IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no. **3076/2021**

In the matter between:

LOUIS JONKER	**1ST Applicant**
JOHANNA JACOBA JONKER	**2ND Applicant**
MUSTANG CHEMICALS (PTY) LTD	**3RD Applicant**

and

MAGISTRATE N MYOBIZI N.O.	**1ST Respondent**
DEON MARIUS BOTHA N.O.	**2ND Respondent**
J Z H MULLER N.O.	**3RD Respondent**
LOUISA SIBIYA N.O.	**4TH Respondent**
LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA	**5TH Respondent**
MASTER OF THE HIGH COURT, BLOEMFONTEIN	**6TH Respondent**

CORAM: **REINDERS, ADJP et VAN RHYN, AJ**

HEARD ON: **7 FEBRUARY 2022**

DELIVERED ON: **30 MARCH 2022**

JUDGEMENT BY: **VAN RHYN AJ**

INTRODUCTION.

[1] The first applicant, a farmer of Bothaville and the sole member of Jonker Products CC (in liquidation) ("Jonker Products"), brought an urgent application on 7 July 2021 requesting a rule *nisi* that the first and second meetings of creditors be declared invalid and be set aside. A rule *nisi* was issued in terms of the Notice of Motion. The return day was extended on several occasions before the matter came before this court on review in accordance with the directive issued by the Judge President.

[2] Second applicant is the wife of the first applicant. She is an erstwhile member of Jonker Products and is a director of third applicant, Mustang Chemicals (PTY) LTD. The first respondent is cited in his capacity as the presiding magistrate of the first and second meeting of creditors of Jonker Products which was held at the Magistrates' Court, Bothaville on 6 May 2021. The second, third and fourth respondents (the "liquidators") are insolvency practitioners appointed by the Master as the joint liquidators of Jonker Products. The fifth respondent is the Land and Agricultural Development Bank of South Africa ("Land Bank"). The Master is the sixth respondent.

THE BACKGROUND FACTS.

[3] A provisional liquidation order of Jonker Products was issued on 11 September 2020. The provisional order was confirmed on 29 October 2020. On 16 April 2021 the liquidators gave notice in the Government Gazette of the intended first and second meeting of creditors scheduled for 6 May 2021. At the meeting Land Bank proved the only claim and certain resolutions were passed. The second meeting of creditors was postponed to 2 July 2021 and 9 July 2021 for purposes of interrogating witnesses. On 11 June 2021 the liquidators caused subpoenas to be issued by the first respondent in respect of eight individuals to obtain their attendance at the postponed second meeting of creditors.

[4] On 7 July 2021 the applicants launched an urgent application to stop the meeting and thus the interrogation from proceeding. A rule *nisi* in the following terms was prayed for:

4.1 that the meeting of 6 May 2021 is invalid and be set aside;

4.2 that the decisions taken and the resolutions passed at the meeting of 6 May 2021 is invalid and be set aside;

4.3 that the subpoenas issued by the first respondent in respect of the first, second and third applicants on 11 June 2021 be set aside;

4.4 that the aforesaid (paragraphs 4.1 to 4.3 above) shall serve as an interim interdict with immediate effect pending the return day;

4.5 that the respondents who opposes the application pay the costs of the application on an attorney and client scale.

[5] The application is opposed by the liquidators. None of the other respondents filed any notices. The Master did not file a report. In the counterclaim filed by the liquidators the following orders are requested:

5.1 that the first and first and second meetings convened by the liquidators were validly held and is not a nullity;

5.2 that the claim of Land bank was validly proven;

5.3 that the resolutions adopted at the meeting were validly adopted;

5.4 that any further and/or other directions that the court deem fit and appropriate in terms of sections 386(5) and 387(3) of the Companies Act 61 of 1973 be granted to the liquidators;

5.5 that any party who opposes the counter application pays the costs thereof.

<u>CONTENTIONS ON BEHALF OF THE PARTIES.</u>

[6] The issue to be determined is the consequences of the liquidators not convening a meeting of creditors within one month of the final winding-up of Jonker Products. Section 78(1) of the Close Corporation Act[1] ("the CC Act") provides as follows:

"(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 creditor's 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, nominate a person for appointment; 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 authorisation in respect of any matter regarding the liquidation"

[7] The applicants contend that:

7.1 there was a failure to comply with the provisions of section 78(1) of the CC Act since the liquidators failed to convene a meeting with the creditors and members within one month from the date of the final winding-up order;

7.2 the liquidators failed to obtain the Master's consent prior to expiry of the one month period to convene the first meeting outside the period of one month since the final winding-up order was granted;

7.3 that any decisions taken and resolutions passed at the meeting held on 6 May 2021 are invalid;

[1] Act 69 of 1984.

7.4 the subpoenas issued on 11 June 2021 by the first respondent was not done with a legitimate purpose, constitutes an abuse of process, are in itself defective and are to be set aside.

[8] Section 66(1) in Part IX of the CC Act deals specifically with the winding-up of close corporations. The laws mentioned or contemplated in item 9 (continued application of previous Act to winding-up and liquidation) of Schedule 5 of the Companies Act[2] ("2008 Act"), read with the changes required by the context, apply to the liquidation of a close corporation in respect of any matter not specifically provided for in the CC Act. The provisions of section 339 of the Companies Act 61 of 1973 ("1973 Act") are important provisions in the context of the winding-up of a close corporation. As a result, in general, the process of the administration of such winding-up is the same as that in case of the administration of an insolvent estate.

[9] The answer to the question whether the meeting held in contravention of the provisions of section 78(1) of the CC Act and the decisions taken are valid or not, can only be decided when the purpose that is sought to be achieved by the relevant acts is analysed. Section 412(1) of the 1973 Act and the winding-up regulations apply *mutatis mutandis* in the winding-up of a close corporation, through section 66 of the CC Act. Section 412 (1) provides as follows:

> "(1) In any winding-up of a company, meetings of creditors and members or contributories shall, save as otherwise provided in this Act, be convened and held in the following manner:
>
> (a) In the case of meetings of creditors, as nearly as may be in the manner prescribed for the holding of meetings of creditors under the law relating to insolvency; and
> (b) In the case of meetings of members or contributories, in the manner prescribed by regulation.

[2] Act 71 of 2008.

(2) The provisions of section 52 of the Insolvency Act, 1936 (Act No 24 of 1936), shall *mutatis mutandis* apply to the right of any creditor to vote at a meeting of creditors in a winding-up of a company"

[10] The Master appoints a liquidator as soon as is practical after a provisional winding-up order in respect of a close corporation has been made. The functions of a liquidator of a close corporation are essentially the same as those of the liquidator of a company, namely to control and administer the property and the affairs of the close corporation and to liquidate it. [3] The first meeting of creditors and members is for purposes of considering the statement of affairs of the corporation lodged with the Master and the receiving or obtaining by the liquidator(s) of directions or authorization in respect of any matter regarding the liquidation. The meeting of creditors serves an additional purpose of proving claims against the close corporation and of deciding whether a co-liquidator should be appointed and, if so, nominating a person for such appointment.[4]

[11] The liquidator must summon the first meeting of creditors and members not later than one month after the final winding-up order has been made unless the Master consents to an extension of this period. The authors of Meskin: Insolvency Law[5] holds the view that the Master may furnish his consent *ex post facto*; but unless he does, a meeting summoned after the expiry of the period of one month is not lawfully summoned. The liquidators, belatedly on 6 July 2021 and only after they were made aware of the non-compliance with the provisions of the CC Act by the applicant, approached the Master to condone non-compliance with the provisions of section 78(1) of the CC Act.

[12] The Master's response was that no such power is bestowed upon the Office of the Master in terms of the provisions of the CC Act or any other legislation, more specifically to condone non-compliance retrospectively.

[3] Section 66(1) Close Corporation Act read with section 391 of the 1973Companies Act.
[4] Close Corporation Act, section 78(1)(a).
[5] At para 7.16, 7-13 at footnote 8.

[13] It is common cause that the liquidators summoned the meeting of creditors for 6 May 2021, more than 6 months after 29 October 2020, the date of the final liquidation order. The first contact by the liquidators with the first respondent was on 15 January 2021 when a date for convening the combined first and second meeting was discussed. Due to further delays regarding the publication of the required notice in the Government Gazette, the publication only occurred on 9 April 2021 with both the first and second meeting taking place on 6 May 2021.

[14] Mr Smit, counsel on behalf of the liquidators, contends that the failure of the liquidators to convene the meeting within a month is not visited with nullity but, in any event, constitutes a formal defect within the meaning of section 157 of the Insolvency Act[6]. Furthermore, the applicant failed to allege any prejudice because of the meeting not being held within a month after the final order was issued. Mr Janse van Rensburg, counsel on behalf of the applicants, argues that the failure to obtain consent from the Master prior to the lapse of one month from the date of the final liquidation order to summon the first meeting, results in the invalidity of the meeting. Consequently, the decisions taken and the claim proved by Landbank are also invalid and are to be set aside. A similar fate befalls the subpoenas issued by the first respondent.

THE APPLICABLE CASE LAW AND LEGAL PRINCIPLES.

[15] In their heads of argument and at the hearing of this review, the court was referred to a number of cases pertaining to the voluntary surrender of an estate and the requirements in terms of the provisions of section 4(2) of the Insolvency Act relating to the sending of notices to creditors prior to publication of the notice of surrender. In a number of cases the courts have condoned the failure to comply with the requirement of section 4(2).

[16] In ***Ex parte* Meyer**[7] De Villiers JP refused to accept the surrender of an applicant's estate where the notice of surrender had been published more

[6] Act 24 of 1936

[7] 1927 OPD 170.

than 21 days before the hearing of the application. The issue was whether section 4 of the Insolvency Act, which had not been complied with, aimed at some definite object and whether that object could be defeated by non-compliance. The court held that the provisions of section 4 had a definite object in view, namely that debtors should not be able to give inordinately long notices, effectively keeping creditors from levying execution and in the meantime enabling themselves to dissipate their assets. The court held that a failure to comply with section 4 could conceivably result in the aforesaid object being defeated and therefore refused to condone the defect.

[17] Section 157 of the Insolvency Act provides that "nothing done under the Act will be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court". It is therefore necessary to ascertain what is meant by 'formal defect or irregularity'. In ***Ex parte* Miller**[8] Tindall J held as follows:

> It is very difficult to give an exhaustive definition of the word 'formal' and I do not think that any (such) definition has been attempted either in our courts or in England."

[18] The test of substantial injustice, only arises where there has been a formal defect or irregularity. In ***Ex parte* Nel**[9] the court held that the provisions of section 124(2) of the Insolvency Act were obligatory and that an omission to comply therewith was not a formal defect.

[19] In **Leibrandt v South African Railways**[10] the court referred to the case of **Liverpool Bank v Turner, 30 L.J CH 379** and the conclusion by Lord Campbell that no universal rule can be laid down as to whether mandatory enactments shall be considered directory or only obligatory with an implied nullification for failure to adhere to the legislative provision. It was held that:

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[8] 1932 TPD 212 at 216.
[9] 1947 (4) SA 439 (TPD).
[10] 1941 AD 9 at p 12.

> "... it is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed".

[20] Horwitz J, in ***Ex parte*** **Mandelstam**[11] referred to several cases where the courts refused to condone any non-compliance with the provisions of the section as well as cases where condonation were granted. The court held that it may be that, since section 4(2) has been enacted for the exclusive benefit of creditors, non-compliance therewith may be waived by the creditors concerned and concluded as follows:

> "Apart from such waiver, however, I agree with those decisions which adopt the view that a failure to comply with the provisions of sec. 4(2) of the Insolvency Act is not to be regarded as a formal defect which a court is authorised to condone under section 157(1) of the same Act. That being so, there is no statutory jurisdiction for the condonation of defects which do not fall within the last- mentioned section. And, in my apprehension, there is no justification under the Act for the exercise of any so-called right to condone a material defect which assumes the form of a non-compliance with an imperative provision of the statute, except, perhaps, on the principle of *de minimis non curat lex*, a principle which cannot be invoked in the present case."[12]

[21] The reasoning in the **Mandelstam** case was not followed in ***Ex parte*** **Hogg**[13] and ***Ex parte*** **Lategan and Lategan**.[14] In these two cases this section was found to be directory rather than imperative and condonation was granted to the applicants.

[22] The same test was applied in ***Ex parte*** **Foley**.[15] The Full Court of the Orange Free State held that the legislature must have had a definite object in enacting section 4(2) which would be defeated or would tend to be defeated by non-compliance. The court held as follows:

> " It seems to me that the reason for this provision is not far to seek. The legislature intended that a creditor, on receiving the copy of the notice of surrender in the Gazette, should have an opportunity of immediately referring to the Gazette to see

[11] 1949 (3) SA 1210 (O).
[12] P 1216.
[13] 1950 (2) SA 606 (N).
[14] 1951 (2) SA 242 (C).
[15] 1954 (3) SA 1 (O).

whether the notice has appeared and thereby satisfying himself whether the debtor genuinely intends surrendering his estate or whether he is attempting to gain time at the expense of his creditors with no intention of taking the important step of publishing a notice of surrender in the Gazette".

And further: "It, therefore, seems to me that by condoning the premature sending of notices in terms of sec 4(2) there is a reasonable danger of one of the objects of the Legislature in enacting se 4(2) being defeated. Applicant's failure to comply with sec 4(2) cannot be regarded as a formal defect which can be condoned in terms of the provisions of sec 157, and, that being the case, the Court has no jurisdiction to condone the defect. The Court might conceivably have come to the assistance of the applicant had the creditors concerned waived the non-compliance with this section or had it been possible to apply the principle *de mimibus non curat lex.* Since no waver has been proved and since there is no room for the application of the principle of *de mimibus*, the application must be refused and it is ordered accordingly" [16]

[23] In **Ex parte Fakir**[17] Herbstein J, in his study of numerous authorities, came to the conclusion that they revealed a difference of judicial opinion on the nature of a formal defect and the right of the court to grant condonation.[18] It was therefore held that a defect cannot be said to be formal if it might cause prejudice to the creditors. The meaning of "formal defect" explained as follows:

"In view of the state of uncertainty in the law, it seems to me that it would not be out of place to revert to a consideration of the ordinary meaning of the expression "formal defect" in sec 154(1). The Shorter Oxford Dictionary gives as the primary meaning of "formal" –"pertaining to form" and one of the meanings given to "form", especially at law, is "formal procedure". From a grammatical point of view, therefore, it would be perfectly legitimate, I think, to paraphrase the expression "formal defect" by describing it as including a defect pertaining to formal procedure, although no doubt a phrase is not restricted to irregularities in procedure; and if that meaning harmonises with the scope and purpose of the statute, then it would, I apprehend, be legitimate to adopt that construction."[19]

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[16] P 3- 4 C.
[17] 1956 (4) SA 177 (CPD).
[18] At page 178 H.
[19] Ex parte Pence 1959 (3) SA (S.R) 933 at 937.

[24] In ***Ex parte* Marais and Two Others**[20] the court held that the approach of the Orange Free State Provincial Division full court is a new approach which had apparently not previously been considered by any of the other divisions. Dowling J held that in his opinion the approach is the correct one and the interpretation put upon sec 4 (2) by the Orange Free State Court is in harmony with the other provisions of the Act. Dowling J thus concluded that the requirement of section 4(2) is imperative and a failure to comply should not be condoned. As a result, the applicants had to re-advertise and supplement the application.

[25] Mr Smit relied on the judgment by Kotze AJ (as he was then) in the matter of **Ex parte Henning**[21] where an applicant in an application for the voluntary surrender of his estate failed to lodge an annexure provided for in the Insolvency Act. The applicant therefore did not comply with the provisions of section 4 (3) of the Insolvency Act. The court held that defective compliance with the requirements will normally lead to the failure of an application for voluntary surrender unless the court is convinced that the relevant defect did not influence the decision-making process of interested parties in a material way. [22] Then such a defect is merely a "formal defect" in terms of section 157(1) of the Insolvency Act. The defect can only be considered non-material if it could not have influenced the decision-making process of interested parties. If a formal defect or irregularity has not caused a substantial injustice, the procedural step in question is valid. However, if a formal defect has caused a substantial injustice, but the prejudice to creditors can, in the opinion of the court, be remedied by an appropriate order, the defect will not be regarded as fatal provided (of course) the deficiencies are rectified.[23]

<u>THE PROVISIONS OF THE RELEVANT LEGISLATION AND DISCUSSION.</u>

[26] Section 40 of the Insolvency Act provides that the Master shall immediately convene a first meeting of creditors of the estate by notice in the Government

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[20] 1957 (3) SA 311 (WLD) at 312 H-313 A.
[21] 1981 (3) SA 843 (O).
[22] Page 852 E- 853 A.
[23] Ex parte van Rensburg 1955(1) SA 570 (O).

Gazette on receipt of an order of court whereby the estate is finally sequestrated. The purpose of the meeting is for the creditors to prove their claims and to elect a trustee. Section 364(1) of the 1973 Act contains a similar provision, in terms of which the Master shall summon a meeting of creditors of the company as soon as may be after the winding-up order has been granted by the court.

[27] The process of winding-up a corporation is carried out subject to the directions and with due consideration of the rights of interested parties since the winding up is done for their benefit. Such interested parties are the creditors whose interests, particularly in the case of a corporation which is unable to pay its debts, are of paramount importance, and its members. The CC Act makes provision for these groups of interested parties to be consulted and their directions to be obtained at meetings convened and held in the prescribed manner.[24]

[28] The first meeting of creditors and members is summoned for the purpose of considering the statement of affairs of the corporation lodged with the Master, proof of claims and deciding whether a co-liquidator should be appointed. If so, nominating a person or persons for appointment will proceed at the first meeting. The first meeting is furthermore convened to obtain directions or authorisations in respect of any matter regarding the liquidation process. The liquidator must also arrange a meeting of members of the corporation for purposes of considering the statement as to the affairs of the corporation.[25]

[29] Every member and manager of the corporation is obliged to attend the first and second meetings in the event of the corporation being wound-up, is unable to pay its debts. A member of the corporation is furthermore obliged to attend any subsequent or adjourned meeting of creditors which the liquidator has in writing required a member to attend.[26] The interested parties must therefore be consulted by the liquidator and their directions must be obtained at meetings to be convened and held in the prescribed manner. Unlike the

[24] Close Corporation Act, Section 78.
[25] Close corporation Act, Section 78(1) (b).
[26] Companies Act 61 of 1973, Section 414(1).

sequestration of an individual, which results in the assets vesting in the trustee, a corporation is not divested of its assets. A corporation continues to exist while being under the control of a liquidator.[27]

[30] Legislative interpretation is anchored in the intentions of the legislator and it is achieved by way of an examination of the text in which that intention is crystallized making use of a complex set of rules and guidelines.[28] The sequestrating, liquidating or administration of an insolvent estate, a company or a close corporation involve several procedures and steps which may at times inevitably lead to the failure to comply with one or more of these procedures or steps during the administration process. A party who failed to take some or other step or procedure in terms of the applicable act and who has committed some procedural breach or who has failed to act within the time stipulated has to establish whether what has been done or not done, is invalid by reason of the defect or irregularity.

[31] The Master may provide some assistance by granting condonation, but as in this case, the Master cannot act unless empowered to do so. The Master is a ‘creature of statute’ and as such only has the powers granted to him by the legislature.[29]

[32] The word “shall” and “must” generally indicate an “imperative, mandatory, obligatory, or peremptory” intention of the legislature. In **Feinberg v Pietermaritzburg Liquor Licensing Board**[30] the court confirmed that if a statutory command is couched in peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity.[31] When determining which of the two alternative constructions, whether a provision was peremptory or merely directory, is to be placed upon a statutory enactment, a court must seek to ascertain the real intention of the legislature,

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[27] Companies Act 61 of 1973, Section 361(1).
[28] Ferrar’s Estate v Commissioner for Inland Revenue 1926 TPD 501 at 508.
[29] The Master v Talmud 1960 (1) SA 236 (C) 237 -238.
[30] 1953 (4) SA 415 AD at 419 -420; see also Mostert v Munroe and Another 1965(1) SA 139 AD 201.
[31] 419 H.

and in so doing must have regard to the scope and object of the enactment as a whole.[32]

> "... In each case you must look to the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case on that aspect decide whether the matter is what is called imperative or only directory"[33]

CONCLUSION.

[33] The formalities to be complied with before a meeting of creditors and members of a corporation in liquidation is held, as set out in the Insolvency Act, in both the 1973 and 2008 Companies Acts and the CC Act, are peremptory. Notice of the first and second meeting, published in the Government Gazette and a newspaper circulating in the district, was not in accordance with the peremptory provisions of the applicable legislation. In **Leyds NO v Simon and Others**[34] the court held that there is nothing in the Insolvency Act to suggest that these formalities cannot be waived, condoned or acquiesced by everybody concerned.

[34] In the matter at hand the only member of Jonker Products avers that he did not receive the email notifying him of the meeting. There is no suggestion that he waived his right to be present at the meeting. He, through a letter by his attorney, in fact complained about the non-compliance with the provisions of the legislation.

[35] It is evident that the legislature intends every member of the corporation to attend the first and second meeting(s) of creditors as well as any subsequent or adjourned meeting of creditors which the liquidator has in writing required him or her to attend. For that purpose, the members of the close corporation are to be informed of the time, place and date of the said

[32] Maharajah and Others v Rampersad 1964 (4) SA 638 (AD) at 643.
[33] Leibrandt v South African Railways 1941 AD 9 at 13.
[34] 1964 (1) SA 377 (TPD) at 382 H – 383 A.

meetings. In **Cool Ideas 1186 CC v Hubbard and Another**[35] the interpretation of a certain section of the Housing Consumers Protection Measures Act 95 of 1998 was considered by the Constitutional Court. The court held that:

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

[36] The duty imposed on a member to attend the first and second meetings can only be fulfilled if notice of the meeting comes to the knowledge of the member(s). In this regard it may be expected by the member to anticipate notice of such a meeting within the period of one month from date of final winding-up of the corporation. The respondents' failure to comply with the provisions of section 78(1) of the CC Act cannot be regarded as a formal defect which can be condoned in terms of the provisions of section 157 of the Insolvency Act. That being the case and since the first applicant did not attend the first and second meetings held on 6 May 2021, did not waive the respondents' non-compliance with the provisions of the relevant section and as a matter of fact, obtained an interim order to prevent the postponed second meeting from proceeding, I am satisfied that the interim order should be confirmed.

[37] The scope and purpose of the CC Act, the Insolvency Act and relevant provisions of the 1973 Companies Act is that not only the creditors of Jonker Products be timeously notified of the meetings to be convened in accordance with section 78 (1) of the CC Act, but the relevant legislation also concerns the interests of the member of Jonker Products. The purpose is furthermore to encourage such member to attend the meetings, which he is obliged to attend, and therefore one is driven to the conclusion that failure to attend such meetings has or may have, caused prejudice.

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[35] 2014 (4) SA 474 (CC).

[38] On behalf of the liquidators it was argued that the applicant did not show that he was prejudiced by the lack of compliance with the requirements of the statute. Mr. Janse van Rensburg argued that the prejudice is caused by the delay in continuing with the winding-up of Jonker Products.

[39] It seems clear that the object of the requirement that the notice of the first meeting be published in the Government Gazette within a month after the final order was granted, is to inform interested parties that the corporation has been liquidated, to provide further protection to creditors and by invoking the machinery of the liquidation process to collect the assets of the corporation, preserve such assets, realize them and distribute the proceeds amongst creditors. All of these steps to commence as soon as possible after the final order of liquidation has been granted. The relevant legislation thus imposes a duty upon the liquidator(s) to take all the steps expeditiously to, where necessary, preserve the assets of the close corporation and furthermore, recover the debt owed to the close corporation as speedily as possible. In **Marshall Bros' Trustee v Transvaalsche Bank** 1907 T.S 1060 at p 1066 Innes, CJ held as follows:

> "The law contemplates the speedy realisation of the assets of the insolvent estate, and the payment of the claims of the creditors promptly and within a reasonable time."

[40] I have come to the conclusion that the only order that this court should grant is to confirm the rule *nisi* and to dismiss prayers 1.1, 1.2 and 1.3 of the counter application. The process pertaining to the convening of the first meeting should start afresh with proper notice and publication in accordance with the provisions of the relevant legislation.

[41] As to the costs, Mr Smit argued that if the main application is granted, the costs should be costs in the winding-up of Jonker Products. Regarding the counter-application, Mr Smit argued that the costs ought to be paid by the applicants, jointly and severally on the basis that their opposition thereof is unreasonable. Mr Janse van Rensburg requested that the rule *nisi* be

confirmed with costs on an attorney and client scale and that the counter application be dismissed with costs.

[42] In my view, the applicants are substantially successful in the main application and the normal order as to costs should follow. The relief prayed for by the liquidators in prayers 1-3 of their counter application should accordingly be dismissed. Appended to the heads of argument filed by the liquidators, is a draft order which may serve as the basis for the order, however with the further provision that the first and second meeting is to be convened within a month from the date of this order. In terms thereof the liquidators request leave to re-convene the first and second meeting of creditors and members before the first respondent and to publish a notice in accordance with the provisions of section 412 of the 1973 Act in the Government Gazette and a daily newspaper. The liquidators did not comply with the provisions of the relevant legislation and now, effectively applies for leave to grant them an indulgence. I can see no reason why Jonker Products should be mulct with costs.

[43] ORDER:

1. The rule nisi is confirmed.

2. Prayer 1, including 1.1, 1.2 and 1.3 of the counter application is dismissed.

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 member of Jonker Products CC (in liquidation), with Master's reference B102/2020 be conducted before the first respondent and the first meeting be convened within one month from the date of this order, on a date to be determined by the first respondent.

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 first respondent must ascertain the wishes of the creditors and member in accordance with the provisions of section 412 of the Companies Act 61 of 1973.

5. The second to fourth respondents are ordered, upon the sixth respondent providing a date for the meeting to be held before the first respondent, 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.

6. The costs (in respect of the main application and the counter application) shall be paid by the second, third and fourth respondents, the one paying the others to be absolved.

I VAN RHYN, AJ

I concur

C REINDERS, ADJP

On behalf of the Applicants: ADV. F.G.JANSE VAN RENSBURG
Instructed by: HENDRE CONRADIE ATTORNEYS

On behalf of the Second to fourth Respondents: ADV. J. E. SMIT
Instructed by: SYMINGTON DE KOK ATTORNEYS