

SOUTH AFRICA / JUDGMENT

Pick n Pay Retailers v Gomwe and Another (44832.2019) [2021] ZAGPJHC 879 (10 November 2021) [2021] ZAGPJHC 879

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wepener

CASE / FILE NUMBER

44832.2019

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IN THE COMMERCIAL COURT OF SOUTH AFRICA

GAUTENG DIVISION HELD AT JOHANNESBURG

CASE NO.: 44832.2019

DATE: 2021.11.10

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES : NO

REVISED

In the matter between

PICK N PAY RETAILERS

Applicant

and

G GOMWE & C TOFIELD

Respondent

J U D G M E N T

WEPENER, J: The applicant issued an application in which it seeks an order directing the respondent to produce certain documents. This is what

Rule 35 provides a party may do.

As far as the attorney for the applicant in the affidavit sets out facts and she is under the impression that the applicant has the right to bring the application by virtue of what I as presiding Judge had said during a case management conference, she is wrong. I gave no permission that allowed the parties to do what they sought to be expedient in terms of the rules of the Commercial Court. I gave no direction that the applicant is entitled to bring any application outside of the applicable Rules. It is still bound by the rules that govern these proceedings.

If it is so recorded and I did not check that I so authorised any special procedures, that minute is wrong. The applicant is obliged to follow the applicable rules. In terms of the rules of the Commercial Court, discovery is not the norm. It allows for targeted discovery. Once the matter falls under the Commercial Court rules, Rule 35 procedure is qualified as per the rules of the Commercial Court.

The application before me purports to be in terms of the ordinary rules of Court and not the rules of the Commercial Court, probably due to the attorney's confusion that I permitted such an application. The attempt to find a "direction" by me, that it was open for the applicant to revert to the ordinary rules, is wholly misplaced.

When bringing an application in the Commercial Court, certain well-known principles regarding discovery, however, remain applicable. The notice of motion in this matter seeks an order to produce documents. It then attaches a hearsay affidavit of the attorney and not the person with knowledge of the facts regarding "several documents still have not been disclosed by the plaintiff".

After some further explanations it is said that certain written orders for products and/or check-out packaging, delivery notes and invoices referred to in each of the weekly statements referred to in ANNEXURE POC6FP234 and ANNEXURE POC9FP414 of the pleadings are sought.

What we do know is that the plaintiff discovered, thousands of documents, mostly electronically. It is further so that the applicant has in the past sent a notice in terms of Rule 35(12) and that the respondent had responded to that notice. The Rule 35(12) notice was dated in July 2020 which, as I was told, was duly responded to. In addition, there is an affidavit filed by the respondent that states that the plaintiff has delivered to the defendants all the documents referred to in the schedule that it has in its possession. It says that the documents (which are numerous), were delivered on a digital platform. There seems to have been some difficulties with access to the documents in this way but in these modern days of digitally hearing cases and delivering documents, one must conclude that the delivery of thousand of documents in a digital form is justified and constitutes compliance with a duty to discover and deliver documents. At the time of sending the digital version of the documents, the plaintiff advised that certain documents had been archived but that these will still be made available when recalled from the archive.

The applicant's attorney insisted that hard copies of the digitally provided documents be provided. This is hard to understand. I am of the view that the attitude was unreasonable. Despite this the respondent tendered to deliver the documents electronically but received no initial response to that letter. That in my view is also a reasonable action on behalf of the plaintiff. The tender was eventually accepted. In the meantime the plaintiff continued to retrieve documents from the archives. As it did so, it made the documents available to the applicant.

On 2 August 2021 and before Meyer J, all seemed to be at an end as it was agreed that the plaintiff was to file its relevant documents duly indexed and paginated by 17 September 2021 and in hard copy and that the defendants to supplement the bundle if necessary. The plaintiff complied a few days later but nothing turns on that. There is now a change of heart and the defendants again seek discovery.

The affidavit filed by the respondent is clear. The plaintiff delivered to the defendants all the documents referred to in the schedule and that are in its possession. In this regard I quote from the affidavit:

"The fact of the matter is that the plaintiff has delivered to the defendant all documents referred to in the schedule that are in his possession or under his control. In summary, it has made three types of disclosure of documents to the defendants in this process:

1. First the plaintiff delivered both electronically and by external hard drive, all the documents that the defendants requested in the discovery notice that the plaintiff had in its possession at the relevant time. The deliveries took place on 2 March 2020, 17 July 2020, 22 July 2020 and 10 May 2021.
2. Second, the essential documents on which the plaintiff relies, were served on the defendant's attorneys on 21 October 2020 which included inter alia the relevant weekly statements, relevant invoices, SAP reports, debt reconciliation reports, relevant agreements and certificates. Meyer J's secretary was also copied in the service emails; and
3. Third, the plaintiff delivered to the defendant's a hard copy trial bundle containing the plaintiff's documents for trial in accordance with the discussions and agreements at the third case management meeting".

The plaintiff has disclosed and delivered not only all the documents that it has in its possession or under its control as requested by the defendants but also all the essential relevant documents that it relies upon to prove its case which documents have in addition to having been delivered on various occasions also been included in the trial bundle that was delivered to the defendants in hard copy.

As to the written purchase orders, the ordering of stock takes place on SAP system. There are no printed or physical orders. The defendants know or reasonably ought to have known that this is so as they ran the store. In addition, on 1 April 2021, the plaintiff served its witness statements in terms of the directive in which one of plaintiff's witnesses describes the process of the ordering and delivery of stocks through the SAP system irrespective of whether delivery is effected to the

franchisee store by the plaintiff's distribution centre or a third party vendor. This confirms their position.

In any event, the plaintiff on a date which I am uncertain of, probably May 2021, clarified and placed on record that there were no written or physical purchase orders.

Therefore, the plaintiff has provided the defendants with all documents referred to in the schedule to the notice of motion that exist and are in its possession or under its control. The plaintiff has even provided additional documentation to the defendant such as the SAP reports that reflect every transaction included in the claim. This in my view is the end of the matter and the application falls to be dismissed with costs.

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WEPENER, J

JUDGE OF THE HIGH COURT

DATE: 26/01/2022

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Prepared on 10 October 2026 · Esheria