REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A5009/12

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

4/3/2013
DATE

SIGNATURE

In the matter between:

AUBY, JOHN DEON Appellant

and

PELLOW, ALLAN DAVID N.O. First Respondent

MOTALA, ENVER MOHAMED N.O. Second Respondent
(in their capacities as the duly appointed liquidators of
WESTERN BREEZE 299 (PTY) (IN LIQUIDATION)

In re:

COURT *A QUO* CASE NO: 2010/31668

In the matter between:

PELLOW, ALLAN DAVID N.O. First Applicant

MOTALA, ENVER MOHAMED N.O. Second Applicant

and

AUBY, JOHN DEON Respondent

JUDGMENT

MOSHIDI, J:

INTRODUCTION

[1] This appeal concerns at least three interesting issues. The first is the authority of the joint liquidators to institute the proceedings under discussion. The second issue is whether an acknowledgment of debt ("*AOD*") by Western Breeze Trading 299 (Pty) Ltd ("*Western Breeze*") in favour of the appellant for R65 million dated 7 May 2007 constituted a disposition without value as contemplated in sec 26(1) of the Insolvency Act 24 of 1936 ("*the Insolvency Act*"). A final issue for determination is whether on the papers, there exist irresolvable disputes of fact necessitating the referral of the matter to oral evidence or trial in terms of Rule 6(5)(g) of the Uniform rules.

THE PARTIES

[2] The appellant, a businessman, was the respondent in the court *a quo* in an application brought by the first and the second applicants, the joint liquidators of Western Breeze. In the application, the applicants, relying on the provisions of sec 26(1) of the Insolvency Act, read with sec 340(1) of the Companies Act No 61 of 1973, essentially sought an order that the AOD between the respondent and Western Breeze be set aside as a disposition

without value; that the payments made to the respondent by Western Breeze pursuant to the AOD be set aside as dispositions without value; and that the respondent pay certain amounts to the applicants with interest thereon and costs. The respondent opposed the application and also raised a preliminary point challenging the authority of the applicants, as joint liquidators, to institute the proceedings.

THE PROCEEDINGS BEFORE THE COURT *A QUO*

[3] The matter came before Beasley AJ who, on 19 September 2011, made the following order:

> "*The acknowledgment of debt dated the 7th of May 2008 between Western Breeze 299 (Pty) Ltd and the respondent is hereby set aside. The respondent is ordered to pay to the applicants the sum of R11 million (Eleven Million Rand); the sum of R28 158,233.81 (Twenty Eight Million One Hundred and Fifty Eight Two Hundred and Thirty Three and Eighty One Cent); interest on the above amounts at the rate of 15,5% per annum a tempore morae. The respondent is to pay the costs of this application.*"

On 12 October 2011 Beasley AJ dismissed with costs, including the costs of two counsel, the respondent's application for leave to appeal against the above order. The present appeal before us is with the leave of the Supreme Court of Appeal. I shall henceforth, and for the sake of convenience, refer to the respondent as "*the appellant*" and the applicant liquidators as "*the respondents*".

VARIOUS GROUNDS OF APPEAL

[4] The grounds of appeal, which I paraphrase, are essentially that the Court *a quo* erred in concluding that there was no valid reason for the AOD; the court *a quo* did not conclude, nor did it examine any facts that would allow it to so conclude, that immediately after the disposition Western Breeze's liabilities exceeded its assets; that the court *a quo* failed altogether to consider the proviso to sect 26 of the Insolvency Act and how this necessary, but absent, finding should apply in the circumstances; that the court *a quo* erred, despite the existence of multiple disputes of fact between the appellant's and the respondents' versions, by not dismissing the application, alternatively referring the matter to trial, alternatively oral evidence; and that the court *a quo* erred in finding that the respondents had the requisite authority to institute the proceedings against the appellant, despite their non-compliance with the provisions of sec 386 of the old Companies Act 61 of 1973 ("*the Companies Act*"), and other relevant provisions of the Law.

COMMON CAUSE FACTS

[5] The following facts are either common cause or not seriously disputed. The appellant was the sole director and shareholder of Tony's Logistics (Pty) Ltd ("*Tony's Logistics*"), a transportation and related logistical services supplier business.

[6] Western Breeze formed part of a group of companies which was essentially controlled by Africa Heritage Investments (Pty) Ltd ("*AHI*"). Messrs Mutumwa Dziva Mawere ("*Mawere*") and Parmanathan Mariemuthu ("*Mariemuthu*") were the directors of AHI, Cade Transport (Pty) Limited, and Western Breeze. They played a significant role in this matter. Western Breeze (represented by Mariemuthu) concluded a written Sale of Business Agreement with Tony's Logistics (represented by the appellant) on 19 March 2007. In terms of the Sale Agreement, Western Breeze purchased the business of Tony's Logistics as a going concern for R20 million ("*the sale agreement*"). Subsequent to the Sale Agreement, and between March and April 2007, Western Breeze concluded several agreements with Investec Bank Limited ("*Investec*"). In terms of these loan agreements, Investec loaned and advanced to Western Breeze the sum of R70 million, R20 million of which was to be utilised to pay the purchase price required under the Sale Agreement. The balance of R50 million was to be used by Western Breeze as working capital. AHI guaranteed Western Breeze's indebtedness to Investec.

[7] The appellant entered into a service contract with Western Breeze in terms of which he was employed as Chief Executive Officer for the period 1 March 2007 to 28 February 2012. During such period, the appellant received a salary of R540 000,00 per month.

[8] On 7 May 2007 Western Breeze and the appellant concluded the AOD forming the subject-matter of the present appeal. In terms of the AOD,

Western Breeze acknowledged itself to be indebted to the appellant in the sum of R65 million. Pursuant to the conclusion of the AOD, Western Breeze paid to the appellant the sum of at least R39 million.

[9] It is also not in dispute that AHI and Western Breeze were finally wound up by this High Court as a result of separate applications at the behest of Investec on the grounds that these companies were unable to pay their respective debts.

[10] In respect of Western Breeze, which conducted a transport carrier business, the winding-up application was issued by Investec on 14 April 2009. Pursuant to the provisions of sec 348 of the Companies Act, the date of liquidation of Western Breeze was therefore 14 April 2009. On 3 June 2009 Western Breeze was placed under final winding-up by Blieden J. The company AHI owned 75% of the issued share capital of Cade Transport (Pty) Ltd ("*Cade Transport*"), and Investec the remaining 25%. Cade Transport, in its turn, owned 100% of the issued capital of Western Breeze. However, Cade Transport was itself later wound up by the North Gauteng High Court, Pretoria, at the instance of another creditor.

[11] Finally, regarding the common cause facts, the respondents were appointed joint liquidators by the Master of the High Court on 3 June 2009. On the application of the respondents, the Master convened an enquiry in terms of sec 417 read with sec 418 of the Companies Act 61 of 1973, into the affairs of Western Breeze ("*the Insolvency Enquiry*"). The appellant was

summoned to appear at the Insolvency Enquiry and to produce all documentation in his possession relating to Western Breeze and its affairs. The appellant testified at the Insolvency Enquiry and was cross-examined. The involvement of the appellant at the Insolvency Enquiry brought to light the existence of the controversial AOD, apparently for the first time. During August 2010 the liquidators (now the respondents) launched the proceedings which culminated in the present appeal.

THE APPLICANT'S CONTENTION THAT THE RESPONDENTS LACKED THE REQUISITE AUTHORITY TO INSTITUTE PROCEEDINGS

[12] In the light of the view I take in this matter, it is necessary to deal first with the appellant's contention that the respondents lacked the necessary authority to institute the proceedings under discussion. Not only does this aspect go to the root of the matter, but it is also undoubtedly, a vexed issue with a long history of contrasting case law dealing with the powers of both liquidators and trustees to institute or defend legal proceedings. The continuance of the problem in the instant matter was mirrored in the parties' election to file supplementary heads of argument.

[13] As the new Companies Act[1] is of no direct application in this matter, the starting point is sec 386 of the Companies Act 61 of 1973 which deals with the powers of liquidators. The appellant also relies on the provisions of sec 386(3) of the same Act for the proposition that the proceedings under

[1] Act No 71 of 2008.

discussion had not been authorised by a resolution taken at a meeting of creditors and members, and that consequently, the powers in sec 386(4) had not been conferred on the respondents. I shall henceforth refer to the Companies Act No 61 of 1973 as "*the Companies Act*".

THE PROVISIONS OF SECTION 386(3) AND (4) OF THE COMPANIES ACT

[14] Subsections (3) to (6) of section 386 of the Companies Act provide, respectively, as follows:

> "*(3) The liquidator of a company –*
>
> *(a) in a winding-up by the Court , with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;*
>
> *(b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and*
>
> *(c) in a members' voluntary winding-up, with the authority granted by a meeting of members; and*
>
> *(d) in a members' voluntary winding-up, with the authority granted by a meeting of members,*
>
> *shall have the powers mentioned in subsection (4).*
>
> *(4) The powers referred to in subsection (3) are –*
>
> *(a) to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorize, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;*

(b) to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;

(c) to compromise or admit any claim or demand against the company, including an unliquidated claim;

(d) except where the company being wound up is unable to pay its debts, to make any arrangement with creditors, including creditors in respect of unliquidated claims;

(e) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

(f) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;

(g) to exercise mutatis mutandis the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act No. 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;

(h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;

(i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.

> *(5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.*
>
> *(6) The Master may restrict the powers of a provisional liquidator.*"

The appellant also relies on the provisions of subsection (3) of sec 361 of the Companies Act for the proposition that in the ordinary exercise of the power to litigate, civilly or criminally, the liquidator requires authority from creditors and members expressly. The subsection, to the extent relevant, and under the heading, "*Custody of or control over, and vesting of property of company*", provides as follows:

> "*If for any reason it appears expedient, the Court may by the winding-up order or by any subsequent order directed all or any part of the property, immovable and movable (including rights of action), belonging to the company, or to trustees on its behalf, shall vest in the liquidator in his official capacity, and thereupon the property or the part thereof specified in the order shall vest accordingly, and the liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official capacity any action or other legal proceeding relating to that property, or necessary to be brought or defended for the purpose of effectually winding-up the company and recovering its property.*"

[15] In the present matter, it is common cause that the respondents were not clothed with authority granted by meetings of creditors and members or contributories or directions of the Master as envisaged in sec 386(3) of the Act. It is, however, plain that the respondents brought the proceedings in their capacities as duly appointed liquidators of Western Breeze.

SOME APPLICABLE LEGAL PRINCIPLES

[16] There is indeed a long list and line of reported cases dealing with the authority of liquidators, cited by the parties in advancing their opposing contentions. These include *Tannenbaum's Executors v Quakley*[2]; *Waisbrod v Potgieter and Others*[3]; *Sifris and Miller NNO v Vermeulen Brothers*[4]; *Smith NO and Another v Hattingh*[5]; *Toubkin NO v Dönges NO*[6]; *Ex Parte Venter and Spain NNO: Fordom Factoring Limited and Others Intervening: Venter and Spain v Povey and Others*[7]; and *Patel v Paruk's Trustee*[8]. Reference is also made to cases such as *Lupacchini NO and Another v Minister of Safety and Security*[9] and *Lynn NO and Another v Coreejes and Another*[10]. As will be seen later herein, the former case had to do with unauthorised conduct of a trustee in contravention of sec 6(1) of the Trust Property Control Act 57 of 1988, whilst the latter case dealt with the effect of two of three appointed liquidators only performing certain functions.

[17] In *Waisbrod v Potgieter and Others* (*supra*) the Court was concerned with an application by a liquidator for an order for examination under the provisions of section 184 of the Companies Act 46 of 1926. At the same time, the provisions of sections 130(2)(a) and 142(4) of the same Act also came up for interpretation. At 507, the Court said that:

---

2 1940 WLD 209.
3 1953 (4) SA 502 (W).
4 1973 (1) SA 729 (T).
5 1984 (2) SA 660 (C).
6 1951 (3) SA 72 (T).
7 1982 (2) SA 94 (D) at 102F-103.
8 1944 (AD) 469.
9 2010 (6) SA 457 (SCA).
10 2011 (6) SA 507 (SCA).

> "... *second point was that the liquidator has no power to bring this application because he had not been authorised by a resolution of creditors and contributories in accordance with the provisions of sec 130(2)(a) and sec 142(4). I am not sure that a liquidator requires the authority of creditors and contributories before he makes an application under sec 184; it may be that the section itself gives him the power to apply ...*"

Later in the judgment, the Court went on to say that:

> "..., *the question is whether it is open to the respondents to raise the objection that the applicant is not so authorised. In my opinion it is not. I think that the provisions of secs 130(2)(a) and 142(4) were enacted for the protection of creditors and contributories and to prevent the assets of the company from being squandered in useless litigation. As between himself and the company the liquidator requires to be authorised before he embarks on litigation, and if he does so without the prescribed authority the Court may refuse to allow him his costs out of the assets of the company and he may have to pay them himself. But that does not give a person with whom the liquidator is litigating the right to object that the liquidator has not been authorised to institute the proceedings.*"

The case of *Waisbrod v Potgieter and Others* was quoted with approval in *Sifris and Miller NNO v Vermeulen Brothers* at 730-731. See also *Griffin and Others v The Master and Another*[11] at 190E-G.

[18] The legal principle that a liquidator who embarked on litigation without the requisite authority, as provided for in sec 386(4)(a) and sec 387 of the Companies Act, was not summarily non-suited, but faced the risk of having to pay the legal costs personally if unsuccessful, has been made consistently in our courts. In the Annual Survey (1984), at 356, and in the context of *Smith NO v Hattingh (supra)*, the following is said:

---

[11] 2006 (1) SA 187 (SCA).

> *"Failure by the trustee or liquidator to obtain the prescribed authority was not fatal to the legal proceedings instituted by him, so that the other party to such proceedings could not object on the ground of lack of authority."*

Tindall JA in *Patel v Paruk's Trustees* 1944 AD 469 at 475 expressed the principle as follows:

> *"The legislature could not have intended that steps taken by a trustee to institute or defend proceedings must necessarily be a nullity because the prescribed consent had not been obtained. An interpretation to the contrary would bring about the result that, where there is not enough time to enable the trustee to obtain such consent, he may be powerless to issue summons timeously in order to prevent a claim due to the estate from becoming prescribed or to file a plea in order to prevent a default judgment being obtained against him."*

A close reading of the cases of *Smith NO v Hattingh, Waisbrod v Potgieter, and Toubkin NO v Dönges NO* 1951 (3) SA 72 (T), reveals two issues. This is that a liquidator who sues personally must justify doing so but does not require an authority. The other is, that a liquidator who litigates on behalf of the company does require authority in terms of sec 386(4)(a) of the Companies Act. However, as shown previously, the *Waisbrod v Potgieter* case took the view that the provision operates only between a company and liquidator and does not give the other litigant any right to object. There is authority for the proposition that the consent requirements stipulated in section 386(3) of the Companies Act which authorise a liquidator to bring "*any action or other legal proceedings of a civil nature*" were wide enough to include the proceedings now under discussion. See *Millman NO and Steub NO v Koetter* 1993 (2) SA 749 (C).

[19] It is plain that in the case of a member's voluntary winding-up of a company it is not only a meeting of creditors or the Master which authorise a liquidator of a company to bring or defend the proceedings, in terms of section 386(3)(c) and section 386(4)(a) of the Companies Act. However, in *Gainsford and Others NNO v HIAB AB* 2000 (3) SA 635 (W) the Court held that where the liquidator requires authority to exercise any power, he may approach the Court under section 386(5) read with section 388(1) of the Companies Act. A litigant against whom a liquidator has instituted action without apparent authority, may except to the action. In *Janse van Rensburg NO and Others v Ladislav* [2006] JOL18539 (T), the plaintiffs, as liquidators, had instituted action against the defendant. The basis of the action was for an order setting aside certain payments on the ground that such payments constituted dispositions without value. The defendant raised an exception to the claim averring that the plaintiffs lacked *locus standi* to bring the claim because of the provisions of section 386(4)(a) of the Companies Act. Southwood J held that the issue was in fact whether the plaintiffs were entitled to sue for the relief sought in their capacities as liquidators of the company. Alternatively, whether the plaintiffs were obliged by the provisions of section 386(4)(a) to institute the claim in the name of and on behalf of the close corporation in liquidation. In dismissing the exception, the Court held that section 386(4)(a) confers on the liquidator of a company the power to institute and defend proceedings by or against the company in liquidation. Further, that the effect of the relevant sections is that the liquidators of the corporation may bring proceedings to set aside any disposition of property and to recover and be awarded compensation. See also *Barnard and Others NNO v Imperial Bank*

Ltd and Another 2012 (JDR) 0871 (GSJ). As regards the authority of creditors to ratify unauthorised decisions of liquidators, see *De Wet NO v Uys NO en Andere* 1998 (4) SA 694 (T).

[20] From all the above case law, the correct legal approach seems to be as stated hereafter: A liquidator has power to bring proceedings on behalf of the company after the winding-up thereof provided he or she is authorised accordingly by meetings of members and creditors, or, where he or she cannot obtain such authority, or the respective directions of the members and creditors, he or she obtains directions accordingly from the Master. If the latter declines such authority, the leave of the Court is required. The matter of whether the liquidator has authority is relevant only in relation to liability as between himself/herself and the company, for the costs of the proceedings. The existence of the authority is not something which the other party to the proceedings is able to competently challenge. A distinction, however, should always be made between the functions of a trustee and that of a liquidator. The fact that the liquidator has failed to obtain the requisite authority is not fatal. The point is made clear in *Henochsberg* Vol 1, Issue 25, at 821):

> *"The failure by a liquidator to obtain the authority requisite for the purpose is not fatal to any proceedings brought by him against a third party because it is not open to the latter to challenge the liquidator's authority as were those of s 130(2)(a) of the 1926 Act, the provisions of s 386(4)(a) have been enacted for the protection of creditors and members and to prevent the assets of the company from being squandered in useless litigation; if the liquidator were to be unable effectively to act without authority such protection may be lost; but if he in fact acts without authority then, as between himself and the company, he may have to bear the costs personally."*

[21] In the present matter, the appellant plainly has no legal basis whatsoever to challenge the respondents' authority for bringing the present proceedings. The appellant is neither a creditor nor a member of the company (Western Breeze). This much is common cause. As a consequence, he is not protected by the provisions of section 386(4). Similarly, the reliance by the appellant on the provisions of section 361(3) of the Companies Act is misplaced. The respondents have alleged and proved on a balance of probabilities that they were duly appointed as liquidators. The papers make it clear that the respondents are acting, not in their personal capacities, but as liquidators, *nominees officii* of Western Breeze in liquidation. This is perfectly acceptable. See *Fundstrust (Edms) Bpk (in likwidasie) v Marais en Andere* 1997 (3) SA 470 (K).

SOME DEFECTS IN THE GROUNDS OF APPEAL

[22] The various grounds of appeal are not a model of clarity in certain respects. The findings of the court *a quo* seem to have been misunderstood partly in relation to the authority of the respondents. For example, one ground of appeal contends that the court *a quo* erred in finding that the liquidators had the authority to institute the proceedings against the appellant, despite their non-compliance with section 386 of the Companies Act. A careful reading of the judgment demonstrates unequivocally that the court *a quo* made no such finding. The finding, which accords with the case law referred to earlier in this judgment, was that despite the respondents' lack of authority to institute the proceedings, it was not open to the appellant to challenge that

lack of authority. On this ground alone the appeal on this aspect of the matter ought to fail.

THE APPELLANT'S RELIANCE ON *LUPACCHINI NO AND ANOTHER*

[23] In addition, in his heads of argument, the appellant submitted that the court *a quo* failed to have proper regard to the case of *Lupacchini NO and Another v Minister of Safety and Security (supra)*. That case arose in relation to the Lupacchini Family Trust. It concerned the question whether non-compliance with sec 6(1) of the Trust Property Control Act 57 of 1988 rendered any acts by the trustees a nullity. Section 6(1) reads as follows:

> *"Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."*

Legal action had been instituted by the trustees of the trust, but one of them was authorised by the Master to act as a trustee only after the action was instituted.

[24] In deciding that the proceedings instituted by a trustee without authorisation were a nullity, and dismissing the appeal, Nugent JA, writing for the Court, at para [22] of the judgment, said:

> *"I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict*

with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be altogether ineffective – then I find nothing to distinguish its effect on legal proceedings. Indeed, it would seem to me that the case is even stronger for finding legal proceedings to be a nullity ..."

[25] It is significant that the Supreme Court of Appeal in the above judgment referred with approval to *Patel v Paruk's Trustee (supra)*, *Waisbrod v Potgieter (supra)* and *Sifris and Miller NNO v Vermeulen Brothers (supra)*. The ratio is limited to trustees.

THE RESPONDENTS' RELIANCE ON *LYNN NO AND OTHERS*

[26] In the supplementary heads of argument the respondents relied on *Lynn NO and Others v Coreejes and Another (supra)* in which the Supreme Court of Appeal had to determine whether non-compliance with the provisions of section 382(1) of the Companies Act rendered the power of attorney given by two of three liquidators for the institution of an action a nullity, and if not, whether it was in law capable of ratification. Section 382(1) of the Companies Act provides that when two or more liquidators have been appointed, they shall act jointly in performing their functions as liquidators, and shall be jointly and severally liable for every act performed by them jointly.

[27] The *Lynn NO* appellants were appointed together with another person, as liquidators of a company that had been voluntarily wound up. In 2008, the joint liquidators instituted action against the respondents. The latter later discovered that the third liquidator had not joined the appellants in instituting

the action. The respondents raised an objection by way of a preliminary point before the High Court. At the time of the institution of the action, the third liquidator was still a joint liquidator. However, he subsequently resigned, and the Master appointed the appellants as joint liquidators of the company's estate. The appellants relied on an *ex post facto* ratification by the appellants of the institution of the action in order to cure the defect. On the other hand, the respondents persisted in their contention that all the liquidators did not authorise the institution of the action. They also contended that section 382(1) requires that the liquidators had to act jointly and that the institution of action could not be ratified *ex post facto* since it was a nullity. The appeal was against the upholding of that argument by the High Court.

[28] In upholding the appeal, the Supreme Court of Appeal examined the decision in *Lupacchini NO and Another*. The Court emphasised that an important consideration in *Lupacchini NO and Another* was the fact that there is no criminal sanction stipulated in respect of a trustee who acted without authorisation under the Trust Property Control Act 57 of 1988, leading to the inescapable inference that the Legislature intended such acts to be a nullity:

> *"Because otherwise a contravention of the prohibition would have no consequences at all."*

The Court was also of the view that Lupacchini NO and Another could not be applied in this case since the role of liquidators under the Companies Act, as opposed to that of trustees under the Trust Property Control Act, was quite different. Further, that although section 382(1) of the Companies Act imposes

no criminal sanction, the consequences of joint action are joint and several liability for every act performed jointly. Nothing is said of the validity or otherwise of an act that is not performed jointly. The Court further said that subsection 382(1) does not visit the acts of the liquidators who did not act jointly with nullity. At paragraph [12] of the judgment, the Court went on to say that:

> "*Section 386(4)(a) empowers a liquidator to, inter alia, bring or defend legal proceedings on behalf of the company. The section requires a liquidator to be duly authorised by a meeting of creditors or members (s 386(3)) or by the Master in case of urgent legal proceedings for the recovery of outstanding accounts (s 386(4)) before he or she can bring such proceedings on behalf of the company. Our courts have held that if a liquidator litigates without the prescribed authority, the court may refuse to allow him his costs out of the company's assets and he may have to pay such costs himself. The litigation is not a nullity, it merely has potential adverse costs implications for the liquidator. And there is ample authority that a person against whom the unauthorised liquidator is litigating may not object to such lack of authorisation, for it is a matter between the liquidator and the creditors. Retrospective sanction of unauthorised litigation is available to the liquidator in appropriate instances, either from the creditors or members under s 386(3) or, if refused, from the Master under s 387(2) and, if the Master refuses, from the court under s 386(5) read with s 387(3).*"

As the basis for its *ratio* the Court relied on the cases of *Waisbrod v Potgieter and Others (supra)* at 507H; *Dublin City Distillery v Doherty* [1914] AC 823; *Bowman NO v Sacks and Others* 1986 (4) SA 459 (W) at 461G; and *Griffin and Others v The Master and Another* (*supra*) at para [7].

[29] From the judgment of *Lynn NO and Another*, it is plain that because the Legislature contemplated and provided for a sanction against the unauthorised "*renegade*" liquidator, through the imposition of a pecuniary penalty, it could never have been its intention that the unauthorised acts of the

liquidator would be a nullity. At paragraph [14] of the judgment, the Court also held that where an act is done by some and not all the liquidators it may not bind the company in liquidation, but it does not follow that the conduct of the liquidator may not be ratified.

[30] In my view, the reliance on *Lynn NO and Another* judgment by the respondents is well-founded. That puts pay to the appellant's submission that the respondents, as liquidators, lacked the requisite authority to launch the proceedings under discussion. It is for this and other reasons advanced previously in this judgment that the present appeal on this aspect must fail.

THE RESPONDENTS' RELIANCE ON THE LETTER OF GUARANTEE ISSUED BY INVESTEC BANK LIMITED

[31] The respondents have also, in the supplementary heads of argument, advanced a further reason why the appellant's assertion regarding the lack of authority on the part of the respondents is untenable. This is that, the unchallenged first liquidation and distribution account presented by the respondents shows that Investec Bank proved claims against Western Breeze totalling some R70 994 125,81. This constitutes 98% of the proved claims. On 8 October 2010, approximately two months after the application against the applicant was issued, Investec Bank issued a letter of guarantee in terms of which Investec Bank irrevocably undertook to indemnify the liquidators for all costs of the application against the appellant. On this basis, the respondents, as liquidators, contend that the letter of guarantee constitutes

unequivocal proof that the major creditor in Western Breeze authorised alternatively, ratified the institution of the proceedings against the appellant. There is merit in the contention. For this reason too, the appeal directed against the authority of the liquidators must fail.

DISPUTES OF FACT

[32] Having determined that the liquidators do in fact have the requisite authority to launch the present proceedings, I must hasten to mention that the rest of the issues raised in this appeal do not stand on the same footing. These issues are highlighted in both the applicant's original heads of argument as well as the supplementary heads of argument, and are clearly not capable of resolution on the affidavits.

[33] The issues include, but are not limited to, the following:

(1) The exact circumstances in which Western Breeze concluded the Acknowledgement of Debt ("*AOD*") in favour of the appellant;

(2) Whether the AOD was a disposition without value as envisaged in sec 26(1) of the Insolvency Act 24 of 1936, read with sec 340(1) of the Companies Act 61 of 1973; alternatively, whether there was any legal basis for the AOD, and whether value had been given for the disposition;

(3) Whether there was any evidence that, immediately after the AOD was concluded, Western Breeze's liabilities exceeded its assets;

(4) The evidence of the appellant on the events that led to the conclusion of the AOD; the Sale Agreement; as well as his evidence at the Insolvency Enquiry into the affairs of Western Breeze in terms of sec 417 of the Companies Act 61 of 1973;

(5) What exactly was the *merx* forming the subject-matter of the Sale Agreement concluded between Tony's Logistics and Western Breeze on 19 March 2007, as well as the terms and conditions thereof;

(6) The evidence, if available, of Ms Jane Eedes, the former consultant of Investec Bank Limited; and

(7) Whether the conduct of the respondents, as liquidators of Western Breeze, is/was biased in favour of Investec Bank Limited to the prejudice of the appellant.

[34] The court *a quo* rejected the appellant's version on affidavit, holding that his evidence of the real agreement between the parties was not believable. I respectfully disagree. Western Breeze's audited financial reflected an amount of some millions due to the appellant. That is consistent

with the appellant's case, and inconsistent with the respondents' case. The respondents' counsel was not able to explain this entry in the audited financial statements.

[35] In this appeal, the appellant in urging upon us to either refer these issues to evidence or trial, relied on, *inter alia*, *Sewmungal and Another NNO v Regent Cinema* 1977 (1) SA 814 (NPD). In that case, an appeal against the decision of a single Judge, the Court considered the test applicable to when oral evidence should be heard in the face of disputes of fact. In allowing the appeal and referring the matter for the hearing of oral evidence, at 819F-H the Court said:

> "*... There has been a tendency in recent years for Courts to decide disputed questions of fact on the probabilities emerging from the affidavits without having any or any proper regard to the advantages of viva voce evidence. Reed v Wittrup, 1962 (4) SA 437 (D), is an example of such a case. I suspect that this tendency owes its origin to the remarks of Price, JP, in Soffiantini v Mould 1956 (4) SA 150 (E), where the learned Judge stated at p. 154H that:*
>
> > *'It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'*"

See also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26].

[36] In my view, there is merit in the appellant's contention. The approach in *Sewmungal and Another NNO* is preferred in this case. The argument of the

respondents to the contrary is not acceptable. The respondents in their application in the court *a quo* sought final relief against the appellant. In the face of the disputes of fact, the test in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-I should have been applied. The issues enumerated in para 47(1) to 47(7) of this judgment constitute real, genuine and *bona fide* disputes of fact. This is so, even with the best endeavours to resolve the disputes of fact as envisaged in *SFW Group Ltd and Another v Martell ET CIE and Others* 2003 (1) SA 11 (SCA) at para [5]. The court *a quo*, with respect, erred in attempting to resolve these issues on affidavit. These issues ought properly to be ventilated in a trial. I would allow the appeal on this aspect of the matter. In the light of the finding made above in regard to the authority of the respondents, it would be incorrect and improper to dismiss the appeal wholly out of hand. I would however set aside the order granted by the Court *a quo* in its entirety and in substitution therefor make an order as indicated below. The costs ought to be in the trial.

ORDER

[37] In the result the following order is made:

1. The appeal challenging the authority of the respondents, as liquidators, in launching the application proceedings against the appellant is dismissed.

2. The order of the court *a quo* is hereby set aside and there is substituted therefor the under-mentioned order.

3. The matter is referred to trial. The notice of motion shall stand as a simple summons and the respondents' notice of intention to oppose as notice of intention to defend.

4. The appellant shall file his declaration within twenty (20) days of this order.

5. Thereafter the applicable provisions of the Uniform rules of Court shall be followed.

6. The costs of the proceedings to date, including the costs of the applications for leave to appeal in the court *a quo* and the Supreme Court of Appeal and the costs of this appeal shall be costs in the trial.

D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I concur:

T M MASIPA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I concur:

G C PRETORIUS
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPELLANT	D VETTEN
INSTRUCTED BY	D M O INC ATTORNEYS
COUNSEL FOR THE RESPONDENTS ASSISTED BY	M ANTONIE SC A BERKOWITZ
INSTRUCTED BY	EDWARD NATHAN SONNENBERGS INC.
DATE OF HEARING	1 OCTOBER 2012
DATE OF JUDGMENT	14 MARCH 2013