

SOUTH AFRICA / JUDGMENT

Homechoice v Lewis Stores (Pty) Limited (17166/2018) [2019] ZAWCHC 189; 2022 BIP 506 (WCC) (25 March 2019) [2019] ZAWCHC 189

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman

CASE / FILE NUMBER

17166/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: 17166/2018

In

the matter between:

HOMECHOICE

Applicant (in the main application)/

Respondent in this application

And

LEWIS

STORES (PTY)

LIMITED

Respondent (in the main application) /

Applicant in this

application

JUDGMENT

DELIVERED ON 25 MARCH 2019

BAARTMAN, J

- [1] The applicant seeks the striking out of certain affidavits and copyright agreements, in terms of Rules 30 and 30A, filed in support of the respondent's application for an interdict (the interdict application) against it. In addition, the applicant seeks, in terms of Rule 35(13) and (14), to compel the respondent to produce for inspection and copying documents referred to in the interdict application or which are required for purposes of responding to allegations contained therein. The applicant has not filed its answering papers in the interdict application.
- [2] On 14 September 2018, the respondent launched the interdict application which concerns unlawful competition, passing off and copyright infringement in respect of 7 specified works. The respondent alleged, in the interdict application that it had been established in 1985 and commenced as a mail order retailer selling homeware products to mass market consumers on credit. It claims to be the largest home shopping retailer in South Africa. Currently, the respondent supplies homeware and financial services to an increasing middle class via mail order catalogues, online platforms, call centres, sales agents and retail showrooms.
- [3] The applicant is alleged to have unlawfully cloned the respondent's core business through its 'Inspire business' and 'off the fruits of the respondent's labour' secured entry into the market as follows:
- '5.1 imitating [respondent's] bedding and other designs;
- 5.2 imitating the design and layout of the [respondent's] catalogue;
- 5.3 imitating the way in which the [respondent] bundles its bedding products;
- 5.4 imitating [respondent's] use of and naming conventions for tiers in relation to the bedding bundles being offered;
- 5.5 attempting to obtain confidential information of [the respondent], such as supplier details, from previous employees of the [the respondent]; and
- 5.6 airing television commercials similar to those aired by [the respondent]
6. In the process [the applicant] has also infringed the copyright which [the respondent] owns in the designs of its bedding. '

The Rule 30 and 30A application

[4] This application is directed at the respondent's claim that it holds copyright in the designs relevant to the interdict application. In support of that case, the respondent has put up the affidavits of the international designers from whom it allegedly acquired the

copyright. The applicant complains that those affidavits and the copyright agreements, I deal with each below, have not been properly

authenticated for use in a South African court. Therefore, the application to have the affidavits and agreements struck out, as it represents, so the submission went, an irregular step. In compliance with Rule 30A[1], the applicant has afforded the respondent 10 days to remove the causes of its complaint.

[5] The respondent maintains that this application is none other than a delaying tactic devoid of merit and that any complaint should be addressed as a point in limine in the applicant's answering affidavit. In addition, the respondent took the view that it would be for the court hearing the interdict application to determine whether the affidavits comply with the Rule and that court may in terms of Rule 63(4) allow the affidavits.

[6] Rule 30 of the Uniform Rules of Court provides:

'30 Irregular proceedings

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule
 - (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if - ...
 - (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
 - (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.'
- [7] It is in issue whether the respondent took a step when it filed the affidavits and agreements that form the subject of this application. The respondent alleges that the step was the filing of the notice of motion in the interdict application and that the filing of affidavits and annexures to the founding affidavit is not a step as envisaged by the Rule. The submission continued that the Rule is directed at procedural irregularities and not substantive deficiencies in evidence. The respondent submits that the deficiencies complained of were substantive deficiencies in evidence and could not be addressed through this application.

- [8] Complaints directed at the lack of authentication are a procedural matter. It is settled law that the rules relating to authentication are not mandatory in the sense that only strict compliance will suffice[2]. Rule 63 prescribes the way documents executed outside the Republic should be verified to be used within the Republic. The Rules are for the court; therefore, a court has discretion[3] to condone non-compliance if there is other evidence indicating that the document is what it purports to be.
- [9] The applicant alleged that the affidavits of Akira Mineed (Mineed), Sanip Prajapati (Prajapati), Geoffrey Haley (Haley) and David Zhang (Zhang), purportedly signed and commissioned in Japan, India, England and China respectively, did not comply with the Rules and should be struck out.
- [10] The applicant further complained that 'copyright assignment agreements' annexed to the founding papers were not verified or authenticated as prescribed by the Uniform Rule of Court 63. The impugned documents are fundamental to the respondent's copyright claim which could fall away in its entirety if the challenge succeeds. It follows that the applicant will be prejudiced if required to deal with affidavits and copyright agreements which on the face of it are not compliant and cannot be used in evidence in a South African court.

I deal with the impugned documents below.

The affidavits are allegedly non-compliant

- [11] The applicant alleged that there has been no explanation from the respondent as to why the applicant should accept that the 'Documents were in fact signed by the persons in question and duly commissioned by persons with the requisite authority to act as commissioners of oaths.'

- [12] The respondent submitted:

'I, deny

42.2 ... that any of the relevant signatures inauthentic - in other words, based on my interactions concerning the signatures in question, I am satisfied that the person who purports to have signed each of the relevant documents actually did so; ...

44.1 that the founding papers [interdict application] violate Rule 63;

44.2 that any of the relevant signatures are inauthentic; and

44.3 do not admit [applicant's] interpretation of the relevant documents.'

- [13] The deponent to the respondent's answering affidavit (Brandani) has unfortunately not indicated what her 'interactions concerning the disputed signature' were. I am therefore unable to determine whether that would be sufficient to supplement any non-compliance with the Rules to the extent that the alleged deficiencies do exist.

[14] I deal with the criticism levelled against each affidavit in turn. Mineeda's affidavit was alleged to be lacking in that:

'26.1 The affidavit of Mineeda was supposedly commissioned by a person who is indicated by a simple stamp to be a notary in Koyoto, Japan.'

[15] At the bottom of the affidavit, above Mineeda's typed name, the following appears:

'I certify that the above signature is the true signature of Akira Mineeda and that he confirmed to me,

1. That he knows and understands the content of the affidavit;
2. that he considers the contents to be true and correct;
3. that he considers it to be binding on his conscience.

The deponent then raised his hand and uttered the words "I confirm that the contents of the affidavit are true" in my presence at Kyoto Japan on this 29th day August 2018.

Kazuo Amano and his designation as Notary Public followed by a rubber stand repeating his name followed by Kyoto District, Legal Affairs Bureau, Notary, Kyoto Japan.'

[16] Although provision was made for the business address, it was left open and the rubber stamp used does not provide the address or any contact details. The commissioning is wanting.

[17] The applicant alleged that Prajapati's affidavit was non-compliant in that it:

'26.2 ...was supposedly commissioned by a person indicated by the stamp to be a notary in Gujarat, India;'

[18] At the bottom of the affidavit, below Prajapati's signature and his typed full names, the following appears;

'I certify that the above signature is the true signature of Sandip Prajapati and that he acknowledged to me,

2. that he considers the contents to be true and correct; and
3. that he did not wish to take the prescribed oath.

The deponent then uttered the words "I truly affirm that the contents of this affidavit are true", in my presence at Kamerej-Surat on this 18 August 2018.

Dhiraj L. Patel, Advocate - Notary, Diwa Ami, Maninagar, Surat Road, Kamrej Char Rasta, Dist:Surat- 394 18S. (apparently a rubber stamp). Next to it designation Notary Public hand written under that Notarised for Sandip Prajapati, a signature follows by the rubber stamp details, Dhiraj L. Patel, Notary, Surat District, State of Gujarat,

Reg No. 5498118, date 18 Aug 2018, next to these details is a rubber stamp depicting Notary Govt of Gujarat (India) Dhirajbai L Patel (India) Reg No 357/2002

Handwritten underneath:

X witness, Sarni Bhai Sammurh Bhei. Panchal, At. Van, TA. , Dist Surat, M 982 54 34924, Sarni Panchard.

Next to a rubber stamp indicating- My Commission Expires on 25 -6- 2022, Dhiraj L. Patel, Advocate - Notary.

The effort is ended with an official seal (red) depicting Notary Govt of Gujarat (India) Dhirajbai L Patel (India) Reg No 357/2002.'

[19] There is sufficient detail to conclude, on a preponderance of probability, that Mr Patel, an advocate in India, is a commissioner of oaths and that the affidavit was actually signed as purported. The objection to this affidavit has no merit.

[20] The applicant complained that Haley's affidavit was non-compliant in that it:

'26.3 ...was supposedly commissioned by someone who has indicated via a handwritten insertion that he is a solicitor in Huddersfield, West Yorkshire, England.'

[21] There has been no attempt to bring Haley's affidavit within the prescribed form[4]. In the absence of any other evidence, this affidavit does not pass muster. I intend to give the respondent a further opportunity to rectify the shortcoming.

[22] The complaint against Zhang's affidavit was that:

'26.4....[it] was supposedly commissioned by someone who merely indicted that he or she is in "sales", and who professes thereby to be a commissioner of oaths; and

26.5. the signatures on the contracts in question were not authenticated at all. '

[23] Incredible as it may seem, the commissioner professes to be one by virtue of being in sales. As indicated above, Brandani alleges to have information that could assist in determining whether the disputed signatures are what they purport to be, but she has not disclosed that information. The submission that Zhang's affidavit is compliant is without merit.

[24] The applicant's further complaint about Zhang's affidavit is:

'28....[the] affidavit was clearly written by an English first language speaker, and parts of that affidavit, at least, may not be readily understood by someone such as Zhang who, as his affidavit indicates, has seemly always been resident in China and has thus conversed throughout this life in a different language with a different alphabet. It is accordingly unclear how much of his affidavit Zhang would have understood .. .'

- [25] South Africans, with our multilingual background, should have no difficulty in accepting that a Chinese national, who is a product manager for a company that specialises in surface designs and is a manufacturer and exporter that works closely with its associated company in the USA, is conversant in English. In addition, Brandani interacted with Zhang in English and is able to confirm that Zhang has a command of the language. There is no merit in this ground of complaint.
- [26] It follows that the applicant should succeed in respect of the above affidavits excepting that of Prajapati.

The copyright assignment agreements

- [27] Copyright agreements must be in writing in terms of South African law. The respondent relies on copyright agreements for its copyright infringement case. The agreements in issue are annexures HC30- 33(pp426-448) and SC 3(pp 1058-1060) to the founding papers. It follows that those agreements are essential; the applicant therefore sought to have the agreements verified or authenticated before dealing with them in its answering papers. The respondent's attitude is that the applicant should raise its objection in the answering papers and that it will respond in reply is not a bar to these proceedings. The applicant, however, is entitled to know what case it is required to meet before filing its answering affidavit; as indicated above, without the agreements, the applicant does not have to meet a copyright case. The prejudice is self-evident.
- [28] The first agreement in issue purports to have been entered into on 6 August 2018 and was signed in the USA by Susan Wang, duly authorised representative of the assignor. On the same day, it was

signed by a duly authorised agent of the assignee. In a similar vein, the copyright assignment agreement entered into on 7 August 2018 was signed in Cape Town and France. The deponent to the respondent's founding papers, in the interdict application, said the following about the agreements:

'219. Joy (geometric)- The [respondent] purchased the Work for this design ... a design company in China. The artist who created the Work were employees of SCM and its associate company E&E Co. respectively (I refer to the affidavit of David Zhang in this regard)

...Accordingly the copyright vested in E&E and SCM....which, in turn, assigned the copyright in the Work to applicant. Copies of both these assignments are HC30 and HC31 respectively.'

[29] The respondent alleged that it had:

'219.3 .. .purchased [HC32] from Tempo Studio Design, a design studio in France....an independent contractor of Tempo ...assigned the copyright in these Works to Tempo. Tempo, in turn, assigned it to the [respondent]. ..

219.4 ... purchased [HC33] .. .from Elka Studio, a design based in France. Elka assigned the copyright to the [respondent].'

[30] As indicated above, Zhang's affidavit does not comply with the Rules for purposes of use in South Africa; similarly, the agreements do not comply with the Rules referred to above. Although, there is no substantive enactment which lays down that a document executed in a foreign country must be authenticated, there is a long-standing practice of requiring such authentication[5]. In our constitutional dispensation, the practice serves to protect the rights of litigants to a fair hearing and prevents litigants from having to engage in spurious applications with no legal basis. As indicated above, the entire copyright case depends on the agreements; if struck out/corrected at this early stage, it could curtail litigation.

[31] The copyright agreement signed on 3 August 2018, SC3, in Paris suffers from a similar defect in that it was not authenticated. The respondent's response to the complaint was as follows:

'42.1 I, deny that the founding papers violate Uniform Rule 63 in any way-

42.2. deny that any of the relevant signatures are inauthentic- in other words, based on my interaction concerning the signatures in question, I am satisfied that the person who purports to have signed each of the relevant documents actually did so;

42.4. deny that [the applicant] has had no option other than' to bring the Rule-30 application - it was entitled to withdraw its Rule-30 notice and tender any wasted costs. In addition, it should and could have followed the Rules by raising a point in limine in its answering affidavit and pleading over.

43. ... The main application is not, however, restricted only to copyright. It is far broader, and involves unlawful competition and passing off. Even if the impugned documents and related allegations were struck out of the founding papers, [the respondent's] unlawful competition and passing-off claims would still need to be addressed. This is a further ...that the impugned part of the founding papers cannot be prejudicial to [the applicant].'

[32] The respondent seems to agree that if the impugned documents are struck out, its copyright case will suffer a fatal blow. It is so that the applicant had other options instead of this application, but that does not mean that this option was not open to it. The applicant is entitled to insist that the basic rules of presenting a document be complied with. The respondent had the opportunity to remedy the obvious defects but instead chose not to. The allegation by Brandani, the respondent's attorney, that her interaction with the deponents satisfied her takes the matter no further

- she does not say what those interactions were.

[33] It follows that the agreements stand to be struck out and the respondent given an opportunity to rectify. This is not a conclusion arrived at lightly but in the circumstances of this application - where the entire copyright infringement application will disappear - the respondent's attitude is regrettable.

The Rule 35(12)/35(14) Notice

[34] The applicant requested the production for inspection and copying of 25 documents it alleged were referred to in the founding affidavit to the interdict application. The respondent has denied that the Rule finds application as these are motion proceedings; however, in an attempt to prevent delay, it provided 20 of the required documents. This application pertains to the remaining 5.

[35]

.

The general rule is that discovery is not applicable to motion proceedings unless specifically ordered by a court[6] The essential feature of discovery is that the person requiring discovery is in general only entitled to discovery once the battle lines have been drawn and the legal

issues

established[7]. It is settled law that it is only in exceptional circumstances that the Rules of discovery should be made to apply to application

proceedings. However, access to information held privately or by government is necessary for the protection of rights and the fair

resolution of disputes in a court[8]. Therefore, I am required to interpret the Rule under discussion to give effect to the spirit, purport and objects of the Bill of Rights.

[36] An applicant who proceeds by way of application does so at the risk of the Plascon Evans rule operating against it[9]. The applicant has submitted that it needed the requested information to answer the allegations in the founding affidavit. As indicated above, the founding papers run to 1 077 pages. I do not consider the mere volume of the papers relevant in deciding whether exceptional

circumstances exist; instead, the complexity of the matter is a factor.

[37] The relief sought is also a relevant consideration - it is final in effect and would, if granted, have far reaching consequences for the applicant. The following relevant relief is claimed:

'... That the Respondent be interdicted from infringing the copyright of the applicant in the Works listed on A by

1.1 reproducing the Works;

1.2 making adaptations of the Works;

1.3 producing the Infringing Works listed in A;

1.4 marketing, selling, offering for sale or distributing any item depicting the Works, the Infringing Works or any other works substantially similar to the Works;

1.5 producing, circulating and/or using marketing materials depicting the Works, the Infringing Works or any products depicting the Works or the Infringing Works or

1.6 in any other manner.

2. That the respondent be ordered to remove from its website (s) and from all social media platforms within its control all images of the Infringing Works and/or products depicting the Infringing Works.

3. That the respondent be ordered to deliver up to the applicant for destruction,

3.1 all copies of its catalogues and other printed materials, depicting any of the Works or the Infringing Works;

3.2 each item of its bedding and/or textile products, and any other products, depicting any of the Works or the Infringing Works.

4. In the event that the respondent refuses, alternatively, fails to deliver up for destruction all the items referred to in 3.1 and 3.2 above, within one month of this order being granted,

authorising the Sheriff of this Honourable Court or any other such persons appointed by him, including the members of the South African Police Service, to attend at the premises of the respondent, on the following day, to remove all such items. '

[38] Annexure A specifically pertains to 'Works (as identified in the founding affidavit)' and lists 7 works: Royal Garden, Christina, Nicolette, Joy (geometric design), Joy (floral design), Whitney and Tatum. A second category identified as 'Infringing works (as identified in the founding affidavit)' lists 7 works: Cecilia, Bianca, Alyssa, Romeo, Robynne & Ruby, Olivia and Tamara.

The requested documents

(39) Firstly, the applicant seeks:

'Documents constituting, or indicating, the purchases of 'between 20-30 artworks each year from artists based in various locations in Europe, the United Kingdom and the USA; including the "purchase [of] the copyright" in relation thereto, as referred in paragraph 71.'

[40] The discovery sought is vague and bears no relation to the relief sought. The respondent has been in existence for 3 decades, therefore the request, unqualified, pertains to the entire period. The respondent has correctly refused this request.

[41] Secondly, the applicant sought:

'Invoices or other documents evidencing the {respondent's] subscription to the "various forecasting platforms such as WGSN", as well as the forecasts received from such platforms during the last completed financial year (current forecasts are not required) as referred to in para 73.2. '

[42] The respondent refused the request as follows:

'No document is referred to in paragraphs 71, 73.1, 73.2 and 78. 7 of the founding affidavit.'

[43] The applicant has not indicated how this information is necessary for it to meet the case in respect of the categories listed in annexure A

- the answer is not obvious. Therefore, it is important to bear in mind that the starting point to this enquiry is that discovery is not applicable to motion proceedings. In respect of this request, seen against the case the applicant has to meet, exceptional circumstances cannot be said to exist.

[44] Thirdly, the applicant seeks:

'Invoices or other documentation evidencing the costs "of around R2.5 million per annum" to attend international trade fairs, referred to in [73.1] of the founding affidavit in the main application (initially requested at [12] of the Rule 35(12)/(14) notice).'

[45] The request is made pursuant to the following allegation:

'73. The success of the applicant's business is dependant on its product offering (including the uniqueness of the design applied to its bedding) and price. The applicant offers unique designs tailored to its market. To achieve this the applicant:

73.1 regularly attends international trade fairs in Europe, North America, South America and Asia at a cost of around R2.5 million per annum;'

[46] The allegation of copyright infringement, since mid-2017, pertains to 7 identified works. In those circumstances, the request is simply too wide. The applicant does not explain how travel expenses spanning many years will assist it in meeting the case in respect of the 7 identified works it is said to have infringed since 2017.

[47] Fourthly, the applicant requested:

'The [respondent's] approval of the final Whitney design on 12 April 2017 referred to in [78.7] of the founding affidavit in the main application ... '

[48] In paragraph 78.7, the respondent alleged that:

'78.7 [The respondent] approved the final design on 12 April 2017.'

[49] Ms Robinson SC, the respondent's counsel, submitted that this information is not relevant to 'whether [the applicant] unlawfully cloned [the respondent's] core business.' I agree.

[50] Fifthly, the applicant requested:

'Documentation which indicates or confirm what is the "most successful product of [the respondent]", as mentioned in para

[192] of the founding affidavit in the main application.'

[51] The respondent made the following allegation in paragraphs 191 and 192:

'191. The [applicant] entered the market in competition with the applicant. It offers the same product to the same customer.

192. The [applicant] set out to do so during approximately September and October 2017, when it attempted to obtain details of the [respondent's] suppliers and when it bought considerable quantities of the [respondent's] bedding products as samples to enable it to replicate the applicant's designs, the combination of its product offering and the composition thereof. It is, accordingly, not surprising that the first Inspire catalogue follows on the [respondent's] September 2017 brochure and that its second brochure features, on the front page, the most successful product of the [respondent].'

[52] The applicant has not indicated how the requested information will assist it in meeting the case that it purchased and replicated considerable quantities of the respondent's bedding, and therefore its first brochure follows on the respondent's September 2017 brochure. Similarly, the applicant has not indicated how the information will assist it in answering the case that its second brochure features the applicant's product on the front page. The gratuitous comment that it is also the respondent's most successful product does not take the cloning allegation any further.

CONCLUSION

[53] I, for the reasons stated above, make the following order:

(a) The Rule 30 and 30A application succeeds. The following documents in the founding papers of the applicant in the main application ('HomeChoice') are struck out:

(i) The affidavits of Akira Mineeds (main record pp1034-1045), Geoffrey Haley (pp1061-1072) and David Zhang (pp1073- 1077).

(ii) The copyright assignment agreements at pp 426--448 (HC30 to HC33) and pp1058-1060 (SC2).

[54] HomeChoice (the applicant in the main application) is afforded an opportunity of delivering properly authenticated affidavits and agreements in place of the documents that have been struck out within 30 days from the date of this order.

[55] HomeChoice is directed to pay the costs of this application, including the costs consequent upon the employment of two counsel.

- [56] The application in terms of Rule 35(13), read with Rule 35(14) is dismissed with costs, including the costs of two counsel.

BAARTMAN J

- [1] '30A Non-compliance with rules (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out. (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.'
- [1] '30A Non-compliance with rules
- (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.
- (2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.'
- [2] *Chopra v Sparks Cimemas (Pty) Ltd and Another* 1973
- (2) SA 352(0) at 358 B-E.
- [3] Rule 63(4) of the Uniform Rules of Court.
- [4] Rule 63(2)(e) and (4) of the Uniform Rules of Court.
- [5] *Superior Court Practice*, Volume 2 at D1 - 744.
- [6] *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003
- (6) SA 190 (SE) at aras 4 and 5.
- [7] *Superior Court Practice*, Volume 2 at D1 - 459.
- [8] Section 1(c) and 32 of the Constitution of the Republic of South Africa Act, 108 of 1996.
- [9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984
- (3) SA 623 (A).

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