IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 15426/2021

Read with case no: 19201/2020

In the matter between:

HERMAN BESTER NO	First Applicant
ADRIAAN WILLEM VAN ROOYEN NO	Second Applicant
CHRISTOPHER JAMES ROOS NO	Third Applicant
JACOLIEN FRIEDA BARNARD NO	Fourth Applicant
DEIDRE BASSON NO	Fifth Applicant
CHAVONNES BADENHORST ST CLAIR COOPER NO	Sixth Applicant

In their capacities as the duly appointed joint liquidators of Mirror Trading International (Pty) Ltd (in liquidation)

and

MIRROR TRADING INTERNATIONAL (PTY) LTD (in liquidation) t/a MTI	First Respondent
CLYNTON HUGH MARKS	Second Respondent
HENRI ROBERT HONIBALL	Third Respondent
CECIL JOHN JACOB ROWE	Fourth Respondent

ALL MEMBERS/INVESTORS OF MIRROR TRADING INTERNATIONAL (PTY) LTD (IN LIQUIDATION) Fifth Respondent

FINANCIAL SECTOR CONDUCT AUTHORITY (FSCA) Sixth Respondent

JUDGMENT: LEAVE TO APPEAL

DE WET, AJ:

[1] The applicant (second respondent in the main application)[1], applies for leave to appeal against orders 1, 2, 4, 5, 6 and 7 of the judgment handed down on 26 April 2023, to the Supreme Court of Appeal and further that these orders be substituted with the following:

1.1 referring the question of fact and/or law whether the business model of Mirror Trading International (Pty) Ltd ("MTI") is an unlawful and illegal scheme, to trial or for oral evidence; and

1.2 referring the question of fact and/or law whether all contracts between MTI and its investor are unlawful and void *ab initio,* to trial or for oral evidence; and

1.3 referring the counter application of the second respondent to trial or for oral evidence.

[2] The main complaints raised by the second respondent against the orders made by this court, can be summarised as:

[1] For ease of reference, I shall refer to the applicant as the second respondent herein and to the applicants in the main application as the liquidators.

2.1 the court erred in granting the declaratory relief contained in orders 1 and 2 of the judgment, as the matter "was beset with material disputes of fact";

2.2 due to the disputes of fact, a final order was not justified and the robust approach allegedly taken by this court amounts to a misdirection;

2.3 the court erred in finding that no non-disclosures were made in the *ex parte* liquidation application;

2.4 the court erred in finding that the respondents had no personal knowledge concerning the operation and management of the affairs of MTI;

2.5 the court erred in finding that crypto currency is movable property for purposes of s 2 of the Insolvency Act and that "crypto assets" or "digital rights" forms part of the definition of property;

2.6 the court erred in finding it (and the FSCA) has jurisdiction to interrogate transactions conducted through the use of crypto assets;

2.7 the court erred in placing reliance on the MTI terms and conditions in paragraph 57 of the judgment whilst later finding it to be void *ab initio;*

2.8 the court erred in finding that Newman received an email from Stephenson whilst he stated in his affidavit that he did not believe it was Stephenson;

2.9 the court erred in finding that the contracts between MTI and its members are illegal and void *ab initio* as this finding results in the court not having jurisdiction (be it over foreign investors or in general).

[3] At the hearing of the application for leave to appeal, counsel for the second respondent raised, and heavily relied on, further grounds of appeal which are based on s 21(1)(c) of the Superior Courts Act, 10 of 2013 ("the Superior Courts Act"), which were not raised as a ground of appeal in the notice of application. As rule 49(1)(b) of the Uniform Rules of Court is peremptory, the second respondent, with the consent of the liquidators, was granted leave to file an amended application for leave to appeal to which the liquidators filed a note in reply.

[4] The further grounds of appeal, as I understand them, are that the declarations that were sought and granted in orders 1 and 2, were not determinations in respect of any existing, future or contingent rights or obligations as contemplated in s 21(1)(c) of the Superior Courts Act as cryptocurrencies were unregulated in South Africa at the date of *concursus creditorum*.[2] Hence it was not legally competent for the court to grant the relief.

[2] It is common cause that during October 2022 the FSCA published regulations wherein crypto assets are referred=-09764a to as+-*85*/7 "a digital representation of value" and that it is regarded as a financial product.

[5] The application is opposed on the basis that the second respondent has no reasonable prospect of success of obtaining the relief sought on appeal and further that there is no other compelling reason why the appeal should be heard as contemplated in s 19(7)(2)(a)(ii) of the Superior Courts Act.

[6] As in the main application, I was provided with comprehensive and helpful written and oral submissions, which I have considered carefully. It bears mentioning that the record in the main application is voluminous and because of the reconsideration application and all the interlocutory applications, all relevant parties were afforded every opportunity to place extensive information and evidence before this court. The record further contains transcripts of the initial interviews held by the FSCA (prior to the liquidation application), transcripts of the insolvency inquiries and the various reports submitted by Judge Fabricius, to which I had regard. It is not helpful nor necessary in my view to rehash all the evidence herein, suffice to say that it is difficult to comprehend what possible further evidence could perceivably be placed before a different court to determine the declaratory relief claimed and granted in orders 1 and 2.

[7] Against this background I first deal with the contention that leave should be granted as there is a reasonable prospect that another court, given the alleged disputes of facts, would refer the relief granted in orders 1 and 2 to oral evidence or trial. I agree with the liquidators' submission that for purposes of the leave to appeal application this inquiry is limited to alleged material disputes of fact relating to illegality and the voidness of the agreements between MTI and investors.[3]

[3] The declaratory relief claimed by the liquidators that MTI was factually insolvent since 18 August 2019 and that any and all dispositions were dispositions without value in terms of ss 26(1) and 29(1) of the Insolvency Act was not granted and consequently any disputes pertaining to this relief is not relevant for purposes of this application.

[8] If a court finds, in motion proceedings, that there are material disputes of fact which cannot be determined on the papers, it has the discretionary power, in terms of Rule 6(5)(g)[4], *inter alia,* to dismiss the application, direct that oral evidence be heard on specified issues or refer the matter to trial. As the second respondent persists with his request that the question of whether the business model of MTI is an unlawful and illegal scheme, the question of whether all contracts between MTI and its investors are lawful or void *ab initio*, and his counterclaim that such contracts be declared valid and binding, be referred to oral evidence or trial, it again raises the issue of whether real and genuine disputes of facts exist in the voluminous papers filed in the application and further, whether such referral, taking into account all relevant factors, would, in the discretion of the court, be an appropriate order[5].

[9] The second respondent, despite saying that he was a director and shareholder of MTI, stated on multiple occasions that he had no personal information or knowledge regarding the business of MTI and more specifically in respect of the bitcoin deposited and held in a pooled account on behalf of the investors of MTI or the trading thereof, as this aspect of the business was exclusively managed by Steinberg. Given these statements, what possible further facts or information could he or anyone else for that matter, place before a court? The statements of the second respondent in this regard further raise serious concerns regarding the reliability and the weight of any information he may have in addition to the speculative submissions placed before this court until now.

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[4] "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the a foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person the be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trail with appropriate directions as to pleadings or definition of issues, or otherwise"

[5] See Mamadi and Another v Premier of Limpopo Province and Others [2022] ZACC 26 and also Repas v Repas (A151/2022) [2023] ZAWCHC 24 (13 February 2023)

[10] I deal very briefly with the alleged factual disputes as listed in the application for leave to appeal insofar as it was not dealt with in the judgment. On the issue of the reliability of the back office data, it is common cause that the second respondent had the same information as the liquidators and no further evidence in this regard is available or was alluded to. The extent to which trading took place through FX Choice or any other trader for that matter, has been traversed and it appears that no further evidence is available even on the second respondent's version. The non-existence of the bot has been dispositively dealt with given the uncontested evidence of Badenhorst. No further evidence is available even on the second respondent's version. The non-existence of Trade 300 has been dispositively dealt with and there is no further evidence available. The issue of whether the bitcoin held at FX Choice was that of MTI or that of investors (the ownership issue), has been dealt with and no further information in this regard is available. On the available evidence the remaining bitcoin that was held at FX Choice (on Steinberg's version), was that of MTI. On the argument that the FX Choice statements were forged, no substantial information has been placed before the court. From the available statements it appears that account 174850 was the only account utilised by MTI for live trades and there is no evidence that the Steinberg operated as a nominee of the so-called My MTI Club investors. Finally, the argument that Steinberg committed a fraud on MTI and that MTI is possibly therefore not an illegal or fraudulent business, completely ignores the false representations made by MTI and its management to investors during July 2021 as set out in the judgment.[6]

[11] A real, genuine and *bona fide* dispute of fact can only exist where a court is satisfied that the party raising such dispute has in his affidavit(s) seriously and unambiguously addressed the facts said to be in dispute – the second respondent

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[6] See Afrisure CC v Watson No 2009 (2) SA 127 (SCA) at para 42.

simply failed to do so and further, contrary to what would have been expected, contributed nothing to gainsay the findings of the FSCA.[7]

[12] The evidence before this court overwhelmingly indicates that there is no "real, genuine and bona fide dispute of fact" which would make a referral to oral evidence or trial appropriate.

[13] It is now widely accepted that cryptocurrencies are mathematically based concepts designed for working off a decentralised financial system and trade electronically with a network of peers independent from a bank[8] and that unlike traditional currencies, the value of cryptocurrencies is based on the theory of supply and demand. It appears from various articles and papers published to date that bitcoin is regarded as a peer-to-peer decentralised electronic cash system based on blockchain technology.[9]

[14] Internationally, bitcoin has been categorised as property and within a legislative framework defined as money or currency, a commodity or property. That it is regarded as an intangible movable asset seems uncontroverted. Whatever the precise definition of cryptocurrencies and more particularly bitcoin, it is now regulated in South Africa, referred to as "a digital representation of value" and regarded as a financial product subject to FSCA regulations in terms of s 1(h) of the of the Financial Advisory and Intermediary Services Act ("FAIS").

[15] The formal categorisation of cryptocurrencies as technology advances forms part of the ongoing process of regularisation which will ensure legal certainty. In light of the relief granted, it is irrelevant for purposes of the application for leave to appeal,

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[7] See Wightman v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at paras 11 to 13.

[8] See Singh & Calitz, "The Impact of Cryptocurrencies on the General Powers and Duties of South African Insolvency Practitioners", (2021) 33 SA MERC LJ, page 298 with reference to article by De Mink, Digital & Virtual Currencies 1; "The Rise of Bitcoin and other cryptocurrencies" (2017) De Rebus 1.

[9] See Singh & Calitz supra and Ryznar, The future of Bitcoin futures (2019) Houston Law Review 539 at 542

whether or not this court correctly held bitcoin to be movable property for purposes of the Insolvency Act.

[16] The argument that this court does not have jurisdiction to make findings regarding the illegality and voidness of agreements because cryptocurrencies are involved, is simply without merit. It was established that the business of MTI was fraudulent and that it amounted to a pyramid scheme, which is prohibited in terms of the Consumer Protection Act 68 of 2008. These findings relate to the business model of MTI and remains so regardless of the currency traded in or whether it was regulated in terms of South African Law at any given time.

[17] On the issue of whether the court had jurisdiction, based on s 21(1)(c) of the Superior Courts Act, to make declaratory orders, it is self-evident that this court's finding that the contracts between MTI and its investors were *void ab initio* resulted in this court dismissing the second respondent's counter claim. It is further non-sensical to argue that because the agreements were concluded in the past, prior to cryptocurrencies being regulated, a declaration of rights is not possible. Such declaration is required and is competent and shall assist the liquidators in determining claims against MTI.

[18] The second respondent further argued that this court erred in finding that there were no non-disclosures made in the *ex parte* liquidation application. This court firstly found that there were no material non-disclosures and secondly, even if some of the facts initially placed before the court were not factually correct in all regards given the available information at the time, it did not dislodge the facts placed before the court at the time of hearing the reconsideration application.

[19] Having regard to s 17(1)(a) of the Superior Courts Act 10 of 2013, leave to appeal, especially to the Supreme Court of Appeal, should not be granted unless there truly is a reasonable prospect of success or some other compelling reason why leave should be granted[10].

[20] Having carefully considered all the relevant facts and arguments in this matter, I am of the view that the second respondent has not met the threshold set for the granting of leave to appeal. I am further of the view that it is unlikely that another court will come to a different conclusion in this matter.

[21] In the circumstances the following order is made:

The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

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A De Wet
Acting Judge of the High Court

On behalf of the second respondent:	Adv Sydney Alberts Selzer Law (Ref: Mr Henry Selzer) Email: henry@selzerlaw.co.za
On behalf of the liquidators:	Advocates R van Rooyen SC and R Raubenheimer instructed by MOSTERT & BOSMAN (Ref: Mr Pierre du Toit) Email: Pierred@mbalaw.co.za

[10] MEC Health, Eastern Cape v Mkhitha (1221/15) [2016] ZASCA 176 (25 November 2016) paras 16 and 17