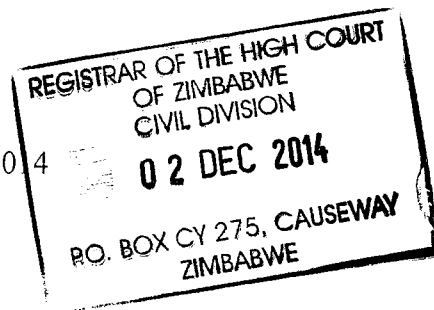


PETERSON TENGENDE  
and  
TRUMBELT COMPUTERS (PRIVATE) LIMITED  
T/A MOBILE CONNEXION  
versus  
TELECEL ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 16 September 2014 and 24 November 2014



**Civil Trial**

*M Nkomo*, for the plaintiff  
*Advocate F Mahere*, for the defendant

MATANDA-MOYO J: The plaintiff filed summons on 31 October 2012 HC 12747/12. In these summons the relief which was being sought was for

- i. an interdict against the defendant to prevent defendant from operating the mobile and quiz promotion called "Mega Promo" without plaintiff's permission.
- ii. Payment of \$ 340 000-00 in damages for copyright infringement and unjust infringement.

This second paragraph was however amended to a claim for the rendering of an account of profits and claim that defendant pay 50% of its profits to the plaintiff within 10 days of accounting for the same.

On 29 January 2013 plaintiff filed further summons against defendant under HC 760/13 seeking a further interdict against the defendant from operating the mobile quiz promotion called Win Big promotion or any of its derivatives without plaintiff's express permission.

It was indicated during trial that claim for damages is not being persisted with. These two cases were consolidated as one in terms of the rules of this court.

The court was thus seized with determining on two issues i.e. whether or not the plaintiff has satisfied the requirements of an interdict – and whether or not the plaintiff is entitled to an inspection of accounts.

The law relating to interdicts is trite and common cause hence in *casu* I will straight away delve into whether or not the plaintiff enjoyed copyright in the proposal and whether or not such right was infringed. A brief summation of the facts will suffice at this juncture.

The first plaintiff one Mr Tengende approached the defendant with a proposal for 2 different Mega promotions on 11 January 2012. The defendant responded that they were already putting final touches on Telecel Mega Promo with another partner. However they wanted to see whether or not there were differences between the promo they were already working on with another partner and the one plaintiffs were offering. Plaintiff was to send their proposal via Munyaradzi Mamutse a value Added Service manager and he did send the detailed proposal to defendant for consideration.

After this a meeting was scheduled wherein the plaintiff and two of defendant's personnel MamutseMunyaradzi and Natasha Muzungu were present and discussed the modalities of the promotional prizes to be won. Grand prizes of a car and residential stand were mooted however plaintiff's proposal was finally agreed on. After the meeting an e-mail was written to confirm the minutes of the 17 November meeting and the plaintiffs sent a detailed proposal for the Telecel Mega Promo pdf on 24 November 2012. This detailed how Mega promo was going to operate in terms of costs, prizes and value of prizes. After months of correspondence and suggestions from defendant to amend the proposal, the defendant then dropped a bomber on 20 June 2012 that it had been advised to work with another technical partner in rolling out the promotion and defendant allegedly went on to coin a promo as enunciated in plaintiff's proposal hence the need for this suit.

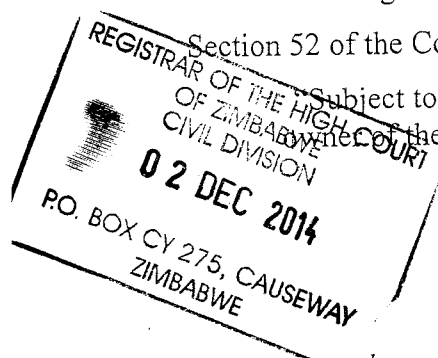
### The Law

In terms of the copyright and neighbouring rights Act [*Cap 26:05*]

“Infringements of copyright are actionable at the suit of the owner of the copyright.”

Section 52 of the Copyrights and Neighbouring Act provides that:-

“Subject to this Act on infringement of copyright shall be actionable at the suit of the owner of the copyright.”



To determine the question whether or not plaintiffs owned the copyright in the said proposal a look at the depths and width of the proposal will be instructive i.e. the Mega promo proposal for Telecel p 40-56. It was argued on behalf of the defendant that Copyright does not subsist in ideas but in form. It was argued that the plaintiffs proposal was for a mere concept which was generic in nature and could not be protectable by Copyright.

The plaintiffs' proposal contained how the Mega Promotion was to be run the prizes to be won, the quiz questions to be asked, the costs of sms, and the apportionment of revenue from the campaign adverts from other countries where the promotion had been run. It also outlined the contributions of both the plaintiff and the defendant in the promo. During the trial the counsel for the defendant cross examined the plaintiff as follows:-

“Q. Did they copy your marketing model and implemented your method of operation.

A. Method of operation yes

Q. Set out in 2 reports p 40.

A. Yes.

Q. Proposal concern ideas.

A. Explains implementation.

Q. A lot of what you set out are ideas.

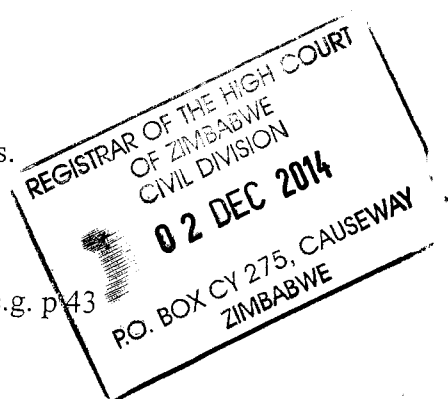
A. No.

Q. And methods of implementation e.g. p 43

A. Yes.

Q. Setting out method of operation of promotion.

A. Yes.”



From this extract from the trial it is clear and emphasised that the proposal which is subject of this trial is a method of operation and implementation.

Our law is very clear on that, Copyright and Neighbouring Rights Act [Cap 26:05] s 10 (5) (a) provides that:-

“The following matters and things shall not be eligible for copyright – ideas, procedures, systems, methods of operation..... even if they are explained illustrated or embodied in a work.....”

Further the TRIPS Agreement entrenches the principle that copyright does not extend to ideas, procedures, methods of operation, or mathematical concepts<sup>1</sup>.

In *Designer’s Guild v Russell Williams Textiles Ltd* (2000) WLR 2416 (HL) (UK).

It was held that:-

“Certain ideas of a literary, dramatic or artistic nature may not be protected because although they are ideas of a literary, dramatic or artistic nature they are not original or so common place as not to form a substantial part of the work. It is on this ground that the mere notion of combining strips and flowers would not have amounted to substantial part of the plaintiff’s work. At that level of abstraction the idea though expressed in the design would not have represented sufficient of the author’s skills and labour as to attract Copyright protection.”

This Dicta resonates well with my perspectives to the case *in casuvis-a-vis* the promotional proposal highlights *a modus operandi* which is so common place that even the plaintiff affixed to his report adverts of the same promotions held in other countries. Page 15 of the defence consolidated bundle of documents defendants indicated to plaintiff’s that they were working with another partner on the provision of Mega Promotions. Hence the subject matter of promotions is an open one and any person is free to choose it and develop it in his/her own manner.

Where two writers write on the same subject similarities are bound to occur because the central idea of both is single but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy<sup>2</sup>.

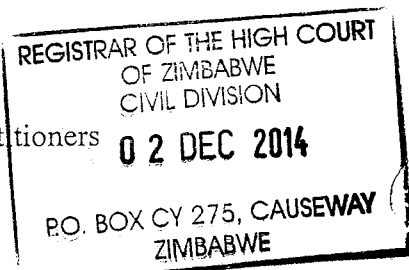
The treatment of the Mega Promo concept as enunciated in the Agreement between Telecel and ARPU Telecommunication Services “ARPUT” is different from the plaintiff’s proposal on Mega Promo.

The plaintiff’s work is therefore not protectable under Copyright.

In the result the plaintiff’s claim is hereby dismissed with costs.



*Donsa Nkomo & Mutangi Legal Practice*, plaintiff’s legal practitioners  
*Honey and Blanckenberg*, defendant’s legal practitioners



<sup>1</sup>Article 9.2

<sup>2</sup> RG Anandi v MisDelux Films 1978 AIR 1613 (India)