

## **PETER-ROSS v RAMESAR AND ANOTHER 2008 (4) SA 168 (C)**

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<b>Citation</b>	2008 (4) SA 168 (C)
<b>Case No</b>	2064/06
<b>Court</b>	Cape Provincial Division
<b>Judge</b>	Desai J
<b>Heard</b>	March 14, 2008
<b>Judgment</b>	March 14, 2008
<b>Counsel</b>	WG Burger SC for the applicant. O Rogers SC for the respondents.
<b>Annotations</b>	<a href="#">Link to Case Annotations</a>

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### **Flynote : Sleutelwoorde**

Intellectual property - Copyright - Literary work - Author - Joint author - Who is - Article dealing with outcome of certain scientific research on which writer and claimant having collaborated from outset with view to co-authoring article - Claimant not writing or dictating any part of article - Claimant and writer joint authors.

### **Headnote : Kopnota**

The applicant prepared the draft of an article which dealt with certain scientific research on which she and the first respondent had been collaborating, under the auspices of the second respondent, and cited both herself and the first respondent as authors of the article. When she submitted the final article for publication in an industry journal, citing herself as sole author of the article, the first respondent objected to the publication of the article on the ground that he believed the article to embody work done by him and the applicant jointly. In a bid to achieve publication of the article, the applicant launched the present application in the High Court for a declaratory order that she had the sole copyright in the article and its draft. The respondent resisted the application principally on the basis that he was joint author of

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the article in that, even though he had not contributed to the written formulation of the article, it was a product of his and the applicant's scientific collaboration in which they engaged with the common intention of producing an article of joint authorship.

*Held*, that under s 23(1), read with s 6(a), of the Copyright Act 98 of 1978, the article would unlawfully infringe the first respondent's joint copyright in the draft if (i) the first respondent was joint author of the draft and (ii) the article copied a significant portion of the draft. (At 171B - C.)

*Held*, further, as to (i), that the evidence established that the parties collaborated from the outset and that they envisaged co-authoring an article embodying the outcome of their research. (At 172B - C.)

*Held*, further, that where the ideas recorded were the product of a collaborative endeavour and the one collaborator undertook the physical recording of the ideas, the

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collaborators could properly be regarded as being joint authors. What distinguished that type of case from the situation where it was said that there was no copyright in ideas was that there was collaboration from the outset and the contributing of ideas was directed towards the creation of a literary work. (At 176D - E.)

*Held*, further, as to (ii), that it appeared that the first draft had been reproduced almost in its entirety in the article. The article also contained certain additional text on which the parties had collaborated. (At 173F.)

*Held*, further, that it followed that the article unlawfully infringed the first respondent's joint copyright in the draft. (At 176F - G.)

*Held*, further, that since almost the entire draft had been copied in the article, the applicant was not entitled to a declaration that she was the owner of the copyright in the article. (At 176I - J.) Application dismissed.

*Semble*: The article, like the draft, was a work of collaboration. The additional text, while textually separable from the reproduced text, could not be regarded as something to which the applicant exclusively contributed. The additional text did not represent new scientific content but only a narrative recordal of what was clearly in the figures contained in the draft. The applicant and the first respondent were thus co-authors not only of the reproduced text but also of the additional text, and thus of the whole article. (At 177C - E.)

## **Cases Considered**

### **Annotations**

#### Reported cases

##### Foreign cases

*Brighton v Jones* [2004] EWHC 1157 (Ch): dictum in para [63] applied

*Cala Homes (South) Ltd and Others v Alfred McAlpine Homes East Ltd* [1995] FSR 818 (Ch): applied

*Donoghue v Allied Newspapers Ltd* [1937] 3 All ER 503 (Ch): distinguished

*Heptulla v Orient Longman Ltd and Others* [1989] FSR 598: applied

*Sweeney v MacMillan Publications Ltd* [2002] RPC 35: referred to.

## **Statutes Considered**

### Statutes

The Copyright Act 98 of 1978, ss 6(a) and 23(1): see *Juta's Statutes of South Africa 2006/7* vol 2 at 2-198 and 2-202.

## **Case Information**

Application for a declaratory order that the applicant had sole copyright in particular article. The facts appear from the judgment of Desai J.

*WG Burger SC* for the applicant.

*O Rogers SC* for the respondents.

DESAI J

*Cur adv vuit.*

*Postea* (March 14).

### Judgment

#### **Desai J:**

This is a rather unseemly wrangle between two academics at the University of Cape Town (UCT), the second respondent in these proceedings. The applicant, a consultant psychiatrist, is a senior lecturer at the said university. The first respondent, a geneticist, is a professor and, *inter alia*, the director of the university's Human Genetics Research Unit.

In 1996 the division of Human Genetics at UCT launched a research project entitled *The Molecular Genetics of Bipolar Disorder*. First respondent leads the project. It focuses on the connection between bipolar psychiatric disorders and the genetic make-up of the patients. The applicant joined the project in 2001. Her principal function was to explore first respondent's idea that the genetic location of bipolar disorders can be improved by concentrating on patients who were not only bipolar but also had some other genetic disorder.

The applicant and the first respondent worked together in developing this idea until early 2005. There is some dispute as to the nature and extent of their collaboration. I shall revert to this aspect in due course. In any event, a draft article (the first draft) was prepared by the applicant at the end of 2004. The paper dealt with the research being done and both the applicant and the first respondent were cited as its authors.

The working relationship between the applicant and the first respondent disintegrated thereafter. The breakdown in their relationship was precipitated by the fact that the applicant wanted to publish the hypotheses as soon as possible while the first respondent was reluctant to do so. He was of the view that more empirical evidence in support of the hypotheses had to be obtained before publication.

On 20 January 2006 the applicant informed the first respondent that an article she had written had been submitted to and accepted by *Molecular Psychiatry (MP)*, for publication in March 2006. Though the first respondent did not see the article at that stage, he believed that the article embodied work done by him and the applicant jointly. This belief was communicated to a Dr Licinio at *MP* and the publication of the article was stopped.

The applicant then launched this application with the stated purpose of achieving the publication of the aforementioned article. However, she seeks herein a declaratory order to the effect that she has the sole copyright in the article and its accompanying article. The first respondent resists the application principally on the basis that he is the joint author of the article. While he did not contribute to the written formulation of the article, first respondent contends that it is a product of scientific collaboration with the common intention of producing an article of joint authorship.

DESAI J

As Mr O Rogers SC, who appeared on behalf of the first respondent, has pointed out,

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the declarator sought is singularly inappropriate for applicant's said purpose. The editors of *MP* require clearance from UCT before publishing the article. It is UCT, and not this court, which is required to assess questions of appropriate academic behaviour. An order by this court that the applicant is the owner of all copyright in and to the disputed article, would not establish that she is legally entitled to publish the article. If the first respondent is a joint author of the first draft and the *MP* article copies a significant portion of the said draft, the *MP* article would unlawfully infringe the first respondent's joint copyright in the first draft. (See s 23(1) of the Copyright Act 98 of 1978 (the Act) read with s 6(a).) Even if the said author is in law the owner of the copyright, it is inconceivable that any reputable academic journal would publish the article in such circumstances. It accordingly seems that the order sought by the applicant in these proceedings would not have any practical effect. This alone may constitute a sufficient basis for exercising my discretion in favour of the first respondent.

The other respondent herein, UCT, has elected to abide the decision of this court. However, prior to the commencement of these proceedings, it set up a committee of inquiry with professor SR Benatar as its chairperson. The committee concluded that though the applicant was not guilty of scientific misconduct, her conduct in relation to the first respondent constituted 'ethical misbehaviour in the research context'. With regard to the authorship of the article, it found that first respondent had met one of the requirements for authorship and had been deprived of the opportunity to make further contributions. The findings of the committee are to be reviewed by a higher-level committee. The editors were notified of the outcome of the Benatar Committee's findings. With regard to the said findings I note first respondent's comment that the applicant had not made the first draft available to the Committee. If it had been available, the Benatar Committee may well have found the applicant guilty not merely of ethical misbehaviour but of scientific misconduct in the strict sense.

The facts and circumstances which give some idea of the nature of the relationship between the parties and the extent of their collaboration warrant noting.

First respondent was instrumental in causing applicant to be invited to join the project. Over the period 2001 to 2005 they spent 'hundreds of hours' developing the hypotheses which lay at the heart of the research. They became increasingly excited at the revolutionary effect which their research might have on the classification and treatment of, and development of drugs for, a range of psychiatric disorders.

The hypotheses were developed jointly. Neither of them could have developed the hypotheses without the active participation of the other - the applicant as a psychiatrist and the first respondent as a geneticist.

Applicant and first respondent knew that for peer review purposes their research would have to be published in a leading medical journal or

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presented at a major international conference or both. According to first respondent it was applicant's responsibility to produce the draft of an article. She would come to first respondent's office with a portion of the draft which would be debated at length. Their discussions often involved line-by-line scrutiny and revision of the draft. First respondent's inputs would be recorded on the draft. During this period the interaction between them took place both orally and by way of emails.

Several factors corroborate first respondent's contention that a co-authored article

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embodying the outcome of their research was envisaged by the parties.

The emails which passed between them graphically illustrate what was intended. I quote from a few of the emails from applicant to the first respondent to illustrate the point:

27 August 2003:

Please never apologise . . . for not being a clinician . . . without your constant encouragement and probing questions and scientific approach and generosity of spirit I would not have travelled the long distance we have covered thus far together . . . this is not a distance that you can travel alone . . . it is only when we combine our talents and work and fly in the same direction that we will have the energy to fly the long distance that our destiny calls us to travel.  
. . .

16 September 2003:

At last the name . . . the title of our *Nature* article . . . *Bipolar Spectrum Genome*.

12 November 2003:

You know that I do not want to discuss the 'S' word [ie Schizophrenia] . . . but that we should be so lucky to have this American group do this (preliminary) paper which I think will assist us with compiling a subsection in our article on founder population. . . .

17 May 2004:

I am continuing to work and to think about all aspects of the search for psychiatric genes and the possible consequence underlying pathophysiology . . . for our paper . . . perhaps with a title of . . . identifying possible new candidate genes involved in psychiatric disorders.

On 8 November 2004 the applicant concluded an agreement with one Karen Adamson in respect of artwork for the article. The terms of the agreement are recorded in a handwritten document signed by the applicant. It indicates that drawings are for an article by the applicant and the first respondent. It also expressly records that the 'art belongs to both parties', namely the applicant and the first respondent. A similar handwritten agreement was concluded with one Angela Ashley on 11 November 2004 for editing the article. It is also signed by the applicant and in express terms records that the article is by the applicant and the first respondent.

Further corroboration for the contention that the research and the resultant article and invention, if such, belonged to the applicant and

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first respondent jointly, is to be found in the Invention Disclosure Form submitted to UCT Innovation. Believing that their findings might be patentable, they jointly approached - on applicant's own version - lawyers attached to UCT Innovation and were advised to complete the disclosure form. It indicates that both the applicant and the first respondent are the inventors. The document was handed to UCT Innovation by the applicant personally or, at least, with her consent.

The first draft in fact bears the name of the first respondent as co-author. In her founding papers no mention is made by the applicant of the existence of any joint article. She conveys the impression in her founding papers that first respondent's role was confined to discussions about testing hypotheses empirically. She also suggests that

work on the article effectively started only after the relationship between the parties had allegedly broken down. When faced with exposure, the applicant, in her replying papers, offers a somewhat contrived explanation for citing the first respondent as co-author. She alleges that he was cited as such because of her admiration and respect for him and her belief that it was a convention to include the name of one's head of department. In the same affidavit applicant concedes that 'gift authorships' are regarded in academia as unethical and a practice to be eliminated. It seems more likely, as *Rogers SC* submitted, that first respondent's name was included because applicant believed that he had indeed made a material contribution.

It seems that the first draft is reproduced almost in its entirety in the *MP* article. No original skill or labour went into the copying of the reproduced text. The copied portions are set out in some detail in first respondent's supplementary answering affidavit. These allegations are not disputed by the applicant in her reply. The *MP* article also contains additional text which, according to the first respondent, is the detailed technical description of the hypotheses summarised and depicted schematically in the figures, which have not been materially changed since last seen by him. First respondent contends that it is the technical detail which occupied most of the many hours he and the applicant spent together from 2001 onwards.

First respondent does not allege that he did any work on the *MP* article. His claim to co-authorship of the said article is not based on an allegation that he wrote or dictated any part of the article. It is premised on the contention that the article contains the greater part of the first draft to which he did contribute. In this regard, Mr *WG Burger SC*, who appeared on behalf of the applicant, argued that the first respondent cannot point to a single sentence in the first draft which he can claim to be his own nor is he able to say that he formulated any significant portion of the draft which the applicant took down as his scribe. According to *Burger SC* first respondent cannot be a joint author of the article as he did not make any contribution to actually writing it. He argued that there is no copyright in ideas or suggestions, only in the material form in which ideas are cast. It follows that a person who merely makes suggestions and criticisms cannot qualify as a joint author for copyright purposes.

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In support of the foregoing proposition, *Burger SC* referred, inter alia, to *Donoghue v Allied Newspapers Ltd* [1937] 3 All ER 503 (Ch). In this matter newspaper articles intended for consumption by horse-racing enthusiasts were based upon the anecdotes recounted by a famous jockey. The evidence did not indicate that the jockey - the plaintiff - and the author of these articles were intended to feature as co-authors, or that the writer simply wrote down the plaintiff's words. The court found that the plaintiff did not have the literary ability to write articles for any newspaper at all and presumably his ability to comment on the merits of the resultant work was rather limited. Though the claim to authorship or joint authorship was rejected, the judge did so 'rather unwillingly'.

Unlike *Donoghue* (supra) first respondent was not in the position of a non-writer conveying information to an author. First respondent - unlike the applicant - has published extensively in South Africa and internationally. Quite patently he has the literary skills to draft scientific articles in his field of expertise. He was the senior figure in a scientific collaboration with the necessary skills to review and comment upon applicant's draft. Moreover from the outset an article of joint authorship was envisaged

by the parties.

*Rogers SC* has referred the court to a decision of the High Court of India in which a different result to *Donoghue* was reached. The case of *Heptullah v Orient Longman Ltd and Others* [1989] FSR 598 concerned the authorship of the book *India Wins Freedom*. One Kabir wrote the book in English. It was based on recollections communicated to him by one Azad in Urdu. Azad was able to read English. He worked through Kabir's draft and suggested amendments. The court held that Azad and Kabir were joint authors. In reaching his conclusion Kirpal J remarked as follows:

A literary work consists of matter or material which is expressed in a language and is written down; both the subject matter and the language are important. It is difficult to comprehend, or to accept, that when two people agree to produce a work where one provides the material, on his own, and the other expresses the same in a language which is presentable to the public then the entire credit for such an undertaking or literary work should go to the person who has transcribed the thoughts of another. To me it appears that if there is intellectual contribution by two or more persons, pursuant to a pre-concerted joint design, to the composition of a literary work then those persons have to be regarded as joint authors.

The other cases cited by applicant's counsel relate either to musical works or stage plays and are clearly distinguishable on their facts. They do not support the sweeping proposition that in our law a co-author's contribution can never be confined to ideas as distinct from expression. In fact, in *Brighton v Jones* [2004] EWHC 1157 (Ch) Park J comments in passing as follows:

Copyright can subsist in a story or a plot, so that if what happened in rehearsals was that Miss Brighton determined what the plot of the play was to be (or Miss Brighton and Miss Jones determined in collaboration

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what it was to be), and then Miss Jones actually wrote the words to give effect to the plot, I can see that Miss Brighton might have been a joint author.

Similarly in *Cala Homes (South) Ltd and Others v Alfred McAlpine Homes East Ltd* [1995] FSR 818 (Ch) Laddie J held that to have regard merely to 'who pushed the pen' is to take too narrow a view of authorship.

The proposition that in order to qualify him as a co-author the contribution of a collaborator has to relate to the form of the work rather than its intellectual content, is not always correct. Though there is no copyright in ideas, a literary work is most often a vehicle for ideas. Once ideas have been captured in words on paper the ideas are an important part of the literary work.

In this instance the first draft is the product of agreed collaboration with a view to publishing a co-authored article embodying scientific hypotheses and research. It is a work in which the scientific content was of greater importance than literary expression. Where the essence of the work is scientific, unlike a novel or a play, the precise mode of expression is of far lesser importance. The major contribution of both parties was in the realm of scientific ideas rather than literary formulation. Lesser expertise was required for the formal recording of these ideas. First respondent's contribution, however, was not limited to his substantial contribution to the scientific ideas embodied in the first draft. Through his critical review of the earlier drafts he also made a material contribution to the form of the said article.

With regard to copyright, the MP article is a 'literary work' as defined in the Act and the Copyright Juta & Company

graphics made at the end of the article appear to be 'artistic works'. It is not disputed by the applicant that separate copyright may rest in the first draft, even though the draft was not in a form ready for commercial exploitation (see *Sweeney v MacMillan Publications Ltd* [2002] RPC 35 at 666 - 9).

The Act defines joint authorship in s 1 as 'a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors'.

An author in the Act is 'the person who first makes or creates the work'.

It seems that joint authorship exists where two or more people collaboratively 'make' or 'create' a work by way of contributions which are not separable. *Burger SC* suggested that in order to qualify as a joint author, the collaborators' contribution must be 'significant'. The word 'significant' is not used in the statutory definition of 'work of joint authorship'. The cases which have used the word appear to convey the idea that the contribution should not be so trifling as to be disregarded as *de minimis*. In any event the authors of Copinger & Skone *James on Copyright* 14 ed para 4.4 point out that the contributions of co-authors need not be equivalent or of the same kind and expressly recognise that there can be joint authorship

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where two people make a contribution to the work's final expression, one being the person actually responsible for committing the work to paper, the other providing an input to what is recorded.

A person can 'make' or 'create' a work by dictating to a scribe or, at the other end of the spectrum, a person may verbally express an idea which another then embodies in a written form. In the latter instance the person who does the writing is the sole author. It is this type of case in which one finds dicta to the effect that there is no copyright in ideas.

In between these two situations are a variety of scenarios where it would be unwise to focus exclusively on contributions to the physical expression of the work. One such case is where two persons agree they will research and co-author an article. The ideas are quite obviously more important to the collaborators if the article is on a scientific topic. If they research and settle on the ideas to be recorded and it is left to one of them to produce a draft, there seems to be no reason why they should not be recognised as having jointly 'made' or 'created' the draft.

Where the ideas to be recorded are the product of collaborative endeavour and the one has undertaken the physical recording of the ideas the collaborators could properly be regarded as having jointly 'made' or 'created' the work. What distinguishes this type of case from the situation where it is said that there is no copyright in ideas is that there is collaboration from the outset and the contributing of ideas does not occur *in vacuo* but is directed towards the creation of a literary work.

The *MP* article, as I have already indicated, comprises the reproduced text plus the additional text. These two components of the *MP* article are clearly discernable. For the purposes of disposing of the present application it is not necessary for me to decide whether the first respondent is the co-author of the whole of the *MP* article. It is enough that he is the co-author of the reproduced text. The use in the *MP* article of the reproduced text infringed the copyright in the first draft held jointly by the applicant and



the first respondent (see s 23(1) read with s 6(a) of the Act). Applicant's co-authorship of the first draft did not entitle her to reproduce the draft without the first respondent's consent.

Insofar as it is suggested that applicant's sole copyright in the *MP* article would be jeopardised only if the first draft formed a substantial or significant part of the *MP* article, such a proposition would not be correct. If copyright in the first draft rests in the applicant and first respondent as co-authors, such copyright would be violated by the reproduction of a substantial part of the first draft. It is irrelevant whether the copied text constituted a substantial part of the *MP* article (see s 6(a) read with s 1(2A); *Brighton and Another v Jones* (supra) para 63).

It seems that almost the entire first draft has been copied in the *MP* article. If this is correct, the applicant is not entitled to a declaration that she is the owner of the copyright in the *MP* article. Applicant's counsel endeavoured to meet this point by arguing that the first respondent made no significant contribution to the bulk of the material contained in the

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*MP* article and, in the circumstances, cannot be viewed as its co-author. However, if it is accepted that the first draft is itself a 'literary work' and the reproduced text in the *MP* article is simply a copying thereof, it is sufficient to preserve the first respondent's status as co-author of the reproduced text.

As *Rogers SC* has correctly pointed out the reproduced text is hardly insignificant. Apart from introducing the hypotheses and placing them in their scientific context, the reproduced text summarises the hypotheses themselves. It also includes all the figures which set out in dense schematic format the scientific details of the hypotheses. The *MP* article to a large extent merely reproduces in full narrative the detail already contained in the figures.

It is accordingly not necessary for me to decide whether the first respondent is a co-author of the entire *MP* article. I may, however, point out that the *MP* article was the end-product of the collaboration to which the parties had committed themselves in their agreement. The applicant could not change this by unilateral conduct. In any event, the *MP* article, like the first draft is a work of collaboration. The additional text, while textually separable from the reproduced text, cannot be regarded as something to which the applicant exclusively contributed. The additional text does not represent new scientific content but only a narrative recordal of what was clearly in the figures contained in the first draft. The applicant and the first respondent are thus co-authors not only of the reproduced text but also of the additional text, and thus of the whole *MP* article.

Assuming that the applicant has copyright in the *MP* article, *Rogers SC* has argued that on ground of public policy I may decline to recognise the copyright. The arguments advanced in this regard are compelling especially where they relate to the applicant's breach of the agreement between the parties. However, in the light of the conclusion to which I come, it is unnecessary for me to deal with this aspect any further.

In the result I am of the view that the applicant is not entitled to an order that she has the sole copyright of the *MP* article. The application is accordingly dismissed with costs, including those occasioned by the enrolment of the matter on 10 and 24 March 2006.

Applicant's Attorneys: *Jan S de Villiers.*

Respondents' Attorneys: *Brian Bacon & Associates.*

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