

DR STELLA OVUAPOYERIN ACHINULO

versus

DR JIMMY GAZI

and

DR E. MUCHENI

and

DR R MUCHENI

HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 13 JULY AND 8 OCTOBER 2015

Opposed Matter

T Moyo-Masiye for applicant

S Collier for respondent

MOYO J: This is an application wherein the applicant seeks an interdict to stop the respondents from using the name Parkade Clinic in their medical practice situate along 8th Avenue at QV House.

The applicant is a medical doctor who runs a private medical clinic on a part time basis under the name and style of Parkade Clinic situate at Royal House, along Fort Street and Ninth Avenue. Prior to operating her practice for Royal House, she operated from 1st Floor QV House, along 9th Avenue and Fife Street. She avers that she started operating at QV House in July 2011 and because she was operating near the big Parkade Centre Building she thought it would be convenient and easy for her clients to remember the name Parkade Clinic.

She then applied to the medical and Dental Practitioners Council of Zimbabwe to register her practice as such in 2011.

Her application was approved as there was no other medical practitioner using that name. She then registered her practice under this name also with other relevant authorities like the City of Bulawayo. She then moved out of the premises at the end of December 2013. She hired

people to remove her name from the premises. She then re-opened her practice where its currently situated.

It would appear that first respondent and the two other doctors then moved into the QV House premises and used the name Parkade Clinic for their operations. Applicant avers that the respondents are not registered with the Health professions council under such a name or at all. She also avers that she fears that if there are any malpractices they will be attributed to her name. She actually alleges some irregularities in the practice of the respondent. In paragraph 15 of her founding affidavit the applicant avers that

“---- The respondents are by virtue of their use of my trade name making representations which amount to passing off.”

The first respondent has on the other hand strenuously refuted the allegations being made by the applicant in her founding affidavit. In his opposing affidavit the first respondent denies that applicant came up with the name Parkade Clinic. First respondent avers that in fact as early as 1987 he conducted his business under the name Dr Jimmy Gazi trading as the Parkade clinic at the Parkade Centre. He further avers that in 1991 his practice moved from the Parkade centre to QV house, first floor. He has annexed proof of his usage of this name that early in terms of service provider receipts and the 2002 TelOne directory entries which all show that he practised as Dr Gazi trading as Parkade Clinic. He has also attached a copy of a bank statement for May 2007 also showing that he has used that name as at that date.

Now at this juncture I have to make a factual finding that in fact from the facts before me, as analysed together with the documentary evidence attached, it is not true that applicant came up with the name Parkade Clinic in 2011. The name was in fact in existence far back dating to 1987 when the first respondent started practising using it.

Clearly, first respondent used the name Parkade Clinic prior to 2011 when applicant then decided to use it. Applicant avers that she owns the name and in her answering affidavit (paragraph 4.1 thereof) she states that she was not aware as at the time that she commenced her practice that first respondent had used the name before.

I have already found that from the facts before me I cannot hold that applicant coined and thus owns the name Parkade Clinic as clearly first respondent used it years before applicant did.

Applicant also, does not allege any intellectual property rights over the name as it is not registered as her trade mark in terms of the law. Section 6 of the Trademark Act [Chapter 26:04] provides thus:

“No person shall be entitled to institute proceedings to prevent, or to recover damages for the infringement of an unregistered trademark, provided that nothing in this Act shall affect the right of any person at common law ---“

Applicant’s name is not registered as a trademark and we then move on to assess applicant’s claim with regard to the common law principle of passing off.

Professor Feltoe in his *Guide to the Zimbabwe Law of Delict* 3rd edition says the following on passing off.

“Passing off:

This form of deception consists of taking unfair advantage of a trade reputation that P has built up. This delict is committed when D by means of a misleading name, work or description or otherwise represents that his business or merchandise is that of another so that members of the public are misled. In other words, if D uses a business name, which he is not entitled to use so that his business is mistaken for that of P’s and, in this way, he unfairly procures P’s customers or -----, P can obtain an interdict to prevent D continuing this practice and can claim damages for any loss which he has suffered as a result of the public being misled.”

“The purpose of the action for passing off is to protect a business against misrepresentation by a defendant that his business, goods or services are that of plaintiff or associated therewith. The delict is committed in relation to a business that has acquired goodwill. Good will is the totality of attributes that lure or entice clients or potential clients to support a particular business. As passing off harms the reputational element of goodwill, plaintiff must prove;

- 1) that he has acquired a business reputation associated with his business name.
- 2) that defendant has misrepresented his business, goods or services as being those of plaintiff or associated therewith.

In order to do that, plaintiff must establish that there was a reasonable probability that members of the public would be deceived or confused into believing that defendant’s business was that of plaintiff. In this regard factors such as the nature of the businesses, how they operate, and the localities in which they operate will be taken into account.”

Per Professor G. Feltoe, a *Guide to the Zimbabwean Law of Delict* at page 199.

In the facts before me I find that:

- 1) Applicant has not proven that the name Parkade Clinic is hers either by registration or by virtue of designing it and using it first, in fact apparently first respondent used it well before applicant did.
- 2) Applicant has not proven that the use of the name Parkade Clinic by first respondent is a misrepresentation of any kind for how can it be a misrepresentation when in fact first respondent has always used that name even prior to applicant using it? I can therefore not find that first respondent is misrepresenting to anyone that that name is his for he has always used that name.
- 3) Applicant has not proven in her founding affidavit that in fact she has created a reputation and as such goodwill in the usage of that name since her own founding affidavit states that she used that name between July 2011 and December 2013 (prior to first respondent re-using it) as opposed to first respondent who has provided proof that in fact he has used that name from 1987 to 2007, a period of 20 years. If there is any goodwill or reputation that goes with that name given the periods each one of them has used the name, whose is it? Applicant's? No, such a finding would be folly. Applicant has thus not proven that she has goodwill or reputation to protect in that name.
- 4) If no goodwill or reputation has been shown by applicant through the usage of that name it therefore follows that the requirements for the action of passing off as enunciated above have not been met.

Neither has applicant even presented a strand of evidence that in fact first respondent is presenting himself to applicant's customers as if he is applicant.

Applicant has sought to argue that since she is the one registered with the health professions council as being the user of that name then first respondent is operating illegally. It may well be so that first respondent is operating illegally but the matter that is before this court for determination is not whether first respondent has complied with the requisite conditions required by the Health professions Council in order to operate a medical practice under whichever name, or not the issue that is before this court is whether applicant is entitled to the exclusive usage of the name Parkade Clinic, whether she owns that name and whether first

respondent has, through deception sought to undermine applicant's rights to that name. The legality or otherwise of their operation falls with the prerogative of the relevant authorities that regulate them and that is not for this court on this platform.

The court may perhaps an appropriate platform be enjoined to enquire into the legality or otherwise of first respondent's operations, but certainly not on this platform. Neither does registration of a name with a professional body then entitle a party to the exclusive usage and protection of that name. That then becomes an intellectual property matter which should be resolved in accordance with legal principles relevant thereto.

Having said that I then move to assess if applicant has established a case for the relief sought. That is, has applicant successfully met the requirements of a final interdict?

The requirements of a final interdict are:

“a clear right established on a balance of probabilities, an actionable wrong already committed or a reasonable apprehension that such an act will be committed, and the absence of any other satisfactory remedy”

per *Civil Procedure in South Africa* page 114 authored by Roshana Kelbrick.

The applicant has not, shown that she has a clear right that is being or is about to be infringed by the first respondent as she has failed to demonstrate her sole entitlement to the ownership and usage of the name Parkade Clinic. Neither has she adequately sustained an action of passing off in terms of the common law rules as against first respondent. The applicant had a burden in my view to show that there is a right to assert by herself in the first place, which right first respondent was injuring or was about to injure in some way, she has however not shown the court, a clear existence of this right. Applicant must first of all show that she has a clear lawful right against the first respondent, which, in my view, she has not done, for she has failed to show how she owns a name that first respondent in fact used well before she did, such name not having been patented at law by her, and neither has she shown that she has created for herself goodwill that first respondent is stealing or is about to steal. There is the immediate question that if first respondent used the same name for a medical practice at the same venue for 20 years before applicant did and she has just used it for barely 2 years, if there could be found that there

is indeed goodwill that attaches to that name, applicant cannot clearly with the factual circumstances before me, claim it.

I accordingly find that applicant has not made a good case for the relief sought and as a result I dismiss the application with costs.

Hwalima, Moyo and Associates, applicant's legal practitioners
Webb, Low and Barry, 1st respondent's legal practitioners