



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Bergh and Others v The Agricultural Research Council (Case no 93/2019) [2020] ZASCA 30 (1 April 2020)

From: The Registrar, Supreme Court of Appeal

Date: 1 April 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of, nor is it binding on, the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Western Cape Division of the High Court, Cape Town (Kose AJ, sitting as the court of first instance). The appeal was upheld with costs.

The matter concerned a Microsoft Windows based computer program (BeefPro), that serves as a cattle or herd management tool, which the respondent, the Agricultural Research Council (the ARC), claimed it developed and introduced to the market in 2005.

The ARC, a juristic person established in terms of the Agricultural Research Act 86 of 1990 to promote agriculture and industry, operates an 'integrated registration and genetic information system' (INTERGIS). In fulfilling this role, the ARC utilises BeefPro and conducts this system on the INTERGIS platform. The basis of its approach to the court below with a claim against the appellants for breach of copyright and unlawful competition was that the appellants had misappropriated BeefPro, so the ARC alleged, and utilised it for purposes of conducting their own database (Logix), a parallel system to INTERGIS. The appellants were allegedly employing BeefPro for financial benefit and consequently undermined the ARC in the performance of its statutory duties. The ARC contended that cattle farmers were supplying data to the appellants that ought to be destined for the INTERGIS system, which the appellants then used in their Logix system. This rendered INTERGIS redundant.

Furthermore, since BeefPro qualified as a work in terms of the Copyright Act 98 of 1978, by misappropriating it the appellants were guilty of copyright infringement or engaged in unlawful competition. As a result, so the ARC contended, it was entitled to seek an interdict in the terms granted by the high court. The ARC also sought an order directing an enquiry into past losses that it had sustained, in terms of s 24(1B) of the Copyright Act, which the high court granted in addition to the interdictory relief.

The SCA noted that the relief sought by the ARC was on the basis that it owned the copyright in BeefPro. The question was thus whether the ARC had discharged the onus in proving its ownership.

The SCA held that the fundamental problem for the ARC was that Mr Pauw, who was commissioned by the ARC to write BeefPro, developed the program by working independently and bringing his own skills and experience to bear, only seeking certain information from the ARC to ensure that the program served its purpose. Mr Pauw did not follow instructions from or work under the supervision of an employee of the ARC. His work was not subject to checking and approval and he did not receive any remuneration for his efforts. The SCA held that the mere provision of functional requirements and a periodic review of the progress made, with a final test to ensure that the program served its purpose, did not without more establish control over the making of the program, or vest authorship therein.

Furthermore, Mr Pauw had insisted from the outset that copyright should vest in him. Written exchanges between him and the ARC substantiated his contention. The SCA concluded that the ARC had failed to discharge the onus in relation to its claim for copyright. It was not established that Mr Pauw acted under the ARC's control in developing the program.

The SCA was also critical of the failure by the high court to supply reasons for its order.

In the result, the appeal was upheld with costs, including the costs of two counsel.
