

NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT.

PRETORIA /ES (REPUBLIC OF SOUTH AFRICA)

CASE NO: 35769/2010

DATE:15/05/2012

IN THE MATTER BETWEEN:

BOARD OF HEALTHCARE FUNDERS

APPLICANT

AND

DISCOVERY HEALTH MEDICAL SCELEME

1st RESPONDENT

DISCOVERY HEALTH (PTY) LTD

2nd RESPONDENT

COUNCIL FOR MEDICAL SCHEMES

3RD RESPONDENT

JUDGMENT

KOLLAPEN. J

[1] This is an application brought by the applicant in terms of the Copyright Act 98 of 1978 ("the Act") against the first and second respondents. The applicant seeks as against the first and second respondents the following relief:

1. restraining the second respondent from infringing the copyright of the applicant in the Practice Code Numbering System ("PCNS") in the course of its business by using it and thereby reproducing and/or publishing and/or making adaptations of it in any manner without the written consent of the applicant;

2. restraining the first respondent from causing and/or aiding and/or letting the second respondent to infringe the copyright of the applicant in the PCNS;
3. directing the first respondent and the second respondent to deliver up to the applicant all data bases, records and/or documents which incorporate the PCNS or any part, adaptations or infringing copies thereof, in whatever form or storage medium there may exist, which are in their possession or under their control; and
4. directing the first respondent and the second respondent to pay to the applicant a reasonable royalty in terms of section 24(1 A) of the Copyright Act for the period 1 January 2010 to the date on which the first and second respondent cease infringing the copyright of the applicant in the PCNS, said reasonable royalty to be calculated at the rate of R1,30 per principal member of the first respondent per annum until 31 December 2010 and, thereafter, at the standard rate of payment per principal member per annum which will be paid by members of the applicant to the applicant;
5. alternatively to paragraph 4 above, directing that:
 - 5.1 an enquiry be held in terms of section 24(1B) of the Copyright Act 98 of 1978 into a reasonable royalty to be awarded to the applicant and/or the damages suffered by the applicant as a result of the first and/or second respondent's infringement of the applicant's copyright; and
 - 5.2 should the parties be unable to reach agreement as to the future pleadings to be filed, discovery, inspection or other matters of procedure relating to the enquiry, either of the parties may make application to this court for directions in regard thereto.

The applicant also seeks cost of the application as against the first and second respondents including the cost of two counsel.

The parties

[2] The applicant is a non-profit organisation which has been constituted as a representative association of the majority of medical aid schemes in South Africa.

2.1 The applicant manages and is responsible for the creation and for the administration and the use of the PCNS by all South African medical schemes and medical health or healthcare service providers.

2.2 The applicant has been approved by the third respondent to allot practice code numbers to healthcare providers in terms of the regulations under the Medical Schemes Act 31 of 1998.

[3] The first respondent is a medical scheme with the second respondent being its administrator. The first respondent was a member of the applicant but resigned with effect from 1 January 2010.

The applicant's case in summary and the respondents' defences in summary

[4] The applicant's case in brief is that it is the owner of copyright in the PCNS and that the first and second respondents continue, despite the first respondent's resignation as a member of the applicant to use the PCNS including both the PCNS numbers and associated data in the course of their business. The applicant contends that by doing so the respondents reproduce and/or adapt the work or substantial parts of it without authority and by so doing infringe the applicant's copyright in the PCNS.

[5] The first and second respondent in opposition to the relief sought by the applicant have raised various defences and they include:

(a) that no copyright can be said to exist in the work that the applicant seeks to make the

subject-matter of its claim in terms of the Copyright Act;

(b) that if copyright could be said to exist in respect of the work the applicant has not demonstrated that it is indeed the author of the work;

(c) that if copyright should subsist in the work it is not the applicant who owns the copyright but the State who is the owner of such copyright;

(d) that if it is found that copyright subsists in the work and that the applicant is the author of the work then the respondents are entitled to use the work on the basis of an implied perpetual licence;

(e) alternatively that the respondents are entitled to use the work in respect of a continued licence on the basis that they paid for it and would therefore be entitled to use it; and

(f) the respondents deny that in the event it be found that the applicant is the author of the work that there was any infringement as contemplated in the Act in respect of the work.

The background to the dispute

[6] The Practice Code Numbering System ("PCNS") comprises a set or compilation of numbers or codes which relate to and identify all of the medical practitioners and medical service providers in private practice in South Africa together with associated related data.

[7] In the PCNS every service provider and practice has been allocated a unique identifying number which is referred to as the Practice Code Number (PCN).

[8] The PCNS also includes, which is linked to each PCN, personal data covering a variety of fields which include the name, address, contact particulars and bank details of each practitioner and practice and issues such as preferred payment method, preferred method of communication and whether the practitioner dispenses medicines. This information is broadly

referred to as the PCNS data.

[9] The PCN appears to be an integral part of the PCNS data and as it were is what unlocks the data.

[10] The PCNS is used by all medical aid schemes in order to deal with claims processing and is an essential tool in verifying the registration and discipline of a practitioner in order to facilitate payment, to prevent fraud and to verify that a claimant is claiming an amount within his or her scope of practice and discipline.

[11] The issue of practice code numbers ("PCN") is regulated by the general regulations promulgated in terms of the Medical Schemes Act 131 of 1998. Regulation 1 of the regulations promulgated in terms of Government Notice R1262 in Government Gazette 205565 of 20 October 1999, provides that a practice code number is "a number allotted to a supplier of a relevant health service as a practice number by an organisation or body approved by council".

[12] Regulation 5 of the same regulations further provides that accounts submitted by suppliers of services must contain a defined list of information including the surname and initials of the member of the patient, the name of the medical scheme, the membership number, the practice code number and such other information set out in the regulation. It accordingly follows that in order for a practitioner to submit a claim the claim would have to comply with the requirements of regulation 5. The regulations also provide for the appointment of a body or organisation approved by council to allot practice code numbers to suppliers of relevant health services.

[13] On 20 January 2003 the third respondent (which is the council referred to in the regulations) appointed the applicant as the body that would allot practice code numbers. This appointment was for a period of three years and was subsequently renewed and it is common cause that in respect of the time frame of this dispute the applicant is in fact the body or organisation approved by the third respondent to allot practice code numbers.

[14] The approval of the applicant by the third respondent and the terms and conditions under which the applicant was so approved is regulated by a written agreement entered into between the applicant and the third respondent,

[15] The main features of that written agreement include the following:

(a) the objective of the agreement is to promote uniform, national and legally constituted health service provider identifier for billing purpose for approval of an organisation or body approved by council to allot practice code numbers to health care providers.

The users of PCN is defined as anyone who uses the PCN and who benefits from it.

(b) Some of the relevant principles contained in the agreement include a provision that access to and utilisation of the practice code numbers by providers shall be transparent, fair and equitable.

(c) The principles also affirm that the applicant is the exclusive property owner of the PCNS and further provides that ownership of the provider registry of the PCN data base falls under the council.

(d) The agreement further provides for the applicant to submit an annual report to the third respondent on financial matters and statistical information pertaining to the PCNS. In addition it has to put in place an accounting system for the purposes of management of financial

transactions of the PCNS.

(e) The written agreement also provides that all the users of the PCNS shall contribute towards the running and maintenance of the system and in this regard provides that a transparent fee structure shall be determined by the applicant.

(f) The agreement provides that the applicant shall gather the following minimum data from providers in order to facilitate the administrative and statistical obligations required by the PCNS: name of provider or licence entity

- practice code number
- professional number or number from licencing authority
- provider discipline organisation

membership of manage care organisation address - postal and physical contact details

banking details VAT registration and company registration number dispensing licence.

(g) The principles contained in the agreement also include a warranty that the applicant has demonstrable capacity to administer the function and to demonstrate ownership of or licence to use the applicable practice code numbering system.

[16] The PCNS comprises a set or compilation of numbers or codes which relate to and identify all the medical practitioners and medical service providers in private practice in South Africa together with the related data.

[17] The PCNS was developed over a long period of time commencing in the 1960's and there were three distinct phases in its development.

The first phase

[18] The first phase commenced in the 1960's under the supervision of what was known as

the Statutory Organisation of Medical Schemes ("SOMS") which later changed its name to Bestmed Medical Scheme. During the first phase of the development of the PCNS a system was created consisting of numbers comprising seven digits. The first two digits indicated the specific discipline in which the practitioner was involved. The following four digits made up a sequence for the service providers in the discipline while the last digit was a check digit based on the modulus 11 algorithm.

The second phase

[19] During March 1978 SOMS and the Representative Association of Medical Schemes ("RAMS") entered into an agreement relating to the future administration of the PCNS by RAMS in terms of which RAMS was responsible for the continued issuing of practice numbers forming part of the PCNS. During the period 1978 to 2000 the PCNS continued to be expanded by the inclusion of new service providers but it soon became evident that the seven digit PCN would have its own limitations with the increasing number of practitioners that needed to be included on the system.

[20] It warrants mention that certain members of RAMS broke away to form an association called the South African Medical Schemes Association and that in order to advance and unify the two bodies that then existed a new entity was formed which was the Board of Healthcare Funders of South Africa which in time established itself as the Board of Healthcare Funders of Southern Africa and which is the current applicant in this application.

[21] By about 2000 the sequence of numbers and the system that was in place was rapidly approaching maximum capacity and this led to the development of a thirteen digit PCN which was structured as follows: the first three digits reflected a specific discipline of the practitioner,

the following three digits reflect the sub-discipline of the practitioner, the following six digits reflected the sequential number allocated to the practitioner while the last digit in the sequence was a check number devised in accordance with an algorithmic formula.

[22] The PCNS has over time increased. While in 1978 the PCNS comprised of about 9 000 individual codes and sets of data this increased to 22 677 by the end of 1993 and this has in turn increased to approximately 91 000 at the present time.

[23] The applicant contends that the time, effort and money expended by itself and its various predecessors over the years (SOMS/Bestmed) has been extensive and has required the efforts of many employees of the various entities involved over the years.

[24] In addition to the above the applicant to the extent that it is necessary relies on an agreement of assignment between Bestmed Medical Schemes and itself dated 9 June 2005 with regard to the copyright in the PCNS up to the end of phase 1.

[25] In respect of phase 2 (the period between 1978 and 1993) it appears that an entity known as Universal Computer Services (Pty) Ltd ("UCS") assisted the applicant with regard to converting the data that it had compiled into computer readable (electronic) form. It also appears that Universal allocated blocks of sequential numbers according to the PCN formula and system. With regard to the second phase it is the applicant's contention that Universal did the work that it was required to do in accordance with the applicant's specific formula and directions and to this extent the applicant contends that it was the author of the PCN component of the work in terms of the provisions of the definition of "author" in the Copyright Act. On account of this it submits that it owns this portion of the copyright. In any event and to

the extent that it may be considered that Universal was the author or joint author of the practice code numbers the applicant relies on a copy of an assignment agreement entered into between the UCS Group Limited and itself dated 17 June 2010.

[26] Finally in respect of the period 1994 onwards it is the applicant's case that all arrangements necessary for the creation of the PCNS were undertaken and performed by the employees of the applicant under contracts of service in the course and scope of their employment.

[27] It is thus the applicant's stance that regard being had to the definition of "author" in the Act as being defined as "in relation to..... musical or artistic works means the person who first makes or creates the work", it is for all intents and purposes the author of the work.

[28] The respondents dispute the factual averments with regard to the applicant's authorship of the work. It must be evident, however, that at the very least the agreements of assignment between SOMS and the applicant and thereafter between the UCS and the applicant and the fact that in the third phase of the development of the system all activities took place under the direct supervision and control of the applicant must compellingly point in the direction that the applicant indeed at least on this basis was the author of the work as contemplated in the Act.

[29] The respondents' next attack on the relief the applicant seeks is that the applicant has failed to demonstrate as is required in terms of section 2(1) of the Act that the work is original and that failing the proof of originality the work cannot be rendered eligible for copyright. In this regard it is the respondents' stance that the work simply consists of a compilation of

numbers and data which data the respondents contend was in any event in the public domain and that on account of that it could hardly be said that the work is original.

[30] In *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd & Others* 2006 4 SA 458 (SCA) the Supreme Court of Appeal accepted the British approach to the concept of originality as the correct one and set out more fully in the matter of *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL).

In the judgment of Lord PEARCE at p479H-I the following appears:

"The words 'literary work' included compilation. They are used to describe work which is expressed in print or writing irrespective of whether it has any excellence of quality or style of writing. The word 'original' does not demand original or inventive work but only that the work should not be copied and should originate from the author. In deciding therefore whether work in the nature of a compilation is original, it is wrong to start by considering individual parts of it apart from the whole as the appellants in the argument sought to do. For many compilations have nothing original in their parts, yet the sum total of the compilation may be original."

In the context of the current application there is little doubt that what the applicant seeks to protect is indeed a compilation in so far as it consists of the combination of a series of digits to form the PCN coupled with the data which then in its totality forms the PCNS. There is little doubt if regard be had to the work and energy put in over the three phases of the development of the PCNS that indeed while some of the component parts may not necessarily be original in its totality the work could be said to be original. It would be cynical to suggest that no effort or skill was expended in the development of the system over the years and in my view the respondents' stance that the work lacks originality must be dismissed in the light of the meaning that has" come to be attached to the concept of originality in the case

law developed over the years. In this regard the dicta in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 relied upon in the Haupt matter supra indicates that "An original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise. While greater works will by definition be original and covered by copyright, creativity is not required to make a work original."

[31] In the matter of *Payen Components SA Ltd v Bovic CC & Others* 1995 4 SA 441 the Appellate Division upheld a claim for breach of copyright in relation to a numbering system identifying a range of gaskets in use in South Africa and in *Bosal Africa (Pty) Ltd v Grapnel (Pty) Ltd & Another* 1985 4 SA 482 (C) the court also upheld a claim for breach of copyright in relation to a part numbering code compiled in the plaintiffs price list and catalogue.

[32] In all the circumstances I am satisfied that the applicants have demonstrated that the compilation and indeed the work in its entirety is an original work and indeed that they are the authors of the work.

State copyright

[33] The respondents contend that to the extent that the PCNS has been developed in terms of a directive by the state and that its content is determined by regulations issued in terms of the Medical Schemes Act copyright in the PCNS subsists in the state. In this regard they seek to rely on the affidavit of Dr Gantsho who is the CEO of the third respondent in which affidavit he denies that copyright subsists in the practice code numbers and alternatively in which he denies that the applicant is the copyright owner.

[34] The applicant contends that firstly Dr Gantsho is not competent to express an opinion with regard to the issue of copyright ownership or indeed copyright infringement and that in any event his affidavit is at odds with the express terms of the agreement entered into between the applicant and the third respondent with regard to the allotment of practice code numbers. In that agreement the third respondent expressly recognises that the applicant is the exclusive property owner of the practice code numbering system. The reference to ownership of the provider registry in that agreement which falls under the third respondent is a separate though related matter but the applicant contends that the agreement specifically recognises the applicant's right in this regard and that Dr Gantsho's affidavit is at odds with both the express terms of the agreement as well as the basis of the appointment of the applicant by the third respondent as the organisation identified to allot practice code numbers.

[35] The question of whether copyright vests in the state would depend on the interpretation of section 5(2) of the Act which provides that copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organisations as may be prescribed. The Supreme Court of Appeal in *Biotech Laboratories (Pty) Ltd v Beecham Group Pic & Another* 2002 4 SA 429 (SCA) had to consider the question of copyright vesting in the state in the context of a package insert for a pharmaceutical product.

[36] Mr Justice HARMS laid down the following test to be applied when considering whether copyright vests in the state:

"The production of the work needs to be the principal object of state direction and control and not merely an incidental or peripheral consequence of some generalised governmental licensing or monitoring power; the direction and control should be directly and specifically

expressed with respect to the work in question and should not be inferred from the fact of some residual or ultimate government veto. On the facts of this case the MCC did not control the making of the work or the intellectual effort involved in his genesis; it controlled its fate to the extent that it had to determine ... whether the insert complied with regulations. Its statutory function is to control the sale of medicines and not to be the controlling mind behind the creation of the insert. An editor is not an author and even if the meaning of the word is always another word control does not mean co-operation or consultation, at least not in the present context."

[37] These remarks are apposite in this matter. While the applicant had to develop a system that complied with the regulations issued in terms of the Medical Schemes Act the manner in which it did so was ultimately within its own control and it could hardly be said that the state saw the production and the development of the PCNS as the principal object of state direction and control. At best it was incidental to governmental licensing and monitoring power. In the circumstances and if regard be had to the written agreement entered into between the applicant and the third respondent to which reference has already been made as well as the test laid down in *Biotech I* I am not satisfied that the respondent has demonstrated on a balance of probabilities that copyright in the work subsists in the State.

Implied perpetual licence

[38] It is evident from the agreement between the applicant and the third respondent that having been identified as the body to allot practice code numbers it would be entitled to charge a user fee for all users of the PCNS and that it must have been in the contemplation of the first and second respondents who were for long periods members of the applicant that such user fees was both permissible in law but also necessary for the efficient functioning of

the applicant in particular its financial integrity and financial stability. The suggestion that the respondent had an implied perpetual licence to use the data militates against the total architecture of the arrangements entered into between the applicant and the third respondent and is also not supported by the first respondent's own conduct during its membership of the applicant, paying a user fee in respect of the PCNS.

Continued licence

[39] The respondent contends that to the extent that it did pay for the data during its tenure as a member of the applicant it is entitled to continue using the information therein ad infinitum. In this regard the respondent likens its stance in respect of this defence to the use of a telephone directory in respect of which and purports to rely on the work of Copping [Copping & Skone James on Copyright at para 7-51 (p420)]. However the learned authors say the following with regard to use and infringement:

"A person may therefore use a work such as a directory to contact the listed names as many times as he wishes. If however in the course of doing so or afterwards he writes down or makes some other record of the substantial amount of the information obtained from the plaintiffs work, then he is liable to infringe."

[40] On the papers before me and it is hardly in dispute that beyond using the data, the respondents copied and reproduced the data and therefore the attempt by the respondents to rely on the concept of continued licence is misplaced as the factual averments which are largely uncontested in this regard hardly support the defence of a continued licence. For these reasons I am of the view that there is no merit in this line of defence as well.

Infringement

[41] Section 6 of the Act provides that:

"Copyright in literary or musical work vests the exclusive right to do or to authorise the doing of any of the following acts in the Republic (a) reproducing the work in any manner or form;"

[42] There is accordingly a prohibition on reproducing the work in any manner or form and in the respondents' opposing affidavit it says the following with regard to its operations in relation to the work:

"It is correct that while the first respondent was a member of the BHF, the second respondent received information from the applicant (and this continued during 2009, the period in which the first respondent's membership of the BHF is in dispute). The second respondent would receive on a weekly basis what is called a delta file containing information relating to changes of medical practitioners as explained more fully in Mr Malan's affidavit filed evenly herewith. All the second respondent did with such files was to extract the portion of the information from those files and to import such information into the relevant fields within the Discovery data base."

From the above it is evident that the respondent certainly on its own version extracted a portion of the data that it received from the applicant and imported that into its own data base. It does not say what portion. In this regard the applicant's attorneys addressed the question about this to the respondents' attorneys on 20 September 2010 enquiring precisely how much of the data was extracted over the years. There appears to have been no response to this particular question.

[43] Under these circumstances the only inference that is open to be drawn is that indeed the respondent used a substantial part of the information that it received from the applicant. On the proven facts it is indeed the only inference that is capable of being drawn and it is based

substantially on the admission made by the respondent alluded to above as well as its failure to expressly deal with the letter dispatched by the applicant's attorneys requesting exactly how much data was extracted over the years. See in this regard R v Blom 1939 AD pi 88 at p202-203.

[44] Under the circumstances it can hardly be in doubt that the respondents' conduct constituted an infringement of the copyright which subsists in the work and in respect of which the applicant has compellingly demonstrated authorship of. I am accordingly satisfied that the applicant has made out a case for infringement.

Relief

[45] Under the circumstances and for the reasons given there is no reason why the applicant should not be entitled to the relief it seeks in terms of prayer 1 to 3 of the notice of motion.

[46] With regard to prayer 4, the applicant seeks a royalty calculated at the rate of R1,30 per principal member of the first respondent per annum from 1 January 2010 until 31 December 2010 and thereafter at the standard rate of payment per principal member per annum which will be paid by members of the applicant to the applicant alternatively directing that an enquiry be held in terms of section 24(1B) of the Act.

[47] In my view and having regard to the manner in which the royalty rate has been historically fixed with specific reference to the agreement between the applicant and the third respondent I am of the view that the amount set out in paragraph 4 in respect of the period until 31 December 2010 appears to be reasonable and indeed that the additional payments beyond 31 December 2010 are also determined by a manner that is fair and transparent and

equitable. Under these circumstances it would simply delay the conclusion of the matter and incur further costs to the respective parties if the court should direct the holding of an enquiry as contemplated in section 24. Under these circumstances there would appear to be no cogent reason why I should direct an enquiry be held and accordingly believe it is competent to grant the relief as sought in paragraph 4.

[48] The parties were in agreement that costs should follow the result and in such event should include the costs of two counsel.

[49] In all the circumstances I make the following order:

1. The second respondent is restrained from infringing the copyright of the applicant in the Practice Code Numbering System (hereinafter "the PCNS")- as described in paragraph 7 of the founding affidavit of Humphrey Zukisa Zokufa, in terms of section 23(1) of the Copyright Act, by making use of the PCNS in the course of its business and thereby reproducing and/or publishing and/or making adaptations of it in any manner without the written licence of the applicant.
2. The first respondent is restrained from causing and/or aiding and/or abetting the second respondent to infringe the copyright of the applicant in the PCNS as set out in paragraph 1 above.
3. The first respondent and the second respondent are directed to deliver up to the applicant all data bases, records and/or documents which incorporate the PCNS or any part, adaptations or infringing copies thereof, in whatever form or storage medium they may exist, which are in their possession or under their control.
4. The first respondent and the second respondent are directed to pay to the applicant a reasonable royalty for the period 1 January 2010 to the date on which the first and second

respondent cease infringing the copyright of the applicant in the PCNS, said reasonable royalty to be calculated at the rate of r1.30 per principal member of the first respondent per annum from 1 January 2010 until 31 December 2010 and, thereafter, at the standard rate of payment per principal member per annum which will be paid by members of the first respondent to the first respondent. 5. The first respondent and the second respondent are directed, jointly and severally, to pay the costs of this application, such costs to include the costs of two counsel.

N Kollapen

Judge of the North Gauteng High Court

35769-2011

Heard on: 01 March 2012

For the applicant: P Ginsburg SC and S Budlender

Instructed by: Adams and Adams

For the respondents: C E Puckrin SC and I Joubert

Instructed by: Spoor and Fisher