COMMISSIONER OF PATENTS

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

7/3/19

DATE SIGNATURE

Case Number: 10711/19

In the matter between:

FRANCOIS JEREMIAS HERPS, N.O	1ST APPLICANT
(In his capacity of the FCFC Herps Trust)	
(IT3560/02(T))	
ANDRIES PETRUS PRETORIUS, N.O	2ND APPLICANT
(In his capacity of the FCFC Herps Trust)	
(IT3560/02(T))	
CHARMAINE HERPS , N.O	3RD APPLICANT
(In his capacity of the FCFC Herps Trust)	
(IT3560/02(T))	
AILEEN MARIE GUEST	4TH APPLICANT
CYNTHIA-ANN BENZINGER	5TH APPLICANT
CLARISS VYNESSA GEOGIA LANDMAN	6TH APPLICANT
PETER ERICH BENZINGER	7TH APPLICANT
ROBERT PAUL HOARE	8TH APPLICANT

And

JENNIFER ANN WARD	1ST RESPONDENT
KENNETH GRAVES CRAM	2ND RESPONDENT
CHRISTIE-MARI DU PLESSIS	3RD RESPONDENT
JOHN LOUIS DAVIS	4TH RESPONDENT
NEIGHBIZ HOLDINGS (PTY) LTD	5TH RESPONDENT
NEIGHBIZ SA (PTY) LTD	6TH RESPONDENT

JUDGMENT

Fabricius J,

[1] In this urgent application which was originally set down for 20 February 2019, but was heard on 27 February 2019, the Applicants sought the following relief:

"2. That the Applicants, in terms of s. 165 (5) of the ***Companies Act, 71 of 2008*** ("the ***Companies Act***"), be granted leave to bring these proceedings in the name and on behalf of Neighbiz Holdings (Pty)

Ltd ... (the Company") and condoning the non-compliance with s. 165 (2), insofar as it is necessary, in order to protect the rights of the Company:

3. The First to Fourth Respondents are interdicted from launching the application known as NEIGHBIZ ("the NEIGHBIZ App") or causing the launch of the NEIGHBIZ App by any juristic person and/or third party, pending an action to be instituted by the Company within 30 days of the date of this order;

4. The First to Fourth Respondents are interdicted from infringing the copy-righted works relating to the NEIGHBIZ Application ("the NEIGHBIZ copy-righted works") of the Company identified in the Founding Affidavit or by causing them to be infringed by any juristic person and/or third party, pending the aforesaid action;

5. The NEIGHBIZ copy righted works are to be kept in escrow at the offices of an independent Attorney pending the outcome of their action;

6. In the event of the parties being unable to agree on the identity of the independent Attorney, either party is entitled to approach a Legal Practice Council to appoint such an Attorney;

7. The First to Fifth Respondents are ordered in terms of s. 165 (9) (e) to permit the Applicants to inspect the books of the Fifth Respondent to obtain full details of the NEIGHBIZ Application and any financial transactions relating thereto."

Costs were also asked for.

[2] The First Respondent filed a conditional counter-application in which she sought a declaratory order to the effect that she was the owner of the relevant copy right that is the subject matter (at least partially) of these proceedings. The existence of the copy right is common cause and in fact, the only issue is to determine *prima facie* who the proprietor is.

[3] It was clear to me from reading the some 500 pages that the parties created for the purposes of this urgent application that a material dispute of fact had arisen in the context of the actual issue between the parties, and that I could not decide this merely on the affidavits.

[4] During Roll Call on 26 February 2019, I mentioned, as I was entitled to, that I was of the view that numerous material conflicts of fact existed. The matter was then heard on 27 February 2019, and the First Respondent withdrew the counter-application and tendered any costs pertaining thereto.

[5] I do not intend to analyse 500 pages of allegations, counter-allegations and all relevant background facts in the light of the fact that the Applicants are merely seeking a temporary interdict at this stage which would make it undesirable, if it is granted, that I make findings of fact by which the trial Court could possibly be bound by. Any views that I express are therefore merely for the purposes of the relief sought at present.

Brief background:

[6] Applicants form a minority shareholding of some 22% in the Fifth Respondent. The first four Respondents have a majority shareholding of some 71% in the Fifth Respondent, and with the First Respondent having a 61% shareholding in the Fifth Respondent. The Fifth Respondent is a company in which the Applicants have invested for the exploitation of the NEIGHBIZ Application. The Shareholder-Applicants contend that the Fifth Respondent ("Holdings"), is a proprietor of the copy-right that vests in the NEIGHBIZ Application. The subsistence of the copy-right is common cause in these proceedings and, as I have said, the only issue is to determine *prima facie* who the proprietor is. It is in this context that numerous material conflicts of fact exist.

[7] The NEIGHBIZ Application has been at least seven years in the making. First Respondent had incorporated Holdings for the purposes of commercializing this application. She sold shareholdings in Holdings for the purpose of

financing the development. Various minority shareholders purchased shares in the hope that they would receive a good return.

[8] It is clear that since early 2018, discussions had occurred why this app. had not yet been launched, and it also seems that there were discussions on a number of occasions concerning the present issue before me. Shareholder-Applicants were advised by the First Respondent that the launch was eminent. It must have come as a bolt from the blue that on 28 January 2019, and without any warning or notice, Respondents' shareholders brought an application in this Court, seeking the winding-up of Holdings on the basis that it was just and equitable to do so. Prior to them doing so, First Respondent, apparently on the advice of her Attorney and Accountant, withdrew approximately R2 million from the bank account of Holdings and subsequently launched that application.

[9] In the context of urgency of the present application before me, it is interesting to note that in support of the winding-up application, the First Respondent made statements to the effect that all of the intellectual property vesting in the NEIGHBIZ Application, belong to her personally, and that she would only have licenced Holdings to make use of such intellectual property.

[10] On 1 February 2019, the Shareholder-Applicants heard from one of the shareholders in the Sixth Respondent, that the Respondent Shareholders were arranging for the NEIGHBIZ Application to be launched in the name of a different legal entity and/or by a third party. Counsel were consulted, and on 7 February certain correspondence was addressed to the Respondents' Attorney which indicated that the copy-right in the NEIGHBIZ Application did not vest in the First Respondent, but rather Holdings, and that it had been brought to their attention that this application would be launched by the end of February, in another entity or third party.

[11] An undertaking from the Respondents was sought failing which urgent proceedings would be launched to protect the rights of Holdings. In response to this letter, the Respondents' Attorneys indicated that First Respondent was the owner of all intellectual property vesting in the NEIGHBIZ Application, and all undertakings were refused. No response was given in regard to the launch date of the application.

[12] On 12 February 2019, one of the shareholders advised that the NEIGHBIZ Application would be launched on 22 February 2019. Again, the Respondents' Attorneys were requested to provide certain information and undertakings. In response to this letter, the Respondents' Attorneys failed to disclose the launch date for the NEIGHBIZ Application, stating that the First Respondent was entirely within her rights to launch the application in her personal capacity, or in any legal entity she should choose, and whether on 22 February 2019, or any other date. Urgent proceedings were then launched and set down on the Urgent Roll for 20 February 2019. When the

Respondent-shareholders filed their Answering Affidavit, it was indicated for the first time that the launch date for the NEIGHBIZ Application would not be 22 February 2019, but that "no date has been launched". Again, the Respondents' Attorneys were contacted in an attempt to avoid setting down the urgent application unnecessarily and a date for the launch was again requested. In response to this correspondence, the Respondents' Attorneys now indicated that the intended launch would be 28 February 2019. During the hearing, the First Respondent's Attorneys undertook not to launch the said app. until my judgment had been delivered.

[13] **In the light of this brief history, and also the consideration of what is actually the issue between the parties, and certain correspondence relating thereto, I hold that this application is urgent.**

Section 165 of the Companies Act:

[14] This section deals with derivative actions such as the present one. The said section provides for a statutory derivative action to enforce the rights of the Company on its behalf, because although it is the proper Plaintiff, the "wrongdoers" are in control of the Company, and will not enforce its rights against themselves. In ***Mbethe v United Manganese of Kalahari (Pty) Ltd 2017 (6) SA 409 SCA***, it was held that the Court exercised an overriding discretion whether or not to grant leave to institute derivative action. The imposition of an onus on an Applicant, together with the exercise of a discretion by the Court, had as its objective, not only the need to protect the rights of members of the Company, but also the need to protect the administration of the business of the Company. With regard to personal derivative actions in terms of s. 165 (5), the Court may grant leave only if it is satisfied that the Applicant for relief is acting in good faith, that the proposed proceedings involve the trial of a serious question of material consequences to the Company, and that it is in the best interest of the Company that the particular Applicant be granted the necessary leave to

commence the proposed proceedings. The provisions of s. 165 (5) (b) of the ***Act***, requires an enquiry into the good faith of the Applicant. It is also clear that the Court retains an overriding general discretion to grant or refuse an application for leave.

[15] Looking at the application holistically, I find that such good faith has been shown to exist. I also need to consider in the present context, the requirements of s. 165 (6) relating to no notice being required under exceptional circumstances. Again, without attempting to analyse every relevant fact, or suggested relevant fact, I have considered all the arguments and I hold that exceptional circumstances do indeed exist, having regard also to the requirements referred to in s. 165 (6) (a) (i), (ii), and (b) and (c). In this context therefore, I exercise my overall discretion in favour of the Applicants.

[16] The real issue is whether or not the First Respondent acted in the course of employment with Holdings under a contract of service as envisaged by the provisions of s. 21 (1) (d) of the ***Copyright Act of 1978***. In my view, this is a topic that the trial Court will address as it is the most appropriate forum having regard to the disputes of fact that relate thereto. There are a number of documents that indicate that on the probabilities, and at this stage I put no higher than that, it may well be found by a trial Court that the First Respondent either attempted to mislead the Applicants and/or to bring them under the wrong impression with the view to ultimately obtain all relevant benefits for herself only. I will refer to a number of these instances. A "NEIGHBIZ business plan" was prepared by First Respondent in March 2018. It indicates that the Sixth Respondent "holds the National Distribution Rights of all NEIGHBIZ licences and trademarks, brand names and other confidential information pertaining to NEIGHBIZ on the on-line portal, has manifested in application's website". And "such rights have been acquired by NEIGHBIZ SA under an agreement with NEIGHBIZ Holdings (Pty) Ltd for the

finalisation of the distribution of all franchise licensees within the Republic of South Africa. Nothing in the entire document indicates that any intellectual property rights belong to the First Respondent. The Answering Affidavit contains no explanation as to why she stated what she did.

[17] She also wrote a letter dated 22 March 2017 to "NEIGHBIZ shareholders". She does not claim any intellectual property rights in the NEIGHBIZ Application or indicate that the patent will be filed in her name. Moreover, she repeatedly uses the word "we" in the context of what rights exist and what needs to be done in that respect in the context of her marketing the NEIGHBIZ Application in the USA. For instance: "If we succeed and the patents are granted, it could be worth millions – if we fail, we gave it our best try". Also, under the heading "DILUTION OR FURTHER INVESTMENT", she says: "We need to complete the applications and API". She also states that she intends to pursue the US market and says: "There is no doubt that this is our first prize". Keeping in mind that this letter is addressed to NEIGHBIZ

shareholders, it is significant that she also stated that "we could defend in Court any breach of copy right". No explanation is given by the First Respondent in this regard. There are other similar instances, one of them also being a revised Memorandum of Understanding, dated 25 January 2017. This indicates that "The design and code of the application will be bespoke, and will remain at all times the property of NEIGHBIZ (Pty) Ltd". This particular email further makes it clear that all funds invested would be for the development of Holdings and that no funds would be for personal use (except for a salary for First Respondent). As I have said, there are at least another half a dozen communications either in the same vein, or that indicate on the balance of probabilities that would support the granting of an interim interdict at this stage. In this context, I refer particularly to annexures FA10, FA11, FA12, FA13.1 to FA13.2, FA13.3, FA13.4 and annexures RA4, RA7, RA9, RA16 and RA17. It was submitted that these objective facts indicate that Holdings is the holder of the copy right vesting in the NEIGHBIZ Application and not the First Respondent.

[18] An interim interdict is requested and in my view, the requirements relating thereto have been fulfilled.

See: ***Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D).***

There are clear indications that the launch date of the NEIGHBIZ Application has been deliberately withheld. Exceptional circumstances exist in my view justifying the institution of this application without prior demand. I have considered the question of irreparable harm, as well as the balance of convenience. This clearly favours the granting of an order at this stage, subject to the qualification that appears in my order. In my view, there is at present no other mechanism available to the Applicants to obtain similar relief than the prayers sought.

[19] The Respondents hold a different view and made detailed submissions in that regard. As I have said however, the objective facts contained in the some 500 pages of affidavits and annexures indicate that the answer

contended for on behalf of the Respondents is not as clear-cut as was put to me. I, for obvious reasons, do not intend making any final rulings in this context, as this is a matter that clearly calls for a decision by trial Court. I am satisfied that the statutory requirements have been met in this case, as have those applying to the granting of an interim interdict. I also exercise my overall discretion in this regard, in favour of the Applicants, and as a result the following order is made:

Prayers 1 to 7 of the Notice of Motion are granted. This order will not operate as a bar to any claim the Respondents may have for damages, nor will the order operate as a defence to any such claim for damages.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA