CONSUMER GOODS & SERVICES OMBUD
Fairplay between consumer & supplier

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~~Don't~~ quote me on this

The ubiquitousness of electronic media has at the same time made plagiarism easier to commit and more likely to be detected. This was evident in the case of *Moneyweb (Pty) Limited v Media 24 Limited and Another.*[1] Moneyweb contended that Media24 infringed its copyright under the Copyright Act 98 of 1978, alternatively that Media24 has engaged in unlawful competition by the publication of seven articles first published by it on its website.

After a painstaking analysis of each of the articles, the Court concluded that only in the case of the reproduction of one article had there been an infringement of the applicant's copyright under the Copyright Act 98 of 1978. In doing so the Court took into consideration that the article was published online within seven hours of the original article being published; almost all of it was a word-for-word copy of the original; and Media 24 had taken more than a substantial part: it had taken the core of the article and did not contribute more of its own work to the article.

"Fair dealing" is a defence available to re-publishers of literary or musical works only for the purposes of research, private study, personal/private use, criticism/review, and (the aspect relevant to the *Moneyweb* case) the reporting of "current events".[2]

In the *Moneyweb* case, the Court listed the factors relevant to a consideration of fairness within the meaning of section 12(1)(c)(i) to include: the nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work. One factor may be more or less important than another, given the context in which publication occurs. The list of factors is not exhaustive.[3]

As to the method of acknowledgement appropriate for online publications, the Court considered hyperlinking as both a most effective way of informing the reader of the source and substantial compliance with the requirement that the source shall be mentioned, as well as the name of the author if it appears on the work.[4]

[1] (31575/2013) [2016] ZAGPJHC 81.
[2] LawDotNews June 2016.
[3] At para 113.
[4] An example on hyperlinking is to be found in the following footnote.

Salt in the wound

I am hesitant to give advice or comment on anything diet related in view of the ongoing trial of Professor Tim Noakes at the Health Professions Council regarding his Banting diet based advice on what to feed babies. (For a "dissident" and amusing analysis of the trial, see: http://www.health24.com/Columnists/professor-noakes-ridiculous-trial-20160425).

The trial is perhaps a manifestation of the rise of the health crusaders. The same can be said for the sugar tax that Pravin Gordham announced earlier in the year. Journalist Andrea Teagle supports the tax on the grounds that "Many consumers do not have the means to make and carry out informed choices."[5] This reasoning appears to gainsay part of the philosophy underlying the Consumer Protection Act: The improved access to, and the quality of, information that is necessary so that consumers are able to make informed choices according to their individual wishes and needs (CPA Preamble).

On the other hand, the CPA also has the objective of protecting consumers from hazards to their well-being and safety. It will be interesting to see how the Tribunal and the courts reconcile and balance these two potentially competing objectives.

Another victory for proponents of the regulated approach was the coming into effect on 30 June 2016 of the first part of the *Regulations relating the reduction of sodium in certain foodstuffs and related matters* (Gazette 36274, Regulation 214).[6] The sodium levels of the following foodstuffs may not exceed the limits listed in Table one of the regulations:

- Bread;
- Breakfast cereals;
- Fat and butter spreads;
- Ready-to eat snacks/ potato crisps;
- Processed meat/ sausages;
- Dry soup/ gravy/ savoury powders and stock cubes.

The sodium levels in these foodstuffs must be lowered further by 30 June 2019.

[5] http://www.dailymaverick.co.za/article/2016-03-06-budgets-battle-of-the-bulge-how-sweet-is-sas-sugar-tax/#.V4OD_k0krIU

[6] Available at http://www.heartfoundation.co.za/sites/default/files/articles/South%20Africa%20salt%20legislation.pdf
See also http://www.werksmans.com/legal-briefs-view/how-badly-do-we-eat/
http://www.spoor.com/en/News/the-sa-department-of-health-worth-its-salt/

Three years and you are not out

Any legal practitioner who has had experience in the courts will tell you that the older a case is, the more difficult it is to come to a conclusion. Memories fade, witnesses lose interest, move elsewhere or die; records get lost or are destroyed. It is for this reason and to create legal certainty and finality between the parties after a lapse of time that time bars and prescription periods limit the right to seek judicial redress.[7]

The Constitutionality of section 23(1) of the Road Accident Fund Act 56 of 1996 (RAF), which requires that claims against the Fund must be instituted within three years from the date the cause of action arose, was considered by the Constitutional Court in the case of *Road Accident Fund and Another v Mdeyide*.[8] The Court considered the section in the light of section 34 of the Constitution, which enshrines the right of access to courts and states that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The provisions of the Prescription Act 68 of 1969 were also considered. Ultimately the Court decided that section 23(1) of the RAF Act is reasonable and justifiable under section 36 of the Constitution and accordingly not unconstitutional.

In a more recent decision of the Constitutional Court, *Links v Member of the Executive Council, Department of Health, Northern Cape Province*[9], the Court came to the assistance of a plaintiff whose claim had on the face of it prescribed. The plaintiff was an uneducated cleaner who dislocated his thumb on his left hand and went to Kimberley Hospital for medical treatment. After a long and sad saga of what appears to have been medical bungling, the plaintiff's thumb was amputated. His woes were compounded by the failure of the NGO assisting him with his claim to lodge it timeously. The Court held that the plaintiff could not have had access to independent medical professionals in time. Accordingly, he could not have had knowledge of all the material facts he needed to have before he could institute legal proceedings. Prescription could, therefore, not have begun running.[10]

In the view of Ebrahim and Felmore, the Constitutional Court either failed to apply its own rationale to the facts or it failed to sufficiently distinguish the fact that the expert opinion serves as evidence of a fact to be proven. In the result, the judgment opens the door to uncertainty and a number of potential unintended consequences.[11]

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[7] *Road Accident Fund and Another v Mdeyide* (CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC) at para 101.
[8] Op cit.
[99] CCT 29/15) [2016] ZACC 10.
[10] At para 49.
[11] Max Ebrahim and Wietske Felmore: Prescription Alert! Available on: http://www.mondaq.com/article.asp?articleid=500570&em