

REPORTABLE: (132)

SONY PICTURES TELEVISION UK RIGHTS LIMITED
v
(1) C MEDIA AFRICA (PRIVATE) LIMITED (2)
ZIMBABWE BROADCASTING CORPORATION (PRIVATE)
LIMITED

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA AND KUDYA AJA
HARARE: 17 JULY 2020 & 29 OCTOBER 2021

F. Girach with *Z. Mlambo*, for the appellant

M. Nkomo, for the first respondent

No appearance for the second respondent

Judgment No. SC 129/21
Civil Appeal No. SC 419/19

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MAVANGIRA JA:

INTRODUCTION

1. This is an appeal against the whole judgment of the High Court dismissing the appellant’s application, filed on 10 November 2017, for a permanent interdiction of the respondents from producing and broadcasting the television show known as Simba Savannah, which the appellant claimed to be “infringing or exploiting (its) right to the copyright, trademarks and all other intellectual rights in and to the television show Format known as Dragon’s Den.”

2. The order that the appellant sought in the court *a quo* was couched in the following terms:

- “1. The application be and is hereby granted.
2. The 1st and 2nd Respondents, their officers, directors, agents, servants, employees, representatives, attorneys, related companies, successors, assigns, and all others in active concert or participation with them, are each and both immediately and permanently interdicted from producing and broadcasting the television show known as Simba Savannah or any such derivative work adapted or based on the Dragon’s Den format.
3. The 1st and 2nd Respondents be and are hereby each ordered to account to Applicant, together with the supporting documents including, but not limited to, contracts for all gains, profits, and advantages derived by 1st and 2nd Respondents by their development, production, promotion, broadcasting and/or any other exploitation of the television show known as Simba Savannah;
4. The 1st and 2nd Respondents be and are hereby ordered to deliver to the Applicant for destruction all digital and/or physical copies of episodes of Simba Savannah, including without limitation, any development materials and/or advertising and other promotional material in the possession of each Respondent, within forty-eight (48) hours of the granting of this Order failing which the Sheriff of Zimbabwe and/or his lawful deputies be and are hereby directed to enter into 1st and 2nd Respondents’ respective premises from wherever such goods are located and seize for destruction all such digital and/or physical copies of episodes of Simba Savannah, including without limitation any development materials and/or advertising and other promotional material in the possession of each of the Respondents;
5. The Applicant be and is hereby authorised to take possession of the digital and physical copies of all episodes of Simba Savannah, including without limitation, any development materials and/or advertising and other promotional material in the possession of each of the Respondents.
6. The 1st and 2nd Respondents shall, jointly and severally the one paying the other to be absolved, pay the Applicant’s Costs of this suit on the legal practitioner and client scale.” (the emphasis is added)

3. In this appeal the appellant contends that the court *a quo* erred and misdirected itself in dismissing its application and seeks the setting aside of the court *a quo*’s judgment and the substitution thereof with an order granting the relief that it sought as reproduced above.

FACTUAL BACKGROUND

A. THE APPELLANT’S CASE

4. It will be necessary for the purposes of this judgment to set out in some detail the case that was presented to the court *a quo* by the appellant.
5. The Appellant was identified by the deponent to the founding affidavit filed in the court *a quo* as “a television production and distribution studio with company registration number 02719242.” It was said to hold “the exclusive right to license, adapt, produce and exploit a copyright protected audio-visual work being a reality television format program known as ‘*Dragons’ Den* (hereinafter ‘*Dragons’ Den*’ or ‘*the Format*’)”. The deponent to the founding affidavit further stated that “(T)he Format is an original work by Nippon Television Network Corporation, a company duly incorporated in accordance with the laws of Japan” and that it features entrepreneurs pitching their business ideas in order to secure investment finance from a panel of venture capitalists in exchange for equity in their businesses. She also stated that “The Format originated in Japan as “*Money Tigers or Tigers of Money.*”
6. It was also the appellant’s averment that since 2002, “local versions of the Format” have been produced and transmitted in over 30 countries by authorized licensees, the appellant included. In some countries more than one version has aired and the most popular name for the show is “Dragons’ Den”, a name that originated in the United Kingdom. There have been variations to the name, with some being titled “Shark Tank”, a name that originated in the United States of America. “Lions’ Den” was said to be another variation of the name. In versions where the name of the show contains a predator’s name, the investors are referred to as that predator. It was averred that the “Dragons’ Den Format” has attained “strong recognition” in North America, South America, Australia, Asia, Europe and Africa.

7. The deponent to the founding affidavit proceeded to enumerate what she described as the distinct elements of the “Dragons’ Den Format.” Seven elements are listed as follows:

- (a) the participants are generally product designers or service operators who have what they consider to be a viable and potentially very profitable business idea, but who lack funding and direction.
- (b) the participants pitch their business idea to established local business investors for funding, in exchange for equity in their businesses.
- (c) globally the licensees of Dragons’ Den have referred to their local investors as “Dragons”, “Tigers”, “Sharks” or “Lions”, with “Lions” being used in Kenya, Denmark, Germany and Finland.
- (d) the “Format’s titles”, as localised around the world, have a particular and distinctive form and content, namely, (1) the animal predator that is top of the local food chain and (2) the place or location in which that animal presides, hence “Dragons’ Den”, “Lions’ Den”, “Shark Tank.”
- (e) The investors are positioned in one row, seated side by side. The entrepreneur then enters the studio and stops, next to his or her product which is pre-placed, facing the investors.
- (f) after the entrepreneur’s pitch, the investors engage in a “lively debate like style” and at the end each investor declares “I’m in” or “I’m out” as an expression of his or her decision on whether or not to invest in the entrepreneur’s product and or service.

(g) lastly, Dragons’ Den features a post-pitch interview with each entrepreneur. The interview takes place backstage, behind the scenes “along with voiceover to narrate the story.

8. It was averred that it came to the appellant’s attention that a television reality show under the title “SIMBA SAVANNAH”, was being broadcast in Zimbabwe by the second respondent every Sunday evening during the 7:00pm prime time slot and that the show was produced by the first respondent. Thirteen episodes of the show (collectively referred to as “Season 1”) had already been broadcast as at the date of the institution of the proceedings *a quo* and a call for applications or pitches for Season 2 of the show was being advertised on the first respondent’s website. In addition, Season 1 of the show was also readily accessible and downloadable from YouTube, a popular video sharing website which is accessible worldwide. The site was said to have “800 million unique users and visitors each month.”

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9. It was contended on behalf of the appellant that “Simba Savannah” was “an unauthorised adaptation of, and is based on and/or incorporates elements of, the ‘Dragons’ Den Format’.” It was also contended that the first respondent “blatantly reproduced and/or incorporated several elements from the “Dragons’ Den Format” including without limitation, its title, studio set, episode sequence, stage design, staging sequence, manner in which the pitches and responses are presented and filmed, music, voiceover and post-pitch interviews thereby creating an entirely similar look and feel as the instantly recognisable Dragons’ Den Format.” It was further contended that “Simba Savannah” replicates Dragons’ Den’s “expression” and that it is neither original nor uniquely Zimbabwean. Furthermore, that the first respondent deliberately chose to

mimic the Format and cause confusion in the minds of consumers. The first respondent, it was contended, did not choose a unique title based on business in Zimbabwe but chose “Simba Savannah” “in order to pass off its program under “the Format” in aid of taking advantage of the goodwill behind the Sony brand.”

10. It was also contended that Simba Savannah is confusingly similar to Dragons’ Den and “suggests an association between the appellant and the respondents “in respect of the Dragons’ Den Format.” Furthermore, that the respondents had derived direct benefit from the international reputation and established goodwill “inherent in the Dragons’ Den Format.”
11. It was averred that the respondents did not seek permission or licence from the appellant “in respect of the use of the Dragons’ Den Format” and that the appellant does not consent to such use, reproduction or exploitation. It was stated that it, in fact, sometime in June 2016, “licensed the Format to Invision Studios (Pvt) Ltd in Zimbabwe” and that to its knowledge, the second respondent was aware of this licence but proceeded with the broadcast of Simba Savannah, regardless. The Appellant disapproved this reproduction or exploitation.
12. It was also stated that on 12 August 2016 the appellant served the respondents with “a cease and desist” letter requesting them to respect its copyright and intellectual property rights. In its response the first respondent declined to comply with the request and indicated its intention to continue with its conduct. The second respondent also declined to comply with the request and advised that it would only do so when so enjoined by the court. The appellant served the respondents with a further “cease and desist” letter

dated 21 December 2016. However, no indication is made as to whether the second letter was responded to.

13. It was further stated that the appellant had thus had to resort to filing the application through which it sought “to immediately stop 1st and 2nd Respondents from continuing their injurious actions from which it has suffered irreparable and incalculable harm, and which will continue unless the respondents are enjoined from further abuse of its copyrighted material and unauthorised adaptation and use of the Dragons’ Den Format.”
14. Regarding the requirement of establishing a clear right to a permanent interdict, it was averred in the founding affidavit that the “Dragons’ Den Format” is a legally protected copyright work and that Simba Savannah is an unauthorised derivative work violating sections 13 and 19 of the Zimbabwe Copyright and Neighbouring Rights Act [Chapter 26:05] (the Act). It was further averred that the appellant being the holder of an exclusive licence “to the copyright, trademark and all intellectual property rights in and to the Dragons’ Den Format was, therefore, entitled in terms of sections 51 to 53 of the aforesaid Act, to the relief sought as its rights are concurrent with the rights and remedies of the owner of the copyright under which its licence was granted.”
15. The averment was also made that Simba Savannah, as an unauthorised derivative work, violates Article 2 of the Berne Convention for The Protection of Literary and Artistic Works, to which Zimbabwe is a signatory. Furthermore, that the appellant’s rights to the copyright “in and to the Dragon’s Den Format are protected in Zimbabwe by virtue of Regulation 17 of the Copyright and Neighbouring Rights Regulations, 2006

[Chapter 26:05]” (sic) which recognises for protection, works originating from any member of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) Agreement with Japan, United States of America, United Kingdom and Zimbabwe, all being signatories to the treaty.

16. The contention was also made that, in the alternative, the facts set out above support a claim of passing off by the first respondent, of the appellant’s “licensed and copyrighted work.” It was contended that the passing off of Simba Savannah has caused confusion amongst or in the minds of viewers in Zimbabwe as demonstrated by local news articles in Zimbabwe where members of the Zimbabwean public have drawn comparisons to the “instantly recognisable Dragons’ Den Format, this being due to the glaringly obvious similarities between Simba Savannah and Dragons’ Den.” This, it was contended, had misled the public to believe that Simba Savannah is based on Dragons’ Den and that it was produced under licence from the appellant. This presumed association, it is contended, is in fact a benefit derived by the respondents from the appellant’s international reputation and established goodwill, resulting in damage to the appellant’s intellectual property and recognised brand.
17. The appellant claimed that the respondents’ continued production and broadcasting of Simba Savannah will continue to cause confusion and was likely to deceive viewers regarding the “origin, affiliation, association, connections and/or endorsement of the respondents’ actions.” Consequently, it was entitled to an injunction or interdict prohibiting further violations of its rights by the respondents. If the relief sought was denied, it was averred, the appellant’s rights to “the Dragons’ Den Format would have been irreversibly and irreparably disregarded or defied. No amount of monetary

damages would adequately compensate the appellant or its licensees for the damage to their “rights, business, positive reputation and goodwill.” The appellant thus had no other remedy but to institute the proceedings, it was contended.

18. The above sets out the material facts on the basis of which the appellant felt that it was entitled to the relief that it sought in the court *a quo* as reflected in para 2 of this judgment.

B. THE RESPONDENTS’ CASES

(i) THE FIRST RESPONDENT

19. The first respondent, in opposing the application, stated *inter alia*:

“While Applicant may be the exclusive licensee of the audio visual work known as ‘Dragons’ Den’, 1st Respondent denies that the ‘format’ is an audio visual work as defined in the Copyright and Neighbouring Rights Act [Chapter 26:05]

- (a) 1st Respondent has no knowledge of the alleged productions and transmission of the ‘format’ and contends that what was produced was the program, not the format.
- (b) In any case, 1st Respondent maintains that the format of a television show is not an audio visual work. Consequently, a format cannot be protected as a copyright work and use of a format which has some similarity with such format does not constitute copyright infringement.
- (c) Further, the name of the show is not a copyrightable work, and the fact that where the name contains a creature’s name, the investors are referred to as such creature only demonstrates that the idea of an animal name to designate its show by 1st Respondent is what aggrieved the applicant. Applicant is complaining about the use of an idea, yet ideas are not protected under the law of copyright.
- (d) I am advised ... that ideas, methods of operation, concept(s) are not eligible for copyright even if they are explained, illustrated or embodied in a work. I therefore submit that the features allegedly infringed are mere ideas or concepts which cannot be protected under copyright law. Applicant therefore has no exclusive rights in any of the alleged elements of the format.”

20. It was also the first respondent's stance that Simba Savannah was not an adaptation of Dragons' Den. It also argued that going by the definition of "adaptation" in the Act, "it is not possible for an audio visual work to be adapted into another audio visual work." Furthermore, that even if it was to be assumed, for argument's sake, that Simba Savannah was based on Dragons' Den, this would not constitute infringement of copyright. The first respondent denied that Simba Savannah incorporated or reproduced any elements of the "Dragons' Den Format." The deponent to the opposing affidavit further stated "(T)he title Studio set, episode sequence, stage design, staging sequence and all other elements stated in this paragraph are not copyright works." Furthermore, that "the basis of Dragon's Den as set out ... clearly shows that it is not a copyright work but an idea or concept." It was also argued that the Appellant did not prove goodwill or any damages suffered by it.

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21. It was contended in the first respondent's opposing affidavit that the appellant itself was not clear as to how its intellectual property rights were allegedly violated as it was not clear whether it claimed copyright infringement or trademark infringement. It is not clear whether the claim is for infringement of copyright or it is for passing off. It denied ever using the appellant's Dragons' Den Format "as alleged or at all." It also denied having derived any benefit from the alleged international reputation and the claimed goodwill of the Dragons' Den Format.

22. The first respondent further contended that the appellant had not demonstrated that it had copyright "in the alleged format of Dragons' Den" as it had placed nothing on the record to establish the existence of such copyright. As the appellant claimed to enjoy copyright in its "format" in the United States of America, it ought to have attached

proof of deposit of its copyright work with the United States Patents and Trade Marks Office (USPTO) where there is a depository system.

23. The first respondent thus denied infringing any of the appellant's intellectual property rights as alleged or at all. It denied that it obtained a direct financial benefit from airing Season 1 of Simba Savannah and denied that it was unjustly enriched as alleged or at all. It commented on the appellant's contention that it is entitled to an interdict because, *inter alia*, the first respondent "has already shown its intention to continue with the copied and/or created derivative works from the Dragons' Den Format by calling for pitches for Season 2." The first respondent's comment was that the appellant's statement that "the copied and/or created works are unauthorised" showed lack of understanding on the part of the appellant or its advisors as the first respondent did not need the appellant's authorisation to create its own work, no matter how similar that work may appear", as long as it had not copied the appellant's work.

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24. The first respondent also contended that sections 51 to 59 of the Act availed other effective remedies to the appellant but the appellant had chosen to disregard them and opted to seek a permanent interdict because it had no evidence to sustain its actions and to attain such remedies. The appellant was thus abusing court process to intimidate and harass legitimate competitors.
25. It was also the first respondent's stance that the appellant ought to have demonstrated that the "Format" is a "work" as defined in the Act but had failed to do so. The "format" of a television program, it argued, "does not fit in the definition of "work" set

out in the Act.” Simba Savannah is not an adaptation of any protected audio-visual work which can be infringed. At most, it is a concept and concepts are excluded from copyright protection by s 10(4) of the Act.

26. The first respondent further contended that besides failing to establish one of the essential requirements for the granting of a permanent interdict, some of the relief sought in the other paragraphs of the Draft Order had not been claimed or founded anywhere in the founding affidavit. This, it claimed to be an indication that the appellant was on a fishing expedition and that it was not sure what it was that it was seeking from the court.

(ii) **THE SECOND RESPONDENT**

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27. The second respondent did not oppose the application.

THE DECISION OF THE COURT A QUO

28. The court *a quo* dismissed the Appellant’s application. It found that the appellant’s claim related to more of a concept or an idea and not to an audio visual work. It found that there had therefore not been any infringement of copyright. With regard to passing off it found that the first respondent had not misrepresented that Simba Savannah was Dragons’ Den. It also found that there was no proof that the appellant enjoyed a reputation in the format, form and presentation of its television program. Neither had the appellant proven goodwill in its program known as Dragons’ Den. It reasoned that the protection which copyright gave created a monopoly and there had to be certainty in

the subject matter of the copyright, which subject matter the appellant had failed to establish.

29. The court also held that the appellant did not have a clear right in the circumstances. It further held that having established that Dragons' Den was not an audio visual work, the appellant could thus not suffer any prejudice through the infringement of a non-existing copyright. It held that the appellant could institute criminal proceedings against the respondents in accordance with s 59 of the Act, and that there was therefore, another remedy which the appellant could pursue. The court *a quo* took the view that the relief sought by the appellant, of a permanent interdict, could not be granted as its requirements had not been satisfied. It found that the appellant had failed to prove that it had goodwill in its programme or that it enjoys a reputation. It dismissed the application.

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30. Aggrieved by this decision, the appellant noted an appeal to this Court on the following grounds:

GROUND OF APPEAL

1. The learned judge in court *a quo* erred in finding that Appellant's programme (Dragons Den) was not an audio visual work within the meaning of that expression as utilized in the Copyright and Neighbouring Rights Act [Chapter 26:05].
2. In any event, the learned judge erred in finding that Appellant had not established a clear right.

3. The learned judge in (the) court *a quo* misdirected himself on the facts and erred in finding that Appellant had not established goodwill in respect of its programme.
4. The learned judge in court *a quo* misdirected himself on the facts and erred in finding that there were no sufficient similarities between the two programs so as to establish passing off.
5. The learned judge in court *a quo* erred in failing to have regard to the provisions of the Berne Convention for the Protection of Copyright Works in determining Appellant's rights.

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RELIEF SOUGHT

Appellant seeks the following relief:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is set aside and the following is substituted:

“The application succeeds and an order is made terms of the Draft Order attached to the application”

THE APPELLANT'S SUBMISSIONS BEFORE THIS COURT

31. Before this Court Mr *Girach*, for the appellant, made the following submissions. The court *a quo* erred in finding that the television program *Dragons' Den* was not an audio visual work. It in fact is an audio visual work in respect of which copyright is held by

the appellant and which the first respondent has wrongfully and unlawfully adapted in contravention of the Act. The court *a quo* failed to have regard to the provisions of the Act which in s 2 defines “audio-visual work.” A television program is an audio-visual work. The court *a quo* ought to have examined whether Simba Savannah constituted an adaptation but it failed to do so. It ought to have had regard to the similarities between Dragons’ Den and Simba Savannah that were highlighted by the appellant in its founding affidavit and that is where the inquiry ought to have ended, with a finding that Simba Savannah is a clear and straightforward breach of copyright.

32. It was counsel’s further submission that the court *a quo* ought not have had regard to the New Zealand case of *Green Broadcasting Corporation of New Zealand* [1989] ALL ER 1056 (*Green’s case*) as the case is inapplicable to the matter that was before it for two reasons. Firstly, the appellant in that case claimed damages for passing off and infringement of copyright in television scripts and dramatic format of his program. Secondly, the expression “audio-visual work” is not defined in the New Zealand Copyright Act, unlike the Zimbabwean Act which has defined it. If the court *a quo* had had regard to the Zimbabwean Act which provides that copyright (which is defined) exists in an audio-visual work and which also in s 19 prohibits an adaptation thereof, it would have come to a different conclusion. Furthermore, *Green’s case* was a trial action and was not argued on the papers as happened *in casu*. In any event, *Green’s case* involved a dramatic work.

33. Counsel submitted that on a proper interpretation of the case of *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & Anor* [2017] EWHC 2600 (Ch), it is clear that the appellant has a copyright and that there has been an adaptation by the

respondents. For that reason, the appellant was entitled to an interdict by virtue of the provisions of the Act.

34. The further submission was made that the first respondent, besides saying that Simba Savannah was uniquely Zimbabwean, had not said that it was its original idea and had not explained where they got the idea from. On the other hand, the appellant had set out in detail the aspects which it alleged had been copied from Dragons' Den and this found credence from press articles and reviews in which members of the public likened Simba Savannah to Dragons' Den. The first respondent had therefore caused irreparable harm to the appellant which had no other remedy than the relief that it sought *a quo*.

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35. It was also counsel's submission that the definition of "adaptation" in s 19 of the Act does not relate to audio-visual works and that in *casu*, resort must therefore be had to the ordinary grammatical meaning of the word. It was submitted that in any event, s 19 of the Act vested in the owner of a copyright, the exclusive right to, *inter alia*, make or authorise the making of an adaptation of the work.

36. With regard to passing off, counsel submitted that the court *a quo* applied the wrong test

when it referred to the making of a misrepresentation whereas the two requirements that must be satisfied are reputation or goodwill (of the plaintiff) and the likelihood of confusion (to members of the public).

THE FIRST RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

37. Mr *Nkomo*, for the first respondent submitted as follows.

The critical question is what it was that the appellant complained of in the court *a quo*. According to the founding affidavit, Dragons' Den is a television program but the appellant complained of infringement of a television format. What the appellant sought to protect was thus a television format. The concept of a television format is alien to the Act. "Format" does not appear in the definition section or any section in terms of which different kinds of works are protected in the Act. The appellant attempted to classify "format" as an original work or an audio-visual work. A format cannot, however, fit into the definition in s 2 of the Act, of an audio-visual work which, in terms of the said definition, must be recorded or fixated, as would be the case with a DVD, which contains moving images and sounds that are embodied and fixated in that medium or an MP3 or MP4 that has pictures and sounds together. That which the appellants alleged to have been infringed has not been fixated and there was no allegation in the founding affidavit that there was a medium which contains or includes moving pictures and sounds that the first respondent accessed and reproduced.

38. Mr *Nkomo* submitted that in para 24 of the appellant's heads of argument there was a vacillation amongst three poles, these being (i) a television program, (ii) a format and (iii) an audio-visual work and that the appellant seemed to suggest that the three are synonymous, when they are not. The primary question was whether or not copyright can ever subsist in a television format in terms of the Act. In terms of s 128 of the Act, the appellant's claim must find residence in an identified section of the Act or any other statutory provision and the appellant had failed in this regard. The idea or concept of entrepreneurs pitching to potential investors cannot be protected by the Act as s 10 which enumerates works that are eligible for copyright, excludes such from protection

by means of copyright. The appellant's claim could not succeed as it was hinged on an alleged adaptation of a format, which alleged adaptation is alien to the Act.

39. With regard to the case authorities in *Green's case (supra)* and the *Banner case (supra)*, counsel submitted that what emerged therefrom was that in principle a format may be protected as a dramatic work, but never as an audio-visual work. The closest that a format comes to get copyright protection is if it is in the form of a dramatic work. The appellant failed to satisfy the criteria for such protection to be availed. In *casu*, there was no reproduction of any known copyrighted work.

40. With regard to passing off, counsel submitted that where a litigant fails to establish a misrepresentation, they cannot succeed in establishing passing off. He also submitted that the reference by the appellant to the Berne Convention for the Protection of Literary and Artistic Works was misguided. The reason for this, he submitted, was that it does not have direct application except as domesticated in the Act.

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THE SECOND RESPONDENT

41. The second respondent not having filed any opposing papers in the court *a quo*, was not present or represented at the hearing of this appeal.

ISSUE FOR DETERMINATION

42. The issues for determination are aptly set out in the first respondent's heads of argument as follows:

1. Whether or not the appellant's programme, Dragon's den is protected as an audio visual work in terms of the Copyright and Neighbouring Rights Act, [Chapter26:05].
2. Whether or not the appellant satisfied the requirements for a permanent interdict.
3. Whether or not the appellant satisfied the requirements for passing off.
4. Whether or not the provisions of the Berne Convention have direct application in copyright disputes in Zimbabwe.

In my view, the listed issues crystallise the questions that arise. The overarching issue of whether or not the court *a quo* erred in dismissing the Appellant's application will be answered by the determination made thereon.

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THE LAW AND ITS APPLICATION TO THE FACTS

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43. Despite the attempt at the beginning of the founding affidavit to describe or classify Dragon's Den as an audio visual work, it is clear from a perusal of the whole document that the appellant's complaint pertained to the format of Dragon's Den. This is demonstrated by the persistent and consistent use, *inter alia*, of the phrase "Dragon's Den Format" and the word "Format" as reflected in the appellant's case as set out *a quo*. More pertinently, in para 14, in describing the nature of the application that was before the court *a quo* the following is stated:

"NATURE OF APPLICATION

14. This is a Court Application in terms of Order 32 Rule 230 wherein the Applicant seeks an Order to permanently interdict the 1st and 2nd Respondents from infringing or exploiting Applicant's right to the *copyright, trademarks and all other intellectual property rights* in and to the television show Format known as Dragon's Den." (the italics and the underlining are added)

44. Para 14 thus identifies the nature of the application as one for the protection of the format of a television show; such format being known as Dragon’s Den. In addition to this the founding affidavit kept referring, in the main, to the format as the aspect that had been adapted without authorisation and which it was claimed ought to be accorded copyright protection by the court. Significantly, this having been the nub of the appellant’s case as pleaded, is the case that the first respondent responded to in its opposing papers.
45. The statutory framework which governs copyright issues is the Copyright and Neighbouring Rights Act [*Chapter 26:05*]. Section 2 of the Act defines “audio-visual work” to mean “a recording or fixation on any medium from which a moving image, together with any sounds associated with the image, may be produced by any means, but does not include a computer program or a broadcast.”
46. From this definition, for anything, excluding a computer program or a broadcast, to qualify as an audio-visual work, it must be:
- a recording or fixation
 - on any medium
 - from which a moving image
 - together with any sounds associated with the image
 - may be produced (by any means).
47. The Act defines “record” to mean “any disc, tape, perforated roll or other device in or on which information is or can be embodied so as to be capable, with or without the aid

of some other instrument, of being automatically reproduced.” I take it that “a recording’ is to be construed accordingly and in conformity to the said definition. The definition given to “sound recording” is “means any fixation of sound on a record, but does not include a sound-track associated with an audio-visual work” I do not think that this definition is of any relevance in *casu*, considering the facts of this matter. The Act also states, in the interpretation section, that “fixation” “in relation to sounds, means the embodiment of the sounds or representations of the sounds in such a way that they can be heard, reproduced or communicated through a machine or device.”

48. The appellant’s complaint, *per* its pleadings, being about the format of the television show known as Dragon’s Den, there has been no demonstration or establishment that the format is a recording or a fixation as contemplated by the Act.

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49. What the appellant alleges to have been infringed has neither been shown to be a recording or a fixation on any medium from which a moving image with sounds associated therewith may be produced and which the first respondent accessed and reproduced. The appellant’s founding affidavit mostly refers to Dragon’s Den as “the format” while occasionally vacillating between calling it a format or an audio visual work or a program. Before us Mr *Girach* submitted that “the program Dragon’s Den is an audio-visual program in respect of which the copyright is held by the appellant and in respect of which the first respondent has wrongfully and unlawfully adapted in contravention ... This television program is an audio-visual work.” The vacillation, and sometimes conflation, is also evident in para 24 of the appellant’s heads of argument where it is submitted as follows:

“To hold as a matter of principle that a television programme or unique format in the form of an original audio visual work is *not* capable of being protected by copyright makes bad law.” (the underlining is added)

50. However, as noted earlier, the appellant’s own characterisation of its application *a quo* was that it was for the protection of the format of its television show. There was a noticeable effort by the appellant’s counsel in addressing us, to steer the appellant’s case away from the pleaded claim of protection of a format, towards it being regarded instead, as a claim for protection of an audio visual work, hence the interchanging descriptions. The impression is created that in formulating the claim no attention may have been given to the Act in order to ascertain the copyrights that are protected. The possible subsequent realisation that a format is not recognised and accordingly protected as an audio visual work might be the explanation for counsel’s great effort to effectively plead the claim afresh during his oral submissions before us.

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51. The lack of clarity by the appellant itself in its founding affidavit detracts from the cogency of its claim. It appears probable that the placing of additional reliance on the Berne Convention is an indication of the realisation on the part of the appellant that on the presented facts coupled with the articulation or formulation of its claim, there would be no copyright protection afforded to it in terms of the Act.

52. Unfortunately, the purported reliance on the Berne Convention is not without its own shortcomings. These will shortly be related to in paras 64 to 71 (*infra*)

53. Section 9 of the act provides as follows:

“9 Nature and vesting of copyright

(1) Copyright is a real right which subsists in a work by virtue of this Act and which

entitles its owner exclusively to do in Zimbabwe the things which this Act designates in relation to that work.

- (2) Copyright subsists in a work if it is eligible for copyright in terms of section *ten* and if any or all of the following requirements are met –
- (a) the author of the work is a qualified person by virtue of section *eleven*;
 - (b) the work qualifies for copyright protection in terms of section *twelve* by virtue of the country in which it was published or made;
 - (c) the work was made under the direction or control of the State or a designated international organisation as provided in section *thirteen*.

54. Section 10 of the Act lists the following in paras (a) to (h), as works that are eligible for copyright: literary works, musical works, artistic works, audio-visual works, sound recordings, broadcasts, programme-carrying signals and published editions. A format does not make the list.

55. S 12 of the Act is significant. It provides:

“12 Copyright by virtue of country of first publication

- (1) A work that is eligible in terms of section *ten* shall qualify for copyright protection if it is published in Zimbabwe or in a designated country.
- (2) Without derogation from subsection (1) –
- (a) a computer program, audio-visual work or broadcast that is eligible in terms of section *ten* shall qualify for copyright protection if it is made in Zimbabwe or a designated country;
 - (b) a programme-carrying signal that is eligible in terms of section *ten* shall qualify for copyright protection if it is emitted to a satellite from a place in Zimbabwe or a designated country.
- (3)” (the underlining is added)

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56. From my reading of s 12, to qualify for copyright protection, a work, whether first published in Zimbabwe or in a designated country, must first be eligible in terms of s 10. In my view, this means that the citation of the Berne Convention is not of any benefit to the appellant’s case. It is rendered irrelevant by the provisions of s 12.

57. The works that are eligible in terms of s 10 have been listed in para 51 above. The answer to the question whether the format of the television show Dragon’s Den qualifies as an audio-visual work in terms of the Act determines whether it is necessary to interrogate whether or not the requirements for the granting of the interdict sought were met. Clearly, the first respondent’s main basis for opposing the application in the court *a quo* was that the appellant sought to protect a format which, in its submission, was not protected by any copyright in terms of the Act. It contended that the appellant was not protecting an audio-visual work.

58. A “format” has been defined to be “the way in which something is arranged or set out” (per google search - Definitions from Oxford Languages). The Concise Oxford Dictionary defines it as “style or manner of arrangement or procedure.”

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59. The pertinent question is whether or not copyright can subsist in terms of the Act in a television show format. S 128 of the Act provides as follows:

“128 No copyright under common law

Subject to this Act, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or any other enactment.”

Clearly, therefore, the appellant’s right or claim must find its residence in an identified section of the Act or another statutory provision. The protection sought under cover of an audio visual work cannot be substantiated under the Act because the “format” of Dragon’s Den does not fit into the Act’s definition of an audio visual work. No other provision has been cited or invoked under which copyright protection should be accorded to the format. A format does not fit into the Act’s definition of an audio-visual work. Neither is a format listed as a work eligible for copyright protection.

60. In the circumstances, the court *a quo* cannot be faulted in dismissing the appellant's main claim based on copyright protection of a format. It stated as follows at p 127:

“I am inclined to agree with the interpretation given by the first respondent. More specifically I am not convinced that any recording or fixation, where there are moving images with sounds associated with the images which must be produced by any means gives rise to rights under copyright.

Understandably, Mr *Girach* sought to argue that the statement in the second sentence by the learned Judge *a quo* was in contradiction to ss 2 and 19 of the Act. Literally read, Mr *Girach*'s submission would appear to be correct. But, read in context, the impression created is that there seem to be some missing or omitted words in the statement. This is particularly so when regard is had to the fact that the court *a quo* found against the appellant. Furthermore, the interpretation given by the first respondent, which interpretation the court indicated that it was inclined to agree with, is captured in the court's judgment at p 126 in the following terms:

“While applicant avers that Dragon's Den falls under an audio visual work as defined in section 2 of the Act first respondent is of a contrary view. First respondent avers that not only is Dragon's Den not an audio visual work but it is not a fixation or an adaptation of an audio visual art work. (the underlining is added)

61. The court *a quo* cannot be faulted considering that the dispute that was presented and ventilated and argued before it was that of copyright protection of a format. However, the tenor of the appellant's heads of argument in this Court shifted from emphasising on the infringement of a format. The submission is made therein that “(T)he distinct elements of Dragon's Den which the appellant avers qualify the television programme as a whole as an original audio-visual work are specifically set out in paragraph 8 of the founding papers at pages 4 – 5 of the record, and are, ...”

62. The definition of “fixation” in s 2 of the Act is of significance. It is stated as follows:

“‘fixation’, ”in relation to sounds, means the embodiment of the sounds or representations of the sounds in such a way that they can be heard, reproduced or communicated through a machine or device.”

It is, in my view, an inescapable fact that on the claim as presented *a quo*, there was no establishment of any fixation pertaining to Dragon’s Den. The claim *a quo* related to the format of the television show Dragon’s Den. The court *a quo* cannot be faulted for stating as follows:

“In the instant case we are talking more of a concept or idea as opposed to a work with a script and details of the text.”

A reading of the Act will show that concepts or ideas are not included for protection by means of copyright. Neither are formats included. S 10 (5) of the Act provides that the following things, *inter alia*, “shall not be eligible for copyright protection, namely, systems, methods of operation, concepts, principles, discoveries, facts or figures, even if they are explained, illustrated or embodied in a work.”

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63. On the case presented *a quo*, because a format is not an audio-visual work in terms of the Act, there was no infringement of, as contended, an audio-visual work in the form of a format.

64. As correctly submitted by the first respondent in its heads of argument, the Berne Convention has no direct application in the determination of this matter. S 128 of the Act categorically states that “(S)ubject to this Act, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or any other enactment.”

Furthermore, the Berne Convention only finds application in Zimbabwe to the extent that its provisions have been domesticated in the Act or any other domestic or local enactment in terms of s 327 of the Constitution of Zimbabwe.

65. The appellant was not clear as to which specific provision of the Berne Convention it was placing reliance on and to what effect. In the pleadings *a quo* it averred that Simba Savannah is an unauthorised derivative work that violates Article 2 of the Convention. The article has eight sub-articles. It refers, *inter alia*, to literary and artistic works, translations, adaptations, arrangements of music and other alterations of a literary or artistic work. Reference was also made to s 17 of the Copyright and Neighbouring Rights regulations, 2006 which provides as follows:

“The following shall be designated countries-

- (a) any member of the Berne Convention for the Protection of Copyright Works;
- (b) any member of the Agreement on Trade related Aspect of Intellectual Property (Trips Agreement).

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The error of the court *a quo* was not articulated with sufficient clarity to enable this Court to appreciate the alleged error or misdirection.

66. In *Chikura v Al Shams* SC 17/17 ZIYAMBI JA stated:

“It is not for the court to sift through numerous grounds of appeal in search of a possible valid ground; or to page through several pages of ‘grounds of appeal’ in order to determine the real issues for determination by the court. The real issues for determination should be immediately ascertainable on perusal of the grounds of appeal. That is not so in the instant matter. The grounds of appeal are multiple, attack every line of reasoning of the learned judge and do not clearly and concisely define the issues which are to be determined by this Court.”

I appreciate that I am not dealing with grounds of appeal *in casu*. However, it is my considered view that the essence of the principle enunciated by ZIYAMBI JA is

applicable in the present circumstances where the appellant did not clearly and concisely plead the specific provision(s) of the article(s) and/or sub-articles of the Convention that it was placing reliance on. The appellant should have identified which of the eight categories listed in article 2 that its claim falls under. It is not for the court to speculate and make assumptions as to what might have been in the appellant's mind. It is not for the court to plough through the Convention in search of the applicable provisions and make a case for the appellant.

67. I also entirely agree with the submission made by Mr *Nkomo* that “(W)hile it is appreciated that section 327 (6) (of the Constitution) allows the court, when interpreting legislation to adopt any reasonable interpretation that is consistent with any international convention which is binding on Zimbabwe, ... there is no inconsistency between the provisions of the Copyright and Neighbouring Rights Act and the Berne Convention that would have persuaded the court *a quo* to find in favour of the appellant.”

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68. In any event, Article 5 of the Berne Convention for the Protection of Literary and Artistic Works provides as follows:

- “(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.
- (3) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.
- (4) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is

protected under this Convention, he shall enjoy in that country the same rights as national authors.”

69. The following submissions are made in paras 5 and 6 of the appellant’s heads of argument:

“5. One of the principles of the Berne Convention is that of national treatment, which is found in Article 5(4), and provides that Appellant is afforded the same protection in Zimbabwe as a Zimbabwean national. It is on this basis that Appellant brought its Application in the court *a quo*.

6. The Berne Convention further acknowledges broadcasts (Article 11) and adaptations (Article 12) as rights that must be recognized as exclusive rights of authorization.”

70. The reference to sub-article (4) must have been in error because the sub-article does not state what is alleged. It may have been meant to be a reference to sub-article (3) (*supra*).

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71. The issue in contention *a quo* having been the format (of Dragon’s Den); a format having been found not to be an audio-visual work and a format having been found to be excluded from works that are eligible for copyright protection under the Act, the invocation of the Berne Convention does not appear to me to import into our (the Zimbabwean) Act the protection, under copyright, of a format. Sub-article (3) affords the enjoyment of the same rights as are enjoyed by nationals. There is no copyright protection of a format in terms of the Act. The decision of the court *a quo* cannot be faulted.

72. The claim based on passing off needs to be interrogated next. In dismissing the claim based on passing off, the court *a quo* stated as follows:

“In the instant case besides alleging that Dragon’s Den is viewed in many countries there is no proof produced that it enjoys a reputation in the format, form and presentation of its television program.

A scrutiny of the facts and legal principles leads me to the conclusion that applicant has not proven goodwill in its program Dragon’s den. Neither has it proven that there is any reasonable likelihood of confusion between Dragon’s Den and Simba Savannah on the material before me.”

73. On the general principles applicable in passing off cases, GUBBAY CJ stated as follows in *Woolworth & Co (Zimbabwe) Ltd v The W Store & Anor* 1998 (2) ZLR 402 (S) at 404 D – G:

“These principles were lucidly identified, with reference to leading authorities, in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) where at 947E – 948B, HARMS JA said:

The essence of an action for passing off is to protect a business against a misrepresentation of a particular kind, namely that the business, goods or services of the representor is that of the plaintiff or is associated therewith (*Capital Estate & General Agencies (Pty) Ltd and Others v Holiday Inns Inc and Others* 1977 (2) SA 916 (A) at 929 C – D) Judgment No. SC 129/21 Civil Appeal No. SC 419/19

In other words, it protects against deception as to a trade source or to a business connection (*Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son (Pty) Ltd* 1993 (2) SA 307 (A) at 315B). Misrepresentations of this kind can be committed only in relation to a business that has goodwill or a drawing power (Afrikaans: werfkrag). Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business (*cf A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A) at 417A). The components of goodwill are many and diverse (*O’Kennedy v Smit* 1948 (2) SA 63 (C) at 66; *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) at 624A-625F). Well recognised are the locality and the personality of the driving force behind the business (*ibid*), business licences (*Receiver of Revenue, Cape v Cavanagh* 1912 Ad 459), agreements such as restraints of trade (*Botha and Anor v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) at 211 H – I) and reputation. These components are not necessarily all present in the goodwill of any particular business.

The only component of goodwill of a business that can be damaged by means of a passing-off is its reputation and it is for this reason that the first requirement for a successful passing-off action is proof of the relevant reputation. (*Hoechst Pharmaceuticals (Pty) Ltd v The Beauty Box (Pty) Ltd (in liquidation) and Another* 1987 (2) SA 600 (A) at 613F – G; *Brian Boswell Circus (Pty) Ltd and Another v Boswell-Wilkie Circus (Pty) Ltd* 1985 (4) SA 466 (A) at 479D; *Williams t/a Jennifer Williams & Associates and Another v Life Line Southern Transvaal* 1996 (3) SA 408 (A) at 419 A – B, 420B).”

74. The appellant's claim, in effect, is to the effect that the first respondent passed off Simba Savannah as Dragon's Den. The nub of the appellant's contention, as already discussed earlier, relates to the format of the television program Dragon's Den. In *Cairns Foods Ltd v Netrade Marketing (Pvt) Ltd* SC 106/21 MATHONSI JA after considering the *Woolworth* authority (*supra*), aptly stated as follows at p 11 of the judgment:

“It is apparent that passing off seeks to protect a product from the deceptive tendencies of a competitor who represents its product as that of the other. As a result of such deception or misrepresentation there should be injury or damage to reputation. Therefore, proof of reputation is a pre-requisite for passing off to be established. See also *Zimbabwe Gelatine (Pvt) Ltd v Cairns Foods (Pvt) Ltd* 2003 (1) ZLR 352 (S) at 55G.”

75. In *casu*, there has been no proof that the appellant had goodwill in the Dragon's Den format. The appellant has neither proved misrepresentation of its judgment. The Appellant Civil Appeal No. SC 419/19 has also not established or placed any cogent evidence of any damage suffered by it as a result of Simba Savannah. The claim for passing off was therefore bound to fail and was thus rightly dismissed by the court *a quo*.

76. It seems to me therefore, that on the facts and contentions presented to the court *a quo*, no protection is accorded by the Act to the appellant's format and that the decision of the court *a quo* cannot be upset in respect of the claim for copyright protection. Similarly, the dismissal by the court *a quo* of the claim for passing off was justified and there is no basis for its reversal. It also seems to me that it therefore becomes unnecessary, in the circumstances, to consider whether the requirements for the granting of an interdict were satisfied.

77. The court *a quo* was criticised for having regard to *Green v Broadcasting Corporation of New Zealand* [1989] All ER 1056; [1989] 3 NZLR 18 (New Zealand: Judicial Committee of the Privy Council). The Court of Appeal stated at p20:

“The alternative formulation of the appellant’s claim relies upon the “dramatic format” of “Opportunity Knocks”, by which their Lordships understand is meant those characteristic features of the show which were repeated in each performance. These features were, in addition to the title, the use of the catchphrases “For [name of competitor], Opportunity Knocks”, “This is your show folks, and I do mean you”, and “Make your mind up time”, the use of a device called a “clapometer” to measure audience reaction to competitors’ performances and the use of sponsors to introduce competitors. It was this formulation which found favour with Gallen J.

It is stretching the original use of the word “format” a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories. Alternative terms suggested in the course of argument were “structure” or “package”. This difficulty in finding an appropriate term to describe the nature of the “work” in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the talent show, the questions and answers in the quiz show etc) and identified as an “original dramatic work”. No case was cited to their Lordships in which copyright of the kind claimed had been established.

The protection which copyright gives creates a monopoly and “there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world”: *Tate v Fullbrook* [1908] 1 KB 821, per Farwell J at 832. The subject-matter of the copyright claimed for the “dramatic format” of “Opportunity Knocks” is conspicuously lacking in certainty. Moreover, it seems to their Lordships that a dramatic work must have sufficient unity to be capable of performance and that the features claimed as constituting the “format” of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential characteristic.” (the underlining is added)

78. It cannot be denied that there are remarkable similarities between the claim in the *Green* case and the instant matter. The appellant’s claim emanates from what it says are unique characteristics of its program or television show called Dragon’s Den. Its complaint relates to the alleged copying of style and layout of the show, Dragon’s Den. As rightly observed by the first respondent’s counsel, the only difference is that Green

claimed that his format constituted a dramatic work, whereas in *casu* the appellant claims that its format constitutes an audio-visual work. In terms of s 2 of the Act, “dramatic work” “does not include an audio-visual work”.

79. In my view, even if no consideration were to be given to the *Green* case, it has, in any event, already been otherwise demonstrated earlier herein that the appellant’s format of Dragon’s Den is not afforded copyright protection.

80. For the above reasons, the appeal has no merit. Costs will follow the cause. However, no basis has been established for the awarding of costs on the higher scale. It is accordingly ordered as follows:

The appeal be and is hereby dismissed with costs.

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MAKONI JA:

I agree

KUDYA AJA:

I agree

Manokore Attorneys, appellant’s legal practitioners.

Donsa-Nkomo & Mutangi, 1st respondent’s legal practitioners.