THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 657/08

CLIPSAL AUSTRALIA (PTY) LTD	**First Appellant**
CLIPSAL SOUTH AFRICA (PTY) LTD	**Second Appellant**
SCHNEIDER ELECTRIC SOUTH AFRICA (PTY) LTD	**Third Appellant**

and

GAP DISTRIBUTORS (PTY) LTD	**First Respondent**
LEAR IMPORTS (PTY) LTD	**Second Respondent**
SHIMON BOTBOL	**Third Respondent**
REGISTRAR OF DESIGNS	**Fourth Respondent**
THE MINISTER OF THE DEPARTMENT OF TRADE AND INDUSTRY	**Fifth Respondent**

Neutral citation:	*Clipsal Australia v Gap Distributors* (657/08) [2009] ZASCA 49 (25 May 2009)
Coram:	STREICHER ADP, CLOETE, SNYDERS JJA, HURT & TSHIQI AJJA
Heard:	4 MAY 2009
Delivered:	25 MAY 2009
Summary:	**Judgment staying judicial proceedings pending the determination of other judicial proceedings held to be appealable.**

ORDER

On appeal from: High Court Johannesburg (Joffe J sitting as court of first instance).

1 The appeal succeeds with costs including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order:

'The application for a stay of the proceedings pending the determination of the review application in case no 19081/08 in the High Court, Pretoria is dismissed with costs.'

JUDGMENT

STREICHER ADP (CLOETE, SNYDERS JJA, HURT and TSHIQI AJJA concurring)

[1] This is an appeal against a judgment by Joffe J in the High Court, Johannesburg,[1] in terms of which he stayed an application ('the contempt application') by Clipsal Australia (Pty) Ltd ('Clipsal Australia'), Clipsal South Africa (Pty) Ltd ('Clipsal SA') and Schneider Electric South Africa (Pty) Ltd ('Schneider') (hereinafter jointly referred to as the appellants) against Gap Distributors (Pty) Ltd ('Gap'), Lear Imports (Pty) Ltd ('Lear') and Mr Shimon Botbol ('Botbol') (hereinafter jointly referred to as the respondents). The application was for an order holding the

[1] *Clipsal Australia Pty Ltd and Others v Gap Distributors (Pty) Ltd and Others* 2009 (3) SA 305 (W).

respondents guilty of contempt of court in that by importing and disposing of certain single and double electrical sockets they disobeyed an order of court. The appeal is with the leave of the court below.

[2] The order of court allegedly disobeyed is an order by this court, in terms of which it replaced an order by the High Court, Johannesburg, pursuant to an application ('the first Clipsal application') by Clipsal Australia and Clipsal SA, as the proprietor and local exclusive licensee respectively of registered design A96/0687, against Gap Distributors and Trust Electrical Wholesalers both of which are firms owned by Gap.[2] The order interdicted Gap Distributors and Trust Electrical Wholesalers from infringing registered design A96/0687 by making, importing, using or disposing of certain Lear G-2000 series single and double electrical sockets ('Gap sockets').

[3] Subsequent to the court order Botbol, who is the sole shareholder and the managing director of Gap, caused Lear, which was a close corporation at the time, to be converted into a company of which he is the sole shareholder and director. Thereafter Lear applied to the High Court, Pretoria ('the Lear application') for an order –

(i) (a) declaring that the word 'original' in s 14(1)(a)(ii) of the Designs Act 195 of 1993 has a different meaning to the one ascribed to it by this court in the first Clipsal application; alternatively

(b) declaring that s 14(1)(a) alternatively s 20(1) of the Designs Act is inconsistent with the constitution; and

(ii) revoking Design A96/0697.

[2] *Clipsal Australia (Pty) Ltd and Another v Trust Electrical Wholesalers and Another* 2009 (3) SA 292 (SCA).

[4] Prior to this court's order against Gap Distributors and Trust Electrical Wholesalers, Lear was not in the business of importing and selling electrical sockets in South Africa but subsequent to the order it started selling such sockets ('Lear sockets'). This gave rise to the contempt application. The appellants contend that the Lear sockets differ only in immaterial respects from the Gap sockets and the sockets that are the subject of the registered design; that Gap and Lear are but Botbol in different guises and that the corporate veil between them should be pierced. The respondents opposed the application and lodged a counterclaim for the same relief as had been claimed in the Lear application.

[5] Upon application by the appellants the Lear application was stayed pending the final determination of the contempt application. Although it was common cause in the first Clipsal application that the design had been registered in respect of class 13 and although this court held in that case that the design was new and original, the respondents, in the contempt application, as in the Lear application, contend that the registration of the design is invalid in that no class is reflected in the register of designs and also in that the design is not new or original. They contend that the design is not new in the sense in which this court interpreted the requirement of originality and also in the sense contended for by them. According to them the originality requirement adopted by this court was adopted in breach of this court's constitutional duty to interpret legislation in a manner that promotes the spirit, purport and object of the Bill of Rights. In the alternative, if this court's interpretation of the originality requirement is the only interpretation that the requirement is reasonably capable of, they contend that the requirement is

unconstitutional because it unjustifiably restricts 'constitutional rights to freedom of expression and freedom of trade, occupation and profession'.

[6] In a yet further application instituted by Lear in the High Court, Pretoria against the Registrar of Designs, Clipsal Australia and Schneider, Lear applied for the review of the 'registration of application A96/0687 in Part A of the Register without a classification having been recorded in the Register, in contravention of Section 15(1) of the Designs Act'. The register referred to is the register of designs.

[7] At the hearing of the contempt application the respondents argued *in limine* that it should be stayed pending the determination of the review application. The appellants argued the contrary. The court below held that, in light of the fact that it is not apparent from the register of designs that the design was registered in class 13, the appellants' entitlement to the relief which they sought in the first Clipsal application was suspect and that it had a discretion to stay the contempt application if it considered it to be in the interests of justice to do so. It thereupon stayed the contempt application pending the determination of the review application on the basis that it was indeed in the interests of justice to do so. An application by the appellants for leave to appeal against the judgment was opposed by the respondents on the ground, among others, that it was not a final judgment and therefore not appealable. In dismissing this argument Joffe J said that the appellants were confronted with a judgment which effectively precluded them from enforcing the order they had in their favour, that registration of the design was due to terminate on 22 July 2011, that the parties could still be litigating by that time and that the effect of the order staying the determination of the application was final in effect and thus appealable.

Is the order of the court below appealable?

[8] The order by the court below will only be appealable if it qualifies as a 'judgment or order' within the meaning of those words in the context of s 20(1) of the Supreme Court Act 59 of 1959 (see *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531B-C). Such a judgment or order 'is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings' (*Zweni* at 532I-533B). The respondents submitted that the order by the court below was merely a procedural order, was not final, did not grant definite and distinct relief and did not dispose of a substantial portion of the relief claimed in the contempt application.

[9] The judgment of the court below did not dispose of any relief claimed in the contempt application. Once the review application has finally been determined the appellants will be free to proceed with the contempt application. But it did dispose of the relief claimed in the application by the respondents for the stay of the contempt application and it did so finally. That the court below intended the order staying the review application to be final and not susceptible to amendment is apparent from the order itself and is confirmed by Joffe J in his judgment in respect of the application for leave to appeal (see *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 792D-F).

[10] In *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale*

Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A) Eerste Nasionale Bank applied for the liquidation of the appellants. The appellants filed certificates in terms of s 21 of the Agricultural Credit Act 28 of 1966, contended that the certificates constituted a bar to the liquidation proceedings and applied for the dismissal of the proceedings. Berman J dismissed the application and on appeal the question arose whether Berman J's order was appealable. This court, per Hefer JA, held that if regard was had to the relief claimed by the applicant for liquidation the order clearly did not qualify as a 'judgment or order' but that seen from the viewpoint of the appellants the position was different. In effect they raised a special plea which if successful would have had the effect that the liquidation applications could not succeed until such time as the certificates had lapsed. That special defence had finally been determined by Berman J.[3] Hefer JA stated that the case was not distinguishable from cases such as *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A), *Smit v Oosthuizen* 1979 (3) SA 1079 (A) and *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) in which defences were raised by way of special pleas. In *Labuschagne* Wessels JA said at 583D-F:

'Die verligting wat eerste verweerder na aanleiding van die bewerings in sy spesiale pleit aangevra het, is hom geweier. Indien die verhoor voortgesit sou gewees het sou die Hof nie bevoeg gewees het om weer opnuut die vraag te oorweeg of die spesiale pleit gehandhaaf behoort te word, al-dan nie. By die verdere verhoor en die daaropvolgende uitspraak sou slegs die geskilpunte betreffende die meriete van eiser se eis ter sprake gewees het. Die uitspraak waarteen eerste verweerder in hoër beroep is, is dus, wat betref die Hof wat die uitspraak gegee het, `n finale en onherstelbare afhandeling van `n selfstandige en afdoende verweer wat eerste verweerder geopper het as grondslag vir die regshulp wat hy in die spesiale pleit aangevra het.'

[3] At 414H-415B.

[11] Having considered these cases and having compared what was said in *Labuschagne* with what was said in *Heyman v Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) where this court held that the dismissal of an alternative defence which had been heard separately was not appealable, Hefer JA said at 416C-D:

'Wanneer dit dan – hetsy in `n aksie of in mosieverrigtinge – gaan om `n spesiale verweer wat afsonderlik verhoor is, kom dit my logies voor om te let op die effek van die uitspraak op die regshulp wat deur die *verweerder* of *respondent* aangevra is. In wese is die Verhoorhof in so `n geval gemoeid met `n versoek van die verweerder of respondent om die eis van die hand te wys op grond van `n verweer wat niks te make het met die meriete van die saak nie. Dit is die regshulp wat op daardie stadium ter sprake is.'

He held that Berman J was likewise only concerned with an issue specially raised by the appellants, which issue had finally been disposed of by Berman J and that the order made by him was therefore an order which was appealable.[4]

[12] In *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 993B-D this court held that the dismissal of a plea that a disclaimer notice at an amusement park exempted a defendant from liability in respect of any injury or damage arising from the use of the amenities at the park constituted a final judgment within the meaning of s 83(b) of the Magistrates' Court Act so as to render it appealable. It held that the dismissal 'had the effect of finally and irretrievably disposing of a self-contained defence which existed independently of the respondents' case' and that it was therefore appealable.

[4] At 416D-F.

[13] Dealing with the appealability of an order refusing an application for security Hefer JA in *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 at 1042D-E quoted, with approval, the following passage in *Ecker v Dean* 1937 (SWA) 3 at 4:

'(t)he usual test, ie whether the order finally disposes of portion of, or a certain phase of, the issue between the parties does not really fit circumstances such as these, for the claim for security was a separate and ancillary issue between the parties, collateral to and not directly affecting the main dispute between the litigants . . . it is not a procedural step in attack or defence at all but a measure of oblique relief sought by one party against the other on grounds foreign to the main issue, ie the financial situation of one litigant, this relief to be effective if at all only after judgment. The order determining this collateral dispute is therefore final and definitive for at no later stage in the proceedings can the applicant obtain the substance of what has been refused to him. If he has been prejudiced by the order his prejudice is irremediable.'

[14] In the present matter the respondents claimed to be entitled to a stay of the contempt application pending the determination of the review application. They were in effect claiming that they had a special defence to the action albeit a temporary defence, to the effect that the appellants were not entitled to the relief claimed by them pending the review application. For present purposes there is no real distinction between that defence and the special defence raised in *Carolus*. It is true that in that case it was claimed that the application for liquidation should be dismissed because of the existence of the s 21 certificate but it would to my mind have made no difference to the reasoning of Hefer JA had the plea been that the application for liquidation should be stayed for as long as the s 21 certificate remained valid.

[15] The respondents submitted that Joffe J did no more than to postpone the contempt application and that an order postponing a matter

was not appealable.[5] I do not agree. An order postponing a matter is merely procedural in nature and not an order in respect of a defence raised. As in *Carolus* the defence raised by the respondents was a self-contained defence which was raised independently of the appellants' case and as stated above that defence was finally determined by the court below. In so far as the other two attributes that an appealable 'judgment or order', as a general principle should have, it should be borne in mind that it is the application for a stay of the contempt application and not the contempt application itself which constitutes the main proceedings. The question is whether the order by the court a quo is definitive of the rights of the parties in respect of the application to stay the contempt proceedings and whether it disposes of at least a substantial portion of the relief claimed in that application.[6] The answer to those two questions is clearly in the affirmative. It follows that the order by the court below is appealable.

Did the court below have a discretion to stay the contempt proceedings?

[16] As stated above Joffe J held that he had a discretion to stay the contempt application if he considered it to be in the interest of justice to do so. In this regard he relied on cases dealing with the stay of proceedings pending the payment of costs incurred in substantially similar previous proceedings between substantially the same parties (see *Western Cape Housing Development Board and Another v Parker and Another* 2005 (1) SA 462 (C) at 465I-466C; and Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed (1997) p 254-261).

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[5] *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50; and *Zweni* at 535F-H.

[6] *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 804C-E.

[17] It is clear that a court does have the power to stay civil proceedings in certain circumstances eg to prevent an abuse of the process of the court (see *Corderoy v Union Government (Minister of Finance)* 1918 AD 512 at 517) and if an action is already pending between the same parties on the same cause of action (see Herbstein and Van Winsen *op cit* Chapter 10 p 245). However, Joffe J did not quote any authority to the effect that a court has a general discretion to stay proceedings whenever it considers it to be in the interests of justice to do so.

[18] In *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Co Ltd and Another* 1999 (4) SA 1039 (T) at 1048H-I Van Dijkhorst J accepted that he had a discretion to stay an application for an interdict restraining the respondents from infringing a registered trade mark pending an application in terms of s 14 of the Trade Marks Act 194 of 1993 on the basis of honest concurrent use and/or other special circumstances. He added that at best for the respondents it was a discretion that had to be exercised sparingly and in exceptional circumstances. But Van Dijkhorst J apparently based his acceptance of a discretion to do so on the authority of *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1340D-1341A in which it was merely assumed that a court had jurisdiction to stay civil proceedings on equitable grounds. In that case, dealing with a request that an action should be stayed in the exercise of the court's 'inherent discretion to avoid injustice and inequity' Nicholas J said at 1340B-D:

'The Courts do not however act on abstract ideas of justice and equity. They must act on principle. CF the *Western Assurance Co* case *supra* at 275. And see the remarks of Innes CJ in *Kent v Transvaalsche Bank* 1907 TS 765 at 773-774:

"(The appellant) also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the insolvency law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word 'equity' in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all."'

Nicholas J then proceeded to deal with the application on the assumption that the court had the power to grant a stay of the proceedings on equitable grounds and concluded that 'even if it had the power to do so' a case had not been made out for such a stay.[7]

[19] As I shall presently indicate, I am of the view that if the court below did have a discretion, on equitable grounds, to stay the contempt application, the exercise of that discretion in favour of the respondents was not justified and should be set aside. I shall, therefore, likewise assume that the court below had such a discretion. I shall furthermore assume in favour of the respondents that the discretion is a discretion in the strict or narrow sense ie a discretion with which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons or materially misdirected itself.[8]

Should the court a quo's order in the exercise of its discretion be interfered with on appeal?

[20] The court below held that 'eise van geregtigheid' indicated that the contempt application should be stayed pending the outcome of the review

[7] At 1341A.
[8] *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 13.

application because if the contempt application 'were to be determined prior to the review application, enforcement of a court order could be ordered in circumstances where the enforcer of the court order was not entitled to the court order in the first instance'. The court would, according to Joffe J, in the circumstances 'knowingly compound the problem'. He added that the determination of the review was important in so far as issues of mala fides and wilfulness were concerned.[9]

[21] However, the outcome of the review application is irrelevant to the question whether the respondents were acting in contempt of court. In terms of the court order Gap Distributors and Trust Electrical Wholesalers are interdicted from infringing registered design A96/0687. That court order is a final order and has to be obeyed even if it is wrong as is alleged by the respondents. Should the review application be successful and the registration of the design be set aside, the interdict would come to an end as there would no longer be a registered design, but until that happens the interdict stands and has to be obeyed. As was said by Herbstein J in *Kotze v Kotze* 1953 (2) SA 184 (C) at 187F-G:

'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.'

[22] In its judgment the court below itself refers to *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-E where Goldstein J said that orders of court have to be obeyed until set aside and that chaos may result if people were allowed to defy court orders with impunity.[10] It also refers to the judgment of Froneman J in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 228F-230A where, relying on *Culverwell* and

[9] At paras[25] and [26].
[10] At 312A-B para [21].

Kotze, Froneman J said that an order of a court of law stands and must be obeyed until set aside by a court of competent jurisdiction.[11] Having done so with apparent approval and having stated that it is obliged to apply the judgment of this court, it is inexplicable how it could then, on the basis that the judgment could be wrong, have considered the outcome of the review application to be of any relevance to the contempt application.

[23] For these reasons I am satisfied that the court below misdirected itself and did not act for substantial reasons. The following order is therefore made:

1 The appeal succeeds with costs including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order:

'The application for a stay of the proceedings pending the determination of the review application in case no 19081/08 in the High Court, Pretoria is dismissed with costs.'

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P E STREICHER
ACTING DEPUTY PRESIDENT

[11] At para [21].

APPEARANCES:

For appellant:	L Bowman SC B du Plessis Instructed by: Spoor & Fisher, Centurion Matsepes, Bloemfontein
For respondent:	M M Jansen SC Instructed by: Adams & Adams, Johannesburg Honey Attorneys, Bloemfontein