IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 11641/2015

In the matter between:

Lambertus Von Wielligh Bester N.O.	First Plaintiff
Reinette Pieters N.O.	Second Plaintiff
Barend Pietersen N.O.	Third Plaintiff
(Acting in their capacity as joint trustees of the sequestrated estate of the RVAF Trust IT 932/2004)	

And

Gertruida Johanna Horn	First Defendant
And various other Defendants forming part of the consolidated action	

JUDGMENT ELECTRONICALLY DELIVERED

5 OCTOBER 2022

Baartman, J

[1] The plaintiffs and the defendants[1] seek competing orders for the separation of issues[2]. However, each contend that the others' request, if granted, would delay rather than expedite finalisation of the trial. The defendants brought the main application and the plaintiffs the counter application. I deal with both below.

[2] It is common cause that the late Herman Pretorius (**Pretorius**), assisted by brokers, solicited investments from members of the public by promising exceptional returns on their investment. The public, in large numbers, invested in excess of R200 million in the scheme that is now believed to have been a Ponzi scheme. The scheme collapsed when Pretorius committed suicide.

[3] The defendants in this action are investors who have received a return on their investment in the scheme. Their funds were invested in the RVAF Trust[3] (**the Trust**), the entity in the scheme through which Pretorius invested their money. The Trust was provisionally sequestrated on 1 August 2012, and on 3 September 2012 a final sequestration order was granted. The plaintiffs were appointed as provisional trustees on 7 August 2012 and as final trustees on

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[1] In terms of a court order, dated 5 November 2018, and a directive, dated 18 November 2021, approximately 466 defendants, against whom the plaintiffs had instituted actions in the various magistrates' court, were transferred to this court and consolidated.
[2] Rule 37(A) (12)(*f*) read with Rule 33(4) of the Uniform Rules of Court: Rule (12): 'The case management judge may at a case management conference –
...(f) order a separation of issues in appropriate cases notwithstanding the absence of agreement by the parties thereto;...'
Rule 33(4): 'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'
[3]The RVAF Trust, with ref.NO. IT932/2004, was established on 26 March 2004. Pretorius and Eduard Brand were trustees. It is common cause that the Trust deed provided for a minimum of three trustees who had to act jointly in all events.

23 October 2012. The plaintiffs seek to recover from the defendants the profit they received from the Trust over and above their investment. The Trust had approximately 9 000 investors; the plaintiffs therefore had to determine who the "winners" had been and institute action against them to recover their winnings.

[4] The plaintiffs based their main claim, for the return of money paid from the Trust's bank accounts to the defendants, in excess of the amount invested on unjustified enrichment. They allege that the payments were unauthorised and *sine causa* in that:

(a) the Trust lacked capacity to make the payments as at times of the payments, there were only two trustees, Pretorius and Mr Brand (**Brand**), holding office while the trust deed specified a minimum of three trustees;

(b) Pretorius acted unilaterally as the Trust's controlling mind to the exclusion of Brand;

(c) the two trustees failed to exercise their powers in accordance with the Trust deed;

(d) the payments made to the defendants were made pursuant to an unlawful and fraudulent Ponzi scheme operated through the Trust.

[5] Alternatively, the plaintiffs based their claim for return of the payments on sections 26(1)(*a*) and (*b*) and/or section 29 of the Insolvency Act, 24 of 1936 (i.e., dispositions without value and voidable preferences).

The first prescription issue

[6] The 462 defendants alleged that separating their prescription issue (**the first prescription issue**) and staying the rest of the trial would be

convenient for the court and the parties[4]. These defendants allege that on 7 August 2012, the plaintiffs had access to all the relevant information to have instituted action against them, in that, on that date, the plaintiffs, as the provisional trustees, had access to the Trust's property where separate hard copy investor files containing relevant information pertaining to potential claims against them were kept. On the same date, the Master of the High Court also authorised the plaintiffs to appoint attorneys to provide legal advice[5]. The defendants allege that the plaintiffs prioritised other matters thereby delaying the action against them and therefore the claims against them had prescribed. It is common cause that action was instituted more than 3 years after 7 August 2012.

[7] The defendants rely, to a great extent, on the Bester[6] judgment in which the brokers who assisted Pretorius had the prescription issue separated and obtained judgment in their favour, which relief the Supreme Court of Appeal (**SCA**) upheld, and the Constitutional Court refused to entertain a further appeal. In Bester, the court held as follows:

> '[40] In terms of s 12(1) of the Prescription Act, prescription begins to run as soon as the debt is due. A debt is due when it is immediately claimable or recoverable. If the debtor has knowledge of the identity of the debtor and of the facts from which the debt arises, the debt is deemed to be due, as by that stage, the creditor acquires a complete cause of action for the recovery of the debt. In terms of s 12(3) of the Prescription Act, the creditor is deemed to have knowledge of the identity of the debtor and of the facts from which the debt arises if it could have been acquired by the exercise of reasonable care.' (Internal footnote omitted)

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[4] *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA).
[5] Section 18(2) of the Insolvency Act, 24 of 1936.
[6] *Bester and Others NNO v Gouws and Others* (851/2019) [2020] ZASCA 174.

[8] It is necessary to deal with the Bester judgment in some detail. On 23 August 2018, the court separated[7] the following issues:

'1. The question whether the plaintiffs' claims for the repayment of commission received by the defendants earlier than 31 July 2009, on the grounds...have prescribed in terms of the Prescription Act 68 of 1969, is to be separately determined in terms of Rule 33(4).

2. The question whether claims in respect of payment made after 31 July 2009, together with plaintiff's claims under Section 26 of the Insolvency Act for the repayment of commission earned /received by the defendants, ...have prescribed in terms of the Prescription Act 68 of 1968, is also to be separately determined from all other remaining issues in terms of Rule 33(4).

3. The two questions are to be determined jointly...'

[9] The SCA confirmed the trial court's factual findings and held that the following were common cause:

'[17] It is common cause, or cannot reasonably be disputed, that the appellants [plaintiffs in this application] knew prior to 23 October 2012 that:

(a) the trust deed required three trustees;

(b) only two trustees had been issued with letters of authority;

(c) Mr Pretorius was the controlling mind of the Trust and took all decisions to the exclusion of his co-trustee, Mr Brand;

(d) the trustees had not exercised their powers according to the trust deed;

(e) the investment scheme was a fraudulent Ponzi scheme;

(f) the Trust was insolvent from inception;

(g) the scheme was dependant, in part, on the participation of various brokers/intermediaries, who had introduced their clients to the scheme and had been paid commissions therefor.'

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[7] *Lambertus Von Weilligh Bester N.O. v Anton Gouws and 10 Others*, Case No. 21057/2015 delivered on 23 August 2018 per Gamble J.

[10] In respect of the brokers, the defendants in the matter, the following was accepted:

'...[the trustees] obtained the necessary power to institute proceedings in terms of the s 18(3) court order on 17 August 2012....[the trustees] had, or could reasonably have had, the requisite knowledge to institute action against the respondents by 23 October 2012.'

[11] The latter finding was based on the following evidence:

'[23] The [trustees] had access to the Group premises from 8 August 2012. They soon became aware that the files, relating to the brokers and the commissions earned by them, were kept by Ms Monica Goodman in a cabinet behind her desk in the reception area at the Group premises. There were some documents relating to the brokers which had been archived in boxes which were kept in a room behind the reception area.

[24] When the appellants began their investigations on 8 August 2012, they were assisted by employees of the Trust and/or the Group. Mr Brand, as a co-trustee, (although apparently not involved in the fraudulent conduct of the scheme) was aware of the scheme and the parties who were involved in it, including the brokers. On 12 August 2012, the services of [the] majority of the staff of the Trust were terminated save for Mr Brand, Ms Swart (who was Mr Pretorius' personal assistant), Ms Swanepoel, and Ms Goodman. Ms Goodman remained at the Group's premises until 17 August 2012.'

[12] The evidence, which the trial court accepted and the SCA upheld, was as follows:

'[33] Mr Janse van Vuuren (the tenth respondent) and Ms Goodman testified...Mr Janse van Vuuren's evidence was that he would get commission statements every month from the Trust. Ms Goodman dealt with all broker related enquiries and Mr Brand dealt with the situation when claw-back payments were deducted. From Mr Janse van Vuuren's evidence, it is clear that his file contained a commission statement, a cheque and deposit slip for every entry on Annexure "E" to the particulars of claim, save for one.

[34] Ms Goodman took over the responsibility of maintaining the brokers' files from November 2008. She testified that if anyone needed to know how much commission any broker received, they only needed to look at the broker files or the archive files containing historic information. The documents contained in the files relating to each broker included one or more

of the following: a deposit slip, a cheque, and/or a commission statement to evidence each payment made to the particular broker. She and/or Mr Brand and/or the other employees of the Trust, could have assisted the [trustees] to find any documentation required. The [trustees] did not seek Ms Goodman's assistance in this regard – either whilst she was at the Group's premises in August 2012, or when she returned to work for them in February 2013.

[35] Mr Bester [one of the trustees] ...confirmed that the investigation into the 37 brokers' files was not an insurmountable task, and when undertaken, it took a relatively short time to be completed. Mr Bester knew from the outset that the Trust had used brokers to procure the investments. He conceded that whilst examining the bank statements for inter-group transactions in August 2012, the auditors could simultaneously have accessed the payments made to the brokers.

[36] Mr Bezuidenhout, the auditor appointed by the [trustees]...conceded further that he could have compiled a schedule, similar to that attached to the particulars of claim...from the documents in the broker files without a forensic investigation. In the case of Mr Janse van Vuuren, it would have taken him approximately two hours to do.

[37] Mr Brand was fully aware of where the brokers' files were kept and that they contained the details of the brokers and the commissions paid to them. He knew many of the brokers personally and had their email addresses. If asked, he could have pointed out the brokers' files and the archived files. He stated that he would have been able to trace all the brokers quite easily – if he would have been asked.' (Internal footnotes omitted.)

[13] The evidence indicated that a small number of files, readily available, contained all the information the trustees needed to institute action against the brokers. In addition, the co-trustee, Brand, and the clerk, Ms Goodman, were at hand and could have attended to any queries. Therein, so the submission went, lies the difference between the brokers' files and 9 000 investors' files. The trustees needed to determine the winners, as they had claims only against them and that involved a far more onerous task than the brokers' investigation. The available investor files, so the submission went, did not in all instances contain the identity of the investor, e.g., some trusts were only identified by name. In those cases, it was necessary to approach the

Master of the High Court for the trust information. Bank statements were necessary to do a reconciliation.

[14] Mr van der Merwe SC, the plaintiffs' counsel who appeared with Ms Wharton, submitted with some vigour that there could be no suggestion that Brand carried 9 000 investors' details in his head. Although, the investor files were available to the defendants, there was no agreement in respect of their content. The defendants assert that the files contained all the relevant information from which the plaintiffs could have determined the identity of the debtors and the facts from which the debt arose and stressed that the plaintiffs had had 3 years to obtain any outstanding information.

[15] It is realistic to envisage that the issue sought to be separated would require detailed evidence in respect of approximately 400 files. Similarly, there is a dispute about the content of the electronic database on the Trust's premises when the plaintiffs first gained access to the premises. Apparently, expert evidence will have to be led in this regard. The plaintiffs allege that the forensic investigation from which it could determine the information necessary to institute action in respect of defendants in these proceedings was only completed in November 2016. Evidence will have to be led in this respect. The merits of this special plea of prescription are linked to the merits of the plaintiffs' claim. That evidence will have to be led in the separated trial and again in the main trial. That is highly undesirable.

[16] It is clear that it will be in issue, in the trial or separate hearing, whether the content of the investors' files, similar to the brokers' files, contained sufficient information for prescription to have started to run. In the brokers' separated trial, several witnesses had to testify over many days. However, that concluded the trial against the brokers and therefore it was convenient for both the court and the parties. It is in issue whether the same will happen in respect of the investors. An obvious difference is that the plaintiffs have claims only against

investors who made a profit, so the reconciliation undertaken by the forensic auditor was, on the face of it, necessary. The defendants allege, based on the brokers' success, that they hold good prospects of success in a separated prescription hearing. There are, however, material differences between the defendants' case and the brokers' case. The plaintiffs allege that the investors' files contained 'incomplete...fake and fraudulent calculations...' Therefore, the forensic analysis undertaken was necessary.

[17] Mr Stelzner SC who appeared with Mr Rabie, the defendants' counsel, submitted that the first prescription issue would resolve the trial in respect of approximately 90% of the defendants. The plaintiffs strenuously deny that submission. If the separation is granted the main trial would have to await the outcome of the appeal process. In this regard, the plaintiffs raised the valid concern that some witnesses are elderly, memory fades with time and some witnesses will have to testify in multiple hearings. A single hearing is an advantage of consolidation which ordinarily promotes expeditious disposal of a matter. Mlambo JA[8] cautioned, however, against ill-conceived separation of issues as follows:

> '[27] In the present case, in spite of the separation of the issues as sanctioned by the trial Court in terms of Rule 33(4), almost all causes of action and defences are still open to the parties. The underlying dispute (between the parties) has yet to be determined. ...Neither counsel could deny that all the litigation thus far has not resulted in the expeditious disposal thereof despite the fact that it has now gone through three Courts at monumental cost, no doubt, to the litigants. I refer to this scenario simply to voice our disquiet at yet another manifestation of a failure to ensure that a separation of issues in terms of Rule 33(4) has the potential to curtail litigation expeditiously. Courts should not shirk their duty to ensure that at all times, when approached to separate issues, there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of litigation.'

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[8] *Privest , footnote 4 above.*

[18] The defendants have indicated that they would, for purposes of the prescription hearing, concede that the scheme was a Ponzi scheme. However, should the prescription defence fail, that would be a dispute in the trial. Mr van der Merwe submitted that the matter was trial ready and that I should certify it as such. The defendants' counsel denied that the matter was trial ready and listed the outstanding issues before the matter could be declared trial ready. The Trust was liquidated in 2012 so it is necessary to finalise its affairs. On 22 January 2020, the parties requested that a judge be appointed to case manage the matter; still the matter is not trial ready. It is of concern that at this late stage, the defendants have incomplete expert reports. The prospect of running the consolidated matter in stages appears to be the reason for this.

[19] I am not persuaded that the separation of the prescription issue would necessarily expedite the process; on the contrary, it might prolong the agony of those with claims against the Trust as approximately 9 000 persons and entities invested roughly R2 billion[9]. I accept that there might be a saving of many days of evidence, but the separation will inevitably delay the finalisation of the main trial. It is realistic to accept that it would take a few years to finalise the separated hearing

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[9] *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 (4) SA 466 (C): '[9] ...I dismissed the Rule 33(4) application...
[10] The Rule enjoins the Court to accede to the application and make the necessary order "unless it appears that the questions cannot conveniently be decided separately". It is incumbent on the applicant to satisfy the Court that the application be granted. Convenience must be demonstrated and the Court must have sufficient information to enable it to decide meaningfully upon the application. It has been held that 'convenient' connotes not only "facility or ease or expedience", but also "appropriateness" in the sense that the procedure would be convenient if, in all the circumstances of the case, it appeared to be fitting, and fair to the parties concerned ...The convenience of all concerned must be taken into consideration by the Court. Thus clearly where evidence is such that it would substantially overlap, no purpose would be served in granting the application to separate issues. While no doubt it might be convenient to the applicant to grant the application, surely it would be inconvenient to the other party and the Court. The hearing could be unduly protracted. It is, after all, in the interests of justice that litigation must be finalised without inordinate delay. Such interests are better served by the disposal of the whole matter in one hearing...'

including all appeals. In the circumstances of this matter, where appeals are already foreshadowed, that outcome does not promote the expeditious finalisation of the main trial and would cause inconvenience to some of the parties and the court[10]. It follows that it is not convenient to separate the first prescription issue.

The second special plea of prescription

[20] The plaintiffs claimed repayment of amounts paid to investors before 1 August 2009, more than 3 years prior to their appointment as the Trust's trustees. The affected investors want to raise prescription as a special plea to be dealt with in a separate hearing. It is common cause that the Trust at times relevant to the dispute had only two appointed trustees, while the trust deed prescribed a minimum of three trustees. Therefore, the Trust could not have authorised any payment.

[21] The defendants allege that the trustees, appointed to represent the Trust and its creditors, cannot institute action to recover amounts paid out more than 3 years after payment. The defendants allege that Brand could have instituted action timeously for the recovery of the amounts paid out. He, so the submission went, had the necessary knowledge and *locus standi* and further that any Trust beneficiary had the required *locus standi*.

[22] The defendants concede that Brand's evidence 'may be relevant...as the sole surviving trustee of the RVAF trust' but importantly that he had already testified in the brokers' matter and that a transcript of his evidence is available. Brand is an elderly man who, if possible, should not have to testify about the same facts in multiple proceedings.

[23] However, in a further "Defendants' Note", the following is alleged:

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[10] *Minister of Agriculture v Tongaat Group Ltd* 1976 (2) SA 537 (D) at p363 D-G.

'73. No evidence will have to be led for the second special plea of prescription, the lack of jurisdiction and the Administration of Estates special pleas as these special pleas can be decided by way of a stated case.'

[24] However, in the same note, it is alleged that: '106...Brand in particular [had] the necessary knowledge of the alleged facts'. As indicated above, it is in dispute whether Brand had the necessary knowledge in respect of the investors. Brand's knowledge of the brokers' files cannot simply be equated with knowledge of the investors' files. Brand's knowledge in respect of the investors' files is in dispute and would require evidence to be led. Nugent JA[11] held that:

'[3] ...Rule 33(4) ...which entitles a Court to try issues separately in appropriate circumstances - is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately....'

[25] I agree with the defendants that 'the second prescription plea is eminently arguable'. However, it does not follow that it is therefore convenient to separate the issue as alleged. There are other considerations, such as that the second prescription plea is raised only in respect of the plaintiffs' claims based on unjustified enrichment. Further, it relates only to a portion of the claims against certain defendants. The plaintiffs further replicated that Pretorius operated a fraudulent investment scheme through the Trust. The plaintiffs deny

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[11] Denel (Edms) Bpk v Voster 2004 (4) SA 481 (SCA).

that the knowledge of Pretorius, the Trust's controlling mind, can be ascribed to the Trust. An appeal against the prescription pleas is already foreshadowed. In the brokers' matter, the appeal process was carried through to the Constitutional Court, which refused to entertain the matter.

[26] The main trial will be delayed which will adversely affect those defendants who have not raised prescription. It must be borne in mind that Brand, as the only remaining trustee and an important witness in the main trial, has already testified. The defendants' counsel submitted that the special pleas were capable of being determined expeditiously by means of admitted common cause facts or with limited evidence. The facts suggest otherwise, the parties are far apart and evidence will have to be led. The court granting separation cannot direct the evidence to be led in respect of the separated issues[12].

[27] If the divergent submissions made in this application are anything to go by, considerable evidence will be led that will have to be repeated should the special pleas fail. The defendants also envisaged that the case management judge 'and the trial judge (at least in respect of separated issues) shall be the same person'. Presumably, the separated issues would then be heard expeditiously instead of waiting their turn on the opposed role. It is not convenient to the plaintiffs and some defendants nor to the proper administration of justice to separate the prescription pleas as the defendants have requested.

The jurisdiction special plea

[28] The jurisdiction special plea is raised in respect of a small number of defendants. The parties are in agreement that this special plea could be dealt with as a discrete question of law on agreed facts. The plaintiffs alleged that it should be dealt with as a point *in limine* at the

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[12] *Van der Burgh v Guardian National Insurance Co Ltd* 1997 (2) SA 187 (E) at 189J.

main trial, while the defendants wanted the issue dealt with together with the prescription special pleas referred to above. I do not intend to separate the prescription special pleas, and as the parties are agreed that a separate hearing on this issue is not warranted and it involves a small number of defendants, this application must fail.

The Administration of Estates Act special plea

[29] The Administration of Estates Act special plea is also only raised in respect of a small number of defendants. It is common cause that it can be dealt with as a question of law on agreed common cause facts. The defendants envisaged the issue to be dealt with together with the prescription special pleas. The plaintiffs contended that the issue should be dealt with as a point *in limine* at the trial. It is not appropriate to direct the order in which the trial court should deal with issues. The issue is best left to the discretion of the court seized with the trial.

[30] I intend to refuse the defendants' application for separation.

The plaintiffs' separation application

The in rem res judicata point

[31] The plaintiffs allege that the Trust 'suffered from an incapacity that precluded it from performing binding acts'. The Trust deed requires a minimum of 3 trustees to be appointed, however, the Master of the High Court only appointed 2 trustees. This is common cause and was the position at times relevant to these proceedings. The plaintiffs allege that two judgments[13] in this division pronounced on the Trust's incapacity, therefore, so the submission went, the Trust's status has

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[13] *M.Calitz and Three Others v Bester NO and Five Others* Case NO. A505/14; *Bester NO and Two Others v A. Pretorius* Case NO 9772/14.

been finally adjudicated upon by courts of competent jurisdiction. The defendants deny that the decisions are binding on them.

[32] Saldanha J, in the Bester matter, delivered after the full bench judgment in the Calitz matter, concluded as follows:

'[4] At the outset it is perhaps appropriate to indicate that a similar application was brought against a broker...Mr Michael Johannes Calitz on the same basis by the applicants...in which similar defences were raised by Calitz in those proceedings...

[44] The claims advanced by the RVAF Trust on the basis of the *condictio sine causa specialis* are premised on two fundamental principles relating to trusts...Cameron JA in the matter of *Land and Agricultural Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA):

"[11] It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.

[12] This is not to say that the trust ceases to exist. ...It is axiomatic that the trust obligation exists even when there is no trustee to carry it out. The Court or the Master will where necessary appoint a trustee to perform the trust. But it does not follow that a sub-minimum of trustees can bind a trust."

[45] The second principle is that in the absence of authorization in the trust deed, the trustees must act jointly in order to bind the trust...

[46] As to the first requirement it was common cause that at no stage during the existence of the RVAF trust were three trustees appointed as required...

[47] As to the second requirement Brand had confirmed in his evidence at the insolvency inquiries as well as his sworn affidavit...Pretorius did not act jointly with him. ...Brand had also claimed that he had never been given access to the bank accounts or any financial statements of the trust. ...

In my view the respondents challenge to the assertions of Brand as constituting a dispute of fact was equally without merit and there is no basis to reject as did Blignault J and Schippers J *et al,* Brand's version that Pretorius had acted alone and had therefore not bound the RVAF Trust in the making of the payments to the respondent.

...

[52] In my view based on the evidence in this matter and supported by the principles upheld by the judgment of Blignault J and that of Schipper J in the full bench, that the most natural and logical conclusion to be drawn from the facts is that the payments made by Pretorius to the respondent from the RVAF Trust were *sine causa* and fall to be repaid.

...

[58] ...any such payments made from funds solicited from the general public was pursuant to an illegal investment scheme...'(Internal footnotes omitted.)

[33] Although they hold good prospects of success, they do not seek that the issue be dealt with separately; instead, they submit it can be dealt with as a point *in limine* at the trial. I agree, although the trial court will decide the process to be followed.

Conclusion

[34] There are issues that can be separated; however, I am not persuaded that it would be convenient to do so in the circumstances of this matter. The two special pleas of prescription, if separated, would cause substantial delay in the finalisation of the main trial. Irrespective of the outcome of the special plea hearing, appeal proceedings would follow; that much was common cause between the parties. Meanwhile, the main trial will be stayed. The convenience to the affected defendants is obvious, it would, however, cause severe inconvenience to the plaintiffs, as the possibility of witnesses becoming unavailable is a reality. Brand has been testifying since 2013 in insolvency inquiries and has attested to affidavits even before that. As indicated above, he also testified in the brokers' matter. He is also the only surviving trustee and thus an important witness who is elderly, which makes fading memory a reality.

[35] The delay in this matter will add to rather than alleviate the already congested court rolls. As indicated above, 466 matters have been consolidated in this action; presumably each litigant saw some benefit

in that strategy. The papers in this application were voluminous and argument took up a full court day, despite my best efforts.

[36] The defendants are intent on obtaining further expert reports on completion of the prescription hearing and resulting appeals. This piecemeal approach has already affected the case management process; therefore, the matter is still not trial ready. It follows that if the prescription pleas fail, the matter will be further delayed to obtain those reports, among others. That is an undesirable and inconvenient outcome.

Costs

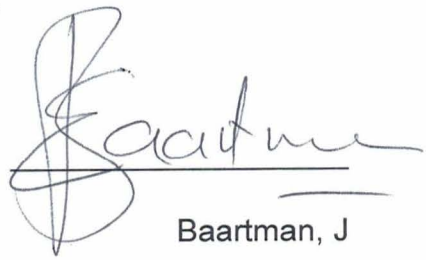
[37] I intend to refuse the defendants' application. The plaintiffs' application for a single trial succeeds even though I am not prepared to direct the course of the trial. That is the prerogative of the trial judge. I intend to grant the plaintiffs' costs.

Order

[38] I, for the reasons stated above, make the following order:

(a) The defendants' application is dismissed with costs, including the costs of two counsel.

(b) The plaintiffs' application, for a single hearing, is granted with costs, including the costs of two counsel.



Baartman, J