MARAIS v BEZUIDENHOUT 1999 (3) SA 988 (W)

Citation	1999 (3) SA 988 (W)
Case No	A3023/98
Court	Witwatersrand Local Division
Judge	Cloete J, Epstein AJ
Heard	October 14, 1999
Judgment	October 16, 1999
Counsel	Brahm du Plessis for the appellant. G Nel for the respondent.
Annotations	None

Flynote : Sleutelwoorde

Copyright - Subsistence of - In whom copyright subsists - Architectural drawings - Architect in private practice - Contract between such architect and client one of work (*locatio conductio operis*) and not of service (*locatio conductio operarum*) as intended in s 21*(d)* of Copyright Act 98 of 1978 - Copyright in architectural drawings vesting in architect and not in client with whom architect had contracted.

Headnote : Kopnota

The usual contract between an architect in private practice and a client who wishes to have a home designed within parameters set by the latter would be one of work (ie *locatio conductio operis*) and not one of service (*locatio conductio operarum*) as intended in s 21*(d)* of the Copyright Act 98 of 1978, unless the evidence establishes a contract which differs from the usual. The

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copyright in architectural drawings produced by the architect in terms of such usual contract with his client vests in the architect and not in the client with whom he has contracted. (At 994E/F-F/G and 995B/C, read with 989H/I-990B.)

Annotations

Reported cases

Claude Neon Lights SA Ltd v Daniel 1976 (4) SA 403 (A): dictum at 413D-G applied

Morren v Swinton and Pendlebury Borough Council [1965] 2 All ER 349 (QB) ([1965] 1 WLR 577): considered

Northern Office Microcomputers (Pty) Ltd and Others v Rosenstein 1981 (4) SA 123 (C): referred to

Shenker v The Master and Another 1936 AD 136: dictum at 143 applied

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A): applied

University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601: dictum at 610-12 applied

Whittaker v Minister of Pensions and National Insurance [1967] 1 QB 156 (QB) ([1966] 3 All ER 531): considered.

Statutes Considered

Statutes

The Copyright Act 98 of 1978, s 21*(d)*: see *Juta's Statutes of South Africa 1998* vol 2 at 2-224.

Case Information

Appeal from a decision in a magistrate's court. The facts appear from the reasons for judgment.

Brahm du Plessis for the appellant.

G Nel for the respondent.

Cur adv vult.

Postea (October 16).

Judgment

Cloete J : The appellant sued the respondent in the magistrate's court for infringement of copy right alleged to consist in the unauthorised reproduction by the respondent of certain architectural drawings.

It is not in dispute that the drawings were produced by the appellant in 1994; and that, in terms of the provisions of the Copyright Act 98 of 1978 ('the Act'), the appellant was a 'qualified person', the drawings constitute 'artistic work' and the appellant was the 'author' thereof.

The respondent admitted in his plea that he produced certain drawings. The detailed evidence of the appellant, culminating in the opinion which he expressed as an expert that those drawings were copies of the drawings he had produced in 1994, was not in any way challenged in cross-examination.

At the close of the appellant's case, the respondent sought, and was granted, an order absolving him from the instance. The magistrate reasoned as follows:

> '[The respondent's attorney] referred the court to the Copyright Act 98 of 1978 and more specifically to s 21*(d)*. . . . [The respondent's attorney] argued that the copyright of the plans in question rested not in the architect [the appellant], but the person for whom the plans were drawn up (who had of course paid for the plans).
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> . . . [The appellant's counsel] said that the section quoted by [the respondent's

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attorney] was not applicable in that the [appellant] was an independent professional architect, employed to do a specific job It was not an ongoing contract of employment or service . .

The court was of the opinion that given the fact that [the appellant] had not had an ongoing working relationship with the client - it nonetheless fell within the ambit of s 21*(d)* of the aforementioned Act and no restrictive interpretation of that section as suggested by [appellant] could be accepted.'

It would be convenient to quote s 21(1) of the Act in full at this stage:

'21 **Ownership of copyright.**

(1)*(a)* Subject to the provisions of this section, the ownership of any copyright conferred by s 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work

(b) Where a literary or artistic work is made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work by virtue of s 3 or 4

(c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematography film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of para *(b)*, be the owner of any copyright subsisting therein by virtue of s 3 or 4.

(d) Where in a case not falling within either para *(b)* or *(c)* 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 any copyright subsisting in the work by virtue of s 3 or 4

(e) Paragraphs *(b)*, *(c)* and *(d)* shall in any particular case have effect subject to any agreement excluding the operation thereof and subject to the provisions of s 20 '

At common law there is a distinction between a contract of service (*locatio conductio operarum*) and a contract of work (*locatio conductio operis*): *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A). There can be no doubt that the phrase 'contract of service' in s 21(1)*(d)* does not include a contract of work. If it did, para *(c)* would (except for the remuneration aspect) be superfluous, and so would the words 'under a contract of service or apprenticeship' in para *(d)* itself.

The respondent submitted that to give the phrase 'contract of service' in the Act its plain meaning at common law would lead to absurdities. But it is difficult to discern any logic in the manner in which copyright in artistic work has been dealt with in successive legislation.

When the Copyright Act 63 of 1965 first came into operation on 11 September 1965, s 5(1) provided that, subject to the provisions of that section, the author of a work was entitled to any copyright subsisting in the work. Subsection (2) dealt with, *inter alia*, artistic work made by the author in the course of his employment by the proprietor of a

newspaper, magazine or other periodical under a contract of service or apprenticeship for publication in the newspaper, magazine or similar periodical. Subsection (3) read:

> 'Where a person commissions the making of an artistic work and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the person who so commissioned the work shall, subject to the provisions of ss (2), be entitled to any copyright subsisting therein by virtue of this chapter.'

Section 1 of Act 56 of 1967 substituted a new ss (3) with effect from 10 May 1967. The new ss (3) read as follows:

> 'Where a person commissions the taking of a photograph, the painting or drawing of a portrait or the making of a gravure and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission such person shall, subject to the provisions of, ss (2) be entitled to any copyright subsisting therein by virtue of this chapter.'

The 1965 Act was (with the exception of s 46, which is not relevant for present purposes) repealed by the present Act which (with exceptions not relevant for present purposes) came into operation on 1 January 1979. Section 21(1) in its original form read simply:

> 'The copyright conferred by s 3 and 4 shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.'

Section 21(1) in its present form was substituted by Act 56 of 1980 with effect from 23 May 1980.

The historical position applicable from time to time, in the absence of a contract to the contrary effect, may be summarised broadly as follows: Under the original 1965 Act, the client of the architect would have been the owner of the copyright in architectural drawings produced by the architect and paid for by the client. After the 1967 amendment, the architect - but subject to exceptions - became the owner of the copyright in drawings produced by him. When the 1978 Act came into operation in 1979, there were no exceptions. By the amending Act of 1980, the exceptions in the (amended) 1965 Act were reintroduced - but, it has been held, not retrospectively: *Northern Office Microcomputers (Pty) Ltd and Others v Rosenstein* 1981 (4) SA 123 (C) at 129A-B.

Against this background, and in view of the clear changes in legislative policy relating to ownership of copyright in artistic works, it seems to me that the absurdity argument raised by the respondent is best dealt with by quoting the following passage in the judgment of De Villiers JA in *Shenker v The Master and Another* 1936 AD 136 at 143:

> '(T)he mere fact that in a statute a dissimilarity of treatment occurs where similarity might have been expected, does not prove that the dissimilarity of treatment is glaringly absurd or that the dissimilarity was not intentionally created by the Legislature. It may well be intentional, and *prima facie* it is intentional. Moreover, as has often been remarked by eminent Judges, "it is dangerous to speculate as to the intention of the Legislature, and what seems an absurdity to one man does not seem absurd to another".'

At the end of the day, the statutory position can always be altered by contract.

Our statute law relating to copyright has, over the years, borrowed extensively from legislation applicable in England. (Kelbrick (1997) 30

CILSA 131 goes so far as to say that 'the English influence on this area of law is greater than any other' and goes on to point out that '(u)ntil the most recent South African legislation was promulgated, copyright legislation in South Africa was a virtual reprint of equivalent British provisions'.) It is therefore instructive to note that in the current English law, and indeed at least since the 1911 Copyright Act, there has been a distinction between a contract of service and a contract of work (called, in the English law, a 'contract for services'). *Halsbury's Laws of England* 4th ed re-issue, (1998) states the position to be as follows (in vol 9(2) para 119 and footnote 9, and para 121):

> 'The author of a work is the first owner of any copyright in it. Where, however, a . . . artistic work . . . made on or after 1 July 1994, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work, subject to any agreement to the contrary.
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> For these purposes, "employee" means an employee under a contract of service or apprenticeship: Copyright, Designs and Patents Act 1988 s 178. . . .
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> A contract of service is not the same thing as a contract for services, the distinction being the same as that between an employee and an independent contractor; an employee is a person who is subject to the commands of his employer as to the manner in which he shall work. The existence of direct control by the employer, the degree of independence on the part of the person who renders services, and the place where the service is rendered, are all matters to be considered in determining whether there is a contract of service. . . .'

As authority for the proposition in the last paragraph quoted, the authors refer to *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601. In that matter, examiners were appointed for a matriculation examination of the University of London, a condition of appointment being that any copyright in the examination papers should belong to the University. The University agreed with the plaintiff company to assign the copyright, and by deed purported to assign it to the plaintiff company. After the examination the defendant company issued a publication containing a number of the examination papers, with criticism on the papers and answers to questions. The plaintiff sued for infringement of copyright and the Court held that the copyright vested in the examiners as they were not 'in the employment' of the University 'under a contract of service' within the meaning of s 5(1)*(b)* of the 1911 Copyright Act. The relevant provisions of that section were the following:

> '(1) Subject to the provisions of this Act, the author of the work shall be the first owner of the copyright therein:
>
> Provided that -
>
> *(a)* . . .
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> *(b)* where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright. . . .'

Peterson J held at 610-12:

> 'The next question is, In whom did the copyright in the examination papers vest when they had been prepared? This problem must be solved by the determination of the effect of s 5 of the Act of 1911. The author, by that section,

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> is the first owner of the copyright, subject only to the exceptions contained in the Act. The only relevant

exception is to be found in s 5, ss (1)*(b)* The examiners were no doubt employed by the University of London, and the papers were prepared by them in the course of their employment But, in order that s 5, ss (1)*(b)*, should be applicable, the examiners must have been 'under a contract or service or apprenticeship"

The meaning of the words 'contract of service' has been considered on several occasions, and it has been found difficult, if not impossible, to frame a satisfactory definition for them In *Simmons v Heath Laundry Co*, in which the meaning of these words in the Workmen's Compensation Act, 1906, was discussed, Fletcher Moulton LJ pointed out that a contract of service was not the same thing as a contract for service, and that the existence of direct control by the employer, the degree of independence on the part of the person who renders services, the place where the service is rendered, are all matters to be considered in determining whether there is a contract of service As Buckley LJ indicated in the same case, a contract of service involves the existence of a servant, and imports that there exists in the person serving an obligation to obey the orders of the person served A servant is a person who is subject to the commands of his master as to the manner in which he shall do his work In *Byrne v Statis Co* the meaning of the words in s 5 of the Copyright Act, 1911, was considered in the case of a person, permanently employed on the editorial staff of a newspaper, who was specially employed by the proprietors to translate and summarise a speech He did the work in his own time and independently of his ordinary duties, and it was held that in doing so he did not act under a contract of service In the present case the examiner was employed to prepare the papers on the subject in respect of which he was elected or appointed examiner He had to set papers for September, 1915, and January and June, 1916, and his duty also comprised the perusal of the students' answers, and the consideration of the marks to be awarded to the answers For this he was to be paid a lump sum He was free to prepare his questions at his convenience so long as they were ready by the time appointed for the examination, and it was left to his skill and judgment to decide what questions should be asked, having regard to the syllabus, the book work, and the standard of knowledge to be expected at the matriculation examination It is true that the University issued instructions to examiners for the conduct of the examination, but these instructions are only regulations framed with a view to securing accuracy in the system of marking Professor Lodge and Mr Jackson were regularly employed in other educational establishments and were not part of the staff of the London University, and it was not suggested that the other examiners were on the staff of the University In my judgment it is impossible to say that the examiner in such circumstances can be appropriately described as the servant of the University, or that he prepared these papers under a contract of service '

The English Court of Appeal has subsequently held that while the presence or absence of a right in the employer to superintend and control is an important factor in determining whether the contract is one of service, it is not the determining test where the person employed is a professional person or a person of particular skill and experience: *Morren v Swinton and Pendlebury Borough Council* [1965] 2 All ER 349 (QB) ([1965] 1 WLR 577) (and cf *Whittaker v Minister of Pensions and National Insurance* [1967] 1 QB 156 (QB) ([1966] 3 All ER 531)).

In the *Smit* case *supra* at 61 Joubert JA set out some of the important legal characteristics of the contract of service and the contract of work in South African law, and included (at 61A-C and E-G) the following:

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'1 The object of the contract of service is the rendering of personal services by the employee (*locator operarum*) to the employer (*conductor operarum*) The services or the labour as such is the object of the contract

The object of the contract of work is the performance of a certain specified work or the production of a certain specified result It is the product or the result of the labour which is the object of the contract

2. According to a contract of service the employee (*locator operarum*) is at the beck and call of the employer (*conductor operarum*) to render his personal services at the behest of the latter

By way of contrast the *conductor operis* stands in a more independent position *vis-à-vis* the *locator operis* The former is not obliged to perform the work himself or produce the result himself (unless otherwise agreed upon) He may accordingly avail himself of the labour or services of other workmen as assistants or

employees to perform the work or to assist him in the performance thereof.

. . .

4. The employee is in terms of the contract of service subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done.

The *conductor operis*, however, is on a footing of equality with the *locator operis*. The former is bound by his contract of work, not by the orders of the latter. He is not under the supervision or control of the *locator operis*. Nor is he under any obligation to obey any orders of the *locator operis* in regard to the manner in which the work is to be performed. The *conductor operis* is his own master being in a position of independence *vis-à-vis* the *locator operis*. The work has normally to be completed subject to the approval of a third party or the *locator operis*.'

Having regard to these remarks, it is apparent that the usual contract between an architect in private practice, such as the appellant, and a client who wishes a home designed within parameters set by the latter would be one of work, not service. The evidence in the present matter suggests that the contract was of the usual type and, in the absence of any challenge by the respondent, establishes that it was. The evidence may be summarised as follows: The appellant had been exclusively in private practice since he qualified in about 1977. He specialised in doing work in shopping centres, but he was prepared to design out of the ordinary homes which he categorised as 'not the run-of-the-mill type of thing, Schachat Cullum or State developers'. The client for whom he drew the plans at issue in the present case wanted a uniquely designed house based on specific requirements. These requirements were discussed in great detail between the appellant and his client, in the appellant's offices.

There is simply nothing to suggest that the appellant entered the service of his client, Pastor Franke, and no attempt was made by the respondent's attorney to show that he did - apart from the following piece of cross-examination:

'You were employed by Pastor Franke? - Correct. And you prepared these drawings in terms of your contract of service? - Correct.'

These answers cannot avail the respondent because the respondent's attorney had already, and more than once, elicited from the appellant that he was not an expert in copyright law. Furthermore, the appellant's evidence in re-examination reads as follows:

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'Mr Marais, were you employed as an employee of Pastor Franke to do this work or were you employed to do this specific job of work? - I was employed for this specific job. I have never met him before. He walked into my office and asked me to do, provide a service.'

It appears that the appellant was oblivious of the significance which the law attaches to the distinction between a contract of service and a contract of work; but to my mind, it is obvious that he did not intend to concede in cross-examination that he became Pastor Franke's servant, as he made clear in re-examination.

The magistrate was accordingly wrong in granting absolution from the instance on the basis which he did.

The respondent's counsel was at pains to demonstrate in heads of argument filed in this

Court that, on the evidence led by the appellant, no reasonable man could grant any of the remedies claimed in the particulars of claim. The purpose of this exercise was obviously to found a submission that if the magistrate erred in granting absolution on the issue of liability, his decision was nevertheless correct (albeit on different grounds) and that the appeal accordingly fell to be dismissed. This approach was not persisted in during argument - wisely, as the identical argument was raised in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 413C, and rejected for the following reasons (at 413D-G):

> 'That a Court has the power, which it may exercise in its discretion, to allow a party who has closed his case to re-open it, is beyond doubt. Such power may be exercised in favour of a plaintiff even after the defendant has closed his case (*Oosthuizen v Stanley* 1938 AD 322 at 333; *Hladhla v President Insurance Co Ltd* 1965 (1) SA 614 (A) at 621-2) and *a fortiori* it may be exercised immediately after the plaintiff has closed his case. If, in the Court below, respondent's counsel had applied for absolution from the instance on the ground that insufficient evidence as to damages had been led, it would unquestionably have been open to appellant to attempt to meet that argument by asking leave to re-open his case for the purpose of leading further evidence relative to *quantum* of loss. Whether such an application would have succeeded is a question which cannot now be answered by this Court but there is certainly nothing to indicate that the application would necessarily, or even probably, have failed. The decision of the trial Court that appellant had no case on the merits put an effective end to the matter and if that decision was wrong, as I consider it was, it appears to me that considerations of fairness and justice require that the decision should be set aside and the case be sent back for further hearing. It would then be open to appellant, if it were so advised, to ask for leave to lead further evidence on damages and for the trial Court to consider and decide upon that application.'

It is not necessary to consider whether there is evidence upon which a reasonable man could grant any or all of the remedies claimed, to the appellant; and my failure to do so is not to be construed as a suggestion - much less a finding - that there is not.

The appeal succeeds, with costs. The order made by the magistrate is set aside and the following order is substituted:

> 'The application for absolution from the instance is dismissed, with costs.'

Appellant's Attorneys: *Peter Horwitz, Mendelsohn & Associates.* Respondent's Attorneys: *Manfred Jacobs & Husted.*