

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)

In the matter between:

Appeal Case no. A363/08

19/2/2010

STUTTAFORD'S STORES (PTY) LTD

First Appellant

STUTTAFORD'S INTERNATIONAL FASHION
CO (PTY) LTD

Second Appellant

THE GAP, INC

Third Appellant

GAP (APPAREL) LLC

Fourth Appellant

GAP(ITM), INC

Fifth Appellant

and

SALT OF THE EARTH CREATIONS (PTY) LTD

First Respondent

KINGSGATE CLOTHING (PTY) LTD

Second Respondent

PAUL VIVALDI FASHIONS (PTY) LTD

Third Respondent

JUDGMENT

PRELLER J.:

P	WHICHEVER IS NOT APPLICABLE
(	REPORTABLE: YES/NO
)	OF INTEREST TO OTHER JUDGES: YES/NO.
1	REVISED.
19/2/10	<i>M. Preller</i>
DATE	SIGNATURE

This appeal comes before us by virtue of leave granted by Makgoka AJ (as he then was) due to the unavailability of the judge who had heard the matter. It is an

appeal against the refusal of the judge *a quo* of an application for his recusal from further participation in that case.

The dispute before the court *a quo* was but one round in an ongoing battle between the present parties and also some others that were not involved in this round. Strange as it may sound, the bone of contention is the right to use the name "The Gap" on certain articles of clothing. Judging by the size of the guns pulled out by the parties to represent them and the number of rounds that they had already gone in court, that right must be worth a substantial amount of money. Before us the parties were represented by no fewer than four senior counsel and two juniors.

The present skirmish kicked off with an opposed urgent application based on passing-off before the court *a quo*. Argument was heard over a period of three days. We do not know the length of the papers on which the application was based, but what does appear from the affidavits before us, is that the applicant filed main heads of 105 pages, the answering heads ran to some 122 pages and that was followed by replying heads of 88 pages.

It is unfair of practitioners, not only to the judge sitting in the court for urgent

matters and who often has to deal with 60 or more urgent applications in a week, but also to the other practitioners who are awaiting their turn, to take up two of the five available days with a single matter and to furthermore burden the judge with more than 300 pages of heads of argument in addition to the voluminous papers that must have been filed. It is not humanly possible to give the necessary attention to so many urgent matters in the time available and the judge sitting in that court often has no choice but to limit the ambit and detail of the judgment he has to give in order to do some justice to all the parties that have come to court with their urgent problems.

The appellants, (the respondents *a quo*), applied for the recusal of the judge *a quo* shortly after he had delivered his judgment. That application was based on his perceived bias against them which, according to the appellants, appeared mainly from the form in which his judgment had been given: after reserving his judgment, he requested the parties to furnish him with an electronic version of their heads of argument. In their recusal application the appellants illustrated that he had composed his judgment almost exclusively from verbatim extracts from the main and replying heads of argument that had been submitted in electronic form by the respondents. On a practical level the judgment, consisting of 1890 lines of typing, contained only approximately 32 lines of the judge's original writing, apart

from his order at the end of the judgment. Of the 122 pages of written argument filed by the appellants, not a single sentence found its way into the judgment, except in so far as the appellants' arguments had been quoted by the respondents in their heads. Except for the above, there is no separate consideration of the submissions made on behalf of the appellants, nor of the decided cases referred to by them. Even though the learned judge may have been wrong in some of the respects mentioned by the appellants, it is not a question that concerns us, since the correctness or otherwise of the judgment in the main application is not before us.

A further result was that all the exaggerated and sometimes scathing terms and hyperbole in which the respondents dealt in their heads with the appellants' affidavits and submissions, were repeated verbatim in the judgment. The appellants understandably took offence to this.

The appellants also complain about the very late stage at which the respondents' replying heads (and which, according to them, also contained new matter) were offered and accepted by the learned judge. The heads are dated some five days before the final day of the hearing, but were only handed to the appellants on the morning of the last day of the hearing. At the very end of the hearing and just

before the court adjourned, the respondents handed to the appellants an undertaking of liability for any damage that they may suffer in the event of the interim relief not being made final. The appellants contend that they did not even have the opportunity to consider the terms of the undertaking and that the acceptance thereof by the court without further ado is another illustration of the court's bias against them. Except for the acceptance of the undertaking (as far as the judge may have played a part in it) this part of the conduct complained of was exclusively the doing of the respondents and could hardly constitute bias on the part of the judge. The appellants seem to have been scraping the barrel with this part of their argument.

The final ground of complaint was that the respondents had, some six days after the judgment, arranged an interview with the judge concerned in order to discuss the further conduct of the case with him. The appellants were informed by letter of the arrangement and invited to attend the proposed meeting. The appellants rely on the well-established rule of ethics that it is improper for a party to communicate with the judge handling a matter in the absence of the opposing party. In the end not much was made of this point because it appeared that the respondents had done nothing more than to arrange a suitable date for the meeting with the judge's registrar.

In their heads of argument (page 21) the appellants referred us to an unreported judgment by a full court of this division in which a similar situation had arisen. The case was L van Rooyen and Another v. Imperial Transport Holdings delivered on 13 February 2006 in Case number A1696/04. The following passage was quoted from p. 12 of the judgment:

“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 die 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.”

The exact extent to which the court had in that matter made use of the heads of the one party is not clear, apart from the statement :

“...as die verhoofhof na 22 maande feitlik woordeliks een party se hoofde oorneem as sy uitspraak, sonder om na ‘n enkele argument van die teenparty

te verwys.”

It seems clear enough though that the trial court in that matter had, as in the present case, adopted the heads of the one party as its judgment. A possible difference between the two cases is that in the present case the heads of the respondent (which were adopted as the judgment), dealt extensively with the arguments advanced by the appellants. The court *a quo* must therefore have taken cognisance of the arguments of the appellants in the process of converting the respondent's heads into its judgment.

In any event the question of bias did not feature in the judgment at all. The full court merely took the view that after 22 months the trial court could not possibly remember all the details that are seen as giving a trial court an advantage over a court sitting on appeal, and concluded that it was in as good a position, if not a better one, to adjudicate the facts as the trial court was and concluded that the trial court had made a wrong finding of fact on the evidence before it.

While I with respect fully agree with the disapproval of the full court of the practice of simply adopting the heads of one of the parties as the judgment of the court, that judgment is not authority for the proposition that if a court does just that, it may give

rise to a perception of bias.

It does not necessarily follow that the way in which the judgment was given is indicative of bias. If the court *a quo* concluded that the respondents were correct and if he was satisfied with all the arguments raised by them, and taking into account that the case was heard in the urgent court, there was no compelling reason why he should not have adopted their heads as his judgment, rather than to find the time to write his own judgment *de novo*. The fact that he fully agreed with the arguments of the respondents and adopted their heads for the sake of convenience when he was saying just that, is no indication of bias.

In any event the essential question in issue in the present appeal, viz whether Basson J should have recused himself, has become of academic interest only, if that had not been the case from the day when his judgment was delivered. It would certainly not have constituted grounds for an application for his recusal if he had said exactly the same things in his judgment, but in his own words. Admittedly there remained thereafter the possibility of an application for leave to appeal and perhaps an application in terms of Rule 49 (11), but one can hardly imagine the loser in every case applying for the recusal of the judge concerned every time that a judgment goes against it. If the application succeeds and the judgment of the second judge goes the other way, one could expect the loser to then bring a similar application.

thus leading to litigation in ever decreasing concentric circles until the parties disappear into the resulting whirlpool. The correct remedy of the appellants was an appeal in which the question of bias could be raised as one of its points. In my view the appeal must be dismissed for that reason alone.

The application for leave to appeal was heard before Makgoka AJ (as he then was) in the temporary absence of Basson J, and succeeded. The latter has since retired and has become permanently unavailable. The risk of perceived or even real bias from a judge who has to decide the further fate of the application has therefore disappeared and the only result of allowing the present appeal will be that there will effectively be a "mini-appeal" before the real appeal. The question that has to decide the outcome of this appeal is purely whether the refusal of the application for its recusal by the court *a quo* was correct or not. At the same time we should not entirely close our eyes to the reality of the subsequent events and the untenable situation that will arise if the appeal were to succeed.

I would finally like to record my appreciation for the comprehensive, lucid and very helpful heads filed by counsel for both sides.

The order that I propose is that the appeal be dismissed with costs, including the costs of two counsel.



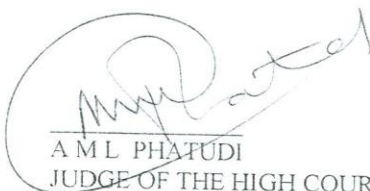
F G PRELLER
JUDGE OF THE HIGH COURT

I agree.



W R C PRINSLOO
JUDGE OF THE HIGH COURT

I agree



A M L PHATUDI
JUDGE OF THE HIGH COURT