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**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 N.O. Fifth Applicant

CHAVONNES BADENHORST ST CLAIR COOPER N.O. 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 First Respondent
(in liquidation) t/a MTI

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)
FINANCIAL SECTOR CONDUCT AUTHORITY (FSCA)**

Fifth Respondent

Sixth Respondent

Coram: De Wet, AJ

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email on 26 April 2023.

JUDGMENT

DE WET, AJ:

"People all over the world, and South Africans are no exception, are bewitched and fascinated by any idea or scheme promising, in most cases, instant wealth, new homes, new cars, holidays abroad and all material possessions that can be acquired with an abundance of money. A further attraction of these schemes is the perception that the money will keep rolling in with little or no effort by the participants, the hardest part being to count one's money.

A consumer who participates in these 'easy money making' schemes apparently believes that money, and lots of it, is there for the taking, without considering where this money comes from. Many consumers are handsomely rewarded by participating in these schemes. Unfortunately, there are many more consumers who lose their money. The total amount gained by the promoters and other participants of these 'easy money making' schemes is usually equal to the amount lost by the other participants. Participants come from all walks of life"¹

[1] The first to sixth applicants, in their capacities as joint final liquidators of Mirror Trading International (Pty) Ltd ("MTI"), seek the following declaratory relief

¹ Government Gazette, 9 June 1999, No. 20169, Business Practices Committee, Report in terms of Section 10 (1) of the Harmful Business Practices Act, 1988 (Act No. 71 of 1988), Report 76, page 1.

[by way of application] in terms of s 21(a)(c) of the Superior Courts Act, 10 of 2013 ("the main application")²:

"1.1

1.1.1.1.1.1.1.1.1 an order declaring that the business model of MTI is an illegal and/or unlawful scheme and/or that MTI at all relevant times operated an illegal and/or unlawful business;

1.2 an order declaring all agreements purportedly concluded between [MTI] and its investors in respect of the trading/management/investment of bitcoin for the purported benefit of the investors, to be unlawful and *void ab initio*;

1.3 an order declaring that MTI has been factually insolvent (in that the value of its liabilities exceeded the value of its assets) since 18 August 2019 until the date of its winding-up on 29 December 2020;

1.4 an order declaring that any and all dispositions, whether by means of payment in fiat currency or by means of transfer of bitcoin (or any other crypto currency) made by or on behalf of MTI to any of its investors or other third party, as payment or part payment of purported profits, referral commissions or any other remuneration in respect of and pursuant to the unlawful investment scheme perpetrated by MTI, to be dispositions without value, as defined in section 2, read with section 26(1) of the Insolvency Act, 24 of 1936 (as amended) ("the Insolvency Act");

1.5 an order declaring any and all dispositions, whether by means of a payment in fiat currency or by means of a transfer of bitcoin (or any other crypto currency), made by or on behalf of MTI to any of its investors or any third party as payment or part payment of any purported claim or entitlement pursuant to the unlawful investment scheme, within 6 months before the *concurso creditorium* i.e., all dispositions since 23 June 2020, to be dispositions which had the effect of preferring one or more of MTI's creditors above others, as defined in section 2, read with section 29(1) of the

² "A Division has the power - (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

Insolvency Act and that such dispositions were not made in the ordinary course of business as provided for in section 29(1) of the Insolvency Act³;

- 1.6 that leave be granted to the liquidators of MTI to approach this Court on the same papers, duly amplified where necessary, for orders setting aside specific dispositions as described in 1.4 and 1.5 above, in terms of sections 26 and/or 29 of the Insolvency Act and for orders declaring that the liquidators of MTI are entitled to recover the aforesaid dispositions, alternatively the value thereof at the date of each disposition or the value thereof at the date on which the respective dispositions are set aside, whichever is the higher, as provided for in section 32(3) of the Insolvency Act;
- 1.7 the costs of this application shall be paid by any party/parties opposing this application, jointly and severally, the one paying the other to be absolved;
- 1.8 save as aforesaid, the costs of this application are costs in the liquidation of the First Respondent”.

[2] In terms of an order granted by De Villiers AJ on 22 January 2021, the powers of the liquidators were extended to include the power to institute legal proceedings. Apart from this order, the parties hereto, by agreement, converted the relief initially claimed in the liquidation proceedings, to which I will revert below, into a separate application under case number 15426/2021. The respondents do not dispute the authority of the applicants to launch this application.

[3] During the proceeding various interlocutory applications, ranging from postponement applications, intervention applications, applications to strike out and applications for the stay of the declaratory proceedings pending other proceedings were launched by various parties. At the time of the final hearing of the matter the record consisted of more than 7000 pages. Most applications were either settled or

³ At the hearing, the insertion of the following words at the end of the relief claimed in paragraph 1.5 of the notice of motion above was sought: “*unless members can show the contrary (i.e. that the specific disposition was made in the normal course of business) in the proceedings contemplated in paragraph 3.6 below*”. It was submitted that this would afford members the opportunity to raise defences contemplated in *Griffiths v Janse van Rensburg NO and another* [2016] 1 All SA 643 (SCA).

withdrawn.⁴ The applications for condonation for the late filing of affidavits and the filing of further affidavits were not opposed and were granted. What ultimately remained for determination was the relief claimed by the applicants in the main application, the counter-application filed by second respondent (“Marks”) and the application by third respondent (“Honiball”), supported by Marks, that certain disputes of fact be referred to oral evidence. At the final hearing of the applications, the respondents requested that the main application be referred to trial should it not be dismissed.

Relevant general background:

[4] A creditor and investor of MTI, Mr Lee (he subsequently joined in this application as an opposing party even though part of the fifth respondent), launched an urgent application for the liquidation of MTI during December 2020 and a provisional winding-up order was granted on 29 December 2020 by Rogers J in the fast lane under case number 19201/2020. Pursuant to the provisional order the applicants (save for the sixth applicant) were appointed as the provisional liquidators of MTI.

[5] On 26 February 2021 Selzar Law, ostensibly on behalf of MTI, filed a notice of intention to oppose. Mr Lee, not surprisingly, filed a notice in terms of rule 7(1) of the Uniform Rules of Court, calling upon Selzar Law to provide copies of the power of attorney and resolutions adopted by MTI authorising them to oppose the application on behalf of MTI. In response to this notice, a resolution and a power of attorney dated 26 February 2021 were filed wherefrom it appeared that Marks,

⁴ During February 2022, 15 000 of the so-called Kriel investors, brought an application to stay the proceedings pending an application for the removal of the applicants. This application was settled in March 2022, the relevant terms of the Kriel agreement were:

“1.3 The claims of loser investors against MTI will be calculated using the following formula:

[Actual amount invested) excluding peer to peer and internal MTI account transfers), calculated on the

highest value of bitcoin on the date of the investment]

Less

[Actual payments made to an investor, based on the value of bitcoin on the date of the payment]

1.4 The value of bitcoin as per the abovementioned formula, will be based on the value, in South African Rand,

as published by Luno (South Africa) on the specific day.”

2. The abovementioned agreement is conditional on the High Court finding that the business of MTI was

conducted illegally. Pending the fulfilment of this condition, the parties shall act in accordance with the terms

thereof, except for the finalisation of a first liquidation and distribution account.

3. It is recorded that the terms of the abovementioned agreement, will be applicable to all net loser investors of

MTI, irrespective of whether they are represented by GetaQuid.”

claiming to be a 50% shareholder of MTI, had called a meeting of shareholders, which only he attended, as Mr Steynberg (“Steynberg”), the other shareholder of MTI, had disappeared and could not be located. I will return to Steynberg later. At this meeting Marks resolved to appoint himself to act as a director of MTI to *inter alia* oppose the liquidation application.

[6] On 8 March 2021, Marks filed a preliminary answering affidavit in the liquidation application and on 5 May 2021, the then provisional liquidators filed a further affidavit which they described “as a fulfilment of their duty as provisional liquidators to place before the court information relating to events that occurred since their appointment as provisional liquidators and that would be relevant in the process of determining whether a final winding-up order should be granted”.

[7] This affidavit, which included an extensive draft investigation report dated 18 January 2021 by the Financial Sector Conduct Authority (“FSCA”)⁵, was also filed in support of an application for leave to intervene and to claim declaratory relief which was essentially in the same terms as that which forms the subject-matter of the main application. The liquidation application and interlocutory applications were by agreement between the parties postponed for hearing to 8 September 2021 in terms of an agreed timeframe for the exchange of further affidavits and submissions.

[8] On 14 June 2021, Marks, in his capacity as a prospective creditor or shareholder, filed a notice in terms of Rule 6(12)(c) requesting a reconsideration of the provisional order granted on 29 December 2020 by Rogers J. He further filed an application for leave to intervene and a conditional application in terms of s 413 read with s 353(2) of the Companies Act, 61 of 1973 (“the 1973 Act”).

[9] Despite the various further applications which were filed days before the hearing, the matter proceeded as it was agreed between the parties that Marks be granted leave to intervene as the third respondent under case number 19201/2020 and that he was entitled to proceed with the application for reconsideration. Marks abandoned his conditional application.

⁵ The FSCA came into existence on 1 April 2018 as part of a model of regulation introduced by the Financial Services Board (“FSB”) known as the “Twin Peaks” model. The FSCA took over the functions of regulating and supervising the conduct of financial institutions previously performed by the FSB.

[10] In the matter of *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 486I-487B the court held in regard to Rule 6(12)(c) that:

“... the dominant purpose of the Rule seems relatively plain. It affords an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. In the circumstances of urgency where an affected party is not present, factors which might conceivably impact on the content and form of an order may not be known to either the applicant for urgent relief or the Judge required to determine it. The order in question may be either interim or final in its operation. Reconsideration may involve a deletion of the order, either in whole or in part, or the engraftment of additions thereto.

The framers of the rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended.”

[11] As to what information may be taken into account by the court upon a reconsideration, it was held in the matter of *The Reclamation Group (Pty) Ltd v Smit and Others* 2004 (1) SA 215 (SECLD), that as a full set of affidavits had been filed at the date of the hearing, it resulted in a new set of circumstances and both sides’ story was now before Court⁶.

[12] In this matter, the issue of whether he had any authority to file opposing papers aside, Marks placed a provisional opposing affidavit consisting of more than 600 pages before the court on 26 April 2021. The applicants and the FSCA filed replies thereto and Marks filed a further provisional opposing affidavit on 11 June 2021 to the application launched by the provisional liquidators to intervene in order to claim the interdictory relief which is the subject-matter of the main application. Marks then brought a further application to intervene and a further conditional

⁶ See also *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 2691; *Industrial Development Corporation of South Africa v Sooliman* 2013(5) 603 (GJ) at para [9] and *Faraday Taxi Association v Director Registration and monitoring: MEC for Roads and Transport and Others* (58879/2021) [2022 ZAGPJHC 213 (5 April 2022)

application requesting the court to stay the winding-up process as aforesaid, which applications were supported by voluminous affidavits.

[13] I consequently had the benefit, not only of argument on behalf of the party allegedly absent during the granting of the original order, but also the benefit of the information contained in the many affidavits filed at that stage.

[14] The mechanism provided for in terms of Rule 6(12)(c), is to redress imbalances, injustices and/or oppression which may flow from an order granted in an urgent matter in a party's absence. It therefore, in my view, follows that all available information, properly before court at the time of reconsideration, should be considered.

[15] In the matter of Phillips and Others v National Director of Public Prosecutions 2003 (6) SA 447 (SCA) Howie JA held at para [29] that:

“It is trite that an *ex parte* applicant must disclose all material facts that might influence the Court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the Court hearing the matter on the return day has a discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion, the later Court will have regard to the extent of the non-disclosure; the question whether the first Court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside.”

[16] Marks did not allege that non-disclosures were made by the applicant prior to the provisional order being granted and I could not find that any material non-disclosures were made. The case made out *ex parte* had not been dislodged by the facts which were placed before court in the reconsideration. The reconsideration was accordingly dismissed.

[17] The applicant had established that he had a claim against MTI which it was unable to pay and it was further common cause that MTI was unable to trade as the only person who allegedly had access to the cryptocurrency codes, Steynberg, had disappeared. Based on all the facts before court, it was in my view just and

equitable to finally wind-up MTI. On 30 June 2021 a final liquidation order was granted and a further order, which pertained to the various further applications before me, was granted by agreement between the parties⁷.

[18] Prior to the hearing of the applications, and in September 2021, the applicants were appointed as the final liquidators of MTI and several further interlocutory applications were launched by other investors/members of MTI. The parties then agreed that the declaratory relief sought by the applicants and the further interlocutory applications be postponed in terms of an agreed order⁸. This order made provision for service on members/investors on the following basis:

⁷ "By agreement between Third Respondent and First to Fifth Proposed Intervening Parties ("the Proposed Intervening Parties");

IT IS ORDERED THAT:

1. The application, launched by the Proposed Intervening Parties, is postponed to the semi-urgent roll for hearing, on Wednesday 8 September 2021.
2. By no later than 7 July 2021 Third Respondent, shall publish this order on the telegram social media platform used by First Respondent and shall file by no later than 12 July 2021 an affidavit confirming such publication and annexing proof thereof:
3. Any party who wishes to oppose any of the relief sought by the Proposed Intervening Parties, shall file their answering affidavits, dealing with all the relief sought by the Proposed Intervening Parties, on or before 30 July 2021.
4. The Proposed Intervening Parties shall file their replying affidavits, if any, on/or before 13 August 2021.
5. The Proposed Intervening Parties shall file their heads of argument on/or before 24 August 2021.
6. Any party who opposes the intervention application shall file heads of argument on/or before 31 August 2021. 7. All questions of costs shall stand over for later determination."

⁸ "By agreement between the First to Fifth Applicants and the First to Fourth Respondents and the Sixth

Respondent, the following order is made:

1. This matter, in which the flowing relief will be sought by the above Applicants, is postponed for hearing before the Honourable Acting Justice De Wet on 2 March 2022:
 - 1.1 [See the prayers as set out in para 1 of this judgement]
2. All affidavits, notice and documents filed, up to and including 8 September 2021, in the matter in this Court under case number 19201/2020 shall be deemed to have been filed in this application and all parties are entitled to rely thereon in support of or opposition to this application.
3. The applicants are granted until 30 September 2021 to supplement their affidavits in support of the relief that they seek.
4. The Sixth Respondent is granted until 30 September 2021 to file a further affidavit, should it choose to do so.
5. Any party, forming part of the Fifth Respondent, and wishing to oppose or support the relief sought by the Applicants, be required to comply with Rule 6(5)(d) by notifying the Applicants' attorneys by e-mail at M[...] , in writing, on or before 20 September 2021 that he or she intends to oppose or support the application, and in such notice appoint an address within 15 kilometers of the office of the registrar, at which such person will accept notice and service of all documents and notices, as well as such person's postal, facsimile or electronic mail addresses where available.
6. Any party, forming part of the Fifth Respondent, wishing to support the Applicants' application be granted until 30 September 2021 to file and affidavit in support thereof.

18.1 By posting the order on the *Telegram* platform of MTI, whereon members communicate;

18.2 By notification to all known members/investors of MTI by way of a letter which had to include a hyperlink allowing interested parties access to the order and all papers filed of record in the matter (including the finalised winding-up application), sent by way of email to the known email addresses of members/investors; and

18.3 By publication of the order in the *Rapport* and *Sunday Times* newspapers.

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7. Rule 35(14) is to be applicable to the current Application as between the First to Fifth Applicants and the First to Fifth Respondents.
 8. All parties, including the parties included in the group of the Fifth Respondent, are granted up to 13 October 2021 to file a notice in terms of 35(14).
 9. Any party to whom a notice in terms of Rule 35(14) was directed, it to file a response to such notice and/or comply with the request contained in the notice, within 10(ten) days of receipt of such notice.
 10. Any further affidavit intended to be filed in opposition (to the relief sought by the First to Fifth Applicants), by any party, shall be filed by no later than 10 January 2022.
 11. The First to Fifth Applicants' replying affidavit shall be filed by no later than 31 January 2022.
 12. Any interlocutory applications shall be adjudicated, expediently, on a date or dates to be determined by Acting Justice De Wet.
 13. Heads of Argument will be filed by all interested parties in accordance with the rules and practice directives of this Honourable Court.
 14. Substituted service of this order and application shall be effected in the following manner:
 - 14.1 the Second Respondent shall post this order on the *Telegram* Platform by no later than 15 September 2021, and file an affidavit with confirmation of compliance with this provision by no later than 21 September 2021;
 - 14.2 the First to the Fifth Applicants shall notify all known members/investors of the First Respondent of this order by way of a letter which letter is to include a hyperlink allowing interested parties access to this order and all papers filed of record in this matter (including the finalised winding-up application), by way of email to the known email address of the members/investors, which service is to be effected by 15 September 2021, and compliance herewith is to be confirmed by affidavit (by the liquidators or the liquidators' attorney), to be filed by 21 September 2021.
 - 14.3 by 19 September 2021, the First to Fifth Applicants shall publish the order in the *Rapport* and *Sunday Times* newspapers, and compliance herewith is to be confirmed by affidavit (by the liquidators or the liquidators' attorney), to be filed by 21 September 2021.
 15. All questions of costs stand over for later determination"

[19] It was undisputed that service was indeed effected in accordance with the agreed order.

[20] In *Fourie NO and Others v Edeling NO and others* [2005] 4 All SA 393 (SCA) at para [21], the Supreme Court of Appeal criticised the service which took place on the basis that the court order provided for publication describing the role of a particular party as the “investors’ representative”, when that was factually incorrect. In those circumstances the court found that “*service fell gravely short of what would have been required to ensure that the investors receive a fair trial*”. The SCA, however upheld the relief granted *a quo*, which is comparable to the relief sought by the applicants, and found, with reference to the relief sought by the applicants (leave to approach this Court on the same papers for setting aside specific dispositions) that:

“Any investor against whom such recovery proceedings are brought would be free to maintain that he or she is, for lack of notification or by reason of having been misled by the terms of the publication, not bound by the order of Hartzenberg J. It may be that fresh setting aside proceedings against such an investor would then have to be combined with the recovery proceedings.”

[21] For purposes of this application, I am satisfied that sufficient service was effected in order to proceed with the main application.

Non-joinder:

[22] It was contended by Marks that there was an obligation on the applicants to join all members/investors of MTI to these proceedings and that the application should be dismissed as a result of such non-joinder. Whilst the general principle is that parties with a direct and substantial interest should be joined as parties in court proceedings, it may be departed from in exceptional circumstances. In this regard and in the matter of *Economic Freedom Fighters and others v Speaker of the National Assembly and others* [2016] 1 All SA 520 (WCC), the court considered earlier authorities and explained, in summary, that when considering the necessity of joinder, it must be done within the context of the case and more particularly with

reference to what the nature and effect of the relief sought or that may be granted, is.⁹

[23] The rationale for joinder is that all substantially and directly interested parties may be heard before the order is given, which is a matter of fairness¹⁰

[24] Flexibility based on pragmatic grounds was remarked upon as follows in the matter of Wholesale Provision Supplies CC v Exim International CC and Another 1995 (1) SA 150 (T)¹¹:

“the rule which seeks to avoid orders which might affect third parties in proceedings between other parties is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case.”

[25] The court further held that where the interests of a very large and effectively indeterminable number of persons may be affected by the order sought, it would be impracticable to require that they should all be joined. A pragmatic approach has to be adopted in such cases in identifying who needs to be joined as a necessary party¹².

[26] In this matter the relief claimed, particularly in prayers 1.1 and 1.2 of the application, amounts to a consideration of whether the business operated by MTI, objectively and not with reference to the subjective views of members/investors, was unlawful and if so what the consequences of such unlawfulness are on the contracts concluded between MTI and its members/investors¹³.

[27] Members/investors were further given an opportunity to be heard on various occasions during the course of the litigation, many members/investors intervened and some members/investors filed opposing affidavits and counter - applications. What is abundantly clear from all the affidavits filed to date, is that none of the members/investors had any personal knowledge or insight into the business of MTI.

⁹ para [27]

¹⁰ para [30]

¹¹ para [37]

¹² Para [47]; Also see Road Accident Fund v Legal Practice Council and others (Pretoria Attorneys Association and another as *amici curiae*) [2021]2 All SA 886 (GP) paras [9]-[10]

¹³ Para [47]

Further, given the magnitude of members¹⁴ in South Africa and abroad¹⁵, over whom this court does not have jurisdiction, the alleged inaccuracy of the back-office data and the conflicting statements of the management of MTI, it would simply not have been pragmatic to join all known members/investors of MTI. In the circumstances I am of the view that the applicants should not be non-suited as a result of non-joinder.

MTI and the FSCA:

[28] MTI was founded by its sole registered director and chief executive officer, Steynberg, during April 2019. Initially the nature of its business was described as *"an internet based crypto-currency¹⁶ club which performs its business through the website www.mymticlub.com and its official offices in Stellenbosch, Western Cape, South Africa. The benefit to members is in the form of the crypto-currency bitcoin where members' bitcoin grows through forex trading by a registered and regulated broker"*. This description appeared in an electronic document uploaded on the official MTI website, which document purportedly served to regulate the contractual relationship between MTI and its investors during the second period of the operations of MTI to which I will return later.

[29] Investors in MTI were referred to as members of the MTI investors club ("My MTI Club"), (I will refer to these members as investors in line with Fourie NO *supra*) and the following were the most important and relevant terms and conditions of their agreement with MTI:

- 29.1 Upon accessing and registering on the MTI website and/or by using any MTI services, a member agreed that he/she has read, understood and agreed to and undertook to abide by the terms of the MTI agreement.

¹⁴ According to the statements made by Steynberg to the FSCA the members/investors were approximately 300 000 whilst Pederson estimates members/investors to be in the region of 200 000 of which about 166 000 are South Africans.

¹⁵ Pedersen's report indicates that countries such as the United States of America, Namibia, Canada, India, the United Kingdom and Nigeria, all had more than 5 000 investors.

¹⁶The Oxford dictionary defines cryptocurrency is a digital currency in which transactions are verified and records maintained by a decentralized system using cryptography, rather than by centralized authority.

29.2 The marketing of MTI's business was based on a multi-level marketing strategy. In addition to receiving a share of trading profits, members also received a variety of incentive-based remunerations, based on the referral of new members who also joined MTI and made an investment.

29.3 The proceeds derived from trading profits to which members were entitled, were regulated by the MTI compensation plan, which consisted of five income streams described as:

29.3.1 40% members daily trading bonus;

29.3.2 10% direct once-off referral bonus;

29.3.3 20% weekly profit-sharing bonus;

29.3.4 2.5% P1 leadership bonus;

29.3.5 2.5% P2 leadership bonus.

29.4 All of the above income streams would be paid from the daily profits made by MTI through its trading activities and not from any of the bitcoin invested by the investors.

[30] The business model of MTI was summarised in an online presentation, and used to attract new investors.

[31] During 2020 the FSCA, due to an anonymous disclosure, started investigation the business of MTI and conducted interviews with *inter alia* Steynberg, Cheri Marks and Keith Badenhorst. Their interviews are on record and are not set out herein.

[32] After the aforesaid interviews [Steynberg was interviewed on 29 July 2020], Steynberg and the main promotor of MTI, Ward, represented to the FSCA, and to all of MTI's investors, by way of circulars, website notices, YouTube clips and on public social media forums, *inter alia* and in summary, that:

- 32.1 Due to concerns expressed by the FSCA concerning the lawfulness of the activities of MTI, MTI had moved the entire bitcoin trading pool of MTI from the trader where it was allegedly held (FXChoice¹⁷) to a new trading platform known as Trade 300, in anticipation of a fear expressed by Steynberg that FXChoice may freeze all the bitcoin held by it pursuant to a cease-and-desist notice MTI had received from the Texas State Security Board¹⁸;
- 32.2 the new broker, Trade 300, was not a licenced forex trader and having been registered in Nevis, it did not require forex trading licenses;
- 32.3 the bitcoin frozen at that stage in the FXChoice account, amounting to approximately 1282 bitcoin, was not part of MTI investors' bitcoin, but belonged to MTI and Steynberg; and
- 32.4 MTI had moved the bitcoin held by it in the trading pool at FXChoice to Trade 300, in four transfers over a period from 21 July 2020 to 24 July 2020, with the number of bitcoin transferred to Trade 300 being 16 444 bitcoin.

[33] MTI was provisionally liquidated on 29 December 2020 and the FSCA's investigations concluded with a report being issued by it on 18 January 2021 ("the FSCA report"), wherein it was concluded that MTI's business was unlawful in a number of respects. Various affidavits were filed by representatives of the FSCA in support of the FSCA report, and later in order to deal with certain disputes raised by the respondents, to which I will return. In summary it was the findings of the FSCA that MTI:

- 33.1 operated a massive fraudulent and unlawful investment scheme, in flagrant disregard of various financial sector laws;

¹⁷ FXChoice is a Belize registered on-line trading platform and a reputable and regulated broker.

¹⁸ On 7 January 2021, the FSCA became aware that The Texas State Security Board had issued an emergency cease and desist order against MTI, Steynberg and three other individuals for offering securities for sale in Texas without being registered; fraud in connection with the offer for sale of securities; making statements that are materially misleading or otherwise likely to deceive the public and due to their conduct, acts and practices threatening immediate and irreparable harm according to the report.

33.2 conducted an illegal, unregistered financial services business in contravention of (at least) s 7 of the Financial Advisory and Intermediary Services Act, 37 of 2002 (“the FAIS Act”);

33.3 that there can be no other conclusion but that the investments made by investors into MTI and the scheme conducted by it, were misappropriated.

[34] From the information gathered by the FSCA, it was further concluded that the representations made by MTI, Steynberg and the management and marketing team of MTI to the investors of MTI [and the FSCA], were false in one or more of the following respects:

34.1 MTI did not move bitcoin from FXChoice during 2020, as MTI’s account with FXChoice had been frozen on 10 June 2020 and the bitcoin could not be moved;

34.2 Trade 300 did not exist and was a fictitious platform created by Steynberg¹⁹;

34.3 The bitcoin frozen by FXChoice was not the property of Steynberg, but belonged to MTI and formed part of the so-called trading pool;

34.4 The bitcoin of the MTI investors, as pooled in MTI, were not transferred immediately to any FXChoice trader account, but, instead, diverted to accounts under the control of Steynberg and the management and marketing team;

34.5 Only a limited number of bitcoin were traded with by MTI at FXChoice and losses were incurred in the following approximate respects:

34.5.1 50,95 bitcoin were deposited into specified MAM accounts, of which 22 bitcoin were lost. This appears to have been during the first period of operation during 2019;

¹⁹ The only reference linked to the website was the name of “Joe Steyn” which is a known alias of Steynberg.

- 34.5.2 for a subsequent period, from approximately January 2020 to 3 June 2020, a limited number of bitcoin were deposited with FXChoice in a total number of 1846,72, of which MTI made a loss in trading of 566,68 bitcoin, resulting in an approximate capital loss of 30%.
- 34.6 No profits were found on any other trading platform;
- 34.7 All daily published reports of daily trading profits were false and reports that MTI investors' bitcoin grew every day, as a result of trading profits, by way of trading bonuses, were false.
- 34.8 All reports that MTI had continuously traded profitably (in the so-called second period), were false;
- 34.9 All reports that the trading of MTI's bitcoin was effected by a bot with artificial intelligence, were false;
- 34.10 Reports that the bot traded in real time were false;
- 34.11 The report that the bitcoin of MTI, held at FXChoice, were transferred to a new broker, Trade 300, were false.
- 34.12 In summary, and contrary to what was represented to MTI investors, and the public at large:
- 34.12.1 MTI never achieved any growth in bitcoin as a result of trading activities;
- 34.12.2 MTI could therefore never have reflected such growth in bitcoin to MTI investors, as it daily did;
- 34.12.3 MTI could never, from any *bona fide* trading activities, pay investors who withdraw their bitcoin, and

34.12.4 MTI used bitcoin received from later investors to pay earlier investors.

[35] According to the FSCA report, the lifespan of the business of MTI can be divided into three periods.

[36] The first was during April 2019 to July 2019, when clients of MTI had linked sub-accounts on the FXChoice platform, trading in foreign currency ("forex"), in respect of which a human trader's trades were mirrored onto each investors sub-account (the "*MAM accounts*"). Hence the name: Mirror Trading. The first period preceded the launch of MTI's website and the implementation of the MTI agreement.

[37] The second period was from August 2019 to October 2020. This was when MTI launched its website and implemented the MTI agreement. During this period and from 2019, Marks assisted Steynberg in recruiting investors and his spouse, Cheri Marks, assisted from February/March 2020 with the marketing of MTI. From July/August 2020, the *de facto* directors of MTI were Steynberg, Marks, Ward and one Monica Coetzee. The first board meeting was held on 28 August 2020. The bitcoin invested by investors were said to have been utilised for forex trading in the name of MTI via the regulated FXChoice platform under the exclusive supervision of Steynberg. The product which MTI traded during this period was so-called "CFD's" (contract for a difference) based on foreign currency pairs. Steynberg alleged that the trading was done profitably by utilising an artificial intelligence bot, developed by Keith Badenhorst, and that MTI only had one negative day of trading during this period.

[38] The third period was from October 2020 to December 2020. Steynberg alleged that during this period, he transferred all the bitcoin in the MTI pool of members' bitcoin from FXChoice to the unregulated broker, Trade 300. In this period, MTI allegedly no longer traded in CFD's based on forex pairs, but in CFD's based on cryptocurrency pairs, also using the artificial intelligence bot.

[39] Steynberg went missing on about 14 December 2020 while he was still busy processing withdrawal requests from investors. There were approximately 16,000 withdrawal requests, totalling approximately 2,600 bitcoin. These payments were never effected. According to media publications in January 2020 Steynberg was

arrested and incarcerated during January 2020 in Brazil. His estate was finally sequestrated in April 2021.

Grounds of opposition to the relief claimed by the applicants:

[40] It appears from the affidavits filed on behalf of the respondents, that they have no personal information regarding the operation and management of MTI. They, given their precarious position, and I will merely summarise, therefore based their opposition to the relief claimed by the applicants, on the following:

- 40.1 They were not investors in MTI and never transferred ownership of their bitcoin to MTI;
- 40.2 All payments to MTI were by way of transfer of cryptocurrency, more particularly bitcoin, and as bitcoin is not regulated by South African law it does not amount to movable property in terms of the Insolvency Act;
- 40.3 They contractually agreed to pool their bitcoin with other members in the so-called My MTI Club and the trading transactions with bitcoin was not meant to be regulated by South African law due to it being bitcoin²⁰;
- 40.4 There are disputes of facts which cannot be determined on application. These pertain to whether MTI was an illegal/unlawful and fraudulent scheme, whether the evidence procured from FXChoice could be accepted as the existence of Mr Stephenson, who deposed to various affidavits in these proceedings, is queried; whether trading took place (some investors attest to seeing “live trading” during 2020); whether the statements provided to members were falsified; whether there was indeed an artificial intelligence bot and whether MTI was

²⁰ The relevant terms of the agreement are: “Clause 2: MTI is an internet based cryptocurrency online trading platform which performs its business through the website known as www.mymticlub.com. MTI operates as club where interested parties acquire membership to the club for the primary purpose to trade the cryptocurrency known as Bitcon on MTI’s online trading platform, whereby MTI utilizes members’ Bitcoin to trade on the global cryptocurrency market via various cryptocurrency brokers and brokerage firms.

Clause 3: All members, prospective members and proxy members, through their action of depositing Bitcoin into the MTI online trading platform, unequivocally consent and agree to MTI holding their Bitcoin on their behalf in a Bitcoin trading pool account, which contains all other members’ Bitcoin funds, for the purposes of trading on the cryptocurrency market where various cryptocurrency denominations are bought and sold on behalf of members, in order to earn gains from such trading activities for the benefit of such members.”

insolvent for purposes of recovery proceedings in terms of the Insolvency Act;

40.5 The applicants have failed to establish the necessary facts which entitle them to the declaratory relief claimed.

Does bitcoin (cryptocurrency) fall within the definition of property in the context of the Insolvency Act and does this court have jurisdiction in respect of cryptocurrency:

[41] The definition of “property” in s 2 of the Insolvency Act is:

“‘property’ means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fidei commissary heir or legatee.”

[42] It is trite that “the meaning of ‘property’ in relation to the provisions of the Insolvency Act, in the light of the definition thereof in s 2, is much wider than under the common law.”²¹

[43] Money falls within the definition of movable property and is included in a debtor’s insolvent estate.²²

[44] From the available information it appears that, in general, cryptocurrency possesses the following characteristics: it is a thing, incorporeal,²³ intangible, fungible, divisible and movable.

[45] I was referred to the matter of David Ian Rusco and Melcolm Russel Moore v Cryptopia Limited (in liquidation),²⁴ where the High Court of New Zealand held that cryptocurrencies are a type of intangible property and that various cryptocurrencies are “property” within the relevant definition of the New Zealand Companies Act (of 1993). The court referred to cryptocurrency as “digital assets”.

²² Meskin, Insolvency Law, para. 5-1 and Van Zyl and Others NNO v Turner and Another NNO 1998 (2) SA 236 (C) para [21]. Meskin continues to state: “By ‘movable property’, in this context, is meant ‘every kind of property and every right or interest which is not ‘immovable property’...”

²² Land – en Landboubank van Suid Afrika v Joubert NO 1982 (3) SA 643 (C) at para 653.

²³In MV Snow Delta – Serva Ship Limited v Discount Tonnage Limited 2000 (2) SA 746 (SCA), Harms JA remarked that rights in relation to a contractual performance of another have, since time immemorial being classified as incorporeal. The obligation is property but the right (often referred to as an action) of the creditor is property.

²⁴ CIV-2019-409-00544 [2020] NZHC728.

[46] The South African Revenue Service has demanded that gains and losses on cryptocurrency be declared and classifies cryptocurrency as intangible assets, which is subject to taxation.²⁵

[47] I was also referred to the matter of Robertson v Person Unknown²⁶ where Justice Moulder in the United Kingdom granted an asset preservation order in respect of cryptocurrency on an exchange, Coinbase UK Limited, holding that bitcoin is to be treated as “property”. In AA v Persons Unknown²⁷, Justice Bryan held that crypto assets were “property” for the granting of proprietary relief.

[48] I agree with the applicants that even on the strictest interpretation of the meaning of property, cryptocurrency, like money, is movable property for the purpose of the definition of “property” in s 2 of the Insolvency Act.

[49] The respondents’ contention that cryptocurrency is not movable property is illogical and will lead to the absurd result that an insolvent with cryptocurrency will be untouchable under the Insolvency Act. In this regard the applicants, correctly so in my view, relied on the “*always speaking*” doctrine of interpretation as explained in the matter of Malcolm v Premier, Western Cape Government 2014 (3) SA 177 (SCA) at para [11]²⁸, where it was remarked that:

“There is obvious sense in this approach when a court is confronted with a novel situation that could not have been in the contemplation of the legislature at the time the legislation was enacted. Courts can then, in the light of the broad purpose of the legislation, current social conditions and technological development, determine whether the new situation can properly, as a matter of interpretation, be encompassed by the language”

[50] The development of technology and internet enabled devices, the use of which transcends physical boundaries, has resulted in new concepts and areas of law developing²⁹. Based on the accepted principles of interpretation (which I deal

²⁵ <https://www.sars.gov.za/wp-content/uploads/IFWG-CAR-WG-Position-paper-on-crypto-assets.pdf>.

See, in general, Tonelaria Nacional RSA Pty Ltd v CSARS 2021 (2) SA 297 (WCC) – fn6.

²⁶ CL – 2019 – 000444.

²⁷ [2019] EWHC 3556 (Comm).

²⁸ See Tonelaria Nacional RSA (Pty) Ltd v Commissioner, South African Revenue Service 2021 (2) SA 297 (WCC) para [25]

²⁹ See Cybercrime: Key issues and debates: Alisdair A Gillepsie regarding cybercrime, particularly pertains to issues of jurisdiction.

with below), bitcoin is movable property for purposes of the Insolvency Act and the transfer or disposition thereof should be dealt with in terms of the Insolvency Act.

[51] On the issue of whether the bitcoin was “owned” by the investors, it is true that ownership of bitcoin depends on the facts of each case. In *casu*, investors transferred their movable assets (bitcoin), from their own wallets to a wallet controlled by Steynberg on behalf of MTI (and probably held in the name of Steynberg), the so-called pooled account. MTI then, in its name, transferred the bitcoin to brokers who held it in an account in the name of MTI. According to Steynberg’s evidence at the FSCA, the brokers did not know about the “members”, and he further explained that “members” would share in profits and losses of MTI. In other words: if MTI suffered losses, the reduction in the total amount of bitcoin would result in an investor being unable to claim entitlement to the number of bitcoin that he/she invested. These facts clearly demonstrate that investors lost “ownership” of their bitcoin whilst acquiring personal rights against MTI.

[52] The operation of MTI’s business in cyberspace, is irrelevant. MTI is domiciled in South Africa and its movable property, wherever situated, is therefore considered to be present at its domicile³⁰

Marks’s opposition and counter-application:

[53] In order to establish *locus standi* for purposes of his opposition to the main application and for purposes of the counter-application, Marks firstly submitted that he is a director and shareholder of MTI and secondly, that he acted as a representative of the so-called My MTI Club.

[54] From the investigations by the FSCA and information obtained in the s 417/418 enquiries, it appears that Steynberg was the only director of MTI registered with CIPC. The minutes of MTI’s board meetings reflect that from August to December 2020, Steynberg, Marks, Ward and Monica Coetzee collectively acted as the *de facto* directors. This was confirmed by Marks in his first provisional affidavit. At the last recorded meeting of these directors on 15 December 2020, it was recorded that when Steynberg “*disappeared on or about 12 December 2020 the de*

³⁰ See Viljoen v Venter NO 1981 (2) SA 152 WLD) 154D-155E and, particularly, 155D where Re Estate Morris 1907 TS 657 at 666 was quoted with approval: “By a fiction of law the insolvent’s movable property is all considered to be present at his domicile”

facto board members declined to function in any managerial role within MTI and the management structure effectively came to a grinding halt".

[55] On Marks's own version, he was no longer a director of MTI as from 12 December 2020 and on the issue of whether he is a shareholder of MTI, it is noted that it now appears to that the applicants acknowledge that Marks was a shareholder of MTI.³¹ Whether or not Marks was a shareholder of MTI is of no relevance for purposes of determining the relief claimed herein and as aforesaid, he was joined by agreement between the parties as a respondent in these proceedings. It is however difficult to understand how Marks, in the absence of Steynberg, could have appointed himself as the only director of MTI and how he, on his own version, has any authority to represent MTI or any of the investors in these proceedings. If Marks was indeed a director of MTI, he had dismally failed to fulfil his duties as a director and there is further a conflict of interest between him and other investors, similar to what the SCA had found in Fourie NO (*supra*).

[56] Whether Marks is a creditor of MTI is also debatable. On the available information, Marks had held at least two accounts in his name, being account numbers 7[...] and 2[...]. Based on the rand value of bitcoin on the respective dates when the relevant bitcoin was deposited and withdrawn, Marks profited from this investment with MTI in an amount of at least R34,334,133.09. I however accept that there exists a dispute of fact in respect of the accuracy of the back-office data to which I will return.

[57] Whatever his status, Marks, on his version, has no first-hand knowledge (or any knowledge) of material information relating to MTI, such as the alleged trading conducted on behalf of MTI, whether the artificial intelligence bot existed and was used for trading as alleged, the wallets in which bitcoin received from members were held, the transfer of bitcoin by MTI to traders or brokers, the existence of Trade 300 and, crucially, the whereabouts or total of the balance of bitcoin received from investors. He further has no expertise in trading and artificial intelligent bots. From a perusal of MTI's terms and conditions, it is apparent that the My MTI Club is not an entity separate from MTI as MTI had reserved the prerogative to amend the

³¹ In a further application under case number 13721/22 by the applicants in this court, they state Marks was a shareholder of MTI. In terms of s 1 of the Companies Act, a "shareholder", subject to s 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated sureties register, as the case may be.

terms and conditions unilaterally and to even reject a "sponsor" application without stating reasons.

[58] It was further alleged, and not disputed that the My MTI Club has not been registered or formed in terms of another law as required by section 8(3) of the 2008 Companies Act and, as a result, it cannot exist as a separate legal entity³².

[59] For the aforesaid reasons, I find that Marks has no *locus standi* to act on behalf of the My MTI Club. The merits of his counter-application, which was limited to prayers 1.1 and 1.9³³, is dealt with later herein.

[60] Marks's voluminous affidavits were of no assistance to this court in determining the correctness of the factual information placed before court by the applicants and the FSCA.

The opposition by Rowe:

[61] The opposition by the Rowe investors were limited to the relief claimed by the applicants in prayers 1.4 to 1.6 of the notice of motion and further, in the event of the court granting such relief, that certain safeguards be put in place. The Rowe investors case is that they "parted with their property" in the *bona fide* belief that MTI operated a legitimate business. These members could not contribute any relevant information pertaining to the operations of or the solvency of MTI at any particular time.

The opposition by Lee:

[62] Lee bases his opposition to the relief sought on the same grounds relied on by Marks and Honiball.

The opposition by Honiball:

³² Section 8(3) reads as follows in this regard:

"No association of persons formed after 31 December 1939 for the purpose of carrying on any business that has for its object the acquisition of gain by the association or its individual members is or may be a company or other form of body corporate unless it—

(a) is registered as a company under this Act;

(b) is formed pursuant to another law; or

(c) was formed pursuant to Letters Patent or Royal Charter before 31 May 1962."

³³ Marks claims an order declaring that: "the MTI TERMS AND CONDITIONS AGREEMENT as concluded with each member of the MY MTI CLUB, is a valid and binding Agreement exclusively regulating the contractual relationship between MTI and each MYMTI CLUB Member." and costs.

[63] Honiball's opposition is in essence a denial that MTI's business amounted to statutory contraventions which rendered the business of MTI illegal or unlawful, that the applicants had failed to establish that the business of MTI amounted to a common law ponzi-scheme and finally that there are disputes of facts that cannot be resolved by way of application.

The admissibility of evidence:

[64] Marks contends that the information obtained by the applicants during the course of the s 417/418 enquiries and subsequent reports by retired Justice Fabricius, which were placed before court with his consent, amount to hearsay and should be disregarded, alternatively it was submitted that diminished weight should be attached thereto. He however did not persist with his striking out application.

[65] From the record it appears that the applicants and the FSCA, within the constraints of the situation (Steynberg for example disappearing and then being arrested and incarcerated in Brazil and Marks, who has admitted in these proceedings that there was no proper oversight or control or even financial records in respect of MTI's operations), has secured all the available evidence which has been placed before this court. Witnesses at the enquiries such as Badenhorst and Van Deventer, also deposed to affidavits in these proceedings. Marks is a party to these proceedings and other witnesses such as Kruger, form part of the fifth respondent before court. Marks was fully informed of his rights during the enquiries and legally represented and has raised no prejudice that would be suffered should such evidence be admitted.

[66] Having regard to the considerations enunciated in s3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988, I believe it is in the interests of justice to admit the evidence obtained through the enquiries³⁴.

Dispute of fact:

[67] Declaratory relief can only be granted if the facts as stated by the respondents, together with the facts alleged by the applicants that are admitted by the respondents, justify such an order.³⁵

³⁴ See Van Zyl NNO v Kaye NO 2014 (4) SA 452 (WCC) para [44]

³⁵ See Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235.

[68] It was argued that the application should be referred to trial, if not dismissed, as there are factual disputes which cannot be determined on the papers.

[69] In a nutshell, the opposing respondents allege that there are disputes of fact pertaining to the following issues: the existence of Mr Daniel Stephenson (Stephenson), a representative of FXChoice, who assisted the applicants and the FSCA in their investigations; whether investors were provided with false trading statements by MTI (or Steynberg) whilst MTI utilised FXChoice's trading platform; whether an artificial intelligence bot was utilised by MTI (or Steynberg) for trading purposes; whether the available back office data of MTI is accurate; whether there was in fact successful trading by MTI (it does appear that there was some trading by MTI, albeit on the available information unsuccessful) and whether MTI is/was insolvent and from when.

[70] The court in the well-known matter of *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634, explained the principles relating to the resolution of disputes of fact as follows:

70.1 a final interdict can only be granted in motion proceedings if the facts, as stated by the respondent, together with the admitted facts in the applicant's affidavits, justify an order. Where facts, though not formally admitted, cannot be denied, they must be regarded as admitted³⁶;

70.2 A court, in motion proceedings, is not confined to only the above-mentioned consideration and in certain circumstances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact³⁷;

70.3 Where the allegations or denials of the respondent are so far-fetched, or clearly untenable, the court is justified in rejecting such facts merely on the papers.

[71] A real and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has, in his or her affidavit, seriously

³⁶ 634E-G

³⁷ 634H

and unambiguously addressed the fact said to be disputed³⁸. The dispute must also be relevant to issues to be determined.

[72] In Soffiantini v Mould³⁹, Price JP stated that:

'If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

[73] A respondent, in addition, cannot merely allege conclusions as facts. A respondent must produce admissible evidence in support of such facts. In motion proceedings the affidavits constitute not only the evidence, but also the pleadings. A party, in motion proceedings, is consequently expected to allege the required facts and, in addition, to support such facts by adducing admissible evidence.⁴⁰

[74] Although the so-called robust common-sense approach usually relates to a situation where the respondent makes bald, vague and hollow denials of factual matter, it has been held to be applicable in accessing a detailed version, which is wholly fanciful and untenable.⁴¹

[75] In Transnet v Rubenstein (*supra*) the Supreme Court of Appeal held that a respondent is required to make necessary allegations to set up a defence (or grounds for opposition) and support such allegations by evidence⁴².

[76] Another principle that is apposite in this matter, flows from the limited access that the liquidators have to facts in the context of the mismanagement of MTI.

³⁸ Wightman v Headfour (Pty) Ltd & another 2008 (3) 371 (SCA), and as applied in Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC 2018 (3) SA 604 (WCC)

³⁹ 1956 (4) SA 150 (E) at 154 F - H

⁴⁰ Transnet v Rubenstein 2006 (1) SA 591 (SCA) paras [28] and [29]

⁴¹ Trust Verification Centre v PSE Truth Detection CC & others 1998 (2) 689 (W); Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & another 2011 (1) SA 8 (SCA)

⁴² Paras [28] to [30]

*‘Generally, the quantum of evidence a party can be expected to adduce depends upon the amount of evidence at his disposal’.*⁴³

[77] I shall deal with the question of whether MTI was an illegal/unlawful and fraudulent scheme and the question of whether MTI was factually insolvent from 18 August 2019 (the beginning of the second period) with reference to the dispute regarding the reliability of the MTI back office date, separately from the disputes of fact raised in respect of the evidence obtained by the FSCA from FXChoice, the existence of Trade 300 and the existence and utilisation of the artificial intelligence bot.

The existence of Stephenson:

[78] It appears to be common cause that the FSCA and consequently the applicants, rely heavily on the information obtained from FXChoice by way of Stephenson, who deposed to affidavits on 28 October 2022 and again on 30 November 2021 in these proceedings.

[79] Stephenson deposed to an affidavit in which he confirmed that he is a citizen of the United Kingdom, with passport number 5[...], in his capacity as the Administrative Director of FXChoice, a Belize International Business Company, with company number 1[...],9[...].

[80] The second and third respondents placed the existence of Stephenson in dispute on the basis that his signatures on the affidavits before court, in their opinion, differ and because an investigative journalist, who is interested in writing a book about MTI, could find no evidence of his existence. What the court should make of this is unclear.

[81] What is however undisputed is the fact that Stephenson signed two affidavits in these proceedings, before a notary public, Mr O’Conner, who exists and practices in London, England.⁴⁴

⁴³ Schmidt, Law of Evidence, 3-28 to 3-28(1)

⁴⁴ According to the journalist Mr O’Conner even had a copy of one of the affidavits, without the annexures, and provided him with a copy of the affidavit.

[82] It further appears that Stephenson replied to an email of the journalist and confirmed that it was his signature on the two affidavits before court during February 2022.⁴⁵

[83] The respondents have failed to place any facts before court to substantiate doubt to the existence of Stephenson or for the court to disregard the facts reported by him.

The existence of Trade 300 and the artificial intelligence bot:

[84] The evidence show that Trade 300 and the email address used by it, was created by Steynberg and that no trace could be found that it is indeed an operating broker. None of the respondents were able to place any evidence before court to show that it exists or that any funds were transferred by Steynberg or MTI to such entity or any other entity for that matter. The inevitable conclusion is: the representations made to investors by Steynberg and the management of MTI to investors in this regard, were false.

[85] Insofar as the bot is concerned, Steynberg told the FSCA during 2020 that MTI had been trading by using an artificial intelligence bot since July 2019, which bot was developed by Keith Badenhorst, who was still maintaining and “tweaking” the bot in order to ensure its performance and in order to “adjust to market conditions”. According to him Badenhorst was paid 30% (later 25%) of MTI’s profits and a human could not effect such trades.

[86] Keith Badenhorst testified under oath before the FSCA on 26 October 2020, at the enquiry and he deposed to an affidavit in this application. He explained that he and Steynberg “dabbled” in the development of a rule-based bot until about 2015, at which stage he walked away from the project. He had not been involved in the upgrading of the bot in any material way and he was not aware that Steynberg was using the bot for trading purposes. He, quite interestingly, stated that:

“The first time I was made aware of myself being involved in this whole situation, was last year when the FSCA contacted me.”

⁴⁵ Despite this email, the journalist still doubts whether it was indeed Mr Stephenson who replied to his email.

[87] He denied ever being involved in MTI, the business of MTI or the trading activities of MTI and was not paid for any services allegedly rendered.

[88] Mr Bell, the Chief Operations Officer of MTI, stated in his letter of resignation dated 26 June 2020, in this regard as follows:

“The BOT, which is at the heart of everything, remains a dark and closed cloud and is a major issue for me and for many other members. I have repeatedly asked you many times for information including this week, which you have promised repeatedly to give to me, with every time you have so promised to provide information, you have done nothing.

More and more people are questioning the Bot and accounting records and as of today, with me paralysed by your non-response, with myself and the team unable to respond properly to inquirers, I have come to a point at which I cannot deal with this anymore.”

[89] The evidence of Badenhorst and Mr Bell was not disputed by the respondents.

[90] There are consequently no *bona fide* dispute of fact and on the evidence, I find that Steynberg did not use an artificial intelligence bot to achieve the alleged incredible trading results and that he did not transfer bitcoin deposited by investors held in a pooled account at FXChoice to an unregulated broker named Trade 300. It follows that the representations made by Steynberg and the management of MTI in this regard were false.

[91] The false representations pertaining to Trade 300 and the artificial intelligence bot, in my view, on a balance of probabilities, show that the business of MTI was fraudulent. I agree with the applicants that the fraud perpetrated by Steynberg and MTI were not isolated incidences but rather fundamental aspects of the structure of the business and as such tainted the business operations of MTI as a whole.

Was the business of MTI illegal and unlawful?:

[92] It is the applicants' case, with reliance on the report filed by the FSCA and the reports and evidence obtained by way of the s 417/418 enquiries, that the business of MTI contravened certain statutory provisions and was therefore an illegal and or unlawful as it:

92.1 rendered financial services without the necessary licence being issued by the FSCA, as provided for in s 7 read with s 8 of the FAIS Act;

92.2 acted as a so-called Over-The-Counter Derivative Provider, as defined by Regulation 2 of the Financial Markets Act, 19 of 2012 ("the FMA"), read with s 6(8) of the FMA;

92.3 provided, as a business or part of a business, a financial product, a financial service or market infra structure in contravention of the provisions of Section 111 of the Financial Sector Regulation Act, 9 of 2017;

92.4 conducted a collective investment scheme as defined in s 1 of the Collective Investment Schemes Control Act, 45 of 2002 ("the CISC Act"), without being registered as a manager or being an authorised agent or being exempted from the provisions of the CISC Act, as provided for in s 5 of the CISC Act;

92.5 directly or indirectly promoted, knowingly joined or entered into or participated in a fraudulent financial transaction, as described in s 42(4) of the Consumer Protection Act, 68 of 2008 ("the CPA");

92.6 directly or indirectly promoted and conducted a pyramid scheme, as described in s 43(2)(b) read with s 43(4) of the CPA.

[93] Applicants further contended that the business of MTI amounted to common law fraud by having an underlying business model which was designed and implemented to perpetrate a fraud on members of the public by enticing them to invest in an illegal ponzi-type investment scheme with the fraudulent intent to convince members of the public to transfer their right, title and interest, alternatively the effective control over their right, title and interest in their assets (specifically bitcoin) to MTI and, ultimately enabling its directing mind(s), being its director(s)

and/or shareholders and/or senior management to misappropriate these assets for his/their personal gain.

[94] It is so that it does not follow that a business conducted in breach of statutory provisions amounts to an illegal or unlawful scheme. A breach of statutory provisions also does not necessarily render the underlying agreements invalid.

[95] Whether or not the business of MTI was in breach of all the statutory provisions relied on by the applicants need in my view not to be decided, if it is shown, on a balance of probabilities, that MTI's business was a common law ponzi-type scheme or conducted in breach of the CPA.

[96] I am nonetheless of the view that MTI, as found by the FSCA, breached several statutory provisions, such as s 7 of the FAIS Act in that it rendered financial services without a licence. In this regard and insofar as it was argued that crypto assets do not fall under the auspices of the FAIS Act, the evidence of Steynberg to the FSCA, was that MTI traded in forex initially and later in CFD's, which are both regulated and required a licence. The evidence was that MTI acted as an intermediary between the investors looking to invest in bitcoin and the online broker. The investors would deposit their bitcoin into a wallet controlled by MTI, who would then invest the funds into a foreign trading market. The bitcoin was never exchanged for any other currency.

[97] Furthermore, and at the first interviews with the management of MTI during July 2020 by the FSCA, it was explicitly stated by the FSCA to Steynberg and MTI's management, that it required proof that trades were being made by MTI's brokers and that the funds or assets were not being "pocketed". It was further expressly stated by the FSCA that it had concerns about the fact that trades through FXChoice were not in the name of the actual clients but rather in the name of MTI itself and that this was known as a discretionary investment for which a licence is required. It was also pointed out that the issue was not that MTI was trading in bitcoin but rather that assets were pooled together, given to a forex broker and then traded in the name of MTI and that was a contravention of the CISC Act.

[98] The concerns raised by the FSCA are substantiated by MTI's management public report to investors, after these interviews, that it was trading in derivative instruments based on forex pairs and that considerable profits were made.⁴⁶

[99] In light of the aforesaid evidence the argument that bitcoin is not a "financial product" for purposes of the FAIS Act and the CPA Act, is contrived.

[100] Even if I am wrong in this regard, and the manner in which MTI operated its business was not subject to the oversight of the FSCA, I am of the view that on the evidence before court, the applicants have shown that MTI's business amounted to an unlawful and fraudulent scheme as a result of the various false representations made to investors.⁴⁷

[101] On the conspectus of the evidence, it cannot seriously be argued, that MTI did not conduct a pyramid scheme in contravention of ss 42 and 43 of the CPA if one considers the evidence of Steynberg himself, the binary structure explained by Ward during the enquiries and in the public domain, Marks's explanations at board meetings regarding the growth of membership numbers through teams and leaders, and the evidence of Ignatius Bell who, save for an investment of R7,000.00 on his behalf by Steynberg, made no further investment but recruited investors and had approximately 190 000 investors in his "downline" in the MTI binary system. Based on the MTI compensation plan, dependent on the investors recruited by Bell, he was enabled to earn an income of R6 million per month.

Declaring all agreements between MTI and its investors to be unlawful and void ab initio:

[102] The applicants seeks an order declaring that all agreements between MTI and investors formed part of the unlawful business of MTI and are therefore void *ab initio* with the result that investors have no contractual right to share in any profits of MTI with reliance on the matter of Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (4) SA 179 (CC) at para [67] and the order that was granted in Fourie NO (*supra*).

⁴⁶ It was published that MTI made a monthly profit of approximately 10 % during this period and that this represented a monthly growth of members' pooled bitcoin of 10 %. These profits were allegedly high and consistent.

⁴⁷ See paras 32 and 34 of this judgment.

[103] It was submitted that a declaratory order to this effect would determine the extent of claims that investors may have against MTI in liquidation and the converse being the extent to which the applicants may have claims against investors who have shared in MTI's alleged profits.⁴⁸

[104] The order in Fourie NO (*supra*) was granted prior to the enactment of the CPA and at the time, the CPA's predecessor, the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, ("the 1988 Act"), was in effect. The question is thus whether the CPA has had any effect on the finding in Fourie NO (*supra*) and further whether the CPA renders a pyramid or ponzi-type scheme illegal.

[105] It was said in Schierhout v Minister of Justice 1926 AD 99 at [109], that: "*It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect*". It was however pointed out in Lupacchini NO v Minister of Safety and Security 2010 (6) SA 457 (SCA) at para [8] that:

"... [T]hat will not always be the case. Later cases have made it clear that whether that is so will depend upon the proper construction of the particular legislation. What has emerged from those cases was articulated by Corbett AJA in Swart v Smuts 1971 (1) SA 819 (A) at 829C-G:

'Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in strydmet 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien ...). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met 'n statutêre bepaling verrig is, as 'n nietigheid beskou, maar hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie.'" (my emphasis)

⁴⁸ How this should be dealt with is subject to another application in this court under case no 13721/22.

[106] In searching for the intention of the legislature, general principles of interpretation apply. Those principles were formulated as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18]:

“...The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. ... The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.” (my emphasis)

[107] In regard to the application of the CPA, it was argued that a sensible interpretation of the words “(a) *person must not directly or indirectly promote ... a pyramid scheme*”, inevitably leads to the conclusion that a pyramid scheme is illegal. I was referred to Van Eeden, *Consumer Protection Law in South Africa*, 2nd ed, para 2.3 where it is stated that the CPA prohibits pyramid schemes and to para 7.5 where it is stated in respect of such schemes: “*Such schemes are not regulated, in the sense that they may be conducted subject to compliance with certain requirements; they are prohibited outright.*”

[108] In accordance with the aforesaid principles and on the question of whether the CPA brought about any change in the law relating to pyramid schemes, the point of departure is the language of the provisions, read in context and having

regard to the purpose of the provisions, bearing in mind that a sensible meaning is preferred to one that leads to insensible or unbusinesslike result or undermines the apparent purpose of the CPA.

[109] Section 43 of the CPA reads, *inter alia*, as follows:

“43 Pyramid and related schemes

(1) ...

(2) A person must not directly or indirectly promote, or knowingly join, enter or participate in—

(a) ...

(b) a pyramid scheme, as described in subsection (4);

(c) ...

(d) ...,

or cause any other person to do so.

(3) ...

(4) An arrangement, agreement, practice or scheme is a pyramid scheme if—

(a) participants in the scheme receive compensation derived primarily from their respective recruitment of other persons as participants, rather than from the sale of any goods or services; or

(b) the emphasis in the promotion of the scheme indicates an arrangement or practice contemplated in paragraph (a).”

[110] Section 43(2) in my view, given the language and the purpose of the Act, makes it illegal to operate a pyramid scheme. In terms of the 1988 Act, there was no distinction between parties who joined knowingly and those who joined unknowingly, which raises the question of whether persons who unknowingly join, enter or participate in a pyramid scheme, will be entitled to enforce an agreement between themselves and the illegal scheme. This cannot be and I agree with Mr van Rooyen (SC) that the distinction in the CPA simply excludes the unknowing participants from being liable in terms of s 112 to pay administrative fines.

[111] As pointed out previously in this judgment, the business conducted by MTI contravened provisions of several statutes other than the CPA and it appears on the facts which cannot be denied by the respondents that the underlying business model of MTI was designed and implemented to perpetrate a fraud on members of the public which ultimately enabled its directing mind(s), being its director(s) and/or shareholders and/or senior management, to misappropriate investors assets for their personal gain.

[112] Section 2(1) of the CPA provides that: *“This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.”*⁴⁹

[113] In respect of “consumer interest”, Van Eeden at para 1.2 states:

“‘Consumer interest’ is not immutable and should not be a doctrinaire concept; it must be context and time sensitive, and must be realised in balance with other legitimate societal interests in respect whereof it does not assert priority or superiority. Consumer interest must also be seen as distinct from the individual's interest as a citizen; and comprising the public interest in conjunction with other group and individual interests.”

⁴⁹ Section 3 reads *inter alia* as follows:

“3 Purpose and policy of Act

(a) The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by—

(d) protecting consumers from —

(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and

(ii) deceptive, misleading, unfair or fraudulent conduct;

(e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;

(f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; ...”

[114] If an “*unknowing*” investor is permitted to enforce an agreement with MTI, it will give effect to a business that is prohibited by the CPA and it will give effect to a fraudulent scheme which would not be in accordance with the purpose and policy of the CPA set out in s 3.

[115] Further to this, s 51 of the CPA reads, *inter alia*, as follows:

“51. Prohibited transactions, agreements, terms or conditions

(1) A supplier must not make a transaction or agreement subject to any term or condition if—

(a) its general purpose or effect is to –

(i) defeat the purposes and policy of this Act;

(ii) mislead or deceive the consumer; or

(iii) subject the consumer to fraudulent conduct;

(b) it directly or indirectly purports to –

(i) waive or deprive a consumer of a right in terms of this Act;

(ii) avoid a supplier’s obligation or duty in terms of this Act;

(iii) set aside or override the effect of any provision of this Act;

or

(iv) authorise the supplier to—

(aa) do anything that is unlawful in terms of this Act; or

(bb) fail to do anything that is required in terms of this Act;

...

(3) A purported transaction or agreement, provision, term or condition of a transaction or agreement, or notice to which a transaction or agreement is purported to be subject, is void to the extent that it contravenes this section.

...

[116] It appears from the context of s 51, and in particular s 51(3), which provides *inter alia* that a “*purported transaction or agreement ... is void to the extent that it contravenes this section*”, that it is not limited to “*a list of unfair terms*”.

[117] The terms of the agreements between MTI and investors are in conflict with the provisions of s 51(1), particularly the sections already highlighted previously herein and are therefore void pursuant to s 51(3).

[118] Voidness of agreements, in the course of illegal transactions, does not only depend on the question as to whether a ponzi-scheme was conducted. In Fourie NO (*supra*) each of the following bases for illegality was considered to trigger voidness of agreements:

118.1 A contravention of section 11 of the Banks Act⁵⁰, due to the peremptory language of the provision that a contravention constitutes a criminal offence and that such prohibited transactions are void *ab initio*;

118.2 a pyramid scheme;

118.3 and a fraudulent scheme in terms of the common law.

[119] It follows that if the agreements, on the facts of this application, are not declared void *ab initio*, it will condone a scheme that is fraudulent and in conflict with several statutes. Such result will be contrary to public policy considerations.

[120] I further agree that the peremptory terms of s 7 of the FAIS Act and s 111 of FSRA Act (“*may not*”) and the fact that a contravention of the Act constitutes a

⁵⁰ ‘(1) ... no person shall conduct the business of a bank unless such a person is a public company and is registered as a bank in terms of this Act.

(2) Any person who contravenes a provision of ss1 shall be guilty of an offence.”

criminal offence, renders the business operations of MTI illegal and unlawful over and above the fact that a pyramid scheme is prohibited in terms of s 43 of the CPA.

Declaring that MTI is factually insolvent and that dispositions as contemplated in sections 26 and 29 of the Insolvency Act were made:

[121] Applicants contend that the factual insolvency of MTI is demonstrated, *inter alia*, by the fact that investors requested the withdrawal of 2 600 bitcoin in December 2020 but those withdrawals were not effected by MTI. Only 1280 bitcoin could be found by the liquidators and further that MTI's back office database reflects the extent of MTI's insolvency. In this regard the applicants rely on the evidence of Stephenson and the investigation by Mr Pedersen, with reference to the Maxtra back office data.

[122] According to Stephenson, MTI, during the first period, had a so-called MAM account with FXChoice and a total of 50.95 bitcoin was deposited into that account. MTI lost 22 bitcoin and clients withdrew what was left of their funds, bringing the activity on that account to a close. In 2020 MTI restarted with a new live count, account 1[...] and MTI advised that it was its funds that would be traded (this is in line with what Steynberg advised the FSCA, but contrary to what Marks stated under oath in his provisional opposing affidavit to the liquidation application).

[123] Contrary to what was stated by MTI to investors, Stephenson states that MTI did not trade as alleged by Steynberg and that during the second period, the limited trading that MTI did, was massively unsuccessful. FXChoice blocked trading on MTI's live account as they came into possession of trade accounts provided by MTI to investors which were false statements as it did not correlate with the live trades on the account of MTI. According FXChoice, the investors were provided with manipulated winning demo trade statements. After blocking MTI's account, it was granted an opportunity to provide further documentation confirming the source of MTI's funds and to explain the discrepancy between the live trades and the statements provided to MTI's investors. MTI failed to do so.

[124] On 13 July 2020, after the account was blocked, FXChoice received a withdrawal request of 280 bitcoin which was refused. MTI was again asked for audited financial statements which it failed to provide previously. On 7 August 2020 the account was marked as "fraud".

[125] According to the records of FXChoice, MTI did not withdraw any funds in 2020 but deposited a total of 1,845,978,020.00 bit and lost 566,676,745.3 bit through trading. The remaining balance of 1,280,045.63 bit was frozen and later converted by the applicants in the liquidation proceedings. FXChoice was not involved in the third period on the available evidence.

[126] *Prima facie*, the aforesaid evidence shows that:

126.1 Contrary to the remarkable profits claimed by MTI, it traded at a loss whilst making use of FXChoice as a broker and the nature of MTI's business was CFD derivative trading;

126.2 Only a very limited amount of bitcoin was deposited in 2020 at FXChoice and nothing was withdrawn;

126.3 No bitcoin was transferred from the only live account in the name of MTI, or the individual accounts held in the name of Steynberg, to a broker called Trade 300 during 2020 from FXChoice.

[127] Mr Pedersen, a forensic cybercrime investigator, instructed by the applicants, states that in his expert opinion, as set out in his report of July 2020 (the "Tokyo report"), and based on the back-office data, it appears that MTI had approximately 200 000 investors (ignoring the duplicate and dormant accounts), but that it is difficult to determine the correct number with accuracy as the database does not reflect any particulars of wallets wherein bitcoin deposited by investors were held. He further states that as July 2020, MTI should have had a balance of 10 866.87 bitcoin (this equates to R 2.1 billion at that time), which cannot be found.

[128] Mr Pederson however qualified his findings by stating that: "The database is most likely incomplete in terms of full and comprehensive investment and withdrawal data. The first withdrawal data is notes as 2019-08-20 while the first deposit is on 2020/02/24. This would indicate a legacy system where perhaps date base been caried in from another database and older data is available. The database shows no indication of active trading in BTC via the database. It is common cause that withdrawals by members were a manual process performed off

of the “MTI back-office” and that consequently there is no direct buy/sell; data available to verify transactions. It is common cause that the database is a legacy system which has been worked on by a number of different parties at different period of time.”

[129] Mr Gooden, another expert employed by the applicants, states that he was asked to investigate whether it is possible to manipulate FXChoice and MetaTrader 4 (“MT4”) software in order for a pro-demo account to appear as if it was a pro-live account. He found that it can easily be manipulated and that daily trade statements can easily be fabricated.

[130] Marks, on the other hand, filed an expert report by Mr Liam Timm, a cyber security consultant, who states that in his expert opinion, the back office data was obfuscated and the database of MTI was incomplete. It is according to him therefore impossible to validate the integrity of trade data. He further states that he was placed in possession of selected videos of demo trades shown to investors, Muller and Haasbroek, and was of the view that there was live trading, contrary to what is stated by FXChoice.

[131] Marks also filed an affidavit by a Mr Stone, who scrutinised on day’s trading history of MTI, 29 June 2020, on an account history report, and concluded therefrom, that in his opinion MTI traded and that the statements in respect of that day were not fictitious nor fabricated. Contrary to this Steynberg’s evidence, which was confirmed by Stephenson, was that since 10 June 2020, he did not trade on the MTI account at FXChoice.

[132] The findings in the FSCA report confirms that trading did take place in the first period and that limited trading took place during the second period.

[133] It appears that the implementation of the referral fee entitlement during April 2020, as part of the investors benefits, which entitled founding members and certain investors to qualify for 10 % referral bonus, together with the unsustainable business of MTI, sunk the boat.

[134] Unlike the factual situation in Fourie NO (*supra*), it is disputed, for purposes of this application for declaratory relief, that MTI was all at material times, or from a

specific date, insolvent in that its liabilities exceeded its assets. Rather, it is alleged that trading in fact occurred, that profits were made and that the volume thereof cannot be determined as the available data is incomplete. Further to this, and again unlike the situation in Fourie NO (*supra*), MTI may, depending on the claim(s) that each and every investor may have had at a specific time, have had sufficient underlying assets or investments at times, given the initial exponential growth in the value of bitcoin and its volatile nature.

[135] A further distinguishing fact is that in Fourie NO (*supra*) all the investors were innocent and unaware of the fact that the scheme was illegal. In the present matter it appears that some investors conducted their own illegal schemes within the MTI scheme. Investors who knew that the MTI scheme was illegal would not have claims based upon enrichment against MTI, which would have a material effect on the nature and extent of the liabilities of MTI.

[136] Whilst in my view there can be no material dispute as to whether the business of MTI was illegal, unlawful and fraudulent and that upon such finding it follows that the agreements between investors and the scheme must be void *ab initio*, I am not persuaded to grant declaratory relief, by way of application, that MTI was factually insolvent on a particular date or that dispositions were made as contemplated in ss 26 and 29 of the Insolvency Act.

Conclusion:

[137] MTI's business clearly amounted to an unlawful ponzi-scheme, i.e. a fraudulent investing scam promising high rates of return to investors and generating returns for earlier investors with investments taken from later investors.

[138] It would appear that there is no pool of members bitcoin, Trade 300 does not exist, the artificial intelligence bot never existed or traded and the remarkable trading results presented to investors were *prima facie* false.

[139] I am satisfied after due consideration of all the relevant principles applicable to disputes of fact, the granting of declaratory relief and the relevant sections of the Insolvency Act, that the applicants have shown, on a balance of probabilities, that they are entitled to the relief claimed in paras 1.1 and 1.2 of the notice of motion.

Costs:

[140] By reason of the exceptional facts, the complexity of the matter, the voluminous documents filed and the difficulty, complexity, voluminous documentation, multiplicity of issues and, to an extent, the novel issues raised, it will be fair in my view, for the purpose of doing justice between the parties, to find that it was reasonable to employ two counsel and to allow the fees of those counsel⁵¹.

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

1.

1.8.1.1.1.1.1.1.1 The business model of Mirror Trading International (Pty) Ltd (in liquidation)

(“MTI”) is declared to be an illegal and unlawful scheme.

2. All agreements concluded between MTI and its investors in respect of the trading/management/investment of bitcoin for the purported benefit of the investors, are declared unlawful and *void ab initio*;
3. The remainder of the relief claimed by the applicants is refused.
4. The counter-application by second respondent is dismissed with costs, such costs to include the costs of two counsel where so employed.
5. The application for referral to oral evidence by third respondent is dismissed with costs, such costs to include the costs of two counsel where so employed.
6. The costs of the main application, on an unopposed basis, including the costs of two counsel where so employed, are costs in the liquidation.
7. The costs occasioned by the opposition to the main application, including the costs of two counsel where so employed, are to be paid by the second and third respondents, jointly and severally.

⁵¹ See Cilliers, *Law of Costs*, 3rd ed at 13-38(6) para 13.24 and the authorities referred to therein.

A De Wet
Acting Judge of the High Court

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