IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No:11371/2022

In the matter between:

NSP UNSGAARD (PTY) LTD	Applicant
and	
MASTER OF THE HIGH COURT, CAPE TOWN	First Respondent
GREEN TISSUE (PTY) LTD (IN LIQUIDATION)	Second Respondent

Date of hearing: 14 August 2023

Date of judgment: 28 August 2023

JUDGMENT

SAVAGE J

Introduction

[1] The applicant, NSP Unsgaard (Pty) Ltd ("NSP"), seeks the review and setting aside of a decision of the first respondent, the Master of the High Court ("the Master"), made on 28 January 2022 under section 46 Insolvency Act 24 of 1936 ("the Act"), in terms of which the liquidators of the second respondent, Green Tissue (Pty) Ltd ("Green Tissue"), were permitted to disregard a set off applied by NSP in its dealing with Green Tissue before liquidation.

[2] Green Tissue manufactured and supplied paper-based products to customers, including NSP. Between 2007 and 2013, Green Tissue caused four general notarial bonds to be registered in favour of Investec Bank Ltd and a special notarial bond in 2015. On 8 September 2016, Standard Bank Ltd entered into a first cession of debtors with Green Tissue. This followed the conclusion, on 8 August 2016, of an agreement between Standard Bank and Green Tissue to vary an existing invoice factoring agreement which created a pledge in favour of the bank in respect of all book debts, with the set off of any claims expressly precluded. The effect was that the debts of Green Tissue had been to Standard Bank and Investec.

[3] In March 2018, Green Tissue became financially distressed when it lost a major client which had accounted for 85 percent of its sales. In September 2018, 100% of Green Tissue's shares were sold to The Lion Match Company (Pty) Ltd ("Lion Match"), with Lion Match in control of Green Tissue from 2 November 2018. From that date, on the instruction of Lion Match, NSP commenced business with Green Tissue through a contract manufacturing agreement. In terms of this agreement NSP supplied raw materials, packaging and advanced working capital to Green Tissue to enable it to fulfil orders it received from NSP. The goods produced by Green Tissue were then purchased by NSP, with the amounts paid by NSP in respect of raw materials, packaging and working capital deducted from the amounts due to Green Tissue for the manufactured goods received.

[4] On 3 June 2019, this contract manufacturing agreement was recorded in a Master Supply Agreement ("MSA"), concluded between NSP and Green Tissue. At the time of conclusion of the MSA, two of the three directors of Green Tissue were also directors of NSP, one of whom, Mr Jacob van Wyk, was also the Group Chief Executive Officer of Lion Match. The date of commencement of the MSA was backdated to the date of the initial supply of raw materials, packaging and working capital by the NSP in November 2018.

[5] The MSA provided that goods were to be manufactured by Green Tissue from raw materials and packaging supplied to it by NSP, with Lion Match and its subsidiaries, including NSP, to assist Green Tissue with working capital. As working capital, NSP advanced to Green Tissue a "conversion fee", which consisted of funding for upfront labour costs, direct overheads and a contribution to other overheads. Green Tissue invoiced NSP for the finished goods it produced, including the cost of raw materials, packaging and the conversion fee for which NSP was credited. Without the raw material supplied and cash advances made, Green Tissue would not have been in a financial position to manufacture the products it supplied to NSP.

[6] On 18 September 2019 Investec Bank Ltd perfected the general and special bonds in its favour, with a final order taken against Green Tissue on 27 September 2019. This created an enforceable cession in favour of Investec and authorised it "*to take and retain possession of the business* [of Green Tissue] *and/or any of the movable assets of* [Green Tissue]", operate and draw on the banking account of Green Tissue and sue any or all debtors of Green Tissue. Mr Van Wyk, as Group Chief Executive Officer of Lion Match and director of both NSP and Lion Match, represented Green Tissue in the perfection application. Thereafter, on 31 October 2019, at the instance of Investec Bank, Green Tissue was placed in provisional liquidation, with a final order of liquidation granted on 6 December 2019.

[7] On 3 September 2021, Green Tissue's liquidators ("the liquidators") wrote to the Master seeking that the set off applied by NSP in respect of the cost of raw materials, packaging and the conversion fee paid to Green Tissue be disregarded in terms of section 46 of the Act. Although initially refuted in its founding affidavit, NSP accepted in reply that its attorney of record, Mr Kobus van Niekerk, had received a copy of this application by email on 6 October 2021, after he had been advised telephonically that the application had been made to the Master.

[8] The application to the Master recorded *inter alia* that NSP had lodged a claim in the amount of R40 124 967,97 with the liquidators and that it had applied a set off in the amount of R52 157 269,92. The liquidators applied to the Master for permission to disregard the set off on the basis that it was "*not in the normal course of business*" and was –

> 'within six months of winding up, amounts to accounting entries after the fact and essentially after the business had ceased operating pursuant to the perfection aforesaid. Applying set-off will give rise to an undue preference in favour of NSP to the prejudice of a substantial body of creditors.'

[9] On 28 January 2022 the Master granted the liquidators permission to disregard the set off in favour of NSP. No reasons for the decision were provided. Subsequent to the Master's decision, on 6 May 2022, NSP's attorneys addressed a letter to the Master stating *inter alia* that:

> '…11. [NSP] deemed it imperative to enter into the aforementioned agreement in order to keep Green Tissue running as a going concern. By entering into the agreement, our client ensured that there would be clarity as to the transfer of funds and stock between NSP and GT.
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> 12. As expressed in clause 3.2 and 3.3, NSP would supply GT with raw material in order for GT to maintain its

manufacturing capacity of finished goods as ordered by NSP. GT would then furnish NSP with an invoice for finished products…GT did in fact deliver goods to NSP, however it was in terms of the [MSA] for which [the liquidator] fails to make reference to.

13. Once GT renders an invoice to NSP, GT proceeded to credit NSP for the value of raw materials supplied in the manufacturing of the said finished products. This provision can be found in clause 3.8 of the [MSA]. In any event, once a liquidated claim existed between the two parties, se-off applied pro-tanto.

14. As per clause 3.10 of the [MSA], it is evident that any set-off that was applied was done in the normal course of business for NSP and GT in order to reconcile the accounts from time to time in terms of what is owed and what is owing. This is evidentially what NSP proceeded to do. NSP completed a reconciliation of the accounts between NSP and GT and doing so in terms of the [MSA] entered into between all of the respective parties.'

[10] On 13 May 2022 the Master responded to NSP's attorneys, stating only that the "*Master instructed the liquidators to disregard the set-off on the 28th of January 2022*".

Submissions of parties

[11] It was argued for NSP that the decision of the Master to disallow the set off was both procedurally and substantively unfair, since NSP was not given the opportunity to be heard or make submissions prior to the decision which was made; and that the decision was made in an arbitrary manner without reasons provided with the Master not having applied the required contextual approach in making the decision, without sufficient material before her to assess properly the facts, the prior conduct of the parties, the terms of the transaction and the

decision to invoke the set off.[1] Consequently, it was submitted that the Master's decision should be set aside and, although in its notice of motion NSP had sought that the matter be remitted to the Master for determination de novo, that this Court should determine the section 46 application afresh since all relevant material is before the Court.

[12] As to the merits of the section 46 application in the event the Court were to determine the matter, it was submitted for NSP that the agreement between Green Tissue and NSP was concluded in the ordinary course of business, was commercially justifiable and that the fact that Green Tissue had ceded its "receivables" to Standard Bank and Investec did not alter this position. The MSA recorded upfront that Green Tissue was in financial distress and that it had been concluded "*to keep* [Green Tissue] *afloat*" in circumstances in which the parties had a pre-existing commercial relationship. It was clearly concluded to keep Green Tissue afloat until NSP's holding company had finalised the purchase of Green Tissue's share capital, and it was expected of NSP to protect its interests by concluding the MSA having injected capital and provided raw materials to Green Tissue, which was in distress. In such circumstances, invoking a set off constituted normal practice with reciprocal debts being set off which was neither anomalous nor a ruse. It was submitted further that in disallowing the set off the liquidators seek to take advantage of NSP's largesse and the terms of the MSA which was concluded in the ordinary course of business.

[13] The application was opposed by the liquidators of Green Tissue on the basis that the decision of the Master was procedurally fair in that NSP had received a copy of the section 46 application and, having received the application, was within its rights to make submissions to oppose it. As to the substance of the application, it was argued that the set off did not occur in the ordinary course of business, nor at arm's length, given

[1] With reference to *MCG Productions (Pty) Ltd v Ramodike NO and Others* 2021 (4) SA 543 (GJ) at para 22.

that the control of NSP, Green Tissue and Lion Match was the same. Rather, the set off was backdated when the directors of NSP took control of Green Tissue and Investec had perfected its notarial bonds over the movable assets of Green Tissue and when the business of Green Tissue had ceased. Furthermore, the set off was not applied on a monthly basis but by way of manual adjustment following the perfection. A set off was precluded since Green Tissue's debts had been ceded to Standard Bank and Investec, with the variation of the factoring agreement entered into with Standard Bank expressing recording that "(n)*o set off will be recognised*" and since the 2016 cession was in respect of "*all the Cedent's right, title and interest in and to all book debts and other debts due and to become due to the Cedent*" by debtors. Furthermore, it was material that when NSP lodged its claim in terms of section 44 of the Act, it made no mention of the MSA apparently because there was "*no need* [to do so] …*when dealing with accounts*". NSP's founding papers, it was contended fail to deal with these crucial aspects, with it stated only in reply that the MSA existed prior to the final winding-up order being granted to ensure the continued existence of Green Tissue and benefit Green Tissue, NSP "*and all relevant stakeholders inclusive of creditors of* [Green Tissue]". For these reasons the liquidators sought that the application be dismissed with costs.

Discussion

[14] The review of the Master's decision is sought in terms of section 151 of the Act,[2] which permits a person aggrieved by any decision of the Master to bring it under review by the Court. A review in terms of

[2] Section 151 of the Insolvency Act states:

'Subject to the provisions of section 57 any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the Court and to that end may apply to the Court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the Court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section 112.

section 151 has been recognised as one in the "*very widest sense*",[3] with the level of review stated in *Nel N.O. v Master of the High Court Eastern Cape and Others (Nel N.O.),*[4] as varying and to be determined in each case by '*the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review*'.

[15] In the current matter, under review is the Master's decision in terms of section 46, which states:

> '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, or if a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is sequestrated; 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: Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 35A and any other party in accordance with the rules of such an exchange, or if it takes place under an agreement defined in section 35B.'

[16] In *Nel NO,*[5] with reference to the earlier decision of *Johannesburg Consolidated Investment Co v Johannesburg Town Council,*[6] the

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[3] *Master of the High Court, Western Cape Division, Cape Town v Van Zyl* [2019] ZAWCHC 23; [2019] 2 All SA 442 (WCC) at para 3. See too *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* [1990] ZASCA 134; 1991 (1) SA 648 (A) 655G – J, [1991] 1 All SA 406 (A), and *Cooper NO and Others v South African Mutual Life Assurance Society and Others* [2000] ZASCA 64; 2001 (1) SA 967 (SCA); [2001] 1 All SA 355 (A) at para 11.

[4] [2004] ZASCA 26; 2005 (1) SA 276 (SCA)

[5] Ibid.

[6] 1903 TS 111 at 117.

recognised wide section 151 review was said to create a "*third kind of review*" which permits a court to –

> '…enter upon and decide the matter de novo. It possesses not only the powers of a Court of review in the legal sense, but it has the functions of a Court of appeal with the additional privileges of being able, after setting aside the decision arrived at … to deal with the matter upon fresh evidence'.[7]

[17] Prior to the advent of the constitutional right to just administrative action and the enactment of the Promotion of Administrative Justice Act ("PAJA"),[8] the recognised usual course in administrative review proceedings was, on the setting aside of a decision, to remit a matter to the administrator for proper consideration.[9] A decision to substitute, as opposed to remit, was one to be made judicially upon a consideration of the facts of each case having regard to issues of fairness.[10] This approach is now reflected in the provisions of PAJA.

[18] A wide review under section 151 allows a court to decide the matter *de novo* having regard into the merits of the impugned decision in a manner distinct from that permissible in a conventional administrative law review.[11] In contrast, section 8(1)(c)(ii)(aa) of PAJA allows an administrative decision inter alia to be substituted in "*exceptional circumstances*", usually with regard had to the record of material placed before the administrator. In a wide statutory review as contemplated in section 151, no such exceptional circumstances are required and the court may, in a manner generally impermissible in a conventional administrative law review, take a decision *de novo* on a consideration of relevant material which may include new material or "*fresh evidence*

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[7] *Nel N.O. (supra)* at para 23.
[8] Act 3 of 2000.
[9] *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 76D-G.
[10] See e.g. *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G.
[11] *Master of the High Court, Western Cape Division, Cape Town v Van Zyl* [2019] ZAWCHC 23; [2019] 2 All SA 442 (WCC) at para 3.

as if [the court] *were the decision-maker of first instance*".[12] It is in this sense that the review is classified as wider.

[19] However, in spite of this, a wide review under section 151 remains a review and not an appeal. Section 151 provides as much. It is therefore unhelpful, in my view, to cloud the distinction between review and appeal in relation to reviews under section 151 as in *Al-Kharafi & Sons v Pema and Others N.N.O,*[13] in which it was stated that a court sits in a section 151 review sits "a*s a court of review and a court of appeal to reconsider the ruling or decision of the Master*".[14] Rather, the wide review contemplated in section 151, is to be recognised as permitting wider powers on review, some which are akin to the powers of an appeal court, which allow a court to take a decision of the Master *de novo* having regard to all relevant material placed before the court, including new material which was not previously before the Master.

Merits of review application

[20] Turning to the merits of the applicant's review application, although NSP initially contended that it had not been provided with a copy of the section 46 application, in a somewhat remarkable change of stance, it subsequently conceded that such application had in fact been received by its attorneys. In spite of this concession, there remains however no dispute between the parties that the Master did not provide NSP with an opportunity to make representations to her before taking the section 46 decision to disallow the set off. While NSP may have been at liberty to make representations of its own accord to the Master following its receipt of the section 46 application, there is no explanation by the Master, who did not oppose this review application, why she did not expressly provide NSP, when it was patently an affected party, with such an opportunity before the decision was taken. This when, at a

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[12] *Cooper NO and Others v South African Mutual Life Assurance Society and Others* [2000] ZASCA 64; 2001 (1) SA 967 (SCA); [2001] 1 All SA 355 (A) at para 11.

[13] [2008] ZAGPHC 273; 2010 (2) SA 360 (W) at 369.

[14] At para 11.

minimum, the dictates of procedural fairness require that the Master provide affected parties an opportunity to make such representations before a decision is made. Having failed to do so, the decision of the Master was clearly procedurally unfair. [15]

[21] As to the substantive fairness of the decision, the Master provided no reasons for the decision taken. Officials in our constitutional democracy, are enjoined to ensure that the public administration is governed by the values enshrined in our Constitution.[16] Reasons serve an important purpose in ensuring that officials adhere to the law and the important principles of fairness, accountability and transparency. They justify why a decision was made, with the adequacy of reasons provided dependent on the facts and circumstances of a matter, the nature and complexity of the matter and the nature of the functionary taking the decision.

[22] There is no explanation provided by the Master why reasons were not provided to justify the decision taken. There is also no indication from the Master as to what material served before her when she took the decision. This was so despite an opportunity provided to the Master to provide such reasons. Our law does not countenance either an abuse of discretionary power or arbitrary decision making in the exercise of public power. Without any reasons it is not possible to determine whether the decision taken by the Master was arbitrary or not, nor what considerations were taken into account by her in coming to the decision that she did or what were not. It follows in these circumstances that the decision made cannot be said to have been one that was either reasonable or rational. The decision of the Master therefore falls to be reviewed and set aside on the grounds that it was both procedurally and substantively unfair.

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[15] *Bam-Mugwanya v Minister of Finance & Provincial Expenditure* 2002 (3) BCLR 312 (Ck); *De Beer v Raad vir Gesondheidsberoepe van SA* [2006] 4 All SA 21 (SCA); 2007 (2) SA 502 (SCA).

[16] Section 195(1) of the Constitution. *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC) ; 2010 (4) SA 327 (CC) at para 62.

Remedy

[23] Although NSP sought in its notice of motion that in the event that the decision of the Master was to set aside on review, the matter be remitted back to her for determination *de novo*, in argument both parties accepted that given the wide review permissible under section 151, this Court was empowered to and ought in the circumstances to determine the section 46 application afresh since all relevant material and submissions had been placed before it. I am satisfied that this is so and that no purpose would be served in remitting the matter back to Master for determination, with the inevitable delay that would arise as a consequence of doing so.

[24] Set off occurs automatically by operation of law.[17] Only where it was "*not effected in the ordinary course of business*" may a set off be disregarded in terms of section 46. A determination as to whether a transaction occurred in the ordinary course of business is an objective one, evaluated in light of all relevant facts. Such a transaction is one which does not appear anomalous or surprising to the ordinary person of business and one that solvent, businesspeople would, in similar circumstances, enter into.[18]

[25] The set off between NSP and Green Tissue was agreed in circumstances in which Green Tissue was insolvent and unable to pay its debts. It fell squarely within the provisions of section 46 in that it was entered into within six months of the winding up of Green Tissue. It occurred when NSP and Lion Match were in the process of concluding a sale of shares agreement to keep Green Tissue afloat; and in the context of a close relationship between Green Tissue and NSP, which companies shared two of their three directors, one of whom was Mr

[17] *Standard Bank Of South Africa Ltd v Echo Petroleum CC* 2012 (5) SA 283 (SCA) at para 33.
[18] *Griffiths v Janse van Rensburg NO* [2015] ZASCA 158 at para 11

Jacob van Wyk, the Group Chief Executive Officer of Lion Match, with both companies controlled by Lion Match.

[26] Furthermore, the set off was agreed and then backdated when NSP was acutely aware that Green Tissue had ceded its debts in favour of Standard Bank and Investec, with Mr Van Wyk having been involved in negotiations on behalf of Green Tissue regarding the repayment of its debt. I am not persuaded that there is any merit in the contention that a distinction can be drawn between trade receivables and debts, as proposed by NSP, when what had been ceded clearly included all debts, including any amounts owed by Green Tissue to NSP in respect of the goods and money advanced by NSP to Green Tissue. Any debate as to the effect of the cessions *in securitatem debiti,* does not detract from the fact that debts had been ceded and that the respective banks' held a right to receive payment in accordance with the terms of the cessions registered.[19]

[27] Having regard to the nature of the transaction and the circumstances in which it occurred, the set off was clearly directed at protecting NSP's exposure in respect of the goods and money it had advanced, while preserving a benefit to its business in being able to purchase the goods then produced by Green Tissue.

[28] It follows on the objective facts that the set off was "*not effected in the ordinary course of business*". It was one that would be patently anomalous or surprising to the ordinary person of business and reflected a transaction which solvent, business people, in similar circumstances, would not enter into. It was not a transaction entered into in between unrelated commercial solvent entities in the ordinary course of business, at arm's length, nor was it an agreement typical of two ordinary solvent businesses. As much is apparent from the fact that

[19] *Standard General Insurance Co Ltd v SA Brake CC* 1995 (3) SA 806 (A) at 815C; *Millman NO v Twiggs and another* 1995 (3) SA 674 (A) at 678 C-D; *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) at paras 11-15; *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* [2000] JOL 7116 (C).

on or after 18 September 2019, the set off was backdated when the directors of NSP had taken control of Green Tissue, after Investec had perfected its notarial bonds and the business of Green Tissue had ceased. The effect was that the set off gave rise to an undue preference to NSP, one which was to the prejudice of a substantial body of creditors. For all of these reasons, I am satisfied that the set off was not one effected within the ordinary course of business and that, in terms of section 46 of the Act, the set off falls to be disregarded by the liquidators of Green Tissue.

[29] As to costs, the review has succeeded in that the decision of the Master has been set aside. It is a relevant consideration that the Master took the decision without granting NSP an opportunity to make representations regarding the matter and without reasons given for the decision taken. NSP was therefore within its rights to approach this Court to seek the relief it did. This is so despite the fact that the decision taken *de novo* by this Court in respect of the set off, on a consideration of the material placed before it, accords with that taken by the Master. Therefore, although NSP has succeeded in having the decision of the Master set aside, this amounts, in effect, only to technical success in the review. In these circumstances I do not consider it either to be appropriate or in the interests of justice that NSP be granted costs in the matter. I am also not of the view however, in light of the fact that the Master's decision has been set aside, that NSP should be held liable for the liquidators' costs since it was entitled to approach this Court to seek the relief it did given the conduct of the Master. In the exercise of my discretion on costs, I therefore consider an appropriate order to be that each party pay its own costs, even in spite of the liquidators' success in the section 46 application.

Order

[30] In the result, the following order is made:

1. The decision of the Master of the High Court, Western Cape, as reflected in her letter dated 28 January 2022, in relation to the pre-liquidation set off entered into between the applicant, NSP Unsgaard (Pty) Ltd, and Green Tissue (Pty) Ltd, is reviewed and set aside.
2. Pursuant to section 151, read with section 46, of the Insolvency Act 24 of 1936, the pre-liquidation set off entered into between NSP Unsgaard (Pty) Ltd, and Green Tissue (Pty) Ltd is to be disregarded by the respondent, Green Tissue (Pty) Ltd (in liquidation).
3. There is no order of costs.

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SAVAGE J

APPEARANCES:

APPLICANT:	W N Shapiro SC
	Instructed by J I van Niekerk Inc.
SECOND RESPONDENT:	R G Goodman SC
	Instructed by ENS Africa Inc.