



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

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

Date: 25 March 2025

Signature: [REDACTED]

Case Nr: 46975/2018 &
2021/30331

In the matters between:

SUPERCART SOUTH AFRICA (PTY) LIMITED

Plaintiff

and

VANESCO (PTY) LIMITED

Defendant

JUDGMENT

GOEDHART AJ:

Introduction

[1] The plaintiff and the defendant are competitors in the design, manufacture and supply of supermarket trolleys. They are also the two market leaders in this field in South Africa. The plaintiff alleges that it is the proprietor of a design registered in 2015 under the Designs Act 195 of 1993 (the Act), which the

defendant has unlawfully copied. The dispute concerns the plaintiff's 90-litre and 180-litre hybrid trolleys (collectively referred to as "the plaintiff's trolleys"). The trolleys are described as "hybrid", because the trolleys have a steel chassis onto which is a "plastic" basket is mounted. The "plastic" is a high-density polyethene, a thermoplastic polymer made from petroleum.

[2] There is a long litigation history, and little love lost between Mr Michael Wolfe, the founder of the plaintiff, and Mr Kenneth Case, the defendant's sole shareholder and director.¹ In this application, the plaintiff seeks an order compelling the defendant to make further and better discovery in both the 2018 and 2021 actions. The defendant, in turn, seeks an order striking out the plaintiff's replying affidavit and dismissing the compelling applications on the basis it was rendered moot when the defendant responded to the plaintiff's Rule 35(3) and (6) notices. The compelling applications in the 2018 and 2021 actions are substantially similar and the filing of affidavits in the two actions followed the same sequence and were thus heard simultaneously. In this judgment, I refer to both applications as "the application", albeit that the order will apply to both the 2018 and 2021 actions.

[3] The relevant background to the current application is summarised below.

¹ See *Supercart South Africa (Pty) Ltd v Vanesco (Pty) Ltd and another* 2024 (3) SA 550 (GJ).

The 2018 proceedings

[4] The 2018 action instituted under case number 46975/2018 concerns the plaintiff's 90-litre hybrid trolley, and combines three causes of action: an interdict for the statutory infringement of a registered design; an interdict (at common law) for the unlawful competitive copying by the defendant of the plaintiff's 90-litre hybrid trolley; and the statutory remedy of a reasonable royalty for the infringement. The 2018 action had its genesis in an enforcement application under section 35 of the Act,², which was then converted into a trial action pursuant to an application by the plaintiff in terms of Rule 6(5)(g). The plaintiff also obtained an interim interdict restraining the defendant from "making and/or disposing of" the hybrid 90-litre trolley within South Africa, pending the outcome of the trial.

[5] The defendant denies the plaintiff's allegations of design infringement. It contends that its conduct is not unlawful because the plaintiff's registered

² "35. **Proceedings for infringement.**— (1) *Proceedings for infringement of a design may be instituted by the registered proprietor.*

(2) *Before the registered proprietor institutes such proceedings, he shall give notice thereof to every licensee in respect of the registered design in question whose name is recorded in the register, and any such licensee shall be entitled to intervene as a co-plaintiff: Provided that no such notice is necessary in the case of a compulsory licence in terms of section 21.*

(3) *A plaintiff in proceedings for infringement shall be entitled to relief by way of—*

- (a) *an interdict;*
- (b) *surrender of any infringing product or any article or product of which the infringing product forms an inseparable part;*
- (c) *damages; and*
- (d) *in lieu of damages, at the option of the plaintiff, an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee or sub-licensee in respect of the registered design concerned."*

design was not novel or original as at the date of its registration, and that the design had therefore not been validly registered. The defendant counterclaims for the revocation of the registration of the plaintiff's design.

The 2021 proceedings

[6] The 2021 action instituted under case number 2021/30331 pertains to the defendant's 180-litre trolley. The plaintiff alleges that the defendant's 180-litre trolley is identical, or substantially similar to, the plaintiff's trolleys and that the defendant has reverse engineered and/or slavishly copied and/or used the plaintiff's trolleys as patterns or moulds. The plaintiff claims: a declaration of design infringement, an interdict against the design infringement, damages for design infringement, an interdict against unlawful competition and damages for unlawful competition.

[7] The defendant denies that the design was registerable under section 14 of the Act,³ because it was not new at the filing date, and denies that the plaintiff is entitled to the relief sought in the 2021 action.

³ "14. **Application for registration.**— (1) *The proprietor of a design which—*

(a) *in the case of an aesthetic design, is—*

(i) *new; and*
(ii) *original,*

(b) *in the case of a functional design, is—*

(i) *new; and*
(ii) *not commonplace in the art in question,*

Discovery history

[8] The defendant served its discovery affidavit in the 2018 proceedings in December 2021. It discovered its certificate of registration, six letters between the attorneys of record and the record of the motion proceedings. In the 2021 proceedings, the defendant discovered two documents, one of which was a letter exchanged between the attorneys of record.

[9] The plaintiff served notices in terms of Rule 35(3)&(6) calling for further and better discovery on 18 March 2022 and 25 August 2022 (“the plaintiff’s discovery notices”). Rule 35(3) provides that where a party believes that there are, over and above what has been discovered by the other party, additional documents which may be relevant to any matter in question in the possession of the other party, it may give notice calling upon that party to make the documents available for inspection in accordance with Rule 35(6) or to state

may, in the prescribed manner and on payment of the prescribed fee, apply for the registration of such design.

(2) *A design shall be deemed to be new if it is different from or if it does not form part of the state of the art immediately before the date of application for registration thereof or the release date thereof, whichever is the earlier: Provided that in the case of the release date thereof being the earlier, the design shall not be deemed to be new if an application for the registration of such design has not been lodged—*

(a) *in the case of an integrated circuit topography, a mask work or a series of mask works, within two years; or*

(b) *in the case of any other design, within six months, of such release date.”*

(i)

under oath within 10 days that the documents sought are not in that party's possession and state the whereabouts of the documents, if known.

[10] The defendant did not respond to the plaintiff's discovery notices and on 6 February 2023, the plaintiff launched its application to compel the responses.

[11] The defendant filed an answering affidavit to the plaintiff's discovery notices on 10 August 2023. It elected not to file an answering affidavit to the application to compel on the basis that the application was rendered moot by the filing of its affidavit responding to the discovery notices, with due regard to the primary relief sought by the plaintiff in its notice of motion. For the most part, its answer was that the documents sought by the plaintiff were irrelevant, and where it did tender inspection, it did so subject to a confidentiality regime to be agreed.

[12] The plaintiff then served a replying affidavit in the compelling application on 22 November 2023. It also seeks condonation for the late filing of the replying affidavit.

[13] On 14 December 2023, the defendant served an application to strike out the replying affidavit. The affidavit in support of the application to strike out was served on 20 February 2024.

The application to strike out

[14] The defendant seeks to strike out the plaintiff's replying affidavit on the basis that it contains entirely new matter in reply, alternatively the content of the replying affidavit is irrelevant because it has no bearing on the relief sought. The affidavit filed in support of the application reiterates these grounds and avers that, once the defendant filed its response to the plaintiff's discovery notices in August 2023, the plaintiff ought to have launched a fresh application. In the *de novo* application, the plaintiff ought to have set out that it was dissatisfied with the defendant's answer and why the documents should be discovered, including an explanation as to the relevance thereof. The defendant asserts prejudice because it has not had the opportunity to answer to all the allegations made by the plaintiff in its replying affidavit.

[15] In argument, it was submitted that, had the plaintiff followed the correct course, the court would then have been in a position to determine the application for further and better discovery in its proper sequence. The failure to proceed with a fresh application in the correct sequence has resulted in the plaintiff requesting relief in a draft order, submitted with the heads of argument in February 2024, which bears no relation to the notice of motion.

[16] The plaintiff's replying affidavit answers to the defendant's response to the plaintiff's discovery notices, albeit that the defendant did not intend for that answer to be an answer in the compelling application. The plaintiff does not agree that its compelling application has become moot consequent upon the

defendant's August 2023 answer. It also disagrees that it was required to institute a fresh application. The plaintiff argued that, were a fresh application to be brought, there was no reason to believe that the defendant's approach would be any different to its August 2023 answer, with due regard to the defendant's limited discovery affidavits filed in December 2021.

[17] The plaintiff denies that there would be any prejudice to the defendant if the substance of the Rule 35(7) application as read with the defendant's August 2023 response thereto is dealt with in this application. A failure to do so would only serve to further delay the already proceedings.

[18] The defendant's complaint is that the replying affidavit is irrelevant, because the relief sought in the notice of motion has been complied with. Relevance in Rule 23(2) means relevant to the issue.⁴ The issue in these proceedings relate to discovery. Relevance in discovery proceedings is determined by the pleadings. Rule 35(7) is designed to assist a party that is dissatisfied with the discovery or supplementary discovery that has been made, and remedies under rule 35(3) have been exhausted.⁵

[19] The plaintiff's founding affidavit in support of the application to compel addressed in detail the reasons why it is entitled to the documents listed in its Rule 35(3)&(6) notices served in March and August 2022. The founding

⁴ *Meintjes v Wallachs Ltd* 1913 TPD 278 at 285.

⁵ *MV Alina II, Transnet Ltd v MV Alina II* 2013 (6) SA 556 (WCC) at para 19 citing *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 (4) SA 359 (W) at 363B-F.

affidavit was thus not a mere assertion that the documents were called for and not served. The plaintiff responded to the defendant's contentions set out in the August 2023 reply in its replying affidavit. As the defendant has already committed itself to an answer under oath in regard to each document sought in the plaintiff's discovery notices, the plaintiff's argument that nothing would change if a fresh application were to be brought except that it would result in a further delay, is convincing.

[20] The plaintiff's complaint is that the defendant has failed to make adequate discovery. The issue is plainly not moot. I do not agree that the relief sought by the plaintiff "bears no relation" to the relief in the notice of motion. The notice of motion sought compliance with the plaintiff's discovery notices. This is still the relief sought by the plaintiff, albeit on an itemised basis together with a proposed confidentiality regime. The parties' respective contentions are addressed in the affidavits before me, and can be adjudicated upon with due regard to the evidence by both parties, without the plaintiff having to commence *de novo* in the knowledge that the defendant's stated position under oath will not change. It is also not a question of the court impermissibly raising new issues not traversed in the pleadings.⁶

[21] The defendant's alleges prejudice because it has been deprived of the opportunity to respond to a fresh application, and that the plaintiff has raised entirely new matter in the replying affidavit. The "new matter", which was not

⁶ *Fischer and another v Ramahlele and others* 2014 (4) SA 614 (SCA), [2014] ZASCA 88, paras 13-14.

directly identified in the striking out application, arises from the defendant's August 2023 response. Mr Marriott, counsel for the defendant, dealt with the substance of the defendant's contention that the plaintiff was not entitled to the documents sought in his heads of argument and in argument with reference to the defendant's August 2023 response, albeit with strict reservation of the defendant's rights.

[22] The defendant is correct that the plaintiff has not followed the strictly correct procedure. The question is however whether, on the facts of this case, form or "standard procedure", should take precedence over substance, bearing in mind that the rules of court are there to facilitate and expedite the administration of justice.

[23] In ***Trans-African Insurance Co Ltd v Maluleka***⁷ Schreiner JA remarked:

*"(T)echnical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."*⁸

[24] In ***Federated Trust Ltd v Botha***⁹ Van Winsen AJA (as he then was) said:

"The Court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are

⁷ 1956 (2) SA 273 (A).

⁸ At 278F.

⁹ 1978 (3) SA 645 (A).

provided to secure the inexpensive and expeditious completion of litigation before the courts. See, eg Hudson v Hudson and Another 1927 AD 259 at 267; L F Boshoff Investments (Pty) Ltd v Cape Town Municipality (2) 1971 (4) SA 532 (C) at 535 (last paragraph); Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 754D – E; Vitorakis v Wolf 1973 (3) SA 928 (W) at 932F – G. Where one or other of the parties has failed to comply with requirements of the Rules or an order made in terms thereof and prejudice has thereby been caused to the opponent, it should be the court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the objects for which the rules were designed. See in this regard the remarks of Schreiner JA in Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278F – G.”¹⁰

[25] In ***Khunou and Others v M Fihrrer and Son (Pty) Ltd and Others***¹¹ Slomowitz AJ said:

“Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of Court, according to the circumstances. This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.”¹²

¹⁰ At 654C-F.

¹¹ 1982 (3) SA 353 (W) at 355H-356A.

¹² At 355H-356A.

[26] In ***Pangbourne Properties Ltd v Pulse Moving CC and another***,¹³ both parties had filed their affidavits late without filing a condonation application. Wepener J held that, to disregard the answering and replying affidavits because they were filed out of time would be too formalistic and would be an exercise in futility. The matter was ready to be dealt with and it was in the interests of justice that the matter be finalised and additional unnecessary costs avoided.¹⁴

[27] The authorities reflect that there is not a universal “one size fits all” approach to the procedural issue which has arisen in this matter. Slomovitz AJ prophetically stated that the rules cannot provide for every procedural situation that arises. The court has an inherent discretion to regulate its own procedure.¹⁵

[28] Litigation is not a game.¹⁶ Judicial resources are already severely constrained in this division, resulting in long lead times for the hearing of opposed applications and trials. I agree with the plaintiff that no useful purpose will be served to require of it to recommence the entire process afresh, when the facts required to determine the issue of further and better discovery as contemplated by Rule 35(7), is already before the court, and where both

¹³ 2013 (3) SA 140 (GSJ).

¹⁴ At paras 17 and 18.

¹⁵ Section 173 of the Constitution provides: “*The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.*”

¹⁶ *Cadac (Pty) Ltd v Weber-Stephen Products Co and others* 2011 (3) 570 (SCA) at para 10; *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at para 197.

parties have substantively addressed the issue in their affidavits and in argument. I have also taken into account that the defendant made limited discovery in December 2021 and that it only filed its answer to the March and August 2022 notices in August 2023, after the plaintiff brought its application to compel. The duty to make discovery of all documents that may be relevant is not to be taken lightly. Discovery assists the parties and the court in discovering the truth, and proper discovery facilitates the orderly presentation of the case in court.

[29] For these reasons, I consider that it is in the interests of justice that the substance of the issues raised in the affidavits are to be dealt with. The defendant's application to strike out the plaintiff's replying affidavit is dismissed. Condonation was not opposed in the alternative. Condonation for the late filing of the replying affidavit is granted.

Discovery principles

[30] The applicable principles pertaining to discovery are firmly established. Relevance is determined by the court with reference to the pleadings, and does not depend on the parties' views of the matter.¹⁷ The party calling for the documents need only demonstrate that the documents *may* be relevant – not *must* – either directly or indirectly, to enable the party calling for the documents to advance its own case or to damage the case of its adversary. Documents

¹⁷ *Swissborough Diamond Mines (Pty) Ltd v The Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 316J-317A.

fall into this category if it may fairly lead to a train of inquiry which may have either of these two consequences.¹⁸ Issues of relevance must be approached with common sense.¹⁹

[31] The court will not go behind a discovery affidavit which is regarded as conclusive, save where it can be shown either from: (i) the discovery affidavit, (ii) the documents referred to in the discovery affidavit, (iii) the pleadings, (iv) any admission made by the party making the discovery, or (v) the nature of the proceedings or the documents in issue that there are reasonable grounds for supposing that the party making discovery has misconstrued the principles relating to discovery.²⁰

[32] From the plaintiff's perspective, the crux of the dispute between the parties is whether or not the defendant's trolley was copied from the plaintiff's trolleys. The plaintiff's case is that it had started the design of its 90-litre and 180-litre trolleys in 2014. If the plaintiff's design was not copied, the defendant should be able to demonstrate the evolution in production and design of the defendant's trolley. The plaintiff is entitled to call for the discovery of documents which either advances its case or damages the case of the defendant. That entitlement must however take into account that the parties are commercial competitors with the result that there is an inherent danger of

¹⁸ *Rellams (Pty) Ltd v James Brown and Harner Ltd* 1983 (1) SA 556 (N) (**Rellams**) at 564A.

¹⁹ *R v Matthews and others* 1960 (1) SA 752 (A) at 758A-B.

²⁰ *Rellams*, fn 18 above at 560G.

abuse when it comes to inspection of confidential documents between trade rivals, and that there must be adequate protection of the parties' trade secrets.

The production process

[33] The plaintiff explains that, to produce a trolley, plastic pellets are fed in predetermined quantities into equipment that melts the plastic and injects it into a mould to produce a basket. The mould comprises a number of parts, including moving parts for shaping the floor, three side walls and a rear gate. There are also add-ons like the handle.

[34] After the plastic injection, chilled water is circulated throughout the mould to cool it so that the mould can be opened and the finished part extracted. The network of tubes and valves comprising the cooling system is complicated and vast. The cooling pipes for each of the parts making up the entire mould are all different. They have to be designed according to *inter alia* the thermal properties of the steel involved, the size of the respective parts and the amount of plastic in the relevant part of the mould itself.

[35] The plastic basket is a lattice work of a particular shape and with several dimensions. Underneath the floor, there must be points of formation for purposes of securely mounting the basket onto the steel chassis.

[36] The moulded plastic is not of uniform thickness. Variances are designed in accordance with strength requirements.

- [37] Injection points, where plastic is injected into the mould, cannot be randomly numbered or located. They must be positioned accurately to prevent plastic from curing inside the mould at different speeds and times, resulting in points of weakness, and aesthetically unpleasing weld lines. To ensure a uniform blend, the location of the injection points is carefully chosen, typically by means of a computerised simulation known as a mould flow analysis.
- [38] The mould cannot be manufactured without first having designed the basket which the mould is intended to make. The entire mould tool is dependent on the design. The basket design is embodied in the drawings.
- [39] The mould is constructed from technical drawings showing the various components in three dimensions with all the angles, material specifications, sizes and dimensions, curvatures, radii, assembly instructions, heat treatment specifications, machining details, tolerances, and steel specifications.
- [40] A design engineer will author the manufacturing drawings on what is known as a CAD (computer aided drawing) program.
- [41] Against that background, I deal first with the plaintiff's March 2022 notice in terms of Rule 35(3) and (6) and thereafter with the August 2022 notice. The August 2022 notice in the 2018 and 2021 actions are identical. The March 2022 notice are substantially similar, but for one paragraph which was not duplicated in the 2021 action.

The March 2022 notice

[42] Ad paragraph 1.1

42.1. The plaintiff requires discovery of the invoices for the purchase, whether outright or of a license, in respect of the “True Tops” computer program referred to by Mr Case in paragraph 71 in his replying affidavit in the Counter Application dated 4 February 2020 and covering the period January 2013 to December 2018.

42.2. In its August 2023 response, the defendant asserted that it no longer has the invoices referred to in this paragraph in its possession and it referred the plaintiff to Tool Room Maintenance Machine Supplies CC (“TRM”) and Retecon (Pty) Ltd.

42.3. Whilst the plaintiff complains that the answer is evasive and inadequate, I am unable to go behind the assertion by the defendant that it is no longer in possession of the invoices referred to in this paragraph.

[43] Ad paragraphs 1.2, 1.3, 1.4, 1.5 and 1.6

43.1. The defendant tendered inspection at the defendant’s attorney’s offices at a mutually convenient time to be arranged between the parties. The defendant asserts that these documents which it has tendered for inspection contain confidential information and are to be made available subject to a

confidentiality regime, with specific reference to the principle established in ***Crown Cork & Seal Co Inc and another v Rheem South Africa (Pty) Ltd and others***.²¹ The defendant objects to the plaintiff's directors or employees having access to its confidential information.

43.2. In its reply, the plaintiff's Mr Wolfe indicated that he had requested his attorneys of record to arrange for inspection and copying once the confidentiality regime had been put in place. He objected to the condition that neither he, nor any employee of the plaintiff, was entitled to inspect the documents tendered.

43.3. By the time this application was heard, no confidentiality regime had been put in place or agreed to between the parties. Counsel for the plaintiff included in the draft order a confidentiality regime which included the plaintiff's directors, Mr Peter Shorten, a senior engineer consulting to the plaintiff, the plaintiff's legal advisers and its expert witnesses, and inspection at the plaintiff's attorneys' offices. As the parties were unable to agree a confidentiality regime, and as the defendant elected not to put forward a confidentiality regime despite having tendered certain documents for inspection in August 2023, it cannot now be seen to complain that the issue was not properly ventilated in the papers.

43.4. I intend to include in this order a confidentiality regime which would entitle Mr Peter Shorten, the plaintiff's experts and its legal advisors to inspect the

²¹ 1980 (3) SA (WLD) 1093.

documents and recordings tendered for inspection by the defendant, but not any of the plaintiff's directors. The plaintiff ought not to be prejudiced in its preparation for litigation if its senior consulting engineer is granted access to the tendered documents together with its experts and legal representatives. The confidentiality regime would follow the remainder of the regime proposed by the plaintiff in the draft order, subject to the changes set out above.

[44] Ad paragraphs 1.7 to 1.9

44.1. In paragraph 1.7, the plaintiff requires discovery of the emails and other written communications between the defendant (including its employees) and the said manufacturer of the moulds in China (and including any agent on behalf of either) relating to the production of the drawings for the moulds as referred to by Mr Case in paragraph 73 of his replying affidavit in the Counter Application.

44.2. In paragraph 73, Mr Case stated:

"The production of a mould requires additional drawing, but the respondent does not produce the drawings for the moulds. The moulds are produced in China and the drawings for the moulds are produced by the Chinese factory from the drawing of the basket the respondent prepares."

44.3. In paragraph 1.8 the plaintiff requires the quotes for the production of the drawings and in paragraph 1.9, the emails and other written communications between the defendant (including its employees) and the said manufacturer (including any agent on behalf of either) relating to these quotes.

44.4. The defendant has refused to make the documents available on the basis that the documents are irrelevant. It was argued that the request is overbroad. Given that the request is linked to what is asserted by Mr Case in paragraph 73, I consider that there is a limitation provided for in these paragraphs.

44.5. The plaintiff argues that the defendant's trolley bears an uncanny resemblance to the plaintiff's trolley, right down to the tell-tale Christian cross bag-hook. Mr Wolfe explained the design of the bag-hook with reference to his Christian beliefs.

44.6. With due regard to the pleadings, the issues between the parties and the specific paragraph referenced, the documents may be relevant to a matter in question in these proceedings. These documents are therefore to be produced for inspection by the plaintiff, subject to the confidentiality regime.

[45] Ad paragraph 1.10

45.1. In this paragraph the plaintiff sought production and inspection of the drawings.

45.2. The defendant's answer was that the drawings for the mould are not in the possession or control of the defendant but in the possession of the Chinese manufacturer of the mould. The plaintiff complains that the answer does not disclose where, if the documents are not in the defendant's possession, they may be found.

45.3. The defendant has not stated that the documents are in control of the Chinese manufacturer and, having regard to the reply that the moulds are produced by the Chinese factory from the drawing of the basket which the defendant prepares, I consider that this is an instance where the court can go behind the answering affidavit by the defendant. I agree with the plaintiff's assertion that, if the defendant has paid for the drawings for the moulds, it would have control of it for purposes of discovery or it can obtain the drawings from the undisclosed entity which does have control.

45.4. Accordingly, the defendant is obliged to either obtain the drawings from its Chinese manufacturer and to make them available for inspection by the plaintiff subject to the confidentiality regime.

[46] Ad paragraphs 1.11 to 1.14

46.1. In these paragraphs the plaintiff seeks the emails and other written communication between the defendant and the Chinese manufacturer (and including any agent on behalf of either) relating to the drawings, the invoices in respect of the drawings and proof of payment of the invoices as well as emails and other written communications between the defendant (including its employees) and the manufacturer (and including any agent on behalf of either), relating to the production of the moulds referred to in paragraph 73 of the replying affidavit.

46.2. The documents have been refused on the basis that they are irrelevant.

46.3. Regard being had to the pleadings, the issues in dispute nature and the content of paragraph 73 of Mr Case's affidavit quoted above, these documents may be relevant and must accordingly be produced for inspection by the plaintiff subject to the confidentiality regime.

[47] Ad paragraphs 1.15 and 1.16

47.1. In these paragraphs the plaintiff seeks the quotes for the production of the moulds and the emails and other written communications between the defendant (including its employees) and the manufacturer (including any agent on behalf of either) relating otherwise to the said moulds.

47.2. The defendant objects to the disclosure of these documents on the basis that it is irrelevant.

47.3. These documents may be relevant with due regard to the pleadings and the nature of the dispute between the parties and accordingly fall to be produced for inspection subject to the confidentiality regime.

[48] Ad paragraphs 1.17 to 1.20

48.1. These documents relate to the shipping, import, email exchanges relating to the moulds, the invoices and proof of payment of the moulds. These documents are refused on the basis that they are not relevant.

- 48.2. Relevance is determined with reference to the pleadings and these documents may be relevant to the issues between the parties. Accordingly, the documents are to be made available for inspection and copying subject to the confidentiality regime.

[49] Ad paragraph 1.21

- 49.1. In this paragraph the plaintiff seeks the emails and other written communications with the company or companies and whether Pimms Group or otherwise relating to the production of the baskets for the defendant's SmartCart hybrid 90-litre trolley which is in issue.

- 49.2. In answer to this paragraph the defendant has stated that it is not in possession of any such communications or emails.

- 49.3. The defendant's assertion that it is not in possession of the documents requested in this paragraph is conclusive, and there is no basis to go behind it.

[50] Ad paragraphs 1.22 to 1.27

- 50.1. The defendant has responded that it is in possession of quotations, purchase orders for the basket of the 180-litre trolley, invoices from the manufacturer of the said baskets, proof of payment of the invoices and delivery notes for the baskets. It asserts that these documents are nonetheless not relevant but

should the defendant be ordered to produce the documents, it would require production subject to the confidentiality regime.

- 50.2. In my view, the defendant should produce these documents for inspection subject to the confidentiality regime given the issues on the pleadings, which includes a claim for damages based on notional royalties.²²

[51] Ad paragraph 1.28

- 51.1. In this paragraph the plaintiff has sought the brief that the defendant received from Shoprite to design “such a trolley”. The answer to this request was that the brief was verbal and that the documents known as an RFI and an RFQ which all suppliers of Shoprite, including the plaintiff, had received from Shoprite is no longer in its possession and would be in the possession of the plaintiff and Shoprite.

- 51.2. The plaintiff is dissatisfied with this answer and asserts that Mr Case has perjured himself.

- 51.3. This court is unable to go behind Mr Case’s assertion that his particular instruction was verbal and that the documents which were provided to the defendant are no longer in its possession.

²² *Puma AG Rudolf Dassler Sport v Global Warming (Pty) Ltd* 2010 (2) SA 600 (SCA) at para 12.

[52] Ad paragraph 1.29

52.1. In this paragraph in the March 2022 notice pertaining to the 2018 action²³ the plaintiff sought the email and other written communications with Shoprite concerning the instruction to brief the defendant and the meeting held between its employees and Mr Case when he flew to Cape Town as alleged in paragraph 41 of the replying affidavit in the Counter Application.

52.2. In response, the defendant has indicated that despite diligent search he was unable to find any invitations to the meeting and Cape Town and accordingly, the defendant is not in possession of such invitation.

52.3. The answer is conclusive and there is no basis for the court to go behind the defendant's answer in this paragraph.

[53] Ad paragraph 1.30 in the 2018 action and Ad paragraph 1.29 in the 2021 action

53.1. In this paragraph the plaintiff seeks the emails and other written communications from and with potential and/or actual customers or agents concerning inquiries about, orders for and/or the manufacturing of the defendant's SmartCart hybrid 90-litre trolley.

²³ Paragraph 1.29 was not included in identical terms in the March 2022 notice served in the 2021 action.

53.2. The defendant has refused the documentation on the basis that it is irrelevant.

53.3. Given that the plaintiff asserts an unlawful copying and that part of the relief sought is damages arising from the infringement, the documents sought in this paragraph may be relevant and should be produced by the defendant subject to the confidentiality regime.

[54] Ad paragraphs 1.31, 1.32, 1.33 and 1.34 in the 2018 action and Ad paragraphs 1.30 to 1.33 in the 2021 action

54.1. In these paragraphs the plaintiff seeks documentation relating to the manufacture of the defendant's SmartCart hybrid 90-litre trolley, the manufacture of the steel chassis for the defendant's trolley, the documents referencing or concerning the sale, supply, delivery and/or manufacture of the moulds for the basket for the defendant's trolley.

54.2. The defendant refused to make discovery of the documents sought in these paragraphs on the basis that it is irrelevant and also vague and broad ranging so as to constitute an abuse of the process.

54.3. I agree that the request for "notes, memoranda, messages, letters, management accounts, WhatsApp messages, sms messages and voice notes" is overbroad, but I consider that the internal correspondence, reports and emails as sought in paragraphs 1.31 to 1.34 in the 2018 action and in paragraphs 1.30 to 1.33 in the 2021 action may be relevant to the disputes

with due regard to the pleadings and are to be made available for inspection subject to the confidentiality regime.

[55] Ad paragraph 2

55.1. In respect of the documents sought in paragraph 2 relative to disposal of the defendant's SmartCart hybrid 90-litre trolley, the defendant has tendered for inspection redacted invoices for the 180-litre trolley subject to the confidentiality regime.

55.2. I consider that the remaining documents sought in this paragraph may be relevant to the issues in dispute and the documents in the following paragraphs are to be included for production and inspection: paragraphs 2.1, 2.3, 2.4, 2.5.

[56] In respect of the documents sought in paragraph 2.6 the defendant is to make available for inspection subject to the confidentiality regime the internal correspondence, reports, emails and letters relating to orders for, the sale and/or delivery to customers or agents of the defendant's SmartCart hybrid 90-litre trolley.

The August 2022 notice

[57] In respect of the August 2022 notice, the defendant is to produce the drawings sought in paragraph 1.3 on the same basis as applied to the request to paragraph 1.10 in the March 2022 notice (see paragraph 45 above).

[58] The drawings as sought in paragraph 1.4 are to be produced.

[59] The documents sought in paragraphs 1.5 to 1.13 are to be produced for inspection and copying subject to the confidentiality regime.

Costs

[60] The plaintiff has been substantially successful and the costs should follow the result, with scale C being the appropriate scale given the nature and complexity of the matter.

Order

[61] The order pertains to case numbers 46975/2018 and 2021/30331.

61.1. The defendant's application to strike out is dismissed.

61.2. The late filing of the plaintiff's replying affidavit is condoned.

61.3. The defendant is ordered to provide to the plaintiff within 20 (twenty) court days of the date of service of this order by email, the following documents and/or recordings for inspection:

61.3.1. Ad March 2022 notice in the 2018 action: paragraphs 1.2 to 1.20, 1.22, 1.27, 1.30 and in respect of paragraphs 1.31 to 1.34 only the internal correspondence, reports and emails as sought in these paragraphs.

61.3.2. Ad March 2022 notice in the 2021 action: paragraphs 1.2 to 1.20, 1.22, 1.27, 1.29 and in respect of paragraphs 1.30 to 1.33 only the internal correspondence, reports and emails as sought in these paragraphs.

61.3.3. Ad August 2022 notice: paragraphs 1.3 and 1.4 (drawings only), 1.5 to 1.13.

61.4. Only Mr Peter Shorten, the plaintiff's legal advisers and its expert witnesses will be entitled to inspect the documents set out in paragraphs 61.3.1 to 61.3.3 of this order.

61.5. The documents and recordings so disclosed will not be used by the plaintiff for any purpose other than the litigation between the parties in the 2018 and 2021 proceedings.

- 61.6. The documents or recordings will be retained at the premises of the plaintiff's attorneys of record, and will only be inspected (other than by counsel) in the presence of an admitted attorney of that firm;
- 61.7. No copy or reproduction of such documents and recordings or any part thereof will be removed from the possession of the plaintiff's attorney of record except to provide to the plaintiff's counsel for their purposes in relation to the litigation between the parties in the 2018 and 2021 proceedings.
- 61.8. The defendant is ordered to pay the costs of this application including the costs of two counsel on scale C.



GOEDHART AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 22 July 2024

Date of judgment: 25 March 2025

(This judgment was handed down electronically by circulation to the parties' representatives via email.)

Counsel for the Plaintiff: Adv O Salmon SC

(Heads of argument prepared by Adv Salmon SC and Adv KD Iles)

Instructed by: Werksmans Attorneys

For the Respondent: Adv G Marriott

Instructed by: Martini-Patlansky Attorneys