Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

Case No: 2067/2011

In the matter between:

ANNE ALETTA SUSANNA MELVILLE **APPLICANT**

And

MZUNGEZI NICHOLAS BUSANE **FIRST RESPONDENT**

EDNER MFUTHI BUSANE **SECOND RESPONDENT**

JUDGMENT

SCHOEMAN J.

1] This is an unopposed application for the winding up of the BRI Construction Trust (IT 1579/98) ("the trust") in terms of the Companies Act 71 of 2008 (the Act). The only issue is whether it is competent in law to liquidate a trust in terms of the Act.

Background

2] The trust performs telecommunication services for Telkom. That is its main source of income.

3] The applicant and the two respondents are trustees of the trust. The second respondent is the wife of the first respondent. The applicant holds 49% of the beneficial interest of the trust, while the two respondents hold 25.5% beneficial interest each. The trust is the only source of income of the applicant.

4] The basis of the application for the liquidation of the trust is that it is just and equitable to do so. The applicant does not know whether the trust is solvent or insolvent, but numerous creditors of the trust have taken action against her as surety for the debts of the trust. It has not been set out whether any of such creditors have been paid and what the amounts of the debts are. However, the bank statements of the trust attached to the application reflect a credit balance. Albeit, the last bank statement attached is that of January 2011, the last time the applicant had the opportunity to have access to the bank statements of the trust.

5] The main allegations why it is just and equitable to liquidate the trust are:

a) The applicant, a trustee and beneficiary under the trust, has been excluded from all the dealings of the trust; she has been prevented from entering the property of the trust from 2009 to the present; and she has no access to the books of account of the trust and since January 2011 has not had access to the bank statements.

b) The first respondent utilises the trust property and funds as if it is part of his personal estate in that he finances his family's lifestyle from the trust.

c) The first respondent transfers money from the trust to a close corporation known as Busane Medserve CC. The sole member of this close corporation is a certain Lindelani Busani, the son of the two respondents. There exists no reason for the transfer of the funds.

d) The respondents have in this way withdrawn an amount of R6 580 442.31 from the trust for the period April 2009 to January 2011.

6] During 2010 the respondents brought an application to have the applicant removed as trustee. She opposed the application and after her answering affidavit was filed, the respondents did not reply to the applicant's affidavit, but sought to withdraw the application. The respondents' application was dismissed with the respondents directed to pay the costs on the scale as between attorney and client.

The applicant's case

7] Mr *Ronaasen*, who appeared on behalf of the applicant, argued that a trust should now be liquidated in terms of the Act. His argument is that: (a) A trust is defined as a juristic person in the Act; (b) In Chapter 14 of the previous Companies Act, 61 of 1973 (the previous Act) the definition of a company includes a body corporate[1] (which is a juristic person); (c) Chapter 14 of the previous Act, dealing with winding-up of companies, has now been incorporated into the Act by way of section 9 of Schedule 5. This has the effect that a trust can be defined as a company in terms of the Act and should therefore be liquidated in terms of the new Act.

<u>The position of the trust.</u>

8] The common law does not recognise a trust as a juristic person, except where a particular statute so provides.[2] The previous Act did not define "juristic person" or "body corporate". In the Act, "juristic person" is defined to include a trust, irrespective of whether or not it was established within or outside the Republic.[3] There is no definition of "body corporate".

9] The trust deed in the instant matter provides that the trust may

1 S 337 of the previous Act.
2 Honoré's South African Law of Trusts 5th Ed page 9-11.
3 S 1 of the Act.

be terminated if there is a resolution to that effect by the trustees. There was no such resolution.

10]In the event of a trust's insolvency, while the previous Act was in operation, the appropriate remedy was to sequestrate a trust. The reason for this is apparent in the judgment of *Magnum Financial Holdings v Summerly NO*[4] where it was found that a trust fell within the definition of a "debtor" as set out in Section 2 of the Insolvency Act, 24 of 1936. In the Insolvency Act "debtor" is defined 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".

It was found that a trust was "a debtor in the usual sense of the word". Furthermore, it was not a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies. Therefore it was found that sequestration is the appropriate remedy.

<u>The relevant legislative provisions.</u>

11]A company is defined[5] as:

4 1984(1) SA 160 (W)
5 S 1 of the Act.

"a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date—

(a) was registered in terms of the –

i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or

ii) Close Corporations Act, 1984, if it has subsequently been converted in terms of Schedule 2;

(b) was in existence and recognised as an "existing company" in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;"

12]It is clear that a trust cannot be defined as a company, although it is a juristic person in terms of the Act.

13]Section 9 of Schedule 5 of the Act determines as follows:

"Continued application of previous Act to winding-up and liquidation. ---

1) Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).
2) Despite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provisions of this Act prevails.

14]In Chapter 14 of the previous Act a company is defined to include "a company, external company and any other body corporate."[6]

15]Because a debtor is defined in s 2 of the Insolvency Act, 24 of 1936 to exclude "a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to companies" the argument is that as a trust is now defined as a juristic person, which is a body corporate, it may be placed in liquidation. Therefore, a trust may not be sequestrated, and the liquidation of the trust is the correct procedure.

16]This argument loses sight of the fact that s 9 of Schedule 5 determines that Chapter 14 of the previous Act "continues to apply with respect to the winding-up of and liquidation <u>of companies under this Act</u>…." (*my emphasis).* As is evident from the definition of "company" as set out supra, a trust is not covered by the definition of a company under the Act for it is not a juristic person incorporated in terms of the Act. Therefore the Act cannot be applied to wind-up or liquidate the trust.

17]I am of the view that if the trust has committed a deed of

6 S 337 of the previous Act.

insolvency, or is insolvent, the appropriate remedy remains the sequestration of the trust. If the trust is not insolvent, a trustee could be removed if the court is satisfied that such removal will be in the interest of the trust and its beneficiaries. [7]

18]The application is dismissed.

Irma Schoeman.

(Judge of the High Court)

Counsel for Applicant: Adv OH Ronaasen
Counsel for Respondents: None

Heard on 26 July 2011
Delivered on 18 August 2011.

7Ss 20 (1) and 9 of the Trust Property Control Act, 57 of 1988; *Tijmstra NO v Blunt-Mackenzie NO and Others* 2002 (1) SA 459 (T).