

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-06-17

Case Number: 11670/08

In the matter between:

SALT OF THE EARTH CREATIONS (PTY) LTD

First Applicant

KINGSGATE CLOTHING (PTY) LTD

Second Applicant

PAUL VIVALDI FASHIONS (PTY) LTD

Third Applicant

and

THE GAP, INC

First Respondent

REGISTRAR OF TRADE MARKS

Second Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicants seek orders in terms of s 27(1)(a) and (b) of the Trade Marks Act 194 of 1993 ('the Act') that the first respondent's trade marks, numbers 1994/10423 and 1990/05434, both in respect of the mark 'GAP,' be removed from the register of trade marks.

- [2] The applicants are South African companies which carry on business in Durban as manufacturers and distributors of clothing and apparel. The first respondent is a corporation incorporated under the laws of the state of Delaware, United States of America, which carries on business in San Francisco, California, as a manufacturer of clothing, apparel and personal care products. For the past decade the parties have conducted litigation as to who is entitled to use the GAP trade marks in South Africa.
- [3] Only the first respondent opposes the application. It has delivered a lengthy answering affidavit as well as a supplementary answering affidavit. The second respondent has played no part in these proceedings. The first respondent will therefore be referred to as the respondent.
- [4] The applicants seek final relief on notice of motion. There are no disputes of fact on the material issues and final relief may be granted if the facts averred in the applicants' affidavits which have been admitted by the respondent together with the facts alleged by the respondent justify the grant of final relief – see ***National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)*** para 26. This is so irrespective of which party bears the onus – see ***Ngqumba en 'n Ander v Staatspresident en Andere 1988 (4) SA 224 (A)*** at 260I-261B; ***Pennello v Pennello (Chief Family Advocate as Amicus Curiae) 2004 (3) SA 117 (SCA)*** at 138G-139F. The

applicants have not requested the court to reject any of the respondent's evidence – see ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)** at 634E-635C; ***National Director of Public Prosecutions v Zuma supra*** para 26 – and accept that none of the respondent's allegations of fact can be rejected.

- [5] Apart from the usual founding, answering and replying affidavits, the parties filed three additional affidavits: a supplementary answering affidavit (4th set), a supplementary replying affidavit (5th set) and a further supplementary replying affidavit (6th set). Without formally applying for leave to file a further affidavit – see ***James Brown & Hamer (Pty) Ltd v Simmons NO* 1963 (4) SA 656 (A)** at 660E-G; ***Standard Bank of SA Ltd v Sewpersadh* 2005 (4) 148 (C)** at para [13]; ***Waltloo Meat & Chicken (Pty) Ltd v Silvy Luis (Pty) Ltd* 2008 (5) SA 461 (T)** at paras [29] – [30] - the respondent filed the supplementary answering affidavit (4th set). The applicants objected to the filing of the 4th set, but, in case the objection was not upheld, filed the supplementary replying affidavit (5th set). The applicants then filed the further supplementary replying affidavit (6th set). The respondent did not object to the filing of the supplementary replying affidavit (5th set) but did object to the filing of the further supplementary replying affidavit (6th set). The applicants gave notice of their intention to strike out the supplementary answering affidavit (4th set) and the respondent gave notice of its intention to strike out the further supplementary replying affidavit (6th set). Because time

was limited, at the commencement of the hearing I ruled that the parties should address full argument to the court on all the issues and that at the end of the case a ruling would be made as to whether the court would receive the additional affidavits (i.e. the 4th, 5th and 6th sets). During argument the applicants did not seek to strike out the 4th set and did not persist in seeking leave for the 6th set to be filed. It also became clear that the parties consider that the contents of both the supplementary answering affidavit (4th set) and supplementary replying affidavit (5th set) are relevant and that they had in effect reached agreement that these affidavits should be filed. In these circumstances, and because the affidavits do not change the substance of the parties' contentions, I am satisfied that I should allow the affidavits to be filed to enable the court to properly decide the matter. Accordingly I rule that the supplementary answering affidavit (4th set) and supplementary replying affidavit (5th set) be filed.

[6] The respondent is the registered proprietor in terms of the Act of the following two trade marks:

- (1) trade mark no 94/10423, GAP, in class 3 in respect of 'Body and bath soaps, lotions, powders and salts; perfumery and eau de toilette; essential oils; cosmetics and cosmetic treatments; hair shampoos, lotions and preparations; dentifrices' ('the class 3 mark');

- (2) trade mark no 90/05434, GAP, in class 30 in respect of 'Biscuits, rusks, bread, crisp bread, bread rolls, buns, scones, cakes, pastry, flour and meal, and flour confectionery' ('the class 30 mark').

The respondent acquired the class 30 mark by assignment with effect from 3 November 2000. The two trade marks are associated.

[7] The relevant parts of s 27 read as follows:

'(1) ... a registered trade mark may, on application to the court, ... by any interested person be removed from the register in respect of any of the goods or services in respect of which it is registered, on the ground either –

- (a) that the trade mark was registered without any *bona fide* intention on the part of the applicant for registration that it should be used in relation to those goods or services by him or any person permitted to use the trade mark as contemplated by section 38, and that there has in fact been no *bona fide* use of the trade mark in relation to those goods or services by any proprietor thereof or any person so permitted for the time being up to the date three months before the date of the application;
- (b) that up to the date three months before the date of the application, a continuous period of five years or longer has elapsed from the date of issue of the

certificate of registration during which the trade mark was registered and during which there was no *bona fide* use thereof in relation to those goods or services by any proprietor thereof or any person permitted to use the trade mark as contemplated in section 38 during the period concerned; or

(c) ...

- (3) In the case of an application in terms of paragraph (a) or (b) of subsection (1) the onus of proving, if alleged, that there has been relevant use of the trade mark shall rest upon the proprietor thereof.'

The applicants rely on paragraphs (a) and (b) of subsection (1) in respect of the class 3 mark and on paragraph (b) of subsection (1) in respect of the class 30 mark. The respondent admits that the applicants are 'interested persons' for purposes of s 27(1).

[8] S 27(1)(a) has two requirements:

- (1) the trade mark was registered without any *bona fide* intention on the part of the applicant for registration that it should be used in relation to those goods or services by him; and
- (2) there has in fact been no *bona fide* use of the trade mark in relation to those goods or services by any proprietor thereof up to the date three months before the date of the application.

- [9] With regard to the first requirement the passage from the judgment in ***In re Ducker's Trade Mark* [1929] 1 Ch 113 (CA) ([1928] 45 RPC 105)** at 121 which was quoted with approval in ***Victoria's Secret Inc v Edgars Stores Ltd* 1994 (3) SA 739 (A)** at 745E-G describes the intention required –

‘... a man must have an intention to deal, and meaning by the intention to deal some definite and present intention to deal, in certain goods or descriptions of goods. I agree that the goods need not be in being at the moment, and that there is futurity indicated in the definition; but the mark is to be a mark which is to be definitely used or in respect of which there is a resolve to use it in the immediate future upon or in connection with goods. I think that the word “proposed to be used” means a real intention to use, not a mere problematical intention, not an uncertain or indeterminate possibility, but a resolve or settled purpose which has been reached at the time when the mark is to be registered.’

See the judgment of the court *a quo* in ***McDonalds Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd; McDonalds Corporation v Dax Prop CC; McDonalds Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd*** (unreported judgment, TPD, 5 October 1995) at 48-52.

In the ***Duckers*** judgment the court also said:

‘What is the meaning of “*bona fide*”? I think that must mean a real intention in the sense which I have already explained and if

it is not found that there was that real resolve, intention and purpose, then it is shown that originally the mark was put upon the Register when it ought not to have been put on, because there was not a sincere purpose to make use of the mark in connection with the goods.'

See the **McDonalds** judgment in the court *a quo* at 51.

The learned authors of **Webster & Page South African Law of Trade Marks 4 ed ('Webster & Page')** summarise the position in para 3.53 –

'(A)n intention to use means a definite and present intention to use the mark as a trade mark in relation to certain goods or services at the time the application is made' and

'(A)n ulterior purpose in applying for the mark may constitute a lack of a *bona fide* intention to use the trade mark as a trade mark' and

'(T)here must be a real intention to use the mark in the future, not a general intention to extend business or an uncertain or indeterminate possibility'.

See also **Ritz Hotel Ltd v Charles of the Ritz 1988 (3) SA 298 (A)** at 310B-C; **J. Batt & Co (1898) 15 RPC 534 (CA)** at 538.

An applicant for registration must have such an intention when he applies for the registration of the mark. If he does not have a *bona fide* intention to use the mark, in terms of s 10(4) of the Act it is not registrable and is liable to be removed from the register. Ordinarily, it

will be difficult to obtain direct evidence that the applicant did not have such a *bona fide* intention to use the mark and the person seeking removal will have to rely on circumstantial evidence, the most important of which is, obviously, that there has not, in fact, been any *bona fide* use of the mark subsequent to its registration. In the **McDonalds** judgment in the court *a quo* at 52 the court said:

‘Non-user for long periods of time such as ten, twenty or even twenty five years, is obviously highly relevant to the question of *bona fide* intention to use the trade mark and the absence of a satisfactory explanation would justify an inference adverse to the proprietor of the trade marks’

See also **Webster & Page** para 13.27 page 13-28 to 13-29.

S27(1)(a) of the Act now provides that the proprietor can avoid the removal of the mark by proving its *bona fide* use at any time up to the date three months before the date of the application to remove the mark from the register.

- [10] The applicant must establish that there has been no *bona fide* use of the trade mark in relation to the goods or services up to the date three months before the date of the application. In **Arjo Wiggins Ltd v Idem (Pty) Ltd and Another 2002 (1) SA 591 (SCA)** at para [6] the court dealt with the concept of *bona fide* use as follows:

‘The most authoritative treatment in our trade mark law of the concept of *bona fide* use is that by Trollip J in ***Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk***, where “*bona fide* user” by a registered trade mark proprietor in resisting rectification of the register under s 136 of the Trade Marks Act 9 of 1916 (the 1916 Act) was at issue. This Court confirmed the judgment of Trollip J, but Steyn CJ expressly withheld endorsement of the comprehensive exposition of the concept at first instance. Trollip J’s treatment was, however resurrected and approved in ***McDonalds Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonalds Corporation v Dax Prop CC and Another; McDonalds Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC***, where E.M. Grosskopf JA, although dealing with the avowedly “somewhat different” context of s 36 of the present Act, nevertheless considered Trollip J’s reasoning to be “entirely applicable”.’

In ***AM Moolla Group Ltd and Others v The Gap Inc and Others*** 2005 (6) SA 568 (SCA) at para [42] the court applied Trollip J’s finding that *bona fide* user –

‘means a user by the proprietor of his registered trade mark in connection with the particular goods in respect of which it is registered with the object or intention primarily of protecting, facilitating, and furthering his trading in such goods, and not for some other, ulterior object.’

It also referred with approval to the test formulated in ***Ansul BV v Ajax Brandbeveiliging BV*** [2003] RPC 40 (Court of Justice of the European Communities) at 160 lines 49-55 –

‘When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark.’

- [11] S 27(1)(b) requires that it be shown that up to a date three months before the date of the application there was no *bona fide* use of the trade mark in relation to the goods or service for a continuous period of 5 years or longer. *Bona fide* use in this paragraph obviously has the same meaning as it has in paragraph (a). With regard to the question of use for an ulterior purpose, the court *a quo* in ***Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T)** said at 25E-F:

‘It would follow that in my view a user merely to protect a trade mark from expungement from the register under sec. 136, without the proprietor’s having any intention of trading in the goods in respect of which it was registered, would not be *bona fide* (cf. ***Newchatel Asphalte Co Ltd*, 30 RPC 349** at p358 lines 3-8 and lines 30-50), because that would constitute an ulterior purpose.’

On appeal (**1963 (3) SA 341 (A)** at 351E-F) the court said –

‘Whatever the full meaning of the phrase may be, it seems clear that user for an ulterior purpose, unassociated with a genuine

intention of pursuing the object for which the Act allows the registration of a trade mark and protects its use, cannot pass as a *bona fide* user (cf. ***Electrolux Ltd v Electrix Ltd and Another*, 71 RPC 23**).’

In order to constitute *bona fide* use the use does not have to be substantial, and use may be *bona fide* even if it is motivated by the desire to defeat threatened proceedings for expungement. In ***Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co* 1986 (4) SA 796 (T)** at 816H-J the court summarised the position as follows:

‘The extent of the use within the relevant period is not material to the question of *bona fides* except insofar as the extent of the use may afford guidance on the question whether its purpose was or was not that which would make the use *bona fide* in the sense laid down by Trollip J. If the necessary “object and intention” were present, even use to a minor extent may defeat an application for expungement (see the ***Nodoz Trade Mark* 1962 RPC (1)**). Moreover, use may be *bona fide* even if the decision to undertake it at a particular time was influenced by a desire to defeat threatened or feared proceedings for expungement (see ***Electrolux Ltd v Electrix Ltd* (1954) 71 (RPC) 37**).’

The use may also be use within the extended meaning of use of a mark in sections 2 and 3 of the Act. S 2(2)(c) provides that references in the Act to the use of the mark shall be construed, where the mark is capable of being audibly reproduced, as references to the use of an audible reproduction of the mark and s 2(3)(a) provides that references in the Act to the use in relation to goods shall be construed as

references to the use thereof upon, in physical or other relation to such goods. In respect of use in other relation to goods it has been held that use in advertisements and promotional material is use in other relation to goods – see ***K-Mart (Pty) Ltd v K-Mart Corporation and The Registrar of Trade Marks*** (unreported judgment, TPD, 18 December 1987) at 18-21 and ***Contrapest Holdings SA (Pty) Ltd v Ecolab Inc 1998 BIP 217 (T)*** at 219G-220A. Both judgments quote, with approval, the conclusion reached in the ***Hermes Trade Mark (1982) RPC 425*** at 430 lines 14-19 -

‘Thus, if the registered proprietor should commence a series of advertisements featuring his mark as part of an introductory campaign, prior to putting his goods on the market under the mark, but before they were actually on the market, in my judgment such use would clearly be use of the mark in the course of trade, not upon the goods or in physical relation thereto, but it would be in other relation thereto, the point being that it would be use in the course of trade in those goods, albeit in advertisements.’

In the ***K-Mart*** judgment at 18 the court also referred to use of the mark during negotiations with potential retailers and seemed to consider that that was use of the mark in other relation to the goods although it did not base the judgment on that finding. It seems to me that where the mark is a word mark it is obviously capable of being audibly reproduced and its use during negotiations with potential retailers could, depending on the context in which it is used, constitute use in other relation to the goods. Nevertheless, the learned authors of

Webster & Page (at 13.29) warn that the courts ‘must be careful to ensure that trade mark proprietors do not, through the expedient of fictitious or simulated use, prove what is, in effect, a form of defensive registration.’

[12] Even if the applicants establish the requirements of s 27(1)(a) and (b) the court retains a general or residual discretion to refuse to remove a trade mark from the register but will exercise this discretion only in exceptional circumstances – see ***McDonalds Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Another; McDonalds Corporation v Dax Prop CC and Another; McDonalds Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC 1997 (1) SA 1 (A)*** at 31H-32C. In the absence of such circumstances the applicant for removal is *prima facie* entitled to expungement for non-use.

[13] The respondent admits that it has not used the class 30 mark during the relevant period of 5 years (in fact, neither the respondent nor the previous proprietor ever used the mark) but alleges that it used the class 3 mark on two occasions, during the period 2002-3 and during the period 2007-8. The applicants cannot dispute what the respondent’s deponents say but deny that such use constitutes *bona fide* use. If it is proved that the respondent used the class 3 mark during the relevant 5 year period and that the use was *bona fide*, such *bona fide* use is a complete defence to the applicants’ claim for

removal of the class 3 mark. In its answering affidavit the respondent contends that if the court finds such *bona fide* use it should exercise its discretion in terms of s 31 of the Act to regard such use as use of the class 30 mark and refuse to remove it from the register.

[14] S 31(1) of the Act provides that –

‘When under the provisions of this Act use of a registered trade mark is required to be proved for any purpose, ... the court, ... may, if and so far as ... it deems fit, accept proof of the use of an associated registered trade mark ... as equivalent to proof of the use required to be proved.’

In ***Distillers Corporation (SA) Ltd v SA Breweries Ltd; Oudemeester Groep Bpk v SA Breweries Ltd*** 1976 (3) SA 514 (A) at 539B-D the court said the following with regard to s 39(1) of the previous Trade Marks Act which, for all practical purposes, is the same as section 31(1) of the Act –

‘Now, in exercising its discretion in secs. 38(5) and 39(1) as to whether or not to accept the proof of the use of the associated trade mark as being equivalent to the use of the mark under enquiry (referred to henceforth as “equivalent use”), the Court, in my view, should have regard to how closely the trade marks are associated and resemble one another and the extent and nature of the equivalent use. The remoter the association, or the lesser the resemblance, or the less satisfactory the equivalent use, the more disposed the Court should be to ignore the association or lean against accepting the use of the associated trade mark as

being the required equivalent use. While these may not be the only considerations bearing on the Court's discretion under secs. 38(5) and 39(1), they are, I think, the important ones.'

[15] The primary issues to be decided are therefore –

- (1) Whether the respondent had a *bona fide* intention to use the class 3 mark when it applied for registration;
- (2) Whether the respondent has established that it used the class 3 mark at any time up to the date three months before the date of this application or during the continuous period of five years up to the date three months before the date of the application;
- (3) Whether such use was *bona fide*;
- (4) Whether such *bona fide* use must be taken to be use of the class 30 mark in terms of section 31(1) of the Act.

[16] With regard to the respondent's intention to use the class 3 mark when it applied for registration the applicants refer to paragraph 7.3 of the founding affidavit of Donald G Fisher, the respondent's chairman and founder, in the proceedings instituted by the respondent against the applicants and their related companies in 1999 under case number 23518/99. (This affidavit is attached to the respondent's answering affidavit marked JG3.) Under the heading 'Expansion of the

Applicants' Reputation and Goodwill in the Gap Trade Mark' Mr. Fisher says –

'The Applicants consider, and have for some time considered, much of the world to be a marketplace for its GAP stores and products. My company has considered and does consider South Africa to have the attributes of a country where GAP stores could successfully trade and GAP products and services could be manufactured, sold and offered. My company wishes, and has wished, to enter the South African market at the appropriate time. In fact my company has already sourced products from South Africa under the OLD NAVY BRAND and would like to source products branded with the GAP trade mark.'

(Mr. Fisher's affidavit consists of 78 pages. As will appear later it is one of the documents which the parties agreed should be struck out. In view of the fact that paragraph 7.3 of Mr. Fisher's affidavit was the foundation for the applicants' argument that when the respondent applied to register the mark the respondent did not have the requisite *bona fide* intention to use it, the failure to retain the relevant pages is a clear oversight and the whole document will not be struck out.)

- [17] With regard to the respondent's initial use of the class 3 mark in 2002-2003 it is common cause that on 6 November 2001 the applicants' attorney addressed a letter to the respondent's attorney (the parties were already involved in litigation) demanding that the respondent voluntarily remove the class 3 and class 30 marks from the register *inter alia* on the grounds of non-use, failing which, the applicants would

institute proceedings for removal of the marks in terms of s 27(1)(a) and/or (b) of the Act.

- [18] The respondent alleges that it used the class 3 mark on two occasions during the relevant 5 year period (i.e. 4 December 2002 to 4 December 2007): during the period August 2002 to May 2003 and again during the period October 2007 to May 2008. The respondent relies on a number of affidavits in support of these allegations. The applicants cannot and have not disputed the facts set out in these affidavits. In their replying affidavits they have commented on the allegations to the effect that the facts set out do not establish that such use as is shown is *bona fide* use of the mark. In argument the applicants contend that on the facts set out it should be inferred that the use was not *bona fide*. In respect of the first period, they rely on the chronology of events, the paucity or absence of evidence of use of the mark and the nature of the evidence and, in respect of the second period, they rely on the fact that the respondent's goods bearing the mark were only sold in South Africa after the relevant period. The respondent contends that its use of the mark in 2002 to 2003 was *bona fide* and in argument before this court the respondent's answer to the latter contention is that it used the mark 'in other relation' to the goods when it negotiated with Stuttafords to sell the GAP personal care goods and when it executed the order which Stuttafords placed for the goods. The question of whether the respondent is entitled to raise this argument will be considered later.

[19] As far as the first period is concerned, the respondent's principal deponent, Julie Gruber, who is the respondent's Vice President and Deputy General Counsel, clearly has no personal knowledge of the facts and relies on affidavits by Marci Friedman, Julie Kanberg and Mark Borrelli filed in the previous expungement proceedings brought by the applicants and their related companies in 2002 and the affidavit of Orsolya Nadasdi deposed to in answer to the present application. When she deposed to her affidavit in November 2002 Marci Friedman was employed by Gap International BV, a wholly-own subsidiary of the respondent, and was a senior manager of the International Sales Program. When she deposed to her affidavit in May 2002 Julie Kanberg was the respondent's Vice President and Associate General Counsel. When he deposed to his affidavit in May 2002 Mark Borrelli was the respondent's Director of Global Compliance and Operational Manager and since November 1994 had been in the respondent's Personal Care Product department which is responsible for the creation of all the respondent's personal care products. When she deposed to her affidavit in April 2008 Orsolya Nadasdi was no longer employed by the respondent. However she had been employed by the respondent during the period December 1999 to September 2007 as Gap Brand Assistant Manager and had dealt with Gap personal care products. The applicants do not contend that these witnesses do not have personal knowledge of the facts to which they deposed. They also do not object to the admissibility of any of the evidence and

accordingly it will be accepted, as the applicants did, that the evidence is admissible.

[20] The relevant facts may be summarised as follows:

- (1) Between 1994 and 2002 the respondent's personal care products were sold under the GAP trade mark in the United States of America, Canada, the United Kingdom, France, Germany and Japan.
- (2) The respondent began selling GAP personal care products in Canada and the United Kingdom in 1995, in France and Germany in 1996 and in Japan in 1997. These products included eau de toilette, body lotion, shower gel, bath salts and lipstick.
- (3) The respondent registered its GAP class 3 mark in the United States, Canada, the United Kingdom, France and Germany and the respondent and its subsidiaries registered a large number of GAP class 3 marks in 39 countries.
- (4) During the period 1995 to 2001 the respondent advertised its GAP class 3 products extensively throughout the world. While the respondent is unable to break down the amounts spent in advertising each of the GAP, BANANA REPUBLIC and OLD

NAVY products the advertising expenditure in respect of the three brands grew from \$60 541 000 in 1995 to \$422 820 000 in 2001. Part of this advertising of GAP class 3 products was in magazines which circulated in South Africa, for example 'Glamour', 'Elle' and 'Vogue'. The advertisements prominently featured the GAP trade mark in relation to the respondent's personal care products.

- (5) Marci Friedman was involved in attempts to market the respondent's GAP personal care products in South Africa. In February 2002 (which was after receipt of the applicants' letter of demand) she approached Edgars Consolidated Stores Ltd ('Edgars') and in April 2002 she approached Ascot Cosmetics ('Ascot'); Foschini Retail Group Ltd ('Foschini') and New Clicks Holdings Ltd ('Clicks') with a view to distributing 'a limited selection' of GAP personal care products in South Africa. Marci Friedman communicated by e-mail with these potential distributors and some of her e-mails were cc Julie Gruber.

(i) Edgars

On 25 February 2002 Marci Friedman addressed an e-mail to a Mr. Allen Brown of Edgars with a view to selling an assortment of personal care products 'featuring our signature GAP scents called 'Dream' and 'Heaven' in the

South African market'. Further correspondence reveals that the parties discussed the detail of the relationship and that the respondent sent Edgars a proposal and samples of GAP perfumes. In most of the e-mails the subject is given as 'GAP personal care' but it is clear that only two eau de toilette products ('Dream' and 'Heaven') in 100ml bottles were to be supplied. Marci Friedman indicated clearly that the respondent was interested in negotiating a contract, selling the products and shipping them by the end of March 2002. Eventually during April 2002 the parties decided not to pursue the negotiations and they ended.

(ii) Ascot

On 3 April 2002 Marci Friedman addressed a similar e-mail to the one she had sent to Edgars to Ascot with a view to selling an assortment of personal care products 'featuring our signature GAP scents called "Dream" and "Heaven" in the South African market'. Ascot did not reply to this e-mail and there were no negotiations.

(iii) Foschini

On 4 April 2002 Marci Friedman addressed an e-mail to Foschini seeking a way to communicate in connection with the merchandising of personal care products and received a reply from Sharon Archer, Foschini's Merchandise Executive – Cosmetics. On 16 April 2002 Marci Friedman sent Sharon Archer an e-mail, similar to that sent to Ascot and Edgars. Subsequent correspondence between Marci Friedman and representatives of Foschini shows that they attempted to negotiate an agreement and that the respondent sent Foschini samples of the products to be sold. Regarding a query about quantities and markets Marci Friedman replied on 2 May 2002 –

‘Regarding your questions below:

As this is a new relationship, we would like to limit our initial sale to 1 000 units per style. If sales go well, and both of us are happy with the relationship, we would discuss more orders at that time. How does this work for Foschini and how many stores would be needed to support this?

We are not planning a formal marketing campaign for this, however, we would be willing to discuss potential in store support (X-customer information cards) and limited external advertising’.

The subsequent correspondence also shows that Foschini was not prepared to enter into an agreement on

the terms proposed by the respondent and that negotiations terminated in August 2002.

(iv) Clicks

On 25 April 2002, after sending samples of the products to Clicks, Marci Friedman addressed an e-mail to Carol Poolton of Clicks similar to her letters to Ascot, Edgars and Foschini, informing her of the respondent's interest in selling GAP brand personal care products in South Africa, the respondent's desire to achieve this by August 2002 and enquiring whether Clicks would be interested in selling the GAP products in its stores. After Carol Poolton expressed interest, further correspondence followed in which the parties discussed the detail of the relationship. On 1 May 2002 Marci Friedman outlined her initial proposal in respect of Gap 'Dream' Eau de Toilette and Gap 'Heaven' Eau de Toilette. With regard to volume she said –

'We would like to limit our initial sale to 1 000 units per style. If sales go well, and both of us are happy with the relationship, we would discuss more orders at that time.'

She also said that the respondent was 'anxious to negotiate a contract, sell the product and ship the product by end of May 2002'.

Negotiations continued and by October 2002 an agreement was concluded. The agreement was between Gap International BV (GIBV) and Clicks and the main appointment clause reads as follows:

'GIBV appoints Retailer as a non-exclusive retailer for the sale of certain goods produced for GIBV and offered to Retailer ('Authorised Goods') for resale by Retailer through the retail stores listed in Exhibit A in South Africa (the 'Territory') and by this reference made a part thereof. GIBV may amend the Territory from time to time by written notice to Retailer, subject to the provisions of this Agreement. Retailer understands and acknowledges that the Authorised Goods selected by GIBV for Retailer will include personal care products produced for GIBV for sale under the GAP Brand ('Brand'). Retailer agrees to purchase Brand personal care products offered to Retailer by GIBV each season in volumes consistent with production and overall volume minimums identified by GIBV prior to Retailer's order placement each season. Retailer shall purchase the Authorised Goods from GIBV and resell them for its own account, in its own name, within the Territory.'

At that stage Carol Poolton wished to expedite the delivery of the GAP products so that they would be available in Clicks stores for the Christmas trading period commencing in the last week of November. The parties then made arrangements for delivery of the products and for payment and Marci Friedman promised to deliver 100 units of each scent for in-store testers. She also confirmed that Clicks would track weekly sales and order additional stocks as it became necessary and advised Clicks of the respondent's advertising requirements. On 29 October 2002 Clicks sent Marci Friedman a fax with an order for 1 152 GAP 'Dream' eau de toilette and 1 152 GAP 'Heaven' eau de toilette sprays (in 100ml bottles) for a total price of \$12 692 (R129 507,84), for immediate delivery. On 12 November 2002 Marci Friedman sent Clicks the respondent's commercial invoice for 2 200 GAP scents EDT with a total price of \$11 000.

On 6 January 2003 Orsolya Nadasdi sent a letter to Melony Roux of Clicks attaching 'Declaration of Sales' and 'Sales Documentation' forms and requesting that they be filled in, signed and returned to her by 22 January 2003. On 11 February 2003 Melony Roux signed the Declaration of Sales and returned it to Orsolya Nadasdi together with the Sales Document and photographs

showing GAP perfumery displayed for sale. The Declaration of Sales reads as follows –

'Declaration of Sales

I, Melony Roux, of Clicks New Holdings Ltd, cnr Searle and Pontac Streets, PO Box 5142, Cape Town 8000, Cape Province, South Africa, do solemnly and sincerely declare as follows:

INTRODUCTION

1. I am the Buyer of Clicks New Holdings Ltd ("the Company"), a distributor of personal care in South Africa. I have been responsible for the Company's dealings with GAP, Inc and its affiliates ("GAP, Banana Republic and Old Navy") since 2002. During that time, the Company has sold merchandise bearing the brands of GAP Inc and its affiliated companies (including and without limitation GAP and Banana Republic) in South Africa for resale within South Africa. I have worked in the retail industry for 9 years and specifically in the personal care field for 2 years. I am duly authorised to make this Declaration. Unless otherwise stated, I make this Declaration from facts and matters within my knowledge or from the books and records of the Company.

SALE OF MERCHANDISE

2. Attached hereto is a true and correct copy of an ISP Distributor Sales Documentation form. I personally filled out this form and the information contained in it is true and correct.
3. Also attached hereto are true and correct copies of invoices, sales reports, etc. for sales indicated on the form referenced in paragraph 2.
4. Attached hereto are true and correct copies of pictures showing the sale of GAP, BANANA REPUBLIC and OLD NAVY brand products in famous clothes stores in Belgium during 200_.'

The copies of invoices and sales reports are not attached and the reference to 'famous clothes stores in Belgium' is not explained. The document was obviously prepared by the respondent with a view to demonstrating use of the GAP mark on personal care products but there is no reference to the sale of GAP personal care products.

The attached distributor sales information reflects the sale of 11 bottles (i.e. 100ml each) of GAP 'Heaven' EDT spray and 10 bottles (i.e. 100ml each) of GAP 'Dream' EDT spray at Clicks stores at various places in South

Africa. The photographs depict GAP personal care products apparently on display.

In February 2003 Orsolya Nadasdi continued to communicate with Melony Roux *inter alia* about promotional material but there was a break in communications when Melony Roux left Clicks. In June and July 2003 Orsolya Nadasdi communicated with Kelly Poerstamper of Clicks about point-of-sale material and sales of the GAP personal care products and Ms Poerstamper sent Nadasdi a schedule of the Clicks stores where Clicks offered GAP perfumery for sale. The schedule reflects that initially Clicks offered the products in 52 stores but by July 2003 Clicks was offering the GAP products at more than 100 stores throughout South Africa. Orsolya Nadasdi states that after this Clicks inexplicably did not respond to further communications. She does not attach copies of correspondence between the respondent and Clicks in support of this statement.

- [21] As far as the second period is concerned the respondent relies on the affidavits of Julie Gruber, Marco Cicoria, the Group Marketing and Merchandising Director of Stuttafords, and Herve Bouillonc, the International Director for GAP and Banana Republic Beauty Care Products at Inter Parfums USA LLC, a company incorporated in the

State of New York, USA, which distributes and retails perfumery, cosmetics and body care products throughout the world. Once again the applicants cannot and have not disputed the allegations in the affidavits.

[22] The relevant facts may be summarised as follows:

- (1) In 2006, after the judgment of the Supreme Court of Appeal in ***AM Moolla Group Ltd and Others v The Gap Inc and Others*** **2005 (6) SA 568 (SCA)** the respondent appointed Stuttafords as an authorised distributor of GAP merchandise in South Africa. The respondent has not attached a copy of the marketing and distribution agreement entered into between the respondent and Stuttafords. (This agreement obviously did not deal with GAP personal care products as the sale of these products was only discussed at the meeting in August 2007 referred to below.)
- (2) Early in 2007 Stuttafords commenced selling GAP clothing at three Stuttafords stores in Johannesburg and Cape Town. The GAP clothing proved to be extremely popular. In the first year after sales commenced Stuttafords sold goods to the value of about R18 million. Marco Cicoria describes the sales as 'phenomenal'.

- (3) In August 2007 Marco Cicoria and Alfred Emdon, the CEO of Stuttafords, met representatives of the respondent, including Nina King, to discuss the purchase of GAP apparel. During their meeting the Stuttafords representatives initiated a discussion about Stuttafords selling the respondent's GAP body care products and this led to an exchange of correspondence about the supply of the products. Eventually, on 3 October 2007, Mareli Coetzee of Stuttafords e-mailed an order for 800 units of GAP body care products to Nina King, who, on the same day, thanked her for the order and said: 'As soon as we have finalized the logistics process we will process your order and will let you know when to expect it in country'. On 7 December 2007 the respondent prepared a Purchase Order for the goods. It states that the order date is 7 December 2007 and contains a note 'Do not ship before: Dec 01, 07' and 'Anticipated Ship: Feb 22, 08 FOB'. The vendor copy print date is 20 February 2008. The witness, Marco Cicoria, does not say when the purchase order was received in South Africa.
- (4) As a result of logistical problems and the resignation of Nina King, who had been liaising with Stuttafords, the shipment of this order was delayed. The products did not arrive in South Africa until the end of April 2008 and only went on sale from 6 May 2008. By September 2008 Stuttafords had sold GAP personal care products to the value of R200 000.

- (5) Stuttafords intends to continue sourcing and selling GAP body care, perfumery and other class 3 products as part of its distributorship in South Africa.

[23] With regard to the respondent's intention when it applied for registration of the class 3 mark I am of the view that the evidence of Mr. Fisher in paragraph 7.3 of the founding affidavit in support of the respondent's expungement application (JG3) is destructive of the requisite intention to use the mark. The affidavit was deposed to in 1999, five years after the application for registration of the trade mark, and shows that the respondent's intention in 1999 was to enter the South African market when it considered it commercially appropriate to do so. Accordingly when it applied for registration of the mark in 1994 the respondent could not have regarded the mark as a mark 'to be definitely used' or could not have resolved 'to use it in the immediate future upon or in connection with goods'. It shows that the intention to use was an 'uncertain or indeterminate possibility'. This view is supported by the surrounding circumstances. The respondent only commenced advertising and selling the GAP class 3 products elsewhere in the world in 1994 and between then and 2002 sold them mainly in the developed economies of the United States of America, Canada, the United Kingdom, France, Germany and Japan as well as in a few other countries despite the fact that the GAP class 3 mark was registered in 39 countries. In South Africa the respondent did not

pertinently advertise its GAP personal care products nor did it sell any of these products either at the time of the application or thereafter for a period of 8 years. It only took steps to sell the products in South Africa after November 2001 when its attorney in South Africa received the applicants' attorney's letter demanding that the mark be removed from the register.

[24] This conclusion is not the end of the matter. The second requirement under s 27(1)(a) of the Act is whether there was any *bona fide* use of the class 3 mark.

[25] The applicants contend that the facts fall short of establishing that there was *bona fide* use of the class 3 mark. It is submitted that from the chronology, particularly the letter of demand in November 2001 followed by the sudden attempts in February and April 2002 to find distributors for the goods in South Africa, the inadequate attempts to get the class 3 goods onto the South African market, the failure to provide promotional material when requested, the limited number of personal care products sold in South Africa and the sudden and inexplicable cessation of sales by Clicks the inference is warranted that the sale of class 3 products by Clicks was not *bona fide* use of the class 3 mark. Use, according to the argument, was simply for the purpose of saving the mark: i.e. an improper purpose: and not for protecting, facilitating and furthering the trading in the class 3 products. As far as sales of GAP personal care products by Stuttafords are

concerned the applicants contend that there were no sales by Stuttafords within the relevant 5 year period.

- [26] The applicants accept that they have not disputed the respondent's evidence of use and that they cannot request the court to reject any of that evidence. Nevertheless they ask the court to draw inferences from the respondent's evidence (and the lack of evidence) that the respondent's use of the GAP mark on personal care products was not *bona fide*. In ***Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T)** at 27F-28D the court *a quo* drew inferences from the respondent's evidence and concluded that the facts did not show that the respondent made *bona fide* use of the trade mark. On appeal this method of reasoning was not criticised and the finding was not disturbed. See ***Rembrandt (Edms) Bpk v Gulf Oil Corporation* 1963 (3) SA 341 (A)** at 351C-G where the court said:

'On this evidence it is difficult to escape the conclusion that in all probability the appellant had no serious intention of carrying on any trade, as a commercial enterprise, in lubricating oil under this mark, and that such use as the appellant had made of it, had no other purpose than to defeat the proceedings brought by the respondent. That, in substance, is the conclusion at which the court *a quo* arrived, and I am not persuaded that it erred in doing so.

Counsel for the appellant referred to decisions in England and in the Netherlands in support of the contention that a single sale under

a trade mark may be sufficient to constitute user. I shall presume for present purposes that the sales and advertisements mentioned above satisfy the requirement of user in respect of lubricating oil. The question is whether the evidence shows that the user was not *bona fide* in the sense contemplated in sec. 136. I do not propose to attempt a comprehensive definition of what the expression “no *bona fide* user” means in this section. Whatever the full meaning of the phrase may be, it seems clear that user for an ulterior purpose, unassociated with a genuine intention of pursuing the object for which the Act allows the registration of a trade mark and it protect its use, cannot pass as a *bona fide* user. (Cf. ***Electrolux Ltd. v Electrix Ltd. and Another***, 71 RPC 23).’

[27] In ***Bates & Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co*** 1985 (3) SA 916 (A) at 939F-940B, Nicholas JA discussed reasoning by inference:

‘Inference, it was observed by Lord WRIGHT in ***Caswell v Powell Duffryn Associated Collieries Ltd*** [1939] 3 All ER 722 (HL) at 733, must be carefully distinguished from conjecture or speculation:

“There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture”

(This passage has frequently been quoted by this Court ...)

From both inference and speculation must be distinguished hypothesis.

This is a theory advanced in explanation of the facts in evidence as a basis for an inference. To be logically sound, it must be consistent with all the proved facts, and it must not postulate facts which have not been proved. It may be advanced by a legal representative or, where the subject is a technical one, by an expert witness. The process of reasoning by inference frequently includes consideration of the various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable). Cf ***Ocean Accident and Guarantee Corporation Ltd V Koch* 1963 (4) SA 147 (A)** at 159.'

See also the cases referred to in ***Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T)** at 780H-781D.

[28] The applicants argue that the evidence does not support an inference that the use of the class 3 mark was *bona fide*. The question to be answered is whether the most natural or plausible inference is that the use was not *bona fide* or that the most natural or plausible inference is that the use was *bona fide*. These are the only two hypotheses.

[29] The evidence pertaining to the sale of GAP personal care products to Clicks cannot be disputed. At face value it creates the impression that the respondent genuinely wished to sell these products in South

Africa. In February and April 2002 the respondent approached four major South African retailers to market in South Africa the respondent's personal care products under the GAP trade mark. The respondent's approaches to three of the retailers proved to be unsuccessful but, eventually, in October 2002, the respondent entered into an agreement with one, Clicks, and in October 2002 Clicks placed one order for 2,300 units of the respondent's products. Clicks first stocked the personal care products at 52 of its stores and by the end of June 2003 Clicks stocked the GAP personal care products at approximately 100 of its stores. However between January and May 2003 Clicks sold a total of 21 bottles (i.e. 100ml each) of the GAP personal care products. This is a tiny number of bottles and an insignificant volume.

- [30] On closer examination there are significant gaps in the narrative and a significant lack of records reflecting sales which should be available. When it applied for registration of the class 3 mark the respondent did not have the requisite *bona fide* intention to use the mark. Thereafter for a period of eight years, from 1994 to 2002, the respondent did not use the mark in South Africa. There is no explanation for the failure to sell GAP personal care products in South Africa during that period which is entirely consistent with the absence of a bona fide intention to use the mark when applying for registration. There is no other explanation for the sudden attempts to find a distributor for the goods in South Africa in 2002 than the fact

that the applicants had threatened to institute expungement proceedings on the ground of non-use. After the respondent decided to find a distributor in South Africa for its GAP personal care products the respondent did not pertinently advertise or promote the goods in South Africa. There is no explanation for the respondent's failure to advertise or promote its GAP personal care products in South Africa. This is entirely consistent with a lack of a bona fide intention to establish a market in South Africa for its GAP personal care products. There was also an unexplained lack of urgency in providing Clicks with promotional material and by July 2003 it had not yet provided Clicks with point of sale material as it had undertaken to do. This is also consistent with a lack of a genuine intention to establish a market for the products in South Africa. There is no explanation for the respondent's failure to establish the cause of Clicks' sudden loss of interest in continuing to sell the GAP personal care products and to deal with the problem. There is not even any evidence that the respondent attempted to do so. Without any supporting evidence it cannot be accepted that this was inexplicable-see ***A M Moolla Group Ltd and Others v The GAP Inc and Others 2005 (6) SA 568 (SCA)*** at para [31]. A large company with a genuine intention of establishing a market for its goods in a new country would not let the matter rest. There is a complete absence of any correspondence dealing with the break-down of the relationship. Finally there was no use of the mark from May 2003 until August 2007 and there is no explanation for the failure to do anything to market the GAP personal

care products during that period. Looking at all these facts and circumstances the most natural and plausible inference is that the sale of the goods to Clicks was done for an ulterior purpose: i.e. simply to save the class 3 mark.

[31] As far as Stuttafords is concerned, it is clear that Stuttafords did not sell any GAP personal care products in South Africa during the relevant period. Although Stuttafords sent an order for GAP personal care goods to the respondent on 3 October 2007 the respondent did not process the order until 7 December 2007 (i.e. after the relevant period), the goods were despatched early in February 2008 and only arrived on the shelves of the Stuttafords stores in May 2008. In argument before this court the respondent contends that this is of no moment because the respondent used the GAP mark in 'other relation' to the class 3 products. According to the argument this occurred during the negotiations to extend the range of good marketed by Stuttafords in South Africa to include personal care goods and when the respondent executed the order for the goods and issued the purchase order describing the goods.

[32] There are two difficulties with the argument. First, the point was not relied upon in the respondent's answering affidavits (Julie Gruber simply referred to these matters by way of background and in order to establish her evidence that the respondent always had the intention to use the class 3 mark in South Africa) and no attempt was made to

establish that such use was in South Africa. It is trite that the affidavits formulate the issues of fact, contain the evidence upon which the parties wish to rely and must set out clearly the issues and averments in support of the parties' cases – see ***Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A)** at 793C-H; ***Transnet Ltd v Rubinstein* 2006 (1) SA 591 (SCA)** para 28; ***Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA)**. Although a party in motion proceedings may advance legal arguments in support of the relief or defence relied upon by it even where such arguments are not pertinently mentioned in the papers this must arise from the facts established – see ***Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A)** at 509E-510B; ***Cabinet for the Territory of South West Africa v Chikane* 1989 (1) SA 349 (A)** at 360F-G. The court will only decide the point where it is satisfied that all the relevant facts are before the court and that there will be no injustice – see ***Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A)** at 285E-F. In the present case the point has not been canvassed in the papers and, as a result, neither party dealt with the issue in its heads of argument. It was raised for the first time during argument before this court. (The applicants also attempted to argue a point not dealt with in the affidavits: i.e. that the respondent had not established that its authorised user was in fact authorised to use the trade mark: but did not persist with the argument when the question of whether it was properly canvassed was debated.) Even if it is accepted that the

matter was pertinently raised, it appears that the negotiations took place in New York and that the mark was used once in an e-mail to Stuttafords and once in an order form. It is not clear whether the latter document was seen in South Africa. In my view the respondent has not established *bona fide* use in respect of the goods sold to Stuttafords.

[33] The applicants are therefore entitled to relief in respect of both trade marks.

[34] I record that even if the respondent had proved *bona fide* use of the class 3 mark I would not have accepted that as use of the class 30 mark in terms of s 31 of the Act. In argument the respondent's counsel conceded that he was unable to advance any sensible reasons why this should be done. The mark has never been used by the respondent or its predecessor. When the previous application was brought in 2002 the respondent relied on s 31 of the Act and it does so again in these proceedings. The goods covered by the mark are far removed from the goods in respect of which the respondent has an interest and it has not even said that it may use the mark in the future. In my view there is no good reason for saving the mark.

[35] The parties prepared a record of 1 471 pages. The evidence relevant to the issues is contained in not more than about 200 of these pages. The respondent gave notice that it would apply to strike out the

irrelevant evidence in the applicants' founding affidavit but did not argue this as a separate issue at the hearing. The respondent was also guilty of incorporating irrelevant evidence in its answering affidavit. At the end of the hearing the parties agreed that a number of passages in the affidavits and a number of annexures should be struck out. These are listed in a letter from the applicants' attorney to the court dated 18 May 2010 which is marked 'A' and filed at pages 1472-1473. The passages and documents listed run to about 530 pages. In my view this agreement does not cover all the matter which is irrelevant. A large proportion of the record was not referred to during argument and was simply ignored. For present purposes it is not necessary to identify all the irrelevant passages and annexures as I am satisfied that both parties are responsible for the state of the record and that the parties should each bear the costs of preparing their own affidavits and that these costs should not be included in the costs of the application. I shall order that with the exception of the first 10 pages of annexure JG3 to the answering affidavit of Julie Gruber which contains paragraph 7.3 and is relied upon by the applicants all the passages and documents referred to in exhibit 'A' be struck out. As pointed out earlier paragraph 7.3 of annexure JG3 was relied upon by the applicants as direct evidence to show that the respondent did not have the *bona fide* intention to use the GAP mark when it applied for registration of the class 3 mark. The other pages are retained so that paragraph 7.3 can be read in context.

Order

- [36] I The following registered trade marks are removed from the register and the Registrar is directed to effect the necessary rectification: Trade Mark number 1994/10423 and Trade Mark number 1990/05434;
- II The following passages in the record and the annexures thereto are struck out:
- (1) Founding affidavit of Ahmed Sadek Vahed
- Paras 10, 21-72, 82-94 and 156
- (2) Annexures to founding affidavit of Ahmed Sadek Vahed
- ASV8, ASV8A.1-ASV8A.9 and ASV10-ASV17
- (3) Answering affidavit of Julie Gruber
- Paragraphs 7.3, 7.4, 12, last sentence of paragraph 16, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 39
- (4) Annexures to answering affidavit of Julie Gruber
- Pages 11-78 of JG3, JG4 and JG5

(5) Replying affidavit of Ahmed Sadek Vahed

The portion of paragraph 65 commencing with the words 'As pointed out by Gruber', paragraphs 67, 69, 70, 71, 72, 75, a portion of paragraph 77 commencing with the words 'I also dispute', paragraphs 78, 79, 80, 81, 85, 87, 93, 94, 95, 98-122 and 129

(6) Annexure to replying affidavit of Ahmed Sadek Vahed

ASV62;

III The parties are to bear their own costs of preparing their affidavits and these costs shall not form part of the costs of the proceedings;

IV The first respondent is ordered to pay the costs of the application including the costs consequent upon the employment of two counsel.

**B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT**

CASE NO: 11670/08

HEARD ON: 17 May 2010

FOR THE APPLICANTS: ADV. A. FINDLAY SC
ADV. O.A. MOOSA SC
ADV. H. GANI

INSTRUCTED BY: Ms. M. Jacobs of Macrobert Inc.

FOR THE RESPONDENT: ADV. C.E. PUCKRIN SC
ADV. R. MICHAU
ADV. I. JOUBERT

INSTRUCTED BY: Ms. N. Bond of DM Kisch Inc.

DATE OF JUDGMENT: 17 June 2010