

**Reportable**

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA**

**Case No.: 9986/2009**

**In the matter between:**

**TONGAAT PAPER COMPANY (PTY) LTD**

**PLAINTIFF**

**and**

**THE MASTER OF THE KWAZULU-NATAL  
HIGH COURT, PIETERMARITZBURG**

**FIRST DEFENDANT**

**THEODOR WILHELM VAN DEN HEEVER N.O.**

**SECOND DEFENDANT**

**LAVINA RAMSAROOP N.O.**

**THIRD RESPONDENT**

**MANOGH DAYANAND MAHARAJ N.O.**

**FOURTH DEFENDANT**

**CAPE WASTE PAPER CC**

**FIFTH DEFENDANT**

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**JUDGMENT**

Delivered on: 15 September 2010

**SISHI J**

**Introduction**

[1] The plaintiff brought an action to review and set aside the decision of the first defendant dated 29 October 2009, in terms of which he rejected an objection by **Spiral Paper (Proprietary) Limited**, to the second liquidation and distribution account of **Auspaper Mills**

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**(Proprietary) Limited (In Liquidation).**

[2] This judgment only deals with the exceptions raised by the second, third and fourth defendants (the liquidators) to the plaintiff's particulars of claim. The plaintiff is opposing the defendants' exceptions. The first defendant has filed a notice to abide the Court's decision on the exceptions. The fifth defendant has not opposed the exceptions.

**Background**

[3] On 25 September 2009, the said objection was lodged with the first defendant by **Spiral paper (Pty) Ltd**, a creditor of **Auspaper Mills (Pty) Ltd**.

[4] The second liquidation and distribution account of **Auspaper Mills (Pty) Ltd (In Liquidation)** provided for a "*late deposit*" of R5 130 000,00 that was credited to the current account.

[5] On 12 June 2009, the second, third and fourth defendants, acting in their capacities as aforesaid (*liquidators*) concluded a written agreement of sale with the fifth defendant in terms of which certain assets purportedly owned by **Auspaper Mills (Pty) Ltd (In**

**Liquidation)** were sold to the fifth defendant. The said late deposit was part of the proceeds of the aforesaid sale.

[6] The plaintiff alleged in the particulars of claim that it was at all material times, in particular, when the first defendant's said decision was made, the owner of the following assets that formed the part of the said assets sold to the fifth defendant:

- (a) 1 x 10 ton Demag Gantry Crane with Length and Breadth Travel;
- (b) 1 x John Thompson MK3 6 ton coal fired boiler;
- (c) 1 x John Thomson MK3 6 ton coal fired boiler;
- (d) 1 x vibrating screen attached to tissue mill;
- (e) 1 x fan pump attached to tissue mill;
- (f) 1 x Elmo vacuum pump attached to tissue mill;
- (g) 1 x effluent Samco (mono type) pumps;
- (h) 1 x slurry pump behind tanks;
- (i) 1 x high pressure pump to feed tissue mill;

- (j) 1 x steam recovery plant;
- (k) 1 x electrical sub-station with switch gear power factor correction ac and dc drives; and
- (l) 1 x chemical plant.

[7] The second, third, and fourth defendants' dispute that the plaintiff is the owner of the aforesaid assets.

[8] The first defendant refused to sustain the said objection on the ground that to do so involved a dispute of fact and he was not empowered by the provisions of the **Insolvency Act, No.24 1936**, to hear evidence to resolve such disputes. The first defendant accordingly rejected the objection.

[9] The plaintiff alleged that it is a person aggrieved by the first defendant's said decision as contemplated in **Sections 111(2)(a) and 151 of the Insolvency Act.**

### **The Exceptions**

[10] The second, third and fourth defendants have filed an exception to

the plaintiff's particulars of claim in terms of Rules 23 and 30 of the Rules of this Court.

[11] The notice of exception is widely cast and Counsel for the defendant has correctly distilled it into two exceptions, namely:

- (a) The fact that the plaintiff has no *locus standi* to sue, and
- (b) The facts pleaded by the plaintiff do not sustain a cause of action.

### **The merits of the exceptions**

[12] Mr Broster for the excipients, the second to fourth defendants, herein after referred to as "*the liquidators*", submitted that, firstly, the plaintiff does not have a legal interest entitling it to object to the account and secondly, the plaintiff's case is that it is the owner of the goods that were sold by the liquidator and the remedy, in law, is that if somebody else sells your goods, it is for the owner to go and vindicate the goods wherever they may be found.

[13] Our Law of Ownership gives the owner this powerful right to go and find the goods and say to the person in possession, even a *bona fide* possessor, "*give them back to me*". He submitted that,

on the facts that are before Court, it is in deed what this case is all about.

[14] Mr Broster submitted that it is clear that the liquidators sold the goods after the date of liquidation. It is also clear from the particulars of claim that the liquidators were appointed on 17 November 2005, and that they sold the assets on 12 June 2009, that is, four years after the date of liquidation. The account that is the subject matter of the review was filed on 15 June 2009.

[15] Mr Broster then submitted that at the date of liquidation, the plaintiff had no claim against the insolvent estate. He referred to Section 44(1) of the Insolvency Act which provides as follows:

*“... any person who has a liquidated claim against an insolvent estate, the cause of which arose before sequestration of that estate, may, prove a claim”.*

He then submitted that it is the words *“the cause of which arose before sequestration”* that brought it into the scheme of the insolvency claims under section 44.

[16] Mr Broster submitted that in order to be a creditor with a legal

interest in the estate account, that creditor must:-

- (a) have a claim which is liquidated; and
- (b) which arose prior to the date of liquidation.

He submitted that the authority for that proposition is a case of ***Vather v Dhavraj 1973(2) SA 232 (N) at 236 A-E***, where Leon J stated:

*“... in view of the fact that the claim of creditors against an estate must be dealt with as they existed at the date of the order of sequestration, it must follow that the reference to creditors in section 123(1) of the Act is a reference to those who had claims against the insolvent estate at the date of sequestration”.*

[17] In the particulars of claim, the plaintiff alleged that his movable property has been sold, it was sold after the date of liquidation but notwithstanding that, he has a right to object to the account.

[18] Mr Broster submitted that, it is that, that gives rise to the exception and it follows from that, that if one does not have a claim, a right to object to the account, one cannot review the master’s decision, and one cannot make a claim against that account. He submitted that, that is clearly set out in case of ***W. K. Holdings (Pty) Ltd v Swatz***

*NO (unreported) Case No. A1358/0, ZAGPHC at 291* dated (8 November 2007), a Transvaal Provincial Division case. He referred to page 5 of the judgment where **Van der Merwe J** stated the following;

*“It is clear from the wording of the section that the plaintiff does not have a liquidated claim against Dexcon. The claim also did not arise before the liquidation of Dexcon. No other provision existed either in the Act or in the Companies Act 61 of 1973, for the proof of post liquidation claims. Such claims would either have to be accepted by the defendant (which it refused to do) or proved by a judgment of the Court” (which the plaintiff endeavours to do).*

[19] Mr Broster submitted that what the plaintiff really has in this case, is that he can sue the possessor of his goods, the purchaser who is the fifth defendant, **Cape Waste Paper CC**, to give back his goods under the vindicatory action or he can sue the liquidators for his damages. His case against the liquidators is that they sold his goods when they had no title to sell them and that he has suffered damages because the cost of replacing them is probably the sale price to the fifth defendant.

[20] Mr Broster submitted that the particulars of claim do neither of these two things. The particulars of claim say that the Master's decision must be set aside. The Master looked at the objection that was filed and said that it involved a dispute of fact and that he was not going to decide a dispute of facts. In that decision, the Master has the full support of the Appellate Division case in the case of *Fey NO & Whiteford NO v Serfontein and Another 1993(2) SA 605 A, at 614 G-H*. Hoexter JA stated the following:

*“The Master’s office from the nature of things, is ill-equipped to determine disputed facts. The recognised procedure for settling disputed facts is by trial action. A court is the obvious tribunal for the determination of such disputed matters. Grave injustice may be done to a litigant who is denied the ordinary procedure adopted in investigating the truth of conflicting allegations.”*

[21] Mr Broster submitted that the Master's decision is unassailable, that is the first part of the plaintiff's action, and the second part is that he wants to stop the account while he sues the liquidator for his goods back. That has the factual problem as the plaintiff knows that the liquidator does not have the goods as he says he sold them to the **Cape Waste Paper CC**, the fifth defendant.

[22] Mr Jeffrey for the plaintiff submitted that the characterisation of this action has been misconstrued by the excipients. He submitted that what we have here is not the plaintiff wanting to have a legal interest to object to the account. The objection to the account has already been raised in paragraph 8 of the particulars of claim by Spiral Paper (Pty) Ltd and reads as follows:

*“... on 25 September 2009, the said objection was lodged with the first defendant (the Master) by Spiral Paper (that is the company In Liquidation) the creditor of House Paper Mills and a company associated with the plaintiff”.*

[23] Mr Jeffrey submitted, correctly, in my view, that the true issue between the parties is whether or not the plaintiff is the person aggrieved by the decision of the Master. In paragraph 17 of the particulars of claim, the allegation is quite clear that the plaintiff is the person aggrieved by the Master’s decision as contemplated in sections 111(2)(a) and 151 of the Insolvency Act.

[24] Mr Jeffrey submitted that the issue is whether or not the plaintiff is a person aggrieved. He then referred to Section 407(4)(a) of the Companies Act, which reads:

*“The liquidator or any person aggrieved by any direction of the*

*Master under this section, or by refusal of the Master to sustain an objection lodged there under, may within 14 days after the date of the Master's direction and after notice to the liquidator apply to Court, for an order setting aside the Master's decision and the Court may on any such application, confirm the account in question or make such an order as it deems fit”.*

He also referred to Section 339 of the Companies Act which provides as follows:

*“In the winding up of a company, unable to pay its debts the provisions of the law, relating to insolvency shall insofar as they are applicable apply **mutatis mutandis** in respect of any matter not specifically provided for by this Act”.*

[25] Mr Jeffrey submitted correctly, in my view, that what is not specifically provided in the Companies Act is the review of the Master's decision in terms of Section 151 of the Insolvency Act. If a person is aggrieved by the Master's decision, and wishes to take the matter forward, such person proceeds in terms of section 151 of the Insolvency Act which is the review.

[26] Section 151 of the Insolvency Act provides as follows:

*“Subject to the provisions of Section 57, any person aggrieved by any decision, ruling, order of 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 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 a notice to all such creditors, and provided further that the Court shall not re-open any duly confirmed trustee's account otherwise than as provided for in section 112”.*

[27] The case of *Nel & Another NNO v the Master (ABSA bank Ltd Intervening) 2005 (1) SA 276 (SCA) 286 B-287B paras 23 and 23*, dealt with the nature of such a review as it is not a review in the usual sense. In paragraphs 22 and 23 of this case, the Court dealt with the law relating to this particular type of review. It is not a review in the normal cause, it's a review, it is an appeal and the Court hearing the matter can also here evidence on the issue. Innes CJ said as quoted in paragraph 22 of the *Nel's case, supra*, in *Johannesburg Consolidated Investment Company v Johannesburg Town Council*, wherein he stated with reference to this kind of review, that a Court could:

*“... enter upon and decide the matter de novo, it possesses not only the powers of the court of review in the legal sense, but it has the same functions of a Court of Appeal with the additional priviledges of being able after setting aside the decision arrived at*

*... to deal with the matter upon fresh evidence ...”*

[28] Mr Jeffrey submitted that this is precisely what the plaintiff is seeking to do in this action, but in order to have *locus standi* in this action, the plaintiff has to be an aggrieved person.

[29] Mr Jeffrey referred to the case of *Fourie’s Poultry Farm (Pty) Ltd v KwaNatal Food Distributors (Pty) Ltd (In Liquidation) and Other 1991 (4) SA 514 (N)*, and submitted that Page J dealt with the entire issue of the nature of proceedings and whether or not a person is an aggrieved person as set out in the Act. He submitted that it is not essential that an aggrieved person be a proved creditor. An aggrieved person must be a person who has a legal grievance. He submitted that the cases are quite clear on that, that an aggrieved person is not some officious bystander, some person who feels upset about the decision, but he must have a legal interest, a legal grievance, and he submitted that a plaintiff in this action clearly has a legal grievance against the decision of the Master because he is the owner of the goods or he alleged that he is the owner goods sold by the liquidators.

[30] The plaintiff is not a person with some passing interest in the

matter and just wanted to become involved. It is not a question of the interest that arises to the account. There is a distinction between the excipients' Counsel's argument and Mr Jeffrey's argument. The plaintiff has not objected to the account. The plaintiff is also not claiming a right to object to the account. He is objecting to the Master's decision in respect of the objection raised by **Spiral Paper (Pty) Ltd** and the only way that the plaintiff can object to such a decision is if he is an aggrieved person and because of his interest in the ownership of goods that were sold. He has a legal interest in the decision of the Master.

[31] Mr Jeffrey submitted that it matters not whether the Master in his objection, could not determine the matter because he could not hear evidence on a disputed fact as he says. That issue is clearly dealt with in the authorities because of the nature of the review proceedings where new evidence can be heard by the Court hearing his action, by hearing new evidence on the issue or more evidence that was placed before the Master. It is not a review in the normal sense where the Court is confined to the evidence led before or that was before the Master.

[32] Mr Jeffrey submitted that it is quite clear that a case has been made

out in the particular of claim that the plaintiff is an aggrieved person because he is the owner and accordingly the Court on review which is the wider form of review can grant the relief sought which is the declaratory order as to the ownership of these particular assets that were sold and for the further relief that has been sought.

[33] He further submitted that it is expeditious to do so, it is in the interest of justice to do so at this stage and it is convenient for all the parties concerned, including those proved creditors who will eventually benefit, or not benefit depending on how the issue of ownership is decided. That issue should be determined now. It should not be left until after the accounts have lain for inspection and have been proved. This is the correct time to bring these set of proceedings.

[34] He submitted further that if one refers to clause 7 of the agreement of sale, that deals with excluded assets, and it is the intention, it appears between the liquidators and the fifth defendant "*the purchaser*", that in the event of the liquidator deciding that a third party (*in this instance the plaintiff or the respondent*) has a good claim to those assets, and those assets can, in the liquidator's

discretion, be excluded from the sale and the price adjusted accordingly. So, the inference can be drawn from that, that the liquidator must have known that in the event of the dispute arising, that those assets should be excluded from the sale right at the time that the sale was entered into.

[35] He submitted that the liquidators obviously do not agree with the plaintiff's action otherwise, they would not be here in Court today. He submitted that it is expeditious, convenient and in the interest of justice that this issue be determined at this stage and not as Counsel for the liquidators has suggested, wait until a later stage where a vindictory application might be brought against the fifth defendant or depending on how it is advised, action for damages against the liquidators. He submitted correctly that, that would be totally impracticable. He then submitted that the best solution is for this action to proceed and for the exceptions to be dismissed with costs.

[36] In reply, Mr Broster submitted that the allegations made by the plaintiff in the particulars of claims, if proved at trial are:

(a) That the liquidators have sold property which they did not

own;

- (b) That the plaintiff has a vindicatory action against the purchaser, the fifth defendant for return of the property;
- (c) If the plaintiff does not wish to pursue the claim for the return of the property, it may, pursue an action for damages against the liquidators;
- (d) Such a cause of action arises post-liquidation and out of the administration of the estate.

[37] Mr Broster submitted that what Counsel for the plaintiff is doing in this action is to have it both ways. He has claimed his goods back from the purchaser, Cape Waste Paper CC in this action, but, he says in addition to that, he can stop the account and that is the fallacy of the particulars of claim as they stand. He is trying to run mutually exclusive remedies. He reiterated that to get into an objection into a liquidator's account, one must have a claim that arises before the liquidation.

[38] Relying on **Section 44(1) of the Insolvency Act**, Mr Broster repeated that in order to be a creditor with the legal interest in the estate account, that creditor must have a claim which is liquidated

and which arose prior to the date of liquidation. He submitted that the plaintiff's claim is certainly not liquidated and arose only after the sale of the movable property by the liquidator which was on 12 June 2009.

[39] Clearly, the plaintiff is excluded from the provisions of **Section 44(1) of the Insolvency Act** as the claim is not liquidated and did not arise prior to the date of liquidation.

[40] Mr Broster's entire argument is based on the provisions of **Section 44(1) of the Insolvency Act**. In his argument, he made no reference to the other applicable sections of both the **Companies Act and the Insolvency Act, Sections 407 (4) (a), 339 of the Companies Act, and Section 151 of the Insolvency Act**. These Sections have been referred to earlier on in this judgment.

The review of the Master's decision is brought in terms of **Section 151 of the Insolvency Act**. In terms of **Section 151** "*any person*" aggrieved by the Master's decision can have it reviewed in terms of this section.

This section does not require that such a person be an approved

creditor with legal interest, who has a liquidated claim or a claim which arose prior to the date of liquidation.

[41] **Section 44(1) of the Insolvency Act** deals with the requirements to be satisfied if a person intends proving a claim against an insolvent estate.

In this case, the plaintiff does not have a liquidated claim and there is no indication that the said claim arose prior to liquidation. **Section 44 (1) of the Act** is therefore not applicable to this case.

[42] One needs, therefore, to look at other relevant provisions of both **the Insolvency Act and the Companies Act** referred to above.

[43] Mr Jeffrey submitted correctly that the liquidator's characterisation of this action has been misconstrued. In this matter we do not have a situation where the plaintiff wants to have a legal interest to object to the account. The objection to the account as pointed out above, has already been raised and this objection was raised by **Spiral Propriety Limited. Spiral Propriety Limited** which raised an objection is an approved creditor to the account.

[44] The issue in this matter is whether or not the plaintiff is a person

aggrieved by the decision of the Master as contemplated in **Section 407(4)(a) of the Companies Act**. As indicated above, **Section 339 of the Companies Act** makes the **Law of Insolvency** to be applicable in the winding up of a company unable to pay its debts in respect of any matter not specifically provided for in this Act.

[45] Mr Jeffrey submitted correctly in my view that, what is not specifically provided for in the Companies Act is the review of the Master's decision which is in terms of **Section 151 of the Insolvency Act**. If a person aggrieved by Master's decision wishes to take the matter forward, such a person proceeds in terms section 151 of the Insolvency Act which makes provision for a review. The nature of the said review has been dealt with in the case of *Nel and Another v the Master, supra*.

[46] In essence, it was submitted correctly in my view that, a person aggrieved is, as **James LJ** said in *Ex parte Sidebotham; In re Sidebotham (1880) 14 Ch 458 (CA) 465*,

*“(not) a person who is disappointed or disgruntled because of a benefit which he might have received. A “person aggrieved” must surely be a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him*

*something, or wrongfully affected his title to something”.*

[47] It has been pleaded that the plaintiff is and was at all material times the owner of certain assets sold by the liquidators to the fifth defendant. Therefore the plaintiff clearly has a legal grievance. The plaintiff falls within the concept of a person aggrieved and accordingly has the requisite *locus standi* to institute the action. The plaintiff does not have to be a proved creditor or to have lodged an objection to the estate account as suggested by Counsel for liquidators.

[48] There is no merit in the submission made by Counsel for the liquidators that the plaintiff has misconceived its remedy by instituting this action. The sale of the assets in question by the liquidators was in terms of a written agreement (annexure “D” to the particulars of claim). The liquidators were alive to the adverse claim, to the assets by a third party and this event was expressly provided for in clause 7 thereof.

[49] In my view, it is desirable, convenient and in the interest of justice that the issue of the plaintiff’s ownership of the assets sold be determined in this action, rather than in some action post

liquidation as suggested on behalf of the liquidators. Once the issue of ownership of the assets has been determined in this action, the assets in question will either be included in or excluded from the sale agreement as contemplated between the liquidators and the fifth defendant; the liquidation and distribution account can be adjusted if necessary and the liquidation can proceed in the ordinary and proper manner.

[50] In dealing with the provisions of **Section 44(1) of the Insolvency Act 24 of 1935**, one cannot ignore the other relevant provisions of the Companies Act referred to above. Counsel for the liquidators sought only to rely on the provisions **Section 44(1) of the Insolvency Act** and ignored the other provisions of the **Companies Act** and the **Insolvency Act** referred to above. Therefore, the argument by Counsel for the liquidators solely based on **Section 44 of the Insolvency Act** cannot be sustained.

[51] In the light of the above, I am satisfied that the plaintiff does have the *locus standi* to bring the action and the facts pleaded do sustain causes of action.

[52] In the result, I am satisfied that the second, third and forth

defendants exceptions should be dismissed with costs.

**[53] In the result, I make the following order**

**The second, third and fourth defendants' exceptions are dismissed with costs.**

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JUDGE T A SISHI  
Judge of High Court of South Africa

Date of hearing : 25 May 2010

Date of delivery : 15 September 2010

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