SEKARD LEARNING DEVELOPMENT SOLUTION (PRIVATE) LIMITED
versus
ROUTHY WORLD EDUCATION ADVENTURE
and
AROGO MOSES ODHLAMBO

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 3 & 19 April 2017

Urgent chamber application

P. Chakanyuka for the applicant
Mrs *R. Mabwe* for the respondents

ZHOU J: This is an urgent chamber application for an interdict to, among other things, stop the respondents from using any information or material relating to the applicant's affairs or business or method of carrying out business or advertisements including referring to any work done by the applicant. The relief sought is also to interdict the respondents from passing off as applicant or holding out that their goods and services are the same as or are associated with those of the applicant. The applicant, further, seeks an order that the respondents return to the applicant all hard and soft copies of information relating to applicant's business which are in their custody, and costs on the legal practitioner and client scale.

Before I consider the facts of the matter I need to comment on the draft provisional order filed on behalf of the applicant. The first defect is that the draft order is not in Form 29C as is required by the rules. The first section of the provisional order in Form 29C is headed: "**TERMS OF FINAL ORDER SOUGHT"**. Below it are the following words: "That you show cause to this Honourable Court why a final order should not be made in the following terms". That sentence does not appear in the draft provisional order filed in this matter. The draft provisional order filed on behalf of the applicant starts with a heading: "**INTERIM RELIEF SOUGHT"** which is wrong. Instead of simply copying the words relating to the final order sought recited

above, the applicant created for itself the following heading: "**FINAL TERMS OF THE PROVISIONAL ORDER**". Where Form 29C requires the heading: "**INTERIM RELIEF GRANTED"** THE wording is ignored, together with the sentence which reads: "Pending determination of this matter, the applicant is granted the following relief". The draft provisional order filed in this matter has no section on service of the provisional order. There is reckless disregard of the requirements of the rules relating to the use of the appropriate form which has become a common practice by the litigants and the legal profession. The court expects litigants, especially those who are legally represented, to comply with the requirements of the rules. In future the court will consider penalizing legal practitioners who ignore basic requirements of the rules relating to the use of appropriate forms through the making of appropriate orders of costs.

In addition to the above, the interim relief is identical to the terms of the final order sought. Understandably, the respondents' counsel raised as one of the grounds of the objection *in limine* the issue of the interim relief being similar to the terms of the final order sought. I shall revert to this issue below.

The brief facts of this matter are as follows. The deponent to the applicant's founding affidavit who is also the Operations Director of the applicant is the wife of the second respondent. The two of them are estranged. The applicant is a company in which the two were involved at some point. They went their separate ways after which the second respondent incorporated the first respondent to carry on the same business as the applicant. The applicant's complaint, which is the basis of the instant application, is that the respondents are interfering with the applicant's facebook page, and are holding themselves out as being part of or as associated with the applicant. That, the applicant alleges, has been done through making alterations to the applicant's facebook page and other conduct which can reasonably mislead members of the public into thinking that the first respondent's business is the same as or is associated with that of the applicant.

The respondents raised four points *in limine*. The first point relates to the urgency of the matter. I am not prepared to uphold that objection for the simple reason that at the time that the application was instituted the alleged wrong was still continuing. The respondents have not led evidence to prove that the applicant took time to enforce its rights after it became aware of the conduct of the respondents which is being complained of. The fact that the first respondent was

incorporated in December 2016 does not mean that it committed the wrong complained of then. Indeed, the respondents have not stated the date when they started to indulge in that conduct or when the applicant became aware of it.

The second objection *in limine* is directed at the certificate of urgency. The certificate of urgency filed sufficiently expresses the basis upon which the opinion of the legal practitioner that the matter is urgent is based. It points to the infringement committed by the respondents and its potential to confuse and mislead the applicant's customers as the justification for the matter to be dealt with urgently. The criticism directed at it is totally unwarranted.

I accept the criticism directed at the draft provisional order. I repeat the caution made above that legal practitioners who prepare such drafts must apply their minds to the requirements of the rules. Also, it has been held that it is undesirable for an applicant to obtain what is in effect final relief under the guise of interim relief. The reason is that at this stage the applicant only needs to prove a prima facie case. I am, however, of the view that the defect in the formulation of the relief sought is not fatal, as the court is at large to emend the draft order. As long as the court is satisfied that the relief sought is supported by the cause as pleaded in the founding affidavit it can amend the draft order. After all, as its name suggests, it is only a draft which the court is not bound by.

The fourth complaint raised is that there is non-disclosure of material facts by the deponent to the applicant's founding affidavit. The facts which are alleged to have been withheld relate to the fact that the deponent is the second respondent's wife and the estrangement of the deponent from the second respondent. That submission is incorrect as the founding affidavit clearly mentions the relationship between those two and has a copy of the marriage certificate attached to it. The fact of their estrangement is not material to the determination of this matter. For those reasons, the objection is misconceived.

As for the merits, the applicant has attached a facebook page, annexure "H1", which suggests that the applicant and the first respondent are one organization or are related. There is an address stated, 83 Sam Nujoma Street, Harare, Zimbabwe, which is the first respondent's address. The first respondent's name appears on that page, where it reads "Routhy Education Services work with students, understanding their unique needs . . . ". On the left hand column

under the subheading "Mission", the name of the applicant appears. Below that there is a statement that "Eskard is engaged in advancing global education . . ."

In the case of *Caterham Car Sales & Caachworks Ltd* v *Birkin Cars (Pty) Ltd* 1998 (3) SA 938(SCA) at 947E-F, HARMS JA elegantly articulated the principles relative to the delict of passing of as follows:

> "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 representer is that of the plaintiff or is associated therewith . . . In other words, it protects against deception as to a trade source or to a business connection . . . "

In *Capital Estate & General Agencies (Pty) Ltd & Ors* v *Holiday Inns Inc & Anor* 1977 (2) ZLR 916(A) at 929 RABIE JA said:

> "The wrong known as passing-off consists in a representation by one person that his business (or merchandise as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of one is, or is concerned with, that of another."

The above principles have been upheld in this jurisdiction. See *F W Woolworth & Co (Zimbabwe) (Pvt) Ltd* v *The W Store & Anor* 1998 (2) ZLR 402(S) at 404D-E; *F W Woolworth & Co (Zimbabwe) (Pvt) Ltd* v *The W Store & Anor* 1998 (1) ZLR 93(H) at 101E-F; *National Foods Ltd* v *Midlands Milling Co. (Pvt) Ltd* 1996 (1) ZLR 159(H) at 162F-163D; *Kellog Co* v *Cairns Foods Ltd* 1997 (2) ZLR 230(S) at 233F-G.

In casu the representation is constituted by the facebook page referred to above. That documents pretends as if the applicant and first respondent are the same company or business. There is clearly a reasonable likelihood of members of the public being confused into believing that the business of the first respondent is that of the applicant or that the two are connected. That confusion is achieved by the use of the first respondent's address to direct members of the public, while at the same time the name of the applicant features in the document in question alongside the name of the first respondent.

Mrs *Mabwe* for the respondents submitted that the respondents have withdrawn the offending page from the social media. That statement was put in issue by the applicant. In any event, the submission was that the page was removed on 30 March 2017, some four days after the instant application was filed. There was a later attempt to state that the advertisements were

stopped on 27 March 2017, which is the date on which the application was filed. That, too, does not assist the respondents, as the wrong has been committed and there is no genuine assurance that it will not be continued in the absence of an order of court. After all, the assurances were only made equivocally and in passing in circumstances where the respondents were vigorously contesting the relief being sought.

I am satisfied that the applicant has established that the conduct of the respondents amounts to passing-off. The requirements of the interdict sought are therefore satisfied, as the applicant has established a clear right and interference with that right. There is no alternative remedy available to the applicant. The balance of convenience also favour the granting of the interdict. After all, the respondents have undertaken not to continue with the act of passing off albeit the court does not accept the assurances given.

As for the draft order, para(s) 2 and 3 of the interim relief sought will be deleted. Paragraph 2 is a final order in its effect. Paragraph 3 is an order of costs which should be left for debate on the return date. The draft provisional will therefore be amended accordingly.

In the result, the provisional order is granted in terms of the draft thereof as amended.

Chakanyuka & Associates, applicant's legal practitioners
Bherebhende Law Chambers, respondents' legal practitioners