HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

05/05/2016 ....

Case No. 31575/2013

In the matter between:

MONEYWEB (PTY) LIMITED — Applicant

and

MEDIA 24 LIMITED — First Respondent
FADIA SALIE — Second Respondent

JUDGMENT

BERGER, AJ

Introduction

[1] The applicant ("Moneyweb") and the first respondent ("Media24") are both in the business of publishing articles on the Internet. These are not their only activities but, for purposes of this case, it is not necessary to list their full range.

[2] Moneyweb publishes business, financial and investment news, primarily on the Internet, but also on other digital platforms. Media24 publishes online magazines and newspapers, including Fin24, an online financial publication. Moneyweb and Media24 are therefore direct competitors. The second respondent was the editor of Fin24 at all relevant times.

[3] Moneyweb seeks a declaration that the publication of seven articles by Media24 was unlawful. Moneyweb contends that Media24 infringed its copyright under the Copyright Act 98 of 1978 ("the Act"), alternatively that Media24 has engaged in unlawful competition. It also seeks to interdict the continued publication of the articles, and a further declaration that Media24 and the second respondent are liable for the damages suffered by it as a result of the publication of the articles. All the articles were published under the banner of Fin24.

[4] Moneyweb has not yet quantified its damages claim. It seeks an order that the extent of its claim be determined in a subsequent enquiry in the event that I hold the respondents liable to compensate it.

[5] Seven articles were first published on Moneyweb's website. Although the articles published under the banner of Fin24 are not word-for-word copies of the articles published by Moneyweb, it contends that Fin24 unlawfully "*copied, appropriated and/or plagiarised*" its earlier articles.

[6] The parties filed extensive heads of argument and argued the matter before me over two days. Three issues appear to be at the centre of this matter:

a. First, there is a dispute concerning the originality of Moneyweb's articles. Media24 argues that Moneyweb has failed to prove originality in any of its articles.

b. Second, if Moneyweb is able to prove originality in any of its articles, the issue arises as to whether Media24 has reproduced a substantial part of the relevant article. Media24 admits reproduction of part of the Moneyweb articles but denies that the reproduction was substantial.

c. Finally, Media24 contends that it is absolved from liability by virtue of the statutory defences in sections 12(1)(c)(i) and 12(8)(a) of the Act.

Originality

[7] Section 2(1) of the Act provides that certain works, including literary works, shall be eligible for copyright "*if they are original*". The Moneyweb articles clearly fall within the definition of "*literary work*". That much is common cause.

[8] There is no definition of "*original*" in the Act. What is clear is that creativity is not required to make a work original. A work is considered to be original "*if it has not been copied from an existing source and if its production required a substantial (or not trivial) degree of skill, judgment or labour.*"[1]

[9] In *CCH Canadian Ltd v Law Society of Upper Canada*[2] the Supreme Court of Canada held 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 characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original"."*

[10] It is nevertheless possible to achieve originality even where the author of a work makes use of existing material. Nugent J (as he then was) approved the test to be applied in such circumstances:[3]

> "*... An artistic work is eligible for copyright if it is 'original'. The following passage from Copeling* Copyright and the Act of 1978 *at p 15, which was cited with approval in* Klep Valves (Pty) Ltd v Saunders Valve Co Ltd *[1987] (2) SA 1 (A) at 22H - 23A, conveniently summarises what is meant by that concept:*

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[1] *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2006 (4) SA 458 (SCA) at 473A-B, par 35

[2] *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at par 25 (2004 SCC 13 (Canlii)), cited with approval in *Haupt* (above) at 473B-C, par 35

[3] *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* 2000 BIP 355 (W) at 357-358

To be original a work need not be the vehicle for new or inventive thought. Nor is it necessary that such thoughts as the work may contain be expressed in a form which is novel or without precedent. 'Originality', for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill or labour in execution. All that is required is that the work should emanate from the author himself, and not be copied ...

The requirement that the work should emanate from the author himself and not be copied must not be interpreted as meaning that a work will be regarded as original only where it is made without reference to existing subject-matter. Indeed, were this so the great majority of works would be denied the benefit of copyright protection. It is perfectly possible for an author to make use of existing material and still achieve originality in respect of the work which he produces. In that event, the work must be more than simply a slavish copy; it must in some measure be due to the application of the author's own skill or labour. Precisely how much skill or labour he need contribute is difficult to say for much will depend upon the facts of each particular case."

[11] There was some dispute before me as to whether the "*sweat of the brow*" test is part of our law. Mr Puckrin SC, who appeared on behalf of the respondents with Mr Spottiswoode, submitted that "*pure industriousness or 'sweat of the brow' is not (or at least no longer) the test for originality. ... This is not to say that 'actual time and effort' expended by the author is of no consideration (it remains a material factor to consider)...* " He relied for these submission on the decisions

in *Haupt*, *CCH Canadian* and *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 (SCA) at 649I.

[12] Mr Ginsburg SC, who appeared on behalf of Moneyweb with Mr Budlender and Mr Marriott, insisted that "*sweat of the brow*" is still the test in our law.

[13] In *Haupt*, having quoted from *CCH Canadian* at its par 25,[4] Streicher JA noted:[5]

> "*It should be noted that no mention is made of labour. In para 24 it is said '(t)he "sweat of the brow" approach to originality is too low a standard'. In this regard the Canadian law differs from our law and the law of the United Kingdom, as also the Australian law. See* Waylite Diary CC v First National Bank Ltd *1995 (1) SA 645 (A) at 652G - 653C and, in respect of the Australian law, Ricketson* The Law of Intellectual Property: Copyright, Designs and Confidential Information *at paras 7.35 and 7.60, where it is said: '(I)f the expression in question represents the independent application of knowledge, judgment, skill or labour on the part of the author, this will be sufficient for the statutory requirement (of originality).' Whether we should, in due course, follow the Canadian approach need not be decided now.*"

[4] *Haupt* (above) at 473B-C, par 35

[5] *Haupt* (above) at 473, footnote 9. I note, however, that the *dicta* in *Waylite Diary*, concerning originality, are *obiter*: at 653C-D Harms JA declined to consider whether the appointment pages were original, it being unnecessary in view of his finding that the appellant had failed to establish that the pages were either artistic or literary works for purposes of the Act.

[14] In *Waylite Diary CC v First National Bank Ltd*, a case concerning the subsistence of copyright in the pages of a diary, Harms JA wrote:[6]

> "*... While it is true that the actual time and effort expended by the author is a material factor to consider in determining originality, it remains a value judgment whether that time and effort produces something original.*"

[15] It seems to me that the expression "*sweat of the brow*" is imprecise and capable of being misunderstood. A court will only be able to determine originality after it has weighed up all relevant considerations and made a value judgment. Our law still regards the time and effort spent by the author as a material consideration in determining originality. But the time and effort spent must involve more than a mechanical, or slavish, copying of the existing material. In other words, there must be sufficient application of the author's mind to produce a work that can be judged to be "*original*": "*Where a work embodies existing subject matter the court must decide whether its author has expended sufficient skill and labour to justify a claim that the work is original.*"[7]

[16] It should also be noted that a determination of originality applies to the work as a whole, and not to select parts: "*Under the Act the inquiry is whether the 'work' ... was original. The inquiry is not whether its parts are original.*"[8]

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[6] *Waylite Diary CC v First National Bank Ltd* 1995 (1) SA 645 *(A)* at 649I
[7] Dean: *Handbook of South African Copyright Law* (30 September 2015), at 1-22, par 3.3.1
[8] *Biotech Laboratories (Pty) Ltd v Beecham Group Plc* 2002 (4) SA 249 (SCA) at 257H, par [8]

[17] I turn to consider whether Moneyweb has established that the articles, in respect of which it claims copyright protection, are original. Moneyweb correctly accepts that it bears the *onus* of proving originality.

The first article: "*Annual packages for MPs may reach well over R1m*"

[18] I shall refer to this article as *Moneyweb 1*. It was published on 25 July 2012 at 5:53pm and was written by Ms Kim Cloete, a freelance contributor contracted to Moneyweb to write articles for publication on its website. As with all the other Moneyweb articles, Media24 does not dispute that the author of the article is a "*qualified person*" in terms of section 3(1)(a) of the Act, that Moneyweb too is a "*qualified person*", in terms of section 3(1)(b) of the Act, and that Moneyweb is the owner of the literary work. The article is set out below. The underlining is my own, intended to mark the parts that were reproduced in the related Fin24 article.

> **Annual packages for MPs may reach well over R1m**
>
> **Updated: Now with a table of the proposed salaries.**
>
> CAPE TOWN – Members of Parliament may soon be earning a basic salary of nearly R900 000 a year if the President accepts the 5.5% salary increase that's been recommended for them.
>
> The proposed annual salary for MPs of R889 383, is apart from a range of perks including S & T, numerous flights, pension, medical aid and virtually free accommodation in Cape Town when Parliament is in session.
>
> The recommended salary increase for all public office bearers – from the president to municipal councilors – was announced by the Independent Commission for the Remuneration of Public Office Bearers, at a media briefing in Cape Town.
>
> President Jacob Zuma will consider the recommendations by the commission, headed by Judge Willie Seriti. In the past, the president has adjusted the proposed increases, although last year, he followed through with the commission's recommended 5% increase.
>
> In terms of the 5.5% raise for 2012/2013, the president's salary could increase from R2 485 839 to R2 622 561.

The Deputy President, the Chief Justice, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces could each earn a basic salary of slightly over R2.3m.

The proposed increase would hike the salaries of ministers to just over the R2m mark, with deputy ministers earning around R1.6m a year.

The recommendations could lead to premiers earning R1.888m a year, with mayors earning slightly over R1m a year. Salaries of judges would range between R1.8m for a Constitutional Court judge to R1.45m for a judge in the High Court.

The commission said it had taken a basket of factors into account, including trends in the consumer price index (CPI), national market trends in the private and public sector and affordability. Seriti said 'relevant stakeholders' had been consulted, although this did not include civil society.

Commissioners consulted with the Ministers of Finance, Justice and Public Service and Administration before making their recommendations.

"The minister of finance has differed with our recommendations in previous years, but this year we received a positive response from all ministers, including the minister of finance," Seriti said, adding that Gordhan's views play a role "although he does not dictate to us."

Schedule 1 [figures and headings omitted]

Schedule 2 [figures and headings omitted]

Past recommendations and the president's determinations had also been noted, together with economic conditions in South Africa.

Seriti said he wouldn't be surprised It the 5.5% increase was contested by magistrates, who objected to the 5% recommendation last year. Magistrates have taken legal action against the commission and the president based on last year's 5% increase.

"Magistrates were unhappy with our decision last year they feel they're entitled to a higher increase. The chances are very high that they could challenge us again this year," said Seriti.

The recommended 5.5% increase would potentially push the annual salaries of ordinary magistrates up to R708 000, with senior magistrates touching nearly R779 000 and regional and chief magistrates earning R944 000 a year.

The other group of public officials that the commission is concerned about are local councilors. A 5.5% increase would take them to an annual salary of R400 000.

Seriti said municipal councilors were sometime the target of derision. The homes of several councilors have been torched during service delivery strikes "yet we've discovered they have no insurance cover," he said.

"The remuneration of local councilors needs to be looked at in its entirety."

The basic salary increases for members of parliament may not sit well with ordinary South Africans, aware of the gulf between rich and poor in South Africa and the perception by many people that their MPS are not delivering value for money.

The commission doesn't deal with the perks which boost the pay packages of MPs in particular.

Questioned about whether the commission should be looking at all the perks before making recommendations on basic salaries, Seriti said it was outside the legal framework he was operating in.

"The Act is silent on who is to implement that."

The commission chairperson said his team had been investigating the possibility of introducing performance-based increases instead of an across-the-board increase.

"We're investigating whether to move away from a 'one size fits all' policy," he told *Moneyweb*.

Seriti said a project on performance-based remuneration had been stalled due to budget constraints, but not before getting 'tentative views' from other countries, including the US and the UK.

The salaries of chief whips of the ANC and DA would nudge up to nearly R1.3m, with chairpersons of committees earning around R1.1m a year.

The commission said the 5.5% suggested increase was in line with Gordhan's comments during his annual budget speech calling tor moderation in annual salary increases.

Questioned about when the salary increases could be approved by the President, Seriti quipped: "Your guess is as good as mine, although it's usually 2 to 3 months after our determination."

[19] Ms Cloete wrote *Moneyweb 1* after she had attended and participated in a press conference in Parliament. At the conference she took notes and asked questions of delegates. About the article, she says that it "*is an original work and required my independent effort, skill and expertise to write.*" Having written it, she emailed it to Moneyweb's editor who made certain adjustments before it was published.

[20] Mr Puckrin submitted that this evidence is not sufficient to prove originality. He argued that it was incumbent on Moneyweb to put up further evidence, such as Ms Cloete's notes of the press conference and an explanation from her as to how she went about constructing the article.

[21] In *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd*[9] Schutz JA noted that "*... the existence of prior material tends also to limit the scope for originality and to require more exacting proof of its existence than is the case with truly original works.*"

[22] The court *a quo* in *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* held that the evidence in that case was not sufficient to prove originality.[10] For Goldstein J, the evidence of Mr Sidorski created more questions than answers:

> "*The applicant alleges that it is the proprietor of the copyright in the drawings referred to in paragraphs 2 and 4 of the draft [order]. There are 240 of such drawings attached to the affidavit of Mr Eugenius Daniel Sidorski which affidavit is itself an annexure to the founding affidavit. Sidorski states that as the applicant's supervising engineer he supervised the making of each of the drawings. He identifies each of the draftspersons concerned and gives the dates on which each of the drawings were made. He says that he 'personally witnessed each person making the drawings listed, at the Applicant's premises in Johannesburg (where) each drawing was made under (his) supervision'.*"[11]

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[9] *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd* 1998 (2) SA 965 (SCA) at 969E; See also *Biotech Laboratories* (above) at 257G, par [7]
[10] *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* 699 JOC (W)
[11] *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* 699 JOC (W) at 702C-E

"Sidorski's affidavit ends with paragraph 8 which reads: 'Each drawing was original in that it was the product of each author's personal skill, knowledge and labour and was not copied from any other drawing'."[12]

"... I find the statement in paragraph 8 very cryptic and bald. The drawings contain considerable detail. I find it difficult to believe that each is the product of the personal skill, knowledge and labour of the author. I find it difficult to believe too that none was copied from any other drawing. Certainly Sidorski fails to explain how each of the authors was able to produce his or her drawing in vacuo without reference to any other drawing. In my view there must overwhelmingly on the probabilities have been copying involved in the production of at least portions of the drawings. The problem created for the applicant's case, insofar as it relies on copyright, is that my conclusion, that there must have been some copying, makes it impossible for me to find which portions of the 240 drawings are the subject of copyright and which are not. ..."[13]

[23] Nugent J took a different view of the evidence, finding that it was "*not altogether clear what caused the learned judge to conclude that Mr Sidorski's evidence was improbable.*"[14] Nugent J continued:[15]

[12] *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* 699 JOC (W) at 702E
[13] *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* 699 JOC (W) at 702G - 703A
[14] *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* 2000 BIP 355 (W) at 359
[15] *Pyromet (Pty) Ltd v Bateman Project Holdings Ltd* 2000 BIP 355 (W) at 359 - 360 (my underlining)

"However, the submissions made on behalf of the respondents were directed to a different point. It was submitted, as I understood it, that the allegations made by Mr Sidorski did not constitute evidence at all, and were no more than conclusions, unsupported by established facts. ..."

"Where existing material has been used to create the relevant work, there may well be cases in which detailed evidence will be required as to the manner in which the work was created to show that, notwithstanding use being made of an existing work, the nature and extent of the author's contribution was such as to constitute more than mere copying. Furthermore, the author might, in such circumstance, be the only person with sufficiently detailed knowledge of what has been done in order to establish that his contribution was original. However, in my view, there can be no rule of thumb in that regard, for each case will necessarily depend upon its own facts."

"In the present case there is no suggestion in the evidence that the authors merely transposed, or even had reference to, existing works in the course of creating the drawings. ..."

"... I do not agree that [Mr Sidorski's] allegations amount to no more than conclusions. He said that he observed the authors producing the drawings by the application of their 'personal skill ... and labour', and without copying from any other drawing. Those, in my view, are observable facts, which, if they are correct, support his conclusion that the

drawings were original. I do not think the appellant was required to go further in the absence of any proper challenge to those allegations."

[24] In my view, this is a case in which more evidence was required to establish that *Moneyweb 1* is an original work. It is common cause that the article is based on the information that was made available at the press conference. I do not know how much of the article is Ms Cloete's own work or simply a repetition of what was said in her presence or contained in a written press release. Simply put, I am not able to discern the nature and extent of her contribution.

[25] Her statement that the "*article is an original work and required [her] independent effort, skill and expertise to write*" is indeed no more than a conclusion. I have no basis from which to assess her independent effort, skill and expertise. The fact that she attended the press conference, took notes and asked questions does not mean that the article is not a mechanical repetition of existing material. How does the article compare against the material on which it is based? Unlike Mr Sidorski's allegations, Ms Cloete's statement on originality contains no factual allegations that could support the conclusion it reaches. Accordingly, I find that Moneyweb has not established that *Moneyweb 1* is an original work.

The second article: "*Group Five hits rock bottom*"

[26] I shall refer to this article as *Moneyweb 2*. It was published on 13 August 2012 at 5:08pm and was written by Ms Sasha Planting, a freelance contributor contracted to Moneyweb to write articles for publication on its website. The article is set out

below, with the underlining of those parts that were reproduced in the related Fin24 article.

Group Five hits rock bottom

But earning expected to rally with construction materials business.

CAPE TOWN – Construction and engineering firm, Group Five, has hit rock bottom but expects to improve within the next year.

This is according to CEO Mike Upton, who noted an uptick in construction orders combined with some tough cost cutting and reorganising of the business, will position the group for a return to earnings profitability in 2013.

Revenues remained flat at R8.8bn, but headline earnings per share fell by 64.4%.

The biggest reason for the loss was contract losses in the Middle East — where cash strapped clients are finding any excuse not to settle their debts. In addition, impairments from preciously discontinued operations in India and impairments of assets in the construction materials businesses, which are being sold off, caused further losses.

While the losses from the Middle East were bigger than expected, the group has no plans to exit that market. The aim is to cut its losses and settle payment disputes now, rather than let the situation drag out, Upton says. The group will then lie low — so to speak — until market conditions improve there.

Light in the tunnel

This is the last year of pain when it comes to the construction materials business. Two businesses in this division have been sold and the remainder will be disposed of before the calendar year is out. Upton estimates over R1bn worth of shareholder value was destroyed through acquisitions bought at the height of the construction cycle.

Meanwhile Africa is where the action is. The group has won business in East and West Africa, particularly in the power and energy sectors where it has won 13 new mining projects and three power plants.

Chinese contractors are a very and real threat. "There are upwards of 70 Chinese construction companies across the bigger markets." However Upton notes that Group Five doss not come head to head with these companies too often. "They usually win their business at a government to government level." When it comes to direct head to head tenders, Group Five has the benefit of a strong track record. "We have built up a good name for ourselves, particularly is the mining sector."

Infrastructure orders in SA are still slow in coming, and have also curbed revenue growth. But Upton believes this in changing. "Infrastructure development [or the lack of it] in SA has become a hot potato and there is now real political pressure to get projects moving." He adds that while the planning is taking place, construction companies will not see the orders for another 12 to 18 months.

Along with its peers, Group Five has had a torrid three years, after the boom years of the 2000s. However many analysts are tipping the sector for growth, arguing that the only way is up.

Question marks

> But Vestact equities analyst Byron Lotter remains cautious. While the sector has good fundamentals and appears to be turning, there are risks, he says. For one there are big question marks over government spending. "Government can't even pay current contractors, where is the money coming from?"
>
> And when the money is available, the competition for projects is fierce and margins are tight. "In my opinion this is a very cyclical business and it's one where it is difficult for the individual investor to stomach the troughs."
>
> Group Five shares traded flat on Monday at R22,85, while the construction sector fell 0.47%.

[27] Ms Planting wrote *Moneyweb 2* after she had participated in a conference call during which the CEO of Group Five, Mr Mike Upton, had spoken to journalists and analysts following the publication of the company's annual results. Ms Planting echoes Ms Cloete: "*This article is an original work and required my independent effort, skill and expertise to write.*" Having written the article, she emailed it to Moneyweb's editor who edited it and wrote the headline before it was published.

[28] The evidence adduced by Moneyweb in relation to the originality of *Moneyweb 2* is even thinner than the evidence relating to *Moneyweb 1*. Unsurprisingly, it also suffers from the same deficiencies. I do not know how much of the article is Ms Planting's own work nor how much she has simply repeated of Mr Upton's words.

[29] I am not able to discern the nature and extent of her contribution. I do not know to what extent *Moneyweb 2* differs, if at all, from the existing material on which it is based. Her statement that the "*article is an original work and required [her] independent effort, skill and expertise to write*" is factually bare. Accordingly, I find that Moneyweb has not established that *Moneyweb 2* is an original work.

The third article: "*McDonald's plans to launch McKitchen*"

[30] I shall refer to this article as *Moneyweb 3*. It was published on 26 August 2012 at 11:12pm and was written by Ms Eleanor Seggie, an employee of Moneyweb. I have set out the article below and underlined those parts that were reproduced in the related Fin24 article.

McDonald's plans to launch McKitchen

The fast-food outlet is looking at innovative ways to keep your plate full of its food.

JOHANNESBURG - "It's a very difficult market to enter right now. Whoever wants to enter this market needs to come In with vision and heaps of cash, a full commitment and a long-term plan. If you're not going to come in with that you're not going to survive," says Greg Solomon, McDonald's South Africa MD.

He was leading journalists on a recent media tour of the Woodmead restaurant.

McDonald's takes long-term positions on people (16 years), initiatives (eg 24/7 outlets) and on leases (eg, 20 years). As such, it owns 68%-70% of its property portfolio in SA.

"We continue to invest ... capital into this business, by growing 20-30 new restaurants every year - that's hundreds of millions of capital spend." The first McDonald's was opened in South Africa is November 1995 and in the last 11 years not one has been closed, although Solomon says he's eyeing one now as its performance isn't up to scratch. McDonald's SA plans on opening 18-22 restaurants this year, around the country.

One of the newbies, in Victory Park, Johannesburg, will debut in the next two months.

Though it was initially referred to as a "McKitchen," it was later clarified that the Victory Park branch will be implementing and testing minor changes to the kitchen and service design, to improve efficiencies. If effective, it may be implemented in other kitchens. Solomon wouldn't say more, but hinted that it will feature a modified cooking platform and new innovations to the front counter and beverages.

However, he maintains that McDonalds is a "people's business" and he aims to make it into a more renowned training institution. Currently the fast-food outlet spends approximately R21m a year on training.

Big Mac anyone?

The company's most successful sales product is the Big Mac; although it got off to a slow start, it now makes up 25% of its business. Second place (on volume) goes to its cheeseburger.

Chicken forms just over 30% of the business revenue. The biggest selling chicken product is the Chicken Foldover – a locally adapted product introduced as part of its

'glocal' strategy, along with a beef product called McFeast, and fresh corn, which is building nice traction as an alternative to fries.

However, it won't steer too much away from its core US brand though — so don't expect chicken McFeet in the near future.

Breakfast now forms 11% of its revenue and Solomon reveals there may be a lot of menu innovation in the pipeline over the next two years.

Other significant parts of the business include beverages as well as dessert: Mcflurries have massive equity — "up there with chicken foldovers and quarter pounders", says Solomon.

Over the past few years, the company has introduced a number of firsts: the drive-through, then breakfast, then 24/7 restaurants and most recently the McCafe with a range of coffees, teas and frappes.

The newly launched McCafe only forms 4-6% of total turnover as yet. But given its continually evolving snack, savoury and baked goods menu as well as the massive investment in very decent coffee makers, this may grow over time.

"We don't want to be a plastic canteen that sells burgers. We are not trying to be a fine dining restaurant, but a casual, informal eating out experience for a family that offers great food, in an environment that feels like home with good service," says Solomon.

The Ramaphosa touch

Businessman Cyril Ramaphosa's company, Shanduka, acquired McDonald's 20-year master franchise last year to run all McDonald's restaurants in SA - a combination of franchise and corporate-owned stores.

Solomon explains that Ramaphosa is involved actively at a high level — he understands the detail but lets Solomon run the business.

In response to a *Moneyweb* question on what Ramaphosa has brought to the table as yet, Solomon emphasises that Ramaphosa is not going to change the brand and that he brings leadership, vision, accelerated growth, as well as the capital and resources to prompt growth. Also the merger allows for a local, independent and accountable view on investments where they are responsible for their own return and not dictated to by the New York stock exchange.

Tough times

This year will be tough, continuing on to Q1 and Q2 next year, after which there will be a slight upturn in mid-2013, warns Solomon, adding that the company is preparing to maximise on the latter.

During its 17-year tenure in SA, the company has weathered a number of economic downturns. He says it expected hard times in 2011 and 2012 and prepared for them. Philosophically he says: "If you're not resilient enough to weather the storm, you probably need to get out of this line."

Its best year in terms of organic growth, for its first 15 years at least, was 2010 - possibly due to the World Cup. Although the past three years have been the best ever, organic growth has slowed down and the company is experiencing "really tough backdoor profitability pressures that are hitting the business."

> "In the highly competitive informal eating-out sector, where companies are fighting for market share, people need to understand their business's [evolution] over the past five years ... and have vision, intelligence, stability and brevity to see where they want to be in the next five years," he advises.

[31] Ms Seggie wrote *Moneyweb 3* after she and two other journalists from other media groups had attended a media visit at McDonald's Woodmead restaurant. Moneyweb's editor then edited it and wrote the headline before it was published.

[32] Ms Seggie states that, in terms of her contract of employment with Moneyweb, she wrote *Moneyweb 3*, other articles and various headlines. She adds: "*These articles and headlines are original works and required my independent effort, skill and expertise to write.*"

[33] Moneyweb has not adduced any further evidence relating to the manner in which Ms Seggie went about writing *Moneyweb 3*. I do not know who hosted the media visit on behalf of McDonald's; whether the presentation was only oral; whether there was a written press statement issued as well; whether Ms Seggie took notes; and to what extent *Moneyweb 3* differs from the presentation given. Even if I were to assume from the content of the article that Mr Greg Solomon hosted the media visit, the other questions remain unanswered.

[34] As with the previous articles, I do not know how much of *Moneyweb 3* is Ms Seggie's own work nor how much she has simply repeated of the presentation at the media visit.

[35] I am not able to discern the nature and extent of her contribution to the article. I do not know to what extent *Moneyweb 3* differs, if it differs at all, from the existing material on which it is based. Her statement that the "*article is an original work and required [her] independent effort, skill and expertise to write*" has become a mantra to be recited by all the authors of the Moneyweb articles. But it adds nothing because it simply concludes without providing the facts on which it is based. Accordingly, I find that Moneyweb has not established that *Moneyweb 3* is an original work.

The fourth article: "*Hout Bay castle sold for R23m*"

[36] I shall refer to this article as *Moneyweb 4*. It was published on 14 September 2012 at 5:42pm and was written by the late Ms Michel Schnehage, a property journalist who was contracted to Moneyweb to write articles for publication on its website. There is understandably no direct evidence from Ms Schnehage.

[37] I have set out the article below and underlined those parts that were reproduced in the related Fin24 article.

> **Hout Bay castle sold for R23m**
>
> **Furniture and trimmings included in the deal.**
>
> JOHANNESBURG - A Russian businessman has bought a six-storey castle (pictured) nestled in the Karbonkelberg on the outskirts of Hout Bay in the Western Cape for R23m.
>
> The castle is situated high up against the mountain and overlooks the bay and Hout Bay beach.
>
> Sotheby's International Realty's Nina Smith says the castle was run as a guesthouse for several years and was once owned by a foreign company.

> It was originally built by Cape Town businessman Reynier Fritz who began the project in 1986 and completed it in 1998, using small facebrick which gives it an antique feel. "Over 12 years it just evolved. As he (Fritz) got money, he would build another wing."
>
> The majestic structure is a replica of the Schloss Lichtenstein castle in southern Germany which is perched on a cliff located near Honau in the Swabian Alb, Baden-Würrtemberg. The current castle was constructed between 1840 and 1842.
>
> The Hout Bay castle is about ten minutes from the Hout Bay village and is accessible only by private road and helicopter.
>
> Smith said the castle blended into the Karbonkelberg with its unique architecture and structure. "It was love at first sign for the owner," said Smith, adding that the new owner had purchased it for private use.
>
> During its years as a bed and breakfast it was extremely popular among overseas visitors to the Cape and was also a sought-after venue for weddings and conferences, with a banqueting hall able to accommodate up to 200 people.
>
> The castle is situated on 8500m^2 of terraced land with a natural waterfall and swimming pool.
>
> The main hall is on ground level with vaulted ceilings, stained-glass windows and a fireplace including a dining area with a table able to seat 24 guests.
>
> The castle also has 13 en-suite bedrooms on different levels with a library, billiard room and bar.

[38] Although Moneyweb could get no direct evidence from Ms Schnehage, it has put up more evidence in relation to *Moneyweb 4* than in relation to the three previous articles. It is undisputed that the source of the article was a press release issued by Sotheby's International on 13 September 2012, the day before the article was published, a copy of which has been put up. Ms Schnehage also interviewed Ms Nina Smith of Sotheby's and sourced additional material. Ms Seggie wrote the headline and sub-headline, and also edited the article.

[39] Although *Moneyweb 4* contains more information than the press release, the difference is insubstantial. Indeed, it is quite trivial. The article is largely a copy of the press release. In my view, Ms Schnehage has not contributed enough to

produce an original work. Accordingly, I find that Moneyweb has not established that *Moneyweb 4* is an original work.

The fifth article: "*Angloplats' Griffith responds to Shabangu outburst*"

[40] I shall refer to this article as *Moneyweb 5*. It was published on 16 January 2013 at 9:40am and was written by Mr Ryk Van Niekerk, the editor of Moneyweb and the deponent to its founding affidavit. I have set out the article below, with the underlining of those parts that were reproduced in the related Fin24 article.

> **Angloplats' Griffith responds to Shabangu outburst**
>
> **Cites JSE regulations ruling sensitive information limiting open discussion before announcement.**
>
> JSE regulations ruling sensitive information and an apparent difference on opinion between the Department of Mineral Resources (DMR) and Anglo Platinum may shake the seemingly precarious relationship between government and the mining sector even further.
>
> Amplats' share price took a beating on Wednesday, falling by 5.95% by 11h15. Parent company Anglo American's price is down 3.2%.
>
> Following the public outburst from Susan Shabangu of the DMR in reaction to Amplats' restructuring plans, Amplats CEO Chris Griffith responded that there was indeed a public process, but that JSE regulations governing sensitive information prevented a totally transparent discussion with all stakeholders.
>
> Shabungu accused Amplats of being irresponsible, that it acted in bad faith and questioned the company's motives. Griffith said during the SAFM Market Update with Moneyweb on Tuesday night that he will not get involved with a public spat with the minister.
>
> "Clearly the minister is unhappy about a number of things, and I'm going to need to go back to the minister and sit down with her and work through the concerns that she may have."
>
> However, Griffith added that due to the regulations regarding sensitive information the company could not discuss its plans openly with all stakeholders. "I think we would argue that, given the narrow range that we have to consult, whilst we are developing our plans before it becomes public and before we get obliged in terms of the Securities Exchange to make all of that information public ... we were not in a position to talk about some of our future plans with every person. Even the nature of that conversation with government we've got to be careful about."

Griffith said the platinum industry has been under severe financial pressure for a number of years. "We have continuously engaged with all stakeholders, including different levels of government. In addition to that, the level of unsustainability of this business reached a peak, you'll recall, in 2010 when Anglo American Platinum had to go back to its shareholders after reaching a debt of R20bn, to say to shareholders, look, we need a rights issue, we need you to reinvest and then raise R12.5bn. I think that was the first indication of the kind of difficulty that the industry was under."

Griffith said Anglo American announced the review of the platinum operations at the beginning of 2012. This coincided with an industry analysis by the platinum industry task team to talk about structural changes in the sector. "So this is likely to be a difficult period. I don't think anyone expected either government or unions or ourselves or civil society to say it's a good idea that we have retrenchments."

"But the fact is that if we don't do something about the company eventually 60 000 people in the company will have no employment. We seek to work with our stakeholders. If some of our stakeholders are feeling uncomfortable about that we need to sit down with them and work through that. And if there are difficulties we need to patch those up."

Peter Major from Cadiz Asset management commented that it would be hard to make everyone happy. "All industries have gone through this – computer, airlines, and definitely automobiles. And so this is a natural part of capitalism."

He even speculated tongue in cheek that there might be room for nationalisation. "There's going to be four shafts available and they said they are going to be looking for a buyer for Union section. How open is government to that?"

Major added that it would be difficult for other stakeholders to influence the implementation of the plan." Anglos have put a lot of work in this and they have thought of all the alternatives. What makes it a little bit sad is it's too hard for the other role-players to completely change. You've had 10 years of double and triple the inflationary cost increases on the platinum mines. That is really entrenched. It's in the DNA of everybody's system – government, labour and the company. And so I think it's a little too late for the employees to say OK, we'll bend now. Or for government to say we'll do anything you need just don't close those shafts."

Earlier Shabangu said she was very disappointed by Anglo Platinum's announcement, as the company did not engage the department. "They made the announcement before engaging us. I must indicate that Anglo Platinum contacted us last week on Tuesday and requested a meeting. They wanted to meet today (Tuesday). Then yesterday (Monday) they said they wanted to meet yesterday, as if I am waiting for them while I am doing other work. I really feel that they are undermining the relationship between us and them."

Shabangu said Anglo Platinum's announcement creates more uncertainty among foreign investors.. "In the past we would talk and engage about issues before we go public. In this case Anglo Platinum was unilateral. They said last year that they will engage on the issues, but they only gave us seven days. It is bad faith ... Anglo has operated in SA for many years. What is their agenda and intention to behave in this fashion?"

This follows Amplats' announcement that it plans to close four shafts in the Rustenburg area and sell its Union mine. These plans are all the result of a review of its operations undertaken by its parent Anglo American in a bid to return the company to long-term profitability and are expected to affect as many as 14,000 jobs, 13,000 of which will be in the Rustenburg area.

These steps would deliver R3.8bn in cost savings by 2015.

[41] Mr Van Niekerk wrote *Moneyweb 5* based on an interview done by a Moneyweb journalist, Mr Hilton Tarrant, with Mr Chris Griffith, the Chief Executive Officer of Amplats. The interview had aired on 15 January 2013 on the radio programme *SAfm Market Update*.

[42] The interview was recorded and transcribed by Moneyweb. Mr Van Niekerk used the transcript of the sound recording to source quotes from Mr Griffith. Ms Seggie then edited the article and wrote the headline and sub-headline before it was published.

[43] Mr Van Niekerk explains how he went about constructing *Moneyweb 5*. He says that he listened to the sound recording and went through the entire interview to extract the most salient quotes. He describes the interview as "*in-depth*" but does not indicate the length of the interview or the transcript. He does say that he sought to "*extract the most salient quotes*", implying that he applied his mind and excluded that which he did not need for purposes of his article.

[44] In my view, Mr Van Niekerk applied his mind to the transcript and sought to write an article that captured the essence of the interview with Mr Griffith. Mr Puckrin submitted that Moneyweb ought to have produced the transcript in evidence. I do not agree. Just as Mr Sidorski was able to testify to what he saw, so too can Mr Van Niekerk. His evidence that he read the entire transcript and selected what he believed to be the most salient quotes stands uncontested. I note too

that, although *Moneyweb 5* is focused on the interview with Mr Griffith, it also contains input from other sources, i.e. Minister Shabangu and Mr Peter Major.

[45] It is clear that Mr Van Niekerk has not slavishly copied from the transcript. In the circumstances, I am satisfied that Moneyweb has proved that *Moneyweb 5* is an original work.

The sixth article: "*Defencex mastermind rallies support*"

[46] I shall refer to this article as *Moneyweb 6*. It was published on 9 March 2013 at 3:07pm and was written by Mr Malcolm Rees, an employee of Moneyweb who was responsible for writing articles for publication on its website. I have set out the article below and underlined those parts that were reproduced in the related Fin24 article.

> **Defencex mastermind rallies support**
>
> **Walker calls for calm and support, following a vague, brief explanation.**
>
> Over a thousand ardent supporters of the embattled Defencex scheme flocked to the Linder Auditorium on the Wits Education campus on Saturday to hear Chris Walker, the scheme's mastermind, speak.
>
> Those who managed to gain entry to the fully-booked auditorium had paid an alleged R1 000 a ticket to hear Walker's five-minute explanation of exactly what had gone wrong with his 2%-a-day investment initiative.
>
> Moneyweb was able to gain access to the heavily guarded, members-only event by purchasing a bootleg ticket outside the entrance to the auditorium (see photos below).
>
> Proceedings began with recitals of hymns and prayers. After music played by a Sowetan music group, to which members sung and danced, Walker entered the stage to a roar of support from the crowd.
>
> "You are going to make me cry," were the opening remarks to a very short speech.
>
> In his address, Walker explained that members' monies had been frozen and that no withdrawals from the scheme would be possible "until the investigation is complete."

> He explained in the vaguest of terms that the situation had now become "a legal matter" and that he had appointed a top attorney to represent the company during the proceedings.
>
> However, he provided members with no explanation of what had led to the current status of events or made no attempt to justify the legitimacy of the scheme.
>
> "There is nothing more I can say."
>
> No questions were taken from the crowd.
>
> He did, however, suggest that once the legal proceedings had concluded members would once again be able to withdraw funds from the scheme.
>
> To this the crowd murmured in support.
>
> Following this very brief explanation, Walker asked members if they were "angry" to which unanimous agreement was heard.
>
> He then urged that no single party, be it the banks or the media, be blamed for the situation and that calm and responsible behaviour be maintained by members.
>
> He did urge members not to listen to "rumours" and suggested that Defencex is not a company but that Net Income Solutions is.
>
> Defencex does not pay tax, he said, but Net Income Solutions does.
>
> "I am going through a very difficult time," he said, to which sympathetic utterances could be heard in the crowd. "I need to know that I have your support," he entreated.
>
> Support was clearly granted.
>
> Walker then guided the crowd through a "visualisation" exercise.
>
> Members where reminded to stay positive and happy with Walker explaining that it is impossible to have both a positive and negative thought in one's mind at the same time.
>
> For the purpose of guiding members towards positive thoughts, they were asked to visualise the construction of the new Net Income Solutions offices in Cape Town.
>
> The exercise ended with members being asked to visualise the time when they could again be able withdraw funds from the scheme.
>
> "I love you all," said Walker as he departed to the cheers of the crowd.
>
> As this journalist left the auditorium one of the "experts in happiness," a member from Laugh SA, took the microphone to explain the power of joy before spontaneously releasing ever-intensifying barrages of artificial laughter into the crowd. After some brief hesitation, members of the crowd could be heard beginning to join in.

[47] Mr Rees wrote *Moneyweb 6* after he had attended an event held at the University of the Witwatersrand. The event was organised so that Mr Chris Walker, the head of an investment scheme known as *Defencex*, could address participants in

the scheme. It was the first time that Mr Walker had spoken in public about the scheme. Although the event was open only to participants who had purchased tickets, Mr Rees managed to gain access by purchasing a ticket for R800.

[48] Mr Rees states that *Moneyweb 6* and *Moneyweb 7* (below) "*are original works and required my independent effort, skill and expertise to write.*" Having written *Moneyweb 6*, Mr Rees consulted with Ms Seggie and Mr Van Niekerk. Together they discussed a headline for the article. Ms Seggie wrote the headline.

[49] Although Mr Rees repeats the mantra common to all the confirmatory affidavits, I am satisfied that the facts adduced over and above the mantra do establish that *Moneyweb 6* is an original work. The *Defencex* event was not open to the media and it is therefore unlikely that there would have been a written press release.

[50] Mr Rees could not pose as a journalist. It is not clear whether he took notes or recorded and transcribed the proceedings. Although he has not produced his notes, a recording or a transcript, I am of the view that the structure of the article demonstrates that Mr Rees applied his mind to what was happening around him and created an original work that described the event using his own observations and Mr Walker's words.

The seventh article: "*Chris Walker breaks the silence*"

[51] I shall refer to this article as *Moneyweb 7*. It was published on 1 July 2013 at 9:58am and was written by Mr Rees. I have set out the article below, with the underlining of those parts that were reproduced in the related Fin24 article.

> **Chris Walker breaks the silence**
>
> **Defencex mastermind: SARB thinks I'm the biggest criminal in SA.**
>
> JOHANNESBURG – Chris Walker, the mastermind behind the R800m Defencex scheme has likened the insurance industry and the banks to Ponzi schemes, while admitting that his battles with the Reserve Bank (SARB) could never have been won.
>
> He also claims not to have profited from his embattled business and suggests that the accounts linked to Net-Income-Solutions were frozen to protect the profit seeking interests of the banks and to allow liquidators and attorneys a slice of the R349m pie.
>
> This was revealed in extensive discussions with Moneyweb which ranged from the new schemes and training seminars being promoted by Walker, to his views on Defencex.
>
> Despite repeated attempts by Moneyweb to contact Walker he has thus far never spoken to the media about his controversial scheme or his court battles.
>
> I approached Walker as an interested investor in the network marketing scheme MyFunLife (MFL).
>
> Walker has been promoting the scheme, which bears a close resemblance to a classical pyramid scheme, through his blog www.wealth4africa.com.
>
> After registering to join MFL through Wealth4Africa, I received an email from Walker inviting me to call should I have any questions.
>
> So I did.
>
> **On network marketing**
>
> *Q: The amounts that MFL suggest can be made are huge, is this offer not a little too good to be true?*
>
> Walker: "You have to work hard, it won't just happen if you don't do anything ... if you want to earn money you are going to have to refer people and grow a team and in that way it is not too good to be true because it takes a lot of effort.
>
> "Theoretically it is very easy but it is a matter of finding the right people ... it's not like you are going to go out there and find hundreds of people immediately because most people are sceptical and ... think it is too good to be true but it is not because you actually have to work.
>
> He later added that "I have been doing it (network marketing) for 13 years and I still find it difficult (to train people) to go out there and create a team that works."

"People that join through me usually know what to do ... they are people that know me and that trust me and that do it full time, some of them have made more money than me... this is how they make their money."

However, Walker warned that network marketing "is not fun" and he would not advise it as a business venture for "beginners."

Q: MFL seems very similar to a pyramid scheme. There seems to be a fine line between a pyramid and a Network Marketing Scheme (NMS)?

Walker: "there is no such thing (as a pyramid) ... Clientele life is an SA company that has been going for years; it works exactly the same way (as a NMS or pyramid) except their product is insurance ... you pay a monthly fee and then you earn down the line from other people paying insurance.

"To my mind insurance is a scam...they take one person's money to pay another person ... the banks are the same, there is no difference.

"But that is just my take on it."

Q: To me it seems like a pyramid, so if I get in early can I make more money?

Walker: "It does not matter how young the company is. You can go and join a company that is ten years old and still make money. It is a matter of what you do ... that is why I am in the business of trying to open help and support centres for my members so that if they find people to introduce to the scheme we can show them what to do."

He added that "the market I deal with is mostly black ... I like to deal with them because they are not sceptical, they are open and they understand sharing ..."

Q: Did you target the poorer communities because they would be less sceptical?

Walker: "no, no, no. I don't go anywhere and talk to people, I just have a website and people trust me and if they know me they will join ... I don't specifically deal with poor people.

"It is not about that, I am not interested in trying to convince people to join, it is their choice ... they go onto the website and they join so it is really up to them."

On Kipi

Q: I had initially been interested in Kipi, how does that work?

Walker: "With Kipi it is a matter of showing people how to do it ... it works like a stokvel. Stokvels are legal in SA ... you don't pay to Kipi or to a bank account its people helping others out."

Q: Stokvels don't generate profits, is it the same then with Kipi?

Walker: "no you can (make a profit), it depends on if you introduce people and if you want your dream to be fulfilled it depends how much you put towards it ... it is terrific, it has been working for years."

On Defencex

Q: What happened with Defencex, it seems like guys lost a lot of money?

Walker: "Well the only reason they have lost money is because the Reserve Bank closed the bank accounts ... SARB did not like people to be able to make money because they rely on debt, the banks make money from debt.

"And 200 000 people not doing business with them anymore ... this is about the (lost) money, it has nothing to do with the system.

"I know the facts; my lawyers know the facts ... (they were concerned that) people were taking their money out of bank accounts and out of investments," and that is why they got involved.

"I am still with the people who made money and [they] understand. The Reserve Bank closed the banks accounts, they must decide what to do with the money.

"I am not going to win against SARB – that is impossible."

Q: The scheme was R800m. I read that you had only directed R20m to yourself – that doesn't seem like a lot?

Walker: "I didn't take R20m that is a lie, that money was going to be used to buy a brand new office block – everybody knows that but they still twist the truth around. I am very angry about that.

"They say I transferred R20m to my personal bank account, I did not, that money was sent to (inaudible) it was a brand new office block that was going to be used as a HQ".

"We paid out R370m; there was still R349m in the bank account. It is just too much money, they just want their slice. They are going to take millions and millions in fees ... the liquidators are going to get their fees, the attorneys are going to get their fee. That is why they are doing it, to get at the money."

Q: What are the similarities between Defencex and MFL?

Walker: "My business was never an investment in the first place, everybody says it was an investment, everybody says it was 2% a day but nowhere on my website did I ever state it was an investment ... people just make up their own things.

"MFL is totally different; it works in a completely different way (to Defencex)."

"Defencex was revenue sharing ... traditional network marketing pays out to up ten levels, they don't advertise so they take the advertising budget and they give it to the members ... what they do is take it as a profit and divide by up to ten levels.

"What my business did, was take that profit and divide it by everybody and give them a small little fraction of that so everybody got a piece of the action. So even if you were not part of that team you still got a piece of it.

"In MFL only ten people got paid, in my fund everybody got paid, people don't get that, they don't understand it ... everybody shared in the daily profit, not just a certain number of people, it was not very much but it was something."

Q: But was that money generated from recruiting new members?

Walker: "No, there was a product, the product was computer training, personal development and emotional freedom workshops ... you were buying points to attend the workshops.

"Those businesses already existed, we were outsourcing, like time share."

On the future

Q: What do you think the future holds in terms of the SARB case?

Walker: "I am not going to win the case, it is over. They are not going to let me carry on. There is just too much money involved. But I knew that four months ago, so I was not expecting to win."

Q: Are you worried?

Walker: "there is no point in worrying, they will do whatever they want ... luckily I still have people on my side that understand, those that know me will understand.

"They may prosecute me but they have to do that to make it seem like I am the bad one not them... They will tell you that they are trying to protect people but they don't care about that.

"Anyway, I better not say too much, they listen to all my conversations.

"They think I am the biggest criminal in SA at the moment."

Walker has not responded to requests to comment on a draft of this article.

However, following those requests he posted the following on his Facebook page:

"We have received some inside information that certain media organizations are paid to distort the facts (lie) and discredit any system that helps people to earn money to reduce/eliminate their debts.

Their objective is to keep the masses poor and dependent on the control system.

What is the control system?"

[52] On 30 June 2013 Mr Rees managed to track down Mr Walker and interviewed him. He posed as a prospective investor and asked many questions. It appears that Mr Rees was the only one interviewing Mr Walker. He wrote *Moneyweb 7* after the interview. Ms Seggie and Mr Van Niekerk edited the article before it was published. Ms Seggie also wrote the headline after consulting Mr Rees and Mr Van Niekerk.

[53] Although the bulk of *Moneyweb 7* is a transcript of the interview, it is clear that the transcript has been edited. Words have been omitted in the discretion of the author and/or his editors. The introductory paragraphs, in Mr Rees's words, set

the context of the interview and draw his conclusions. In my view, Mr Rees has contributed more than merely copying the transcript. I am therefore satisfied that Moneyweb has proved that *Moneyweb 7* is an original work.

[54] My conclusion, in summary, is that Moneyweb has discharged its *onus* of proving *Moneyweb 5, 6* and *7* to be original works. It has failed to establish originality in respect of *Moneyweb 1, 2, 3* and *4*.

[55] Before I turn to the issue of substantiality, it is appropriate that I deal with one of the statutory defences upon which Media24 relies, section 12(8)(a) of the Act. If the subsection applies to any of the Moneyweb articles, those articles would not enjoy copyright protection. It would be fruitless then to engage in a determination as to whether there has been substantial reproduction of an article covered by section 12(8)(a) of the Act.

<u>Section 12(8)(a) of the Copyright Act</u>

[56] Section 12(8)(a) of the Act provides:[16]

> "*No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, <u>or in news of the day that are mere items of press information</u>.*"

[16] My underlining

[57] The parties did not refer me to any decided case that has considered any aspect of section 12(8), nor am I aware of any.

[58] The learned author, O H Dean, notes in relation to section 12(8):[17] "*Unlike all the other exemptions dealt with in the Act, which, as mentioned above, pre-suppose that copyright subsists in the work being used and that the user has taken a substantial part of the work (and prima facie has committed an act of copyright infringement), this exemption goes one step further: it states in effect that the types of work concerned do not enjoy copyright at all and are indeed in the public domain. They are thus free for use by all, in their entirety, without restriction and without authorisation being required from anyone.*"

[59] There are three categories of works covered by section 12(8)(a): official texts and their translations, political and legal speeches, and certain news of the day.

[60] In Dean's opinion, "*official texts of a legislative, administrative or legal nature*" include statutes, regulations, court judgments and government notices. I would add awards and rulings of administrative tribunals, recognising that the list is not exhaustive. According to Dean: "*This makes perfectly good sense since it is in the public interest that the general public should be easily aware of information and edicts disseminated by government during the course of carrying out its basic functions.*"[18]

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[17] Dean: *Handbook of South African Copyright Law* (30 September 2015), at 1-98B to 1-98C, par 9.9.1 (my underlining)
[18] *Handbook of South African Copyright Law* (above), at 1-98C, par 9.9.2

[61] But the exemption in section 12(8)(a) is not limited to official texts of a legislative, administrative or legal nature. It covers also "*speeches of a political nature [and] speeches delivered in the course of legal proceedings*", thus extending to literary works not produced by government. "*Speeches*" in this context means speeches that have been reduced to material form. This is because section 2(2) of the Act requires all works eligible for copyright to be reduced to material form. A speech that has not been reduced to material form is not eligible for copyright, regardless of the provisions of section 12(8)(a). For section 12(8)(a) to have any purpose, it must refer to works that have been reduced to material form.

[62] In my view, this too makes perfect sense. It is certainly in the public interest that the general public should be easily aware of political speeches, and arguments in the course of legal proceedings, all of which are already in the public domain.

[63] That brings me to "*news of the day that are mere items of press information*". In my view, "*news of the day*" means current news. I can think of no good reason why the phrase should be limited to a 24-hour news cycle.

[64] However, it is clear from the words used that section 12(8)(a) is not intended to apply to all "*news of the day*", but only to "*mere items of press information*". The subsection certainly does not exempt from copyright protection all current news articles. Section 12(1)(c)(i) of the Act, dealt with below, regulates that issue.

[65] Mr Ginsburg submitted that the use of the word "*mere*" further qualified the "*items of press information*". For the reasons set out below, I do not agree.

[66] According to *The Concise Oxford Dictionary of Current English* (eighth edition), the word "*mere*" is an adjective meaning "*that is solely or no more or better than what is specified*". On this view, the word does not add or take away anything; it simply underlines that which is specified.

[67] Section 12(8) appears to be derived from Article 2(8) of the Berne Convention, providing: "*The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.*"[19] The Berne Convention lays down certain minimum standards of protection that must be granted to works under copyright in the member countries.[20]

[68] Article 2(8) of the Convention appears to apply more widely than section 12(8) of the Act. Put differently, section 12(8) affords greater protection to original works. Whereas Article 2(8) would exempt all news of the day and miscellaneous facts having a certain character, section 12(8) exempts only certain news of the day.

[69] There is no issue with the Copyright Act affording greater protection. The Berne Convention lays down minimum standards.

[70] In my view, the use of the adjective "*mere*" in Article 2(8) does not add anything to the class of "*miscellaneous facts*". If the adjective had been omitted, Article 2(8) would still exempt miscellaneous facts having the character of items of press

[19] *Berne Convention for the Protection of Literary and Artistic Works*: South Africa is a signatory and a member country.
[20] *Handbook of South African Copyright Law* (above), at 1-166C to 1-166D, par 13.6

information, and nothing more. Similarly, section 12(8) exempts news of the day consisting of items of press information, and nothing more.

[71] Once again, it should be noted that "*news of the day that are mere items of press information*" refers to works that have been reduced to material form. It matters not whether these are original works: if they are, section 12(8) applies; if they are not, section 2(1) applies; either way they are not entitled to copyright protection.

[72] What are these "*items of press information*" that are exempted from copyright protection? In my view, this includes all information communicated to the media in material form or subsequently reduced to material form. This would include, but not be limited to, press statements and press interviews concerning "*news of the day*" which journalists, and anyone else, would be free to use, in whole or in part, without restriction and without authorisation being required from anyone.

[73] Anyone who communicates information to the media intends that information to be put into the public domain. In my view, it is certainly in the public interest that the general public be easily aware of information communicated to the media that is either already in the public domain or soon will be.

[74] In this application, items of press information, communicated in material form or subsequently reduced to material form would be: the information disclosed at the press conference attended by Ms Cloete, or given by Mr Upton in the conference call with Ms Planting and others, or gathered by Ms Seggie during the media visit

at McDonald's; the press release issued by Sotheby's; Ms Schnehage's interview with Ms Smith; and Mr Tarrant's interview with Mr Griffith.

[75] In all of these instances, the items of information were given to the media with full knowledge that the information would be put into the public domain. That was not the case with Mr Walker's address at the University of the Witwatersrand (which was closed to the media) and Mr Rees's interview with Mr Walker (where he had posed as a potential investor). In these two cases, there was no expectation that the information would be given to the press and put into the public domain; they were therefore not items of press information.

[76] The fundamental issue, however, is whether any of the Moneyweb articles could be regarded as "*news of the day that are mere items of press information*". In my view, the answer depends on whether the article is an original work or not. If it is, then the article will contain more than "*mere items of press information*" because the author's contribution will have constituted more than mere copying. Section 12(8)(a) would not apply. On the other hand, if the Moneyweb article is not an original work, the article will be no more than a repetition of the "*news of the day that are mere items of press information*". Section 12(8)(a) would then apply.

[77] Accordingly, I find that section 12(8)(a) of the Act does not apply to *Moneyweb 5, 6* and *7*. Regarding *Moneyweb 1, 2, 3* and *4*, I have not found that they are not original works. What I have found is that Moneyweb has not discharged its *onus* of proving originality. The *onus* of proving a defence in terms of section 12(8)(a) rests on the respondents. In order to discharge this *onus*, the respondents would

have to prove that *Moneyweb 1, 2, 3* and/or *4* contain nothing more than "*mere items of press information*". This they have not done in relation to any of the four articles. The respondents have therefore not proved that section 12(8)(a) applies to *Moneyweb 1, 2, 3* and *4*.

Substantiality

[78] The issue here is whether Media24 has reproduced any substantial part of the articles that have been proved to be original works - *Moneyweb 5, 6* and *7*.

[79] In *Galago Publishers (Pty) Ltd v Erasmus*,[21] Corbett JA (as he then was) set out the test to be applied in determining whether there has been an infringement of copyright:

> "*... [I]t is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced. To 'reproduce' within the meaning of the Act means to copy and in order for there to have been an infringement of the copyright in an original work it must be shown (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or copy of the latter; and (ii) that the original work was the source from which the alleged*

[21] *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A)

infringing work was derived, ie that there is a causal connection between the original work and the alleged infringing work ..."[22]

"*As to what is meant by the reproduction of a 'substantial part' of the plaintiff's work, I would simply refer to what was stated in the* Ladbroke *case* supra *by Lord Reid (at 469):*

> *'If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is novel or striking, or is merely a common-place arrangement of ordinary words or well-known data. ...*"[23]

[80] Mr Puckrin submitted that "*whatever the amount of Moneyweb's article (in each case) used by Fin24, it is the originality of the parts used which is relevant to the inquiry into whether there has or [has] not been any reproduction for purposes of the infringement inquiry. ...*"[24] In argument, he further submitted that if the part used by Fin24 had been copied by Moneyweb from another source, then it could not be said that Fin24 had copied a substantial part. In this regard, Mr Puckrin relied on two works: *Copinger and Skone James on Copyright*[25] and *The Modern Law of Copyright and Designs*:[26]

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[22] *Galago Publishers* (above) at 280B-E (my underlining)
[23] *Galago Publishers* (above) at 285B-C (my underlining)
[24] Respondents' Heads of Argument, par 23 (underlining in the original)
[25] Garnett, Davies and Harbottle, *Copinger and Skone James on Copyright* (16th edition), at 7-28 and 7-30
[26] Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs* (4th edition), at p 82

"The quality or importance of what has been taken is much more important than the quantity. The issue thus depends therefore not just on the physical amount taken but on its substantial significance or importance to the copyright work, so that the quality, or importance, of the part is frequently more significant than the proportion which the borrowed part bears to the whole. ... Quality and importance must therefore be understood in terms of the features of the work which made it an original work in the first place. It follows that the quality relevant for the purposes of substantiality in the case of a literary work refers to the originality of that which has been copied."[27]

"As soon as a situation arises where not all of the work has been copied, or where imitation is not exact, the court has to decide whether what the defendant has taken is a 'substantial part'; and the answer to that question depends <u>at least in part</u> on the degree of the originality of the part that is taken."[28]

[81] In *Express Newspapers Plc. v News (UK) Ltd*,[29] the Chancery Division of the English High Court, in an application for summary judgment, was required to adjudicate upon a dispute between two newspapers that had accused each other of breaching copyright in respect of an article that each had published. Both articles contained quotations of the words used by the interviewee. In the case:

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[27] *Copinger and Skone James on Copyright* (16th edition) at 7-30
[28] *The Modern Law of Copyright and Designs* (4th edition) at p 82 (my underlining)
[29] *Express Newspapers Plc. v News (UK) Ltd* [1990] 1 WLR 1320

"... There is no verbatim quotation of the journalist's own words. The position is different so far as the original article contains quotations of the actual words used by Mrs Bordes or Miss Ogilvy, as the case may be. The original article quotes them verbatim. They are then also quoted verbatim in the pirated article. The only source of the verbatim quotation of the words of Mrs Bordes and Miss Ogilvy to the pirate reporters were the quotations contained in the original articles."[30]

[82] Confronted with an application for summary judgment, the court was not willing, or able, to make final pronouncements. Nevertheless, the court expressed the view that there could be no copyright in the news. In my view, that is correct. As the court explained:

"I think, therefore, that it is very improbable that the courts would hold that a newspaper could, by reason of the law of copyright, obtain a monopoly on a news story as opposed to copyright in the actual words used by its reporter in reporting that story. ..."[31]

[83] The issue for the court was whether the reproduction of the actual words used by the interviewee, as reported in the original article, could found a claim for breach

[30] *Express Newspapers* (above) at 1324E-F
[31] *Express Newspapers* (above) at 1325C

of copyright. Relying on *Walter v Lane*[32] and *Sands & McDougall Proprietary Ltd v Robinson*,[33] the court held:

> "*... Although Miss Ogilvy had approached the reporter, the whole conduct of the interview and the selection of quotations involved at least as much (and in my view greater) skill and judgment than merely taking down the words of a speaker at a public speech. Therefore, in my judgment, in the absence of any other defence, it has been shown that "Today" does enjoy reporter's copyright in the words of Miss Ogilvy. It follows that, in the absence of such defence, by copying those quotations from "Today's" article, the "Daily Star" has infringed "Today's" copyright.*"[34]

[84] It seems to me that the English position is no different from our own. If a literary work is eligible for copyright on the basis of originality, then it is the whole work that is original and not selected parts, even if some of its parts have been copied from other sources. In my view, the quotations relied upon by Mr Puckrin must be read in that light, i.e. the "*originality of the part that is taken*" also applies to material that has been copied from other sources.[35]

[85] I therefore do not agree with Mr Puckrin's submission that if a part used by Fin24 has been copied by Moneyweb from another source, then it cannot be said that Fin24 has copied a substantial part. In determining whether a substantial part of

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[32] *Walter v Lane* [1990] AC 539
[33] *Sands & McDougall Proprietary Ltd v Robinson* (1917) 23 CLR 49
[34] *Express Newspapers* (above) at 1326H - 1327A (my underlining)
[35] See also *Juta & Co Ltd v De Koker* 1994 (3) SA (T) at 504D - 505C

the work has been reproduced, the court must make a value judgment based on the work as a whole, focusing more on the quality of what has been taken than on the quantity.

[86] Against this, I turn to consider whether Fin24 has reproduced a substantial part of *Moneyweb 5, 6* and *7*.

"Amplats: CEO cites JSE rules"

[87] I shall refer to this article as *Fin24 5*. It was published on 16 January 2013, the same day that *Moneyweb 5* was published, at 4:38pm. Seven hours separated publication of the two articles. I have set out the article below, underlining those parts that are sourced from *Moneyweb 5*:[36]

> **Amplats: CEO cites JSE rules**
>
> Johannesburg - Anglo Platinum [JSE:AMS] (Amplats) CEO Chris Griffith responded to comments made by Mineral Resources Minister Susan Shabangu on Wednesday, saying that despite the fact that there was a public process, JSE regulations on sensitive information prevented a totally transparent discussion with all stakeholders.
>
> Shabangu questioned the miner's decision to "leave government out" of its announcement that it may retrench some 14 000 jobs.
>
> She also called Griffith "arrogant" following an announcement that Amplats planned to close four shafts in the Rustenburg area and sell its Union mine.
>
> **In an interview with Moneyweb**, Griffith said he would not be drawn into a public spat with the minister.
>
> "Clearly the minister is unhappy about a number of things, and I'm going to need to go back to the minister and sit down with her and work through the concerns that she may have."
>
> Griffith told the publication that due to the regulations regarding sensitive information, the company could not discuss its plans openly with all stakeholders.

[36] The emphasis in **bold text** is my own.

"I think we would argue that, given the narrow range that we have to consult, whilst we are developing our plans before it becomes public we were not in a position to talk about some of our future plans with every person. Even the nature of the conversation with government we've got to be careful about.

"We have continuously engaged with all stakeholders, including different levels of government," **Griffith said in the report**.

Anglo American announced at the beginning of 2012 that that it would review platinum operations.

"So this is likely to be a difficult period. I don't think anyone expected either government or unions or ourselves or civil society to say it's a good idea that we have retrenchments.

"But the fact is that if we don't do something about the company, eventually 60 000 people in the company will have no employment. We seek to work with our stakeholders.

"If some of our stakeholders are feeling uncomfortable about that, we need to sit down with them and work through that. And if there are difficulties we need to patch those up," he said.

Meanwhile, shocked Amplats workers refused to go underground on Wednesday.

The ANC also responded with anger, calling the miner's decision "cynical and dangerous in the extreme".

Amplats' share price fell 6.30% on Wednesday, while parent company Anglo American's price was down 1.43% on the JSE.

[88] Much of *Fin24 5* is a word-for-word copy of *Moneyweb 5*. In addition, Moneyweb 5 focuses on two main issues: Mr Griffith's response to Minister Shabangu and the effect of the JSE regulations on Anglo Platinum's conduct. Both issues, the core of *Moneyweb 5*, have been reproduced in *Fin24 5*. Accordingly, Fin24 has indeed reproduced a substantial part of *Moneyweb 5*.

"*Defencex boss rallies support*"

[89] I shall refer to this article as *Fin24 6*. It was published on 10 March 2013, one day after *Moneyweb 6* was published, at 9:29pm. Thirty hours separated the two

articles. I have set out the article below, underlining those parts that are sourced from *Moneyweb 6*:[37]

Defencex boss rallies support

Cape Town – The mastermind behind the Defencex "Ponzi scheme" on Saturday tried to allay investors' fears at a brief appearance at a Motivational/Feelgood Day (sic) meeting at Wits University.

Chris Walker, the sole member of the close corporation Defencex, a trading name for Net Income Solutions, told over a thousand "investors" that their money had been frozen and that no withdrawals from the scheme would be possible "until the investigation is complete", **reported a Moneyweb reporter who gained access to the closed meeting**.

Attendees reportedly paid R1 000 a ticket to hear Walker's five-minute explanation of exactly what had gone wrong with his 2%-a-day investment initiative.

But it will take more than just facing a handful of investors who invested up to R500m in the alleged scheme.

Investors were up in arms when news broke that the bank account of Net Income Solutions had been frozen on February 28. There was R320m in the Standard Bank account at the time.

According to Gavin Came, chairperson of the Financial Intermediary Association of South Africa, Walker can only soothe investor fears by appearing at the court return date on March 26.

He said the only institutions authorised to take deposits are banks, collective investment schemes (unit trusts) and stock broking firms through stock broking accounts.

"With Defencex, Walker has been taking deposits from the public in breach of the banking laws. If he can convince the court on March 26 that he is not a bank, the scheme could be in business again, which is unlikely."

Defencex promised investors some 2% per day on investments of five-month duration subject to a complicated points-based assessment system. They could enhance these returns by earning commission on the amounts invested by people they in turn introduced to the scheme.

At the end of last month, the Western Cape High Court ordered the bank accounts connected to the scheme be frozen after the Registrar of Banks applied to the court for an interim order interdicting Net Income Solutions/Defencex from continuing its deposit-taking activities.

Thousands of people had bought into the promise of a daily return of 2% on R100 investment. Defencex sells "points" for R100 apiece. These points "earn" 2%, or R2, a day for 75 days, at which point they can be withdrawn.

Came said the worrying trend emerging from this is that participation in the scheme had increasingly been linked to the unsecured borrowing market, where some investors could even have used their overdrafts to "invest" in the scheme.

[37] The emphasis in **bold text** is my own.

Another worry is the level of financial literacy of investors, judging from the posts on Facebook and Twitter. "It is difficult for the ordinary person to pick up a pyramid or Ponzi scheme, but financial intermediaries are equipped to do so.

"And extra protection for the investor is that the intermediary can be held liable for inappropriate advice and be referred to the ombud," said Came.

Defencex's website redirects to an internet page called recycle4dollars which introduces visitors to Emotional Freedom Techniques (Meridian tapping).

Further browsing of the site brings up a Financial Opportunity which outlines how Defencex works and the navigation button Getting Started instructs investors how to deposit money.

The contact email is a g-mail address.

[Picture]

Instructions on how to deposit money into the scheme. (Defencex website)

Defencex punts itself as an online investment company that allows you to "grow your profits by learning to compound your daily profits".

It goes on to encourage clients to "invest their money for cash-flow as opposed to invest for capital gains. Cash-flow investing is the best because you enjoy your account returns for a lifetime," the company says.

Although the Defencex website is still there, members have vented their frustration that they cannot enter the Member login.

"Guys what is hapening with defencex website I cnt login," (sic) one member said on Facebook.

"does anybody have any new info on what is happening on Defecex. Can't even get into the website," (sic) another said.

However, many investors still back Walker and when he asked for it at Saturday's meeting, support was clearly granted.

Moneyweb reported that Walker said he is going through a difficult time. "I need to know that I have your support," which was clearly granted, according to the Moneyweb report.

Almost 4 000 people also signed an online petition backing Walker.

Meanwhile, the SA Reserve Bank has asked auditors PwC to investigate whether Defencex, Cycle4Dollars, Net Income Solutions and its director Chris Walker are contravening the Banks Act, **Moneyweb reported**.

According to affidavits, large sums of money were deposited into the accounts of Net Income Solutions, none of which were reinvested by Walker.

According to Moneyweb, Walker, 46, is no stranger to controversy. His previous scheme, Gold Charity Fund Investments, was reportedly declared an unfair business practice back in 2002.

Walker was accused of operating a pyramid scheme which abused the name and image of former president Nelson Mandela.

> Came warned South Africans against get rich-quick schemes.
>
> "Warning signs that you are dealing with a Ponzi scheme are that the promised returns offered are way over those achieved in bank deposits, unit trusts and other regulated savings and investment products," said Came.

[90] Fin24 took very little quantity from *Moneyweb 6*. It reproduced the headline, but used the word "*boss*" instead of "*mastermind*". The first three paragraphs, and two paragraphs towards the end, of *Fin24 6*, are also copied from *Moneyweb 6*. The remainder of a fairly long and detailed article is not taken from *Moneyweb 6*.

[91] But what about the quality of what was taken? It is correct, as Moneyweb says, that the headline and introductory paragraphs of an article are important to retain the reader's interest in reading the article to completion. However, in my view, it does not follow, without more, that the headline and introductory paragraphs of *Moneyweb 6* represent, qualitatively, a substantial part of the article.

[92] The essence of *Moneyweb 6* is an undercover report of a closed meeting during which an elusive character addresses his supporters. The article is devoted to a detailed account of what transpired at the meeting. The detail is central to the article, capturing the atmosphere of the meeting. By contrast, *Fin24 6* contains very little detail of the meeting and is barely descriptive. In my view, Fin24 has not reproduced a substantial part of *Moneyweb 6*.

"Defencex boss opens up to Moneyweb"

[93] I shall refer to this article as *Fin24 7*. It was published on 4 July 2013 at 1:33pm, more than three days after *Moneyweb 7*. The article is set out below, with those parts underlined that are sourced from *Moneyweb 7*:[38]

> **Defencex boss opens up to Moneyweb**
>
> Johannesburg – "I'm not going to win against the Reserve Bank - that is impossible."
>
> This is the view of Chris Walker, the mastermind behind the R800m Defencex scheme.
>
> Walker made this statement **during an exclusive interview with Moneyweb**, which ranged from the new schemes and training seminars he is promoting to his views on Defencex.
>
> Defencex is the latest scheme to hit the headlines, after the Western Cape High Court on February 28 ordered its Standard Bank account to be frozen because of the company's deposit-taking activities.
>
> In terms of the Banks Act, only banks, collective investment schemes and brokers through a brokerage account are authorised to take deposits.
>
> **Moneyweb earlier reported that** the Reserve Bank had asked auditors PwC to investigate whether Defencex, Cycle4Dollars, Net Income Solutions and Walker were contravening the Banks Act.
>
> According to affidavits, large sums of money were deposited into the accounts of Net Income Solutions, none of which were reinvested by Walker.
>
> **Still no returns on invested amounts**
>
> Defencex punted itself as an online investment company that allows you to "grow your profits by learning to compound your daily profits".
>
> It promised investors about 2% per day on investments of five months' duration, subject to a complicated points-based assessment system. They could enhance these returns by earning commission on the amounts invested by people they in turn introduced to the scheme.
>
> Investors have no clue when they will see any of their money.
>
> The last post on June 25 on the Defencex website stated: "The interim order made on 28 February 2013 was made final and confirmed today. In other words the Registrar of Banks still has control over the money. So nothing has changed.
>
> "We still have to wait until the investigation is finalised. We do not know when that will be."

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[38] The emphasis in **bold text** is my own.

Analysts said the signs were clear for investors not to buy into a scheme like Defencex. "Every time a scheme is exposed, people go through something similar to the normal five phases of loss – disbelief, anger, fear, negotiation, and then a very distant acceptance or resigning themselves to the loss," said Daryl Ducasse, investor activist and member of Merkurius Capital Solutions.

Answering questions on the loss people suffered from investing in Defencex, **Walker told Moneyweb**: "The only reason they have lost money is because the Reserve Bank closed the bank accounts ... Sarb did not like people to be able to make money because they rely on debt... the banks make money from debt.

"They think I am the biggest criminal in SA at the moment," said Walker.

He likened the insurance industry and the banks to Ponzi schemes, while admitting that his battles with the Reserve Bank could never have been won.

He also claimed not to have profited from his embattled business and suggested that the accounts linked to Net Income Solutions were frozen to protect the profit-seeking interests of the banks, and to allow liquidators and attorneys a slice of the R349m pie.

Pyramid scheme accusations

According to Moneyweb, Walker, 46, is no stranger to controversy. His previous scheme, Gold Charity Fund Investments, was reportedly declared an unfair business practice back in 2002.

Walker was accused of operating a pyramid scheme which abused the name and image of former president Nelson Mandela.

Walker went on to say: "I'm still with the people who made money and [they] understand.

"The Reserve Bank closed the banks accounts... they must decide what to do with the money.

"I'm not going to win against Sarb - that is impossible."

Referring to Defencex, he said: "The company was about revenue sharing... traditional network marketing pays out up to ten levels, they don't advertise so they take the advertising budget and they give it to the members..."

Ducasse said he doubted whether Defencex members will ever see their money again.

[94] *Fin24 7* is headlined "*Defencex boss opens up to Moneyweb*". It is an article that is based on Moneyweb's wide-ranging interview with Mr Walker. However, the article is focused only on one of the issues covered in the interview, Mr Walker's views on *Defencex*. On this issue, Fin24 copied certain extracts almost word-for-word from *Moneyweb 7*.

[95] Fin24 did not reproduce the bulk of *Moneyweb 7.* It left alone all the other issues covered in the interview and focused only on *Defencex*. Even its coverage of *Defencex* was selective. Much of the discussion was left out. Quantitatively, its reproduction was not substantial.

[96] Is the position different when viewed qualitatively? In my view, not. Moneyweb contends that "*... Fin24 has copied verbatim the heart and conclusion of the Moneyweb article ...*". That appears to be an exaggeration.

[97] *Moneyweb 7* is headlined "*Chris Walker breaks the silence*"; the sub-headline is "*Defencex mastermind: SARB thinks I'm the biggest criminal in SA.*" Although Mr Walker was identified by reference to his *Defencex* links, the substance of the article covered several issues, namely network marketing, another project known as *Kipi*, *Defencex* and "*the future*".

[98] Fin24 copied the first three paragraphs of *Moneyweb 7*, four extracts from the discussion on *Defencex* and part of the sub-headline. In the first two paragraphs of *Moneyweb 7*, Mr Rees highlighted two of the statements in the interview linked to *Defencex*. In my view, these paragraphs did not summarise the interview as a whole, nor the part on *Defencex*. They simply gave a taste of what was to come. The third paragraph reported that Moneyweb had managed to conduct a wide-ranging interview with Mr Walker, the details of which were set out below. The sub-headline is not dealt with in the body of *Moneyweb 7*.

[99] The four extracts copied by Fin24 come from different parts of the discussion on *Defencex*. They do not form a continuous block of text. They certainly cannot be said to represent the heart of *Moneyweb 7*. More of the discussion on this issue is left out than is taken. In my view, Fin24 has not reproduced a substantial part of *Moneyweb 7*.

Section 12(1)(c)(i) of the Copyright Act

[100] Having found that Fin24 has reproduced a substantial part of *Moneyweb 5*, it now falls to the respondents to prove that their publication of *Fin24 5* constitutes "*fair dealing*" within the meaning of section 12(1)(c)(i) of the Act.

[101] Section 12(1) provides (underlining added):

> "*Copyright shall not be infringed by any fair dealing with a literary or musical work* -
>
> *(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;*
>
> *(b) for the purposes of criticism or review of that work or of another work; or*
>
> *(c) for the purpose of reporting current events* -
>
> *(i) in a newspaper, magazine or similar periodical; or*
>
> *(ii) by means of broadcasting or in a cinematograph film;*
>
> *Provided that, in the case of paragraphs (b) and c(i), the source shall be mentioned, as well as the name of the author if it appears on the work.*"

[102] The key provisions of section 12(1)(c)(i), for purposes of this case, are that the dealing must be "*fair*"; the purpose must be to report "*current events*"; and the source, including the name of the author, must be "*mentioned*".

Fair dealing

[103] As before, there does not appear to be any South African decision on point. Both sides referred me to decisions and writings from several foreign jurisdictions on the meaning of the phrase "*fair dealing*". I understand that foreign authorities are referred to for guidance only. I also accept that I must be cautious in considering foreign law because each jurisdiction has its own particular history and, in many cases, is bound or influenced by domestic statutory precepts. I therefore intend, for historical reasons, to focus on English authority.[39]

[104] In *Ashdown v Telegraph Group Ltd*,[40] the English Court of Appeal was concerned with whether the Human Rights Act 1998 impacted on the protection afforded to owners of copyright by the Copyright, Designs and Patents Act 1988.[41] On the defence of "*fair dealing*", Lord Phillips MR held:

> "*Where part of a work is copied in the course of a report on current events, the 'fair dealing' defence under s 30 will normally afford the court all the*

[39] Dean, *Handbook of South African Copyright Law* (2015) at 1-4D to 1-4E, par 1.4
[40] [2001] 4 All ER 666 (CA)
[41] Section 30(2) of the Copyright, Designs and Patents Act 1988 provided: "*Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work* ..."

scope that it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press. There will then be no need to give separate consideration to the availability of a public interest defence under s 171."[42]

[105] Lord Phillips approved "*the test of fair dealing in the general context of s 30*" as summarised in *The Modern Law of Copyright and Designs*:[43]

> "*It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for*

[42] *Ashdown v Telegraph Group* (above) at 683b-c, par [66]
[43] *Ashdown v Telegraph Group* (above) at 683g to 684c, par [70]; See also Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs*, vol. 1, p 754, par 20.16

sometimes it is necessary for the purposes of legitimate public controversy to make use of "leaked" information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

[106] In my view, the test approved by Lord Phillips cannot simply be imported into our law. To start with, our Copyright Act must be interpreted through the prism of our Constitution, the Constitution of the Republic of South Africa, 1996. In order to survive constitutional scrutiny, the Act must be capable of being interpreted in a manner that is consistent with the Constitution.

[107] Section 6 of the Act declares that copyright in a literary or musical work vests the exclusive right in the owner to (amongst others) reproduce or publish the work. According to Dean: "*The right to control the use of a work in all manners in which it can be exploited for personal gain or profit is an essential right under the law of copyright and that law does not achieve its objective unless such essential right is granted to the full.*"[44]

[108] Copyright is an intellectual property right. It is protected by section 25(1) of the Constitution: "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*" A

[44] Dean, *Handbook of South African Copyright Law* (2015) at 1-1, par 1.1

law of general application could therefore limit a right in terms of section 25(1), provided that the law meets the requirements of section 36 of the Constitution. It follows that the right to reproduce or publish a copyrighted work is not absolute.

[109] On the other hand, section 16(1) of the Constitution provides that everyone has the right to freedom of expression. This right includes "*freedom of the press and other media*" and "*freedom to receive or impart information or ideas*". Similarly, the right is not absolute.[45]

[110] Does section 6 of the Act clash with section 16(1) of the Constitution? I think not. Section 6 must be read with section 12(1) which in turn must be interpreted in a manner consistent with the constitutional right to freedom of expression.[46]

[111] Section 12(1) only becomes relevant after a finding of substantial reproduction. The section contemplates a situation in which a newspaper publishes an article, reporting on current events, that has substantially been reproduced from another article previously published in another newspaper. In such a situation, the party who has published the later article will not be liable for copyright infringement, despite substantial reproduction, if it can prove that it dealt fairly with the original work. It is in this context that the test approved by Lord Phillips can be brought into our law.

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[45] It too may be limited by law of general application: section 36 of the Constitution.

[46] The Constitutional Court has recognised that intellectual property rights (attaching to registered trademarks) may be limited by the right to freedom of expression: *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC).

[112] What then are the facts relevant to the test? In my view, the relevant facts must be limited to those existing at the time of dealing, i.e. at the time of publication of the later article. A journalist who is about to reproduce part of an article ought to be able to assess whether or not she is about to deal fairly with the article. She cannot anticipate the extent of the copyright owner's loss. She can only assess the fairness of her conduct on the facts existing at the time. Her obligation, in exercising her right to freedom of expression, is to deal fairly with the original work. The test is an objective one.

[113] In my view, the factors relevant to a consideration of fairness within the meaning of section 12(1)(c)(i) 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.

[114] Respectfully, I agree with the learned authors of *The Modern Law of Copyright and Designs* that it is "*impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression.*" Fairness is an elastic concept. A determination of "*fair dealing*" involves a value judgment and will depend on the particular facts or circumstances at the time of dealing.

[115] In its founding affidavit, Moneyweb makes the extravagant claim that the conduct of Fin24 "*amounts to systematic plagiarism on an industrial scale and forms a*

core part of its business model in an effort to gain a commercial advantage for itself." The respondents point out that, during the period covered by *Fin24 1* to *Fin24 7* (26 July 2012 to 4 July 2013), Fin24 published more than 10 000 articles. During that period, only 11 articles sourced content from Moneyweb (including the articles at issue in this application). In addition, during the same period, 194 articles published by Fin24 contained content sourced from non-syndicated third parties.

[116] Clearly, Moneyweb's claim of "*systematic plagiarism on an industrial scale*" is not supported by the facts and is simply designed to colour what should be a focused inquiry. Each of the Fin24 articles that have caused offence has to be assessed on its own and in relation to the relevant Moneyweb article. In addition, it might be possible that a pattern of offending articles could for that reason negative a defence of "*fair dealing*", but that is not the position in this case.

[117] Moneyweb also attempts to put Fin 24's "*aggregation guidelines*" at the centre of the inquiry into "*fair dealing*". In my view, the attempt is misdirected.

[118] The guidelines, attached as an annexure to the respondents' answering affidavit, state:

> "*It is part of 24.com's editorial policy to publish content aggregated from various sources. When aggregating content, take note of the following guidelines:*
>
> *1. Never use more than 30% of the original source.*

2. Rewrite all content.

3. Where possible add in your own context and own information.

4. Always credit the original source.

5. Include a link to all original sources."

[119] In its replying papers (which run from pages 410 to 826 of the record) Moneyweb attaches affidavits deposed to by editors and executives of news publications in South Africa, all expressing the view that the "*aggregation guidelines*" are not in accordance with industry standards. The respondents seek the striking out of these affidavits on the ground that they constitute new matter in reply.

[120] Mr Ginsburg submitted that the evidence of the editors is critical to the inquiries into "*fair dealing*" and unlawful competition. He denied that it constitutes new matter in reply, pointing out that the respondents first attached the guidelines to their answering affidavit (at par. 21). However, in paras. 24 to 26 of Moneyweb's founding affidavit much is made of the respondents' "*practice*" of "*aggregation*", which it says "*means nothing more than copying original content from other news organisations and publishing it on the Fin24's website, and misrepresenting that this content is its own.*" Nothing prevented Moneyweb from attaching the editors' affidavits (appropriately modified) to its founding affidavit, to support its attack on the respondents' "*practice*" of "*aggregation*". It chose not to do so and ought, therefore, not to be permitted to adduce the evidence in reply. For that reason alone, the evidence ought to be struck out.

[121] In any event, the editors' affidavits are not helpful on the issues that matter in this application. First, none of them, bar one, deals with any of the articles published by Fin24. The editor of the *Daily Maverick* states that he wrote an opinion piece "*after carefully considering the relevant facts*". It is not clear whether he read all, or some, or none of the articles. Second, all of the affidavits contain paragraphs that are almost identically worded. It seems to me that someone composed the paragraphs and then copied them into all the affidavits. Third, the content of the affidavits is unhelpful. They state that "*these guidelines ... are not in accordance with industry standards or practice*" and "*... appear to permit a form of illegitimate and unlawful copying.*" If this were a case about the legitimacy of the guidelines, which it is not, this would be an issue for the court to decide. The editors go on to decide an issue that is one for this court to decide: they "*do not agree that a hyperlink to an original article in the online article which has copied from or re-used from the original*" is "*sufficient, in and of its own, to constitute fair dealing or sufficient attribution.*" I deal with this issue below.

[122] In the circumstances, I have decided to strike out the editors' affidavits at pages 509 to 540 of the record, as well as paragraph 21.2 of the replying affidavit and sub-paragraphs 21.2.1 to 21.2.7.

<u>Reporting current events</u>

[123] I do not think that this phrase is controversial. In my view, it ought to be given its ordinary, wide meaning. Any event that is relatively close in time to the report will qualify. It need not be an event that has occurred on the day of the report.

Mentioning the source, including the name of the author

[124] In the context of online publication, the use of the hyperlink is a most effective way of informing the reader that he or she can access further information at the click of a mouse or keypad. A hyperlink is a computer programme that links the article being read to another article on the Internet. It appears as part of the text of the article being read and is differentiated from the text usually by the use of a different colour or by underlining or both. In my view, almost every reader of the Internet will be familiar with the use of hyperlinks.

[125] Once a hyperlink has been provided, the reader will simply have to click the link to be taken to the underlying article where the name of the author appears. Mr Ginsburg informed me that Moneyweb does not contend, correctly in my view, that the names of its contributing authors ought to have been mentioned in the Fin24 articles.

[126] I therefore find that a hyperlink substantially complies with the requirement that "*the source shall be mentioned, as well as the name of the author if it appears on the work*".

Fin24 5 - "Amplats: CEO cites JSE rules"

[127] Have the respondents proved that their publication of *Fin24 5* constitutes "*fair dealing*" within the meaning of section 12(1)(c)(i) of the Act? In their answering affidavit, the respondents explain that they published the story as it "*is of topical*

interest to our readership because it concerns the activities of two key actors in the economy: the large corporation Amplats and the rules of our stock exchange. This story was written [as] a follow-up to other related stories that Fin24 had run previously." They also say that *Moneyweb 5* was "*used by*" other publications.

[128] The fact that the story was of topical interest to its readers did not relieve Fin24 of its obligation to deal fairly with *Moneyweb 5*. It is also irrelevant if other news publications copied *Moneyweb 5*. The issue here is whether the respondents dealt fairly with *Moneyweb 5*.

[129] *Fin24 5* was published online within seven hours, and on the same news day as *Moneyweb 5*. Almost all of *Fin24 5* is a word-for-word copy of *Moneyweb 5*. In my view, *Fin24 5* has taken more than a substantial part: it has taken the core of *Moneyweb 5*. The respondents do not say why Fin24 took so much, or why it did not contribute more of its own work to the article, as it had apparently done in its earlier related stories. Nor do the respondents dispute that the author of *Fin24 5* simply copied from *Moneyweb 5* and had no regard for the radio interview or the transcription of the interview.

[130] Even though *Fin24 5* referred twice to Moneyweb, it seems that the article was likely to be a substitute for *Moneyweb 5*. The provision of a hyperlink does not by itself discharge the burden of proving "*fair dealing*".

[131] In my judgment, the respondents have not proved that their publication of *Fin24 5* constitutes "*fair dealing*" within the meaning of section 12(1)(c)(i).

Unlawful competition

[132] Moneyweb contends, in addition to its submissions on copyright, that Fin24's publication of the seven articles constitutes unlawful competition at common law. Its case is that Fin24 has unlawfully sought to derive an advantage over one of its key competitors (Moneyweb), "*by making impermissible use of the time, effort, money and skill expended by Moneyweb to produce the articles concerned.*"

[133] It seems to me that this argument seeks to blur the lines between copyright and other forms of unlawful competition. What is permissible use will depend on what copyright law permits.

[134] I am also aware of the warning issued by Schutz JA in *Payen Components SA Ltd v Bovic CC*:[47]

> "*In my opinion a Court should be wary of allowing the sharp outlines of these two established branches of the law of unlawful competition [copyright and passing off], evolved through long experience, to be fudged by allowing a vague penumbra around the outline. Unlawful competition should not be added as a ragbag and often forlorn final alternative to every trade mark, copyright, design or passing off action. In most such cases it is one of the established categories or nothing.*"

[47] *Payen Components SA Ltd v Bovic CC* 1995 (4) SA 441 (A) at 453G-H

[135] Accordingly, Moneyweb's claim of unlawful competition cannot succeed where its claim of copyright infringement has failed.

Order

[136] It remains for me to consider an appropriate order. There are two issues that require consideration: the interdict and costs.

[137] As for the interdict, Mr Puckrin points out that section 6 of the Act distinguishes between reproduction and publication. It is the reproduction of *Moneyweb 5* that constitutes an infringement of copyright.[48] In publishing *Fin24 5*, *Moneyweb 5* was reproduced. Reproduction is not an on-going act. In any event, whatever harm Moneyweb has suffered, it is likely that the harm is no longer continuing. Accordingly, an interdict is not warranted.

[138] Regarding costs, it seems to me that the respondents have been substantially successful in defending the claims against them. They have not been successful in some of the significant defences raised. The applicant, on the other hand, has succeeded in one claim and may yet be able to establish that it has suffered damages as a result of the publication of *Fin24 5*. On balance, the respondents have been substantially more successful than the applicant. I am of the view that it would be fair to order that Moneyweb pay 70% of the respondents' costs.

[139] Accordingly, I make the following order:

[48] Section 6(a) of the Act. In terms of section 6(b), publication constitutes an infringement of copyright if the work "*was hitherto unpublished*".

a. It is declared that the respondents' publication of the article of 16 January 2013, entitled "*Amplats: CEO cites JSE rules*", constituted an infringement of the applicant's copyright under the Copyright Act 98 of 1978;

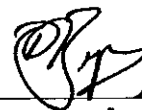
b. It is declared that the respondents are liable to the applicant for the damages suffered by it as a result of the unlawful publication of the said article;

   i. The *quantum* of the damages to be paid, including the *quantum* of any additional damages payable pursuant to section 24(3) of the Copyright Act 98 of 1978, will stand over for determination in a damages enquiry;

   ii. For purposes of the damages enquiry, the applicant is to file a declaration particularising the damages claimed within 20 days of the date of this order and the respondents are to file a plea within 20 days thereafter;

   iii. The Rules of Court applicable to the exchange of pleadings and the process of discovery will apply in this regard;

c. The applicant is to pay 70% of the respondents' costs of this application, including the costs of two counsel.



D. I. BERGER
ACTING JUDGE OF THE HIGH COURT

5 May 2016

Dates of hearing:	7 and 8 May 2015
Date of judgment:	5 May 2016
Applicant's counsel:	Mr P Ginsburg SC, with Mr S Budlender and Mr G Marriott
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