

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Reportable

CASE NO: 111/2001

In the matter between:

NEDCOR BANK LTD	First Appellant
MURRAY AND ROBERTS CONSTRUCTION LTD	Second Appellant
GARY CHARLES HESS	Third Appellant
JAMES BYRNE	Fourth Appellant
TREVOR JOHN GRIFFITHS	Fifth Appellant

and

THE MASTER OF THE HIGH COURT, PRETORIA	First Respondent
ANTON VICTOR HAMMAN NO	Second Respondent
ANNA CATHERINA BASSON	Third Respondent
JOHANNES MARTHINUS BASSON	Fourth Respondent

Before:	HEFER AP, ZULMAN, BRAND & NUGENT JJA & LEWIS AJA
Heard:	16 MAY 2002
Delivered:	29 MAY 2002
Summary:	<i>Application of s 152 of Insolvency Act where Close Corporation placed under winding-up order</i>

JUD G M E N T

[1] Are the provisions of s 152 of the Insolvency Act 24 of 1936, which regulate the holding of a private enquiry in the administration of an insolvent's estate, applicable to close corporations in liquidation? This is the only question for decision in this appeal.

[2] Section 66 of the Close Corporations Act 69 of 1984 provides that the provisions of the Companies Act 61 of 1973 that govern the winding up of a company apply, appropriately adapted, to the liquidation of a close corporation in so far as any matter is not specifically governed by a provision of the Close Corporations Act. However, the section expressly excludes the application of certain provisions, including ss 417 and 418 of the Companies Act, which deal with confidential enquiries.

[3] In turn, s 339 of the Companies Act makes the law relating to insolvency, including of course the provisions of the Insolvency Act, applicable to the winding-up of a company unable to pay its debts. Section 152 of the Insolvency Act is, in effect, the equivalent provision governing the holding of a private enquiry into an insolvent's estate (see *Strauss & Others v The Master* 2001 (1) SA 649 (T) at 662C-D).

[4] Van der Merwe J in the court a quo held that s 152 of the Insolvency Act does apply in the winding up of a Close Corporation by virtue of the provisions of s 339 of the Companies Act. The learned judge relied in this regard on an unreported decision of Jordaan AJ in *Meintjies en 'n ander v*

Die Meester van die Hoogsgeregshof en 'n ander (Case 2827 of 1994). The essence of the decision in the court a quo is that because the Close Corporations Act is silent on the holding of a confidential enquiry, the law relating to insolvency, including s 152 of the Insolvency Act, applies by virtue of s 339 of the Companies Act.

[5] Commentary on the applicability of s 152 (2) to close corporations is divided: P M Meskin *Insolvency Law* para 8.1 states that a private enquiry under s 152 of the Insolvency Act obtains also to a close corporation (and see also para 8.5.3, where the author submits that the only private enquiry that may be held in the winding up of a close corporation is that under s 152 since the relevant provisions of the Companies Act are expressly excluded by s 66 of the Close Corporations Act). On the other hand, it is stated in *The Law of South Africa* (First re-issue) Vol 4, Part 3, para 564 that there is no provision for the holding of such an enquiry where a close corporation is wound up, given the exclusion of the operation of ss 417 and 418 of the Companies Act. (The authors do, however, acknowledge that there is persuasive argument to the contrary by A Bonnet (1992) 17 *TranCBL* 175.)

[6] The argument of the appellant before us was that ss 417 and 418 of the Companies Act are expressly made inapplicable to the winding up of

close corporations; s 152 of the Insolvency Act is the equivalent of those sections; s 339 of the Companies Act does not render s 152 applicable to companies because private enquiries are governed by ss 417 and 418; and that, therefore, s 152 is of no application to close corporations being wound up. This argument is said to follow the literal wording of the various statutory provisions traversed which do not expressly render s 152 applicable to close corporations. Moreover, contended counsel for the appellant, there was no reason for the legislature, in enacting the Close Corporations Act, to make the complex provisions of the Companies Act governing confidential enquiries applicable to a close corporation, which is a simpler entity.

[7] The purpose of the Close Corporations Act, the appellant submitted, was to provide for a simple, inexpensive and flexible corporate entity to which the complex provisions of the Companies Act need not apply. That may well be so. But it seems to me to entail the opposite conclusion on the means of obtaining information on the affairs of a close corporation being wound up. Counsel for the appellant could suggest no reason why a close corporation should be treated differently from an individual who is sequestered or from a company being wound up. In both those instances, provision is made for confidential enquiries. Assuming that the complexity of the procedures set out in ss 417 and 418 of the Companies Act is not warranted in respect of a close corporation, and for that reason the legislature excluded their application, it seems obvious that the simpler process entailed in s 152 enquiries, designed for individuals, should have been made applicable to close corporations.

[8] There is no reason, in my view, to exclude an enquiry of the sort contemplated by s 152 in the process of winding up a close corporation: if a private enquiry serves a useful purpose in the administration of an insolvent estate, or the winding up of a company, it must do so also in the winding up of a close corporation. In *Bernstein & Others v Bester & others NNO* 1996 (2) SA 751 (CC) para 16 Ackermann J discussed the objectives of ss 417 and 418 of the Companies Act and said, inter alia,

- ‘(e) It is only by conducting such enquiries that liquidators can
- (i) determine what the assets and who the creditors and contributories of the company are;
 - (ii) properly investigate doubtful claims against outsiders before pursuing them, as well as claims against the company before pursuing them.’

The same reasoning applies to close corporations. A less complex procedure would undoubtedly, however, be more appropriate.

[9] Accordingly, both on a literal interpretation of the various sections of the statutes regulating the winding up of corporate entities and of the sequestration of individuals, and on a purposive interpretation, I consider that s 152 of the Insolvency Act does apply to close corporations.

[10] The appeal is dismissed and the third and fourth respondents are ordered to pay the costs.

C H LEWIS

ACTING JUDGE OF APPEAL

HEFER AP	)	
ZULMAN JA	)	
BRAND JA	)	concur
NUGENT JA	)	