

A In our view the word 'decision' is wide enough to cover an interlocutory order. The stage at which a review can be brought is not co-extensive with the stage at which an appeal can be brought. This is pointed out by Rose Innes *Judicial Review of Administrative Tribunals in South Africa* at 18 where the learned author says the following:

B 'The power of judicial review is not limited as is an appeal to the final stages of proceedings before the lower tribunal. The Court's power of review is exactly the same at a preliminary stage in the proceedings once they have commenced as at the final stage or conclusion of those proceedings. Thus, for example, the reviewing Court will hear an application calling upon the lower tribunal to show cause why its proceedings should not be postponed, the lower tribunal having refused a postponement, and a good ground for such postponement having been made out, as where it is necessary to enable the applicant to prepare his case or to answer allegations made against him. Review proceedings are not restricted as are appeals from inferior courts of law to orders which have the effect of a final and definitive sentence because the function of review is not to attack the decision or order but to question the regularity of the proceedings.'

D There are compelling reasons why, in our view, we ought to entertain the review at this stage. The statutory provisions with which the electoral tribunals are concerned are all directed to ensuring that free and fair elections are held in less than two weeks time from now. From their nature these proceedings are all extremely urgent. Were we not to entertain the review at this stage, we would allow proceedings to continue which are vitiated by irregularity. This can only cause severe prejudice to the applicant. If these proceedings were allowed to continue it seems unlikely that a review or appeal against any final decision could be heard before the elections. This would defeat the object of the legislation and the tribunals enforcing such legislation. Any delay in reaching a final decision should, in the interests of public policy, be avoided.

F There is a further relevant consideration in the very special circumstances of the legislation in question. This review judgment may assist in giving guidance to proceedings pending before or which may still be launched in electoral tribunals. It follows from the foregoing that in our view the application for review must succeed. Before making our order, however, we consider it necessary in the public interest to make certain observations.

G The granting of this review application will not address the reprehensible events which, on the strength of the papers before us, took place in H and around the Cape Peninsula over the period 26 February to 19 March 1994. They constitute a threat to the holding of free and fair elections. We would call on the leaders of all political parties and their officials at all levels to redouble their efforts to inculcate political tolerance amongst their supporters and to act urgently and effectively against those who behave intolerantly. We would make a similar appeal to all members and supporters of all political parties. Whatever political leaders and officials may do, a just, equal, peaceful and viable civil society cannot come into existence in South Africa if ordinary men and women do not accept their full share of responsibility in promoting political tolerance and ensuring free and fair elections. Political intolerance is ultimately self-destructive.

J The following order is made:

1. The review application succeeds. A
2. The order of the electoral tribunal for the Wynberg electoral district is reviewed and set aside and for it the following order substituted: B
'All the claimant's claims are dismissed with costs, such costs to include the costs of respondent's attorney and counsel.'
3. The respondent on review (the African National Congress) is to pay the costs of the applicant on review (the National Party), which costs are to include the costs of applicant's attorney and the costs attendant upon the employment of two counsel.

Advocate Prest SC and the Reverend Jones concurred. C

Applicant's Attorneys: *De Klerk & Van Gend*. Respondent's Attorneys: *E Moosa, Waglay & Petersen*, Athlone. D

JUTA & CO LTD AND OTHERS v DE KOKER AND OTHERS* F

TRANSVAAL PROVINCIAL DIVISION

McCREATH J G

1989 October 17 1990 June 4, 6 1991 February; November 18
Case No 8214/89

Copyright—Infringement of—What constitutes—Reproduction of substantial part of original work—'Substantial part'(s) 1(2A) of Copyright Act 98 of 1978) denoting qualitative rather than quantitative standard—Principle being that as long as what is taken has substance in original work or has sufficient pith to constitute embodiment of original intellectual activity in material form, copyright infringement could arise—Principle to be applied with caution where subject-matter of works is common one, such as income tax law governed by Income Tax Act—Such Act common property to all wishing to write thereon—Similarities in competing works in sequence of topics and use of identical terms and phrases not H

*An appeal which was noted was not proceeded with—Eds. J

A amounting to copying if such resulting from following sequence and wording of Act—Similarity in choice of quotations from decided cases, or in paraphrasing provisions, or even coincidence in submissions not necessarily constituting infringement—Writer of later work cannot, however, use result of original writer's labour—

B Causal connection between original work and alleged infringing copy required—Question is whether defendant copied plaintiff's work or whether alleged infringing work is independent work of his own.

C The reproduction of a 'substantial part' (s 1(2A) of the Copyright Act 98 of 1978) of an original work in which copyright subsists denotes a qualitative rather than a quantitative standard. (At 504C/D.) There is no reason why chapters of a book, or pages, sentences, phrases or even a single word therein contained cannot in an appropriate case be regarded as separate and discrete literary works enjoying copyright. (At 504H–H/I.) Where infringement of copyright in a literary work is in issue, the principle to be applied is that '(a)s long as what is taken has substance in the original work (and is not *de minimis*) or has sufficient pith to constitute the embodiment of original intellectual activity in a material form . . . copyright infringement could arise' (O H Dean *Handbook of South African Copyright Law* at 1-20). (At 504I/J–505B.) Such principle has to be applied with caution to works the subject-matter of which is a common one, such as the income tax law of South Africa, which is governed by the provisions of the Income Tax Act. The Act is common property to all who may wish to write a treatise thereon and the legal principles therein embodied. Similarities in the resultant competing works, in the sequence of corresponding topics and the use of identical terms and phrases cannot be dubbed as copying if they are but following the sequence and wording of the Income Tax Act. Nor can similarity in the choice of quotations from decided cases dealing with the provisions, or in the paraphrasing of the provisions themselves, or even a coincidence in the submissions made by the authors necessarily constitute an infringement of copyright by the author whose creative product has found its way onto the market subsequent to that of his fellow writer. (At 505C–F.) What the writer of the later work cannot do is to 'avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely take away the result of another man's labour . . .' (*Harman Picture NV v Osborne and Others* [1967] 1 WLR 723 at 732). (At 505F–H.) Finally, it must be borne in mind that in order for there to have been an infringement of the copyright in the original work it must be shown that the original work was the source from which the alleged infringing work was derived, ie that there is a causal connection between the original work and the alleged infringing work, the question to be asked being whether the defendant has copied the plaintiff's work or is it an independent work of his own. (At 506A–B.)

H Application for an interdict. The facts and the nature of the issues appears from the reasons for judgment.

C E Puckrin SC (with him P Ginsburg SC) for the applicants.

B R Southwood SC (with him L G Bowman SC) for the respondents.

Cur adv vult.

Postea (18 November 1991).

J McCreath J: During 1957, shortly before being awarded the degree of doctor of philosophy by the University of Cape Town, the late Dr A S Silke wrote a work entitled *Silke on South African Income Tax*. The work was published by the first applicant. As its name indicates the work

constituted a treatise on the income tax law of South Africa. Several subsequent editions of the work were written by Dr Silke and, in between editions, supplements were written bringing each edition up to date. The various editions and supplements were once again published by the first applicant. During 1972 the seventh edition of the work made its appearance. In the meantime the second and third applicants had entered the employ of Dr Silke and assisted in the writing of that edition. Subsequent editions of the work appeared at intervals, written by Dr Silke and the second and third applicants, and published by the first applicant. This was also the case in respect of the tenth edition, which was published in 1982 and to which I shall refer as the copyright work. Dr Silke died in April 1983. It is not disputed that the copyright work enjoys copyright and that such copyright is presently held by the first to the fifth applicants inclusive. Nor is it disputed that until 1989 the copyright work and its predecessors were leading South African works on the income tax law of South Africa. Several events occurred during that year which have a bearing on the present application and to which I shall hereinafter refer.

D The first respondent is an associate professor of taxation at the University of the Witwatersrand. During the course of 1988 the second respondent published a work entitled *Income Tax in South Africa* which had been written by the first respondent and Messrs T S Emslie and C R Frame. I shall hereinafter refer to the said work as the affected work. In the preface thereto it is stated that the work is intended primarily for the use of students and non-expert practitioners. It is also recorded therein that the work is based on a book entitled *Income Tax in the South African Law* which was written by Prof Van Niekerk and published by the second respondent. I shall refer to this third work as the Van Niekerk work.

F The second respondent is the publisher of the affected work.

G According to the second applicant he received information in January 1989 which led him to make a study of the affected work. This, so he alleges, revealed that large and significant portions of the affected work reproduced verbatim substantial parts of the copyright work. In addition thereto, according to the second applicant, portions of the affected work reproduced passages of the copyright work with relatively insignificant changes of wording or by paraphrasing portions thereof.

H In the meantime further works were in the process of completion. The second and third applicants were completing an eleventh edition of the copyright work which was to be published in loose-leaf form in approximately June 1989. The third respondent had commenced advertising a new product comprising a work in loose-leaf form in two volumes entitled *Income Tax in South Africa* which was being written by the first respondent and a Mr Urquhart. This work, to which I shall refer as 'the new work', was to be published by the third respondent.

I The first, second and third applicants feared that the new work, one of whose co-authors was also a co-author of the affected work, would likewise contain reproductions of substantial parts of the copyright work. The applicants through their attorneys sent letters of demand to the first, second and third respondents, as well as to Messrs Frame and Emslie, calling upon all these persons to give a written undertaking that the alleged infringement of the applicants' copyright would cease and would not be

A perpetrated again in the future. The letters also called upon the addressees to deliver up to the alleged infringing material and required undertakings as to the payment of compensation to the applicants. The attention of the addressees was also drawn to the fact that the applicants were concerned about the imminent publication of the new work and required a copy of the manuscript thereof to enable the applicants to ascertain whether the new work infringed the applicants' copyright. In response hereto the attorneys of the second and third respondents, in a letter dated 27 February 1989, stated that many of the applicants' complaints related to words of a commonplace nature or phrases in respect whereof they could not claim copyright. It was not admitted that there had been an infringement of copyright in any respect but, 'to avoid disputes' in respect of the affected work, an assurance and undertaking were given that the said work was out of date and out of print and all stocks had been destroyed and that no new edition would be published. A trade announcement requesting return of any stock-in-trade would be sent out within 10 days or as soon as possible thereafter. Insofar as the new work was concerned, the second and third respondents' attorneys stated that that work had no connection with the affected work. They pointed out that the brochure for the new work stated that it was 'a new major text work', was a work which comprised some 1 500 loose-leaf pages in contrast with the 550 bound pages of the affected work and was aimed at practitioners and not intended for students. It was also pointed out that the new work was not a new edition of the affected work and there was only one author common to both works. The letters further stated that there was no intention of copying all or any part of the applicants' work and that any insinuation that there was such an intention was absurd. The letter concluded by stating that the second and third respondents would not agree to give the applicants sight of the manuscripts of the new work.

The failure to comply with the applicants' demands precipitated the present application. It should be stated at the outset that the applicants have not proceeded against Messrs Emslie or Frame, nor is there any complaint in regard to Mr Urquhart. The applicants' complaints relate to chapters in the affected work which were written by the first respondent and their apprehension at the time when the application was launched in May 1989 that the new work would contain offending material similar to that in those chapters. In the notice of motion the applicants sought an interdict restraining the respondents from infringing the copyright in the copyright work by 'publishing, printing, selling, offering for sale or distributing in the Republic of South Africa' any copies of the affected work. Certain ancillary relief in relation to the affected work was also sought. Insofar as the new work is concerned, an order was sought interdicting all three respondents from competing unlawfully with the applicants by 'publishing, printing, selling or offering for sale or dealing with any copies' of the new work. By the time the answering affidavits were filed during July 1989 the new work had in the interim been published and was being marketed. The replying affidavits dealt *inter alia* with the contents of the new work.

When the matter first came before Court during October 1989 two preliminary issues were argued on behalf of the respondents. After hearing

argument on each of the said issues I made a ruling and indicated that I would give my reasons therefor during the course of this judgment. I accordingly proceed to deal with those two issues.

It was argued, firstly, on behalf of the respondents that the applicants had failed to make out a *prima facie* case against any of the respondents in the founding affidavits. Insofar as relief in respect of the affected work is concerned, it was contended that the undertaking given on behalf of the second and third respondents (which I shall accept would be effective against the first respondent as well even though no specific undertaking had been given on his behalf) rendered it unnecessary for the applicants to approach the Court for any relief. However, it is clear that the applicants, in seeking relief in respect of unlawful competition in regard to the new work, rely in the founding affidavits on an infringement of copyright in respect of the affected work and an allegation that substantial parts of the alleged infringing matter would be repeated in the new work. To that extent the undertaking in respect of the old work was irrelevant. In the correspondence between the attorneys it had also been indicated that there was no intention of copying all or any part of the copyright work in the new work and an undertaking had been given that the new work would not infringe the copyright in the copyright work. However, nowhere in the correspondence preceding the launching of the application is there any admission on behalf of the respondents that the passages in the text of the affected work in respect whereof the applicants complained as infringing copyright did in fact constitute such infringement. Indeed the contrary is indicated. The undertaking and the expression of intent in regard to the new work did therefore not settle the dispute as to whether there had been any copying in the sense of an infringement of copyright and constituted no assurance that the new work would not contain the same or similar 'offending' material. The applicants would accordingly be entitled to approach the Court if a *prima facie* case of infringement of copyright in respect of the affected work and of anticipated unlawful competition in respect of the new work had been made out. In that event relief could properly be sought against the first respondent as author and the third respondent as publisher of the new work. In addition thereto the applicants would be entitled, in the light of the allegation of deliberate copying by the first respondent, to an interdict against him in respect of the affected work. (See the *dictum* of Schreiner J in *Peter Jackson (Overseas) Ltd v Rand Tobacco Co (1936) Ltd* 1938 TPD 450 at 453-4. Insofar as the second respondent is concerned, in the event of the applicants showing a breach of the copyright in the affected work, I considered that *prima facie* they would be entitled to an order requiring the second respondent to recognise the second and third applicants' authorship in the affected work as provided in s 20 of the Copyright Act 20 of 1978 ('the Act').

The question which arose then in regard to this first preliminary issue was whether a *prima facie* case in respect of copyright infringement and anticipated unlawful competition had in fact been made out in the founding affidavit. The initial enquiry was whether sufficient allegations had been made out in the said affidavits to substantiate *prima facie* that the affected work infringed the copyright of the applicants in the copyright

A work. The applicants allege that the copyright work is an original literary work and that they are the owners of the copyright therein. As such they are entitled in terms of s 6 of the Act to the exclusive right *inter alia* to reproduce the work in any manner or form, to publish the work and make an adaptation thereof and to reproduce or publish any such adaptation.

B 'Reproduction' is defined in s 1 of the Act to include *inter alia* a reproduction made from a reproduction of the original work whilst s 1(2A) provides that any act done in relation to a work shall include the doing of an act in relation to 'any substantial part' of such work. The applicants allege that both the copyright work and the affected work were duly published as required in terms of the Act. The question for determination is whether sufficient allegations are contained in the founding affidavit to indicate that a substantial part of the copyright work has been reproduced in the affected work.

C The reproduction of a 'substantial part' denotes a qualitative rather than a quantitative standard. In *Galago Publishers (Pty) Ltd and Another v Erasmus* 1989 (1) SA 276 (A) at 285B-E the Appellate Division adopted with approval the following statement in the case of *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 (HL):

E 'If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is novel or striking, or is merely a common-place arrangement of ordinary words or well-known data. So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. But, in my view, that it only a short cut, and the more correct approach is first to determine whether the plaintiff's work as a whole is "original" and protected by copyright, and then to enquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could section A be the subject of copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind, it does not follow that because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangement of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.'

H The British Courts have not excluded the possibility that a single word can be a literary work and thus the subject of copyright—see *Exxon Corporation and Others v Exxon Insurance Consultants International Ltd* [1982] RPC 69. Indeed, in my view, there is no reason why chapters of a book or even pages, sentences and phrases therein contained cannot in an appropriate case be regarded as separate discrete literary works enjoying copyright. (See generally in this respect Nimmer on *Copyright* 1989 ed 2-15; Cornish *Intellectual Property* at 348; Lahore *Copyright Law* paras 2.3.15 and 2.3.20; Laddie, Prescott and Vittoria *The Modern Law of Copyright* paras 2.9, 2.33, 2.34, 2.81; Latman *The Copyright Law* 5th ed at 25-6.)

The principle to be applied is succinctly stated in O H Dean *Handbook of South African Copyright Law* where the learned author at 1-20 states the following:

J 'Section 1(2A) of the Act provides that any reference to the doing of an act in

A relation to a work means a reference to doing that act in relation to "any substantial part of such work". This is consistent with the test for infringement being primarily qualitative and not quantitative in nature. As long as what is taken has substance in the original work (and is not *de minimis*) or has sufficient pith to constitute the embodiment of original intellectual activity in a material form, for instance a paragraph in a book or perhaps even a sentence or sequence of sentences, copyright infringement could arise. Support for this contention can be found for instance in s 12(3) of the Act which postulates that the taking of an ordinary quotation from a work can constitute copyright infringement if the stated formal conditions are not met. When determining whether the taking of a paragraph or sentences constitutes copyright infringement one must have regard to the degree of similarity between the original material and the derivative material.'

C However, caution must be exercised in applying the aforementioned principles to works of the nature of those under consideration in the present application. The subject-matter of the works is a common one, viz the income tax law of the Republic of South Africa. That in turn is governed and regulated by the provisions of the Income Tax Act. The Act is common property to all who may wish to write a treatise thereon and the legal principles therein embodied. Similarity in the competing works, in the sequence of corresponding topics and the use of identical terms and phrases, cannot be dubbed as copying if they are but following the sequence and wording of the Income Tax Act. Nor can similarity in the choice of quotations from decided cases dealing with the provisions, or in the paraphrasing of the provisions themselves, or even a coincidence in the submissions made by the authors necessarily constitute an infringement of copyright by the author whose creative product has found its way onto the market subsequent to that of his fellow writer.

F Decisions of the English Court in a matter of this nature are helpful and I consider reflect the correct approach to be adopted. In *Harman Pictures NV v Osborne and Others* [1967] 1 WLR 723 at 732 the following is stated:

G 'In the case of works not original in the proper sense of the term, but composed of, or compiled or prepared from materials which are open to all, the fact that one man has produced such a work does not take away from anyone else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by Hall VC in *Hogg v Scott*, "the true principle in all these cases is, that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or, in other words, his property".'

H At 736 the Court held that the question to be posed in regard to the work of the infringing author (John Osborne) was

I '... did John Osborne work independently and produce a script which from the nature of things has much in common with the book, or did he proceed the other way round and use the book as a basis, taking his selection of incidents and quotations therefrom, albeit omitting a number and making some alterations and additions by reference to the common sources and by some reference to other sources?'

J The same test was applied by the Court of Appeal in *Elanco Products Ltd and Another v Mandops (Agro-Chemical Specialists) Ltd and Another* [1979] FSR 46.

A Finally, it must be borne in mind that in order for there to have been an infringement of the copyright in an original work it must be shown that the original work was the source from which the alleged infringing work was derived, ie that there is a causal connection between the original work and the alleged infringing work, the question to be asked being has the defendant copied the plaintiff's work or is it an independent work of his own? *Galago's case supra* at 280C-D.

It is against the background of the aforementioned principles that I turn to what is contained in the founding affidavits. The second applicant attaches to his affidavit copies of some 200 pages of the affected work and copies of the corresponding pages from the copyright work. It should immediately be stated that on some pages only a heading, such as, for instance, 'Introduction', has been marked as constituting offending matter. On other pages but an isolated phrase or very short passage has been thus marked. However, there are many instances where the similarities are of a more substantial nature. The second applicant alleged that a comparison between the relevant portions of the two works indicates that passages from the affected work are reproductions of the corresponding portions of the copyright work. The allegation is made that the possibility of two different sets of authors using identical language to the extent which the applicants allege has occurred is extremely remote. The second applicant contends that the alleged reproductions are further substantiated by the fact that examples in the two works illustrating how taxable income is arrived at are substantially identical in the marked passage and that in several instances the amounts used in the affected work are multiples of the amounts used in the copyright work. It is also alleged that non-standard terms coined by the second and third applicants in the copyright work have been repeated in the affected work. Moreover, so it is contended, there are several instances in which subjective submissions on legal points which do not describe the existing confirmed law have been repeated in certain passages. Reference is also made to blemishes in the copyright work in regard to punctuation which have been repeated in the affected work. There is also in the copyright work an instance where reference is made to the practice of the Commissioner for Inland Revenue in respect of a matter relating to income tax which existed in 1982 when the copyright work was published. It is contended that the practice no longer existed by the time the affected work was published in 1988 and, that notwithstanding, the same practice is mentioned in the affected work. Moreover, in one of the identical passages of text appearing in each work certain words emphasised in the copyright work have been likewise emphasised in the affected work. Mention is also made of an instance where a citation of a case in a footnote is prefaced by the word 'see'. This, so the applicants contend, is not customary unless the citation goes on to refer to an aspect of the judgment in the case. The footnote in question is for this reason so prefaced in the copyright work. However, although the case is cited in the corresponding footnote in the affected work there is no ensuing reference to an aspect of the judgment therein. This is not in accordance with the general pattern of the citation of cases in footnotes in the affected work. It is, so the applicants contend, indicative of the fact that the authors of the affected work were not working independently but

were copying selectively from the copyright work. A further aspect, and in my view an important one mentioned by the second applicant, relates to the table of cases of the copyright work. The first page thereof lists the abbreviations used in the table in that work. The abbreviation used is in two instances incorrect in that it is not the customary abbreviation. The list is repeated verbatim in the affected work and the same errors appear therein. Moreover, in the copyright work the abbreviations relate only to cases in fact mentioned in the table of cases and all abbreviations are thus appropriately included in the list. This, however, is not so in the case of the affected work. Some six examples are mentioned of abbreviations which are redundant in that no cases appear in the table to which the abbreviations would apply. The conclusion is inevitable that the list of abbreviations has been taken directly from the copyright work.

I proceed to enumerate but two further examples of the applicants' complaints:

(i) The applicants contend that terms such as 'insurance and funds rebate', 'percentage dividend deduction' and 'basic exemption' are non-standard terms coined by the second and third applicants and repeated in the affected work.

(ii) In the copyright work the following passage appears:

"The repayment of an advance or loan that is a deemed dividend under s 8B does not affect the shareholder's liability for tax. Thus a shareholder who repays an advance or loan before the end of the year in which the advance or loan was made will nevertheless be liable to tax on the deemed dividend resulting from the advance or loan.

It should be noted that a deemed dividend may arise only if there is an amount "which could properly have been paid or distributed to such shareholder by way of a dividend out of the profits or reserves of (the) company at the relevant time". Thus if there are no such profits or reserves no deemed dividend can arise.

Inland Revenue takes the word "properly" in the phrase "properly . . . paid or distributed" to mean properly in terms of the Companies Act 61 of 1973, that is, presumably, without regard to the articles of the company. It thus regards advances or loans made to its shareholders out of capital profits by a company the articles of which prohibit the distribution of dividends out of capital profits as deemed dividends under s 8B, on the ground that the articles may be amended at any time to authorise the distribution of such profits. It is submitted that this practice is incorrect, since at the time when the advance or loan is made the capital profits cannot "properly have been paid or distributed".

In the affected work the corresponding passage reads as follows:

"The repayment of an advance or loan that is a deemed dividend in terms of s 8B does not affect the shareholder's liability for tax. For example, a shareholder who repays an advance or loan before the end of the year in which the advance or loan was made will nevertheless be liable to tax on the deemed dividend resulting from the advance or loan.

It should be noted that a deemed dividend may arise only if there is an amount "which could properly have been paid or distributed to such shareholder by way of a dividend out of the profits or reserves of (the) company at the relevant time". Thus if there are no such profits or reserves, no deemed dividend can arise. Inland Revenue regards the word "properly" in the phrase "properly . . . paid or distributed" to mean properly in terms of the Companies Act 61 of 1963, that is, presumably, without regard to the articles of the company. It thus regards

A advances or loans made to its shareholders out of capital profits by a company whose articles prohibit the distribution of dividends out of capital profits as deemed dividends under s 8B, on the ground that the articles may be amended at any time to authorise the distribution of such profits. It is respectfully submitted that this practice is incorrect, since at the time when the advance or loan is made the capital profits cannot "properly have been paid or distributed".

B The similarity in phraseology (including the wording of the submission at the end of each passage) and in the punctuation of the two extracts are apparent.

C In the light of the foregoing I was of the view that sufficient allegations were contained in the founding affidavits to establish *prima facie* that passages in the affected work constituted an infringement of copyright in respect of the copyright work. I emphasise that it was but necessary for the applicants to make out a *prima facie* case in this respect. Clearly, once regard was to be had to the evidence following upon the founding affidavits, that *prima facie* case might be destroyed or the applicants might D at the end of the day have been in the position that they had failed to show on a balance of probabilities that there was any such infringement.

E The point was made on behalf of the respondents that the applicants had failed to make any reference in the founding papers to the Van Niekerk work. In the correspondence between the attorneys for the parties prior to the application being launched the respondents' attorneys had made F mention of the fact that the respondents contended that much of the alleged infringing material had been taken from this latter work. In my view it was not for the applicants in their founding papers to discount the possibility that the alleged infringing material had indeed emanated from the Van Niekerk work. The specific allegation is made that the first G respondent had deliberately copied the copyright work. This, to my mind, was sufficient to establish a *prima facie* case, bearing in mind the similarities between the two works of which examples have been given above.

H Finally, in regard to this first preliminary issue, it was argued on behalf of the respondents that the applicants had been premature in launching G the application prior to the publication of the new work and seeking relief in relation to a work still to be published. There was no evidence, so it was contended, to suggest that the new work would incorporate any portions of the affected work and that the letters written by the respondents' attorneys indicated the contrary. This argument, to my mind, overlooks H the fact that the second applicant states in the founding affidavit that as an author he is aware that the writer of a second work on the same subject has regard to his earlier work in preparing the second publication. The probabilities, in my view, favour the correctness of this statement, more particularly if regard is had to the fact that the affected work had been published in 1988, a period of but approximately one year prior to the anticipated publication of the new work. Moreover, the brochure advertising the new work purported to reproduce two pages therefrom. These I pages were identical to two pages in the affected work. Admittedly the contents of the pages related to close corporations, a topic not dealt with in the copyright work inasmuch as the Close Corporations Act only came J into operation in 1984. However, the reproduction in identical terms of

the only two pages of the affected work to which the applicants had been A able to obtain access was supportive of the second applicant's contention that it is the common practice of authors to use the language of an earlier work in producing a later work unless there is good reason to depart from the language previously used. Once that is accepted there was then also B *prima facie* evidence to support the applicants' allegation that the first and third respondents would obtain a 'spring-board' advantage over the applicants in the publication of the new work shortly before the appearance of the eleventh edition of the copyright work.

C I consequently came to the conclusion that a *prima facie* case had been made out by the applicants and that the first point *in limine* taken on behalf of the respondents could not succeed. I reserved the issue of costs in that I was of the view that should the Court ultimately come to the conclusion on all the evidence that the applicants had not established their case on a balance of probabilities the costs of this preliminary issue should follow the result.

D I turn then to consider the second point *in limine* raised on behalf of the respondents, namely an application to strike out certain of the averments in the replying affidavits filed by the applicants. The striking out application consisted of six paragraphs. In paras 1, 4 and 6 thereof the cause of complaint was in essence that certain evidence contained in the replying affidavits constituted new matter and that such evidence was E not relevant to any relief claim, alternatively that it was not the proper subject of a reply. The objection in paras 2 and 5 was that the evidence was irrelevant. In para 3 the basis of the objection was that the evidence was scandalous and/or vexatious, alternatively argumentative and accordingly irrelevant. The allegation is also made in the notice to strike out that all the evidence aforesaid was prejudicial to the respondents in the conduct of F their defence. I proceed to deal with each of the said complaints *seriatim*.

G The evidence which the respondents contended constituted 'new matter' related to the nature and extent to which the new work infringed the copyright in the copyright work and constituted unlawful competition. Publication of the new work occurred at approximately the end of June 1989 shortly before the answering affidavits of the respondents were filed. G In the replying affidavits the applicants give examples of the similarity between the new work and the affected work. The second applicant goes on to allege that 'cosmetic changes' had been made to passages which the second applicant had high-lighted in the marked-up version of the affected work and which said passages had been made available to the respondents. H He makes the further allegation that, after the first and third respondents had received the applicants' letter of demand of February 1989 to which I have referred, they perused the marked-up copy of the affected work made available to them and took steps to change those portions of the text of the new work existing at the time in respect whereof they felt themselves to be 'at risk'. In the alternative the second applicant states that during the period available to him he has not been able to specify all the parts of the new work which were comparable to that which he does mention in the replying affidavits as constituting an infringement of the applicants' copyright. It seemed clear to me that the applicants were J alleging that the same type of copying which the applicants alleged had

A occurred in respect of the affected work had been repeated in the new work with 'cosmetic changes'. This forms the basis for the further allegation in the replying affidavits to the effect that the respondents have 'reproduced and/or adapted substantial parts of the copyright work' in writing, printing and publishing the new work and selling copies thereof.

B Thereby, so it is alleged, the respondents have infringed the applicants' copyright in the copyright work. It must be borne in mind, in my view, that the first respondent himself makes reference to the new work in his answering affidavit, compares the new work with the affected work and makes the allegation that as the new work has not been published a comparison would reveal that it does not contain any reproduction of

C substantial parts of the copyright work. To this extent the replying affidavits are dealing with allegations made in the answering affidavits and the alleged new matter is not really such. In any event, to the extent that the allegations do constitute new matter, then there is the fact that the new work made its appearance only subsequent to the launching of the

D application. Prior thereto the applicants had requested sight of the manuscript of the new work as it existed in February 1989 (and there is nothing to suggest that no manuscript existed as at that date—indeed the fact that the respondents stated that the work was still in the process of being written indicates that a portion of the manuscript must have been in existence). The respondents had consistently refused to allow the applicants to have sight thereof. The applicants had, as I have indicated, made out a *prima facie* case in regard to 'a reasonable apprehension' that the new work would contain material which infringed the copyright in the

E copyright work. Moreover, I consider that prayer 3 of the notice of motion is couched in wide enough terms to cover an infringement of copyright in

F the new work. In the light hereof the principles stated in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) are I consider applicable. The headnote to that case sets out accurately the principle enunciated by Miller J and is in the following terms:

G 'In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for relief sought by

H the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.'

I Insofar as the second respondent's association or involvement with the publication or distribution of the new work is concerned, the respondents in their answering affidavits revealed that the statement in their attorney's letter addressed to the applicants' attorney prior to the institution of the proceedings to the effect that the third respondent held the copyright in the affected work was in fact incorrect. In the answering affidavit it is stated that it is the second respondent who is the owner of the copyright

J therein. The allegations made in the replying affidavit relate thereto and

constitute averments to the effect that the second respondent, in the knowledge that portions of the affected work would be reproduced in the new work and that the copyright in the copyright work would thereby be infringed, nevertheless did nothing under their rights in respect of the affected work to prevent this from occurring. In further reliance hereon the applicants state that a search of the records of the Registrar of Companies reveal that the directors of the second and third respondents are to a large extent the same persons.

The respondent also contended that portions of the affidavit filed by the managing director of the first applicant constituted new matter. The allegations related to the standard procedure followed by the first applicant and book publishers in general in publishing books. The purpose of these allegations was to indicate that in the deponent's opinion it would be impossible for a 'new work' to be inferred from that which is alleged by the respondents to have been done in the case of the new work. In their founding affidavits the applicants had referred to a projected earlier publication date for the new work because of 'short cuts' due to copying. This was dealt with by the respondents in their answering affidavits and the passages complained of could therefore not be regarded as new matter. Paragraph 5 of the notice to strike out deals with similar matter. The material in respect whereof the respondents objected could not, in my view, create any prejudice as far as the respondents were concerned, particularly if they were granted the opportunity should they so wish to file further affidavits to deal therewith. To the extent that the replying affidavits did contain new matter the Court has a discretion to allow such material to remain in the replying affidavit, giving a respondent an opportunity to reply thereto should special or exceptional circumstances exist—*Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* 1978 (1) SA 173 (T) at 177G–178A.

Regard being had to all the circumstances, I considered that the whole of the application to strike out should be dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

The respondents then sought the opportunity to file further affidavits and the matter was accordingly postponed to enable them to do so. The hearing of the matter was resumed on 4 June 1990 after a fourth set of affidavits and a reply thereto had been filed.

On this latter date it was argued on behalf of the respondents that, regard being had to the papers as a whole and in view of the fact that final relief was being sought by the applicants, a proper case had not been made out and that the application should be dismissed. As against this, the applicants contended that a situation had arisen which required that the matter be referred to evidence on specific issues. More particularly, so it was argued, the first respondent should be required to testify on the question as to what sources had been used by him in writing both the affected and the new works.

In the initial answering affidavits the first respondent stated that much of what was contained in the chapters of the affected work which had been written by him had been taken from lecture notes prepared by himself and his predecessors at Witwatersrand University. The book was also to some extent based on the Van Niekerk work. He conceded that there were

A similarities between the affected work and the copyright work as indicated in the marked pages of the former work attached to the founding affidavits. He stated that the lecture notes would of necessity have 'related' to the various editions of Dr Silke's work, which had been relied on as a standard test work for students. Any similarities between the copyright work and the affected work (other than extracts from the copyright work acknowledged in the affected work) arose from the adoption of the lecture notes and of passages from the Van Niekerk work. The first respondent 'simply did not consider the source from which the lecture notes and Van Niekerk's book were taken'.

C Whilst in these affidavits the first respondent did not specifically admit that there had been any infringement of copyright by virtue of anything contained in the affected work and left that issue for the Court to decide, he acknowledged that the similarities between the two works had caused him much distress and stated that he had, without any admission of liability, made a tender to the applicants in respect of their claim for damages in full and final settlement thereof.

D Although the first respondent contended that certain of the applicants' complaints related to standard terms used by many authors on the subject, and other complaints to headings of a general nature in respect whereof no copyright could be claimed, there remained several passages in the text of the affected work which, in the absence of any explanation, were in my view so similar to the copyright work to warrant the conclusion that there had been copying of the copyright work. Moreover, the list of abbreviations and the anomalies therein indicating direct copying from the copyright work remained unexplained. I therefore considered that the case made out in the founding affidavits in regard to the affected work remained to a large extent F undisturbed by the allegations in the initial answering affidavits and appropriate relief was warranted. In this respect an amendment of prayer 1 of the notice of motion to prohibit the respondents from reproducing any portion of the copyright work was moved by the applicants at the commencement of the hearing in June 1990 and granted without any opposition on behalf of the respondents. The amendment cured any defect in the nature of the relief G originally sought against the first respondent.

In regard to the new work the respondents denied any similarity therein to the copyright work and contended that a comparison between the two works would demonstrate that there had been no reproduction or infringement of copyright. I have previously indicated that in the replying H affidavits the applicants contended that there had been cosmetic changes made to the alleged offending passages in the affected work in the production of the new work. In the absence of any suggestion by the respondents that the changes were effected by having recourse to original sources, then the alterations made to the passages in question would not cure the original infringement of copyright. Thus, in *Moffat & Paige Ltd v George Gill & Sons Ltd and Marshall* [1902] 86 LT 465 there was a first I edition of a work to which the copyright holder of a competing work took objection. The first edition was withdrawn and a second edition compiled making use of the first, but altering it in ways which it was thought would protect the author thereof from any complaint that it constituted an J infringement. At 471 the Master of the Rolls states:

'No doubt he says: "I am a very well-informed man; I have given, in fact, the greater part of my attention to these works, and I have no doubt I could have evolved the whole of these quotations from researches which I could have made: I know not only where those quotations come from, but I know the authors who have named them as appropriate to the particular matters, and I could tell you who they were." But, unfortunately, he did not go through that process himself; he has adopted the work of another man who may or may not have gone through it; but, whether he did or did not, the defendant did not. He simply took what another man had done.'

I was therefore of the view that on that which was contained in the original answering affidavits relief was also justified in respect of the new work on the basis of unlawful competition, in that the alleged infringement of copyright perpetrated in respect of the affected work had been perpetuated in the new work.

The second set of answering affidavits, however, put the whole matter, in regard to both the affected and the new work, in a different light. In regard to the old work the first respondent says the following:

- 3.4 However, insofar as the applicants have made allegations of copyright infringement in respect of the old work and that the old work was based on the copyrighted work, I state that the contents of the old work were not copied from the copyrighted work. The old work was based on the following:
- (a) the lecture notes previously used by me at the University of the Witwatersrand; and
 - (b) *Income Tax in the South African Law* by Van Niekerk ("*Van Niekerk*"), which was published as a loose-leaf publication and up-dated on an annual basis.
- 3.5 *Van Niekerk* was originally published in 1977 and the last up-date (issue 5) appeared in January 1982. The copyrighted work was published only in November 1982, five years later than the first edition of *Van Niekerk* and about ten months after the last up-date.
- 3.6 Copies of the lecture notes were made available to the applicants after all the affidavits were filed in the matter but prior to the hearing. With the exception of the section on Dividends, the notes were to a substantial extent prepared and distributed to students at the University in the period from 1978 to 1980. In late 1980 and 1981 I up-dated the notes but the up-dated notes were not handed to students because it was found that the provision of comprehensive notes adversely affected students' attitudes towards attending lectures. The bulk of the notes therefore antedated the publication of the copyrighted work by two years.'

The section on dividends, according to the first respondent, was up-dated in 1986, but only three passages in the old work include subject-matter which does not antedate the copyright work. Save for 21 lines in one of the passages, which the first respondent concedes are substantially identical to the corresponding passage in the copyright work, the first respondent points out that there are differences in the other passages, or that that which is similar is of a minor nature.

As far as the new work is concerned, the first respondent maintained in his second answering affidavit that it was not based on the old work but on various other sources, including original articles written by him and Mr Urquhart, his personal lecture notes and previous Butterworths publica-

A tions. These publications all antedated the copyright work. They included the Van Niekerk work, the latest up-date whereof was also, according to the first respondent, published almost a year prior to the copyright work. The use of the publications mentioned by the first respondent was authorised by either the second or third respondents, who had the right to do so.

B If these averments by the first respondent were correct, it meant that there could have been no infringement of copyright in respect of the affected work. Moreover, any argument that offending material in that work had been incorporated in the new work with cosmetic changes thereto would be destroyed. The difficulty, however, as I saw it was that there had been a change of stance in the respondents' approach as set out in the initial answering affidavits compared with that in the later affidavits, which made it confusing to determine with any degree of certainty the case being made out by the respondents. The confusion was increased when, during the course of the hearing during June 1990, it appeared that the first respondent was incorrect in his statement that the latest up-date of the Van Niekerk work was published prior to the copyright work. Counsel for the respondents had ascertained that there were several subsequent up-dates thereof.

E In all circumstances I considered that it was in the interests of all parties, including the first respondent, that he be required to clarify the position by way of oral evidence. Any referral to evidence was opposed by counsel for the respondents, who argued in the alternative that, if the first respondent were to be ordered in terms of Rule 6(5)(g) to testify, then the second and third applicants and representatives of the first applicant should also be ordered to do so on various aspects. However, the only issues on which I considered that evidence was necessary related to the sources and methods employed by the first respondent in writing the affected and the new works, issues on which he alone and any witnesses he might wish to call could testify. I accordingly made an order in these terms.

G The matter was resumed early in February 1991 and the first respondent testified on the aforesaid issues. According to his evidence, it appears that there was a set of lecture notes in existence at the time he joined the lecturing staff of Witwatersrand University. He had access to these notes from 1981 onwards and was given possession thereof when Prof MacGregor retired in 1986. In addition hereto, he had his current lecture notes which had last been fully up-dated in 1981. However, he conceded during the course of cross-examination that a measure of up-dating had been done subsequent thereto to enable him to retain for himself an up-to-date series of lecture notes for lecturing purposes. I gained the impression from his evidence that the up-dating had not been as extensive subsequent to 1981 because of the fact that from then on written lecture notes were not handed to students. It is not altogether apparent why this factor should have played any role. In addition to the foregoing documents, there was a paper dealing with income tax on dividends which for the greater part, according to the first respondent's testimony, had been drafted in 1982, an estates and trusts documents also prepared in 1982 and an annual review document of 1982. The current lecture notes were in part the source of the

affected work, whilst some reliance had also been placed on the Van Niekerk work. Numerous works in respect whereof the second and third respondents held the copyright and had authorised the use thereof by the first respondent had in part been used for purposes of the new work. Moreover, it became apparent during the course of cross-examination that there were connections between the affected work and the new work.

B The first respondent dealt extensively with these various writings in considering the passages in both the affected and the new works which the applicants alleged infringed their copyright. I do not propose to analyse this evidence in detail. I shall refer to some examples in due course. The effect of the evidence was to show that the passages had their origin in material which preceded the copyright work and which the first respondent was entitled to use.

C Counsel for the applicants criticised the first respondent as a witness. It was submitted that his evidence was at variance with the affidavits filed by him as to the material used for the affected work and whether there was any connection between that work and the new work. That there were discrepancies cannot be denied. At no stage, however, did I gain the impression that the first respondent was an untruthful witness. Indeed, he impressed me as a person who was endeavouring, to the best of his ability, to give a frank and accurate account of the methods employed and the sources utilised by him in writing both works. Such criticisms as can be directed at him must be seen against the background of the fact that there was an accumulation of material at his disposal when he formulated the notes upon which he ultimately relied, together with the Van Niekerk work, in creating the affected work. There were likewise numerous sources to which he had access when writing the new work. He had been called upon to trace the origin of a number of passages in each of the two works to qualify himself to testify. This he had been required to do whilst still performing his other duties as lecturer and as consultant in the income tax field. He was subjected to a searching cross-examination traversing a wide spectrum. And I accept the authenticity of his statement that he was unwell at one stage during his evidence which necessitated the postponement of the hearing for a day before he could resume his testimony.

G I do not propose to detail all the features in the evidence of the first respondent which can be regarded as not entirely satisfactory. They relate, in my view, principally to aspects on which there was a measure of confusion on his part. Moreover, certain criticisms suggested by counsel for the applicants were, to my mind, on a proper analysis of the testimony, unwarranted. Thus, for instance, the statement in the answering affidavits that there was no connection between the affected work and the new work might at first blush be considered to be at variance with the concessions made during the course of cross-examination that portions of the two works were identical or bore a strong similarity to each other. However, in my view, what the witness at all times intended to convey was that, in concept and intention, the two works, as far as he was concerned, bore no relation to each other—the affected work was designed to meet the needs of students only, whilst the new work was directed at a wider public to include the demands of the more sophisticated reader. Similarly, the criticism that it is improbable that the first respondent would not have had

A more regard to the affected work in writing the new work than he was prepared to admit loses a lot of its significance once it is accepted that his object was to create a work different in character and objective.

B It is therefore against the background of my finding that the first respondent was a credible witness that I turn to deal with the salient features of his evidence intended to indicate that neither in respect of the affected work nor of the new work any infringement of the applicants' copyright had been perpetrated.

C The first respondent traced the passages in the affected work in respect whereof the applicants alleged there had been copying from the copyright work, back to other sources to which he had access—partly to the Van Niekerk work (of which the latest up-date to which he had access was that of 1981 and which thus preceded the publication of the copyright work), partly to his lecture notes and, to a much lesser extent, the estates and trusts and annual review documents of 1982. As far as the lecture notes are concerned (which are relevant in respect of a very large number of the passages complained of), the first respondent was able to link D the corresponding passages in the affected work to notes (exh 'C' of the documents before Court) which purport to antedate the copyright work. Thus, although he used later notes up-dated to 1987 in writing the affected work, such later notes were in turn derived from exh 'C', at least as far as the offending passages in the affected work are concerned.

E The admissibility of exh 'C' was challenged by counsel for the applicants. The determination of this latter issue is important. Those 'offending' passages which are said by the first respondent to have their origin in the Van Niekerk work and/or exh 'C' are in all instances as similar in their wording to the corresponding passages in these latter F sources as they are to any passage in the copyright work; in most instances the similarity is greater. It is therefore probable that they were derived from such sources and not from the copyright work.

G Exhibit 'C' comprises the lecture notes which according to the first respondent were inherited by him from his predecessors at Witwatersrand University. They are not the original notes of these earlier lecturers. Therefore, so it is argued, they are hearsay and, in the absence of any consent to their being used as evidence, are inadmissible in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988.

H The fallacy in this argument lies, in my view, in the fact that the documents in question do not constitute 'copies' insofar as the first respondent's use thereof is concerned. They are the original material given to him by his predecessors to utilise for his own purposes, even though they had been copied from some other source before coming into his possession. Nor are they submitted in evidence as proof of the truth of the contents thereof. Their purpose is to indicate that the wording of the contents is similar, and in some cases identical, to corresponding passages in the affected work. I accordingly consider that exh 'C' is admissible evidence for this purpose.

J The next question is the date to be ascribed to the sets of lectures comprising exh 'C'. The only relevant aspect in this connection is whether they pre-date the publication of the copyright work. The dates reflected on the various sets differ. Some purport to originate during the decade

commencing in 1950. All, according to the dates reflected on the documents, antedate the copyright work. Clearly, however, the first respondent was unable to testify of his own knowledge as to the accuracy of the dates appearing on the documents. Nevertheless, I have come to the conclusion that there is sufficient evidence to establish that the whole of exh 'C' was in existence prior to the date of publication of the copyright work and could not therefore have been copied therefrom.

Firstly, there is the evidence of the first respondent that he had access to these notes as from 1981. The tenor of his evidence is to the effect that there would have been no cause for any up-dating thereof subsequent thereto. Thereafter he had his own notes, described as his 'current' lecture notes (annexure 'A'). Secondly, certain of the notes date themselves. C According to the first respondent paper of a different size was used on which to type lecture notes until 1970 from that used thereafter for this purpose. Many of the 'offending' passages are similar, if not identical, to notes on the pre-1970 paper. There are other pointers to the date of certain of the notes. Thus, one set of notes contains a page on which reference is D made to a 'recently' decided case, being a case reported in the 1954 vol 3 South African Law Reports. Admittedly, the same set of lecture notes must have been up-dated in 1956 in that mention is made on another page thereof to an amendment to the Income Tax Act of that year. However, I am of the view that if regard is to be had to the total picture presented by the evidence on this aspect of the matter, it can be accepted that exh 'C' E pre-dates the copyright work.

The close similarity between so many of the 'offending' passages and the corresponding passages in exh 'C' and/or the Van Niekerk work has the consequence that the major portion of that complained of by the applicants in the affected work falls away.

F There is a further factor which requires mention in regard to the material to which the applicants have taken offence. Certain portions of the lecture notes of the various lectures on income tax at Witwatersrand University have no doubt, down the years, been perpetuated in later notes in the same or similar form. I refer to notes dealing with basic principles relating to aspects of income tax laid down in early Appellate Division G cases which have not altered by later income tax legislation. Doubtless the same has occurred in various succeeding editions of *Silke on South African Income Tax*. It is not inconceivable that there are passages appearing in both the lecture notes and the copyright work which, unbeknown to the parties to these proceedings, have in some measure had a common author. H In the preface to each of the first to the sixth editions of the copyright work, spanning the years 1957 to 1969, Dr Silke acknowledges the 'assistance and criticism' of a Mr Drake. The evidence reveals that Mr Drake was at the time a part-time lecturer at the University of the Witwatersrand.

I If the passages having their origin in the Van Niekerk work and the lecture notes comprising exh 'C' are to be left out of consideration for purposes of this matter, then but very few passages remain which can have any bearing on the question whether there has been copying of the copyright work in the affected work. There are some passages which the first respondent could not relate to any lecture notes still in his possession, J

A but which he said must have derived from notes which had been used to form part of the manuscript for the new work. That manuscript was no longer in his possession and he had no copy thereof, despite his contract with the third respondent requiring that a copy be retained by him. The respondents called no other witness to clarify this aspect of the matter. It is an unsatisfactory feature of the respondents' case. However, I did not gain the impression that the first respondent was being untruthful in regard hereto. In any event, the passages concerned are not, in my view, of any real importance as far as the ultimate decision of this matter is concerned.

C It is desirable also to illustrate the fact that there are passages complained of which, whether or not they can be related to documents other than the copyright work, are not, to my mind, supportive of the applicants' case. The first example illustrates that, on the probabilities, the passage in the affected work was copied from the copyright work (and that the document whence it comes, namely the 1982 Annual Income Tax Review, was therefore also up-dated subsequent to 1982 despite the first respondent's initial statement to the contrary) but, at the same time, that it is in effect only a recapitulation of the relevant provisions of the Income Tax Act.

The passage in the copyright work is the following:

E 'The first R100 of the aggregate of any dividends referred to in s 11(s) (dividends distributed other than out of capital profits by a "fixed property company" on shares indicated in a unit portfolio comprised in a unit trust scheme in property shares, such dividends being treated as non-dividend income for income tax purposes; see para 13.19) and amounts distributed by a unit portfolio out of interest income (that is consequently rendered exempt income for the unit portfolio under s 10(1)(iA) and for the purposes of s 19 is deemed to be income derived by the taxpayer other than in the form of dividends under s 19(5B); see para 9.39) received by or accruing to such a taxpayer less the amount of any interest that is exempt from tax under s 10(1)(i)(xv) is also exempt from tax (s 10(1)(i)(xvi)).'

G The corresponding passage in the affected work reads as follows:

H 'The first R1 000 of the aggregate of any dividends referred to in s 11(s) (dividends distributed other than out of capital profits by a "fixed property company" on shares included in a unit portfolio comprised in a unit trust scheme in property shares, such dividends being treated as non-dividend income for income tax purposes; and amounts distributed by a unit portfolio out of interest income (that is consequently rendered exempt income for the unit portfolio under s 10(1)(iA) and for the purposes of s 19 is deemed to be income derived by the taxpayer other than in the form of dividends under s 19(5B); (see 12.19.1)) received by or accruing to such a taxpayer less the amount of any interest that is exempt from tax under s 10(1)(i)(xv) is also exempt from tax (s 10(1)(i)(xvi)).'

I It is apparent that the two passages are identical save for the following: the reference in the copyright work to 'para 13.19' in the first phrase in parenthesis has been omitted—this was obviously necessary in that reference was being made to a paragraph in the copyright work which was not apposite insofar as the affected work was concerned; secondly, the author of the passage in the affected work has neglected to delete the semicolon preceding that which had been omitted and also the bracket

thereafter; thereby the whole passage has been rendered nonsensical. The conclusion that there has been copying, albeit inept, is inescapable. However, the fact that the whole passage is but a summary of the relevant provisions of the Income Tax Act, demonstrates the insubstantial nature of the copying.

B The second example illustrates that, where it is alleged that there has been copying from the copyright work, the similarity in wording can equally well be attributed to the author's own individual research. The content of the passage is itself indicative thereof.

Thus, in the affected work the following passage appears:

C 'Finally, there are other provisions that effectively provide for amounts to be deemed to be from a source within the Republic, irrespective of the actual source. The provisions are the following:

Section	Amounts
22A(2)	Proceeds of disposal of asset or interest in an asset consisting of trading stock acquired under a scheme of arrangement or reconstruction of a company (see para 11.33).
24A(3)	Amounts, benefits and advantages derived from the disposal of shares acquired in an exchange of certain assets (see para 11.34).
30	Taxable income of persons carrying on business extending beyond the Republic (see para 8.7).
32	Taxable income of persons carrying on the business of transmitting messages to places outside the Republic by submarine cable or by wireless apparatus (see para 21.6).
33	Taxable income of persons other than those ordinarily resident in the Republic or "domestic companies" who or which embark passengers or load livestock, mails or goods in the Republic as the owner or charterer of a ship or aircraft (see para 21.5).
37A(2), (3), (4) (6) and (7)	Obsolete provisions relating to the taxable income of companies in the territory of South West Africa.'

The corresponding passage in the copyright work reads as follows:

G 'Other provisions providing or effectively providing for amounts to be deemed from a source within the Republic irrespective of their actual source are listed and briefly described below:

Section	Subject-matter
22A(2)	Proceeds of disposal of asset or interest in an asset consisting of trading stock acquired under a scheme of arrangement or reconstruction of a company (see para 17.24).
24A(3)	Amounts, benefits and advantages derived from the disposal of shares acquired in an exchange of certain assets (see para 17.6).
30	Taxable income of persons carrying on business extending beyond the Republic (see para 17.2).
32	Taxable income of persons carrying on the business of transmitting messages to places outside the Republic by submarine cable or by wireless apparatus (see para 17.39).
33	Taxable income of persons other than those ordinarily resident in the Republic or "domestic companies" who or that embark passengers or load livestock, mails or goods in the Republic as the owner or charterer of a ship or aircraft (see para 14.37).
37A(2), (3), (4) (6) and (7)	Obsolete provisions relating to the taxable income of companies in the territory of South West Africa (see para 13.35).'

A It is apparent that two competent and conscientious authors, working independently of each other, will both compile a similar list with regard to those provisions of the Income Tax Act which provide for amounts deemed to be income derived from a source within the Republic (that being the topic under consideration). Nor is it surprising that the wording of a paragraph dealing therewith is couched in similar terms, even though B no copying whatsoever has occurred. It is accordingly understandable that a paragraph of like nature is to be found in the new work; no inference adverse to the respondents can be drawn therefrom.

C It is true that there is at least one further instance where the probabilities point convincingly to the fact that, in that instance, recourse was had to the copyright work and that the copying was not insubstantial. I refer to the list of abbreviations in respect of decided cases mentioned earlier in this judgment. The first respondent stated that he was not responsible for compiling the list. His hearsay statement to the effect that he understood D that some person engaged by the second respondent for the purpose was responsible therefor does not assist the respondents, nor did counsel for the respondents seek to justify what had occurred. The question which arises, however, is whether isolated instances of this nature, which is all E that remains in regard to any infringement of copyright in relation to the affected work, warrants the grant of any relief in respect thereof. I think not. The undertaking given by the respondents in their attorneys' letter prior to proceedings being instituted has, in consequence of the evidence now before the Court, proved to be one on which full reliance can be placed. The isolated instances have not been repeated in the new work. F The first respondent has proved that by far the greater portion of the passages in respect whereof complaint was made were, on the probabilities, derived from sources other than the copyright work, or are the fruits of his own labour. That which remains is, save for the list of abbreviations, not of a substantial nature. No passages other than those mentioned in the papers and in the documents disclosed prior to the hearing of oral evidence have been relied upon. The relief sought is also confined to the 10th G edition of *Silke on South African Income Tax*. On the totality of the evidence there can be no question of cosmetic changes having been made to copied passages in the affected work in order to enable their inclusion in the new work. By virtue of the undertaking the affected work is for all practical purposes confined to the realms of the past. I consider that no useful purpose would be served at this stage to grant any form of relief, H which in any event would in effect be of an academic nature.

I There remains the question whether any case has been made out in respect of the new work based on unlawful competition. It is apparent from what has already been said in relation to the affected work that the applicants cannot rely on infringement of copyright to substantiate any such case.

J However, it was argued that there has also been unlawful competition in representing the new work to be a 'new major tax work'. The first contention advanced by the applicants that it is but a second edition of the affected work is to my mind devoid of substance. It is a work of two volumes, the first volume comprising well over 1 000 pages and the second J approximately that number of pages; this compared to a single volume of

some 600 pages. The first volume comprises text, whilst the second A contains the Income Tax Act, the regulations promulgated thereunder, double tax agreements with other countries, practice notes and an index. Each volume is in loose-leaf form. It is apparent that both in content and in format it differs from the affected work. The second contention is in my view equally without substance. It is submitted that as the first respondent, on his own evidence, had made use of material from other works B (having obtained the copyright holders' permission so to do) in creating the new work, the latter could not be described as a 'new major' tax work. I am unable to agree. The selection and arrangement of all that went into the new work was that of the first respondent, as also the combination of such material with his own input in order to create the whole. The relief C sought in respect of the new work must in my judgment therefore also be refused.

D There remains the issue of costs. It was argued on behalf of the respondents that as allegations of flagrant plagiarism had been made against the first respondent an award of attorney and client costs was justified. As against this consideration, there is the fact that the applicants were confronted with passages in the affected work which, in the absence of any explanation, appeared to constitute deliberate copying (for example, the list of abbreviations of decided cases). There was no admission of copying in the letter of undertaking to which I have referred. The brochure advertising the new work created the impression that two pages E of the affected work were reproduced verbatim therein.

F In all the circumstances I consider that no special order in regard to costs is warranted. The respondents are liable for the costs of the application to strike out, as well as the costs of the two days when the case was unable to proceed, once because of the postponement sought by counsel to correct the position in regard to the up-dates of the Van Niekerk work and the other due to the indisposition of the first respondent.

The following order is made:

1. Save as provided in para 2 hereof, the application is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel. G
2. The respondents are ordered to pay the costs of the application to strike out as well as the costs of the hearing on 6 June 1990 and 7 February 1991; such costs are to include the costs consequent upon the employment of two counsel. H

Applicants' Attorneys: *Spoor & Fisher*. Respondents' Attorneys: *Adams & Adams*.