**VELD CLIFF ENGINEERING (PVT) LTD T/A FIREMATIC CONSULTING ENGINEERS (represented by WATSONMURUVIWA)**

**VERSUS**

**FIREMATIC CONSULTING ENGINEERS (PVT) LTD**

**AND**

**VENSON GAMBIZA**

**AND**

**NOMTHANDAZO NGWENYA**

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO1 NOVEMBER 2013 AND 6 FEBRUARY 2014

*B. Sengweni* for the applicant
*G. Nyoni* for the respondents

Opposed matter

**MOYO J:** This is an application wherein applicant seeks an order in terms of Section 24(13) of the Companies Act [Chapter 24:03].

Applicant is Veld Cliff Engineering (Pvt) Ltd t/a Firematic Consulting Engineers. First Respondent is Firematic Consulting Engineers (Pvt) Ltd. 2nd and 3rd Respondents are directors in the 1st Respondent. The facts of the matter which are not in dispute, are that 1st Respondent used to be a director in the Applicant. 3rd Respondent used to be an employee and a branch manager in the Applicant.

Since January 2005 the Applicant's company used the trading name Firematic Consulting Engineers. On 17 July 2012, 1st Respondent was registered. On 18 July 2012, 3rd Respondent resigned from the Applicant. On 30 August 2012, 2nd Respondent resigned from the Applicant. From 2005 the Applicant Company used the trading name Firematic Consulting Engineers for all purposes as evidenced by Annexure A being the VATregistration certificate with the Zimbabwe Revenue Authority. Applicant's case is that 2nd and 3rd Respondents registered a company in a

name that the Applicant company is trading in and they are engaged in exactly the same business that the Applicant company is engaged in. Applicant contends that 1st Respondent's name is thus likely to mislead the public and cause economic harm to the Applicant. On the other hand, Respondents contend that Section 24 (13) of the Companies Act provides that "The court", meaning applicant should have proceeded by way of a court application not a chamber application." This view is incorrect as the definition of court is not given in the Companies Act [Chapter 24:03] and in the High Court rules, Order 1 Rule 3 thereof the rules specifically state that "in these rules", so that meaning can not be extended to a situation beyond the High Court civil rules. It is in these rules that the definition of a court application and a chamber application are given.

Respondents further contend that applicant has alternative remedies in the form of either instituting an action of passing off, or proceeding in terms of Section 24(7) as read with Section 24(10) of the Companies' Act [Chapter 24;03]. Respondents further contend that Applicant is not registered as Firematic Consulting Engineers but that 1st Respondent is, therefore Applicant has no claim whatsoever to a name they did not protect through registration with the Companies office.

Section 24 (13) of the Companies Act [Chapter 24:03] provides as follows:-

> "The court may, at any time, on application by any person, order a company to change its name within such period as may be specified by the court on the grounds that the name of the company.
>
> (a) is likely to mislead the public or gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public, or
> (b) is likely to cause damage to any other person."

Respondents contend that applicant has an alternative remedy either through the common law action of "passing off" or in terms of Section 24(7) of the Companies Act [Chapter 24:03].

Section 24 (7) of the Companies Act provides as follows:-

> If the Registrar, after due enquiry and considering any evidence that may be placed before him, considers that a company is registered whether originally or by reason of a change of name, by a name which:-
>
> (a) in his opinion, is likely to mislead the public or to cause offence to any person or class of persons or is suggestive of blasphemy or indecency, or

(b) he considers to be in conflict with the provisions of this Section, or undesirable for any other reason, he may order the company in writing to change its name, and the company shall thereupon do so within a period of six weeks from the date of the written order or such longer period as the Registrar may see fit to allow:
Provided that the Registrar may not make such an order if a period of more than 12 months has elapsed since the date of the registration of the company or the change of name of the company, as the case may be."

1st Respondent was registered on 17 July 2012, this application was brought on 15 January 2013, well within the 12 months given to the Registrar to act in terms of Section 24(7) of the Companies Act [Chapter 24:03].

It is the Respondent's contention that Applicant has not satisfied the requirements of an interdict as they have an alternative remedy in terms of Section 24(7) of the Companies' Act. In the case of *ZESA staff Pension fund v Mushambadzi* SC 57/02 ZIYAMBI AJA (as she then was), stated the requirements for a final interdict as follows:

(1) a clear right which must be established on a balance of probabilities,

(2) irreparable injury actually committed or reasonably apprehended.

(3) the absence of a similar protection by any other remedy.

The applicant upon realising that the Respondents were then using a name that is likely to cause it prejudice or harm, should have first sought to find protection in the remedies available to it like Section 24(7) of the Companies Act through lodging of a complaint with the Registrar as in seeking a final interdict applicant would be expected to meet all the requirements of an interdict, including the absence of any other protection.

Applicant's counsel unfortunately fails to address the third requirement for an interdict, that is to say that Applicant did not have an alternative remedy at the time that these proceedings were instituted.

In the answering affidavit, *ad para* 2.3 wherein the issue of the availability of an alternative remedy was raised, applicant simply says:-

> "This is a matter which is so peculiar by the Respondent's apparent desire to mislead the public through the case of Applicant's trading name that the Applicant had no choice but to resort to the relief sought. Applicant reserves the right to choose the most appropriate remedy and it is for the court not the Respondent to determine whether or not such a remedy is sustainable at law."

Applicant's counsel, in his submissions does not address fully the aspect of the non-availability of another remedy. Whilst the Applicant may have satisfied the 1st two requirements for an interdict, as correctly pointed out by CHATUKUTAJ, in the case of *Chirenje v Vendifin Investments P/L and others* HH 4/05, the Applicant has a duty to satisfy all the requirements for an interdict, not some of them. It is the totality of all the three requirements that would win the Applicant an interdict in this court. Therefore, even if Applicant does satisfy the 1st two requirements for a final interdict, but the third requirement of a lack of any other alternative remedy is not satisfied. This clearly means that the Applicant would have failed to show or prove before this court on a balance of probabilities that he is entitled to the relief of a final interdict. Refer to *Mabhodho Irrigation Group v Kadye and others* HB 8/03, *L. R Boshoff Investments Pty Ltd v Capetown Municipality* 1969(2) SA 256 (c) at 267 A- F. This remedy does not fall within the mould of ordinary judicial remedies.

Accordingly, I find that the Applicant has failed to show before this court that he is entitled to the final interdict sought as he has not fully challenged the availability of, nor averred the absence of an alternative remedy. For this reason alone, this application accordingly fails. The provisional order granted by this court on 16th January 2013 is as a result discharged with costs.

*Messrs. T. Hara and partners*, applicant's legal practitioners
*Messrs Moyo and Nyoni*, respondent's legal practitioners