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, on date reflected below

16 January 2020

(Signature)

In the matter between:

MGG PRODUCTIONS (PTY) LTD	**Applicant**
and	
TREVOR MAHLASALE RAMODIKE NO	**First Respondent**
SOLOMON STANLEY ISSOKER BOTKANYO NO	**Second Respondent**
SHOWGROUP WORLD (PTY) LTD (in liquidation)	**Third Respondent**
AND SEVENTEEN OTHER RESPONDENTS	

Heard on: **11 November 2019**

Delivered on: **16 January 2020**

Insolvency - Review of Master's decision to set aside set-off in terms of section 46 of the Insolvency Act, 24 of 1936

JUDGMENT

DE VILLIERS, AJ

Section 46

[1] This matter deals with a section in the **Insolvency Act**, 24 of 1936, section 46, a section that rarely features in judgments. Section 46 reads (shortened in accordance with the facts of this matter, and underlining added):

> "***46. Set-off***
> *"If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is sequestrated within a period of six months after the taking place of the set-off, … ; then the trustee of the sequestrated estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place …"*

[2] It is difficult to understand the mischief section 46 sets out to curtail, especially when the original transactions are not impeachable dispositions:

[2.1] Section 46 does not seek to obtain *concursus creditorum* amongst all potential creditors of the insolvent. Had this been the case, it would have stipulated that all set-offs that took place in the six-month period should be set-aside;

[2.2] Section 46 does not contain a requirement that the set-off would be at risk only if the set-off had the effect of preferring one of the insolvent's creditors above another. As a matter of logic this would apply to all set-offs where creditors will not receive payment in full (to be expected in the case of insolvency);

[2.3] Section 46 does not contain a requirement that the set-off would be at risk only if the transactions and/or the set-offs took place in insolvent circumstances;

[2.4] Section 46 makes no reference to intent, such as the intent to prefer one creditor above another (and does not contain a requirement that the set-off would be at risk only if the set-off took place in collusive circumstances);

[2.5] Instead, section 46 becomes of possible application if the set-off was not effected in the ordinary course of business. Why would this be offensive? Such an outcome may simply be the result of legitimate, innovative thinking without any moral turpitude. The point of departure in our law is that loss falls where it is incurred.

[3] Not only is section 46 bereft of references to when it is to be applied and is it difficult to understand the mischief it sets out to curtail, but the section as formulated gives a true discretion to the person invoking it, the trustee. The trustee has a financial interest in the decision as the trustee stands to be benefit through higher fees if additional money has to be paid into the insolvent estate.

[4] The person who stands to be prejudiced is the former creditor in the proverbial ten-cents-in-the-Rand matter. He or she will be left out of pocket as result of the interference ultimately by the State (the Master) in setting aside a set-off that has already taken place. It seems to be an effective deprivation of property, and the question would be under which circumstances it would not be an arbitrary deprivation of property constitutionally prohibited. Similarly, under what circumstances would the decision by the Master be reasonable

and procedurally fair, as required by section 33(1) of the **Constitution of the Republic of South Africa**, 1996?

Type of review

[5] The matter came before me as a review in terms of section 151 of the **Insolvency Act**, alternatively as a review under the **Promotion of Administrative Justice Act**, 3 of 2000, alternatively as a legality review.

[6] The primary contention by the parties was that this is a statutory review in terms of section 151. The parties argued that as such I have review and appeal powers hearing the matter. I must consider the factual material placed before the Master, together with his report. If he erred or misdirected himself in any material respect, I may determine the matter *de novo*. As will appear below, there is a question mark as to what material the Master considered.

[7] Counsel were *ad idem* that I must consider the evidence (before the Master) to see "*if the set-off was not effected in the ordinary course of business*". Should I find that it was, the application must fail, and vice versa. Both asked me to approach the matter on this agreed basis, and not on a legal technical evaluation of the requirements of each type of review. They were of the view that all potential types of review would lead to the same outcome.

[8] The leading case on section 46, **Al-Kharafi & Sons v Pema and Others NNO** 2010 (2) SA 360 (W), is a judgment by Malan J. Malan J in **Al-Kharafi** approached the matter as a statutory review and held at Para 11 (underlining added):

> "*[11] A court hearing a review application under s 151 sits both as a court of review and a court of appeal to reconsider the ruling or decision of the master. That does not mean that the court may disregard the factual material before the master or the master's reasoning. It is only where the master, in granting his approval, has erred or misdirected himself based on the material placed before him, that the court can, on review and/or appeal, go further and decide the matter de novo. It is by reference to what was placed before the master that the correctness or otherwise of the master's decision is to be judged. If, based on what was before the master, there*

> *was no error or misdirection on the master's part, then that is the end of the matter. It is not open to the parties to introduce the new material that they seek to place before this court, and argue on the basis of what was not before the master that the master erred or misdirected himself. The approach is to consider the factual material placed before the master, together with the master's decision and his report, and to consider whether, in the light of that material, the master erred or misdirected himself in any material respect. If any basis for interfering with the master's decision does appear ex facie the documents before the master, as read with his decision and rulings, then the reviewing court may reconsider the matter based on the material before it*."

[9] In making this finding, Malan J applied **Nel and Another NNO v The Master (ABSA Bank Ltd and Others Intervening)** 2005 (1) SA 276 (SCA) Para 22 - 23, a judgment by Van Heerden AJA (Howie P, Harms JA, Zulman JA and Jones AJA concurring). This approach to section 151 has been confirmed as correct in **Hough v Sisilana and Others** (1121/17) [2018] ZASCA 4 (2 February 2018) Para 6, a judgment by Maya P.

[10] Accordingly, I approach the matter as requested, a statutory review under section 151.

Set-off

[11] I next address set-off briefly before I address the section in issue, section 46.

[12] The Common Law principle is that a set-off takes place automatically; one debt cancels another *ipso iure*, but it has to be relied upon to take effect.

[13] Malan JA (Navsa JA, Shongwe JA, Tshiqi JA and Majiedt AJA concurring) held in **Blakes Maphanga Inc v Outsurance Insurance Co Ltd** 2010 (4) SA 232 (SCA) Para 14-15 (underlining added and footnotes omitted):

> "*[14] It is trite that where two persons are mutually indebted to each other their obligations may be extinguished by set-off. Where debts in the same amount are set off, mutual extinction of the debts occurs; but where the amounts differ the smaller debt extinguishes the larger pro tanto. Set-off*

presupposes mutual obligations between two persons in their personal capacities. ....

[15] Although set-off operates ipso iure its operation may be excluded by agreement. In this case set-off was purportedly effected by the appellant deciding to 'invoke' set-off pursuant to the fees agreement between them. Set-off can only take place if both debts are liquidated in the sense that they are capable of speedy and easy proof. ..."

[14] In this division, Margo J held that set-off operates automatically in **Great North Farms (Edms) Bpk v Ras** 1972 (4) SA 7 (T) at 8D-10G, but that it must be invoked. See too the decision to this effect by van Zyl J (Griesel AJ concurring) in **Southern Cape Liquors (Pty) Ltd v Delipcus Beleggings BK** 1998 (4) SA 494 (C) at 499E-501E, quoted with approval in **Standard Bank Of South Africa Ltd v Echo Petroleum CC** 2012 (5) SA 283 (SCA) Para 33, a judgment by Heher JA (Snyders JA, Malan JA, Wallis JA and Boruchowitz AJA concurring) (underlining added):

> "... *Although set-off occurs automatically by operation of law, it only operates retrospectively if and when the debtor (the Bank) elects to rely on it. See* ***Southern Cape Liquors (Pty) Ltd v Delipcus Beleggings Bpk*** *1998 (4) SA 494 (C) at 499I – 501D and the authorities there cited. ..."*

[15] In this matter, the set-off was effected after the retrospective debts arose. It was then invoked by agreement when the insolvent's trading terms changed from 90-day credit to cash on delivery.

Impeachable dispositions

[16] It seems to me that the interpretation of section 46 must be approached in the context of impeachable transactions under the **Insolvency Act**. They are section 26 (dispositions without value), section 29 (voidable preferences), section 30 (undue preference to creditors), and section 31 (collusive dealings before sequestration).

[17] "*Disposition*" is defined in the **Insolvency Act** as follows (underlining added):

> "... *'disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and 'dispose' has a corresponding meaning*".

[18] The initial transactions that led to a debt by the insolvent and the creditor could have been a disposition, so defined. On the facts of this case, the insolvent sold and delivered goods to the creditor on credit, and leased equipment and obtained services on credit.

[19] Had something been untoward with those transactions, the trustees would have their normal remedies under the **Insolvency Act** to set those dispositions aside.

Applying section 46

[20] In approaching the matter as requested, a statutory review, Para 28 of **Al-Kharafi** is important (underlining added):

> "... *The operative expression is 'if the set-off was not effected in the ordinary course of business'. The word 'effect' means 'bring about, accomplish' and 'cause to exist or occur'.*[1] *Thus, far from s 46 focusing on whether the set-off occurred in the ordinary course of business, the section expressly requires an analysis of whether it was 'brought about' or 'accomplished' in the ordinary course of business*. ..."

[21] As held in **Al-Kharafi** at Para 25, "... *the enquiry is not limited to the terms of the particular transaction. The master could, and was obliged to, consider all of the relevant circumstances pertaining to the transaction.*"

[22] Section 46 calls for an analysis of all the matter relevant to the giving effect to the set-off. This would include the background facts that led to the transaction, the prior conduct of the parties, the terms of the transaction that brought about the set-off, and in an appropriate case, the decision to invoke the set-off. In

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[1] "51 *The Concise Oxford Dictionary.*"

short, a contextual approach should be followed to determine if the set-off was effected in the ordinary course of business.

[23] How does one determine if the set-off has been done "*in the ordinary course of business*"? After all, it is an automatic outcome, unless delayed for some reason.

Ordinary course of business

[24] There is value in looking at the use of the same words ("*in the ordinary course of business*") in the same act, but one should bear in mind that context wherein they are used, differs.

[25] Only one of the sections in the **Insolvency Act** dealing with the setting aside of dispositions also contains the words "*ordinary course of business*", namely section 29 (underlining added):

> "***29. Voidable preferences.***
> *(1) Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.*"

[26] Immediately the following distinctions between sections 29 and 46 must be clear:

[26.1] Section 29 requires a finding that the effect of the disposition was of preferring one creditor. Even where such preference takes place, it may be a proper disposition if it occurred (a) in the "*ordinary course of business*", and (b) preferring one creditor was not an intentional outcome. Section 46 only mentions "*ordinary course of business*";

[26.2] Section 29 draws a distinction between "*ordinary course of business*", and the intent with the transaction. By drawing this distinction, "*ordinary course of business*", could and is held to be an objective test with regard to section 29, as will appear below. Section 46 does not contain this distinction;

[26.3] Section 29 comes into effect if insolvency follows upon the disposition. Logically this cannot happen in case of a real set-off of reciprocal debts (a zero sum), but section 46 also does not seek to introduce its application where the set-off took place in insolvent circumstances.

[27] Section 29 features more regularly in the law reports than section 46. I refer to two such instances:

[27.1] In **Gazit Properties v Botha N.O**. (873/10) [2011] ZASCA 199 (23 November 2011) 2012 2 306 Majiedt JA (Harms AP, Heher, Snyders and Shongwe JJA concurring) held at Para 8 (underlining added)-

> "*The general test of what constitutes a disposition in the ordinary course of business is well established. In* ***Estate Wege v Strauss*** *1932 AD 76 the matter concerned a transaction between a professional bookmaker (Strauss) and his client (Wege) and this court had to determine whether the transaction had been concluded in Strauss's ordinary course of business. Wessels ACJ found that in the special type of business of that kind it is not normal for a bookmaker to permit the settlement of betting debts to stand over for an unlimited period of time and that the late payment therefore was not done in Strauss's ordinary course of business. He said that 'if a debtor pays a debt in accordance with the stipulations of his contract, then such payment is prima facie made in the ordinary course of business'. This means that one first has to have regard to the nature of the obligation in terms of which the disposition or payment was made. This was made*

> *clear by Van Winsen JA in* ***Hendriks NO v Swanepoel*** *1962 (4) SA 338 (A) at 345B when he said the following: 'Die Hof benader die vraag of 'n transaksie in die gewone loop van sake geskied het, objektief wanneer hy hom afvra of, in ag genome die voorwaardes van die ooreenkoms en die omstandighede waaronder dit aangegaan is, die bedoelde ooreenkoms een is wat normaalweg tussen solvente besigheidsmense aangegaan sou word.'*
>
> *The same approach was adopted in* ***Amalgamated Banks of South Africa Bpk v De Goede & 'n Ander*** *1997 (4) SA 66 (SCA) at 78C-D where FH Grosskopf JA said the test under s 29(1) involved the question whether the underlying transaction was one 'met gebruiklike terme wat gewone besigheidsmense normaalweg onder die gegewe omstandighede sou aangegaan het.'*

Without attempting a full translation of the Afrikaans quotataion, the courts held that the test in section 29 is objective, taking into account (a) the terms of the agreement, and (b) the circumstances under which it was concluded to determine if it is an agreement that would normally be concluded between solvent business people. Also to be taken into account are (c) if the terms were usual for the circumstances under which the agreement was concluded;

[27.2] In **Griffiths v Janse van Rensburg NO** (20269/2014) [2015] ZASCA 158 (26 October 2015) 2016 3 389 Gorven AJA (Shongwe, Pillay and Saldulker JJA concurring) held at Para 11 (underlining added):

> *"[11] There has been much judicial comment on what is meant by the phrase 'the ordinary course of business'. It is not necessary to rehearse all of it. This court has been consistent over many years in the test to be applied. The test is an objective one. The disposition should be evaluated in the light of all relevant facts. This must be done on a case by case basis. Put traditionally,*

> *the disposition '. . . must be one which would not to the ordinary [person] of business appear anomalous or unbusinesslike or surprising.'*[2] *The question is whether ordinary, solvent, businesspeople would, in similar circumstances, themselves act as did the parties to the transaction.*[3] *Consideration should not be given to any intention to prefer or to the fact that the party making the disposition was insolvent at the time since these are considered separately under other parts of the section.*[4] *The question to be answered is whether the transaction is one 'with conventional terms which ordinary businesspeople would normally have concluded under the given circumstances'.*[5] *In other words, the disposition in question should not cause wrinkled noses or raised eyebrows among solvent businesspeople who know the circumstances in which it was made."*

[28] Both **Gazit Properties** and **Griffiths** post-date **Al-Kharafi**.

[29] In considering "*ordinary course of business*", I found the description of the conduct by ordinary business people by De Villiers JP in **Fourie's Trustee v Van Rhijn** 1922 OPD 1 at 6 useful (underlining added):

> *"Taking the words "in the ordinary course of business" in their ordinary sense, the meaning is, I take it, that the payment must be made in accordance with ordinary business practice and ordinary business principles. The payment or satisfaction of the debt must be shown to have taken place in a manner and time, which would not to ordinary business men appear to be unbusinesslike or anomalous. By ordinary business principle and practice a debtor fulfils his obligation, but he does no more than that, and the man of business takes on every business occasion the greatest profit that he legitimately can; if he takes less than that, it is, as a*

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[2] "*8* ***Malherbe's Trustee v Dinner & Others*** *1922 OPD 18 at 22.*"
[3] "*9* ***Hendriks NO v Swanepoel*** *1962 (4) SA 338 (A) at 345A-346A.*"
[4] "*10 See* ***Hendriks*** *at 342F-H and 345A-B.*"
[5] "*11 My translation of the dictum of FA Grosskopf JA in* ***Amalgamated Banks of South Africa Beperk v De Goede & 'n Ander*** *[1997] ZASCA 30; 1997 (4) SA 66 (SCA) at 78C-D: holding that the transaction there met the test because it was one 'met gebruiklike terme wat gewone besigheidsmense normaalweg onder die gegewe omstandighede sou aangegaan het.'*"

rule, with an eye to future business and future profits. I do not consider it necessary, under sec. 27, to state that the business man who is taken as the standard of comparison should be specifically reputable or scrupulous. The words of the section appear to refer to the ordinary de facto practices and principles of business which are adopted among solvent men of business. Thus a solvent debtor may pay a debt in such a way as to secure for himself every advantage, every discount and deduction, which a business man of higher moral tone would hesitate to insist upon. If the example of the former were followed in paying a debt, that would hardly be a reason for holding that the payment was not in the ordinary course of business; indeed it would, if anything, be a reason to the contrary. Business practice would be to gain as much and give as little as possible, concessions are only made as matters of advertisement or with a view to future business. Business is not philanthropy. A payment or other "disposition" by which a debt is discharged is then under sec. 27 in the ordinary course, of business if made in accordance with the common and known practices and methods and principles obtaining among solvent men of business. Moreover it is not in my opinion necessary to show that the payment or disposition in question reproduces in every feature any disposition or series of dispositions which has previously taken place among business men. Business is, I take it, progressive, and it would no doubt be hard to find many business transactions which are exact replicas. Some variation in one feature or other may be expected to occur, or some combination of previously well-known features. It is, in my opinion, sufficient as already stated, if the payment or disposition is in accordance with the common and well-known principles and practice of business, so that the payment would be recognised as a commonplace business transaction by a business man and cause him no surprise."

[30] Advancing from section 29 to section 46, cases specifically dealing with section 46 of the **Insolvency Act** are few and far between. I have referred to one, **Al-Kharafi**. I know of two more:

[30.1] Brokensha J in **Estate Engelbrecht v Engelbrecht** 1957 (3) SA 83 (N) dealt with a matter where clearly an unusual transaction took place between two brothers, as would appear from the following comments at 85 (underlining added):

> "*The transaction took place on 25th August, 1951, when the defendant agreed to purchase from Freyer, as the agent of Richard Engelbrecht, timber as set out in the declaration. At that time defendant must have known that his brother, Richard's financial position was not in a sound condition. I say this because three months previously he had accepted from Richard Richard's motorcar in payment of his then indebtedness to defendant in the sum of £500, which the defendant had paid to the Bank under a guarantee given by the defendant on Richard's behalf. This transaction for the sale of timber was made after defendant had given the Bank another guarantee, being the one in question, and dated 16th July, 1951, and defendant said the arrangement was that payments were to be made by him to the Bank for credit of Richard's account. Defendant said he agreed to pay more for the timber than its true value, and more than he would have paid to anyone else. He did this because he wished to assist his brother. He claimed that he would have entered into this transaction with anyone because of the security which he attained, but it seems to me that there was in fact no security given him.*
>
> *I have no hesitation in coming to the conclusion that the factor which decided the defendant in entering into this transaction was to assist his brother and to help reduce his brother's overdraft. In my view the transaction was not one that would be ordinary amongst solvent business men, and in a manner and when that would not appear businesslike and anomalous to an ordinary business man; see* ***Brand's Trustee v Osman****, 1926 NPD 253, and* ***Essop Essack v Rex****, 1944 NPD 193.*"

I point out the learned judge focussed on the intent with the transaction and that it (objectively) was not a commercially justifiable

one. The set-off was a mere consequence of this "*unbusiness-like*" transaction.

[30.2] Boshoff J In **Re Trans-African Insurance Co Ltd (In Liquidation)** 1958 (4) SA 324 (W) makes the point at 329A that "*set-off is an operation of law and not a disposition within the meaning of the term in the **Insolvency Act** and this accounts for the fact that the **Insolvency Act** has special provisions in relation thereto*". On the facts of the matter the learned judge allowed set-off to stand where a shareholder was called upon by the company to make a capital contribution. There was nothing unusual to the set-off in the matter. The company and the shareholder were debtors and creditors of each other.

[31] In **Al-Kharafi**, the third case dealing with section 29:

[31.1] The creditor for about a year before the set-off threatened to apply for the winding-up of the insolvent and had knowledge of its inability to pay its debts. As will appear below, in the present case, the insolvent did not keep up with its payments, but made a substantial payment shortly before the set-off was effected. There is no evidence of actual knowledge by the creditor that the insolvent was unable to pay its debts;

[31.2] The reciprocal debt was created by a cession, with the object to avoid *concursus creditorum*. This makes the transaction one that is *in fraudem creditorum*, and as such cannot be in the ordinary course of business. As will appear below, in the present case, there is no evidence of such an object and the original transaction for the reciprocal debt was a sale, not a contrived cession;

[31.3] No consideration was given for the cession. As will appear below, in the present case, there was no contrived cession;

[31.4] Some of the debts in issue formed the subject matter of litigation. As will appear below, in the present case, the reciprocal debts were common cause;

[31.5] The set-off resulted in a substantial disturbance of the distribution of the assets of the insolvent, a reduction of 52 cents in the rand to 36 cents in the rand if the set-off were to stand. As will appear below, in the present case, there is no evidence of such a disturbance.

[32] Malan J in para 25 to 28 of **Al-Kharafi** addressed from the authorities dealing with section 29 the factors to be considered in considering "*in the ordinary course of business*" in section 46. I extracted the following factors mentioned by him:

[32.1] The test of what is "*in the ordinary course of business*" is objective. [I respectfully disagree with Malan J on this issue with regard to section 46. As reflected above, it was held in **Griffiths** that the test is objective with regard to section 29 as intent is listed as a distinct matter to be considered. With respect, the same reasoning does not apply to section 46, as intent is not mentioned. As reflected above, **Estate Engelbrecht** in fact did consider intent as a factor in determining if the transaction was "*in the ordinary course of business*". I believe that intent must be one of the contextual factors to be considered. I need to address one submission in this regard, in the absence of evidence of intent to prefer one creditor over the others, I cannot assume this to be the case simply because it is the outcome. Intent must be proven, and the intent could well have been simply to close a chapter in credit dealings between the parties];

[32.2] Was the disposition made, given all the circumstances under which it was made, in accordance with ordinary business methods obtaining amongst solvent men of business. This test is formulated in a number of ways in the cases dealing with section 29. They include-

[32.2.1] Was the set-off effected as a unique arrangement?

[32.2.2] Was the set-off a special course of dealing?

[32.2.3] Was the set-off the usual and ordinary course of trade or business being transactions in the usual and ordinary every-day course of mercantile dealing?

[32.2.4] Was the set-off even the practice of traders in some small community?

[32.2.5] Would businessmen "... *regard the transaction, with all of its particular facets, as unusual or anomalous*"?

[32.2.6] Would the set-off "... *fall into place as part of the undistinguished common flow of business done, so that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special situation*"?

[32.3] " ... *Regard must therefore be had to all the circumstances, including the actions of both parties to the transaction. As appears from the formulation of the principle, the fact that one of the parties to the transaction was insolvent at the time is, however, to be excluded from the circumstances which are relevant*", as held in **Van Zyl and Others NNO v Turner and Another NNO** 1998 (2) SA 236 (C) paras 33 - 42 at para 34, a judgment by Brand J. [*Mutatis mutandis* the argument with regard to intent, this finding about insolvency of the insolvent does not transplant to section 46 from section 29, as solvency is not mentioned in section 46. In my view, there is no reason to exclude the insolvent's solvency at the time (or not) from a consideration if the set-off was brought about in the "*ordinary course of business*"];

[32.4] Did the set-off result in a substantial disturbance of the distribution of the assets of the insolvent? It was argued before me that Malan J had introduced a two-fold test by requiring proof of a substantial disturbance of the distribution of the proceeds of the assets of the

estate. It is not how I read the judgment and such an interpretation is not borne out by section 46. It is merely one of the factors to be considered;

[32.5] Has there been any similar transaction between the parties?

[32.6] The comparative size of the transaction, was it extraordinary?

[32.7] Was the debt disputed? Had litigation commenced?

[32.8] Was the debt paid through the set-off in a roundabout way?

[32.9] Was consideration given (for the reciprocal debt)?

Master's findings

[33] The Master had found that the set-off to the value of R1 145 915.27 was not effected in the ordinary course of business.

[34] The Master's report merely stated his reasons for this finding as:

> "5 … *I considered all the evidence led at the enquiry into the affairs of the company in liquidation together with the application made on behalf of the liquidators.*
>
> *6. I was then satisfied that the set-off was not effected in the ordinary course of business. I attach hereto a copy of the application to disregard the set-off as Annexure A.*"

[35] These reasons by the Master are unhelpful and with respect do not reflect a reasoned decision but merely the fact of a decision. The absence of ascertainable reasons for the decision by the Master points to an arbitrary decision. Reasons mean adequate reasons, reasons that justify the Master's conclusion. None was given. As such the Master's decision must be set aside as one where he erred or misdirected himself.

[36] I must then still reconsider the matter.

Sitting as a court of appeal: The facts

[37] I have had access to the "*application*" to which the Master referred, a letter dated 31 August 2017. It is a confusing letter, containing a number of irrelevant averments. In point are three averments in the letter:

[37.1] Showgroup World (Pty) Ltd was liquidated pursuant to a resolution by its sole shareholder on 21 October 2016. This is not in dispute;

[37.2] The set-off took place within six months of that date, on 19 August 2016, a mere 63 days earlier. This is not in dispute;

[37.3] It was allegedly obvious that the cession (I think set-off was meant) was a collusive dealing to prefer the applicant as a creditor. However, no evidence of a collusive dealing was presented. The letter does not show a basis for such a finding, and the Master did not make such a finding.

[38] The Master allegedly "*considered all the evidence led at the enquiry*", but the person who made the decision did not conduct the enquiry and did not hear the evidence. He could not have found reasons for the decision in that evidence unless he had access to a transcript of proceedings at the enquiry. I find it odd that the transcript is not mentioned. Why did the Master not say that a transcript and exhibits presented at the enquiry were considered?

[39] I am bound by the record, namely the letter dated 31 August 2017 and (on the benevolent assumption) the transcript of proceedings at the insolvency enquiry. The difficulty I faced was overcome, as it was common cause that the material facts were set out in the applicant's heads of argument and that those were the facts that I should consider. I address them next:

[39.1] The third respondent, Showgroup World (Pty) Ltd (in liquidation) ("***Showgroup***") did business with the applicant since February 2014. It is in position of the insolvent to which I have referred to above. The applicant, MGG Productions (Pty) Ltd ("**MGG**") is in the position of the creditor to which I have referred to above. It is misnomer, as the

applicant was both a creditor and a debtor of the insolvent prior to the set-off;

[39.2] Showgroup owned some technical equipment and also rented further technical equipment and obtained technical services at agreed rental and fees from MGG;

[39.3] Showgroup received a rental discount of 25%, which increased to 35% in September 2015. This discount was initially only in respect of rental;

[39.4] Later in 2015 Showgroup decided to restructure its business. It would retrench staff; It sought to sell its technical equipment; It sought to sell its vehicles; It would obtain technical equipment and technical services from the applicant;

[39.5] By 30 November 2015, Showgroup owed MGG R1 181 741.66;

[39.6] Showgroup offered to sell the vehicles and the equipment to MGG and negotiations followed;

[39.7] MGG was prepared to acquire the vehicles at R450 000.00 and the equipment at R1 500 000.00. The latter figure was reduced to R1 250 00.00 after proper inspection and assessment;

[39.8] The two amounts (R1 700 000.00) exceeded the then indebtedness of Showgroup by some R500 000.00;

[39.9] It is not suggested that these agreed values were not market values. As such, it is not suggested that the sale of the assets would have rendered Showgroup insolvent. Showgroup would hold the same value in assets, only in a different form;

[39.10] It is not suggested that the decision by Showgroup to restructure, the decision by Showgroup to offer the assets for sale to MGG, or the decision by MGG to acquire the assets, at the agreed values on credit, were not decisions taken in the ordinary course of business;

[39.11] Ultimately three agreements were concluded on 4 December 2015, an acknowledgement of debt by Showgroup for its indebtedness to the applicant, and two sale agreements on credit in respect of the vehicles and the equipment. This would have led to reciprocal debts by Showgroup and MGG;

[39.12] Two sets of independent attorneys assisted in the preparation of the agreements;

[39.13] Showgroup admitted to its indebtedness in the sum of R758 254.36 and not in R1 181 741.66 as purchase price of the vehicles (R450 000.00) was set-off against its indebtedness and as there was a further invoice on 30 November 2015;

[39.14] The indebtedness of Showgroup to MGG was not capped, as it would and did lease equipment and obtain services thereafter. The agreement was that the R758 254.36 would be paid (R250 000.00 plus proceeds from the sale of immovable property). In short, the slate would be cleaned;

[39.15] The reciprocal debt by MGG to Showgroup was R1 250 000.00. The parties agreed that the R1 250 000.00 would be paid by MGG giving additional discounts to Showgroup when it leased equipment and obtained services from MGG. These additional discounts were in in excess of a 35% discount on all rentals and fees, and were not properly set out in the agreement. I would have had serious questions if this agreement was in the normal course of business. Even if it were to be repaid in trading with Showgroup, why not set-off such invoices in full against the debt of MGG?

[39.16] Showgroup did wipe the slate clean, it paid MGG R250 000.00 on 11 December 2015, and for some reason the whole R758 254.36 on 12 February 2016;

[39.17] The Showgroup debt to MGG grew from R232 663.26 as at 12 February 2016 to R1 135 781.24 as at 31 July 2016. Showgroup did

not keep to its 90-day credit terms and requests for payments had to be made;

[39.18] This last figure of R1 135 781.24 was reduced by a payment by Showgroup on 25 July 2016 of R197 906.25;

[39.19] The discount application did not materially reduce the MGG debt. It originally was R1 250 000.00 and by 31 July 2016 it was still R1 145 915.27, an amount very similar to the debt of Showgroup;

[39.20] The parties agreed on 4 August 2016 to wipe the slate clean, this time in respect of both of them. The two debts would be set-off, and future business would be on a cash on delivery basis and no longer on 90-day credit, still at a baseline discount of 35%;

[39.21] Showgroup did not discuss or convey an intent to seek liquidation. Its financial position was not disclosed to MGG;

[39.22] The set-off agreement was reduced to writing;

[39.23] No one told the applicants that Showgroup's liquidation was imminent.

Conclusion

[40] The set-off in my view was effected in the ordinary course of business. It is not enough that MGG as a result of the set-off would not stand in the queue for payment. More has to be shown to invoke section 46. A business person who has to deal with a slow paying customer is perfectly entitled to take reasonable steps to change trading terms without attracting an imputation of fraud on other creditors. In this case that change in terms was from 90-day credit to cash on delivery, wiping the slate clean in the process. I had no evidence that the agreement to stop doing business on credit and to set-off two debts were not perfectly normal transactions. They do not seem to me to be out of the norm, certainly so much out of the norm that an otherwise valid transaction should be set aside. In addition:

[40.1] Set-off is a form of payment that is a common occurrence in business;

[40.2] The set-off was not a special course of dealing between the parties, there had been an earlier set-off of debts between the parties. See the sale of the vehicles (R450 000.00) and the giving of discounts as a method of payment;

[40.3] The original transaction not to apply set-off in respect of all Showgroup debts is the one that was unusual, this was rectified in August 2016 through the set-off in issue;

[40.4] In addition, the Showgroup slate was wiped clean earlier as well;

[40.5] There is no evidence that the set-off results in a substantial disturbance of the distribution of the assets of the insolvent;

[40.6] There is no evidence of collusion, in effect, to defraud other creditors;

[40.7] The set-off was not effected in a round-about way such as by concluding a purported cession to obtain a reciprocal debt;

[40.8] There is no evidence of insolvency (and imminent liquidation), only of slow payment, a common occurrence in business which may or may not show commercial insolvency. Whilst slow payment may have caused concern to MGG, it had no further knowledge of the financial position of Showgroup (which may or which may not have been actually insolvent in August 2016).

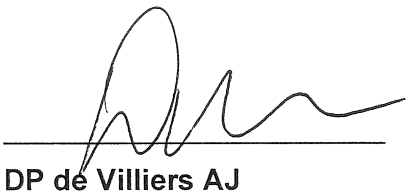
[41] This matter came to me on the Monday morning after the passing away of Van der Linde J during that weekend as a matter that was meant to be dealt with by him. The papers were voluminous. I could not have heard the matter on such short notice without the able assistance of counsel. I thank them.

I grant the following order:

1 The decision by the fourth respondent dated 5 February 2018 to grant authority to the first and second respondents as joint liquidators of the third

respondent in terms of section 46 of the **Insolvency Act** 24 of 1936 to disregard the set-off dated 19 August 2016 in the amount of R1 145 915.27 is set aside;

2 The applicant's costs of this application shall be paid out of the assets of the estate of third respondent.



DP de Villiers AJ

On behalf of the Applicant:	Adv. L Hollander
Instructed by:	Edelstein Farber Grober Inc
On behalf of the First and Second Defendants:	Adv. G Kairinos SC
Instructed by:	Eugene Marais Attorneys