



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 687/10

In the matter between:

MARK WILLIAM LYNN NO

FIRST APPELLANT

TINTSWALO ANNAH NANA MAKHUBELE NO

SECOND APPELLANT

and

COLIN HENRY COREEJES

FIRST RESPONDENT

LEON LOOCK

SECOND RESPONDENT

Neutral citation: *Lynn NO v Coreejas* (687/2010) [2011] ZASCA 159
(28 September 2011)

Coram: **LEWIS, SNYDERS, MALAN, MAJIEDT AND SERITI JJA**

Heard: **1 SEPTEMBER 2011**

Delivered: **28 SEPTEMBER 2011**

Summary: Civil proceedings — s 382(1) of Companies Act 61 of 1973 — institution of action by two of three liquidators not a nullity — s 382(1) not containing a prohibition — therefore not analogous with s 6(1) of Trust Property Control Act 57 of 1988.

ORDER

On appeal from: North Gauteng High Court, Pretoria (De Vos AJ sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the court below is set aside and substituted with the following order:

'The application is dismissed with costs.'

JUDGMENT

MAJIEDT JA (LEWIS, SNYDERS, MALAN and SERITI JA concurring)

[1] Section 382(1) of the Companies Act 61 of 1973,¹ 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.'

The question for determination in this appeal is whether non-compliance with this provision renders the power of attorney given by two of three liquidators for the institution of an action a nullity and, if not, whether it is in law capable of ratification. In the high court De Vos AJ answered the first part of the question in the affirmative, holding that it was indeed a nullity incapable of subsequent ratification. He upheld this as a point in limine in the respondents' favour and granted their application to strike the appellants' claim in terms of Rule 30A. This appeal is with his leave.

[2] The appellants and one Mr J M Oelofsen were appointed as joint liquidators of Wagmaar Investments CC (Wagmaar) which had been

¹ The repeal of this Act by the Companies Act 71 of 2008 has no bearing on this appeal.

voluntarily wound up in terms of a special resolution of March 2005. The winding-up was preceded by a judgment in October 2004 for payment of the sum of R3 409 907.33, interest and punitive costs against Wagmaar in favour of Total SA (Pty) Ltd (Total) after a lengthy trial before Maluleke J.

[3] During July 2008 the joint liquidators, as plaintiffs, instituted action against the respondents, as defendants. Their cause of action appears to be the *actio Pauliana*. The details of the claim are not material to the issue for determination. It would suffice to state that the respondents were sued on the basis of allegations that they, as trustees of the Kiriake Trust, received Wagmaar's transport and farming businesses (with the assets thereof) and certain of Wagmaar's immovable and movable property for no consideration in return, as part of a fraudulent scheme designed by Wagmaar. The respondents were cited in their representative (qua trustees) and personal capacities.

[4] A procedural challenge in terms of Uniform Rule 7 by the respondents to the authority of the attorneys representing the liquidators in the action developed into an objection by way of a point in limine before the high court, when it became apparent that Oelofsen had not joined the appellants in instructing their attorneys to institute the action. At the time of institution of the action Oelofsen was still a joint liquidator. He resigned thereafter, citing a potential conflict of interest. The Master accepted his resignation and appointed the appellants as joint liquidators of Wagmaar's estate.

[5] In the high court the appellants implicitly accepted that only two of the three liquidators had mandated the institution of the action and the matter was argued on that basis, as was also the case in this court. The appellants relied on an indemnity agreement signed by all three liquidators (including Oelofsen) with Total in respect of the action and other related proceedings and an *ex post facto* ratification by the appellants of the institution of the action to cure

this defect. The respondents, on the other hand, persisted in their contention regarding the attorneys' authority, arguing that all the liquidators did not authorise the institution of the action. They contended that s 382(1) of the Act requires that the liquidators had to act jointly in giving such authorisation and that the indemnity could not cure the defect. The institution of action could not be ratified *ex post facto* since it was a nullity. As stated, the respondents' argument found favour with the court below.

[6] In coming to the conclusion that the unauthorised action is a nullity and incapable of ratification, De Vos AJ relied on *Powell & another v Leech & another; Leech & others v Powell & others*² in which two liquidators had been appointed by the Master in respect of a company in provisional liquidation. Only one of them sought and obtained a search warrant in terms of s 69 of the Insolvency Act 24 of 1936. In an application for the setting aside of the search warrant, Sutherland AJ held that the provisions in s 382(1) of the Act, which require liquidators to act jointly, were peremptory and that subsequent ratification of the decision to apply for the search warrant was legally untenable. He put it thus:³

'Ratification after the event is not open to a liquidator who did not participate in the original decision. Section 382 clearly contemplates a joint decision prior to action taking place. There is no room to make a joint decision after the act has been performed. Comparisons between the powers of liquidators and the powers of directors to ratify each other's deeds are fundamentally inapt in this context.'

I am of the view, however, that *Powell* is distinguishable on the facts. *Powell* dealt with a situation where ratification was no longer possible, since the warrant had been applied for without the requisite consent and had been issued and executed. The present matter is different – here a procedural challenge was made in respect of the institution of an action by two of three liquidators, and the proceedings have not been finalised.

[7] The respondents relied on *Lupacchini NO & another v Minister of*

² *Powell & another v Leech & another; Leech & others v Powell & others* [1997] 4 All SA 106 (W).

³ At 118g-h.

*Safety and Security*⁴ in supporting the judgment of the court below. That case concerned the question whether non-compliance with s 6(1) of the Trust Property Control Act 57 of 1988 rendered any acts by the trustees a nullity. Action had been instituted by trustees of a trust, but one of them was authorised by the Master to act as a trustee only after the action was instituted. 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 authorized thereto in writing by the Master’.

It was not in issue that institution of the action in these circumstances was in contravention of s 6(1). In deciding that the proceedings instituted by a trustee without authorisation was a nullity, Nugent JA analysed a number of decisions and came to the conclusion that ‘. . . [there are] no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem . . . to point the other way’.⁵ An important consideration in reaching that conclusion, said Nugent JA, is the fact that there is no criminal sanction stipulated in respect of a trustee who acts without authorisation, 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’.⁶

[8] I turn next to a consideration of the legal consequences of non-compliance with s 382(1). A useful point to start with, I believe, is to determine whether s 382(1) contains a general prohibition. In order to make such a determination and also to examine whether *Lupacchini* can be applied to this case, a brief consideration of the role of liquidators under the Act, as opposed to that of trustees under the Trust Property Control Act, is required. The law reports and the text books are replete with descriptions of what a liquidator is and does. I adopt for present purposes the following description in M S Blackman et al *Commentary on the Companies Act* vol 3 at 14–288:

⁴ *Lupacchini NO & another v Minister of Safety and Security* 2010 (6) SA 457 (SCA).

⁵ Para 22.

⁶ Paras 17 and 18, he then continued to cite Goldblatt J in *Simplex (Pty) Ltd v Van der Merwe & others* NNO 1996 (1) SA 111 (W) at 113C-D.

‘ . . . a person who holds an office under the Companies Act, which office confers on him various powers to enable him to wind-up the company. One of these powers is the power to bind the company’s estate; another is the power to institute and defend proceedings in the company’s name.’

First and foremost and at the risk of stating the obvious, it is well to remind oneself that a liquidator is a creature of statute; he or she derives his or her powers from the Act and the Insolvency Act and may act within the bounds of those powers only. Although there are some analogies to be drawn between the office of a liquidator and that of a trustee (eg the fiduciary nature of both), a liquidator is not a trustee in the strict sense.⁷ The estate of the company in liquidation remains vested in the company itself (save of course in those exceptional circumstances where a court orders in terms of s 361(3) of the Act that all or part of the company’s property shall vest in the liquidator); the liquidator merely administers the estate as laid down by statute⁸ and does so under the control of the Master.⁹ In a trust on the other hand, the trust estate vests in the trustees who must administer it.¹⁰

[9] In the case of a trust the trust deed is its ‘constitutive charter’¹¹ and ‘[w]hen fewer trustees than the number specified [in the trust deed] are in office, the trust suffers from an incapacity that precludes action on its behalf’.¹² Even where trustees act jointly, they cannot in law bind the trust estate where they are not the requisite number stipulated in the trust deed, because ‘the trust’s incapacity during this period does not arise from the joint action requirement, but from the trust’s incapacity while a sub-minimum of trustees held office’.¹³ The difference between s 6(1) of the Trust Property Control Act and s 382(1) of the Companies Act is stark – appointment as a trustee by the Master is a *sine qua non* for a trustee to be clothed with the requisite authority to act on behalf of the trust, whereas s 382(1) does not contain such a

7 M S Blackman et al at 14–288; P M Meskin *Henochsberg on the Companies Act* 5 ed Vol 1 at 789.

8 Blackman et al, *ibid*.

9 Section 381 of the Act.

10 *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA) para 10.

11 *Ibid*.

12 Para 11.

13 Para 13.

requirement. A mere reading of the two sections reveals a marked difference; in this regard the use of the word 'only' in s 6(1) is significant, since this is indicative of invalidity in the case of non-compliance.

[10] It will be recalled that in *Lupacchini* the absence of a criminal sanction in s 6(1) of the Trust Property Control Act led Nugent JA to the conclusion that non-compliance with that section renders all acts a nullity.¹⁴ Section 382(1) of the Act imposes no criminal sanction. The consequences of joint action, however, are set out in the second part of the subsection, that is 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. For these reasons *Lupacchini* is not applicable in this instance.

[11] The primary objective of s 382(1) is to ensure that joint liquidators act jointly. The second part of the section which relates to joint liability is in my view decisive in this regard. It imposes joint and several liability on liquidators who act jointly. Nothing more is said and it is not necessary to inquire into any implication that might flow from this provision. The subsection does not visit the acts of the liquidators who did not act jointly with nullity.

[12] 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.¹⁵ The litigation is not a nullity, it merely has potential adverse costs implications for the

¹⁴ Para 7 above.

¹⁵ *Waisbrod v Potgieter & others* 1953 (4) SA 502 (W) at 507H.

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.¹⁶ 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).¹⁷

[13] Actions in terms of s 382(1) are prohibited only in the absence of consent of all the liquidators. In *Neugarten & others v Standard Bank of South Africa Ltd*¹⁸ the absence of consent by all the members of a company for security furnished by that company for an obligation of another company controlled by one or more of the directors of the first-mentioned company, in contravention of s 226(2)(a) of the Act, was considered and resolved as follows:¹⁹

‘The transactions set out in ss (1) of s 226 are prohibited or illegal only in the absence of the consent of all the members. The question in any specific case is whether such consent has been given: if it has, the transaction is not prohibited or illegal. Consequently, to postulate that the transaction is prohibited and illegal is to beg the question. If the requisite consent is given to the transaction *in initio*, it is a valid transaction. If the transaction is subsequently ratified by the non-consenting members, the ratification relates back to the original transaction and the position is the same as if consent had originally been given.’

[14] Where an act is done by some and not all the liquidators it may not bind the company in liquidation.²⁰ But it does not follow that the conduct of the liquidator may not be ratified. In *Smith v KwaNonqubela Town Council*²¹ the same approach as in *Neugarten* was followed, albeit in a different context:²²

16 *Dublin City Distillery (Great Brunswick Street, Dublin) Limited & another v Doherty* [1914] AC 823; *Waisbrod v Potgieter*, supra, at 507G-H; *Bowman NO v Sacks & others* 1986 (4) SA 459 (W) at 461G; *Griffin & others v The Master & another (Commings & another intervening)* 2006 (1) SA 187 (SCA) para 7.

17 *Henochsberg on the Companies Act* supra at 822.

18 *Neugarten & others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A).

19 At 803D-E.

20 *Cooper v The Master & others* 1996 (1) SA 962 (N).

21 *Smith v KwaNonqubela Town Council* 1999 (4) SA 947 (SCA).

22 Para 10.

'The next attack upon the purported ratification was along these lines: Watson's contentious act was an administrative one; it was not authorised by law; an unauthorised act is invalid; an invalid act cannot be ratified. The argument, I fear, already breaks down at the first proposition and it becomes unnecessary to consider the others. The launching of legal proceedings is not an administrative act but a procedural one open to any member of the public. Watson apparently believed on insubstantial grounds that he had the necessary authority to act on behalf of the town council. He was wrong. His expressed intention was to act on behalf of the town council and not on his own behalf. It is a general rule of the law of agency that such an act of an "unauthorised agent" can be ratified with retrospective effect. ...

[15] Two of the three liquidators authorised the institution of the action. The non-consenting third liquidator then resigned and his resignation was accepted. The remaining two liquidators were then appointed by the Master as the only joint liquidators in the estate. They jointly pursued the litigation, as such ratifying their procedural act taken initially. As no time limit within which they had to take or ratify the institution of the action arises in the case, that is the end of the matter.²³

[16] For these reasons the high court erred in upholding the objection in limine. It should have dismissed with costs the application to strike out the claim in terms of Rule 30A. The appeal must consequently be upheld and the following order is issued:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and substituted with the following order:

'The application is dismissed with costs.'

²³ *Smith* para 12.

S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

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