



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1003/2022

In the matter between:

DEON MARIUS BOTHA N O

FIRST APPELLANT

JOHANNES SACHARIAS HUMAN

MULLER N O

SECOND APPELLANT

LOUISA SIBIYA N O

THIRD APPELLANT

and

LOUIS JONKER

FIRST RESPONDENT

JOHANNA JACOBA JONKER

SECOND RESPONDENT

MUSTANG CHEMICALS (PTY) LTD

THIRD RESPONDENT

Neutral citation: *Botha N O and Others v Jonker and Others* (1003/2022)

[2024] ZASCA 78 (27 May 2024)

Coram: PETSE DP, GOOSEN JA and UNTERHALTER AJA

Heard: 23 November 2023

Delivered: 27 May 2024

Summary: Liquidation – close corporation – first meeting of creditors and members of close corporation summoned more than one-month after date of final liquidation – effect of failure by liquidator to obtain consent of the Master in terms of s 78(1) of Close Corporations Act, 69 of 1984 – whether the Master entitled to consent to summoning of meeting *ex post facto*.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Reinders ADJP and Van Rhyn J, sitting as a court of first instance):

- 1 The appeal is dismissed.
- 2 The costs of the appeal shall be costs in the liquidation.
- 3 It is declared that s 78(1) of the Close Corporations Act, 69 of 1984 permits the Master to grant consent to a liquidator to summon a first meeting of creditors and members after the expiry of one-month from the date of final liquidation, at any time before the meeting so summoned is held.

JUDGMENT

Goosen JA (Unterhalter AJA concurring):

[1] This appeal concerns the consequences of a failure to obtain the consent of the Master to summon a meeting of creditors after the expiry of the period of one month prescribed in s 78(1) of the Close Corporations Act, 69 of 1984 (the Close Corporations Act). The appellants are the joint liquidators (the liquidators) of Jonker Products CC (Jonker Products). The first respondent is the sole member of Jonker Products. He is married to the second respondent, who is a shareholder and director of the third respondent, Mustang Chemicals (Pty) Ltd (Mustang).

[2] The issue on appeal arose when the respondents were summoned to appear at a second meeting of creditors of Jonker Products for the purposes

of an enquiry into its affairs. The respondents obtained a *rule nisi* before the Free State Division of the High Court (the high court) setting aside as invalid the proceedings of the first meeting and all resolutions adopted at the meeting. The *rule nisi* was confirmed on the return date. The appeal is with the leave of the high court.

The facts

[3] On 23 July 2020, the Land and Agricultural Bank of South Africa (the Land Bank) launched an application for the provisional winding up of Jonker Products. On 27 August 2020, the Land Bank instituted an urgent application to set aside a resolution adopted by Jonker Products to place it in business rescue and to expedite its liquidation. On 11 September 2020, Jonker Products was placed under a provisional order of liquidation. The liquidators were appointed as such on 21 October 2020. On 29 October 2020, a final order of liquidation was granted, and the liquidators received their letters of appointment from the Master on 9 November 2020.

[4] The liquidators summoned the first meeting of creditors of Jonker Products by publication of a notice in the Government Gazette on 9 April 2021. The notice was defective since it did not indicate that both the first and second meeting would be convened on the appointed date. A corrected notice was published on 16 April 2021, and the meeting was convened before the Magistrate at the Magistrates' Court, Bothaville (Magistrates' Court), on 6 May 2021. The first respondent did not attend the meeting. The Land Bank was the only creditor to prove a claim. A resolution was adopted to postpone the second meeting to permit witnesses to be summoned for an enquiry into the affairs of Jonker Products. Other resolutions were taken to

ratify certain actions taken by the liquidators prior to the meeting, including the sale, by auction, of certain property held by Jonker Products.

[5] On 11 June 2021, summonses calling upon the respondents to appear at the second meeting of creditors, scheduled for 2 and 9 July 2021, were issued. They were served on 22 June 2021. On 25 June 2021, the respondents' attorney requested reasons for the issuing of the witness summonses. On 2 July 2021, the attorney requested the liquidators to provide a copy of the written consent of the Master to convene the first meeting on 6 May 2021, after the one-month period provided by s 78(1) of the Close Corporations Act had lapsed. The liquidators stated that they did not have such consent. On 5 July 2021, the respondents wrote to the liquidators stating that the first meeting and the resolutions adopted on 6 May 2021, were invalid. They called upon the liquidators to cancel the enquiry meeting.

[6] On 6 July 2021, the liquidators wrote to the Master advising that a first meeting of creditors had been convened on 6 May 2021. They requested the Master to consent to the meeting. On 7 July 2021, the Master informed the liquidators that she was not aware of any statutory provision which would permit her to provide such consent *ex post facto*. On the same date, the respondents launched an application to declare that the first meeting of creditors held on 6 May 2021 was invalid considering the absence of the consent of the Master. They also sought orders setting aside the proof of claims and the resolutions adopted at the meeting, including the resolution authorising the issuing of witness summonses.

The high court proceedings

[7] On 8 July 2021, the high court granted a *rule nisi* calling upon the liquidators to show cause on 5 August 2021, why a final order setting aside the first meeting, should not be granted. The liquidators opposed the application and filed a counter-application, seeking an order that the meeting was not invalid. In the alternative, they requested the high court to issue directives for the further conduct of the liquidation process, in terms of s 386(5) and s 387(3) of the Companies Act 61 of 1973 (the 1973 Companies Act).

[8] The application and counter-application were heard on 7 February 2022. The respondents contended that no provision is made in the Close Corporations Act or in the Insolvency Act 24 of 1936 (Insolvency Act), for the Master to grant consent to convene a meeting *ex post facto*, ie after the meeting has been held. They submitted that the consent of the Master as required by s 78(1) of the Close Corporations Act, is not a mere formality, the absence of which may be condoned. The proceedings of such meeting are a nullity.

[9] The liquidators argued that, upon a proper business-like interpretation of s 78(1), consent may be obtained after the expiry of the one-month period and after the meeting had been held. They contended that, even if the section does not permit consent to be obtained after the meeting has been held, s 157 of the Insolvency Act permits non-compliance to be condoned. This was so, it was submitted, because the consent of the Master is merely a formality. Since no substantial injustice or prejudice to creditors flowed from the

absence of the Master's consent, the failure to obtain such consent, did not invalidate the proceedings of the meeting.

[10] On 30 March 2022, the high court granted a final order declaring the proceedings of the meeting held on 6 May 2021 to be invalid and set aside the resolutions adopted at the meeting. It dismissed the counter-application. The high court, however, issued orders directing that the first and second meeting of creditors be convened within one month of the date of its order.¹

[11] The high court reasoned that s 78(1) was preemptory in requiring the consent of the Master to convene a meeting after the expiry of the period of one month from the date of final order of liquidation. It held that the Master is a creature of statute and is only entitled to exercise powers which are expressly conferred. The high court found that the section did not confer on the Master authority to consent to the holding of a meeting after it had been held. The meeting of 6 May 2021 was, therefore, vitiated by irregularity and its proceedings, invalid.

[12] In relation to costs, the high court stated that since the consequence was brought about by the failure of the liquidators to comply with the provisions of s 78(1) of the Close Corporations Act, Jonker Products should

¹ The relevant orders read as follows:

'3. In terms of section 386(5), read with section 387(3) of the Companies Act, Act 61 of 1973, it is directed that meetings of the creditors and members of Jonker Products CC (in liquidation), with Master's reference B 102/2020, be convened within one month from the date of this order, on a date to be determined by the Magistrate.

4. At the aforesaid meetings of creditors and members of Jonker Products CC (in liquidation), creditors may submit claims for proof in terms of section 44 of the Insolvency Act, 24 of 1936 and the Magistrate must ascertain the wishes of the creditors and members in accordance with the provisions of section 412 of the Companies Act, 61 of 1973.

5. [The liquidators] are ordered, upon the Master providing a date for the meeting to be held before the Magistrate, to publish a notice in accordance with the provisions of section 412 of the Companies Act, 61 of 1973, read with the regulations thereto, in the Government Gazette and in a daily newspaper.'

not bear the costs. It ordered the liquidators to pay the costs of the application and counter-application.

[13] The leave to appeal granted by the high court was confined to the order confirming the *rule nisi*, dismissing the counter-application and its costs order. The directives issued pursuant to ss 386 and 387 of the 1973 Companies Act are not subject to appeal before this Court.

The issues

[14] Two issues arose for consideration by this Court. The preliminary question was whether the liquidators had, by their conduct, acquiesced in the high court order thereby waiving their right of appeal. The second, substantive question, concerned the meaning and effect of s 78(1) of the Close Corporations Act.

Peremption of the appeal

[15] It was common ground that the liquidators had published a notice summoning a first and second meeting of creditors and members pursuant to the directive orders issued by the high court.² It was also common ground that the meeting had been postponed considering the appeal to this Court.

[16] The respondents' heads of argument filed contained extensive reference to facts and correspondence which were not included in the record of appeal. These facts, it was contended, supported the conclusion that the liquidators had acquiesced in the high court order. At the hearing, the argument was not pursued with vigour. Counsel for the respondents accepted

² See fn 1 above.

that this Court could not have regard to documents not properly before us. Counsel also accepted that the respondents bore a full onus to show an unequivocal intention to acquiesce in the court order appealed against;³ and to establish conduct on the part of the liquidators which ‘indubitably and necessarily’ points to a conclusion that the summoning of the court sanctioned meeting was inconsistent with an intention to attack the judgment.⁴

[17] Apart from the fact that the liquidators had summoned a meeting of creditors, authorised by the high court order, there was no evidence which pointed to a waiver of rights or acquiescence in the order. Nor is that the only inference to be drawn from the summoning of the meeting. Accordingly, the onus to prove acquiescence could not be discharged.

[18] It was nevertheless urged upon us that directive orders rendered the appeal moot. I fail to see upon what basis that would be so. The meeting was postponed, pending the outcome of the appeal. Ironically, this was at the instance of the respondents. The substantive issue regarding the meaning and effect of s 78(1) remains alive. Furthermore, the practical effect of the appeal, is that the decisions taken at the meeting of 6 May 2021, if reinstated, would avoid the need to commence the process afresh.⁵

The meaning and effect of s 78(1)

³ *Natal Rugby Union v Gould* 1999 (1) SA 432 (A) at 445.

⁴ *Ibid* at 443.

⁵ Compare *Gentiruco SA (Pty) Ltd v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A-C.

[19] The liquidation of a close corporation is regulated by the provisions of the Close Corporations Act and the 1973 Companies,⁶ and by the Insolvency Act, applied with changes necessary to suit the context.⁷

[20] Item 9 of Schedule 5 of the Companies Act 71 of 2008 (the 2008 Companies Act) provides that Chapter 14 of the 1973 Companies Act shall apply to the liquidation of companies. Certain provisions are, however, excluded in the liquidation of solvent companies. For present purposes, the whole of Chapter 14 applies and is relevant to the proper construction of s 78(1) of the Close Corporations Act.

[21] In the winding up of a close corporation by the court order, all the property and assets of the corporation are deemed to be in the custody and under the control of the Master.⁸ Upon receipt of the winding up order, the Master assumes control over the liquidation process. The liquidation is carried out by one or more liquidators, under the direction of the Master. The authority to appoint a suitably qualified person as liquidator, vests in the Master.

[22] In the case of a company, the appointment of a liquidator is a matter addressed at the first meeting of creditors. In terms of s 364 of the 1973 Companies Act, the Master must summon the first meeting of creditors to consider, *inter alia*, the statement of affairs of the company prepared by the

⁶ Section 66 of the Close Corporations Act states, with reference to the Companies Act, 2008, that: '(1) The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.'

⁷ See s 78(2)(a) of the Close Corporations Act. See also s 339 of the 1973 Companies Act.

⁸ Section 361 of the 1973 Companies Act.

directors; the proof of claims against the company; and nominations for the appointment of a suitable liquidator. The appointment is made by the Master in terms of s 367. The Master may, if necessary, appoint a provisional liquidator pending the appointment of a final liquidator.⁹

[23] In the case of a close corporation, the appointment of a liquidator follows a different course. The Master appoints a liquidator in terms of s 74 of the Close Corporations Act. The section, however, imposes an obligation upon the Master to appoint a liquidator ‘as soon as practicable after receipt of a provisional winding up order’.¹⁰ The appointment therefore occurs prior to final liquidation and prior to the first meeting of creditors and members of the corporation. It is for this reason, no doubt, that s 78 requires the liquidator to summon the first meeting of creditors and members of the corporation.

[24] Section 381 of the 1973 Companies Act places the Master in control of the administration of the liquidation process. It provides in relevant part that:

‘(1) The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.

⁹ Section 368 of the 1973 Companies Act.

¹⁰ Section 74(2) reads as follows:

‘(2) The Master shall make an appointment as soon as is practicable after a provisional winding-up order has been made, or a copy of a resolution for a voluntary winding-up has been registered in terms of section 67(2).’

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator.’

[25] The principal objective of a winding-up is to realise the assets of the corporation, to cover the costs of the liquidation process, and to distribute the proceeds of liquidation to proven creditors in accordance with the ranking of their claims.¹¹ To facilitate this task, a liquidator is given wide powers.¹² They include the authority to execute deeds or documents in the name of and on behalf of the corporation; to prove claims in the estate of a debtor; and the power to summon general meetings of the creditors or members of the corporation to obtain authorisation for the conduct of the liquidation process. The liquidator may alienate property owned by the corporation with the consent of the Master. A liquidator may also perform a wide range of functions on the authority of a resolution of creditors or members in a general meeting.¹³ Where authorisation is not given by

¹¹ Section 391 of the 1973 Companies Act provides that:

‘A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.’

¹² See s 386 of the 1973 Companies Act.

¹³ See s 387(1) of the 1973 Companies Act. Section 386(4) sets out the nature of these powers, as follows:

(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;

resolution, the liquidator may seek a direction from the Master.¹⁴ If the Master does not provide such direction, the liquidator may seek authorisation from the court.¹⁵

[26] It is against this backdrop that s 78(1) of the Close Corporations Act must be read. In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*¹⁶ this Court stated that:

‘The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself.’

[27] Section 78(1) reads as follows:

(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:

(g) ...

(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.’

¹⁴ Section 387(2) of the 1973 Companies Act.

¹⁵ Section 387(3) of the 1973 Companies Act.

¹⁶ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

‘(1) A liquidator shall as soon as may be and, except with the consent of the Master, not later than one month after a final winding-up order has been made by a Court or a resolution of a creditors’ voluntary winding-up has been registered—

(a) summon a meeting of the creditors of the corporation for the purpose of—

(i) considering the statement as to the affairs of the corporation lodged with the Master;

(ii) the proving of claims against the corporation;

(iii) deciding whether a co-liquidator should be appointed and, if so, nominating a person for appointment; and

(iv) receiving or obtaining, in a winding-up by the Court or a creditors’ voluntary winding-up, directions or authorization in respect of any matter regarding the liquidation; and

(b) summon a meeting of members of the corporation for the purpose of—

(i) considering the said statement as to the affairs of the corporation, unless the meeting of members when passing a resolution for the voluntary winding-up of the corporation has already considered the said statement; and

(ii) receiving or obtaining directions or authorization in respect of any matter regarding the liquidation.’

[28] The formal administration of the liquidation of a close corporation commences when the liquidator is appointed. Upon appointment the liquidator takes charge of the affairs of the corporation. The duty to execute the liquidation process, in accordance with legislation and subject to the control and oversight of the Master, commences upon appointment. Section 78(1) imposes the duty to summon the first meeting of creditors and members, upon the liquidator. It requires that the meeting be summoned ‘not later than one month after’ the final order of liquidation is made. The section does not specify how the meeting is to be summoned. For this we turn to s

40(1) of the Insolvency Act.¹⁷ It provides a first meeting of creditors is ‘convened’ by publication of a notice stating the date and time of the meeting, in the *Gazette*. Regulation 5 of the Insolvency Regulations¹⁸ provides that the notice published in the *Gazette* must state the date, time, place, and purpose of the meeting. It must be published at least ten days before the date of the meeting.

[29] The act of summoning a first meeting must therefore be understood to involve the determination of when and where the meeting will take place, and what its purpose will be. In this regard, it must be stated what business is to be conducted at the meeting. The act of summoning the first meeting of creditors is carried out by the Master, in the case of a company in liquidation and in the case of an insolvent estate. This is so because the liquidator or trustee (as the case may be) is appointed upon nominations received at the first meeting of creditors. Since a liquidator of a close corporation is appointed at the stage of provisional liquidation, the authority to summon the first meeting of creditors must necessarily be exercised by the liquidator.¹⁹

[30] The setting of a period in s 78(1) underscores the need for expedition in the administration of the liquidation process. The need is emphasised in several relevant provisions. The liquidator must, in accordance with s 391 of the 1973 Companies Act, act ‘forthwith’. Members of a corporation or directors of a company must file a statement of affairs with the Master

¹⁷ Section 339 of the 1973 Companies Act makes the law of insolvency applicable in the absence of any specific provision.

¹⁸ GNR 1379 24 August 1962.

¹⁹ Section 386(4) of the 1973 Companies Act.

within 14 days of the date of final liquidation.²⁰ Section 402 requires the liquidator to submit a report to creditors and members within three months of the date of appointment as liquidator. Section 79 of the Close Corporation Act contains the same obligation in the case of a close corporation in liquidation.

[31] The use of the phrase ‘except with the consent of the Master’, indicates that the consent of the Master is a necessary condition for the exercise of the authority conferred by the section. It serves to limit the authority of the liquidator. It must equally be construed as conferring upon the Master the power to either grant or withhold consent to a liquidator acting in terms of s 78(1). ‘Consent’ must mean, as the term suggests, that Master agrees with and approves the act of summoning the meeting at that stage, ie after the expiry of the one-month period. This accords with the general scheme of control exercised by the Master over a liquidator, as provided by s 381 of the 1973 Companies Act.²¹ Seen in this light, the requirement that consent be obtained to summon the meeting serves to ensure that the Master maintains effective control over the liquidation leading to the first meeting of creditors. It is consonant with the authority exercised by the Master in the case of a company liquidation or sequestration.

²⁰ Section 363(2) of the 1973 Companies Act. The Master of the court may extend the period for special reasons.

²¹ The Master is entitled to hold a liquidator to account for the administration of the affairs of the liquidated corporation. The Master is empowered to appoint a co-liquidator where necessary or to seek the removal of a liquidator, in terms of s 379. The Master may also disallow remuneration of a liquidator, either in whole or part, if the liquidator has failed to fulfil functions or unduly delayed, in terms of s 384.

[32] The central question in this matter is this: when may the required consent be obtained? Counsel for the respondent initially argued that the consent of the Master must be obtained within the stipulated one-month period. That argument was, however, correctly abandoned. Instead, it was argued that the Master's consent to summon a meeting after the expiry of the period, must be obtained *prior* to the meeting being summoned, ie prospectively. If, it was submitted, consent was not obtained before the meeting was summoned, the act of summoning the meeting was unauthorised and invalid.

[33] At face value, the language of the section is open to this interpretation. There are, however, three scenarios to which the section might apply: consent obtained before a meeting is summoned; consent obtained at any time before a summoned meeting takes place; and consent obtained after the meeting has been held.

[34] Section 78 (1) gives to the liquidator the authority to make the determinations necessary to summon the first meeting of creditors and members. The authority is unrestricted for the period of one-month after the date of final liquidation. Thus, if the liquidator decides to issue a notice summoning the meeting before the expiry of one month, then the liquidator alone decides when and where the meeting is to be held and what business is to be conducted. The plain language of the section says this. If, however, the liquidator exercises the authority to summon the meeting, after the expiry of the one-month period, it can only be exercised with the consent of the Master.

[35] The section, however, does not state that consent must be obtained prior to the meeting being summoned. To read it as requiring that consent may only be obtained *before* the meeting is summoned would, in my view unduly fetter the Master's authority. It would mean that a meeting convened at a time and place and for the purpose of business with which the Master agrees, could not validly proceed merely because consent was not obtained before the notice was published. Yet, the Master could immediately grant consent to summoning another meeting where the same business would be conducted. On the other hand, to read the section as permitting the Master to consent at any time *prior* to the meeting being held, does not conflict with the purpose served by the section. The Master would still be able to exercise the authority that s 78(1) confers upon the Master. It must be emphasised that, in the case of a corporation, the liquidator would have commenced the liquidation process prior to the first meeting. It might therefore be expected that the business of the first meeting would include consideration of such actions and approval by the creditors. The determination of whether the meeting should then be held and what business is to be conducted at the first meeting therefore assumes greater significance. The Master would still be able to decide upon these matters, prior to the meeting being held. If the Master was satisfied that the liquidator had faithfully fulfilled their obligations, including that of expedition, and that the proposed business of the meeting would serve to fulfil the objects of the liquidation process, consent might be given. If not, withholding consent would mean that the meeting could not, validly, continue. In that event, the Master and the liquidator could take whatever steps they were authorised to take to advance the liquidation process.

[36] To hold that consent may be obtained at any time prior to the meeting being held, does not diminish the effect of a failure to obtain consent. Consent remains a necessary condition for the validity of the meeting. Nor does it mean that the Master's consent is available for the mere asking. On the contrary, the Master remains bound to ensure that the objects of liquidation will be met and that the interests of parties will be served by the meeting.

[37] Different considerations, however, come to the fore in the third scenario, namely whether consent may be obtained *after* the first meeting has been held. Once the meeting has been held and resolutions have been adopted or directions given by creditors, the Master is no longer able to exercise the authority conferred by s 78(1) of the Close Corporations Act. The Master is unable to consent to the act of summoning the meeting nor consent to its purpose and the business to be conducted at the meeting. Instead, the Master would be faced with outcome of business already conducted at the meeting, in respect of which resolutions may have been adopted. The 'consent' then sought would require the Master to validate invalid conduct and to ratify decisions taken at the meeting. Such decision would require the Master to consider whether there is reason to nullify the proceedings. The language of the section does not confer such power upon the Master. To read the concept of 'consent' as embodying the authority to determine the validity of the outcome of the business conducted at a meeting of creditors, goes beyond interpretation and the ascertainment of contextual meaning. If it had been intended to clothe the Master with such authority, then express language to that effect would have been employed. There is also no reason for such authority to be conferred upon the Master. The high

court has jurisdiction to intervene, as it did in this instance, to deal with unlawful or unauthorised conduct. It issued appropriate directions to facilitate the liquidation process.

[38] There are, in my view, further considerations which militate against obtaining the Master's consent *after* the meeting has been held. Permitting consent to be obtained at that stage would introduce considerable uncertainty in the liquidation process. The status of decisions taken at the meeting would depend upon the Master's consent. It would also encourage liquidators to act without reference to the Master in the knowledge that they could obtain approval after the fact. Furthermore, the exercise of a power to validate the meeting *ex post facto* would undoubtedly be subject to lawfulness challenges. This would create further scope for protracted delays in the liquidation process.

[39] The high court was correct in finding that the absence of consent by the Master rendered the proceedings of the meeting held on 6 May 2021, invalid. It was, however, not correct in concluding that the consent could not be obtained after the meeting had been summoned by the liquidators. In my view, the consent of the Master may be obtained *after* a meeting has been summoned but *before* the meeting is held. In this case the Master was asked to consent after the meeting had been held. The Master formed the view that there was no statutory provision permitting her to give consent after the meeting. She was correct. It is nevertheless appropriate to clarify, in an order, when the consent required by s 78(1) of the Close Corporations Act may be obtained.

[40] In the circumstances the high court was correct to declare that the meeting of 6 May 2021 was invalid and to set aside the resolutions adopted at the meeting. The counter-application was also correctly refused. As far as the high court's costs order is concerned, it was not suggested that the high court had, in effect, failed to exercise its discretion. There is, therefore, no basis for this Court to interfere. The liquidators pursued the appeal, principally, to clarify the interpretation and application of s 78(1) of the Close Corporations Act. In the circumstances, the costs of the appeal should be costs in the liquidation.

[41] I therefore make the following order:

- 1 The appeal is dismissed.
- 2 The costs of the appeal shall be costs in the liquidation.
- 3 It is declared that s 78(1) of the Close Corporations Act, 69 of 1984 permits the Master to grant consent to a liquidator to summon a first meeting of creditors and members after the expiry of one-month from the date of final liquidation, at any time before the meeting so summoned is held.

GOOSEN JA
JUDGE OF APPEAL

Petse DP (dissenting):

[42] I have had the benefit of reading, with interest, the first judgment penned by my colleague Goosen JA. Up to a certain point, we both travel on the same path during which our views converge. However, halfway through, our paths diverge in a most fundamental way, taking us to different destinations. Thus, our disagreement has a direct bearing on the outcome of the appeal. Hence, I have been compelled to write for reasons that will be set out below as succinctly as the circumstances dictate.

[43] First, this appeal requires us to decide, as the first judgment has found, two discreet and prominent disputes between the protagonists in this litigation. The first dispute is whether, on its terms and proper interpretation, s 78(1) of the Act permits the Master to consent to the convening of the first meeting of creditors and members of a close corporation in liquidation for the purposes spelt out in the section in question in circumstances where the liquidator who bears the obligation to convene such meeting ‘not later than one month after’ the final order of liquidation is made has failed to do so. The first judgment rightly observes that the expression ‘except with the consent of the Master’ located in s 78(1) is a clear indication that the consent of the Master is a prerequisite for the lawful exercise by the liquidator of the authority conferred by the section beyond the one month period. On these aspects, we both make common cause. I therefore agree with the first judgment that the argument advanced on behalf of the respondents that the Master’s consent must be obtained before the meeting is summoned – in circumstances where s 78(1) finds application – is without merit for, to construe the section in that way would, in the language of *Natal Joint*

Municipal Pension Fund v Endumeni Municipality,²² lead to insensible or unbusinesslike results, or undermine the manifest purpose of the provision. Therefore, nothing more need be said on this score.

[44] The second dispute is whether the Master is still empowered to grant the consent contemplated in s 78(1) in circumstances where a liquidator of a close corporation has, without reference to the Master – and thus absent the latter’s consent – not only summoned a meeting outside the one-month period prescribed in s 78(1), but has, in fact, proceeded to hold the first meeting and transactions of the kind of business that s 78(1) contemplates are concluded.

[45] As to the second dispute, the first judgment holds that ‘Different considerations, however come to the fore..., namely whether consent may be obtained *after* the first meeting has been held’. In support of its conclusion on this score the first judgment reasons as follows:

‘Once the meeting has been held and resolutions have been adopted or directions given by creditors, the Master is no longer able to exercise the authority conferred by s 78(1) of the Close Corporations Act. The Master is unable to consent to the act of summoning the meeting nor consent to its purpose and the business to be conducted at the meeting. Instead, the Master would be faced with outcome of business already conducted at the meeting, in respect of which resolutions may have been adopted. The ‘consent’ then sought would require the Master to validate invalid conduct and to ratify decisions taken at the meeting. Such decision would require the Master to consider whether there is reason to nullify the proceedings. The language of the section does not confer such power upon the Master. To read the concept of ‘consent’ as embodying the authority to determine the validity of the outcome of the business conducted at a meeting of creditors,

²² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*).

goes beyond interpretation and the ascertainment of contextual meaning. If it had been intended to clothe the Master with such authority, then express language to that effect would have been employed. There is also no reason for such authority to be conferred upon the Master...'²³

[46] It then concludes:

'There are, in my view, further considerations which militate against obtaining the Master's consent *after* the meeting has been held. Permitting consent to be obtained at that stage would introduce considerable uncertainty in the liquidation process. The status of decisions taken at the meeting would depend upon the Master's consent. It would also encourage liquidators to act without reference to the Master in the knowledge that they could obtain approval after the fact. Furthermore, the exercise of a power to validate the meeting *ex post facto* would undoubtedly be subject to lawfulness challenges. This would create further scope for protracted delays in the liquidation process.'²⁴

For reasons that will soon become apparent, I see the resolution of the second dispute differently.

[47] I am grateful to the first judgment for its rendition of the factual background and its traversal of the submissions advanced by counsel on both sides which, unsurprisingly, were diametrically opposed. Therefore, except to the extent required by dictates of this judgment, the facts will not be repeated. And for the sake of completeness, it behoves me to state that I endorse the reasoning and conclusion relating to the first dispute at which the first judgment has arrived.

[48] At the core of this appeal, is the proper meaning to be ascribed to s 78(1). In particular, the question is whether on its terms the section is open

²³ Para 37 of the first judgment.

²⁴ Para 38 of the first judgment.

to the interpretation that nothing precludes the Master from considering and, if deemed appropriate, granting consent, even in circumstances where the meeting has come and gone with the result, inter alia, that: (a) the statement as to the affairs of the corporation lodged with the Master has been considered; (b) claims against the corporation have been proved; and (c) directions or authorisation in respect of any matter regarding the liquidation have been obtained or received.

[49] The principles of statutory interpretation are by now well settled. It is therefore not necessary to rehash them. Suffice it to emphasise that in *Endumeni* this Court restated the proper approach to statutory interpretation. It explained that statutory interpretation is the objective process of attributing meaning to the words used in legislation. And that this unitary interpretive exercise entails a simultaneous consideration of: (a) the language used in the light of the ordinary rules of grammar and syntax; (b) the context in which the provision appears; and (c) the apparent purpose to which it is directed.²⁵

[50] In *Cool Ideas 1186 CC v Hubbard and Another*,²⁶ the Constitutional Court said the following concerning statutory interpretation:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.

There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and

²⁵ *Endumeni* para 18.

²⁶ *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) para 28.

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).’ (Footnotes omitted.)

And, as *Endumeni* emphasised, ‘[t]he inevitable point of departure is the language of the provision itself’.²⁷ Therefore, what has been said in the preceding paragraph and this one is all I have to say for present purposes concerning statutory interpretation.

[51] Section 78(1) has already been quoted in para 27 of the first judgment. However, for convenience it will be quoted again. It reads:

‘(1) A liquidator shall as soon as may be and, except with the consent of the Master, not later than one month after a final winding-up order has been made by a Court or a resolution of a creditors’ voluntary winding-up has been registered—

(a) summon a meeting of the creditors of the corporation for the purpose of—

(i) considering the statement as to the affairs of the corporation lodged with the Master;

(ii) the proving of claims against the corporation;

(iii) deciding whether a co-liquidator should be appointed and, if so, nominating a person for appointment; and

(iv) receiving or obtaining, in a winding-up by the Court or a creditors’ voluntary winding-up, directions or authorization in respect of any matter regarding the liquidation; and

(b) summon a meeting of members of the corporation for the purpose of—

(i) considering the said statement as to the affairs of the corporation, unless the meeting of members when passing a resolution for the voluntary winding-up of the corporation has already considered the said statement; and

(ii) receiving or obtaining directions or authorization in respect of any matter regarding the liquidation.’

²⁷ *Endumeni* para 18.

[52] Although the facts of this case are, as alluded to above, fully set out in the first judgment, I have deemed it necessary to add some observations of my own in order to underscore certain material facts that will conduce to a better understanding of this judgment. They are the following. Jonker Products was placed under final liquidation on 29 October 2020. The appellants were appointed joint liquidators by the relevant Master on 21 October 2020. Accordingly, the appellants were required by law to summon the first meeting on or before 28 November 2020. However, they failed to do so. Instead, the first meeting was summoned some four months later and therefore outside the prescribed one month period and held on 6 May 2021. Certain resolutions were adopted at the meeting. The crucial one that precipitated this litigation was the decision to interrogate witnesses on 2 and 9 July 2021, including the first and second respondents.

[53] Realising that the liquidators had summoned the first meeting outside the one month period, the respondents requested the liquidators to provide them with the requisite Master's consent. None was provided as none existed. Only on 6 July 2021 did it dawn on the respondents, who had been oblivious to that fact, that they required the Master's consent which they belatedly requested. On 7 July 2021 the Master informed the liquidators that he was not aware of any statutory provision empowering him to grant consent after the meeting had been summoned and held. With an impasse having arisen, the respondents resorted to litigation.

[54] To recapitulate, the first judgment holds that 'the Master is no longer able to exercise the authority conferred by s 78(1)' once the meeting has

already taken place and resolutions adopted as happened in this case. It then proceeds to say that granting “consent” in such circumstances is tantamount to requiring ‘the Master to validate invalid conduct and to ratify decisions taken at the meeting’. To do so, the first judgment reasons, would in effect be straining the language of s 78(1) and taking it outside the realm of statutory interpretation, ie ‘cross the divide between interpretation and legislation’.

[55] I respectfully disagree. I can conceive of no reason why, if the Master is empowered to grant consent after the meeting has been summoned by a liquidator but before it takes place, as the first judgment has found, the Master’s power cannot extend to similarly granting consent, if deemed appropriate, even in circumstances where the meeting has already taken place and resolutions, if any, adopted. The first judgment points out that granting consent is not a mere formality or is there for the mere asking. Thus, it is no small matter, but a momentous one. That much I would accept without question. Drawing a solid line in the sand at the point where the first judgment does, ie before the meeting is held is, to my mind, both artificial and arbitrary.

[56] It is an indubitable fact that, whenever a meeting of creditors is held not later than one month after the final winding-up order or registration of a resolution of creditors placing the corporate entity in liquidation, a liquidator enjoys a wide latitude. That the consent of the Master is sought only after the meeting has taken place and resolutions adopted can in no way undermine or frustrate the authority of the Master in ensuring that there is effective control of the liquidation process. Evidently, when consent is

sought at this belated stage a liquidator would presumably provide a full report to the Master when seeking the latter's consent after the fact. It would still be open to the Master to consider the belated request on its merits and then decide whether in the light of all relevant factors consent should nevertheless be granted. One of such relevant factors would undoubtedly be the interests of the creditors and members of the entity in liquidation. The extent of the delay, reasons therefor and the need for expeditious finalisation of the liquidation process would all bear on the matter.

[57] The first judgment (at para 35) rightly notes that s 78(1) 'does not state that consent must be obtained prior to the meeting being summoned'. It proceeds to state that, to construe the section to require this 'would unduly fetter the Master's authority'. But this begs the question: If there is nothing that precludes the Master from granting consent after the meeting has been summoned but before it actually takes place, for the reasons stated, why then, one might rhetorically ask, should the Master not have the power to decide the same question even after the meeting has taken place at which resolutions are adopted? Significantly, s 78(1) does not require that the Master's consent may be granted only before the meeting takes place and that beyond that point the situation is rendered irredeemable.

[58] To posit that the section empowers the Master to grant consent, if deemed appropriate, before the meeting takes place but not after, simply does not accord with the ordinary and natural meaning of the text of s 78(1). And it is noteworthy that the section itself draws no such distinction. On its clear and unambiguous terms, it cannot be read to mean that the Master is denied the right to even entertain a liquidator's request for consent under s

78(1) and determine it on its merits. As the Constitutional Court tells us in *Cool Ideas*, the ordinary and clear meaning of the words used in a statute must be given effect to, unless to do so would result in absurdity.²⁸ It is as well to remember that a meaning that frustrates the apparent purpose of a statutory provision or leads to unbusinesslike results should whenever possible be eschewed.²⁹ Accordingly, absent any glaring absurdity or undue straining of the language of the section, there is no room in the present case to warrant a departure from the ordinary grammatical meaning of s 78(1).

[59] The first judgment (at para 36) opines that to ‘hold that consent may be obtained at any time prior to the meeting being held does not diminish the effect of a failure to obtain consent’. For my part, and in similar vein, I do not see how granting consent after the meeting has already been held would diminish the effect of a failure to obtain consent after the meeting has already taken place, especially when it is accepted, as the first judgment does, that the section does not require that such consent be sought prior to the meeting being summoned. As already indicated, liquidators enjoy a wide latitude in going about the liquidation process and are vested with extensive statutory powers, subject only to the strictures of the relevant statutory framework and the collective interests of the creditors and members of the liquidated entity. Before the expiry of the one month period, it is the liquidators themselves who determine the date of the meeting and the nature of the business to be transacted at the meeting to give effect to the object of s 78(1).

²⁸ Op cit fn 26 above.

²⁹ Op cit fn 22 above.

[60] That consent is sought only after the meeting has been held it in no way entails that the Master should then consider ‘[validating] invalid conduct and *to ratify decisions taken at the meeting*’. (Emphasis added.) The Master will be called upon to determine one issue only, be it before or after the meeting has been held, namely whether to grant consent *ex post facto* in circumstances where such consent should have been sought in advance. Thus, there is nothing curious about the fact that the language of the section does not confer powers on the Master to consider whether there is reason to nullify the proceedings. What the Master is required to do, on the plain wording of s 78(1), after all, is to consider whether consent should be granted *ex post facto* and nothing more.

[61] Accordingly, there is no logical reason why the Master may not grant consent even after the meeting has been held. Such construction equally does not diminish the effect of a failure to obtain consent, which remains the necessary pre-requisite for validity of the conduct of the liquidators. The Master’s oversight responsibility remains, which is to ensure that liquidators comply with their statutory duties and responsibilities in the course of the winding-up process.

[62] Therefore, I incline to the view that there is nothing in the text of s 78(1) that precludes the Master from granting consent, even retrospectively, to the summoning of a meeting of creditors and members of the corporate entity in liquidation, which has already taken place even after the expiry of the period of one month as prescribed in the section. In these circumstances, it must follow that, whilst the high court was correct in finding that the absence of consent by the Master had a bearing on the validity of the

proceedings of the meeting held on 6 May 2021, it was, however, not correct in its ultimate conclusion that the Master's consent could not be obtained retrospectively.

[63] I pause here to mention that it is common cause in this case that the Master was belatedly asked to grant consent. The liquidators' letter, dated 6 July 2021, addressed to the Master requesting consent, in relevant part, reads:

'We hereby request you to condone the fact that the First Meeting of Creditors was not convened within the period as set out in Section 78(1) for the following reasons:

- The inability to publish the meeting as set out above;
- The effect of the state of disaster declared by the State President on 15 March 2020 due to the Covid-19 outbreak;
- The effect of the various directives that were issued during this time and that is still being published by the Chief Master from time to time to ensure the safety of all concerned had;
- The obstructive behaviour by the member of the close corporation and specifically in not providing the Master or the liquidators with a Statement of Affairs being the primary purpose of the First Meeting of Creditors in the estate of a close corporation;
- The fact that the late convening of the First Meeting did in no way lead to a substantial injustice to anyone.'

The letter then concludes by stating that:

'We therefore formally apply to the Master of the High Court to condone the formal defect by not convening the First Meeting of Creditors within the time period prescribed in Section 78(1) for the reasons set out above.'

[64] In response, the Master did not grant or refuse consent. Rather, the Master expressed the view that there was no statutory provision conferring

such powers on her or him to do so. The effect of the Master's response is that the liquidators' request for consent remains undetermined. Thus, it is still open to the Master to decide the fate of the liquidators' request for consent *ex post facto* on its merits. No doubt in so doing, the Master will, inter alia, bear uppermost in his or her mind that the finalisation of the liquidation process has been held up for some four years already whilst litigation was underway.

[65] For all the foregoing reasons, I would uphold the appeal and grant consequential relief. Since mine is a minority judgment, it is not necessary to set out the terms in which such consequential relief would have been framed.

X M PETSE
DEPUTY PRESIDENT
SUPREME COURT OF APPEAL

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