

TAPOZ ACADEMY (PVT) LTD  
t/a BETHEL ACADEMY  
versus  
FARAYI MUUNGANIRWA

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 3 October 2017 and 8 November 2017

### **Civil Continuous Roll**

A. Muchandiona, for the plaintiff  
*S Chikitora*, for the defendant

MATANDA-MOYO J: Plaintiff claimed \$47 700.00 together with interest at the prescribed rate from 7 April 2015 to date of payment plus costs of suit on a higher scale from the defendant from an alleged unlawful use of its trading name and goodwill. Plaintiff also alleged that defendant fraudulently used its certificate of registration.

Plaintiff in its declaration averred that it formed an educational institution and registered it with the Ministry of Education, Sports, Arts and Culture's department of Secondary Non-Formal Education under the name Bethel Academy; Certificate registration number IC/HRE/154 refers. Unbeknown to the plaintiff the defendant fraudulently accessed plaintiff's certificate and started operating an Academy in Budiriro under the name Bethel Academy. Plaintiff's director stumbled upon the College sometime in 2014. As a result plaintiff claimed it suffered damages in the sum of \$47 700.

Defendant opposed the granting of the claim on the basis that the defendant had been using the plaintiff's certificate of registration with the plaintiff's blessings as from 6 June 2002 to sometime in 2015. This was as a result of an agreement allegedly entered into between plaintiff and defendant. The agreement was that defendant would use the certificate and take over the running of Bethel Academy then located at suite 7, 1<sup>st</sup> Floor Khan House, 84 Leopold Takawira Street, Albion Avenue, Harare. Plaintiff had failed to run the college due to financial constraints. Defendant was to keep the certificate of registration alive until such time that plaintiff's directors would be able to run the college. Defendant pleaded that he did not breach

the contract as he paid the annual fees to the Ministry and kept the certificate alive. Defendant denied that he acquired the certificate fraudulently. Defendant denied that plaintiff was entitled to any good will as he took over the Academy with only 4 students. It was the defendant who built the name over the years. Defendant prayed that plaintiff's claim be dismissed.

Three issues were referred to trial namely;

1. Whether the plaintiff gave its registration certificate number IC/HRE/154 to the defendant and authorised him to take over its college run under the style of Bethel Academy.
2. Whether the defendant's use of the plaintiff's certificate and operation of Bethel Academy was unlawful and
3. The quantum of damages, if any, suffered by the plaintiff as a result of the defendant's use of registration certificate and operation of Bethel Academy.

Three witnesses testified for the plaintiff namely Zadzisai Macheke, Kudzai Zirebwa and Fananidzai Ndiripo. Zadzisai Macheke testified that she and her husband registered the plaintiff company in 2000. She is the Managing Director of plaintiff. In 2002 the Ministry of Education awarded plaintiff with a certificate to run an educational college under the name Bethel Academy. By that time this witness was heavily pregnant. The college then was operating from Cnr Leopold Takawira and Albion Street.

This witness testified that the defendant was unknown to her. She came to know the defendant after finding out he was using plaintiff's certificate of registration unlawfully. She denied entering into any form of agreement with the defendant. It was her evidence that when she left for Nyanga in 2002 she left plaintiff's college under the stewardship of one Fabion Maunganidze, a cousin brother of this witness's friend, Mercy Maunganidze. This witness had been running Bethel Academy with Mercy Maunganidze, who introduced Fabion to her. The agreement with Maunganidze was that he would run the college until she returned to Harare. She also left her sister Kudzai Zirebwa doing the administrative work.

She testified that she became aware of Bethel Academy in Budiriro by chance. Sometime, in 2014 whilst driving around Budiriro she came across a Bill board written Bethel Academy. Upon enquiring she realised the Academy was using plaintiff's registration certificate. She engaged lawyers to deal with the matter.

On quantum of damages this witness testified that she engaged a chartered accountant firm to calculate the figures. She obtained a brochure from the college which the accountants used to come up with the figures.

Under cross examination she admitted that they got the certificate of registration in February 2002 a month before she left for Nyanga. She was asked what goodwill she had built within a month and she responded that good will was calculated backwards for 3 years from 2014. She understood good will to mean value given to a name. She admitted that she left certificate and college under Fabion Maunganidze with no specific agreement save for Fabion to continue running the college. She could not say when she came back to Harare to look for Fabion. It was however her testimony that upon returning to Harare Fabion had relocated to South Africa.

On the financial status of the college at the time she left for Nyanga this witness conceded that the College had about 6 students only and that it was struggling financially. She also conceded that if Fabion was using Bethel Academy they would have sorted the problem differently. She admitted that if proof was rendered that it was Fabion running Bethel Academy that would be the end of the matter. She also confirmed after she relocated to Nyanga she had no information on how the college was being run.

Upon being shown minutes of a meeting held on 8 June 2002 she confirmed Fabion and defendant were noted as Directors of Bethel Academy.

Under cross examination she admitted that when she left the college under Fabion she did not surrender bank accounts. Fabion had to open his own accounts in whatever name he chose. She could also not dispute, that the college collapsed due to lack of business.

Kudzai Dzirebwa also testified for the plaintiff. She is a sister to the last witness. After her 'A' levels in 2002 Kudzai worked for her sister at the Bethel Academy in city centre. She took up that job just to assist her sister who was heavily pregnant then. She was doing administrative work; that is recruiting students and accepting fees. She knew defendant before her sister left for Nyanga. She said defendant was also introduced to her by Fabion. She denied that defendant was a teacher at the college. She left the college sometime in August / September 2002. She gave two reasons for leaving; firstly that Fabion advised her that business was not thriving and that she should stop reporting for work. Secondly she had to pursue her studies in Mutare and that was the time for registration. She testified that Fabion remained in charge of the business. At the time she left there were about two teachers. She could not remember the number of students.

Under cross examination she could not bring herself to say how many students were at the college. She simply said people would come to enquire. She agreed to having been part of a meeting where defendant and Fabion were noted as directors.

Fananidzai Ndiripo was called to testify on behalf of plaintiff. The court was asked to take note that he was not part of the witnesses and that he had no summary of evidence filed of record. Fananidzai testified that he was a chartered accountant who was engaged to calculate good will by the plaintiff. He testified that he was presented with a flier by the plaintiff which he used as a basis for calculating goodwill. He looked at levies charged and centre fee as indicators of what value the public would give to the institution. The document he prepared with three scenarios was admitted as evidence. The plaintiff used the least of the three.

Under cross examination it became clear the only source document he used was the flier. He confirmed the flier had no date. He could not say for sure that the figures represented by the flier were genuine. He failed to answer when it was suggested to him the flier could have been picked from the streets. He could not deny a suggestion that the flier never emanated from the defendant. He admitted the figures he provided only represented potential goodwill. Actual goodwill could only be determined by audit. He could not dispute that Budiriro College had no centre fee and hence his computations were based on misinformation.

The defendant testified that he was a teacher. Around May 2002 Mercy Maunganidze approached the defendant and Fabion and requested them to assist a friend of hers who was struggling to run a college. They were informed that the college had problems with creditors and was even failing to pay rentals.

Defendant and Fabion were directors of Farayi Institute of Science and Technology and were already running Budiriro College. The defendant and Fabion agreed to meet Mrs Macheka. They met before Mrs Macheka left for Nyanga and discussed problems bedeviling the college. Mrs Macheka did not want to lose her registration certificate she had worked hard to secure. She had been given two months' notice to cancel lease. She offered defendant and Fabion the running of college and ensure the certificate remained valid. Mrs Macheka took away everything including bank account. She did not want any payment save that the registration remain alive. The annual fees payable to the Ministry of Education were \$1 400.00.

This witness testified that they only operated for 15 months in town and when they failed to turn the fortunes of the college, they relocated to Budiriro. This position, he said, was communicated to Mrs Macheka. He testified that they met part of their agreement with Mrs

Macheka and saw no basis of this claim. In any case he testified that Mrs Macheka left the college at the point of collapse, without any goodwill. If any good will was later made, it was due to this witness and Fabion's efforts.

He testified that Mrs Macheka did not leave plaintiff's company operating the Academy. The agreement was that the defendant and Fabion use their names trading as Bethel Academy. Hence the use of the trading name was lawful. Even bank accounts were opened. Even the bank accounts were opened in this witness and Fabion's company name. Even the lease after 31 July 2002 was entered into in defendant's company name. He said at all times he was known to Mrs Macheka. In 2007 Mrs Macheka called his wife when she wanted to pick up a computer she had left at the college in town.

When Mrs Macheka finally came back he met with her to discuss issue but failed to resolve the same as Mrs Macheka refused to involve Fabion. However this witness since got his own certificate of registration from the Ministry and has since stopped using the plaintiff's certificate of registration.

Under cross examination he said they took over Bethel Academy in town in June 2002 and left in October 2003. H said they opened the Budiro College in 2001 and when they met Mrs Macheka they were in the process of registering the same. He maintained the agreement they had with Mrs Macheka had no financial benefit on her. He explained that Mrs Macheka would derive benefit from defendant paying the annual fees to keep the certificate of registration alive. He stopped using her certificate when told to stop by Mrs Macheka.

He admitted he has since registered their college under the name El Bethel College. He said the Budiro College started using the name Bethel Academy in 2004. They had spent so much money advertising the town college and wanted to ride on that investment. He confirmed he last paid for Bethel certificate of registration in 2013.

Fabion Maunganidze testified on behalf of the defendant. His testimony was similar in all respects to that of the last witness. He insisted the arrangement with Mrs Macheka involved defendant and him as the two were partners already. He expressed shock at defendant being taken to court by the plaintiff. He insisted that the only way they could have kept the promise made to Mrs Macheka of ensuring the certificate of registration remained alive was to trade in the name appearing on the certificate.

#### Analysis of Evidence

The parties agreed that plaintiff obtained a certificate of registration to run Bethel Academy. By then plaintiff was operating a college at Kahn House and the business was struggling.

Plaintiff's testimony was that it left the registration certificate with one Fabion Maunganidze. By accident in 2014 it discovered that defendant was using its certificate of registration unlawfully. On the other hand the defendant's testimony was to the effect that it was using the certificate of registration lawfully as same was given to him and Fabion by the plaintiff. The defendant called Fabion Maunganidze to testify. Fabion confirmed the version of the defendant that the certificate of registration was given to the defendant and Fabion by Mrs Macheka. Mrs Macheka denied having knowledge of the defendant until in 2014. This evidence was contrary to the evidence of plaintiff's own witness and sister to Mrs Macheka, Zadzisai. It was Zadzisai's testimony that the defendant came to see Mrs Macheka before she left for Nyanga. The defendant was in the company of Fabion. Again according to minutes of a meeting held on 8 June 2002 attended by Zirebwa, defendant was present. In such minutes defendant was recognised as a Director of Bethel Academy. The defendant also gave uncontested evidence that Mrs Macheka called his wife when she wanted to pick up a computer she had left at the Academy. From the above evidence it is clear that the defendant was known to Mrs Macheka before she left for Nyanga. The defendant was a business partner of Fabion. I tend to agree with Fabion when he said he could not have agreed to assist Mrs Macheka without involving the defendant. What also tends to diminish plaintiff's authenticity of events is the decision to totally leave out Fabion. If plaintiff version was the truth surely it could have called Fabion as its witness. Once plaintiff admitted Fabion was in lawful custody of the certificate of registration, it became necessary for plaintiff to say how the certificate left Fabion's custody and ended up with the defendant. There is no such explanation in plaintiff's testimony.

On the status of the business at the time Mrs Macheka left for Nyanga I am of the view that the testimony by all witnesses showed that all was not well. Although Mrs Macheka was evasive on the issue, it was clear that when she left for Nyanga there were only four students registered with the academy. As at 8 July 2002 according to a registration form produced by the defendant only eleven (11) students were registered. Generally the college was facing closure at the time Mrs Macheka left for Nyanga.

The parties agreed that the college was left in the hands of Fabion. Fabion was very clear that the college was left under the defendant and his charge Fabion struck me as a very truthful witness. The terms of the agreement was that the defendant and Fabion would be

responsible for all costs involved in running the college and payment of the annual fees to the Ministry of Education. The main term was to ensure that the certificate of registration remain valid. In order to remain valid annual fees had to be paid.

In order to continue paying for the registration certificate it follow the defendant had to use the name as appearing on the certificate. From the evidence there is no doubt that Bethel Academy located at Kahn House failed to attract the requisite number of students to maintain viability and closed in 2003. The defendant and Fabion moved back to Budiriro College and postponed registration of Budiriro College in order to maintain the name Bethel Academy. This was done so as to satisfy the terms of their agreement with plaintiff that is, to ensure the certificate of registration remained valid.

The accountant who testified on the figures admitted that he used dubious source document. That dubious source document was a flier purportedly from Budiriro College. Such flier was challenged by the defendant. Without genuine source documents from Budiriro College having been used by the accountant, his testimony was rendered valueless.

### The Law

The plaintiff submitted that its claim is based on *rei vindicatio*. I do not agree. *Rei vindicatio* is a legal action where plaintiff demands that defendant return a thing that belongs to the plaintiff. To succeed it is one of the essential elements of *rei vindicatio* that the defendant must be in physical possession or control of that property at the time the action is instituted. Summons were instituted on 10 April 2015 and by that time the defendant was no longer in possession of the certificate of registration. The last payment for the certificate of registration was done in 2013. When the summons were issued on 10 April 2015 the certificate was no longer valid and not in existence.

It is my finding therefore that the law relating to *rei vindicatio* is not applicable herein. See *Chelty v Naidoo* 1974 (3) SA 13 (A) , *Philip Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 (2) SA 420 A.

This is a claim firstly in terms of the *actio legis aquiliae* which provides for damages on account of the unlawful ultimately causing patrimonial loss. The plaintiff claimed damages from the defendant for the unlawful use of its certificate of registration by the defendant. In order to succeed the plaintiff ought to show on a balance of probabilities that defendant unlawfully accessed and made use of its registration certificate. *Van de Walt and Midgley* 2005 at p 8 list the elements of a delict as follows:

1. harm sustained by the plaintiff
2. conduct on the part of the defendant which is unlawful
3. causal connection between the conduct and plaintiff and
4. the fault on blameworthiness on the part of the defendant

From the facts above the plaintiff has not shown that the defendant was unlawfully using the certificate. Evidence showed that the certificate was handed over to the defendant in terms of a verbal agreement entered into between plaintiff as represented by Mrs Macheka and defendant and Fabion on the other hand.

Unlawfulness depicts unauthorised use or illegal use. In this matter the unlawfulness would have been proven by unauthorised use of the plaintiff's certificate. Applying the law to the evidence canvassed, once the facts show that the use was with the consent or authority of plaintiff, it follows that no unlawful use attaches. Possession of the certificate by the defendant was obtained with the consent of the plaintiff. Whilst evidence is overwhelming that the defendant was in possession and control of the certificate there is no evidence on a balance of probabilities that such possession was unlawful. The use of such certificate by the defendant, having been sanctioned by Mrs Macheka, it follows there was nothing wrongful with such use.

The plaintiff has therefore failed to prove that the defendant's possession, control and use of the certificate was wrongful nor unlawful.

The plaintiff also sought to recover good will through the use of its certificate and name by the defendant. Good will has been defined as;

“The good reputation or brand identification enjoyed by a commercial entity.”

Goodwill has value and can be sold or transferred. Goodwill is a reputation which has ability to earn profits without further efforts by the purchaser. The efforts have already been made in the past. It is the benefit of a good name already created and continuing to benefit the business without the effort of the purchaser. Goodwill is that which distinguishes a new business from an old business. Goodwill is excess profit over and above that which comes from the purchaser's efforts.

ZIYAMBI JA in *Polaris Zimbabwe (Pvt) Ltd v Zapchem Detegent Manufacturers CC t/a Starchem* SC 68/04 had this to say;

“Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business (of *A Becker and Co (Pty) Ltd v Becker and Ors* 1981 (3) SA 406 (A) at 417 A. The components of goodwill are many and diverse (*Kennedy v Smit* 1948 (2) SA 63 (c) at 66, *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) at 624 A – 625 F)---”

Having understood what goodwill is the question to be answered is whether plaintiff

managed to prove the existence of goodwill at the time of handing over the business to the defendant and if so the quantum thereof.

From the evidence at the time plaintiff's business was handed over to defendant there were only four to six students. No profits were derived from the business. The college had no reputation to talk about. There was no benefit or advantage to the defendant. The defendant had to sweat to try and make the business successful. Even with defendant's efforts the business failed to yield results. The college in town was closed due to its unviability.

The Budiriro College was trading under the name of Bethel Academy. As I have already found above such college was run by defendants as per a verbal contract entered into with Mrs Macheka. There is no evidence plaintiff played any part in its running nor its reputation. Again plaintiff has failed to quantify any goodwill claimed.

Accordingly I am of the view that the plaintiff has failed to prove any claim against the defendant.

In the result the plaintiff's claim is dismissed with costs.

*Danziger & Partners*, plaintiff's legal practitioners  
*Rubaya & Chatambudza*, defendant's legal practitioners