

IN THE HIGH COURT OF SOUTH AFRICA

[TRANSVAAL PROVINCIAL DIVISION]

NOT REPORTABLE

CASE NUMBER: 4720/2007

In the matter between:

31 JANUARY 2008

SALT OF THE EARTH CREATIONS [PTY] LTD

FIRST APPLICANT

KINGSGATE CLOTHING [PTY] LTD

SECOND APPLICANT

PAUL VIVALDI FASHIONS [PTY] LTD

THIRD APPLICANT

and

STUTTAFORDS STORES [PTY] LTD

FIRST RESPONDENT

**STUTTAFORDS INTERNATIONAL FASHION
CO [PTY] LTD**

SECOND RESPONDENT

THE GAP, INC

THIRD RESPONDENT

GAP [APPAREL] LLC

FOURTH RESPONDENT

GAP [ITM], INC

FIFTH RESPONDENT

JUDGMENT

MAKGOKA AJ

[1] Before Court are various interlocutory applications, which flow from an urgent application brought on 2 February 2007 by the First to Third Applicants against the First and Second Respondents, for an interim interdict based on passing off. The Third to Fifth Respondents were granted leave to join the application. For the sake of convenience, in this judgment the parties would respectively be referred to as follows: The Applicants ["Salt"], and the Respondents ["Stuttafords and the Gap"].

[2] The dispute between the ultimate adversaries, namely the First Applicant and the Gap, concerns the proprietorship of the trade mark GAP in South Africa, which dispute has in essence traversed almost a decade in our courts. The present litigation between the parties was foreshadowed by the Supreme Court of Appeal in *AM Moola Group Ltd and Others v The Gap Inc and Others 2005 [6] SA 568 [SCA]* at 591 *D - E* when Harms JA stated:

"I am conscious of the fact the result may satisfy neither party because their respective ability to prevent the other from using GAP marks in this country hangs in the air and further litigation may be on the cards".

[3] The main application was heard by Basson J over three days on 22, 23 March and 16 April 2007. Judgment in the main application was delivered on 28 May 2007. On 29 May 2007 Stuttafords and the Gap delivered application for leave to appeal which was later amplified and supplemented. In turn Salt brought an application for a declarator that the judgment of Basson J was not appealable, or alternatively that the said judgment be executed in terms of Rule 49 [11] of the Uniform Rules. Flowing from the Rule 49 [11] application, in the event it be found that the said order is an interim order and therefore not appealable, Stuttafords and the Gap brought a conditional variation application to vary the order of Basson J in certain respects. On 11 June 2007 Stuttafords and the Gap brought an application for Basson J

to recuse himself from hearing the various applications brought flowing from his judgment. The recusal application was heard on 22 June 2007 and dismissed with costs. The dismissal of the recusal application resulted in a further application brought by Stuttafords and the Gap for leave to appeal against the judgment of Basson J refusing to recuse himself.

[4] From an overview of the above, there therefore are four distinct interlocutory applications, namely:

[4.1] the application for leave to appeal in the main application brought by Stuttafords and the Gap;

[4.2] the Rule 49 [11] application brought by Salt;

[4.3] conditional variation application brought by Stuttafords and the Gap;

[4.4] application for leave to appeal in the recusal application;

[5] It might be convenient at this stage to set out Stuttafords and the Gap's grounds in their application for leave to appeal in the recusal application. The grounds are that:

[a] the Court erred in finding that a Court may copy, as its Judgment, *verbatim* the Heads of Argument of one party to the exclusion of all arguments of the other party;

[b] the Court erred in finding that such a *verbatim* adoption of one party's argument does not give rise to a reasonable suspicion of bias on a lay litigant;

- [c] the Court erred in finding that it was not necessary for a Court to refer to a party's argument in its Judgment when the party whose Heads it is copying has dealt with those arguments;
 - [d] the Court failed to apply the law correctly to the facts before it in failing:
 - (i) to consider the effect on the perception of a lay litigant of accepting *verbatim* the Heads of Argument as its Judgment; and
 - (ii) to consider whether that may create the reasonable apprehension that the Court was not open to persuasion by the submission of Counsel;
 - [e] the Court erred in seemingly constraining its enquiry into the reasonableness or not of an apprehension of bias to the fact whether or not the Court was in fact biased;
 - [f] the Judge erred in making the findings concerning the approach by Salt for a meeting with the Learned Judge;
 - [g] The Judge erred in failing to recuse himself;
 - [h] The Judge should have granted the Application for Recusal with costs.
- [7] Clearly, the *gravamen* of the application for leave to appeal in the recusal application is the manner in which the judgment of Basson J was structured. Perhaps it is prudent to comment briefly about the judgment here. After the conclusion of argument of the matter on 16 April 2007, Basson J on 18 May 2007 requested the parties to submit to him their respective Heads of Argument in an electronic form which both parties did. Apparently the judgment was similarly transmitted to the parties in an electronic form. When one has regard to the judgment, it is clear that what Basson J did was to "cut

and paste" Salt's Main and Replying Heads of Argument. It is a judgment of 103 pages, consisting of a *verbatim* repetition of the said Heads of Argument.

- [8] Stuttafords and Salt in the premises contend that the manner in which the judgment was written, created a reasonable apprehension that Basson J did not display a mind open to persuasion and had created a perception of bias. It was in the main on this basis that an application for recusal of Basson J was made. The second leg upon which the application was based, related to alleged dealings or communications which Basson J purportedly had with the Salt's legal representatives to which Stuttafords and the Gap's representatives were not party to. As indicated above, the application was dismissed with costs, hence the application for leave to appeal in the recusal application.
- [9] The refusal of the recusal application is an appealable order - see *Moch v Ned travel [Pty] Ltd t/a American Express Travel Services* 1996 [3] SCA 1 at 11B. Now the general principles applicable to an application for recusal are trite and have been restated in a long line of decisions in our Courts. See in general *President of RSA v South African Rugby Football Union* 1999 [4] SA 147 [CC]; *S v Basson* 2007 [3] SA 582 [CC]. However, most of the decisions in this regard deal with instances where the application is based on the conduct of a judicial officer during the hearing. The present case, as is apparent from the grounds of appeal, rests on the conduct of a judicial officer after of the hearing, namely during judgment stage. Despite diligent research, I have not been able to find authority in which a similar situation arose. Similarly counsel have not referred me to any such authority.
- [10] *Mr. Puckrin*, for Stuttafords and the Gap referred me to *Van Rooyen & Another v Imperial Transport Holdings and Another*, unreported TPD decision delivered on 13 February 2006 under case number A1696/04. In that case Van Der Merwe J, with Claasen *et Jooste* agreeing, remarked *obiter* as follows at page 12, lines 2 - 5:

"Natuurlik staan dit 'n hof vry om ruimskoots van hoofde van betoog van een of albei partye in litigasie gebruik te maak. Hoe dit gedoen word, maak natuurlik ook saak. As dit gebruik word in 'n oorwoë bespreking van feite, regsargumente en gevolgtrekkings op feite en die reg, het ek weinig probleem daarmee. As daar egter luidens die uitspraak nie oorweging geskenk word aan verskillende standpunte nie, kan dit 'n probleem gee. Die wyse van gebruikmaking van 'n stel hoofde kan ook betekenisvol wees."

- [11] It is not in dispute that the judgment of Basson J is a verbatim repetition of Salt's main and replying Heads of Argument. Of the 103 pages of the said judgment, only about two or three pages are the original writing of the Court. A further disturbing aspect of the judgment is the criticism therein of the Supreme Court of Appeal. On page 26, referring to *Moola [supra]*, it is stated:

"While the result in the Supreme Court of Appeal in regard to the expungement cannot now be reversed, that it quite distinct from the contention that the Court, with respect, misdirected itself on a finding of part which is not binding on the parties" [My emphasis].

- [12] This criticism was contained in Salt's Heads of Argument and in the nature of how judgment was approached, the criticism found its way into the judgment. This is unfortunate. While some degree of tolerance may be accorded to counsel to express such views about the decisions of the Supreme Court of Appeal, it is definitely expected, as a matter of public policy and a fundamental touchstone of our jurisprudence, of judges of the High Courts to defer to authority of the Supreme Court of Appeal.

- [13] Turning briefly to the main application which resulted in the judgment. It suffices to mention the following: in total over 2 900 pages in affidavits and 393 pages of Heads of Arguments were filed. In such Heads of argument pertinent and cogent authorities, mostly decided by Supreme Court of Appeal, were referred to. Various issues relating to market segmentation,

distinguishing of the Gap's goods, alleged shared reputation etc, were covered. Argument was heard over three days, proffered by four senior counsel of considerable experience and eminence.

[14] It is an established principle of our legal system that a judgment should reflect an independent, considered and balanced overview of the respective parties' arguments. A judgment should reflect and manifest a judge's open-mindedness, impartiality and independence of thought on the issues in dispute. To my mind, the above threshold becomes higher when a judgment flows from the circumstances outlined in the preceding paragraph. This becomes so especially in view of the importance of the matter to the respective parties. Anything short of the stated threshold, could well found a reasonable apprehension of bias in the mind of one of the parties.

[15] I have earlier on referred to the second leg of Stuttaford and Gap's complaint, namely that it was alleged that Basson J communicated with Salt's representatives without involvement of Stuttafords and Gap's representatives. Briefly what transpired in this regard is that Salt's representatives had arranged a meeting with Basson J and only thereafter invited Stuttafords and the Gap's representatives to such a meeting. The explanation by Salt's attorney was that there was no unilateral meeting or discussion with Basson J, but simply a request, via the Judge's Registrar, for the parties to be afforded a meeting with a view to obtaining directions in regard to the further conduct of the matter. I am satisfied that Salt's attorneys were *bona fide* in this regard. It is however an undesirable practice, in an opposed matter to make contact with a presiding officer, without reference to one's opponent. Similarly, it may lead a lay litigant to form a reasonable apprehension of bias by the judicial officer.

[16] The last aspect relates to the hearing of the application for recusal. In his judgement refusing recusal, Basson J relied on *Kriel v Terblanche NO and Others 2002 [6] SA 132 [W]*. Basson J quoted a paragraph, purportedly from the said judgment, in English. Upon reading of the said judgment, two issues emerge: firstly the judgment is in Afrikaans and therefore the purported direct quotation in English could not be from the judgment. Secondly the remainder

of the quotation does not appear in the judgment at all. On a closer perusal of Salt's "*Authorities relevant to the legal principles articulated in the Applicant's affidavit for recusal*", it appears that Basson J's purported quotation is a *verbatim* repetition of what is stated therein. One would have expected the learned judge, particularly at that stage, to be more circumspect in the manner in which he approached his judgment. Granted, the judgement refusing recusal application was granted *ex tempore*, and when transcribed, punctuations and quotes could be distorted. Unfortunately it added impetus to a view already held by Stuttafords and the Gap that Basson J did not display a mind open to persuasion.

[17] Regard being had to the totality of the application, I am persuaded that Stuttafords and the Gap's apprehension of bias on the part of Basson J is a reasonable one. I am therefore of the view that there is a reasonable possibility that another Court may arrive to a different conclusion. Consequently I am disposed to granting leave to appeal. Having so decided, it becomes unnecessary for me at this stage to consider Stuttafords and the Gap's two other applications. I must however, give consideration to whether or not to grant Salt's Rule 49 [11] application. Given that it is my *prima facie* view that justice was not done to the pertinent arguments in the main application, it would be most undesirable to order execution of the order of Basson J despite the appeal to be noted.

[18] Accordingly I make the following order:

[18.1] Leave is hereby granted to the First, Second, Third, Fourth and Fifth Respondents [Stuttafords and the Gap] to appeal to the Full Court of this Division;

[18.2] The costs of this application shall be costs in the appeal;

[18.3] The Applicants' [Salt] Rule 49 [11] is dismissed with costs.

[18.4] The remainder of the applications, namely application to appeal in the main case and the conditional variation application, are postponed *sine die*.



TM MAKGOKA
Acting Judge of the High Court

DATE OF HEARING: 26,27 OCTOBER 2007

APPEARANCES:

FOR THE APPLICANTS [SALT]:

A. FINDLAY SC
P. GINSBURG SC
O.A MOOSA SC
H.S GANI

INSTRUCTED BY: *MACROBERTS INC*, BROOKLYN, PRETORIA

FOR THE RESPONDENTS [STUTTAFORDS AND THE GAP]

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