

A have referred at the beginning of this judgment. I have, with the consent of leading counsel representing the applicants, ascertained from counsel representing the respondents that the Attorney-General is prepared to make available the photographs and video tape and that the Commissioner of Police has no objection thereto. There is no list of exhibits.

B At this stage of the proceedings and on the facts before me I see no warrant for permitting the applicants access to the other statement in section A of the dossier, or to what is contained in sections B and C of the dossier, nor do I see any warrant for directing that summaries of evidence of witnesses who have not made statements, should be furnished to the applicants.

C I base my judgment not only on what I have stated in the previous paragraph but also on the practical problems referred to in para 3.25 of the Botha Commission Report which would result if the applicants were to be given access to the police dossier (*in casu* the investigating officer spoke siSwati to the witnesses and translated the statements into Afrikaans); the general approach that it is undesirable for a Judge of first instance radically to depart from a practice laid down repeatedly over many years by South African Courts (including the Appellate Division), where fundamental rights entrenched in chap 3 of the Constitution can be given effect to without doing so; and on my belief that the decision of the majority in the *Tune* case is preferable to the decision in *Stinchcombe's case supra* in the context of the South African situation.

E It is necessary for me to say, and I do so with great respect to my learned Colleague who decided *Botha's case supra* and to the Full Bench of the Eastern Cape Division who decided *Phato's case supra*, that in my judgment those cases were wrongly decided and ought not to be followed in the Transvaal.

F For the same reasons, I consider that the prayers relating to consultation with State witnesses should not be granted. The Courts have repeatedly given effect to the practice whereby an accused or his legal representative may only consult with a State witness with the consent of the prosecutor: *S v Hassim and Others* 1972 (1) SA 200 (N); *S v Mangcola and Others* 1987 (1) SA 507 (C); *S v Tjiho* 1992 (1) SACR 639 (Nm); and *S v Gquma and Others* (3) 1994 (2) SACR 187 (C). I see no reason on what is before me to conclude that the applicants will not be given a fair trial unless I were to depart from that practice in the instant case.

H The application is dismissed. I direct that the trial of the accused shall proceed on a date to be fixed by the Attorney-General.

I am of the view, however, that this application raises constitutional questions of such public importance that a ruling should be given by the Constitutional Court.

I The correct interpretation of s 241(8) of the Constitution has already been referred to the Constitutional Court by the Appellate Division in *S v Makwanyane en 'n Ander* 1994 (3) SA 868 (A).

The following questions are referred to the Constitutional Court for decision in terms of s 102(8) of the Constitution:

J 1. Whether a Court interpreting the Constitution is bound by the principles of *stare decisis* to follow the decision of a superior Court; or whether such a Court may hold that a decision of such superior

Court (other than the Constitutional Court) is *per incuriam* because it incorrectly interprets the Constitution.

2. Whether s 23 of the Constitution can be utilised by an accused in the exercise of the rights contained in s 25(3) of the Constitution; and if so
 - 2.1 whether the accused should have access to the police dossier; and if so,
 - 2.2 to what extent, under what circumstances and subject to what conditions (if any) such access should be exercised.
3. Whether any provision in the Constitution permits an accused to consult with prospective witnesses who have given statements to the police; and if so, under what circumstances and subject to what conditions (if any) such consultations should take place.

WAYLITE DIARY CC v FIRST NATIONAL BANK LTD

APPELLATE DIVISION

CORBETT CJ, SMALBERGER JA, KUMLEBEN JA, NIENABER JA and HARMS JA

1994 August 25; September 27

Case No 663/92

Copyright—Subsistence of—Copyright Act 98 of 1978, s 2(1) —Whether work a proper subject-matter for copyright protection —Question involves objective test in respect of originality and of 'work'—Two inquiries can become entwined—Permissible to have regard to consequences of recognition of copyright in work of doubtful substance.

Copyright—Subsistence of—In 'artistic work' within meaning of 'drawings' as defined in s 1(1) of Copyright Act 98 of 1978 —Appointment pages in printed diary—Whether such constituting 'drawings' or a 'chart' within meaning of 'artistic work' in Act—On common-sense approach and having regard to ordinary meaning of 'drawings', cannot be fairly said that appointment pages were drawings—Cannot also be fairly said that they were charts —Appointment pages not an artistic work entitled to protection.

Copyright—Subsistence of—In 'literary work' as defined in s 1(1) of Copyright Act 98 of 1978—Appointment pages in printed diary —Such not covered by term 'literary work'—Also not a 'compilation' within meaning of such word in definition of 'literary work'—For compilation to be subject of copyright, it should not be commonplace—So-called compilation of appointment pages clearly commonplace—Not a literary work entitled to copyright protection.

- A Whether an alleged work is proper subject-matter for copyright protection as envisaged in s 2(1) of the Copyright Act 98 of 1978 involves an objective test, both in respect of originality and 'work'; also that the two inquiries can become entwined. In assessing whether a work is entitled to protection, it is permissible to have regard to the consequences of the recognition of copyright in a work of doubtful substance. (At 650D–E.)
- B The appellant had in 1987 been commissioned by the respondent to provide it with 'field diaries' for the following year. The diary was allegedly designed by one C, a member of the appellant, and supplied to the respondent. Similar diaries were commissioned by the respondent from the appellant for 1989, 1990 and 1991. The respondent invited tenders for the supply of field diaries for 1992 and, although the appellant had submitted a tender, the respondent awarded the tender to another printing firm. The format of these diaries was, to all intents and purposes, identical to those produced by the appellant. The appellant thereupon applied in a Local Division for an order interdicting the respondent from infringing its copyright in the appointment pages of the diaries. The application was dismissed on the ground that the work in designing, drawing and composing the pages in which copyright was claimed was not 'original' within the meaning of that word in s 2(1) of the Act. The appointment pages in which copyright was claimed consisted of pairs of facing pages, each pair covering a particular week, beginning on a Monday. On the first line of the left-hand page appeared the month in English and Afrikaans as well as the number of the week. The days of the week were then listed in English and Afrikaans and dated on the same page, four horizontal lines of writing space being allocated for weekdays and two such lines each for Saturdays and Sundays. The right-hand page contained a number of lines for the making of notes and at the foot thereof was a calendar consisting of the current and the two succeeding months. The colours and typeface used followed the respondent's standard corporate identity specifications. In an appeal it was contended for the appellant that the sketch of the appointment pages prepared by C was an 'artistic work' as defined by s 1(1) of the Act because it was either a 'drawing' or a 'chart', that s 1(1) of the Act defined 'artistic work' as meaning, 'irrespective of the artistic quality thereof— . . . drawings . . .' and the word 'drawing' was defined as including 'any . . . chart . . .' It was also contended that the appointment pages were 'literary works'.
- E *Held*, that it could not, on any common-sense approach to the matter and having regard to the ordinary accepted meaning of the term, be fairly said that the appointment pages were drawings. (At 651C/D–D.)
- Held*, further, as to the contention that the appointment pages constituted a 'chart' (ie a 'sheet bearing information of any kind arranged in a tabular form'—*The Oxford English Dictionary* definition 3a), that the effect of the argument would be to blur the distinction between artistic and literary works in the light of the definition in s 1(1) of the latter, which encompasses 'tables and compilations': it could not be accepted that, fairly speaking, it could be said that the works in issue were charts. (At 651E and E/F–F/G.)
- G *Held*, further, that the appointment pages were not covered by the term 'literary work'. (At 651J–652A.)
- Held*, further, as to a contention that the appointment pages were a literary work because they consisted of a 'compilation' as intended in the definition of 'literary work' in s 1(1) of the Act, that the effect of the argument would be that, having regard to the fact that copying could be indirect and that an adaptation of a work was 'an "infringing act", anyone who saw the field diary and who wished to produce a diary having the basic layout of two facing pages, the one for daily entries and the other for notes, would infringe copyright: such a result would be so far-fetched that the Legislature could not have contemplated it. (At 652B and D–E.)
- H *Held*, further, applying certain *dicta* in *G A Cramp & Sons Ltd v Frank Smythson Ltd* [1944] AC 329 (HL) ([1944] 2 All ER 192), that 'there seems to be nothing that can properly be described as an "original literary work" in grouping together the information in the appointment pages and that not every compilation could claim to be an original literary work 'even in the pedestrian sense attributed to these words by the law'. (At 652F–G.)
- I *Held*, further, that, for a compilation to be the subject of copyright, it had not to be commonplace: the so-called compilation in the present case was clearly commonplace. (At 657B–C.)
- J

Held, accordingly, that the appellant had failed to establish that the appointment pages were either artistic or literary works for the purposes of the Act. (At 653C.) Appeal dismissed.

The decision in the Witwatersrand Local Division in *Waylite Diaries CC v First National Bank Ltd* 1993 (2) SA 128 (W) confirmed.

Appeal from a decision in the Witwatersrand Local Division B (Stegmann J), reported at 1993 (2) SA 128. The facts appear from the judgment of Harms JA.

A N Goodman SC for the appellant.

C E Puckrin SC (with him *A A Louw*) for the respondent.

The following authorities were cited in argument by counsel on both C sides:

Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192 (A) at 197A–B;

British Northrop Ltd and Others v Texteam Blackburn Ltd and Another [1974] RPC 57 (Ch) at 68;

Condé Nast Publications Ltd v Jaffe 1951 (1) SA 81 (C) at 86G–H;

Davis (J & S) Holdings Ltd v Wright Health Group Ltd [1988] RPC 403 at 412;

Elanco Products Ltd and Another v Mandops (Agrochemical Specialists) Ltd [1980] RPC 213 at 226;

Express Newspapers plc v Liverpool Daily Post & Echo plc [1985] FSR 306;

Frank Smythson Ltd v G A Cramp & Sons Ltd and the Surrey Manufacturing Co [1943] 1 All ER 322 (CA) at 324A, 329D–E;

G A Cramp & Sons Ltd v Frank Smythson Ltd [1944] AC 329 (HL) ([1944] 2 All ER 192) at 334, 337;

Hollinrake v Truswell [1894] 3 Ch 420 at 427–8;

Kalamazoo Division (Pty) Ltd v Gay and Others 1978 (2) SA 184 (C) at 190A–C;

Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 981B–G;

Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 WLR 272 ([1964] 1 All ER 465 (HL)) at 277–8;

Page v Wisden (1869) 20 LTR 435;

Pastel Software (Pty) Ltd v Pink Software (Pty) Ltd and Another (TPD, case No 12196/91, 25 July 1991, per Eloff JP);

Performing Right Society Ltd v Berman and Another 1966 (2) SA 355 (R) at 357F–H;

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E–635C;

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (A);

University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601 at 608;

William Hill (Football) Ltd v Ladbroke (Football) Ltd [1980] RPC 539 (CA) at 542, 543.

Blakeney and McKeough *Intellectual Property: Commentary and Materials* (1987) at 27, 44;

Copeling *Copyright and the Act of 1978* para 7;

Copinger and Skone James *Copyright* 13th ed paras 2.7, 3.27, 3.32;

- A *Cornish Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1981) at 326;
 Eddy *The Law of Copyright* at 29;
 Laddie, Prescott and Vitoria *The Modern Law of Copyright* paras 2.10, 2.33 *et seq*, and at 115 para 3.25;
- B *The Oxford English Dictionary* 2nd ed *sv* 'chart', 'drawing', 'literary'.
Cur adv vult.
Postea (September 27).

C **Harms JA:** This appeal relates to the subsistence of copyright in the appointment pages of a diary.

The appellant (the applicant in the Court below) is a close corporation carrying on business as a designer and producer of diaries. During the course of 1987 it approached the respondent bank ('FNB') with a view to providing the latter with diaries for the following year. In the event an agreement was reached in terms of which the appellant was to supply FNB with, *inter alia*, so-called 'field diaries' for its managers. A field diary is a pocket diary intended for the use of FNB's bank managers when not at the office. A field diary was then designed (by whom is in dispute) and about 3 000 were in due course supplied by the appellant to FNB.

D FNB's managing director was very pleased with the work and the appellant was commissioned to produce similar field diaries for 1989, 1990 and 1991. During the course of 1991, it seems, FNB invited tenders for the supply of field diaries for 1992. The appellant submitted a tender, at the same time pointing out that the diaries had been designed by the appellant and claiming that copyright in the diaries vested in it. FNB ignored the implied warning and awarded the tender to another printing concern. The format of these field diaries was, to all intents and purposes, identical to that printed by the appellant.

E Relying on its alleged copyright, the appellant applied during March 1992 to the Witwatersrand Local Division for an order interdicting FNB from infringing its copyright, not in the diary as such, but in respect of the appointment pages only. (The prayer for the delivery for destruction of all the field diaries in FNB's (or their managers') possession was abandoned.) The application was dismissed by Stegmann J in a judgment reported at 1993 (2) SA 128 (W). It was in his view not necessary to consider the conflicting allegations relating to authorship; he assumed that the appointment pages were either artistic or literary works; but he concluded that the work in designing, drawing and composing the pages in which copyright is claimed was not original (within the meaning of that word as used in s 2(1) of the Copyright Act 98 of 1978 ('the Act')) since it did not have the 'quality of meritorious distinctiveness' (at 136C). He refused leave to appeal but leave was granted in consequence of a petition to the Chief Justice.

F The field diary in issue is vertical in layout. On the title page FNB's logo is printed in so-called corporate colours, with the year and the words 'field diary' and 'velddagboek'. On its reverse side appears a claim that it had been 'designed and produced by the Waylite Diary Co', the latter's

telephone number is given and there is a copyright claim. The next page is entitled 'Identification/Identifikasie' and has space for the insertion of personal information. Subsequent pages provide lists of public holidays and school terms, some conversion and distance tables, calendars for the current and following year, the year 'at a glance' and space for important dates and notes. The last few pages make provision for the following year 'at a glance' and leave space for telephone numbers. As indicated, the appellant (for no given reason) did not claim copyright in any or all of this.

The format of the appointment pages in which copyright is claimed, consists of pairs of facing pages, each pair dealing with a particular week, beginning on a Monday. The left-hand page furnishes on the first line the name of the month in English and Afrikaans and also the number of the week. The days of the week are then listed (also in both languages) and dated on the same page, with four horizontal lines of writing space for weekdays and two horizontal lines each for Saturday and Sunday. The right-hand page has a number of lines for the making of notes and at the foot a calendar consisting of the current and the two succeeding months. The colours and typeface used were standard in terms of FNB's corporate identity specifications.

Mr Cianfanelli, a member of the appellant and the alleged author of the appointment pages, stated in the founding affidavit that, as far as he could recall, he had spent about 12 hours before arriving at the 'preferred layout and format'. This involved preparing a sketch on tracing paper and crasing and adding *indicia* to try out numerous different formats and layouts. He did not, he said, base his design on any existing diary and had only utilised his own skill, knowledge and expertise.

The types of works listed in s 2(1) of the Act are 'eligible for copyright' provided they are 'original'. The categories relevant to this case are artistic and literary works. The subsection presupposes, as a general rule, two different inquiries: first, whether the work relied upon falls within one of the categories and, if so, whether it was original. But, as pointed out by Blakeney and McKeough *Intellectual Property: Commentary and Materials* (1987) at 27:

"To some extent the concept of what constitutes a "work" within the Act and the concept of originality are intertwined. It is difficult to discuss what amounts to a "work" without discussing originality, since without a sufficient degree of "originality" a "work" will not come into existence."

Counsel for the appellant submitted that this statement is incorrect because it does not take account of the fact that the question of whether a work is, say, an artistic work is an objective question, whereas originality involves a subjective inquiry. I am not convinced that the latter part of the submission is correct. While it is true that the actual time and effort expended by the author is a material factor to consider in determining originality, it remains a value judgment whether that time and effort produces something original.

To illustrate the point reference may be made to *Francis Day and Hunter Ltd v Twentieth Century Fox Corporation Ltd and Others* [1940] AC 112

A (PC). * The copyright in the title of a song (written and composed by Fred Gilbert) called 'The Man Who Broke the Bank at Monte Carlo' was an issue in the case. The title was subsequently used by the defendants for the name of a film. Lord Wright stated in this regard (at 123):

B 'As a rule, a title does not involve literary composition, and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale, and of so important a character, as to be a proper subject of protection against being copied. . . . But this could not be said of the facts of the present case. There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title, though it is of the most obvious. To "break a bank" is a hackneyed expression, and Monte Carlo is, or was, the most obvious place at which that achievement or accident might take place. The theme of the film is different from that of the song, and their Lordships see no ground in copyright law to justify the appellants' claim to prevent the use by the respondents of these few obvious words, which are too unsubstantial to constitute an infringement, especially when used in so different a connection.'

D It is implicit in this statement that whether an alleged work is proper subject-matter for copyright protection involves an objective test, both in respect of originality and 'work'; also that the two inquiries can become entwined. And the last sentence quoted indicates that in assessing whether a work is entitled to protection, it is permissible to have regard to the consequences of the recognition of copyright in a work of doubtful substance.

E It was submitted on behalf of the appellant that the sketch prepared by Mr Cianfanelli of the appointment pages is an 'artistic work' as defined by s 1(1) of the Act, because it is either a 'drawing' or a 'chart'. The subsection, as far as is relevant, provides that an artistic work 'means, F irrespective of the artistic quality thereof— . . . drawings' and the term 'drawing' is defined to include any diagram or chart. Reliance was in this connection placed on certain dictionary meanings of the words 'drawing' and 'chart'. In regard to the use of dictionaries generally, and more particularly counsel's reliance on them, it may be useful to refer to a *dictum* G of Margo J in *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council* 1972 (1) SA 88 (W) at 94G that

'(d)ictionary definitions serve to mark out the scope of the meanings available for a word, but the task remains of ascertaining the particular meaning and sense of the language intended in the context of the statute under consideration'.

H *The Oxford English Dictionary* ('OED') gives as one meaning for 'drawing', '(t)hat which is drawn; a delineation by pen, pencil, or crayon; a representation in black and white, or in monochrome; a sketch'. Applying this definition, counsel submitted that the lines and the layout of the appointment pages form a drawing which is, on the facts of this case, an 'artistic work'. Under 'layout' counsel meant the positioning of the words I and numbers on the pages, the spacing of the lines, their colours and the font selected. It was also argued that a single line or the lines on an exercise book's pages could similarly be artistic works. I am of the view that this submission is not correct. The Court in *Page v Wisden* (1869) 20 LTR 435

J * Also reported at [1939] 4 All ER 192.

at 436 was more forthright when it stated that 'to say that a particular A mode of ruling a book constituted an object for a copyright is absurd'. The *OED's* definition must be read in context. It is followed by a number of examples of the use of the word in the defined sense, all dealing with drawings in the nature of paintings or sketches.

This does not mean that a drawing must, for the purposes of the Act, be B similar to a painting or sketch. A simple drawing may, obviously, be the subject of copyright, provided it can 'fairly be called . . . a drawing of any kind' (*per* Megarry J in *British Northrop Ltd and Others v Texteam Blackburn Ltd and Another* [1974] RPC 57 (Ch) at 68 line 41). The learned C Judge was there dealing with engineering drawings of parts of weave looms. Some, he said, were simple, but they were all carefully drawn to scale with precise dimensions. He was of the *prima facie* view that they were therefore artistic works because, fairly speaking, they were drawings. Can it fairly be said that these appointment pages are drawings? On any common-sense approach to the matter and having regard to the ordinary D accepted meaning of the term, I think not. (Compare the approach adopted by Whitford J in *J & S Davis (Holdings) Ltd v Wright Health Group Ltd* [1988] RPC 403 (Ch) at 410 lines 26–50 with regard to the meaning of 'sculpture' and at 412 lines 30–35 in relation to 'simple' drawings.)

The submission that these pages constitute a 'chart', was solely based on E the *OED's* definition No 3a namely '(a) sheet bearing information of any kind arranged in a tabular form'. Once again, the examples given by the *OED* do not support the submission. They all relate to titles of works such as the 'Historical Chart of the Sovereigns of England'. The effect of the argument would be to blur the distinction between artistic and literary F works in the light of the definition of the latter (also in s 1(1) of the Act) which encompasses 'tables and compilations'. I do not accept that, fairly speaking, it could be said that the works in issue are charts (*cf Hollinrake v Truswell* [1894] 3 Ch 420 (CA)).

In relation to literary works reference was made, once again, to the G *OED*, this time for the proposition that 'literary' means, among others, '(p)ertaining to the letters of the alphabet'. There is an annotation against this entry to the effect that the meaning was obsolete. On the other hand, it must immediately be conceded that the word is not used in its ordinary H meaning in the Act, a fact amply borne out by what the Act includes under this term. In *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, Peterson J had to consider whether papers set by H examiners were literary works. He said (at 608):

'In my view the words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the word "literature" in political or electioneering literature and refers to written or printed I matter.'

This *dictum*, read in its context, does not say that anything written or J printed is a literary work. Had the position been otherwise, there would not have been any need for the Legislature to list anything from novels to compilations. It is not necessary for the purposes of this case to define a 'literary work' any closer since I have not been persuaded that these pages

A are covered by that term. A similar conclusion was reached by the Court of Appeal in *Frank Smythson Ltd v G A Cramp & Sons Ltd and The Surrey Manufacturing Co* [1943] 1 All ER 322 (CA).** The Court was there also concerned with the layout of the body of a diary and found that that part of it was not in any sense a literary work to which copyright could be attributed.

B It was argued, seemingly in the alternative, that these pages are a literary work because they consist of a 'compilation'. What was compiled, according to the submission, was the selection of the days of the week represented on the one page and the decision to place an abbreviated calendar of three months at the foot of the next page. It seems to me implicit in the argument that a layout and a compilation are the same, a point of view rejected rather laconically by Lord Denning in *William Hill (Football) Ltd v Ladbrooke (Football) Ltd* [1980] RPC 539 (CA) at 545 line 5. In any event, the information 'compiled' for the 1988 diary could not be the same as that 'compiled' for the 1992 diary. The dates had all to be compiled afresh. The effect of the argument would be that, having regard to the fact that copying can be indirect and that an adaptation of a work is an infringing act, anyone who sees the field diary and who wishes to produce a diary having the basic layout of two facing pages, the one for daily entries and the other for notes, will infringe copyright—a result so far-fetched that the Legislature could not have contemplated it.

E The *Frank Smythson* case went on appeal to the House of Lords.*** At that stage the author had abandoned any further reliance on the appointment pages of the diary in issue. What remained in contention was the claim to copyright in a collection of tables at the beginning of the diary. The author was unsuccessful. Viscount Simon LC came to the conclusion (at 335) that 'there seems to be nothing that can properly be described as an "original literary work" in grouping together this information' and Lord MacMillan (at 337) pointed out that not every compilation can claim to be an original literary work 'even in the pedestrian sense attributed to these words by the law'.

G These *dicta* appear to me to be germane to the facts of this case. Counsel was unable to distinguish them, nor was it submitted that the case had been decided incorrectly. It also appears to be in consonance with other English case law which, in the absence of local authority, is of considerable persuasive force. For instance, in *Leslie v Young & Sons* [1894] AC 335 (HL), Lord Herschell said (at 340):

H 'The mere publication in any particular order of the time-tables which are to be found in railway guides and the publications of the different railway companies could not be claimed as a subject-matter of copyright. Proceedings could not be taken against a person who merely published that information which it was open to all the world to publish and to obtain from the same source.'

I And at 341–2 he drew this contrast:

'But there is another part of the case which strikes me as of a very different character. . . . It appears to me the only part of the work which can be said to

** Also reported at [1943] 1 Ch 133.

*** *G A Cramp & Sons Ltd v Frank Smythson Ltd* [1994] AC 329 (HL) ([1944] 2 All ER 92).

indicate any considerable amount of independent labour. I refer to the part . . . A containing the information with regard to excursions. It seems to me that this was a compilation containing an abridgment of information of a very useful character. . . .

In other words, and relying once again on Lord Denning, for a compilation to be the subject of copyright, it must not be a commonplace selection (*William Hill* case *supra* at 546 lines 7–8). (This case was decided in 1962 but was first reported in 1980. His decision that copyright subsisted in the football coupon reproduced at 542 of the report was upheld in *Ladbrooke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 (HL).) In my judgment the so-called compilation was clearly commonplace.

To sum up, I am of the view that the appellant has failed to establish that the appointment pages are either artistic or literary works for purposes of the Act. It is accordingly unnecessary to consider separately whether they were original. The other issues raised during argument also fall away. In consequence the appeal must be dismissed and the order is:

'The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.'

Corbett CJ, Smalberger JA, Kumleben JA and Nicnaber JA concurred.

Appellant's Attorneys: *Adams & Adams*, Johannesburg; *Honey & Partners*, Bloemfontein. Respondent's Attorneys: *D M Kisch Inc*, Johannesburg; *Naudes*, Bloemfontein.

KOMMISSARIS VAN BINNELANDSE INKOMSTE v ABSA BANK BPK

APPÈLAFDELING

BOTHA AR, E M GROSSKOPF AR, NESTADT AR, VAN DEN HEEVER AR en NICHOLAS Wn AR

1994 September 1, 30

Saaknr 28/93

Estoppel—Res judicata—Geskilpunt-estoppel—Wanneer toepaslik—Uitdrukking 'geskilpunt-estoppel' eintlik net 'n gerieflike beskrywing van gevalle waar daar streng gesproke nie aan tradisionele vereistes van res judicata voldoen word nie omdat in twee betrokke gedinge dieselfde regshulp nie gevorder word op dieselfde eisoorsaak nie, maar waar verweerder tog suksesvol kan wees—Streng gemeenregtelike vereistes vir verweer van res judicata (in die besonder eadem res en eadem petendi causa) moet nie as onwrikbare reëls toegepas word nie—Geen vasgestelde stel