

A Another 1938 CPD 449 op 455 geregverdig was, "when the effect of such an order would be to alter the rights which creditors had prior to such order being granted". Kyk ook De Wet en Yeats *Kontraktereg en Handelsreg* 4de uitg op 526 en sake aangehaal in note 885.

B Al sou ek verkeerd wees in my kritiek op beslissings waarin 'n vennootskap gesekwestreer is waar nie al die vennote tegelykertyd gesekwestreer is nie, maar slegs sommige van hulle, is dit in elk geval na my mening voor die hand liggend dat die Insolvensiewet as sulks nooit gemik was op 'n situasie waar daar nie 'n enkele natuurlike persoon is wat 'n vennoot is of die vennootskap as sulks kan verteenwoordig nie. Die woordomskeywing van skuldenaar in art 2 van die Wet lees as volg:

C "Skuldenaar in verband met die sekwestrasie van 'n skuldenaar se boedel beteken 'n persoon of vennootskap of die boedel van 'n persoon of vennootskap wat 'n skuldenaar volgens die gewone betekenis van die woord is, met uitsondering van 'n regs persoon, maatskappy of ander vereniging van persone wat kragtens die Wet op Maatskappye gelikwedeer kan word."

D Alhoewel dit so is dat maatskappye 'n vennootskapsverhouding kan aangaan, soos reeds genoem, en alhoewel so 'n vennootskap nie uitdruklik uitgesluit word deur hierdie woordomskeywing nie, is dit baie duidelik uit die bepalings van die Insolvensiewet dat dit nooit boedel was om te handel met enige vennootskap waar nie 'n enkele van die vennote 'n natuurlike persoon is nie. Mnr Seligson se vraag kon mnr Van Riet nie antwoord nie. Indien slegs 'n vennootskapsboedel gesekwestreer word onder omstandighede soos wat ons hier het, wie op aarde sou in terme van art 64 van die Wet as insolvent die byeenkomste van skuldeisers bywoon?

E Na my mening is die punt *in limine* wat die respondent opper, geldig. Die aansoek word van die hand gewys met koste wat die koste van twee F advokate insluit.

Applikant se Prokureurs: *Marais Müller*. Respondent se Prokureurs: *Sonnenberg, Hoffmann & Galombik*.

G BOSAL AFRIKA (PTY) LTD v GRAPNEL (PTY) LTD AND ANOTHER

(CAPE PROVINCIAL DIVISION)

H 1984 November 20-29 1985 May 23 BURGER J

I Copyright—Infringement of—Plaintiff alleging infringement of drawings made of prototype after the development of the prototype by its employees—As skill and originality had gone into the prototype and not the drawings copyright subsisted in the prototype and not in the drawings—Court holding furthermore that action had to be dismissed as judged in the light of the state of the art at the time of the making of the alleged original work it could not be said which aspect was copied and which aspect was part of the common prior art.

J Copyright—Infringement of—Adaptation—Definition of "adaptation" in s 1 not exhaustive and regard had to be had to ordinary meaning of

word—Afrikaans version of Act (the signed version) using word A "aanwending" which emphasized aspect relating to "use" as opposed to English meaning which emphasized aspect relating to "conversion" B —Defendants having adopted a parts numbering system linked to that of plaintiff held to have infringed copyright by making an adoption of plaintiff's system—Although little originality in initial compilation it had required a great deal of effort and would be protected by Courts.

The plaintiff instituted action against the defendant alleging infringement of their copyright in respect of (a) the drawings of the exhaust systems of two makes of motorcar and (b) the parts numbering code as collected in the plaintiff's C pricelist as read with its catalogue. Evidence placed before the Court was to the effect that the plaintiff's engineering drawings had been made after a prototype had been developed by plaintiff's employees; the drawings were then made under the supervision of these employees. Plaintiff did not, however, claim copyright in the prototype. The numbering code which was used by the defendants was not a direct copy of the plaintiff's code but was D linked to it in that each part was given a number which was obtained by deducting the number allocated by the plaintiff to such part from 999 999. The defendants denied that copyright subsisted in the drawings or that they had copied such drawings and denied furthermore that its parts numbering system was an "adaptation" as defined in s 1 of the Copyright Act 98 of 1978 and contended that there was no originality displayed in compiling the plaintiff's price list.

E Held, that the skill required to make a drawing of an exhaust system that was already in existence as a model before the draughtsman was comparatively small and the originality that went into the development of the exhaust system had nothing to do with the skill that went into making the drawings and accordingly the copyright subsisted in the prototype and not the drawings.

F Held, further, that, in spite of the similarity between the original work and the alleged infringements, this had to be judged in the light of the state of the art at the time of the making of the alleged original work and, regard being had to the existing prior art, it was difficult to say which was copied and which was part of the common prior art: the plaintiff had accordingly not proved unlawful copying.

G Held, further, as regards the alleged infringement of the copyright in the parts numbering code, that the definition of "adaptation" in s 1 of the Act was not exhaustive and regard also had to be had to the ordinary meaning of the word: the Afrikaans version of the Act which was the signed version used the word "aanwending" which appeared to emphasize the aspect relating to "use" as opposed to the English word which emphasized the aspect relating to "conversion".

H Held, further, that, by adopting a number code linked to the plaintiff's code, the defendant's had used the plaintiff's code and it could accordingly be said that this was an adaptation as envisaged by s 6 (f) of the Act.

I Held, further, although there was little originality attached to the plaintiff's pricelist, that it had required a great deal of effort in its compilation which would be protected by the Courts. Claim in relation to the exhaust systems dismissed but upheld in respect of the parts numbering system and defendants interdicted from infringing the plaintiff's copyright, ordered to deliver up all infringing copies and action postponed for determination of damages pursuant to the infringement.

Action on alleged infringement of copyright. The facts appear from the reasons for judgment.

A *R Grbich* for the plaintiff.
C E Puckrin for the defendants.

Cur adv vult.

B *Postea* (May 23).

BURGER J: The plaintiff, a manufacturer of motor vehicle exhaust systems, claims that defendant has infringed its copyright in the following manner:

C claim A: certain drawings in respect of the exhaust systems of a Leyland Mini motor car and a Peugeot 305;
claim B: drawings and legend relating to motor vehicle exhaust systems substantially as reproduced and collected in the Bosal catalogue; and
claim C: the parts numbering code as collected in the plaintiff's trade and retail price list as read with the Bosal catalogue.

D The first defendant is the company, Grapnel (Pty) Ltd, a manufacturer of motor vehicle exhaust systems and publisher of its own price list and catalogue. Second defendant was at all relevant times the executive director of the first defendant.

Claim A.

E The plaintiff claims copyright in respect of:

(a) the engineering drawing 1.1 of exh 11 with amendments depicting and describing the exhaust system for a Peugeot 305 motor car. It is alleged that an employee, Mr Freemouw, of the plaintiff developed and caused a prototype of this silencer to be made. The drawing in question was then made under the supervision of the said Mr Freemouw;

(b) In the same way plaintiff claims copyright in an engineering drawing 2.1 and 2.2 of exh 11 with amendments depicting and describing the exhaust system of a Leyland Mini motor car. It is alleged that a prototype of this silencer was developed and caused to be manufactured by one Mr Van der Meulen, an employee of the plaintiff and thereafter the drawing in question was made under the supervision of the said employee.

The main contentions of the defendants in reply to the claim A are summarised as follows:

H "1.1 We say that the silencers and silencer systems respectively in this matter are works of craftsmanship of a technical nature in terms of s 1 (1) (iii) (c) of the Copyright Act 98 of 1978 as amended by the Copyright Amendment Act 66 of 1983, and the authors of such works are the sample makers referred to in the evidence who have not been identified. The plaintiff has not pleaded nor made out a case for the subsistence of copyright in such works.

I 1.2 The authors of the 'drawings' 1.1, 2.1 and 2.2 are Shivas and Clarke, respectively. If it is found that these are original drawings (which is denied), then their originality is of a very low degree. It must be determined what about them is original. Wherein lies the skill and effort exercised by Shivas and Clarke? As to the question of the reproduction and infringement of the copyright, these drawings must be assessed against the background of what it is about them which is original. It is submitted that the skill and effort of the authors lay in depicting an existing three-dimensional article in a manner which could enable the plaintiff's workers to manufacture the articles in

question to precise and exact dimensions. The defendants have not reproduced a substantial part of any aspect of that which is original in the drawings in question even when such drawings are viewed as wholes.

1.3 The position regarding these prototypes and the drawings of them must be contrasted with the situation where detailed engineering or machine drawings are produced and then subsequently articles are made from them. In this situation the skill and effort of the author lies in designing an article and the three-dimensional article is a mere reproduction, instead of *vice versa*.

1.4 Because the British Courts have been unable to protect works of craftsmanship of a technical nature or prototypes, they have been constrained by somewhat tortuous logic to protect them *via* subsequently made drawings. In both the *Leyland* and *Swish Products* cases the Courts have specifically stated the premise that the prototypes could not be protected, *per se*. Our Courts do not need to resort to this fiction in view of the difference between the British Act and our Act."

In the first of its contentions cited above the defendants' counsel draws a distinction between, on the one hand, copyright in the prototype which he says is covered by: "works of craftsmanship of a technical nature" in the definition of "artistic work" in s 1 (1) of Act 98 of 1978 as amended by Act 66 of 1983 and, on the other hand, he says that there is a separate copyright (assuming sufficient originality) in the drawing which was made of the prototype this being covered by "drawings" in the definition of "artistic work", the word "drawing" being subsequently defined as including "a drawing of a technical nature".

In support of this argument defendant's counsel relies on the fact that in the pleadings the plaintiff only claimed copyright in the drawings and not in any prototype or model, and that the subsistence of copyright in the drawings was specifically denied by the defendant.

It may well be that, since the draughtsmen were making the drawings under the directions of either Freemouw or Van der Meulen and subject to their approval, the latter should be considered to be the joint "authors" of the drawings in question. So also in the case of the manufacture of the prototype. The welder or sample-maker who does the actual physical work may be a joint author with the person who directs the welder or maker or artisan and who decides where to weld or bend etc. But the real question remains: did the "originality" which is essential for the subsistence of copyright go into the making of the prototype or the making of the drawing?

The evidence of both Freemouw and Van der Meulen were that they first caused the prototype to be manufactured and *after* this was finished and satisfactory on tests, then instructions were given for the drawings. It is true that both Freemouw and Van der Meulen say that during the course of their development work, sketches were made as a guide. These sketches were however no more than preliminary designs — they were destroyed in the process and there is no reliable evidence that these sketches were in the same form as the final drawings or had sufficient detail to justify the conclusion that they were so complete as to qualify as copyright drawings.

One can well have the situation where a prototype is made without a drawing ever being made — thus a manufacturer may in his workshop assemble and manufacture a model or prototype and simply reproduce without ever going into the refinement of having a drawing made. In

A terms of the definition of "artistic work" in the Act he would be entitled to copyright without a drawing ever being made. On the other hand there may never be a prototype, the development and design may all take place when the draughtsman designs the object in the course of drawing it, particularly where the development and design requires difficult and intricate calculations, eg the design of structures or machines which are so large that they must be fully designed before they can be built. This applies particularly to bridges, buildings or large electricity generating sets.

I am in agreement with counsel for defendant that the skill required to make a drawing of an exhaust system that is already physically in existence as a model before the draughtsman is comparatively small. It is the skill common to all engineering draughtsmen and it is the skill necessary in order to make a good drawing, but this skill in making drawings is completely independent of the skill in making an effective exhaust system. The plaintiff does not claim copyright because the drawings *qua* drawings are unique and so original that others would want to copy them — on the contrary, the only interest that the drawings have is that they represent a prototype of an effective exhaust system. This exhaust system came into being before the drawings and independently of the drawings. The "originality" that went into the development of the exhaust system had nothing to do with the skill that went into making the drawings. Before the drawings now in question were made, a sophisticated prototype was made and finally approved by all concerned. Thereafter the prototype was measured and depicted on paper by unqualified draughtsmen.

The originality expected of them was to designate the various parts to be used in the manufacturing process with reference to the plaintiff's standard codes and tooling. This aspect does not require a great deal of effort or originality and in any event the defendant did not copy the plaintiff's standard part and tooling — it had its own.

This aspect is well substantiated in the evidence of Freemouw, plaintiff's expert:

"The draughtsmen that we used are not qualified draughtsmen. They are usually people that or usually they are sometimes people that have moved up from other positions inside the factory or people that we recruited from outside but we never attracted qualified draughtsmen.

Mr Puckrin: Well now, that's interesting because presumably, if this were a difficult drawing in engineering drawing terms, you would not entrust it to somebody who was not a draughtsman? — As I said before, one cannot compare this type of drawing to an engineering drawing. It is a different thing. The aspect of drawing or accurate drawing is not all that important but what is written on the drawing, the dimensioning, the numbering of the parts, the coding of the parts and all that, is extremely important.

Well, that's exactly my point, Mr Freemouw. In engineering terms, this is a simple drawing. What is important here in 1.1 is the notes? Is that correct? — And the dimensioning. And the dimensioning? — But the drawing as such, it's not that critical.

Correct. Now, if I may refer to the drawing, the sketches without the dimensioning, as the artistic content, all right? — Yes.

What Mr Harris is saying is that the artistic content require little skill, effort or talent? Would you agree with that? — The artistic content as such requires a relatively little effort, yes."

It is to be noted that the witness feels that the notes are the important part and the drawing merely supplementary to the notes. But if one compares the effort and originality that went into the development of the prototype with the originality and effort of the unskilled draughtsmen in merely measuring the prototype and identifying the standard parts used, then, as pointed out above, it is illogical to accord the privileges going with copyright to the draughtsman who has merely drawn up a table of measurements. It follows that in the present case the copyright subsists in the prototype and not in the drawings.

The above conclusion is contrary to what was said in *LB (Plastics) Ltd v Swish Products Ltd* 1979 RPC 551 at 568 by WHITFORD J:

"It arises in this case because of a suggestion that some of the drawings relied upon by the plaintiffs may have been made from models first produced in three dimensions, which models, not being works of artistic craftsmanship, would not attract copyright.

Counsel for the defendants rightly pointed out that there might be said to be disparities between the evidence of the plaintiffs on motion and their oral evidence as to which came first, models or drawings. Having seen and heard the relevant witnesses on the plaintiffs' side, I can at once say I have no hesitation whatsoever in accepting their oral evidence which went to this, that in every case the drawings were drawn first and there was no pre-existing model from which they were taken. However, I would go further than this. Even if the situation had been that a three-dimensional model had been made and from those models the drawings had been compiled, I am of the opinion that they would in any event qualify as original works.

There is this further point to be considered that some of the drawings undoubtedly derive in part from earlier drawings, but on the evidence I am still of the opinion that each work relied upon can claim to be a separate original artistic work attracting copyright and, indeed, counsel for the defendants, if against his assumption copyright were to be found to reside in these drawings at all, was specifically concerned to assert that one drawing, to which I shall have to come later, LBP/LB/479A, must be considered as being a separate copyright work although it was in some not inconsiderable measure a redrawing of an earlier drawing. The draughtsmen called on both sides made it quite plain that even where there has been a previous drawing or some sketches have been made which are in part redrawn, the making of any drawing of the kind I have to consider is a skilled business involving hours of labour, although the end result may seem relatively simple.

Before I leave this aspect of the case, I must add that it was urged upon me that I ought not to reach the conclusions which I have reached and have endeavoured to express, because a construction of the Act in the sense in which I have construed it would lead to absurd results. First it was said that it must be absurd to give protection to drawings of a three-dimensional model not being a work of artistic craftsmanship if the model itself is not protected. Counsel for the defendants was concerned to point out that assuming, for the purposes of argument, his clients have undoubtedly copied plastic drawers of the defendants on the market but that there had never been any drawings of them, then it must be plain that no action could lie, and so it was said that it was absurd that the accident of a drawing might in fact make what would otherwise have been lawful copying an infringement of copyright. The absurdity however can just as well be said to lie in the failure to provide for protection by the three-dimensional version of the work if created independently of any drawings."

See also in the case *British Northrop Ltd v Texstream Blackburn Ltd* 1974 RPC 57 at 71 *per* MEGARRY J:

"One head of contention was that in some cases the part copied by the defendants may have been a part manufactured by the plaintiffs before any drawing of that part came into existence, and not a part manufactured by the plaintiffs from the drawing, so that there has been no copying, direct or indirect,

A of the drawing in which the plaintiffs own the copyright. It was, said Mr *Mervyn Davies*, for the plaintiffs to prove that the part which the defendants had copied was a part manufactured after the plaintiffs had produced a copyright drawing of that part.

I do not think that this can be right. If it were the law, it would mean that in any case in which a manufacturer produced any parts before making drawings of these
B parts, a rival could freely copy those parts and rely upon the difficulty or impossibility of the manufacturer ever proving that the particular part from which the rival copied was one which was manufactured after the drawings had come into existence. I say nothing of the case where the rival establishes that what he copied was in fact a part manufactured before any drawing of it existed. There may be cases where the rival can do this by establishing the date on which the part
C was acquired, and there may be cases where the drawings were made so shortly before the commencement of proceedings that the Court will infer the probability that the part copied was made before the drawing. The present case, however, is not in that category."

These decisions are cited by Copinger on *Copyright* 12th Ed at 120 note 36 and in *The Modern Law of Copyright* by Laddie, Prescott and Vitoria
D at 116 and at 122.

The comment of the authors at 134 is significant:

"If, on the other hand, it is not possible to rely on an original artistic work within those categories, an action for infringement of copyright will fail unless the prototype article in question was a 'work of artistic craftsmanship'. In such a case artistic quality (in the popular sense of the term) is essential. Thus, there exists the
E anomalous position that, if, for instance, the designer of a suite of ordinary commercial furniture originated the design as a drawing, he will normally be able to prevent imitation of the design by a competitor; whereas, if the design came into existence as a three-dimensional prototype, and he has no drawings, he may find that his work is devoid of copyright protection. It has been recommended that this *lacuna* in the law should be removed in future legislation. In the meantime the
F situation, which is certainly irrational, may perhaps be ameliorated by using the existing law more effectively. Thus, quite a lot can be done by taking extra care to adduce the best available expert evidence in cases where it is arguable that the prototype is a work of artistic craftsmanship."

Probably because of the above-quoted decisions, it seems that the learned authors accept that copyright protection can be obtained for a
G prototype by way of a subsequent drawing. This, however, is illogical. As pointed out above, the "skill" of the draughtsman is completely different from the "skill and originality" of the artisan, designer or developer of the prototype — the one needs skill in drawing, the other the skill of a designer, developer etc. In fact the draughtsman may merely have
H ordinary skill. Thus a man may spend years developing a prototype of an exhaust system and another without any knowledge of exhaust systems would draw the prototype and then be entitled to copyright protection to the exclusion of the real developer.

As Act 98 of 1978, unlike the British Act, recognises copyright in
I "artistic works, irrespective of the artistic quality thereof", which includes "works of craftsmanship of a technical nature" the *lacuna* referred to by the learned authors above has been filled. The Legislature has recognised the validity of the argument by extending in 1983 the definition of an artistic work to include prototypes.

The defendant denied in his plea the subsistence of copyright in the
J drawings as claimed and in argument the above contention was specifi-

cally raised. There was no attempt by plaintiff to amend and claim A copyright in the prototypes. It follows that plaintiff has failed to prove the subsistence of copyright in the drawings 1.1 and 1.2 of exh 11 as claimed.

In the event of the above conclusion being wrong, it is advisable that I should also deal with the other argument on behalf of defendant, viz that the plaintiff has not proved copying by defendant. B

"In order to constitute reproduction within the meaning of the Act, there must be (a) a sufficient degree of objective similarity between the original work and the alleged infringements; and (b) some causal connection between the plaintiffs' and the defendants' work."

(*Per* NICHOLAS J in *Cyril Laubscher v Henk Vos and Others* — Case No 278/1974 — unreported judgment in WLD at 4.) C

Mr *Puckrin*, on behalf of defendants, is correct when he argues that "the objective similarity" must be judged in the light of the state of the art as at the date of the making of the alleged original work. Thus, although the alleged infringement and the original work may bear a close resemblance, this resemblance may be explained by the fact that they both incorporate common prior art. Thus, where in the trade a shape or size or method of construction has become standardised and common because that shape or size has over the years for a variety of reasons proved to be the most desirable, then it would be an undue restriction to say that there is an undue degree of objective similarity when a person has adopted
E those same shapes or sizes or methods of construction. This situation differs from the so-called "chinese copy" where the infringing article is an exact replica of the original work and thus a clear case of unlawful copying. One can have a situation in between the above-mentioned two
F situations — then it is a question of degree and in coming to a decision the Court should take into account expert evidence as to what the state of the prior art is. In this regard there is a significant difference between the South African and English statutes. Section 9 (8) of the United Kingdom 1956 Act reads as follows:

"The making of an object of any description which is in three dimensions shall not be taken to infringe the copyright in an artistic work in two dimensions, if the object would not appear, to persons who are not experts in relation to objects of that description, to be a reproduction of the artistic work." G

The South African Statute, although modelled on the English statute, has no such provision — a significant omission. H

In the present case it became clear during the cross-examination of the plaintiffs' experts that the use of the "bommetje" or resonator in the exhaust of the Leyland Mini was part of the prior art. The first defendant had this part in production before the plaintiff developed the Mini exhaust system. In regard to the other box, it appears that the defendant I used its standard tooling for its manufacture, eg for the oval end plates. The pipes were all standard sizes. The method of construction was standard practice in the trade. The defendant did copy the routing of the exhaust system, more particularly the bends in the exhaust pipe, in order to accommodate it under the car. But this configuration was not developed by the plaintiff, it was copied from the original Leyland design. J

A The witness Freemouw, the plaintiff's expert, in chief stated unequivocally that the defendant's Peugeot 305 silencer (exh 12) was copied from the Bosal silencer (exh 10). Under cross-examination he said the following at 166 (lines 10-21):

B "If you were to give your factory drawing 1.1 and tell them to copy and reproduce it and make a silencer according to that drawing and they produced . . . (intervention)

Court: Drawing with the notes or without the notes?

Mr Puckrin: With the notes, M'Lord. With the notes — Yes. And they were to produce silencer No 12, would you be satisfied? — No.

Why not? — Because there are a number of differences in exh 10 and 12.

In fact they would not have reproduced 1.1? — That's correct."

C Page 183 (lines 10-21):

"Would you say that he has copied the cross-section if he decides to use his 05 standard cross-section? — He has used the Bosal system as a reference.

As a reference. Thank you. In fact, what he has done, he has taken the general idea, the general design principles, he has got inspiration from it and he has embodied them into his particular silencer? Is that not correct? — Can you repeat that again, please?

D He has derived assistance from the general design, the general concept? — Yes.

In effecting or manufacturing his own silencer? That is the Grapnel silencer? — You can put it that way."

Page 214 (lines 25-31) and page 215 (lines 2-4):

E "If you are instructed to copy the principle, the idea and to use your standard parts and obviously standard diameters of piping which will fit with rest of the Mini system, would you come up with something that is very similar? — Yes.

Thank you. And I take it that that applies to the Peugeot 305 as well? — That would apply to the 305 as well, yes.

Court: In other words on that basis the result would be what could look like a copy? — that is correct my Lord."

F Plaintiff and defendant were both manufacturers for some time prior to the present events took place which gave rise to the present action. Over the years the work and development done by one must of necessity have given ideas to the other. The replacement equipment manufactured by them had to fit the pipes coming from the engines concerned, it had to fit the existing mountings on the vehicle concerned and had to fit into the shape provided for the exhaust system under the vehicle. In the result the overall dimensions of the rival systems would approximate. Further, the methods of construction would be the same, possibly borrowed from one another, and the tooling used would be similar. If one therefore has regard to the existing prior art, it becomes difficult to say which is copied and which is part of the common prior art. Laddie's comment at para 2.62 of *The Modern Law of Copyright* is very apposite:

I "The Courts will not be astute to prevent the copying of a mere general idea, choice of subject-matter or principle of construction. In the first place such copying will usually be exceedingly difficult to prove, although it would be almost inconceivable that two authors should independently compose lengthy passages in identical language or which contain the same collection of detailed incidence. It is quite credible that both should invent a broad principle without reference to each other. In the second place, reasons of public policy demand that general ideas and principles, even if new, which they seldom are, should be in the public domain. Were it otherwise, creativity in literature, drama, music and the fine arts would be impossible, for there can hardly be a work in existence which does not owe something to what has gone before. In other words, there has to be an accommodation between two principles: the first, that authors should reap the

fruits of their work and skill; the second, that composition does not occur in a vacuum but that each author is inspired, whether he knows it or not, by the efforts of his fellows."

In the result, in spite of the objective similarity on the evidence, I am not convinced that defendant unlawfully copied the plaintiff's systems.

B The drawings for which plaintiff claims copyright are diagrammatic sketches not to scale and, if one uses merely what is drawn, it will not be possible to manufacture the exhaust systems. For this purpose one must also have recourse to the notes in tabular form on the drawing and in addition it will be necessary to ascertain the codes used in the notes to identify oval plates and other parts.

C It is clear that a drawing may be supplemented by dimensions shown on the drawing; these dimensions are really part of the drawing. On the other hand one may have the other extreme where the notes are extensive and in substance contain all the information necessary to manufacture the three-dimensional object and any sketches or diagrams are there merely to elucidate some portions of the text. Where does one draw the line D between the artistic work and the written table or compilation? Plaintiff has however based his case solely on the drawing being an artistic work and it may be that the literary part is so dominant that one could hardly call it a drawing.

E It seems to me that the answer in the present case lies in another direction.

As pointed out above, one should look to the originality and effort which went into evolving the work. Neither the draughtsman nor the compiler of the legend supplied the originality. It is therefore unnecessary to consider this aspect further.

Claim B

The first defendant has consented to a draft order in respect of the drawings appearing in the 1983 Bosal Catalogue. This draft order is acceptable to the plaintiff. The second defendant's role in infringement of the plaintiff's copyright in these drawings will be dealt with later in this judgment.

Claim C (the parts numbering code)

H The plaintiff had a patent for a method of numbering the parts of the various exhaust systems manufactured and/or supplied by it to the trade or public. This was a system which greatly facilitated the storing of the parts in a warehouse and identifying the vehicle on which the particular part fits. The plaintiff's parts number consists of six digits. The defendant has also adopted the same system also with a six-digit number in respect of each part. But it has gone further and in each case adopted a number I in respect of the same part which one gets by deducting the Bosal (plaintiff) number from 999 999. In the same way by deducting the Grapnel (defendant) number from 999 999 one gets the equivalent Bosal number.

The plaintiff claims that the first defendant has infringed its copyright in its part numbering system as published in its catalogue by adopting a system of numbers which is connected in the manner set out.

A The defendant's numbering code is not a direct copy — the question is whether it is an "adaptation" of the plaintiff's system or if not an adaptation, does it amount to a copying in substance.

The definition in s 1 of Act 98 of 1978 is as follows:

"'Adaptation', in relation to:

- B (a) a literary work, includes:
(i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;
(ii) in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;
(iii) a translation of the work; or
(iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;
C (b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;
(c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable."

D Mr Puckrin, on behalf of the defendant, argued that the word "includes" is used in an exhaustive sense and that what has been done does not amount to adaptation as defined in the Act.

The Afrikaans text of the statute, which is the signed version is as follows:

"'Aanwending', met betrekking tot:

- E (a) 'n letterkundige werk, ook:
(i) in the geval van 'n nie-dramatiese werk, 'n verwerking van die werk waarin dit tot 'n dramatiese werk omgeskep word;
(ii) in the geval van 'n dramatiese werk, 'n verwerking van die werk waarin dit tot 'n nie-dramatiese werk omgeskep word;
(iii) 'n vertaling van die werk; of
F (iv) 'n verwerking van die werk waarin die verhaal of handeling geheel en al of hoofsaaklik deur middel van prente in 'n vorm geskik vir reproduksie in 'n boek of in 'n nuusblad, tydskrif of dergelike blad weergegee word;
(b) 'n musiekwerk, ook 'n bewerking of oorskrywing van die werk, indien so 'n bewerking of oorskrywing van 'n oorspronklike skeppingsaard is;
(c) 'n artistieke werk, ook die omskepping van die werk op so 'n wyse dat die oorspronklike of wesenlike kenmerke daarvan herkenbaar bly."

G It is significant that the equivalent of the word "including" is the word "ook" (also).

H The Afrikaans version as I read it therefore says that "aanwending" shall in addition to the ordinary meaning also include the cases mentioned. This definition is therefore not exhaustive. The English version appears to be ambiguous but, even if it was clearly exhaustive, then as the Afrikaans version was signed, that meaning must be accepted — the word "aanwending" must be given the ordinary grammatical meaning and also the extended meanings specified in the definition clause.

I The meaning of "aanwending" appears to be somewhat different from "adaptation"; thus *HAT Verklarende Woordeboek van die Afrikaanse Taal*: "aanwend: gebruik — sy invloed, 'n poging aanwend. Die regte middele aanwend."

Kritzinger, Steyn, Schoonees & Cronje *Groot Woordeboek*: "aanwend: use, employ, apply, adapt, appropriate (funds), exercise, convert, adapt . . ."

J The Afrikaanse word appears to emphasise the aspect relating to "use" while the English "adapt" would appear to emphasise the aspect relating

to "conversion". By adopting a numbering code which is linked to that of plaintiff, the first defendant uses the plaintiff's numbering code and it and its customers can in future make use thereof. It can be said that the defendant "het die eiser se kode aangewend".

It follows that the first defendant has done what is prohibited by s 6 (f) of Act 98 of 1978, ie "making an adaptation of the work".

It was further argued that there was no "originality" displayed in compiling the list of numbers in the plaintiff's price list. It may not have required a great deal of judgment to develop and list all the parts, but it certainly required a great deal of effort to compile the list of numbers, in the same way as compiling a street directory. Such work and effort the Courts will protect. Copeling *Copyright Law* at 68-69.

It was argued that whereas in the pleadings reference was only made to the catalogue whereas the evidence referred to the price lists and the numbers there listed. The catalogues were handed in as exhibits and it is quite clear that the same system of numbers appear there as in the price lists.

In the result the plaintiff's claim that its part numbering system was used must be upheld.

During his argument in reply, counsel for plaintiff claimed that the defendant had infringed plaintiff's copyright by publishing the Bosal numbers in its price lists next to the Grapnel numbers. This was never an issue in the trial and it came as a surprise to me when it was mentioned in the argument in reply for the first time. It apparently also came as a surprise to the attorney and counsel for the defendant. There was no evidence that plaintiff ever objected to this use of its code and in my view this issue was not properly raised throughout the lengthy trial and I am not prepared to make any order in that regard.

It was contended that second defendant was a party to the infringement of the copyright in respect of the engineering drawings. There was however no evidence that the second defendant did so knowingly at any stage or that he was knowingly personally involved in any copying. It follows that no order should be made against second defendant.

The order of the Court is:

Claim A:

The claim A is dismissed with costs.

Claim B:

H The first defendant is interdicted and restrained from reproducing, publishing or distributing, in the course of trade or otherwise to the prejudice of the plaintiff, any of the drawings by Bartolemeus Niezen, copies of which drawings are reproduced in the 1983 Bosal catalogue.

I The first defendant is ordered to deliver up to the plaintiff for destruction all infringing drawings, including the 1982 and 1983 Grapnel catalogues (the Grapnel catalogues) in its possession or in its control, as well as any artwork, drawings, printer's films, printer's plates or the like, used for the purpose of producing any of the drawings by Bartolemeus Niezen referred to above, including such materials used to print and produce the Grapnel catalogues which are in the possession or in the control of the first defendant.

- A In regard to damages, the action is postponed to a date to be arranged in order that the question of damages (including such damages, or an account of profits, under s 24 (1), 24 (2) and/or 24 (3) suffered by the plaintiff arising out of the printing, publishing and/or distributing, in the course of the trade or otherwise to the prejudice of the plaintiff, by the first defendant of the Grapnel catalogues, be investigated and determined.

The first defendant is ordered to pay the costs of the action in relation to claim B including the qualifying fees of the witness Niezen.

Claim C:

- C (a) The defendants are interdicted and restrained from infringing the plaintiff's copyright in its parts numbering code for its motor vehicle exhaust systems.
- (b) The defendants are interdicted and restrained from reproducing, publishing or distributing, in the course of trade or otherwise to the prejudice of the plaintiff, the Grapnel price list dated 1 April 1983 and the Grapnel price list dated 1 April 1984 (the Grapnel codes).
- D (c) The defendants are ordered to deliver up to the plaintiff for destruction all infringing parts numbering codes, including the Grapnel codes, in the possession or under the control of either of them, as well as any artwork, tables, compilations, printer's films, printer's plates, or the like, used for the purpose of producing any of the infringing parts numbering codes referred to in (a) and (b) above, including such materials used to print and produce the Grapnel codes.
- E (d) In regard to damages, the action is postponed to a date to be arranged in order that the question of damages (including such damages, or an account of profits, under s 24 (1), 24 (2) and/or 24 (3)) suffered by the plaintiff arising out of the printing, publishing and/or distributing, in the course of trade or otherwise to the prejudice of the plaintiff, by the defendants of the Grapnel codes, be investigated and determined.
- F (e) The defendants are ordered to pay the costs of the action in relation to claim C, including the costs of the witness Douglas Renecke, who is declared to be a necessary witness for purposes of taxation.

Plaintiff's Attorneys: *Adams & Adams*. Defendants' Attorneys: *Routledge-MacCallums*.

TAVERN DRANKWINKEL (EDMS) BPK v MUNISIPALITEIT VAN STELLENBOSCH

(KAAPSE PROVINSIALE AFDELING)

1985 Mei 15; Junie 12 VAN SCHALKWYK WN R

- J *Munisipaliteit—Strate en paaie—Aansoek om bevel wat munisipaliteit gelas om houtpale te verwyder wat opgerig is om toegang deur voertuie

af te sny van sypaadjie wat gebruik is vir laai en aflaai doeleindes—Betoog dat sodanige houtpale padverkeertekens was wat onwettig was aangesien hulle nie deur Administrateur ingevolge art 99 van Ord 21 van 1966 (K) voorgeskryf is nie, verwerp—Houtpale nie padverkeertekens nie juis omdat hulle nie voorgeskryf is nie—Onwettig om voertuie op sypaadjie te bring ingevolge reg 4 (b) van Standardregulasies insake Strate in PK 710 van 23 November 1950 omdat voetgangerverkeer daardeur belemmer—Betekenis van "belemmer" nie algehele belemmering nie—Applikant se reg van toegang het nie die reg ingesluit om 'n gedeelte van sypaadjie te gebruik vir laai en aflaai doeleindes nie—Aansoek van die hand gewys.

- Die applikant, die eienaar van 'n drankwinkel, het aansoek gedoen om 'n bevel wat die respondent, 'n munisipaliteit, sou gelas om 'n aantal houtpale te verwyder wat op die rand van die sypaadjie voor applikant se winkel opgerig is en wat toegang deur voertuie tot die sypaadjie wat vir laai en aflaaidoeleindes gebruik is, verhoed het. Daar was voorheen 'n parkeerterrein agter applikant se winkel wat vir die doeleindes gebruik is maar sedertdien is dit in 'n tolparkeerterrein omskep en is daar nie voorsiening gemaak vir 'n laaisone nie. Die applikant en sy verskaffers het daarna die gebied tussen die pad en 'n stoep voor die applikant se winkel gebruik totdat die pale opgerig is wat hulle toegang versper het. Die applikant het aangevoer dat die respondent onwettig opgetree het deur die pale op te rig aangesien: (a) die pale padverkeertekens was wat nie deur die Administrateur voorgeskryf was ingevolge art 99 van die Ordonnansie op Padverkeer 21 van 1966 nie; en (b) dat die respondent onredelik opgetree het in die uitoefening van sy statutêre bevoegdheid.
- Beslis*, dat die pale nie padverkeertekens was nie juis omdat hulle nie deur die Administrateur voorgeskryf was nie en voorwerpe slegs padverkeertekens geword het sodra hulle deur die Administrateur voorgeskryf was.
- Beslis*, verder, dat, aangesien die optrede van die applikant deur voertuie op die sypaadjie te bring onwettig was ingevolge reg 4 (b) van die Standaard Regulasies op Strate soos afgekondig in Provinsiale Kennisgewing 710 van 23 November 1970 aangesien dit die voetgangerverkeer daarop sou belemmer (slegs gedeeltelike belemmering synde nodig daarvoor), kon die aansoek nie slaag nie.
- Beslis*, verder, dat, aangesien die applikant 'n finale bevel aangevra het, moes hy aangetoon het dat hy 'n duidelike reg gehad het waarop daar deur respondent inbreuk gemaak word wat nie bewys is nie: alhoewel die applikant 'n reg van toegang gehad het, het hierdie reg nie die reg ingesluit om daardie gedeelte van die sypaadjie te gebruik vir laai en aflaai doeleindes nie.

*Municipality—Streets and roads—Application for order compelling municipality to remove wooden poles which had been erected to prevent access by vehicles to pavement for purposes of loading and unloading—Contention that such wooden poles were road traffic signs which were unlawful as they had not been prescribed by the Administrator in terms of s 99 of Ord 21 of 1966 (C), rejected—Wooden poles not road traffic signs precisely because they had not been prescribed—Unlawful to bring vehicles onto pavement in terms of reg 4 (b) of Standard Street Regulations promulgated in PN 710 of 23 November 1950 as pedestrian traffic obstructed thereby—Meaning of "obstruct" not a complete obstruction—Applicant's right of access did not include the right to use a portion of the pavement for the purposes of loading and unloading—Application refused.

The applicant, the owner of a bottle-store, applied for an order compelling the respondent, a municipality, to remove a number of wooden poles erected on the edge of the pavement in front of the applicant's shop and which prevented