



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 971/2018

Reportable

In the matter between:

TELLYTRACK

APPELLANT

and

MARSHALLS WORLD OF SPORT (PTY) LTD

FIRST RESPONDENT

MARSHALLS WORLD OF SPORT

GAUTENG (PTY) LTD

SECOND RESPONDENT

MARSHALLS WORLD OF SPORT

EASTERN CAPE (PTY) LTD

THIRD RESPONDENT

MARSHALLS WORLD OF SPORT

WESTERN CAPE (PTY) LTD

FOURTH RESPONDENT

JEREMY MARSHALL

FIFTH RESPONDENT

SUSAN CARLISLE MARSHALL

SIXTH RESPONDENT

STEVE MARSHALL

SEVENTH RESPONDENT

BRETT BOWMAN

EIGHTH RESPONDENT

Neutral Citation: *Tellytrack v Marshalls World of Sport (Pty) Ltd & others* (971/2018)
[2019] ZASCA 153 (25 November 2019).

Coram: Navsa, Saldulker, Van der Merwe and Dlodlo JJA and Weiner AJA

Heard: 4 November 2019

Delivered: 25 November 2019

Summary: Copyright – whether enabling the public to view horse racing events at bookmakers' business locations constituted an infringement of the appellant's rights in cinematograph film as provided for in s 8 of the Copyright Act 98 of 1978 – discussion of definition of cinematograph films and eligibility for copyright.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Radebe J sitting as court of first instance):

1 The appeal is upheld with costs including the costs consequent upon the employment of two counsel.

2 The order made by the court a quo is set aside and substituted as follows:

‘1 The first, second, third, fourth, fifth, seventh and eighth respondents and Marshalls World of Sport KZN 2 (Pty) Ltd (“the respondents”) are interdicted and restrained, in terms of s 8(1)(b) of the Copyright Act No. 98 of 1978 (“the Copyright Act”), from infringing the appellant’s copyright in the Tellytrack Cinematograph Films and Raw Race Feeds by causing them to be seen in public.

2 An enquiry be held for the purposes of determining the amount of damages, alternatively, a reasonable royalty to be paid by the respondents to the appellant and that if the parties cannot agree upon the procedure to be adopted, they may approach the Court to prescribe such procedure for conducting such enquiry.

3 The costs are to be paid by the respondents, jointly and severally, the one paying the others to be absolved, such costs to include those consequent upon the employment of two counsel.’

JUDGMENT

Navsa JA (Saldulker, Van der Merwe and Dlodlo JJA and Weiner AJA concurring):

[1] This is an appeal by Tellytrack, a partnership between Phumelela Gaming and Leisure Limited (Phumelela), Gold Circle (Pty) Ltd (Gold Circle) and Kenilworth Racing (Pty) Ltd (Kenilworth), against an order of the KwaZulu-Natal Division of the High Court, Durban, in terms of which an action for an interdict against seven defendants, the present respondents, was dismissed with costs, including the costs of two counsel. Tellytrack had sought an interdict, *inter alia*, restraining the respondents from permitting the public to view, at their business locations, horse racing events shown on the Tellytrack Television

channel 239, broadcast by DSTV, a national television broadcast entity. The appeal is before us with the leave of the court below. Phumelela, Gold Circle and Kenilworth are racetrack operators. They are the only entities licenced to conduct horse race meetings in South Africa. They also each hold totalisator betting licences.

[2] The first respondent is Marshalls World of Sport KZN (Pty) Ltd, the second respondent is Marshalls World of Sport Gauteng (Pty) Ltd, the third respondent is Marshalls World of Sport Eastern Cape (Pty) Ltd, the fourth respondent is Marshalls World of Sport Western Cape (Pty) Ltd, the fifth respondent is Jeremy Marshall and is the sole director of the second and third respondents. He is one of two directors of the first respondent. Tellytrack did not proceed against the sixth respondent in the court below. The seventh respondent, Steve Marshall, conducts business at Marshalls World of Sport KZN in Pinetown, Port Shepstone and at the Taj Hotel in Marburg. The eighth respondent, Brett Bowman, is one of the two directors of the first respondent. The present respondents all hold bookmakers licences and conduct business at various provincial locations. It is uncontested that they permit viewing by the public of channel 239 at their business locations for the benefit of, *inter alia*, potential and actual punters.¹

[3] The action in the court below was based on alleged contraventions by the respondents, of provisions of the Copyright Act 98 of 1978 (the Act). Simply put, this case is about whether the respondents are guilty of copyright infringement. The detailed background culminating in the present appeal is set out hereafter.

[4] At the outset it is necessary to have regard to the scale of interest in the horseracing industry in this country, best demonstrated by the facts set out hereafter. There are nine domestic race tracks in this country and some 400 totalisator betting outlets, branded as TAB, in South Africa, two tote telephone betting centres and two online tote betting sites. This is over and above the locations at which bookmakers

¹ As to how totalisator betting as opposed to fixed odds betting – conducted by bookmakers - operates, see the judgment of this court in *KwaZulu-Natal Bookmakers' Society v Phumelela Gaming and Leisure Ltd* [2019] ZASCA 116.

conduct their business. Channel 239 which is made available for viewing by the public at locations where the respondents conduct business, runs continuously from 10h00 to 22h30 every day of the year, except for Christmas Day, and a live horserace is shown on channel 239 every 10 minutes. As will be explained in more detail later, most of the material displayed on channel 239 concerns international horseraces conducted at racetracks in numerous countries across the world.

[5] Tellytrack operates a television control room in Rivonia that receives raw television feeds from domestic horse races, via a transmission services provider, Telemedia, and receives raw international horse race feeds via satellite. The raw race feeds consist of visual images of events leading up to the race, images of the live race being run, accompanied by auditory commentary, as well as pre and post-race celebrity and guest interviews. Tellytrack through its employees enhances the raw race feeds by editing, compiling and adding the following graphics:

- (a) betting scrolls, incorporating the totalisator odds offered on each horse or combination of horses in a given race or races;
- (b) horse race previews, tips and selections;
- (c) horse race totalisator pool information;
- (d) horse race totalisator betting information;
- (e) compilations of horse racing data and information; and
- (f) race preview and post-race interviews with racing personalities.

These are effected by computer software supplied by an American company, customised and modified for Tellytrack's purposes. Phumelela holds the licence for the software utilised by Tellytrack.

[6] Once the enhancements are added, the final product, referred to as a dirty feed, is then sent by fibre optic cable to Multichoice, a national satellite dish broadcaster, to be shown on its DSTV Tellytrack channel 239 via Intelsat. The international and domestic races are billed as being broadcast live. It is to be noted that the enhancements are added within one second of receipt by way of a computer program, the details of which are referred to later, and the final product is then dispatched immediately for broadcast on

channel 239. More than 75 per cent of the races shown on channel 239 are international horse races from, amongst others, England, Dubai and Singapore.

[7] In respect of domestic races it should be understood there is a production team consisting of Phumelela employees stationed at the race tracks owned by the constituent members of Tellytrack, operating mostly from outside broadcast vans (OB vans). In respect of two racecourses there is a fixed gallery at each instead of an OB van. At each racetrack there are several cameras strategically positioned to film races at that track. The images captured during a race are converted to a format which enables them to be received via fibre-optic cable at the OB van or gallery. For convenience I shall hereafter refer to both as the OB van. The race-day producer works with a video tape operator and with a stipes operator. The images are accompanied by the audio commentary of on-course presenters who talk about the horses and their form to entice potential punters to place bets. Post-race interviews are also conducted. The following are the domestic racetracks in question:

- 1.1 Turffontein, Vaal, Arlington, Fairview and Flamingo Park Racecourses (Phumelela).
- 1.2 Clairwood, Greyville and Scottsville Racecourses (Gold Circle).
- 1.3 Durbanville and Kenilworth Racecourses (Kenilworth).'

The racetracks that have a fixed gallery are Fairview in Port Elizabeth and Flamingo Park in Kimberley.

[8] What is received by the OB van from the cameras at domestic racetracks via a cable is simultaneously recorded on one digital server as well as on a separate dedicated server for the stipes stewards and is kept in archival storage there. The images can be replayed for stewards to monitor whether everything was above board and permits slow motion replays at the instance of the race-day producer. Before the signal leaves the OB van it has to be compressed to facilitate transmission to the Tellytrack control room in Rivonia. The onward transmission by fibre-optic cable is effected by Telemedia, a service provider, at the instance of Tellytrack. The enhancements are then added and the complete product is recorded in Tellytrack's control room on the output digital video recorder and simultaneously sent to DSTV by Telemedia in compressed form via fibre-

optic cable. It is kept in archival storage at Tellytrack's control room. After it is received by DSTV it is encrypted for transmission by satellite to DSTV's private subscribers. This latter process takes six seconds. Separately, Telemedia sends in encrypted form, via satellite, the dirty feed from the Tellytrack control room to the latter's commercial subscribers, for viewing by the public at their respective business locations. To be accurate, what is viewed on channel 239 is displayed at least seven seconds later than what is occurring at the race tracks at that moment.

[9] In relation to international races, the capture of the race by cameras involves production teams employed by rights owners in respective countries and the raw feed is then transmitted by Tellytrack's international supplier via satellite to the Tellytrack control room via Telemedia. The same process as in relation to domestic raw feeds as referred to in the preceding paragraphs is then followed.

[10] It is necessary to record that in terms of a Channel Distribution Agreement between Multichoice Proprietary Limited, which conducts DSTV operations and Tellytrack, Multichoice is given the right to receive, distribute and market channel 239 and is entitled to licence the reception, distribution and marketing of the channel, by means of Pay TV Systems for reception by subscribers. In terms of that agreement Tellytrack reserved to itself the right to grant communal subscribers such as totalisators and bookmakers authorisation to receive, distribute or broadcast the channel.

[11] I now turn to deal with the history of Tellytrack's involvement with the respondents and the genesis and resolution of the litigation leading up to the present appeal. During 2000 a meeting took place, attended by representatives of Phumelela, Gold Circle, the Western Cape Bookmakers, Eastern Cape Bookmakers, Gauteng Bookmakers and KwaZulu-Natal Bookmakers. The respondents are members of the respective provincial Bookmakers Associations. At that meeting an oral agreement was concluded between Phumelela and Gold Circle on the one hand and licenced bookmakers on the other, in terms of which Phumelela and Gold Circle (both being race course operators in South Africa) together with other race course operators in South Africa, would establish and

operate a television channel for the purpose of broadcasting horseracing events. Totalisator operators would subscribe to the television channel and would have the right to display the television channel's contents at their outlets. Phumelela and Gold Circle (which subsequently established Phumelela Gold Enterprises (PGE), for this purpose) would bear the cost of establishing the television channel. The television channel would be operated on a 'break-even' basis with the costs associated with bringing the feeds from the various race courses in South Africa to the recipients of the broadcast being spread equally between the licensed bookmakers in South Africa and totalisator agents in South Africa on a per outlet or 'per shop' basis.

[12] The envisaged television channel would be known as Tellytrack, which initially was a partnership comprising Phumelela and Gold Circle. It was later extended to include Kenilworth. In terms of each of the contracts concluded between Tellytrack and KwaZulu-Natal Bookmakers Society; the Gauteng Off-Course Bookmakers Association; and the Western Cape Bookmakers Association, Tellytrack would provide the television channel for a monthly subscription fee determined in accordance with an agreed formula set out in the contracts which was on the break-even basis.

[13] From 2001 to September 2013 the relationship between Tellytrack and the KwaZulu-Natal Bookmakers Society (the successor in title of the Natal Bookmakers' Society (CO-OP Limited)), the Gauteng Off-Course Bookmakers Association and the Western Cape Bookmakers Association, of which the respondents are members, was regulated by a series of written agreements. In terms of the agreements Tellytrack would provide the television channel for a monthly subscription fee, determined in accordance with an agreed formula which was on the break-even basis referred to earlier.

[14] From September 2013, after the termination by effluxion of time, so Tellytrack alleged, of the last written agreements referred to in the preceding paragraph, Tellytrack, desirous of extracting more from the various betting entities, prompted by financial demands by their international suppliers, sought to base a future subscription fee on a percentage of turnover. This was communicated to those entities, including the

respondents. Negotiations to that end ensued. Thereafter, Tellytrack wrote to the bookmakers. The relevant part of a letter dated 24 January 2014 is set out hereafter:

'We have not managed to persuade our international suppliers to continue to permit exploitation of their intellectual property by bookmakers in betting outlets without being remunerated therefor. Accordingly, the international content has to be removed from the Tellytrack channel and broadcast as a separate channel on separate decoders with effect from February 2014.

Your options therefore are:

- a) You can subscribe for either the Tellytrack channel or the international content, or both, at 3 % of your over-the-counter turnover;
- b) You can elect to accept our offer of mediation;
- c) You can still make an alternative proposal to us;
- d) You can pursue the clean feed alternative offered by Phumelela; or
- e) You can elect not to subscribe for any of our services and take bets without displaying live South African or international racing in your retail betting shops.

We have deployed decoders to bookmakers who have to date opted for alternative a).'

[15] Neither the respective bookmakers associations nor any of the respondents were amenable to the proposals and they all stopped paying for the material received from Tellytrack. The constituent members of Tellytrack were adamant that they were the proprietors in what they described as the cinematograph films and sound recordings of the horse racing events (the raw feeds) that took place at the racetracks operated by them. Phumelela asserted that it was the proprietor of the copyright in the computer program used to produce the betting scrolls, added to the raw feed and that it was the proprietor of the copyright in the resultant betting scrolls which constitute computer generated literary works as contemplated in the Act and that it ultimately holds copyright to what was being viewed on channel 239, namely, the dirty feeds of domestic and international race events. Insofar as any of the constituent members of Tellytrack hold copyright in any part of the works in respect of which copyright protection was sought, an exclusive licence therein was granted to Tellytrack.

[16] The factual material recorded in paras 5 to 9 above are common cause. They were largely drawn from a diagrammatic representation produced by a witness on behalf of the

respondents, namely Mr David Fraser. The paragraphs that follow describe the essential dispute between the parties and the findings of the court below.

[17] It is on the basis of the reservation of its rights in relation to communal subscribers in the agreement concluded with Multichoice, referred to in para 10 above, that Tellytrack in the past provided to be viewed at the business locations of members of the bookmakers' associations with which it had reached agreement, the dirty race feeds of domestic and international races. As stated above, the relationship between Tellytrack and members of the bookmakers' associations broke down when the former demanded an increased fee and the latter stopped paying any subscriptions. Such members are presently making available for viewing to the public at its business locations what DSTV broadcasts to its private subscribers. It is that conduct that formed the basis of the action instituted by Tellytrack. At the time of the hearing of this appeal a number of bookmakers and tote operators had signed up to receive access to the Tellytrack channel in the terms proposed by it in the letter set out in para 14 above.

[18] Tellytrack's complaint in proceeding to litigation and seeking an interdict against the respondents, was that the respondents, since they stopped paying any subscription fees and in the absence of any new agreement granting them the right to do so, continued to make available for viewing by the public the dirty race feeds on channel 239 broadcast by DSTV at their betting shops, thereby infringing Tellytrack's copyright in the works referred to above, in terms of ss 6, 8, 9, 11B and 23 of the Act. Sections 6 and 9 deal with the nature of copyright in literary or musical works and in sound recordings. Section 8 sets out the nature of copyright in cinematograph films. Section 8, which is central to this appeal, will be dealt with in greater detail later. Section 11B sets out the nature of copyright in computer programs. The relevant part of s 23 reads as follows:

'Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorize.'

[19] Tellytrack was adamant that the respondents were infringing their copyright on a daily basis since October 2013. Tellytrack claimed that consequently it suffered damages, alternatively, that it was entitled to be awarded an amount calculated on the basis of a reasonable royalty, which would have been paid by a licensee in respect of the use of the works. It also claimed additional damages it insisted it was entitled to in terms of s 24(3) of the Act. I shall in due course deal with the applicability of that subsection.

[20] It is necessary to record that pending the finalisation of the litigation the respondents have in the interim paid an amount based on the break-even formula that applied when the written agreements were still in force into their attorneys' trust account. The issue before us is whether there was an infringement by the respondents of Tellytrack's copyright.

[21] In adjudicating Tellytrack's action for an interdict, the court below (Radebe J) had regard to the principal dispute between the parties, namely, the assertion and refutation of copyright in what the public was being permitted to view on channel 239, at the respondents' business locations. She had regard to ss 2(2) and 2(2A) of the Act, which deal with works that are eligible for copyright and which read as follows:

'2 Works eligible for copyright

(1) . . .

(2) A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form.

(2A) A broadcast or a programme-carrying signal shall not be eligible for copyright until, in the case of a broadcast, it has been broadcast, and, in the case of a programme-carrying signal, it has been transmitted by a satellite.'

[22] Radebe J also considered ss 8(1)(a) and (b) of the Act which deals with the nature of copyright in cinematograph films. Those subsections read as follows:

'8 Nature of copyright in cinematograph films –

(1) Copyright in a cinematograph film vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the film in any manner or form, including making a still photograph therefrom;
- (b) Causing the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public.'

These sections should be read with s 1 of the Act which defines cinematograph films as follows:

'[A]ny fixation or *storage by any means whatsoever on film* or any other material of *data, signals* or a sequence of images capable, when used in conjunction with any other mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program.'

(My emphasis.)

The court below, however, had regard to two previous incarnations of this definition, drawn from the decision of this court in *Golden China TV Game Centre & others v Nintendo Co. Ltd* 1997 (1) SA 405 (A). In that case, this court was considering the question whether video games qualified for copyright protection as 'cinematograph films'. It dealt with the relevant provisions of the Copyright Act 63 of 1965 and those of the Act, pre and post amendments in 1992. The versions of the definition that this court in *Nintendo* had regard to were those initially contained in the Act upon its promulgation and subsequently by virtue of the amending Act in 1992.² The word in square brackets indicate an omission from the 1978 Act and those underlined represent insertions. The text that the court in *Nintendo* had regard to reads as follows:

"Cinematograph film" means the [first] fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction and includes the sounds embodied in a sound-track associated with the film, but shall not include a computer program.³

The differences can be seen by comparing the historical texts with the emphasised parts of the present definition.

[23] The court below, after having regard to the historical rather than the present day text, referred to 413A-J to 414A of *Nintendo* where the following appears:

² Act 125 of 1992.

³ At 412C-E.

“First Fixation”

As a rule, a work has to be fixed or reduced to some or other material from before it can be eligible for copyright (s 2(2)). Before its amendment in 1992, this subsection imposed the requirement on literary, musical and artistic works only, but it is now applicable to all works except, obviously, a broadcast or programme carrying signal. As far as cinematographic films are concerned, the fixation requirement has been part of the definition since 1978. It replaced the requirement of “recording” in the 1965 Act. Since the amending Act, the requirement is therefore to be found not only in the definition, but also in s 2(2) . . .

“A sequence of images”

The obvious difference between a “conventional” cinematograph film and a video game lies in the fact that, with the former, the sequence of images is fixed whereas in the case of the latter the sequence of images is, to an extent, variable and under control of the player . . . “Reproduction”, in the contexts of copyright, refers to the copying of the work (i.e. the cinematograph film) in question . . . and not to ephemeral versions, renditions or application of a work. This is clear if regard is had to the definitions of “copy” and “reproduction” (s 1) and, especially, s 8(1) of the Act. What seems to me, to have to be capable of reproduction is the film itself and not the sequence of images’

[24] The court below went on to state the following, at para 23 of its judgment:

‘It is clear from the above exposé that for a work to fall within the definition of “cinematograph film”, the data or signals or a sequence of images, must have been fixated or stored, in other words, been recorded on material, and been capable of being seen as a moving picture and of being reproduced when used in conjunction with any other mechanical, electronic or other device. Infringement of the copyright in a cinematograph film therefore requires that there is copying of that film or a substantial part thereof. The term “copy”, in relation to cinematograph film, means any print, negative, tape or other article on which the film or part of it is recorded.’

In *Nintendo* this court held that video games fall within the definition of ‘cinematograph films’.

[25] I interpose to record that in dealing with the then definition of ‘cinematograph films’, Harms JA, in *Nintendo*, said the following at 412E-F:

‘As with many definitions in the Act and its antecedents, very wide terms have been employed. The only reason for this can be an intention to cover future technical innovations by using general

words. Legislative inertia ought not to impede human ingenuity and the reasonable protections thereof.'

[26] Returning to the judgment of the court below, Radebe J, after referring to *Nintendo*, progressed to dealing with sound recordings and had regard to s 9(e) of the Act, which provides:

'9 Nature of copyright in sound recordings. -

Copyright in a sound recording vests the exclusive right to do or to authorize the doing of any of the following act in the Republic:

. . .

(e) Communicating the sound recording to the public.'

[27] Radebe J thereafter proceeded to evaluate the evidence adduced and held as follows at para 45:

'It cannot be disputed that both the Raw Race Feed and the Tellytrack Film are cinematograph films, as is abundantly clear from Plaintiff's (Mr Wahlberg's) and Defendant's (Dr Fraser) witnesses. What needs to be still determined is whether the Plaintiff is the owner of what vests in the telecast that is broadcast by Multichoice on DSTV channel 239 (Tellytrack channel) the evidence of both Mr Wahlberg and Dr Fraser is that what is being broadcast as the Tellytrack Channel is recorded "simultaneously" as the channel is viewed.'

[28] The court below then, somewhat paradoxically, once again considering *Nintendo*, stated the following, referring to specific parts of the evidence adduced:

'Mr Wahlberg's evidence under cross-examination was that: at the time of the broadcast there did not exist in material form any work which could be copied because they were in the process of being recorded (simultaneously) as they were being broadcast. He thus conceded that all that which could be shown was the broadcast by Multichoice.

Similarly, the evidence on affidavit by Mr Stuart, which Mr Wahlberg agreed, is that what was shown on the television channel was a broadcast and not a film. The latter was still in the process of being made, possibly in the process of being fixated or stored or reduced to material form. Mr Wahlberg's evidence is that what is shown on the Tellytrack TV channel is a broadcast by

Multichoice. This is not dependent upon the recordal of the Tellytrack channel, albeit these two events happen simultaneously, or concurrently or at the same time as the channel is viewed.¹⁴

[29] The court went on to reach the following conclusions:

'In the premises, the Plaintiff's claim for copyright must fail for the following reasons:

In respect of cinematograph film, the evidence of both Mr Wahlberg and Dr Fraser was that what is broadcast as Tellytrack television channel is recorded simultaneously or concurrently as the channel is viewed. There was therefore no copying of a work which had been fixated or stored when, the Defendants showed the Tellytrack channel on their screens. Fixation for storage of the data or signal or sequence of images is required.

The definition of "cinematograph film" is clear and unambiguous s 1(1) and should be interpreted as is done, for instance in the decision in *NINTENDO (supra)*.

In respect of literary works, Mr Wahlberg's evidence is that the Plaintiff relies on the same thing for literary works and for the computer-generated works. Plaintiff fails to identify these works separately and Plaintiff's evidence shows that both are in any event part of the cinematograph film relied on.

In respect of the sound recordings, the Plaintiff's evidence amounts to showing that these cannot be a work separate from the cinematograph film. Mr Bowman argued that even if they were otherwise separately identifiable, they are nothing other than part of the cinematograph film the Plaintiff relies on. I agree with him. The Plaintiff could not identify these works as separate from cinematograph film. The literary works, the sound recording and the computer-generated works do not have existence other than part of the cinematograph films.

It is on these bases that I accept that what the Defendants were showing on their screens was a broadcast, in respect of which the Plaintiff has not claimed copyright. It is Multichoice and not the Plaintiff, that is the owner of the copyright which might vest in the Tellytrack TV Channel. The Plaintiff therefore has no copyright in the "telecast" on which it relies as being the cinematograph film.¹⁵

[30] The court below consequently dismissed the appellant's claim with costs, including the costs of two counsel. It is against that order and the conclusions upon which it was based that the present appeal is directed.

⁴ Paras 47 and 48.

⁵ Paras 60-61.

[31] Section 2(1) of the Act lists the categories of works that are eligible for copyright. One such category includes cinematographic films. Section 2(2) of the Act provides: 'A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to material form.'

Section 8, the provisions of which appear in para 24 above, make it clear that copyright in a cinematograph film vests the exclusive right to authorise, *inter alia*, 'causing the film, in so far as it consists of images, to be seen in public; or, in so far as it consists of sounds, to be heard in public'.

[32] Although the action instituted by Tellytrack is based on infringement by the respondents of copyright in relation to a variety of works, namely, literary, cinematograph films, sound recordings and computer programs it soon became clear that the core of its case was that it was entitled to copyright protection in relation to cinematograph films, which comprised the other works. It will be recalled that the definition of cinematograph film in s 1 of the Act includes a soundtrack associated therewith.

[33] Before us, the crux of the respondents' case, was that since what was displayed at their business premises by way of DSTV's channel 239 was a broadcast of a live event, there was no fixation or storage as required by the definition of cinematograph film and that consequently there had been no infringement of appellant's copyright in the work. More particularly, that the broadcast was not from a recording as required by the definition of cinematographic film, because the recording was happening concurrently with the transmission of the live event. That is the part of the judgment of the court below that the respondents support and rely on. The respondents also support the conclusion by the court below that Multichoice, as the first broadcaster of the Tellytrack television channel owned the copyright in the broadcast and in any event in terms of clause 12 of the Channel Distribution Agreement copyright in the broadcast vested in Multichoice. The respondents also criticised Tellytrack for initially basing its case on s 8(1)(a) in terms of

which it accused them of reproducing the film whereas only latterly, relying on s 8(1)(b), namely, causing the images of the film to be seen in public.

[34] It is true that Tellytrack was at times confused about the core of its case. Too much unfocused effort was expended on the nature of what was sent to Multichoice by Telemedia and whether what was seen on channel 239 was a reproduction rather than on whether what the public was ultimately permitted to view at the business locations of the respondents was a cinematograph film, within the definition of that expression in the Act. That notwithstanding, before us, the principal question is whether Tellytrack is entitled to claim copyright in relation to cinematographic films. There can be no doubt that what the public is allowed to see at the respondents' business locations are a sequence of images seen as a moving picture constituting in the main horse racing events. Those images and others, including those of studio interviews and the overlay of all the items imposed by way of the computer program, have indisputably been reduced to material form by way of the recordings on the aforesaid occasions. First, in relation to domestic races, two recordings were made at the OB van, second at the Tellytrack control room. In respect of international races, the recording is made of the complete product, including enhancements, at the Tellytrack control room. What is seen on channel 239 is what has already been recorded and stored at the OB van and the Tellytrack control room. At the time that a race event is seen on channel 239 is has already been recorded and stored, as described above. As noted in *Nintendo*,⁶ the stored images need not be stored in their original form, that is, as images. It is capable of being reproduced as it was when examples were shown to the court below. These facts bring it squarely within the definition of s 1 of the Act and provides it with copyright protection in terms of ss 2, 8 and 23 of the Act.

[35] This is not a case in terms of which Multichoice is claiming copyright infringement in relation to the broadcast of the material on channel 239. This case is about Tellytrack claiming copyright in cinematograph films which encompass sound recordings and the graphic enhancements. There is something to be said for the refrain on behalf of the

⁶ At 415C-D.

appellant, namely, that one cannot broadcast 'nothing' and that consequently, what the public was being allowed to view at the respondents' business locations, was a cinematograph film. There is no dispute in relation to it being produced at source and later being added to by Tellytrack employees. In all of the circumstances set out above, the appellants have discharged the onus of establishing copyright in cinematograph films. Tellytrack was clearly entitled to the interdict sought in the court below. To hold otherwise would be to frustrate the purpose of the Act.

[36] Reverting to the question of additional damages being claimed by the appellants as contemplated in s 24(3) of the Act, the concession was rightly made before us that in terms of that subsection, Tellytrack was not entitled to such relief if effective relief was otherwise available to it. Section 24(3) reads as follows:

'(3)Where in an action under this section an infringement of copyright is proved or admitted, and the court having regard, in addition to all other material considerations, to -

(a) the flagrancy of the infringement; and

(b) any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied *that effective relief would not otherwise be available* to the plaintiff, the court shall in assessing damages for the infringement have power to award such additional damages as the court may deem fit.' (My emphasis.)

It was accepted that an enquiry to be held for the purposes of determining the amount of damages, alternatively, a reasonable royalty to be paid, would, in the circumstances, provide Tellytrack with effective relief.

[37] One last aspect requires attention, namely Phumelela's licence conditions in relation to Gauteng and the Eastern Cape. These licence conditions placed certain obligations on Phumelela which explains the formal tender made by Tellytrack and which remain extant. The tender is as follows:

'Phumelela tenders to make available, to the defendants conducting business in Gauteng, the visual broadcasts of all horse races staged at Turffontein Race Course in accordance with its Gauteng Race Meeting licence.

Phumelela tenders to make available, to the Defendants conducting business in the Eastern Cape, the television signals of all horse races staged at Fairview Race Course in accordance with its Eastern Cape race course licence.'

The interdict sought by Tellytrack is somewhat impinged upon by the tender but does not otherwise militate against it. The tender and is enforceable by the respondents and we need not concern ourselves any further in relation thereto. The order that follows does not encompass the visual broadcasts in respect of which the tender is made.

[38] The following order is made:

1 The appeal is upheld with costs including the costs consequent upon the employment of two counsel.

2 The order made by the court a quo is set aside and substituted as follows:

'1 The first, second, third, fourth, fifth, seventh and eighth respondents and Marshalls World of Sport KZN 2 (Pty) Ltd ("the respondents") are interdicted and restrained, in terms of s 8(1)(b) of the Copyright Act No. 98 of 1978 ("the Copyright Act"), from infringing the appellant's copyright in the Tellytrack Cinematograph Films and Raw Race Feeds by causing them to be seen in public.

2 An enquiry be held for the purposes of determining the amount of damages, alternatively, a reasonable royalty to be paid by the respondents to the appellant and that if the parties cannot agree upon the procedure to be adopted, they may approach the Court to prescribe such procedure for conducting such enquiry.

3 The costs are to be paid by the respondents, jointly and severally, the one paying the others to be absolved, such costs to include those consequent upon the employment of two counsel.'

MS NAVSA

JUDGE OF APPEAL

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