



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: **24 August 2021**

Case No: 37629/2021

In the matter between:

PCCW VUCLIP (SINGAPORE) PTE LTD

Applicant

and

E.TV (PTY) LTD

Respondent

JUDGMENT

WILSON AJ:

- 1 The central issue in this case is the extent to which a licensor of intellectual property can expect a licensee to secure the licensed property.

The licence agreements and the piracy

- 2 The applicant (“Vuclip”) purchased a licence from the respondent (“eTV”) to disseminate episodes of two popular soap operas, “Scandal” and “Imbewu”,

(“the soap operas”) on its video on demand platform (“Viu”). The relevant terms of the licence were that Vuclip would have the sole and exclusive right to disseminate an identified range of episodes of the soap operas on Viu for 12 months from the first broadcast of those episodes on that platform. The right to broadcast the episodes was triggered by the first broadcast of the episodes on eTV’s “linear channel” in South Africa. The linear channel is essentially the terrestrial, cable or satellite channel, ordinarily viewed on a television, on which eTV’s programmes are broadcast sequentially.

- 3 Two license agreements – one for each of the soap operas – were entered into on 31 December 2019. They can be treated as identical for the purposes of these proceedings.
- 4 In March 2021, the soap opera episodes licenced to Vuclip began to appear on an app that called itself “Philosopher: Stream Mzansi SA Soapies Free App” (“the Philosopher App”). On 17 May 2021, Vuclip wrote to eTV informing it of this. Vuclip stated that it assumed that the Philosopher App content had been pirated, and that eTV would want to take steps to protect its intellectual property in the pirated episodes.
- 5 On 28 May 2021, eTV replied to the e-mail. It stated that it had determined, after an investigation, that “Viu’s system and/or personnel are facilitating the piracy of e.tv content to Philosopher”. This was said to be in breach of clauses 6.1 and 9.3 of the licence agreements. The reference to clause 6.1 of the agreement is hard to decipher, as that clause merely confirms Vuclip’s right to broadcast the licenced episodes from half an hour after their first appearance on eTV’s linear channel. Clause 9.3 of agreement contains a list of warranties.

The relevant warranties in this case are contained in subclauses c) and d). Subclause c) records that Vuclip will “strictly observe and comply with all of its representations, undertakings and warranties” specified in the agreement. Subclause d) records that Vuclip would not “make or authorise the use of” the licenced material for a purpose other than those authorised under the agreement.

- 6 The letter of 28 May 2021 styled itself as a notice of breach. It put Vuclip on terms to cure the breaches it identified by ensuring that all of eTV’s “content is removed from the Philosopher App” within 30 days, failing which eTV would cancel the licence agreements.
- 7 There followed an exchange of correspondence with which it is not necessary to deal in any detail. Vuclip asserted that it had not facilitated any piracy, and that it was, in fact, eTV’s duty to take steps to eliminate the Philosopher App’s infringement of eTV’s property rights. eTV adopted the position that the primary obligation to deal with the Philosopher App lay on Vuclip, since Vuclip was apparently the source of the material which ended up on the App.
- 8 On 3 August 2021, eTV purported to cancel the licence agreements. By that time, however, it had modified the basis on which it claimed the right to cancel. It still relied on clause 9.3 of the agreement. It also suggested that Vuclip had, contrary to clause 4.2 b) of the agreement, failed to render assistance to eTV “in the elimination of piracy”.
- 9 Then eTV raised another contention. It alleged that “it is an implied term of any content licence agreement that the licensee shall protect the content it is licensing and prevent its unauthorised use”. It was this implied term – not any

breach of clause 9.3 of the agreements, or of clause 4.2 b), or of any other express term of the agreements – on which eTV made its case before me.

10 The reason for this is plain enough. There is no serious suggestion that Vuclip has actually authorised the Philosopher App to make the licenced material available. eTV's case is only that Vuclip is the source of the pirated material. In other words, it is a breach or defect in Vuclip's systems that has enabled the piracy to take place. Vuclip does not dispute this. The questions raised in this case must be determined on the basis that it is Vuclip's failure to maintain its systems in a manner that prevented the Philosopher App's hack that is at issue – rather than any active facilitation of piracy on Vuclip's part. As Mr. Botha, who appeared for Vuclip before me, submitted, the Philosopher App was at least as much a problem for Vuclip as it was for eTV. The unauthorised use of the material affected both its licenced exclusivity, and eTV's ownership of the licenced property. There could be no serious suggestion that Vuclip actually intended the content to be pirated or was sanguine in the face of that result.

11 There can also be no serious suggestion that Vuclip breached the agreements because it failed to render assistance to eTV in addressing the Philosopher App's piracy. eTV's complaint excludes any such claim. eTV does not say that Vuclip has failed to assist it. eTV says that Vuclip bears the primary responsibility to protect eTV's content and prevent its unauthorised use. Vuclip takes the view that it has no such responsibility. It contends that the agreements require the parties to co-operate to detect and eliminate piracy of

the licensed content, and that this was precisely what it was trying to do when it notified eTV of the Philosopher App's reproduction of that content.

eVOD

- 12 Two days after it purported to cancel the licence agreements, on 5 August 2021, eTV launched "eVOD". eVOD is eTV's own video on demand streaming service. It operates in direct competition with Viu. Presumably because, by its lights, eTV had brought the licence agreements to an end, it placed the soap operas on the eVOD platform, and began to broadcast them itself.
- 13 Vuclip, on the other hand, contends that the agreements were never validly cancelled, that its rights to broadcast the soap operas on Viu were not extinguished, and that eTV's placement of the soap operas on eVOD constitutes a breach of the agreements.

The urgent application

- 14 Characterising eTV's cancellation of the agreement as an unlawful repudiation, on 9 August 2021, Vuclip launched an urgent application for interim relief requiring eTV to continue to abide by the terms of the agreement pending an arbitration to be launched within 30 days of the interim relief being granted.
- 15 The matter was placed on my urgent roll, and argued on 20 August 2021. In addition to seeking the effective reinstatement of the agreement pending arbitration, Vuclip also seeks orders directing eTV to remove from eVOD any episodes of the soap operas over which it has exclusive rights in terms of the licence agreements.

- 16 eTV's position is that it has lawfully cancelled the licence agreements. Building on eTV's notice of cancellation, Ms. Southwood, who appeared together with Ms. Turner for eTV, contends that it was an implied or, at the very least a tacit, term of the licence agreements that both parties would "secure the content of their respective platforms, which includes the transmission of such content to subscribers, against unauthorised access". This is the formulation of the term contended for that appears at paragraph 52 of eTV's answering affidavit. It was Vuclip's breach of this term, Ms. Southwood contended, on which eTV was entitled to cancel.
- 17 Ms. Southwood also contended that, even if eTV was not entitled to cancel, and the agreements fall to be reinstated, eTV would still be entitled to broadcast the licenced material on the eVOD platform. This was argued to be so because, properly construed, the exclusivity granted in the licence agreements does not extend to episodes of the soap operas broadcast on eVOD before they appear on eTV's linear channel. The licence agreements only grant exclusivity once Vuclip has broadcast them on Viu for the first time. Because Vuclip has not pleaded when it first broadcast any of the episodes over which it claims exclusive rights, it has not made out a case against eTV for the removal of any episodes that appear on eVOD after they have been broadcast on the linear channel either.
- 18 It is accordingly necessary for me to determine two issues in this application. The first is whether eTV is likely to be able to demonstrate at arbitration that there is an implied or tacit term in the licence agreements of the nature that eTV contends. If there is likely such a term, then eTV has thrown serious doubt

on any *prima facie* right to the interim relief Vuclip may have. If there is unlikely to be such a term, then eTV was probably not entitled to cancel the agreement, and Vuclip has made out a strong case that its arbitration claim will succeed.

19 The second issue only arises if I decide the first issue in Vuclip's favour. In that event, I must decide whether Vuclip will be able to demonstrate at arbitration that the licence agreements, on their own terms, prevent eTV from broadcasting the exclusively licenced episodes of the soap operas on the eVOD platform.

20 I address each of these issues, in turn, below, before considering whether Vuclip has met the remaining requirements for an interim interdict.

The obligation to secure the content of the Viu platform

21 Neither Mr. Botha nor Ms. Southwood were able to point me to any authority that suggests that it is a rule of law, or a normal term of video on demand streaming licences, that a licensee must secure its platform to a standard necessary to prevent piracy of the content placed on the platform. Ms. Southwood acknowledged that eTV was effectively asking me to find that there is a rule, grounded in legal policy, that applies to all contracts of this nature, even though such a rule has never before – at least as far as anyone before me has been able to tell – been declared.

22 Mr. Botha argued that this acknowledgement in itself militated strongly against a finding for eTV. I accept that it is far from ideal that a Judge in urgent court should be asked to make new law in a complex and developing commercial field. However, that does not in itself mean that eTV is not entitled to import

the term it contends for. The circumstances in which the law must develop and adapt to commercial or social needs are seldom those that Judges would choose for themselves. It is no argument against eTV's contentions that they have been raised in a context that deprives me of the opportunity to consider the matter at the length I would like. The judicial function remains the same: to determine on the facts before me whether the law supports the conclusions eTV urges. Where there are no facts to support those conclusions, or where the exploration of the policy issues reaching those conclusions entails is not possible on the facts adduced, then the conclusions cannot be accepted. But that is not the same as saying that a Judge in urgent court should decline to entertain the arguments presented in favour of the relevant conclusions altogether.

The implied term alleged

- 23 An implied term is a rule of law that creates rights and obligations between the parties to a particular class of contract, unless those contracting parties agree to exclude it. In other words, a court asked to formulate a new implied term makes a new rule of law which, at the very least, sets the agreement to which the parties will default in the absence of a contrary joint intention.
- 24 There are some implied terms that may not be excluded by agreement, but that is not the sort of term that eTV relies on.
- 25 To formulate a novel implied term is to “make new law based on policy considerations” (*Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) at 374F-H). The new rule of law eTV contends for is that parties to a licence agreement to stream proprietary content will “secure the content of

their respective platforms, which includes the transmission of such content to subscribers, against unauthorised access”.

- 26 The problem with this rule is that it invites more questions than it answers. To what standard must the parties’ platforms be secured? Although Ms. Southwood submitted that eTV does not contend for an absolute duty to prevent piracy of licensed content, that is the effect of the rule eTV identifies on the facts of this case. Vuclip lost control of the licenced content because of a defect in its system. It wanted neither the defect nor the loss of control. It was unable to prevent the Philosopher App from pirating the content within the 30 day period eTV afforded it. Even if Vuclip had done everything naturally possible to secure its platform, but had not been able to prevent the piracy, it would still have been in breach of the implied term on which eTV relies.
- 27 There can be little doubt that the technology available for the copying and dissemination of proprietary content over the internet is constantly developing. New internet security measures, and new ways of evading those measures – not just to protect proprietary content, but to prevent a whole range of hacking activities – are a constant, even banal, feature of modern life. To impose an absolute duty to prevent any loss of proprietary content on parties to a licence agreement may well be to make those agreements a good deal less common. A licensee would take on an almost impossible task: prevent any hack, from any source, anywhere, or risk the cancellation of the agreement. Few commercially sensible licensees would assume such an obligation, unless the value of the licensed content were so high as to guarantee an instant profit, whatever problems may later arise.

- 28 It is seldom the function of the law to import a rule that would set a standard so high as to effectively debilitate the market to which it is meant to apply. Sometimes the state regulates markets in the public interest, and those regulations can narrow the scope of, or exclude altogether, certain kinds of market activity in order to meet a pressing social need. That sort of activity is of course subject to judicial oversight, but it is on a fundamentally different footing to what is contended for in this case.
- 29 What eTV says is that a court should, as a matter of law, give what appears to be an unprecedented level of assurance to an owner of intellectual property that, in every licence agreement for streaming video on demand content that owner enters into, the licensee will be obliged to effectively guarantee that the content will not be pirated by third parties because of a breach in the licensee's systems, whether or not the breach was the result of any identified oversight, negligence, or other fault on the part of the licensee.
- 30 Although neither party dealt with the matter on a constitutional footing, public policy is of course determined, in the first instance, by the Constitution, 1996. The licencing of intellectual property online is increasingly important to the exercise of the right, guaranteed in section 16 of the Constitution, to "freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research".
- 31 To impose an impossible – or even a very high – standard of security on a licensee risks significantly curtailing the constitutionally protected exchange of ideas that takes place when content is licenced and shared over the internet.

It does not matter that, in this case, the content concerned is popular entertainment, rather than, say, scientific or political commentary. I am asked to formulate a rule of more general application than a licence to stream soap operas. The duty to secure the content, at the level eTV pitches that duty, is one that could have a far-reaching impact.

32 This impact must, of course be balanced against eTV's property rights in the licenced material. These are weighty and important. But no property right of any sort is absolute. Nor can it expect the law to provide it with absolute protection. Section 25 of the Constitution confirms this. That provision does not enjoin the law to go to ever greater lengths to protect intellectual or other property rights. It rather provides a framework within which property rights – intellectual or otherwise – must be weighed and balanced against other social needs.

33 Whatever those needs are, a licensor is obviously not required to sit back and placidly accept the likelihood that its licensed content will inevitably be pirated. It can bargain for a warranty that the licensee's systems will be fit to prevent piracy. If the licensee accepts a standard that it is not naturally impossible to reach, then, at least from the licensor's perspective, so much the better. A licensor can also bargain for a licensee to have a specific set of measures in place to secure its systems, and even an appropriately crafted set of due diligence standards that require those measures to be reviewed and updated. It can also bargain for a set of remedial measures to be taken by the parties if piracy eventuates.

34 But it was accepted by both parties that the licence agreements do not contain provisions – express, implied or tacit – of this nature, and eTV offered no argument on how the implied term it urged me to import compared to these less drastic alternatives. This was no doubt because the alternatives lie in the particular bargains that may be reached in specific contexts. What eTV wants instead is a general rule of law on the terms it specifies.

35 I am not satisfied that eTV has a realistic chance of establishing that there is such a rule at arbitration. eTV licenced its intellectual property to Vuclip. In doing so, it assumed at least some risk that its content may be pirated while under Vuclip's control. The question at arbitration is really what level of assurance eTV was entitled to that Vuclip's systems could protect the licenced content. Instead of addressing this question, eTV bets the house on an implied term that is so severe that it would have to trump almost all of the contrary policy concerns I have outlined above, and perhaps many more that, in the context of this urgent application, neither I nor the parties have been able to consider.

36 I am not persuaded, in these circumstances, that eTV's arguments for the importation of the implied term have thrown much doubt on Vuclip's right to enforce the licence agreements.

The tacit term alleged

37 Anticipating the possibility that I would reach this conclusion, eTV argued, in the alternative, that there is a tacit term in the licence agreements in this case, of exactly the same nature as the implied term it argues for.

- 38 A tacit term is “one so self-evident as to go without saying”. It can be “actual or imputed”. It is actual if the parties thought about it but did not “bother to declare their assent”. It is imputed if the parties did not consider it, but would have agreed to it had it been present to their minds when the agreement was negotiated. The onus of proving that there is a tacit term of either type is on the party alleging its existence (*Wilkins v Voges* NO 1994 (3) SA 130 (A) at 136H to 137B).
- 39 A tacit term is unlikely to be imported into an agreement unless it is to some extent entailed by the express terms (*Hamlyn & Co v Wood & Co* [1891] 2 QB 488 at 491). The meaning of the express terms must be interpreted, where appropriate, in the light of the purpose and contents of the agreement as a whole, and in light of the circumstances in which the agreement was made (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18).
- 40 The exercise is not merely linguistic. This is classically illustrated by the officious bystander test. If an officious bystander peered over the shoulders of the parties to the agreement during their negotiations, and asked them whether they intended the tacit term argued for to be part of the agreement, they would, if the tacit term was truly part of the agreement, have said so. They would further have told the officious bystander that he was being officious: that the term is so obvious that they need not make it explicit.
- 41 The licensing agreements in this case are not entirely silent on what is to be done in case of the licenced content being subject to piracy. Clause 4.2 of the agreements deals with infringement of the copyright held over the licenced

material. That clause places the primary obligation to deal with those infringements on eTV, although Vuclip is under a duty to render reasonable assistance when eTV calls upon it to do so. It is on the basis of Clause 4.2 that Mr. Botha argued that it was eTV that was required to pursue the Philosopher App, albeit with Vuclip's assistance.

42 Ms. Southwood argued that clause 4.2 does not apply to the situation in which the parties find themselves. The target of the tacit term that Ms. Southwood argued for was not copyright infringement at all, but the integrity of the systems that the parties put in place to prevent the content being pirated by third parties. Clause 4.2 applies only where there is actually an infringement – presumably one unrelated to a defect in Vuclip's systems. In that case eTV must use its reasonable endeavours to address such an infringement. But, as I understood the argument, where the infringement results from a defect in Vuclip's systems, the tacit term requiring the parties to secure those systems applies to the exclusion of clause 4.2.

43 The problem with this argument is that it assumes its own premises. It interprets clause 4.2 as if the tacit term is already part of the agreement. It is not really an argument in favour of an interpretation that favours the importation of the tacit term. On its face, apart from any term that may be imported into the agreement, clause 4.2 appears to me to require eTV to take the lead in combatting the Philosopher App's piracy, assisted where necessary by Vuclip. It does not entitle eTV to cancel the contract merely because the piracy emanated from a defect in Vuclip's systems. While the

standard of reasonable endeavours is quite vague, and does not provide eTV with the level of assurance it says it needs, that is what the agreements say.

44 This fact is relevant to eTV's argument that there is a tacit term in the agreements that requires the parties to "secure the content of their respective platforms, which includes the transmission of such content to subscribers, against unauthorised access". While such a term does not directly contradict the infringement regime set up in clause 4.2, it does narrow the scope of that regime significantly. The effect of the tacit term eTV contends for is that, where a copyright infringement results from piracy made possible by Vuclip's own systems, it can either cancel the contract, or trigger the infringement regime in clause 4.2.

45 This sets up a conflict between the express terms of the agreement, and the tacit term eTV argues for. The tacit term carves out a special set of circumstances in which the express infringement regime will not apply.

46 I have some doubt about whether eTV can contend that the obligation to secure Vuclip's systems to prevent the interception and piracy of the licenced content is so obvious as to be necessarily implied in face of an agreement that accepts that the content may fall into the hands of third parties, and sets out that it is eTV that must take the lead combatting any resultant copyright infringement in co-operation with Vuclip when it does.

47 I need not finally decide the matter, since the question of whether there is a tacit term of the sort contended for is likely to be one of the principal issues in the arbitration that is contemplated. I have not heard the evidence necessary

to finally decide whether there is such a tacit term, and I do not think it would be appropriate to express a final view in those circumstances.

48 It is enough that eTV bears the onus of establishing the existence of such a term, and there is some room for doubt about whether that onus can be discharged. As such, I am not persuaded that eTV has established that it is so likely to be able to import the tacit term it argues for that it has thrown serious doubt on Vuclip's *prima facie* right to enforce the licence agreements.

eVOD and the express terms of the agreement

49 I now turn to consider whether Vuclip is entitled to an order directing eTV to remove the exclusively licenced content from its eVOD platform.

50 eTV's eVOD platform has two features of relevance to this case. The first is the "Fast Forward" feature. The second is the "Catch-up" feature. The Fast Forward feature allows users to view episodes of the soap operas before they are broadcast on eTV's linear channel. The Catch-up feature makes them available after they are broadcast.

51 Ms. Southwood argued that, even if Vuclip had demonstrated that eTV lacked the right to cancel the license agreements, it was not entitled to an order directing eTV to remove the episodes of the soap operas to which Vuclip had exclusive rights under the license agreements.

52 In respect of the Fast Forward function, it was argued that Vuclip's exclusivity only kicks in after the relevant episode is broadcast on eTV's linear channel. But, Ms. Southwood argued, it is in the nature of the Fast Forward function

that episodes of the soap operas become available before they appear on the linear channel.

53 The answer to this is that neither the Fast Forward function, nor eVOD itself, existed at the time the license agreements were entered into, and so could hardly have been in the contemplation of the parties when the terms of Vuclip's exclusivity were negotiated. Ms. Southwood submitted that the express terms of the agreement nonetheless definitively exclude any right on the part of Vuclip to exclusivity before linear transmission.

54 I do not have the comfort of that certainty. It seems to me artificial to give an agreement a meaning that no-one would have contemplated at the time it was entered into. eVOD did not exist at the time the agreement was entered into, and the circumstances in which the agreement was concluded are clearly relevant to its interpretation, unless the words used are dispositive. Given that the words used in the agreement do not address the possibility of eVOD – or any like service – coming into existence, they cannot be dispositive, and Vuclip has an arguable case that it has the exclusive right to broadcast the relevant episodes, the Fast Forward function notwithstanding.

55 As to the Catch-up function, it seems to me that the impact of that function – which, again, was not in existence at the time the agreements were entered into – is something to be determined at arbitration. Vuclip has at least an arguable case that its exclusivity rights are not affected by eVOD, whether or not it has alleged the date on which it first broadcast the relevant episodes.

The requirements for interim relief

- 56 Vuclip has accordingly demonstrated at least a *prima facie* right to an interdict enforcing the agreement pending arbitration in the terms sought in its notice of motion. In my assessment, eTV's arguments that the licence agreements contain the implied or tacit terms it alleges do not throw "serious doubt" on Vuclip's case at arbitration (*Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189).
- 57 It is clear to me that Vuclip has also met all of the other requirements for an interim interdict. On the test of irreparable harm, it is harm enough, in my view, that Vuclip is losing the value of what it bargained for, and that this loss is ongoing. The broadcast of the soap operas is central to Vuclip's South African business. There was no serious submission to the contrary emanating from eTV.
- 58 I am not satisfied that damages are an adequate surrogate for the specific performance that Vuclip seeks in this case. There was virtually no argument to the contrary. Vuclip has no realistic remedial alternative to an interdict.
- 59 As to the balance of convenience, this is not a case where, as Ms. Southwood framed matters, eTV is being asked to sit back and allow its intellectual property to be pirated because of a weakness in Vuclip's systems. Vuclip's and eTV's interests are aligned in this respect. It helps neither of them to allow the piracy to continue, and there is no reason why Vuclip does not have at least as potent an incentive to address the issue as eTV, at least for so long as the agreements subsist. I was informed during argument that Vuclip's latest efforts to prevent the unauthorised reproduction of the soap opera episodes on the Philosopher App appear, for the time being, to have been successful.

There is no reason why that success will not endure, especially if the parties co-operate to maintain it.

The strike out applications, the application to introduce further affidavits and costs

60 In response to eTV's formulation of the alleged implied or tacit term on which it relied in its answering affidavit, Vuclip introduced new facts in reply about its ongoing efforts to secure its systems against piracy. That was met by eTV with an application to strike out and an affidavit pleading over, to which Vuclip then replied. I am asked to deal with the striking out application, and the applications to file the supplementary affidavits.

61 The rule against new matter in reply is not absolute. A court may consider new matter in a replying affidavit if it is just to do so, having regard, in particular to "(i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs" (*Mostert v Firstrand Bank* 2018 (4) SA 443 (SCA) at para 13).

62 In this case, neither party has suggested that there is any prejudice to the new matter that would not be cured by the admission of the supplementary affidavits. Much of the new matter deals with facts that have only recently come into existence. There is no suggestion that there is anything more to be said, at this stage, about whether Vuclip can secure its systems against piracy.

The situation is fluid, and the question is really about what standard it can be held to, rather than what it is in fact doing to prevent piracy.

- 63 In these circumstances, the application to strike out will be dismissed, and the applications to introduce further affidavits will both be granted. The costs in both matters will be costs in the main application.

Costs in the main application

- 64 Vuclip says that the cancellation of the agreements was contrived to permit the licenced content to be placed on the eVOD platform, which was launched shortly after eTV purported to cancel the agreements. As a result, Mr. Botha submitted, eTV should pay the costs of the application on the attorney and client scale.

- 65 However, I do not have the evidence on the papers necessary to endorse this conclusion, and cannot make a punitive costs order at this stage. Mr. Botha asked, in the event that I took this view, that I order costs to be reserved for determination at the arbitration, or that they be costs in the arbitration itself.

- 66 If eTV was entitled to cancel the agreement, then it did not matter why it did so. If, on the other hand, eTV was not entitled to cancel the agreement, it may be relevant to the scale of costs in the arbitration whether it did so to frustrate Vuclip's rights, or was simply mistaken about Vuclip's obligations towards it. In these circumstances, it seems to me that the question of costs is so tightly bound up in the merits of the claim at arbitration, that costs in this application should follow the outcome of the arbitration.

Order

67 For all of these reasons, I make the following order –

67.1 The forms, service and time periods prescribed by the Uniform Rules of Court are dispensed with and this application is heard as one of urgency in terms of Rule 6 (12).

67.2 The application to strike out is dismissed.

67.3 Both parties' applications to file supplementary affidavits are granted.

67.4 Pending the final determination of an arbitration to be launched within one month of this order –

67.4.1 the video on demand licence agreements between the applicant and the respondent in relation to the drama series “Scandal” and “Imbewu” (“the agreements”) are reinstated and declared to be in full force and effect;

67.4.2 the respondent is directed to comply with all of its obligations under the agreements; and

67.4.3 the respondent is ordered to remove from its e-Video-on-Demand platform (“eVOD”) any episodes of “Scandal” and “Imbewu” identified in the agreements as having been purchased by the applicant on an exclusive basis and which fall within the exclusive period as defined in the agreements.

67.5 The costs in this application will be costs in the arbitration.



S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 24 August 2021.

HEARD ON: 20 August 2021

DECIDED ON: 24 August 2021

For the Applicant:

A Botha SC

Instructed by Webber Wentzel Attorneys

For the Respondent:

F Southwood SC

K Turner

Instructed by Rosengarten & Feinberg
Attorneys