



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: ☒

Date: **30th August 2018** Signature: _____

CASE NO: 2017/24696

In the matter between:

YOUNGMAN, CLAIRE ELIZABETH

First Plaintiff

YOUNGMAN, ASHLEY

Second Plaintiff

and

KIDZ EMPORIUM CC

Defendant

JUDGMENT

ADAMS J:

[1]. This is an opposed interlocutory application in terms of Uniform Rule of Court 35(7) by the first and second applicants, who are the first and second plaintiffs in the main action, against the respondent, which is the defendant in

the trial action. In this application, the plaintiffs seek an order compelling the respondent to properly reply to the applicant's notice in terms of Uniform Rule 35(3) which required the respondent to make available for inspection the following documentation:

'Copies of all financial documents, management accounts and all other information and / or documentation concerning the financial status of the franchise dating back at least 24 months prior plaintiffs entering into the franchise agreement with the defendant, in order to quantify the true value of the franchise situated at The Mall of the South and / or the true value of the defendant's brand for the area of Johannesburg South and / or franchise which operated in Genvista'

[2]. The defendant's formal response to the plaintiffs' notice in terms of 35(3) was in the form of a further 'discovery affidavit' to the effect that defendant is not in possession of any documents other than those documents mentioned in the defendant's discovery affidavit. The said affidavit was deposed to by the Chief Operations Officer of the defendant, who confirmed under oath in the aforementioned affidavit that the defendant does not have in its possession any of the documents or copies thereof required by the plaintiffs in their rule 35(3) notice.

[3]. The deponent goes on to explain in the said affidavit that the reason for this is the fact that the plaintiffs had purchased the operating territory under the defendant's brand for Johannesburg South from a third party who owned the franchise in question. He furthermore reiterates that he, and therefore the defendant, does not have access to the financial documents of any of the franchisees of the defendant. The deponent apparently attempted to make contact with the third party from whom the plaintiffs had purchased the franchise, with a view to complying with the plaintiff's rule 35(3) notice, but those attempts were to no avail. In conclusion, the deponent confirms that the defendant is not in a position to discover and / or produce the requested

documents and he is also unable to state in whose position these documents presently are.

[4]. The plaintiffs dispute the foregoing and deny that defendant is not in possession of the documentation requested. In the supplementary founding affidavit in support of this application in terms of rule 35(7), the plaintiffs support their aforementioned view by reference to a communication which they received from the previous franchisee, from whom they had acquired *via* the defendant the franchise. In this communication the said person, one Natasha Fernandez Nassif, confirmed with them that whilst she was a franchisee she had on a monthly basis transmitted to the defendant 'monthly sales reports', as she was required to do in terms of the franchise agreement. The high watermark of the case of the plaintiffs on this aspect of the matter is that the defendant, by all accounts, should at least be in possession of the monthly sales reports, which is confirmed by the *communiqué* from the previous owner. On the papers before me and at very best for the plaintiffs, the defendant probably is in possession of these sales reports. However, there is no evidence to suggest that the defendant is also in possession of the financial statements of the previous franchisee.

[5]. The respondent opposes this application to compel inspection of the documents and it does so on precisely this basis, namely that the court cannot and should not go behind the affidavit of the defendant and find, contrary to what is stated in the discovery affidavit, that the documents do in fact exist and are in the possession of the defendant.

[6]. It is not disputed that the documents requested 'may be relevant to any matter in question'. The opposition to the relief sought is not to challenge the plaintiffs' entitlement to the production of the required documents, but rather to

excuse the non – production thereof on the grounds that they are not in the defendant's possession.

[7]. Recently Sutherland J had occasion to consider a similar situation in this division in the unreported judgment in *Dube v Member of the Executive Council for Health, Gauteng Province*, Case no: 6279/17. In that matter, the Judge held as follows:

'The reason why the documentation had not been discovered is that the staff of the hospital, so it is alleged, cannot find the material. There is a tender to discover whatever is found, when it is found. The argument on behalf of the applicant is that this excuse is unacceptable, emphasis being placed on the obligation in terms of law to keep records and the prima facie breach of that duty is alleged.

In my view the *de facto* position is deplorable and the idea of a breach of statutory obligations is on the probabilities in my view a plain fact. Notwithstanding these considerations, the ambit of rule 35 of the uniform rules is limited to imposing a duty on a litigant to discover what it has got.

In circumstances where it ought to have a document but cannot access it and may even confess to not knowing whether or not it still exists, and is still in its possession, the duty imposed by rule 35 requires a party merely to frankly declare what the true state of affairs is at the time that discovery is demanded. Ostensibly that is what the respondent has done. Assuming that the defendant / respondent is rightly to be rebuked for its poor record keeping it has not violated rule 35 by stating that it cannot lay its hands on the relevant documentation.

In the absence of facts from which I can on these papers infer the affidavit of the defendant is untruthful, the plaintiff in such circumstances must unhappily accept the position as described, however disgraceful the conduct of the respondent, objectively, may be. Rule 35 itself plays no role in the disciplining of state officials to perform their statutory duties. There

may indeed be other remedies in order to compel compliance with those statutory duties but they do not fall within the ambit of rule 35.

In the circumstances I have taken the view that there is no useful purpose in granting the relief which is sought, which would achieve no more than to provoke a contempt application which would be readily answered by the same explanation which is proffered now. In the circumstances, therefore, the application must be dismissed.'

[8]. I respectfully agree with the sentiments expressed and the findings made by Sutherland J in the above – quoted passage. *In casu* a probability has not been shown to exist that the deponent to the defendant's affidavits are either mistaken or false in his assertions that the required documents, other than the monthly sales reports, are not in the possession of the defendant. In that regard see: *Richardson's Woolwasheries v Minister of Agriculture*, 1971 (4) SA 62 (ECD) at 67 D – F. It would therefore amount to a *brutum fulmen* to grant to the applicant the relief sought in this interlocutory application relative to the documents other the monthly sales reports.

[9]. As far as the sales reports are concerned, I am of the view that, on the probabilities, and notwithstanding the claim by the defendant to the contrary, these reports are indeed in the possession of the defendant or was at some point in time in its possession or under its control. The uncontested and uncontradicted evidence is that the previous franchisee has confirmed that she handed over to the defendant on a monthly basis the said reports. This evidence must be accepted in the absence of a version by the defendant on this aspect of the case.

[10]. In the circumstances, I am satisfied that the applicant has made out a case for the relief sought relative only to the monthly sales reports. A case has however not been made out in respect of the balance of the documentation.

Cost

[11]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[12]. In this matter the plaintiffs have had limited success in that they have been granted the relief sought only for one set of documents. There is however a further consideration which, in my view, is relevant to the issue of costs, and that is the dilatory manner in which the defendant dealt with discovery in this matter. The defendant formally replied to the plaintiffs' notice in terms of rule 35(3) some two days prior to the date on which the application to compel a reply to the said notice was to be heard and long after the application had been served on the defendant. We now know that that reply, in any event, was inadequate.

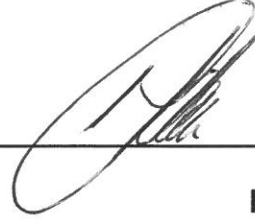
[13]. In the circumstances, I am of the view that it would be just, fair and equitable to order the defendant to pay the cost of this application.

Order

Accordingly, I make the following order:-

1. The first respondent be and is hereby directed, in terms of Rules 35(6) and 35(7), read with Rule 35(3), to make available for inspection by plaintiffs the monthly sales reports of the previous Franchisee for a period of 24 months preceding the date on which the franchise agreement was concluded between the plaintiffs and the defendant.

2. The defendant shall pay the first and second plaintiffs' cost of this application



L ADAMS

*Judge of the High Court
Gauteng Local Division, Johannesburg*

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| HEARD ON: | 23 rd August 2018 |
| JUDGMENT DATE: | 30 th August 2018 |
| FOR THE PLAINTIFFS: | Adv A J Reyneke |
| INSTRUCTED BY: | Y Incorporated |
| FOR THE DEFENDANT : | Adv Haywood |
| INSTRUCTED BY: | Roberts Incorporated |