is a collection of statistical information covering reader/viewer/listener numbers by media consumption, by various demographic data (sex, age, income, education, etc) and product ownership/usage (refrigerators, biscuits, cameras, etc) in addition to the consumption of services such as banks and credit cards.

The information is compiled from personal interviews with a representative sample of the group which is the object of the research. The result so obtained is multiplied by the number of people in the group and adjusted by a complex system of weighting.

The AMPS data is published in book form by AC Nielsen and is also available electronically in binary form in a so-called UFL file. Special computer programs are required to read and interpret the data in this form. Various such programs are available in the market. The programs are designed to read and interpret the AMPS data and make the vast amount of information contained therein accessible to end users who would typically be marketing managers, advertising agencies and the media.

The business activities of the first respondent

The first respondent and its various predecessors have a strong background in advertising. The company was active within two distinct areas, the production of advertising material and the publication of advertising and marketing information.

The production of advertising material was done by an advertising agency styled *The Works*. The publication of advertising and marketing

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information was

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done under the flag of *Brewer's Almanac* and *Brewer's Business Books*. *The Works*, *Brewer's Almanac* and *Brewer's Business Books* were not separate legal entities but simply business groupings within the company as it existed at any time.

The contribution of *The Works* to the business of the company diminished through the years and in time the bulk of the company's turnover and income was generated by *Brewer's Almanac* and *Brewer's Business Books*. The principal publications producing the income were:

The South African Almanac, a media reference book

Who's Who in Advertising and Marketing, an industry reference book

Dictionary of Advertising and Marketing Terms

MAD - The Marketing and Advertising Database, a marketing industry reference book

BAD - Brewers Advertising Agency Database, an advertising reference book

The relationship of the applicant and the second respondent

In a letter dated 9 November 1992 the second respondent offered the applicant the position of sales manager of "Brewers Business Books". Though the company was then still styled Brewer Jones & De Greef, the letter has a letterhead in bold letters, BREWER'S ALMANAC. In the letter it is stated that the second respondent and Jones have for some time been concerned "about a few things relating to 'Brewer's Business Books'", that they both believe that a marketing manager is required "and we'd like to offer you this position". It is common cause that at the time, the applicant was in dire financial straits as a result of a failed property development. In November 1993 the applicant was sequestered on the application of the second respondent in what was clearly a "friendly" sequestration.

During 1995/1996 Jones emigrated to New Zealand. On 21 February 1996 the name of the company was changed to Brewer & Haupt (Pty) Ltd. The transfer of 149 ordinary shares in Brewer & Haupt (Pty) Ltd from Jones to the second respondent was approved by resolution dated 7 March 1996. The second respondent then held all the

shares in Brewer & Haupt (Pty) Ltd.

The applicant continued to work for the company during 1997 and 1998. He says that he contributed significantly to the expansion of the business of the company; the second respondent is less enthusiastic about his contribution.

The applicant was of the view that by reason of his contribution to the business, he was entitled to a share in the business. The second respondent said that his attitude throughout was that he was keen to give the applicant a shareholding in the company, but that there were two major stumbling blocks: the applicant's unwillingness to accept his share of responsibility for the liabilities of the company by standing surety for its indebtedness to the bank, and a dispute as to the second respondent's loan account.

Proposals were made in an effort to resolve the differences but none was found acceptable by both parties. Relations were becoming strained and one gained the impression from the evidence that the family

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gatherings which took place from time to time (at Sunday braai's, for example) became occasions of superficial conviviality with considerable strain and tension simmering below the surface.

Matters came to a head during July 1998. The second respondent during the first half of July 1998, while on holiday in Plettenberg Bay, prepared a further

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proposal to resolve the differences between himself and the applicant. The second respondent says that the proposal was made in a conciliatory spirit, and that he made major concessions in an effort to meet the applicant. The one major concession he offered to make, was to resolve the dispute regarding the loan account by splitting the difference.

The proposal was discussed at a meeting on 31 July 1998. The applicant did not accept the proposal and terminated his association with the company and with the second respondent with immediate effect.

It is clear, in my view, that the applicant had decided prior to the meeting of 31 July 1998 to sever his relationship with the company and with the second respondent, and that he took certain preparatory steps during the course of July while the second respondent was on holiday in Plettenberg Bay. On 6 July 1998 he purchased a laptop computer and paid for it with a company cheque. When he left on 31 July 1998, he took the computer with him, with the Project AMPS program and source code loaded on to it. Also during July 1998 he wrote himself a company cheque for R30 000. He says it was in payment of salary. He had never before drawn a salary of R30 000 (his monthly salary seems to have been R20 000) but, he says, he drew the amount because the second respondent had drawn R30 000 and they were entitled to draw equal monthly amounts.

The computer programs

During 1997 and early 1998 the applicant and the second respondent envisaged a computer software package by which AMPS data could be cross-tabulated and analysed for Microsoft Windows operating systems. The idea was to develop "user friendly" software which can translate the information contained in the binary form of the AMPS disks into a format that could be used and manipulated by the user of the program. It was thought that the various programs available in the market were expensive and not very user friendly. The applicant says that the idea and the initiative was his, and that the second respondent was not enthusiastic about the idea. The second respondent denies that the applicant played a dominant role in the conception and creation of the software. It is not necessary to resolve this dispute, save for saying that I have the clear impression that the applicant's role in the development of the software is overstated by himself and underplayed by the second respondent. The project became known as the Project AMPS and the software it developed as the Project AMPS program.

The second respondent says that when the applicant left the company on 31 July 1998, a prototype of the operational version of the Project AMPS software was complete. The applicant disputes this and says that at that stage the program was still very much in the initial stages of development. He says that it was only after he had left that he was able

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to concentrate, on a full time basis, on the development of the product. An AMPS cross tabulation program was developed which the applicant called Data Explorer. The applicant says that he was the architect and creator of the program while the third respondent was responsible for the actual programming.

The third respondent worked on the Data Explorer program during the period August 1998 to approximately July 2000. During September 2000 he emigrated to the United States. After his departure, the applicant no longer made use of his services.

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The Data Explorer program came on the market in September 1998 through Softcopy, the name under which the applicant trades. The applicant says that it services clients countrywide whose software and data are updated twice a year.

The second respondent testified that from the time that the applicant had severed his ties with the company, it was always his intention to continue with the development of the Project AMPS software. Early in 2001, after he had engaged the services of Mr Hank Bento ("Bento") as a computer programmer, he began further development of the project in earnest. He commissioned Bento to rewrite the program and he also made use of the skill and expertise of the third respondent who was still in the United States at the time. The result was the Brewers AMPS software which came on the market early in 2002.

In May 2003 the applicant received a telephone call from one Mr Louw, an employee of Media 24 t/a Die Burger Newspapers. Media 24 was a client of the applicant. Mr Louw informed the applicant that the Data Explorer program was not functioning properly. The applicant says that he then discovered that the first respondent had sold a product known as Brewers AMPS to Media 24. The applicant further says that the computer software provided by the first respondent uses the Data Explorer program which he had designed and developed, including the source code to the program.

The applicant then launched the application for an Anton Piller order and for an interdict.

The applicant seeks copyright protection for the whole "package" of his Data Explorer program, both the source code, executable file and the databases. He says that the executable file houses all the functionality of the program, including the source code. The underlying tables and databases contain the questions, answers and weightings for each person interviewed. The executable file cannot function without the databases. This part of the program is housed outside the executable file and changes as and when new data become available. The applicant contends that both components that make up the Data Explorer program are unique to him.

The witnesses

On behalf of the applicant, the evidence of the applicant himself was adduced and that of an expert, Mr Marius Bosman ("Bosman"). On behalf of the respondents, the second and third respondent gave evidence, as well as the computer programmer Bento and an expert, Mr

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Francois Jordaan ("Jordaan"). The respondents also called Ms Muriel Vennoot to fill in some of the background.

It is appropriate at this stage to give my impressions of the various witnesses. The applicant and second respondent each spent several days in the witness-box and each one of them was examined and cross-examined at length.

The second respondent is a man of standing in the advertising industry. He has, for example, been chairman of the Media Association of South Africa, and has acted as consultant to the Media Directors Circle and the Association of Advertising Agencies. He undoubtedly has vast experience in and intimate knowledge of the advertising industry.

He said of the applicant: "If Anton can cheat anybody, he will". The applicant said of him, in a private memo, that he "kan nie meer tussen waarheid en leuens onderskei nie". Can the pot call the kettle black?

The second respondent has falsely given out that he was a barrister of the Middle Temple (but not in the latest edition of BAD which he edited himself,

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though there is a reference to some association with the Inner Temple). He also tried to mislead the bank by giving out to the manager that the applicant was a shareholder while to his knowledge he was not. His dishonesty can perhaps best be described as "fudging"; that is, a tendency to "adjust or manipulate (facts or figures) so as to present a desired picture" (see the *Concise Oxford English Dictionary*, sv, "fudge").

The applicant will perhaps not make openly false statements as the second respondent does. But he is shrewd and calculating, much more so than the second respondent. His severance of his relationship with the company and with the second respondent and the removal of the Project AMPS program and the source code were carefully planned in advance. The laptop that he took with him was the property of the company, a laptop which he purchased and paid for with a company cheque a few weeks before his departure. He told the third respondent that he was going to leave the company and elicited his support for the further development of the program. He indicated to the third respondent that he was going to remove the software from the company's computers - in a private memo written before his departure he noted under "benodigdhede", "[a]lle kode; alle ander sagteware; alle leë diskette". Shortly before his break with the company and the second respondent, he registered a new e-mail address in the name of "Softcopy", the entity under which he began operating after his departure.

Their attitudes and views of each other are coloured by strong bias and an intense personal dislike. As a result, the version of events of each one of them tends to be one-sided and each one exaggerates his role and contribution, and plays down that of the other.

In argument, Mr Roux submitted that the second respondent had in his evidence not been candid with the court and that during the course of the case he had shifted his ground. Mr Acton listed examples of similar conduct on the part of the applicant.

I shall deal with these issues, where appropriate and in so far as may be necessary, during the course of this judgment. In general, I am of the view that the evidence of both the applicant and the second respondent

must be treated with circumspection and must at all times be carefully evaluated within the context of all the circumstances.

The third respondent is an expert computer programmer. He is a soft-spoken man who takes obvious pride in his work. Although he feels himself "done in" by the applicant, he did not allow his animosity to colour his evidence. He was fair, gave credit where credit was due and was prepared to make concessions. He did make mistakes and was sometimes wrong. When it comes to development work on the program, and the state of the program at various stages, I have no hesitation in accepting his evidence.

Bento, also an expert computer programmer, has been in the employ of the company since 2001. He gave his evidence, which was not seriously disputed, in a straightforward and matter-of-fact way. He was in all respects a reliable witness on the matters on which he testified.

Copyright in computer programs - the law

The Copyright Act [98 of 1978](#) ("the Act") differentiates between computer programs and databases. The Act applies different criteria for their protection and defines authorship differently in respect of them.

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Computer programs

Computer programs were previously protected as literary works (*Northern Office Micro Computers (Pty) Ltd v Rosenstein* [1981 \(4\) SA 123](#) (C)). The Act, as amended by the Copyright Amendment Act [125 of 1992](#), has since 1992 recognised computer programs as a specific and *sui generis* form of expression which can be the subject of copyright. In section 1(1) of the Act, a computer program is defined as -

"a set of instructions fixed or stored in any manner which, when used directly or indirectly in a computer, directs its operations to bring about a result."

The protection lies in the set of instructions. Both Dean *Handbook of South African Copyright Law* 1-14 (hereafter referred to as Dean *Handbook*) and Van der Merwe *Computers and the Law* (2ed) at 86-87 submit that the definition of "computer program" in the Act is limited and refers only to the finished product in the form of the program's source code and object code.

The source code of a computer program is a textual description of the program, written in a programming language. The source code is not directly executable by a computer, and must first be converted into an object code which is "machine readable", either by passing it through a compiler or loading it into an interpreter that translates and executes it one statement at a time. Thus, in the sense employed by the definition in section 1(1) of the Act, a program in object code "directly" directs the operations of a computer to bring about a result. A program in source code does so "indirectly" after conversion into an object code which is machine readable.

The definition does not cover other elements of a program, such as the preliminary stages embodied in specification sheets and flow charts. These are not protected in the same form as the program itself and will still have to be protected as "literary works" (Pistorius and Visser "The

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Copyright Amendment Act [125 of 1992](#) and Computer Programs: A Preliminary Overview" (1992) 4 SA Merc LJ 346 at 348, 349-350; Van der Merwe "Copyright and Computers, with special reference to the Internet" 1998 (115) SALJ 180 at 191).

There seems to be uncertainty about the copyright protection of screen displays. Van der Merwe suggests that it "is probable" that they "may not be protected in the same form as the program itself" (Van der Merwe "Copyright and Computers, with special reference to the Internet" 1998 (115) SALJ 180 at 191).

In *Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd and another* 399 JOC (T) (which decided was prior to the amendment of the Act by the Copyright Amendment Act [125 of 1992](#)) it was held that a screen layout may be the subject of copyright. The case was decided on the basis of the documentation in the form of flowchart and planning diagrams which underpinned the screen layouts. These were held to be copyrightable, and therefore what appeared on the screen of the program was a mere translation of such written documents and was protectable on that basis.

The computer program and code which underlie the screen layout may be the subject of copyright as such. Similarity in screen layout does not necessarily arise from similarity of underlying code. In *Lotus Development Corp v Borland International Inc*, 49 F 3d 807 (1st Cir 1995) the question arose whether the Lotus 1-2-3 computer spreadsheet program was infringed by Borland who

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copied the Lotus 1-2-3 menu hierarchy into its own computer spreadsheet programs. In paragraph [40] of the judgment it is said:

"[40] The Lotus menu command hierarchy is also different from the underlying computer code, because while code is necessary for the program to work, its precise formulation is not. In other words, to offer the same capabilities as Lotus 1-2-3, Borland did not have to copy the Lotus's underlying code (and indeed it did not); to allow users to operate its programs in substantially the same way, however, Borland had to copy the Lotus menu command hierarchy.

The fact that the programs have similar screens which are viewed by the user does not necessarily mean that the one is copied from the other. Similarity may, for example, be due to the fact the different programs seek to achieve the same functionality or the fact that the same programming tools (available in a programming language) were used."

Databases

In terms of section 1(1) of the Act, as amended by section 50(e) of the Intellectual Property Laws Amendment Act [38 of 1997](#), electronic databases are included under the definition of literary works, which are defined to include:

(g) tables and compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer,

but shall not include a computer program;

The South African Legislature has thus opted for the protection of electronic databases as a form of compilation which is a species of literary work (see Dean *Handbook* at 1-8 to 1-8A, 1-14).

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Authorship

[Section 3](#) of the Act provides that copyright shall be conferred on every work eligible for copyright of which the author is a qualified person. In terms of section 3(1)(b) a juristic person incorporated under the laws of this country is a qualified person. In terms of section 21(1)(a) the ownership of copyright conferred by [section 3](#) shall vest in the author of any work, or in the case of joint authorship, in the co-authors of the work. In section 21(1)(d) it is provided that where a work 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 the copyright subsisting in the work.

In section 1(1) of the Act, the author of a computer program is defined as -

"the person who exercised control over the making of the computer program."

Actual involvement in the creative work going into the making of the program is, therefore, not critical and authorship arises simply from control over the persons concerned (*LAWSA* 2ed vol V part 2 paragraph 4). The person who exercises control over the making of a computer program is a person who has the power of regulation of the manner in which the person who "makes" the program is to do his or her work.

The author of a literary work is defined in section 1(1) of the Act as -

"the person who first makes or creates the work."

The author of a database, which is a species of literary work, is the person who first makes or creates the database.

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Originality

Works are eligible for copyright only if they are "original" (section 2(1) of the Act). This does not mean that -

"the work must in any way be unique or inventive, but merely that it should be the product of the author's or maker's own labours and endeavours and should not be copied from other sources. Originality is a matter of degree depending on the amount of skill, judgment or labour involved in making the work."

(Dean *Handbook* 1-15 and the authorities cited)

The originality of a computer program, and its eligibility for copyright, would therefore depend upon the question whether sufficient original skill and labour were used in the creation of the program.

The protection of the contents of databases has been a world-wide headache. In the USA there has in recent years been a "spate of *sui generis* proposals aimed at protecting the contents of data bases" (Lemley *et al*, *Software and Internet Law* 2ed (2003) at 275-276). The European Union has adopted a directive which extends copyright protection to databases if they constitute -

The author's own intellectual creation, ie databases which evidence some measure of "originality" or "creativity" on the part of the author.

In the United States in *Feist Publications Ltd v Rural Telephone Service Company Inc* 449 US 340 (1991), O'Connor J stressed that while facts are not copyrightable, compilations of facts are within the subject matter of copyright:

Factual compilations, on the other hand, may possess the requisite originality.

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The compilation author typically chooses which facts to include, in what order to place them, and to arrange the collected data so that they may be used effectively by readers. The choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original . . .

The Supreme Court explicitly rejects the approach that had been dubbed the "sweat of brow" or "industrious collection" approach, which would base copyright protection as a reward for hard work and effort, stating that the "sweat of brow" doctrine "flouted basic copyright principles".

Dean *Handbook* 1-8A submits that under South African law an electronic database, like any other work, should be "original", and requires no higher standard of creativity.

The legal relationship of the applicant and the first respondent

In order to determine whether or not the applicant can make any claim to the ownership of the software, it is necessary to ascertain what the legal relationship was between the applicant and the company. Loose use of terminology does not make this an easy task. For example, when one of the parties refers to the other as a former "partner", one cannot be sure whether the word is used in its legal significance, or loosely to denote no more than that they had worked closely together.

As was indicated above, the applicant joined the company in 1992 as an employee at the invitation of the second respondent.

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On 21 February 1996, after the departure of Jones, the name of the company was changed to Brewer & Haupt (Pty) Ltd. The applicant says that at this juncture he was offered and accepted 50% of the shares in Brewer & Haupt (Pty) Ltd. There is no record that the shares were in fact transferred to the applicant. On the contrary, the transfer of 149 ordinary shares in Brewer & Haupt (Pty) Ltd from Jones to the second respondent was approved by resolution dated 7 March 1996. The resolution is signed by the second respondent in his capacity as director of the company. The second respondent then held all the shares in Brewer & Haupt (Pty) Ltd.

In February 1996 the second respondent submitted a memorandum to the company's bankers in support of an application for overdraft facilities. In the memorandum, it is stated that the applicant holds 50% of the shares in Brewer & Haupt (Pty) Ltd. The second respondent said in evidence that although he was in fact at the time the sole shareholder in the company, he stated in his memorandum that half of the shares were held by the applicant in order to impress the bank with the participation in the company of a dynamic young man.

The bank manager was not happy with the fact that half of the shares in the company were held by an unrehabilitated insolvent. On 7 May 1996 a document was prepared, signed by both the applicant and the respondent, which purported to transfer 149 shares in Brewer & Haupt (Pty) Ltd held by the applicant to the second respondent. On 7 May 1996 this document was submitted to the bank manager. In an accompanying letter, handwritten by the second respondent and dated 7 May 1996, it is stated:

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"At a meeting of the Directors of Brewer & Haupt (Pty) Ltd held yesterday it was agreed that Anton Haupt relinquishes all his shares in the company and that I buy them at the nominal price.

This was duly carried out by our Auditor this morning and the appropriate paperwork is attached.

I now own 100% of the shares of the Company and am the sole director.

I trust that this meets with your approval."

Attached to the letter was a securities transfer form for the transfer of 149 ordinary shares in Brewer & Haupt (Pty) Ltd, duly signed by the applicant as transferor and by the second respondent as transferee.

The whole operation was a ploy (in which both the applicant and the second respondent participated) designed to mislead the bank manager. When the bank manager had reservations about the applicant being a shareholder in the company, a sham transfer of shares from the applicant to the second respondent was engineered which, with a misleading accompanying letter, was designed to satisfy the reservations and doubts of the bank manager.

The applicant says that he was under the impression that the shares held by Jones had in fact been transferred to him, and that in May 1996 he agreed to the transfer of his shares to the second respondent in order to accommodate the doubts of the bank manager and to make it possible for the company to get the overdraft facility. I find it difficult to believe that a man with the applicant's business acumen would be "under the impression" that 50% of the shares in a company (with which he was intimately involved) had been transferred to him.

When he severed his relationship with the first and second respondents on 31 July 1998 the applicant was not a shareholder in the company. The applicant

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and the second respondent were at the time negotiating a basis for giving the applicant a shareholding in the company, but they could not and did not reach agreement on the terms.

In his replying papers, the applicant contended that he and the second respondent were in fact in a partnership. The nature of the partnership is not clarified in the evidence. The applicant describes his decision to part with the first and second respondent, both in evidence and affidavit, as a resignation from the company, not the dissolution of a partnership. Moreover, there is no evidence that there was any attempt by the applicant to enter into negotiations for the division after his departure of the partnership assets and liabilities.

The company was, in fact, the vehicle through which all the business was done: the liabilities (for example, the bank overdraft, trade creditors and the wages payable to employees) were those of the company; the assets (such as furniture, computer equipment (including the laptop), trade debtors, loan account and goodwill) were similarly those of the company. In addition, both the applicant and the second respondent drew salaries from the account of the company.

This is not a case in which there was a contractual relationship between shareholders (the applicant was not a shareholder) beyond the articles which creates personal obligations between the members of the company (see, for example, *Stewart v Schwab and others* [1956 \(4\) SA 791](#) (T); *Wackrill v Sandton International Removals (Pty) Ltd and others*

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[1984 \(1\) SA 282](#) (W); *Francis v Sharp and others* [1 2004 \(3\) SA 230](#) (C) at 238H-239D).

On the evidence it is clear that there may have been agreement between the applicant and the second respondent that the applicant would be paid a larger share of the income generated by the business divisions of the company handled by the applicant (in particular *Brewer's Business Books*). Such an agreement does not, however, amount to an agreement of partnership: it is an agreement with an employee in regard to his remuneration.

Mr *Acton* submitted that the applicant correctly sets out his position *vis-à-vis* the company in his founding papers; namely, that he was employed by the company until 31 July 1998 when he resigned his employment. In cross-examination, the applicant conceded that he was an employee until his resignation.

As an employee up until the 31 July 1998 the applicant falls within the ambit of section 21(1)(d) of the Act which provides that where a work is made in the course of the author's employment by another person under a contract of service, that other person shall be the owner of the copyright subsisting in the work. That being the case, the applicant could not have become the owner of any software which he may have produced in the course of his employment under a contract of service to the company.

The author of Project AMPS

Both the applicant and the second respondent were involved with the conception and creation of the ProjectAMPS software. The second respondent, who has a lifelong involvement in advertising, contributed his knowledge and

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experience of media planning. The applicant familiarised himself with the needs of the program and worked closely with the programmer.

The program was conceived and developed under the aegis of the company. The applicant acknowledges in his replying affidavit that "the AMPS program . . . had its birth at Almanac". In this regard, the following factors are of significance:

1. Both the applicant and the second respondent were employees of the company.
2. The third respondent was at the time working for the company on other projects on contract basis.
3. The third respondent was contracted to create the source code and write the program.
4. At an early stage of the development, the applicant, the second respondent and the third respondent, jointly visited an advertising agency in Wynberg in order to view the Telmar program, the market leader at the time.
5. The 1997B version of the AMPS data was purchased and paid for by the company.
6. The third respondent created the source code and wrote the program.

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7. The third respondent from time to time reported to the applicant and the second respondent who would comment on his work and make suggestions.
8. The third respondent created the structures of the databases which were to be filled with the AMPS data and form the foundation upon which the program is built. The structure of the Questions.db database was to a large extent determined by the existing AC Nielsen questionnaire.
9. The applicant "populated" the Questions.db table by transposing the data from the hardcopy of the AC Nielsen questionnaire into the electronic database structure created by the third respondent.
10. In June 1998 the holder of the copyright in ProjectAMPS is in the properties file indicated as "Brewers".

In terms of section 1(1) of the Act, the author of a computer program is "the person who exercised control over the

making of the computer program". As has been pointed out above, the person who exercises control over the making of a computer program is a person who has the power of regulation of the manner in which the person who "makes" the program is to do his or her work. "Control" in this context does not, in my view, mean that the person who exercises control must be able to instruct the programmer as to technical detail. Control means setting the purpose and requirements that the program to be made must satisfy, and evaluating the work of the person that "makes" the program to ensure that the requirements are met and that the program is functional and capable of fulfilling the stated purpose.

In my view, it was the company which was, through its employees, the applicant and the second respondent, in general and overriding control of the creation of the program. The applicant and the second respondent instructed the third respondent, the "maker" of the program, as to the purpose and functionality of the program that the company required. The third respondent

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employed his own technical skill to write a program that fulfilled the requirements that were set.

As has been pointed out above, the applicant filled the Questions.db table by capturing all the questions, possible answers and occupations that form the backbone of the AMPS data. Transposing the data from the hardcopy of the AC Nielsen questionnaire was a time-consuming, laborious and tedious task. It was, however, a task that involved no creativity or originality: the selection and arrangement of the material was determined by the AC Nielsen questionnaire.

Waiver

The applicant has a further arrow in its quiver in the form of a waiver of copyright. The contention makes its appearance in the replying papers:

"What is important to note is that second respondent, since inception of my business, was well aware of the fact that the sole asset of my new business was the AMPS program and at the time, he had no objection to the fact that I was proceeding with the AMPS program that had its birth at Almanac. I stress this point as second respondent, as stated in the founding papers, is married to my wife's sister. My new business venture, was regularly discussed at family gatherings which took

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place at least every six weeks. With hindsight I am of the opinion that Second Respondent accepted the fact that I continue with the AMPS program as this was my share of the entitlement to the assets of the business of Almanac which has now ceased trading. As stated above, he continued with the other assets of Almanac and in fact I was under the impression that, if second respondent had any rights, he had waived any right, title or interest in the AMPS program, alternatively, had abandoned any right, title and interest in the AMPS program." (My emphasis.)

Waiver must always be strictly proved and is never presumed. The position is succinctly stated by Nienaber JA in *Road Accident Fund v Mothupi* [2000 \(4\) SA 38](#) (SCA) at 50G:

"Because no one is presumed to waive his rights (cf *Ellis and others v Laubscher* [1956 \(4\) SA 692](#) (A) at 702E-F), one, the *onus* is on the party alleging it and, two, clear proof is required of an intention to do so (*Hepner v Roodepoort-Maraiburg Town Council* [1962 \(4\) SA 772](#) (A) at 778D-779A; *Borstlap v Spangenberg en andere* [1974 \(3\) SA 695](#) (A) at 704F-H). The conduct from which waiver is inferred, so it has frequently been stated, must be unequivocal, that is, consistent with no other hypothesis."

The failure on the part of the first respondent to assert its copyright does not, in my view, amount to conduct from which an intention to waive and abandon those rights can be inferred.

The state of the Project AMPS program on 31 July 1998

The Project AMPS program consisted of a compiler, that is, a program that translates the binary data stored in the AMPS UFL file into a programming format that can be read by the software; the "front end" of the program, that is, the executable file which contains all the necessary programming code which interacts with the various other files in the program to manipulate the data. The executable file also determines the final look of the program and the way in which the user is able to interface therewith. There were also other files which stored the data, including the weighting, the questions and the answers contained in the AMPS disks.

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The applicant's case is largely based on the contention that as at 31 July 1998 the program was not functional.

In order to back up his contention that the program did not function, the applicant conducted a demonstration in court in which he did certain test runs. One example he chose related to "average readership" which produced a zero result in the results screen. This was not a random choice since the problem regarding "average readership" was known to both the applicant and the third respondent already in the middle of June 1998. The problem was highlighted by the third respondent in an e-mail to the applicant dated 14 June 1998 which reads as follows:

"Hi,

1. weighted, unweighted, percentages working
2. rough print working

3. Grid word wrapping working + column moving + resizing.
4. Grid working so you can edit.
5. x /y/ filter lists can be edited.

Couldn't figure out problems with average readership yet?"

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In evidence, the third respondent confirmed that he was aware of the problem and that he was working on it at the time.

The applicant further selected a few criteria at random and showed that certain of the results tabulated on the results screen were incorrect, the results being 2, 3, 4 or 5 times greater than they should have been. The third respondent explained that this was due to the fact that he had not "cleared his variables", that only a minor program adjustment needed to be made, and that the problem would have been dealt with prior to 31 July 1998.

The evidence of both the third respondent and Jordaan is that by 31 July 1998 the program was complete in terms of its core functionality. By core functionality is meant the ability of the program to read and interrogate the raw AMPS data to be found on the binary disc, to select any criteria (questions), and to calculate cross-tabulations on these questions. This functionality, they say, was achieved as early as June 1998. In his evidence, Jordaan said that by mid-June 1998 there was a "functioning beta version" of the program. He explained that in programming one finds an alpha version which only has partial functionality, a beta version which is functional but remains to be tested for errors, and a final version.

The work on the program and databases of Project AMPS began during March 1998. The third respondent worked continuously on the project for five months up to 31 July 1998. From the documentation, it is apparent that the first sale of the Data Explorer program was made on 1 September 1998. In other words, after less than one month's further work on the project, the program was on the market as a functional product. This indicates that what had been achieved by 31 July 1998 was not insignificant, and ties in with the evidence of the third respondent and Jordaan that by the 31 July 1998 the program was complete in terms of its core functionality. The fact that the applicant considered the program ready for the market at the end of August 1998 does not tie in with his statement in the founding papers that he was the "architect and creator" of the Data Explorer program and that it was -

"only after I left the employ of Brewers Almanac (Pty) Ltd that I concentrated, on a full time basis, to develop this product."

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Jordaan stressed that it took time to develop a program that could read the binary file and show the results to the user:

"Die eenvoudige rede hiervoor was dat die UFL file moes in struktuur leer ken word en daar moes met - in goeie Engels - trial and error probeer word om die rekords te rekonstrueer totdat hulle in leesbare vorm aan die gebruiker gewys word. So ek sou sê dat daar heelwat werk in is om dit reg te kry."[sic]

The amount of effort and time the third respondent expended to achieve this result prior to 31 July 1998 is evident from his evidence.

The position after 31 July 1998

The applicant's case is that the true development of the program, which he styled Data Explorer, occurred after 31 July 1998. It is, therefore, necessary, to evaluate the changes that were made to the program after 31 July 1998.

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It would seem that two principal changes were made. One was the manner in which the raw AMPS data in the UFL file was converted. In the Project AMPS software, with each query, the UFL file was read to memory to find the appropriate record. This was a slow process because the binary form of the file had to be read from beginning to end with each query. The major change that came about was that a new converter program was developed which made it possible to write the answers of all queries into two new tables known as Answers.db and Weightings.db. Adjustments were made to the front end of the program so as to read such tables, rather than the raw data from the UFL file. It is common cause that the program of the new converter was written by the third respondent.

The second major change was the incorporation, as is apparent from Exhibit "A", of several new databases as part of the program. Most of these databases consist entirely of structure, and unlike the Questions.db table they need not be "populated" with data by a person prior to the use of the program. Thus the Answers.db and Weightings.db tables are filled with data by the converter program. This is an automated process based on the existing AMPS data.

It will be recalled that the applicant seeks copyright protection for the whole of the Data Explorer program, source code, executable file and databases, all of which, he contends, assumed copyrightable form only after 31 July 1998. In my view, the contention is not supported by the evidence from which it is apparent that the developments after 31 July 1998 were improvements and refinements of the existing Project AMPS program.

The applicant may have expended time, effort, skill and expense on improving and refining the software. It is,

however, necessary to have regard to what the time and effort was expended on. The time and effort was devoted to making changes to a program, the copyright of which at all times vested in the first respondent. By expending time and effort on the improvement of the program, the applicant did not, in some way, become the holder of the copyright.

I may add that the respondents did not contend, as they may well have, that what the applicant did, was to use confidential information gleaned during the period of his employment with the company, and to use that information as a springboard to compete, and springboard it will remain as long as he uses a program which is based on material filched by him (see *Prism Holdings Ltd and another v Liversage and others* [2004 \(2\) SA 478](#) (W) at 489H-I).

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It is not the applicant's case that one (or more) of the developments that occurred after 31 July 1998, and of which he was the author, satisfied the originality requirement of the Act and attracted copyright in its own right. It is, therefore, strictly unnecessary to consider the third respondent's claim that he, and not the applicant, is the holder of the copyright in the converter program that came into being after 31 July 1998. The applicant's case is simply that he (applicant) is the holder of the copyright in the converter program as part of the Data Explorer "package".

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However, I shall nonetheless indicate briefly what my views are as to the rival claims of the applicant and the third respondent to the copyright in the work done after 31 July 1998. The applicant says that after 31 July 1998 he employed the third respondent to do the programming for him and that as an employee, the third respondent has no rights of any kind to the work he produced for the applicant. From the evidence it is apparent that whatever their relationship was, it was not simply one of employment or of independent contracting. Both contributed to the development of the program and both drew income from the proceeds of sales of the program. In 2000 it was given out to clients that the third respondent was the "project leader" in respect of the development of the program and that the applicant was responsible for sales information and client feedback. Much was made of the fact that there was constant communication by e-mail between applicant and the third respondent, while the latter was in the United States, about aspects of the work the third respondent was doing. The contention was that the e-mails show that the applicant was in over-all control of the development of the program and that the third respondent fulfilled his technical function as programmer at the behest and under the control of the applicant. Mr *Acton* submitted that the role of the applicant at this stage was largely that of a "beta tester" whose function is described as follows in *Flyde Microsystems Limited v Key Radio Systems Limited* [1998] EWHF Patents 340 (11 February, 1998) at paragraph [25]:

"The fact that the programmer is saved time by reason of the beta tester's efforts does not mean that the latter is an author. Although the beta tester may expend skill, time and effort on testing the software, it is not authorship skill. As Mr Purvis put it, it can be likened to the skill of a proof-reader. In all cases it is necessary to have regard to what the time and skill was expended on. Here Mr Purvis says that Mr Barrett's efforts, although lengthy and valuable, did not save any of Mr Seedle's time in respect of programming."

While the applicant expended effort as a beta tester on the development of the program after July 1998, his interest went further. He was intimately involved in the development of the program. But from the moment in July 1998 when the applicant recruited the third respondent to join him in the further development of the software, the development of the program was a joint effort between them. Their relationship ended in acrimony and there has never been an attempt to resolve the issues between them. When their ways parted, the third respondent retained a copy of the source code of the program that he had developed. In the circumstances, the applicant can, in my view, claim no more than co-authorship in respect of the changes made to the software after July 1998.

Conclusion on copyright

The onus is on the applicant to prove ownership of the copyright that he claims. In the properties file of the Data Explorer program, the holder of the copyright is given as "Softcopy". Section 26(1) of the Act provides -

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"Where in the case of a . . . computer program a name purporting to be that of the author appeared on copies of the said . . . program as published . . . in any

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proceedings brought by virtue of this Chapter be presumed, unless the contrary is proved, to be the author of the . . . program."

The presumption in the section applies only to proof of authorship, not of ownership (*LAWSA* 2ed vol V part 2 paragraph 61). Section 21(1)(a) of the Act provides that the ownership of copyright conferred by [section 3](#) shall vest in the author of any work. As far as authorship is concerned, it is in my view clear from the totality of the evidence that neither Softcopy nor the applicant was the author of the Data Explorer program. The applicant's claim to ownership of the copyright in the program can, therefore, not be sustained.

Infringement

In view of the finding that the applicant's claim to copyright cannot be sustained, it is not necessary to deal with a number of issues that were canvassed in the evidence. It is, in particular, not necessary to deal with the major issue of infringement. Suffice to say that I find Jordaan's penetrating technical analysis of the various programs convincing. He highlights the common origin of the programs, and of elements of the programs. Thus he concludes that the final version of Data Explorer has been refined over the years, but that it would not have been possible without the crucial functionality that is evidenced in the June 1998 version of Project AMPS. He points to the fact that both Data Explorer and Brewers AMPS make use of a converter program that was probably written by the same person. His conclusion that the source codes which form the ends of Data Explorer and Brewers AMPS are different, finds support in the evidence of Bento. Bento said that he wrote the code which forms the front end of Brewers AMPS in the Delphi programming language and that his code was derived from neither Project AMPS nor Data Explorer.

Similarities that may exist in screen layout, column size, window appearance and dimensions are as a result of the fact that both Data Explorer and Brewers AMPS use a screen layout that is derived from Project AMPS. The similarity in the "look and feel" of the programs is further due to the fact that the programs aim to produce the same functionality, and to the fact that the same programming tools (available in the Delphi programming language) were used.

Unlawful competition

One of the points raised *in limine* by the respondent was that the applicant was not, on the case set out in the papers, entitled to rely on unlawful competition as an additional or alternative cause of action. It was submitted on behalf of the applicant that the applicant was not relying on "mere copying", but on misappropriation and filching by the respondents of the products of the applicant's skill and labour.

The general principles of unlawful competition have been set out by the Appellate Division in *Schultz v Butt* [1986 \(3\) SA 667](#) (A) and *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* [1991 \(1\) SA 412](#) (A) and are conveniently summarised in *The Concept Factory v Heyl* [1994 \(2\) SA 105](#) (T) at 115C-J).

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In order to succeed in an action based on unlawful competition, the plaintiff must establish all the requisites of Aquilian liability, including proof that the

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defendant has committed an unlawful act. In *Payen Components SA Ltd v Bovic CC and others* [1995 \(4\) SA 441](#) (A) at 453B Schutz JA stresses that -

"... in judging questions of unlawfulness, not only in this field, questions of policy may play an important part, and that in the field of unlawful competition an important one is the need for free competition.

The lawfulness or unlawfulness of an act of competition may be determined by the application of certain further criteria which include fairness and honesty in competition, which requires that regard be had to the *boni mores* and the general sense of justice in the community."

It is important to emphasise once again what the applicant's case is and what it is not. The unlawfulness of which the applicant complains is that the first and second respondent have appropriated a computer program which he has developed without them having expended skill, time and effort, and that they are passing off the program thus appropriated as their own. The applicant's case is not that he had made certain improvements to the first respondent's program and that the first and second respondents have unlawfully appropriated those improvements and included them in their software.

Having reached the conclusion which I have in connection with copyright, the question arises whether the copying of something which was not protected by the Act, can be unlawful? In *Schultz v Butt* (*supra*) at 681B the following is said in this regard:

"If that would be the main question the answer would be clear. Anyone may ordinarily make anything produced by another which is in the public domain: One may freely and exactly copy it without his leave and without payment of compensation."

This approach was adopted and followed in *The Concept Factory v Heyl* [1994 \(2\) SA 105](#) (T).

The interrelationship between unlawful competition and forms of statutory protection of intellectual property rights such as copyright was further examined by Plewman JA in *Premier Hangers CC v Polyoak (Pty) Ltd* [1997 \(1\) SA 416](#) (A). The learned Judge of Appeal refers to the "common thread" in intellectual property legislation favouring a freedom to copy works which have been permitted to pass into the public domain (at 424C). He concludes:

"Finally, it remains to say that in most foreign systems where unfair competition rules apply there appears to be a search where relief is to be given for some special unfairness in that which has been done. This, all too frequently, is a difficult task because it is hampered in a case such as the present by the vast differences in the amount of effort and skill which is called for in the design of articles that would warrant statutory protection. This is acutely so where what is under consideration are matters of shape or appearance.

In my view, it was considerations such as the foregoing that underlie the decision in the *Butt* case. The finding was that copying *per se* was not unlawful. It was only the existence of extraneous factors that rendered the unsuccessful party's conduct unlawful. Thus it appears to me that in our law, as in many of

the foreign systems to which Ms Fellner refers, where statutory protection can be claimed but is not, or where statutory protection expires or is lost, anyone is free to copy."

(The reference is to Christine Fellner "The Future of Legal Protection for Industrial Design" - A Report Commissioned by the Common Law Institute of Intellectual Property and the Intellectual Property Unit Queen Mary College, London (1985)).

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It follows from the foregoing that the fact that a work does not qualify for copyright protection means that it is in the public domain and anyone is free to copy.

The applicant has not in his evidence shown the existence of any extraneous factors would render the respondents' conduct unlawful. If I may, with respect, paraphrase the words of Harms JA in *Memory Institute SA CC t/a SA Memory Institute v Hansen and others* [2004 \(2\) SA 630](#) (SCA) at 635A, I cannot perceive what wrong the applicant relies upon unless he laments the fact that the first respondent competes with him and he cannot prevent it because he has no copyright protection.

Points in limine

Earlier in this judgment, I referred to the points *in limine* which were raised by the respondent at the beginning of the trial. The issues were the following:

- (i) The first point raised was that the applicant as an unrehabilitated insolvent lacks *locus standi in iudicio* and may not sue in his own name.

The applicant's case is that he developed the computer program during his insolvency, that it is an asset which does not fall into his insolvent estate, and that he is in terms of [section 23\(9\)](#) of the Insolvency Act [24 of 1936](#) ("the Insolvency Act") entitled to take legal steps in respect thereof.

The reliance upon the provisions of [section 23\(9\)](#) of the Insolvency Act is misconceived. The subsection provides that an insolvent may recover for his own benefit, the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate. The applicant is not seeking to recover remuneration for work done or professional services rendered. He seeks by way of interdict to protect from infringement his rights as holder of the copyright to a computer program, and to protect his potential reward to be derived from commercial exploitation of the program from unlawful competition.

In terms of the provisions of [section 20\(1\)](#) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent is to vest it in the Master until a trustee has been appointed and, upon the appointment of a trustee, to vest it in the trustee. [Section 20\(2\)\(b\)](#) provides that the estate of an insolvent shall include all property which the insolvent may acquire or which may accrue to him or her during sequestration, except as otherwise provided in [section 23](#) of the Insolvency Act.

In [section 2](#) of the Act "property" is defined as movable or immovable property, and "movable property" is defined as every kind of property and every right or interest which is not immovable property. The definition

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includes intellectual property rights such as copyright (see *Bank of Lisbon and South Africa Ltd v The Master and others* [1987 \(1\) SA 276](#) (A) at 290I; *Van der Merwe Sakereg* 2e uitg 45, 170).

In view of the provisions of [section 20\(2\)\(b\)](#) of the Insolvency Act, and of the definition of "[property](#)" in [section 2](#), the copyright which the applicant says he acquired during his insolvency forms part of his insolvent estate. The applicant's estate is, therefore, affected by the legal proceedings brought to protect a right which forms part of the estate.

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[Section 23\(6\)](#) of the Insolvency Act provides, *inter alia*, that an insolvent may sue or be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his estate.

Ms Penderis, the trustee in the applicant's insolvent estate, filed an affidavit in which she states:

- "4. I confirm that I have been approached by the Applicant's attorneys with regard to the relief sought by the Applicant in these proceedings. In my aforesaid capacity I have considered same and am satisfied that there is a serious issue to be decided.
5. I am of the opinion that it is not a claim which relates to the Applicant's insolvent estate and that in the circumstances it was not necessary for me or the creditors to institute the present proceedings.
6. Be that as it may, insofar as it may be necessary, I support the relief sought insofar, as it may be necessary, also ratify all steps already taken herein."

The affidavit of the trustee makes it clear that the applicant is not suing "without reference" to his trustee and accordingly he cannot purport to act in terms of [section 23\(6\)](#) of the Insolvency Act.

The Insolvency Act does not deprive an insolvent of his or her *locus standi* other than in those instances mentioned in [section 23\(6\)](#). An insolvent retains general competency to sue and be sued. An insolvent's disability is confined to the legal consequences arising from the fact that his or her estate vests in the trustee who exercises all rights in respect of the property comprising the estate (*Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais* [1998 \(2\) SA 450](#) (E) at 453H-I; *Voget and others v Kleynhans* [2003 \(2\) SA 148](#) (C) at 153H-I). Where a trustee declines to institute proceedings against a debtor of an insolvent estate for the recovery of any benefit to which the insolvent estate is entitled, the insolvent has a reversionary interest in the insolvent estate (see *Mears v Rissik, Mackenzie NO and Mears' Trustee* 1905 TS 303 at 305; *Nieuwoudt v The Master and others NNO* [1988 \(4\) SA 513](#) (A) at 524H-525G; *Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais* (*supra*) at 453I; *Voget and others v Kleynhans* (*supra*) at 153I-154A). Mr Acton referred to *Muller v De Wet NO and others* [4 1999 \(2\) SA 1024](#) (W) in which it was held (at 1030D-F) that an insolvent can only act in terms of his common-law reversionary interest where the trustee has acted improperly in not taking the required action. On appeal to the Full Bench, the judgment was reversed but the issue of the reversionary interest was not dealt with because the Full Bench was of the view that the question of *locus standi* was not necessary for the determination of the case (*Muller v De Wet NO and others* [5 2001 \(2\) SA 489](#) (W) at 500I). In

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Voget and others v Kleynhans (*supra*) at 154A, the decision of the court *a quo* in *Muller v De Wet NO and others* (*supra*) is referred to without comment and not followed. I prefer, with respect, to follow the course adopted in *Voget and others v Kleynhans* (*supra*) which is a decision of this Division.

In *Voget and others v Kleynhans* (*supra*) the two plaintiffs were both un-rehabilitated insolvents who brought their action "with the knowledge and consent of their trustee/liquidator". Van Reenen J held (at 154B-C):

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"In my view, the most plausible of the inferences that could be drawn from the fact that first and second plaintiffs' trustee has knowledge of and has consented to the institution of the action by them in their own names, is that he was not prepared to do so (cf *De Polo and another v Dreyer and others* [1991 \(2\) SA 164](#) (W) at 177F-G). Accordingly, first and second plaintiffs are entitled, by virtue of their reversionary interest in their sequestered joint estate, to institute these proceedings and do have *locus standi* in the first of the two senses mention in par [6] above."

(The sense of *locus standi* to which the learned Judge refers is that of "a direct and substantial interest in the right which is the subject-matter of the litigation and the outcome thereof").

In this matter, the trustee was informed of the legal proceedings, satisfied herself that there was a serious issue to be tried, and explicitly declined to institute proceedings. In my view, the applicant was entitled, by virtue of his reversionary interest in his sequestered estate, to institute these proceedings in his own name.

- (ii) It was contended that the applicant had not made out a *prima facie* case in the founding papers. In essence, the objection was that the applicant had not in the founding papers proved or established the basis for authorship and therefore of ownership of the copyright in question. Mr Acton submitted that when an objection *in limine* is taken by a respondent in a matter on papers that they do not disclose a cause of action, the approach to be adopted is that set out in *Hart v Pinetown Drive-in Cinema (Pty) Ltd* [1972 \(1\) SA 464](#) (D). Mr Acton relied in particular on the following passage (at 469C-E) in the judgment:

"It must be born in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in the declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case had not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which will be led at the trial and if there are absent from the declaration such facts as will be necessary for determination of the issues in the petitioner's favour, an objection that it does not support the relief is sound."

(The passage is cited with approval in *Pearson v Magrep Investments (Pty) Ltd and others* [1975 \(1\) SA 186](#) (D) at 187E-H and in *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* [1992 \(2\) SA 279](#) (W) at 323H-I).

Mr Acton also referred to *Lacfin (Pty) Ltd v Le Roux* 769 JOC (O) in which objection was taken *in limine* by the respondent that the founding affidavit failed to disclose a cause of action. The cause of action on which the applicant relied was, as in the present matter, infringement of

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copyright of a computer program. After setting out the requisites for establishing such a cause of action, the learned Acting Judge states (at 781):

"It may well be that the failure to prove even one of these prerequisites, may be fatal to the plaintiff's application. Therefore, upon the grounds and for the reasons dealt with above, the plaintiff, in my view, has failed to prove ownership in the computer program in question and the argument *in limine* should succeed." . . .

On the same page, the learned Acting Judge echoes the view expressed in *Hart v Pinetown Drive-in Cinema (Pty) Ltd* (*supra*) that what might be sufficient in a declaration to foil an exception, would not necessarily, in a

petition, be sufficient to resist an objection that a case had not been adequately made out:

"Unlike a pleading in action procedure, an affidavit contains evidence and not allegations of fact, and what might be sufficient in summons may be insufficient in a founding affidavit."

In the present matter, the final interdict sought by the applicant was on 13 May 2002 referred to trial. It was ordered that the affidavits were to stand as pleadings and that the Uniform Rules of Court pertaining to trial actions were to apply.

I dismissed the objection on the ground, one, that the matters in issue were to be determined on the basis of the oral evidence that was to be led at the trial; two, that the matter having been referred to trial with the affidavits standing as pleadings, the respondent's objection was in effect an exception to a pleading and, three, that the applicant's cause of action was adequately set out in the founding papers if these were viewed from the perspective of pleadings in an action.

- (iii) The third objection that was raised *in limine* was that the applicant was not, on the case set out in the papers, entitled to rely on unlawful competition as an additional or alternative cause of action. In particular, it was submitted that there was no allegation of "extraneous factors" (as to which see, for example, *Premier Hangers CC v Polyoak (Pty) Ltd* [1997 \(1\) SA 416](#) (SCA) at 424I) that would render the respondents' conduct unlawful, apart from the alleged infringement of copyright.

Mr Roux submitted that it is made clear in the founding papers that the applicant was not relying on "mere copying", but on a "deliberate misappropriation and filching of the products of another's skill and labour" (see *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* [1968 \(1\) SA 209](#) (C) at 221F-H).

I was of the view that sufficient allegations were made in the papers to lay the foundation of a cause of action based on unlawful competition. In order to ensure that the respondents were not prejudiced by any lack of clarity in the allegations, I ruled that the respondents may on this issue request particulars for purposes for trial. This was in due course done.

- (iv) The applicant applied in terms of Rule 33(4) that the issue of the existence of the copyright and the issue of infringement be separated, and that the issue of the existence of the copyright be determined first. Mr Acton submitted that the issue of infringement would involve a complex analysis of the source code of the program which would require

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a large amount of technical evidence. He further submitted that such technical evidence would not be necessary if the question of the existence of the copyright were to be resolved in favour of the respondent.

I dismissed the application for a separation of issues because, in my view, the question of the existence of the copyright was inextricably linked to the issue of infringement and that the two could not be conveniently separated. This approach was subsequently endorsed in *Denel (Pty) Ltd v Vorster* (SCA, unreported, case number 13/2003) in which Nugent JA said the following:

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"Before turning to the substance of the appeal it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules - which entitles a court to try issues separately in appropriate circumstances - is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though at first sight they might appear to be discrete. And even where the issues are discrete the expeditious disposal of litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter."

In the ultimate result, I concluded that the respondent was to succeed on the question of the existence of the copyright. That conclusion was reached after I had heard all the evidence, including the expert testimony pertaining to the question of infringement. The expert evidence was an essential component of the totality of the evidence which made possible proper evaluation of the question of the existence of the copyright.

Costs

The liability for the costs occasioned by a number of preliminary skirmishes needs to be resolved.

The respondents agree that they must bear the costs of the unsuccessful application for security for costs.

There were two interlocutory applications relating to discovery, one brought on 11 September 2002 and another brought on 11 November 2002. The application of 11 September 2002 was postponed to 4 November 2002, the date originally set aside for the trial. On that date, the matter was further postponed because Traverso DJP was disinclined to hear the matter until such time as the issues around discovery had been resolved. The respondents say that this application has not been brought to finality and that while it was still pending the applicant launched the second application on 11 November 2002 for substantially the same relief as had been sought previously. On 4 December 2002 Moosa J made an order by agreement between the parties giving the applicant access to the documents held by the sheriff. The costs of the application were ordered to stand over for determination at the trial.

As a result of the application of 11 November 2002 access was gained to certain documents which had not been discovered. On the other hand, the application also related to documents which had in fact been

discovered. One of the applicant's major complaints, namely, that the respondents had discovered only 130 e-mails while there were approximately 500 e-mails held by the sheriff, proved to be without foundation. The parties agreed that an independent attorney would determine how many e-mails there were in the custody of the sheriff, and any disputes would be referred to the trial court for determination. It was found that there were approximately 160 e-mails, and no documents were referred to this Court for a ruling.

In the circumstances, I am of the view that the applicant should pay the costs of the application of 11 September 2002; in other words, the costs of this application are to be costs in the cause.

In regard to the costs occasioned by the application brought on 11 November 2002, I am of the view that it would be fair and reasonable that the parties bear their own costs.

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The orders made

The following orders are made:

1. The application is dismissed.
2. Save as is provided in paragraphs 3 and 4 below, the applicant is ordered to pay the costs of the application, such costs to include the qualifying expenses of Mr Francois Jordaan.
3. The respondents are ordered to pay the costs of the application for security for costs.
4. No order is made in respect of the costs occasioned by the applicant's interlocutory application launched on 11 November 2002.

For the applicant:

JH Roux instructed by *Jaques Viljoen Attorneys*

For the respondents:

R Acton instructed by *Musto Brindley Incorporated*

Footnotes

- 1 Also reported at [\[2003\] 2 All SA 201](#) (C) - Ed.
- 2 Also reported at [\[2000\] 3 All SA 181](#) (A) - Ed.
- 3 Also reported at [\[1997\] 1 All SA 134](#) (A) - Ed.
- 4 Also reported at [\[1999\] 2 All SA 163](#) (W) - Ed.
- 5 Also reported at [\[2000\] 3 All SA 620](#) (W) - Ed.
- 6 Also reported at [\[1997\] 1 All SA 134](#) (A) - Ed.