



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Botha N O and Others v Jonker and Others (1003/2022) [2024] ZASCA 78 (27 May 2024)

The Supreme Court of Appeal (SCA) today dismissed an appeal against an order of the Free State Division of the High Court (per Reinders ADJP and Van Rhyn J) (the high court), which declared invalid a first meeting of creditors held without the consent of the Master as required by s 78(1) of the Close Corporations Act, 69 of 1984 (the CC Act). The SCA declared that s 78(1) of the CC Act permits the Master to grant consent to a liquidator to summon a meeting after the expiry of one month from date of final liquidation, at any time before the meeting is held.

Jonker Products CC was finally liquidated on 29 October 2020. The liquidators summoned a first meeting of creditors by publication of a notice in the Government Gazette on 9 April 2021. A corrected notice was published on 16 April 2021 and the meeting was held on 6 May 2021 before the magistrate of Bothaville. The Land and Agricultural Bank of South Africa (the Land Bank) was the only creditor to prove a claim. Several resolutions ratifying the actions of the liquidators were adopted. The meeting also resolved to summon Mr and Mrs Jonker (the Jonkers) and company controlled by Mrs Jonker to appear at the second meeting of creditors for purposes of inquiry. They were required to appear on 2 July 2021. They requested the liquidators to provide a copy of the written consent of the Master to convene the meeting on 6 May 2021. The liquidators stated that they did not have the consent of the Master. On 5 July 2021 the Jonkers informed the liquidators that the meeting of creditors was unauthorised and that the resolutions adopted at the meeting were invalid. They called on the liquidators to cancel the inquiry meeting.

On 6 July 2021, the liquidators requested the Master to consent to the meeting that had been held on 6 May 2021. The Master responded by stating that there was no statutory provision which allowed consent to be given after the meeting had been held.

The Jonkers launched an application in the high court to declare that the meeting and the resolutions adopted at the meeting were vitiated by irregularity and therefore invalid.

A rule nisi was obtained on 8 July 2021 and on 30 March 2022, the high court granted a final order. It found that s 78(1) of the CC Act was peremptory in requiring the consent of the Master to convene a meeting after expiry the period of one month after date of final liquidation. The high court found that the section did not confer authority to consent to a meeting after it had been held. It therefore set aside the resolutions adopted on 6 May 2021. The high court, however, granted orders in terms of s 386(5) of the Companies Act 61 of 1973, permitting the liquidators to convene a first meeting of creditors afresh.

The central issue on appeal to the SCA concerned the interpretation of s 78 of the CC Act.

The SCA, by majority (per Goosen JA and Unterhalter AJA), held that the granting of consent as required by s 78(1) of the CC Act is a necessary condition for the exercise of the power of a liquidator to summon a meeting after the period of one month had expired. The Master may either grant or

withhold consent. Such authority is consonant with the statutory scheme of control that the Master exercises over the liquidation process. The requirement that consent be obtained serves to ensure that the Master maintains effective control over the process. The Master's consent meant approval of arrangements for the meeting and the business to be conducted at the meeting.

The SCA found that the section did not require the Master's consent to be obtained prior to publication of the notice by which a meeting is summoned. Upon a sensible interpretation of the section the Master would still be able to exercise his authority to control the process, if consent was sought before the meeting of creditors occurred. At that stage the Master would still be able to decide whether the envisaged meeting would fulfil the liquidation process.

Once the meeting is held, different considerations apply. Creditors exercise control over the liquidation process by resolutions adopted at the meeting. Once that occurs, the Master is no longer able to exercise the authority to consent or withhold consent. At that stage consent could only be granted if the Master is satisfied that the proceedings of the meeting ought to be validated. Section 78(1) does not confer upon the Master the power to validate the proceedings of a meeting of creditors.

The majority therefore held that the high court order was correct. The SCA issued a declaratory order to clarify when the Master may grant consent in terms of s 78(1) of the CC Act.

In a minority judgment Petse DP differed on whether the Master may consent after a meeting had been held. He found that since consent could be given after publication of the notice summoning a meeting, there was no reason why such consent could not be given after the meeting. The Master would, at that stage, be no less able to exercise supervisory control over the process.

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