CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 59/10
[2010] ZACC 14

In the matter between:

STUTTAFORDS STORES (PTY) LTD	First Applicant
STUTTAFORDS INTERNATIONAL FASHION CO (PTY) LTD	Second Applicant
THE GAP INC	Third Applicant
GAP (APPAREL) LLC	Fourth Applicant
GAP (ITM) INC	Fifth Applicant

and

SALT OF THE EARTH CREATIONS (PTY) LTD	First Respondent
KINGSGATE CLOTHING (PTY) LTD	Second Respondent
PAUL VIVALDI FASHIONS (PTY) LTD	Third Respondent

Decided on : 2 September 2010

JUDGMENT

THE COURT:

Introduction

[1] This is an application for leave to appeal to this Court against an order of the Full Court of the North Gauteng High Court, Pretoria (Full Court). The order was made in an

appeal brought by the applicants (Stuttafords and The Gap) against the refusal by a High Court judge (Basson J) to recuse himself from any further proceedings in a matter in which he had handed down judgment on 28 May 2007 (main judgment). The application for leave to appeal to this Court is opposed by the respondents (Salt).

[2] The recusal application was based on the contention that the main judgment exhibited little or no sign of any original or independent application and reasoning, that it essentially copied the written heads of argument of Salt's counsel and, consequently, created a perception of bias in favour of Salt. Basson J refused to recuse himself. The Full Court dismissed the appeal against his refusal. The present application seeks to have the recusal issue reconsidered on appeal by this Court.

[3] The application must in our view be refused because it is not in the interests of justice for this Court to hear the matter; but this outcome should not be seen as an endorsement of the main judgment. We shall first set out why we consider that it is not in the interests of justice to grant leave to appeal and then make some brief comments on the main judgment.

Interests of justice

[4] The Gap and Salt have been locked in litigation about the use of the trade mark GAP for more than a decade. Before 1994, The Gap did not trade in South Africa. Salt had registered the GAP trade mark in its name, but in 2005 the Supreme Court of Appeal

expunged Salt's registered trade mark on the basis of non-use.[1] The Gap then took steps to appoint a South African retailer and in March 2007, Stuttafords commenced selling GAP merchandise in South Africa. Having lost trade mark protection Salt then turned to passing-off as a weapon to continue the battle. It brought an interim application for an order interdicting The Gap and Stuttafords from trading in GAP merchandise pending finalisation of the main application for final relief in that regard. On 28 May 2007 Basson J granted the relief sought. It is that judgment that is said to have created a perception of bias.

[5] On 29 May 2007 an application for leave to appeal against the merits of the main judgment was lodged. This appeal has apparently not yet been heard. Shortly thereafter, on 11 June 2007, The Gap and Stuttafords lodged an application for Basson J to recuse himself from further proceedings in the matter and from further proceedings flowing from the main judgment. On 22 June 2007 Basson J delivered a judgment refusing to recuse himself. He was thereafter not available to hear the application for leave to appeal against his decision not to recuse himself. The application for leave was then heard by Makgoka AJ who granted leave. At the same time, he refused Salt's application that the stay of the order granted in the main judgment, resulting from the noting of the appeal, be lifted.

[1] *A M Moolla Group Ltd and Others v The Gap Inc and Others* 2005 (6) SA 568 (SCA).

[6] The Full Court heard the recusal appeal in September 2008, but only delivered judgment 18 months later. It dismissed the recusal appeal on the basis that the matter had become academic because Basson J had since retired, and that he would not hear any of the subsequent applications envisaged in the matter. While the Full Court expressed disapproval of the practice of simply adopting the heads of argument of one of the parties as the judgment of the court, it held that this did not necessarily give rise to an indication of bias. It went on to hold that "there was no compelling reason why [Basson J] should not have adopted [Salt's] heads as his judgment, rather than to find the time to write his own judgment *de novo*."[2] The Full Court added that "[t]he fact that he fully agreed with the arguments of [Salt] and adopted their heads for the sake of convenience when he was saying just that, is no indication of bias."[3] This judgment refrains from expressing any view on that finding.

[7] The position at this stage of proceedings is thus that: (1) Basson J did not hear any of the proceedings after his judgment of 22 June 2007; (2) because of his retirement there is no possibility that he will do so in future; (3) his order in the main judgment has not been given effect to until now; and (4) the appeal on the merits of the main judgment may still be heard. On the papers before us it is not clear what happened to the principal application between the parties, in which final relief was sought, but it is not

[2] *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd and Others*, North Gauteng High Court, Pretoria, Case No A363/08, unreported, at 8.

[3] Id.

unreasonable to expect that the dispute could have been brought to finalisation in the three years since the main judgment of Basson J.

[8] Under these circumstances, it appears to us that if this Court determined the recusal dispute this would have no practical effect on the material issues between the parties. It is not in the interests of justice to hear a matter where that is the case.[4] As noted, however, this does not endorse the Full Court's findings that the judgment did not give rise to bias or a perception of bias. That is an issue that must be left for decision for another day in an appropriate case. Nevertheless, we do think a note of disquiet and caution is called for.

Independent judgment

[9] The application was heard by Basson J over two days in March 2007 and a further day in April 2007. On 18 May 2007 Basson J requested the parties to provide their heads of argument in electronic format. Salt provided its heads in editable format; The Gap and Stuttafords in non-editable format. On 28 May 2007 the main judgment was delivered. On analysis, it appears that the judgment consists of approximately 1890 lines of typing of which, apart from a summary of the relief sought and the terms of the order, only approximately 32 lines are the judge's original writing. The rest consists of words taken

[4] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29; *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 9; *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 17.

exactly from Salt's counsel's heads of argument, sometimes even without taking out phrases like "it is submitted" and emotive comments on The Gap and Stuttaford's contentions and actions. There is no direct independent reference in the main judgment to The Gap and Stuttaford's heads of argument, except for references carried over from Salt's heads of argument.

[10] This Court has stated that furnishing reasons in a judgment—

> "explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions."[5]

[11] While some reliance on and invocation of counsel's heads of argument may not be improper, it would have been better if the judgment had been in the judge's own words—

> "The true test of a correct decision is when one is able to formulate convincing reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn . . . are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.
>
> . . .

[5] *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12; quoted with approval in *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC) at para 17.

> The very act of having to summarize in one's own words what a witness has said, or what is stated in an affidavit or what a document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case."[6]

[12] These remarks were made by a former Chief Justice, Corbett CJ, in an address at the first orientation course for new judges under the new constitutional dispensation.[7] We have deliberately refrained from dealing with case law on the issue whether the extensive use of counsel's heads could lead to a perception of bias, because it is not a question we need to decide here. Suffice to state, however, that if these wise words are heeded by judges the necessity of deciding the issue in the future should not arise.

Order

[13] The application for leave to appeal is dismissed.

Ngcobo CJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J.

[6] M Corbett "Writing a Judgment" (1998) 115 *SALJ* 116 at 118 and 123.

[7] Id at 116.