THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 446/2004

In the matter between

JOHN MALCOLM GRIFFIN	**FIRST APPELLANT**
NEWBERRY INTERNATIONAL INC	**SECOND APPELLANT**
PIETER JOHANNES HANEKOM	**THIRD APPELLANT**
	(Applicants *a quo*)

and

THE MASTER OF THE HIGH COURT	**FIRST RESPONDENT**
MICHAEL JOHN LANE N O	**SECOND RESPONDENT**
JOHN COMMINS	**THIRD RESPONDENT**
HUGO LEGGATT	**FOURTH RESPONDENT**

CORAM: ZULMAN, STREICHER, NAVSA, PONNAN JJA
et COMBRINCK AJA

DATE HEARD: 30 AUGUST 2005

DELIVERED: 19 SEPTEMBER 2005

In terms of s 386(3)(a) read with s 386(4)(c) of the Companies Act 61 of 1973 made applicable to a close corporation by s 66(1) of the Close Corporations Act 69 of 1984, a liquidator of a close corporation is required to be authorized by meetings of creditors and members or contributors or on the directions of the Master in order to admit any claim against the close corporation. A members resolution will not suffice.

JUDGMENT

ZULMAN JA

[1] This is an appeal with leave, against an order granted by Erasmus J in the Cape High Court dismissing an application by the appellants in terms of section 407(4)(a) of the Companies Act 61 of 1973 (the Companies Act) against the first respondent's (the Master) refusal to sustain an objection to an amended liquidation and distribution account which did not include the appellants' claims.

[2] The Master and the second respondent (the liquidator) who is the liquidator of Cape Trails CC (In Liquidation) (the Close Corporation) abide the decision of the court. The third and fourth respondents who intervened in the application seek the dismissal of the appeal. For the sake of

convenience these respondents will be referred to simply as the respondents.

[3] Counsels' heads of argument canvas two essential issues as arising in this appeal:

3.1 Whether the liquidator was authorized in terms of s 386(3)(a) of the Companies Act to admit the appellants' claims in terms of s 386(4)(c); and

3.2 whether the application of the appellant is time-barred in terms of s 407 of the Companies Act.

However, counsel for the appellant fairly conceded that if the appellants were unable to show that the liquidator was authorized to admit the appellants' claim then the appeal would fail and it would be unnecessary to determine the second issue.

[4] The following are the relevant common cause facts:

4.1 The Close Corporation was placed under provisional winding-up at the instance of the first appellant on 26 March 1998 and finally wound up on 2 December 1998.

4.2 At the time of its liquidation the first appellant and the respondents were members of the Close Corporation. The first appellant held a 1/6 share in the members' interest and the respondents held the remaining 5/6 in equal shares.

4.3 The liquidator convened a first meeting of members and creditors of the Close Corporation in terms of s 78 of the Close Corporations Act before the Master on 29 December 1998. Only the first appellant attended the meeting. A resolution was adopted at the meeting. I will refer to this resolution in detail later in this judgment. No claims were lodged for proof.

4.4 After subsequent meetings of creditors the appellants tendered three claims for proof against the Close Corporation. The claims were rejected by the presiding officer.

4.5 The claims were subsequently admitted to proof by the liquidator. The claims were originally reflected in the liquidation and distribution account.

4.6 Following an objection by the Respondents, the liquidator framed an amended liquidation and distribution account which lay open for inspection for a fourteen day period from 1 August 2003. The appellants' claims were not reflected in the amended liquidation and distribution account.

4.7 On 13 August 2003 the appellants lodged an objection with the Master. The basis of the objection was that in spite of the prior admission by the liquidator of the claims, these had not been reflected in the amended liquidation and distribution account.

4.8 On 5 August 2003 the Master refused to sustain the appellants' objection.

4.9 In upholding the Master's refusal, Erasmus J, held that it had not been shown that the liquidator had been granted any authority to compromise or admit any claim.

[5] In order to determine whether the liquidator was authorized to act in the manner that he did it is necessary to interpret the relevant provisions of s 386 of the Companies Act read with s 66 of the Close Corporations Act 69 of 1984 (the Close Corporations Act). Section 66(1) in part IX of the Close Corporations Act deals specifically with the winding-up of close corporations. The section applies the provisions of the Companies Act which relate to the winding-up of a company including the regulations made thereunder, with the exception of certain specifically mentioned sections, including s 387, but not s 386, of the Companies Act, *mutatis mutandis* in so far as they can be applied to the liquidation of a close

corporation, in respect of any matter not specifically provided for in part IX of the Close Corporations Act or in any other provision of the Act. Sections 386(3)(a) and 386(4)(c) of the Companies Act which deal specifically with the powers of liquidators provide as follows:

'386(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;

…

shall have the powers mentioned in subsection (4).

…

(4) The powers referred to in subsection (3) are –

(a) …

(b) …

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

[6] It is clear that s 386(3) specifies in terms that a liquidator may only exercise the powers given (with certain exceptions which are not here relevant) if granted authority to do so. Furthermore s 386(3)(a) specifies from whom this authority must be obtained; namely in the case of a winding-up by the court, meetings of creditors and members or contributories or on the directions of the Master. It is not suggested that in this case there was any authority given by contributories or that there were directions from the Master.

[7] The learned authors Blackman *et al* in their *Commentary on the Companies Act* (2002) Vol 3 page 14 – 330 correctly state the position in these terms:-

‘Section 386(3) provides that with the required authority the liquidator ‘shall have the powers mentioned in subsection (4)’. Thus it would seem that the grant of authority is not merely a condition for the exercise of those powers, but, is rather, a necessary condition for their existence. Where the liquidator requires such authority to exercise a

particular power, other than the power to litigate, [a situation not of application here] it is open to a third party to raise the question of liquidator's lack of authority'.

(See also *Ex parte Du Plessis* 1965 (2) SA 438 (T) 440D, *Du Plessis v Protea Inryteater (Edms) Bpk* 1965 (3) SA 319 (T) 320A-B and Henochsberg on *The Companies Act* – Vol 1 (5th Edition) p 821.

[8] The way I understood the argument of counsel for the appellants it was to the effect that although he accepted that in regard to a company, a liquidator seeking to exercise powers under s 386(4) was in terms of s 386(3) required to be authorized both by creditors and members, the position was different when considering the powers of a liquidator of a close corporation. In my view this argument is plainly untenable, particularly, if one has proper regard to s 386(3) of the Companies Act made applicable to close corporations by s 66(1) of the Close Corporations Act. One cannot have one interpretation of a section of an Act for the one purpose and another interpretation of the same section for another purpose.

[9] The appellants submitted that it could be implied in the case of the winding up of a close corporation that the words 'with the authority granted by meetings of creditors and members' in s 386(3)(a) of the Companies Act had no application to a close corporation and that the words in question must be read disjunctively and not conjunctively. There is no substance in the argument in the light of the unambiguous words in s 66(1) of the Close Corporations Act or s 386(3)(a) of the Companies Act.

[10] It was also suggested that a possible deadlock in the winding-up of a close corporation would arise if one were to require its liquidator to be authorized not only by members but also by creditors and it was not possible for the liquidator of the close corporation to obtain authority from creditors. However, on a proper construction of s 386 there is no substance in the argument. Section 386(5) of the Companies Act gives the Court the power to grant leave to a liquidator to do 'any other thing which the Court may consider necessary for winding up the affairs of the company and

distributing its assets’. There is therefore no possibility of a deadlock occurring.

[11] Section 78(3) of the Insolvency Act 24 of 1936 similarly requires a trustee to be authorized to admit claims by creditors who have proved claims against the estate, or if no claim has been proved, by the Master.

[12] Turning again to the facts of the matter it is contended by the appellants that the liquidator was in any event authorized by the resolution passed at the first meeting of members and creditors of the close corporation on 29 December 1998 to which I have previously referred. More particularly it is argued that paragraph 1(c) of the resolution authorized the liquidator to compromise or admit any claim or demand. However an examination of the stereotyped form containing the resolution reveals that although it is headed ‘First Meeting of Members and Creditors’ at the foot, below the signature of the first appellant, the words ‘qq creditors’ have a line drawn through them and in handwriting the word

'member' is written underneath. This resolution could therefore only have been one taken by a member and not also by creditors. This much is clear from para 7.2 of an affidavit deposed to by the liquidator to the effect that no claims were lodged for proof at this meeting. Since only creditors who have proved claims can take resolutions (the voting going according to number and value) it follows that at the first meeting there were no creditors who could give the liquidator the authority required by s 386(3)(a) read with s 386(4)(c) of the Companies Act.

[13] The appeal is accordingly dismissed with costs.

R H ZULMAN

JUDGE OF APPEAL

STREICHER JA)

NAVSA JA) CONCUR

PONNAN JA)

COMBRINCK AJA)