with all the panoply and after all the preparation and all the extra expense that goes with this procedure. Possibly that should be done by the Registrar, but in turning over the questions to which I have had to address my mind in this case, it occurred to me that a better way may very well be to ensure (and this obviously will have to be done legislatively) that the Supreme Court should not be used in any shape or form for debt collection. The way to do it is fairly simple. In those cases where summons must be issued in the Supreme Court, and where they concern debts or liquidated demands, that is those which properly fall within the category of pure debt collection in the case of ordinary credit transactions, and upon failure of the defendant to enter appearance (which confirms the fact it is a simple debt collecting case), such file could automatically be transferred to the local magistrate's court for judgment to be inscribed there and for all the specialised machinery which is there provided (and which might be improved upon legislatively) to be utilised for this purpose — be it by way of execution against property or any other form. This kind of provision would emphasise the true function of the Supreme Court as a Superior Court with original jurisdiction. To associate it with any form of debt collection is, I believe, a partial denial of this function. This suggestion, I would think, is something that at least deserves investigation, as it may contribute to a possible way out of the dilemma which is facing Supreme Courts these days, particularly this Local Division.

The applications in both cases (212 and 213) are dismissed.

Plaintiff's Attorneys: *Andrew & Lister Inc.*

mlwjlw-c

MAGNUM FINANCIAL HOLDINGS (PTY) LTD (IN LIQUIDATION) v SUMMERLY AND ANOTHER NNO

(WITWATERSRAND LOCAL DIVISION)

1982 *December* 22, 23 NESTADT J
1983 *August* 31 GORDON J

Insolvency—Persons liable to insolvency—A trust—Trust able to possess an estate and incur liabilities—Trust "a debtor in the usual sense of the word" within the meaning of those words in definition of "debtor" in s 2 of Act 24 of 1936—Not a "body corporate" within the meaning of that word in aforesaid definition and s 337 of Act 61 of 1973—Sequestration, and not liquidation, of trust the appropriate remedy.

A trust, whose trustees have the power to acquire and hold property, to borrow money, if necessary on mortgage, and to open and operate a bank account, the trust accordingly being enabled to possess an estate and incur liabilities, is "a debtor in the usual sense of the word" within the meaning of those words in the definition of "debtor" in s 2 of the Insolvency Act 24 of 1936. Furthermore, a trust is not a "body corporate" within the meaning of that word in such definition and in s 337 of the Companies Act 61 of 1973. Accordingly, such a trust is susceptible of sequestration; sequestration, and not liquidation, being the appropriate remedy in respect of a trust which has committed an act of insolvency (*in casu* an act of insolvency in terms of s 8 (*g*) of Act 24 of 1936).

Application for a provisional order of sequestration of the respondents in their capacities as the sole trustees of a trust. The facts appear from the reasons for judgment.

J I van Niekerk for the applicant.

No appearance for the respondents.

Cur adv vult.

Postea (23 December 1982).

NESTADT J: This is an unopposed application, brought as a matter of urgency, for a provisional sequestration order. The respondents are described as the sole trustees of the Summerly Family Trust and are sued in their capacities as such. It is the trust that is sought to be sequestrated.

I am satisfied that a case has been made out for the relief sought and, more particularly, that there has been sufficient service on the one trustee, that the one provisional liquidator of the applicant has *locus standi* to make this application, that the company in liquidation has a claim against the trust in the sum of about 1,6 million Rands which is presently due and payable, that an act of insolvency in terms of s 8 (*g*) of the Insolvency Act 24 of 1936 has been committed, that the estate of the trust is in any event insolvent and that it is to the advantage of the creditors that it be urgently sequestrated. The requisite security bond has been timeously furnished and is annexed to the papers.

The only problem that arises is whether it is competent in law to sequestrate the trust. It is one which was very properly raised by Mr *Van Niekerk*, on behalf of the applicant, and dealt with by him during the course of his helpful argument.

The effect of the Act, and more particularly s 9 (1) thereof, is that it is a "debtor" who can be sequestrated. Section 2 defines this word as follows:

" 'debtor', in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies".

Insofar as the point under consideration in the present matter is concerned, this section would not appear to have been dealt with in our case law. A similarly worded section in what was then Southern Rhodesia has, however, been judicially considered. This took place in *Ex parte Milton NO* 1959 (3) SA 347 (SR) in which it was held that it was competent for the Court to accept the surrender as insolvent of an administrative trust created by contract. The asset of the trust was certain immovable property. MURRAY CJ (QUENET J concurring) found it

unnecessary to inquire into, as the learned Judge put it, the debatable question of the precise juristic niche into which to place the type of trust in question and, more particularly, whether it possessed a legal personality. The Court's approach was that this was not an essential for sequestration or surrender; even if the trust did not, strictly speaking, possess a distict legal *persona,* it fell within the definition of "debtor", or at the very least could be described as a debtor "in the usual sense of the word". It could, through its trustee, borrow money and, as the owner of property, incur liability, *inter alia,* for rates and taxes. Creditors could look to the trust property alone for satisfaction of their claims. In the incurrence of debts on behalf of the trust, the trustee incurred no personal liability. It was impossible to secure a *concursus creditorum* by sequestrating the estate of either the donor or the beneficiaries or the personal estate of the trustee. Reference was made to, and reliance placed on, *Silverman* v *Silver Slipper Club* 1932 TPD 355 in which, approving and applying *Cassere* v *United Party Club* 1930 WLD 39, the Full Bench held that a club which is capable of holding property apart from its members, and whose members are not liable for its debts beyond the amount they owe for subscriptions, can be sequestrated under Act 32 of 1916. MURRAY CJ quoted the reasoning of GREENBERG J in this case, namely that a club could be sued and execution could be levied by attachment and, that being so, it would be illogical that sequestration, being a form of execution, should not be applicable. In *Cassere's* case this type of unincorporated body was found to be a "debtor" within the meaning of the definition thereof in Act 32 of 1916.

In my opinion *Ex parte Milton* is in point and should be followed. It is quoted with apparent approval by Mars *The Law of Insolvency in South Africa* 7th ed at 28; Smith *The Law of Insolvency* 2nd ed at 10 and Joubert *The Law of South Africa* vol II para 162. (See, too, "The Trust in SA Law" by H R Hahlo in 1961 *SALJ* 195 at 204-5.) The trust in the present matter is also one *inter vivos*. The deed, dated 14 November 1980, is annexed to the founding affidavit. The parties are the donor, two trustees and certain "primary beneficiaries" (being the wife and children of the donor). The trustees, in their capacities as such, are given the power, *inter alia,* to acquire and hold property, whether movable or immovable, corporeal or incorporeal, and to apply

"the nett income and/or capital of the trust . . . for the maintenance of any one or more of the primary beneficiaries, the donor and the donor's further descendants . . ."

An initial sum of R1 000 is given to them upon trust by the donor but it is provided that they may acquire further assets which are to be deemed to form part of the funds donated to them. The trustees may borrow money, if necessary on mortgage, and may open and operate a bank account. They are obliged to keep proper records and books of account reflecting their administration of the trust which may enter into contracts. The following clauses give protection to the personal position of the trustees.

"12.3 (*a*) No trustee shall be liable to make good to the trust or any beneficiary any loss occasioned or sustained by any cause, howsoever arising, except such loss as may arise from or be occasioned by his own personal dishonesty or other wilful misconduct.

(*c*) The trustees shall be indemnified out of the trust assets against all claims and demands of whatsoever nature that may be made upon them arising out of the exercise or purported exercise of any of the powers hereby conferred upon them."

Clearly then the trust as such is enabled to possess an estate and incur liabilities. That this has occurred, is apparent from the founding affidavit. It is alleged that the trust holds the entire issued share capital of the applicant as also shares in various other companies, together with other assets such as a yacht, aeroplane and motor car, and that it is indebted to the applicant in respect of monies lent and advanced to the trust. It is further stated that the trust has substantial other debts.

The trust is, in the result, so it seems to me, "a debtor in the usual sense of the word", and accordingly susceptible of sequestration — provided that it is not

"a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies".

This point was not specifically dealt with in *Ex parte Milton* but by implication it was decided that the trust there in issue was not liable to liquidation; and this despite MURRAY CJ's inclination to hold that it possessed, in certain respects, a *quasi*-personality.

What has to be determined is whether the trust is a body corporate. This is the only exclusionary category in the definition of "debtor" in the Insolvency Act into which it could fall. It has its counterpart in the Companies Act 61 of 1973. What may be wound up are companies. Section 337, however, for the purposes of winding-up proceedings, defines a company to include *inter alia* "any other body corporate". In neither Act is the term defined. It therefore bears its common law meaning, viz an association of individuals capable of holding property and of suing and being sued in its corporate name (*Lawclaims (Pty) Ltd* v *Rea Shipping Co SA: Schiffscommerz Aussenhandelsbetrieb der VVB Schiffbau Intervening* 1979 (4) SA 745 (N) at 751) or (according to Henochsberg *On the Companies Act* 3rd ed (*4th (Cumulative) Supplement*) at 113 *sv* "p 585") an *universitas*. The main characteristics of the latter are

"the capacity to acquire certain rights as apart from the rights of the individuals forming it, and perpetual succession"

(*per* KUPER J in *Malebjoe* v *Bantu Methodist Church of South Africa* 1957 (4) SA 465 (W) at 466).

I do not believe it necessary to enter upon what has been described as the vexing problem of whether a trust possesses legal personality (Honoré *The South African Law of Trusts* at 50). As stated by BEADLE CJ in *Ex parte Bircher* 1962 (2) SA 649 (SR) (in which *Ex parte Milton* is cited with apparent approval), the question is purely one of procedure as to which is the proper Act to employ. Accepting that in certain respects a trust does possess legal personality, I am of the opinion, applying *Ex parte Milton,* that it is insufficient to constitute it a body corporate within the meaning of this term as used in the sections of the Acts referred to. Consequently it could not be placed in liquidation. It follows that sequestration is the appropriate remedy.

Some, at least, of the beneficiaries are minors. I have therefore

considered whether they should have been represented in these proceedings by a *curator ad litem*. In my view, not. They would not have *locus standi*. The management of the trust is entirely in the hands of the trustees.

Service of the rule on creditors has been sought. This is unusual in the case of a provisional sequestration order, but it can do no harm.

There will be a provisional sequestration order returnable on 15 February 1983. In addition to the usual service and publications, there is to be service on all known creditors by registered post. The Master is requested to procure the appointment of a provisional trustee or trustees as a matter of urgency.

Postea (31 August 1983): The provisional order of sequestration was confirmed by GORDON J; there being no opposition thereto by the respondents.

Applicant's Attorneys: *Hofmeyr, Van der Merwe.*

SMIT v VAN DE WERKE NO EN ANDERE

(TRANSVAALSE PROVINSIALE AFDELING)

1983 *February* 15; *Augustus* 31 LE ROUX R

**Testament—Vertolking van—Trust geskep—Twee trustees benoem—Bepaling dat "daar sal te alle tye minstens twee eksekuteurs of trustees die amp beklee"—Bedanking van een trustee—Oorblywende trustee het alleen die mag van assumpsie uitgeoefen en 'n trustee aangestel—Geen reël in ons reg wat die mag van assumpsie aan 'n oorblywende trustee alleen laat toekom afgesien van die bepalings van die testament nie—Aanstelling deur oorblywende trustee ongeldig.*

Daar bestaan in ons reg geen reël wat die mag van assumpsie aan 'n oorblywende trustee (van 'n trust in 'n testament geskep) alleen laat toekom afgesien van die bepalings van die testament nie.

In 'n kodisil tot sy testament het die testateur die eerste respondente en ene G benoem as die trustees van 'n trust wat hy in sy testament geskep het. Hy

**Will—Interpretation of—Trust created—Two trustees nominated—Provision that "there shall at all times be at least two executors or trustees holding office"—One trustee resigning—Remaining trustee alone exercising power of assumption and appointing a trustee—No rule in our law conferring on a remaining trustee alone the power of assumption except in terms of the provisions of the will—Appointment by remaining trustee invalid.*

There is no rule in our law conferring the power of assumption on a remaining trustee alone (of a trust created in a will) except in terms of the provisions of the will.

In a codicil to his will the testator had nominated the first respondent and G as the trustees of a trust which he had created in his will. He had also made

het ook voorsiening gemaak in die bepalings van die testament vir die te tree. Die wee eksekutrustees verleen. Na die oorlye van die testateur het die eerste respondente en G as trustees opgetree, maar G het later as trustee bedank. Die bepalings van die testament in verband met die aanstelling van 'n trustee in die plek van G kon nie uitgevoer word nie. 'n Paar maande later het die eerste respondente alleen die mag van assumpsie uitgeoefen en die tweede respondent geassumeer as trustee. Die applikante, een van die testateur se kinders en 'n bevoordeelde van die trust, het toe aansoek gedoen om 'n bevel waarkragtens die aanstelling van die tweede respondent as 'n trustee ongeldig verklaar word.

Beslis, dat die bepaling dat "daar sal te alle tye minstens twee . . . trustees die amp beklee" beteken het dat twee trustees te alle tye gesamentlik moes handel in alle sake rakende die bedoel en die trust.

Beslis, verder, dat daar ander aanduidings in die testament was dat die assumpsie deur twee persone gesamentlik moes geskied.

Beslis, derhalwe, dat die tweede respondent se aanstelling as 'n trustee ongeldig was en dat die aangevraagde bevel toegestaan moes word.

Aansoek om 'n bevel waarvolgens die tweede respondent se aanstelling as 'n trustee van 'n testamentêre trust ongeldig verklaar word. Die feite blyk uit die uitspraak.

H Daniels SC namens die applikante.

D H van Zyl namens die eerste respondente.

Geen verskyning namens die tweede en derde respondente nie.

Cur adv vult.

Postea (Augustus 31).

LE ROUX R: Die applikante vra 'n bevel aan waarkragtens die aanstelling van die tweede respondent as 'n trustee in die boedel van wyle Johannes van de Werke ongeldig verklaar word. Daar is ook verdere bedes dat die derde respondent versoek word om die tweede respondent se aanstelling terug te trek en dat 'n tweede trustee, wat benoem word deur eerste respondent en die drie dogters van die oorledene

provision in the will for the appointment of a trustee in the event of a trustee ceasing to act. The will also provided that "there shall at all times be at least two executors or trustees holding office". A power of assumption was also conferred on the trustees. After the death of the testator the first respondent and G acted as trustees, but G later resigned as trustee. The provisions of the will in connection with the appointment of a trustee in the place of G could not be carried out. A few months later the first respondent alone exercised the power of assumption and assumed the second respondent as trustee. The applicant, one of the testator's children and a beneficiary under the trust, then applied for an order declaring the appointment of the second respondent to be invalid.

Held, that the provision that "there shall at all times be at least two . . . trustees holding office" meant that two trustees should at all times act jointly in all matters concerning the estate and the trust.

Held, further, that there were other indications in the will that the assumption had to be exercised jointly by two persons.

Held, accordingly, that the appointment of the second respondent as a trustee was invalid and that the order claimed had to be granted.