IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38218/2018

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes

(Signature)

In the matter between:

TREVOR MAHLASALE RAMODIKE NO	**First Applicant**
SOLOMON STANLEY ISSOKER BOTKANYO NO	**Second Applicant**
and	
MGG PRODUCTIONS (PTY) LTD	**Respondent**

JUDGMENT

DE VILLIERS, AJ

[1] This is an application for leave to appeal against my judgment dated 16 January 2020. The delay in dealing the matter was caused by an administrative error: I did not know until recently that leave to appeal was sought.

[2] Two main issues were raised in argument:[1]

[2.1] The first issue was that I erred, it was argued, in interpreting section 46 of the Insolvency Act, 24 of 1936[2] to consider the other impeachable transactions in the act and to seek a mischief. It was argued that I simply should have applied the clear meaning of the section; and

[2.2] The second issue is that I incorrectly, it was argued, applied the facts to the law.

[3] The application for leave to appeal went beyond this short summary, and was extensive. It mostly addressed the questions that I asked in seeking to understand section 46 and thus how to apply it.

[4] It is true that section 46 has meaning when one reads it, and I did not find that it was ambiguous. The one perplexing aspect is that it requires a finding whether set-off was effected in the ordinary course of business, whilst in law it is (usually) effected automatically. In this case, unusually so, the implementation of set-off was delayed and only took effect when the parties changed their trading terms to a cash basis. I found that the transaction was in the ordinary course of business (the baseline in section 46) and thus not impeachable.

[5] I asked in my judgment when a court should find that set-off was not effected in the ordinary course of business. In considering this, I did look at the mischief the section addressed. It is true that I found it difficult to understand why set-off is offensive, but not say payment, and dealt with this aspect in my judgment. I also looked at the section in contrast to the other sections of the Insolvency

[1] I shorten the argument to what I believe was its real essence.
[2] I refer herein only to sections of the Insolvency Act.

Act dealing with impeachable transactions. Those sections require the involvement of a court to set aside such impeachable transactions, unlike section 46. They are section 26 (dispositions without value), section 29 (voidable preferences), section 30 (undue preference to creditors), and section 31 (collusive dealings before sequestration), all impeachable transactions where one could easily identify the mischief that the sections addressed. In contrast, section 46 seeks to undo a transaction, without involving a court, without a hearing, primarily by a party with a financial interest in the matter, where no one seems to be able to identify the mischief in issue, merely on a finding that a transaction was unusual.

[6] I do not believe that there is any prospect that another court will find that I erred in trying to understand section 46 by looking at the mischief it seeks to address, or by seeking to read it in the context of the Insolvency Act. The only other relevant contextual fact that I took into account in my judgment was that upon a declaration of insolvency, *concursus creditorum* kicks in, only then, and not six months earlier. That was proper too. I dealt with the acceptance by our courts that the concept "*in the ordinary course of business*" permits a range of actions by businesspeople. I followed the approach in three reported cases referred to in my judgment that dealt with section 46. In two cases a set-off was set aside,[3] the facts were clear that some sort of a contrived manipulation existed to apply the effect set-off. In the third matter,[4] no such manipulation existed, and the set-off was not set aside. This conservative approach undoubtedly is correct. My judgment reflects that I think that section 46 should not find easy application. It is the approach by our courts. This outcome is arrived at by interpreting "*in the ordinary course of business*" to allow for a range of actions by businesspeople.

[7] In my view the application for leave to appeal does not address the questions I asked about the reasons for, and ambit of, section 46. It in effect merely restates the section. This approach does not fill me with confidence that another court will formulate a different approach to apply to the section to the

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[3] *Estate Engelbrecht v Engelbrecht* 1957 (3) SA 83 (N); and *Al-Kharafi & Sons v Pema and Others NNO* 2010 (2) SA 360 (W).
[4] *In Re Trans-African Insurance Co Ltd (In Liquidation)* 1958 (4) SA 324 (W).

one that I (and the other judgments) followed. My judgment did not differ from the existing judgments, save for one immaterial aspect.[5]

[8] In applying the law to the facts, I also do not believe I erred in firstly setting aside the Master's unreasoned decision, or secondly in finding that the set-off was effected in the ordinary course of business. In simple terms, in this matter one businesses said to the other: "*Our current arrangement is not working. Let us set-off our respective claims against each other, effect payment in that manner, and in future do business on a cash basis, not on credit.*" I believe no one could argue that the simple change was not in the ordinary course of business. What other arrangement would have been in the ordinary course of business? It meets the tests set out in my judgment as applied in *Gazit Properties v Botha N.O.*,[6] *Griffiths v Janse van Rensburg NO*[7] and in *Fourie's Trustee v Van Rhijn*.[8] Even when the matter moves beyond the simplistic, illustrative summary above (as it must) and the context (including the background) is considered, I do not believe that there is any prospect that another court will find that I erred in applying the facts to the law. I have dealt with my reasoning in my judgment.

[9] Both parties asked for any referral to be to the Supreme Court of Appeal. It would have been the correct court to hear an appeal, but only if I am satisfied that leave to appeal should be granted. I am not.

[10] Accordingly, I make the following order:

1. The application for leave to appeal is dismissed with costs.

DP de Villiers AJ

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[5] Both counsel seem to disagree with my questioning of the correctness of applying an objective test in the case of section 46 (as distinct from section 29), but no one argued that my approach materially influenced the matter.

[6] *Gazit Properties v Botha N.O.* [2011] ZASCA 199.

[7] *Griffiths v Janse van Rensburg NO* [2015] ZASCA 158.

[8] *Fourie's Trustee v Van Rhijn* 1922 OPD 1.

Heard on:	31 July 2020
Delivered on:	17 August 2020

On behalf of the Applicants:	Adv. G Kairinos SC
Instructed by:	Eugene Marais Attorneys
On behalf of the Respondent:	Adv. L Hollander
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