

THE MTI LIQUIDATORS' RESPONSE TO THE ENQUIRY OF MR BEN JANSE VAN VUUREN

Introduction

This written response to an enquiry of an investor in MTI, one Mr Ben Janse Van Vuuren, has been prepared in an attempt to explain, by using practical examples, the workings of the very technical provisions of Sections 26, 29 and 32 of the Insolvency Act. Care was taken not to oversimplify the explanation, as the very specific provisions of the Insolvency Act and the rather unique outcome of the application of these provisions to the bitcoin investment scheme of MTI, are indeed complicated and may not be easily digested by a lay person.

Factual synopsis

1. Mr Janse van Vuuren explains:
 - 1.1 that he had invested R20,000.00 in bitcoin value in MTI in July 2020 (approximately 0.12 bitcoin at the time);
 - 1.2 when he heard that MTI may possibly be an unlawful scheme, he requested a withdrawal of all of his money (actually bitcoin) during October 2020;
 - 1.3 close to R21,000 were paid out to him in bitcoin value at the time;
 - 1.4 he had now received a letter of demand from one of the liquidators' attorneys claiming the full amount (of bitcoin) that was paid out to him at the time, however in today's bitcoin value, which currently amounts to R97,000.00;
 - 1.5 the initial deposit that he made, is not deducted at all.

The applicable legal principles

2. Any investment agreement in respect of an unlawful investment scheme, is void from the outset.
3. The moment that an investor makes a deposit in an unlawful investment scheme, he immediately has a claim for the return of the amount that he had "invested".

4. An investor in an unlawful scheme has no right to any profit/return on his capital investment, as same is fictional, as no/not sufficient profits were ever made.
5. If an investor received more bitcoin than what he has invested, the amount of bitcoin exceeding his initial investment, constitutes a claim in the hands of the liquidators, on the basis as provided for in Section 26 of the Insolvency Act, read with Section 32 of the Insolvency Act, being a so-called "disposition without value".
6. If an investor withdrew any bitcoin from his investment, i.e. irrespective of whether he withdrew only a portion of his initial investment, or all of his initial investment plus the fictitious profit reflected on his investment statement, within a period of six months before the liquidation of MTI, the liquidators have a claim for the return of all of the bitcoin which were withdrawn in the said period, irrespective of whether same constitutes only the initial bitcoin invested, or also fictitious profits. This claim is based on the provisions of Section 29, read with Section 32 of the Insolvency Act (so-called "voidable preferences").
7. The effect of Section 29 of the Insolvency Act, is often viewed by innocent investors as extremely harsh and unreasonable. However, it is important to keep in mind that the reason why these claims were created in the Insolvency Act, is based on fairness by restoring equity amongst the investors who lost their capital invested in MTI and did not withdraw their capital in the last six months before MTI's liquidation and those investors who fortunately made a withdrawal within six months before liquidation. Whilst the investor who is required to return what he received, will obviously view this remedy as extremely unfair, the investor who made no withdrawal and lost everything, will most definitely agree that it is only fair that the withdrawals within six months should be returned, to be shared on a pro rata basis amongst all investors who lost their initial investments. This is precisely what Section 29 of the Insolvency Act aims to achieve.
8. If an investor also has to return part of his initial capital investment in terms of Section 29, he will be entitled to prove a claim for an amount equal to his capital loss against MTI's insolvent estate, in respect of which loss he will then share pro rata in available funds in the estate, with other net loser investors. If, for example, an investor invested one bitcoin and, within 6 months before the liquidation of MTI, withdrew 1.5 bitcoin (i.e. his initial investment plus the fictitious growth/profit), the liquidators will have a claim against him for the return of 1.5 bitcoin, or its current value (as explained above), whereafter the investor will be entitled to prove a claim against the insolvent estate for the loss of his initial 1 bitcoin investment.

9. In terms of Section 32 of the Insolvency Act, the liquidators can only reclaim the property, in the form that it was transferred to an investor, to be returned on the basis of Section 26 and/or Section 29 of the Insolvency Act, as explained above. It is only where the specific property is no longer available for the investor to return, that the liquidators are entitled to claim an amount in money, which, in terms of the provisions of Section 32 of the Insolvency Act, will be the value of the property when it was transferred to the investor upon its withdrawal, alternatively the value of the property at the date when the court orders the return of the property, whichever amount is the highest.
10. To give a practical example, this means that if the property that was transferred to an investor, was for example a specific motorcar, the liquidators will only be entitled to recover the motorcar. Only if the investor is no longer in a position to return the motorcar, then the liquidators will be entitled to recover the value of the motorcar at the higher value at either the date when it was transferred to the investor, alternatively the date when the court makes the order. In the case of a motorcar, which generally loses its value over time, the highest value will typically be the value of the car at the time when it was transferred to the investor, and not the later date when the court makes the order, as the value of the car would obviously have declined over time.
11. However, due to the unique nature of bitcoin, together with the fact that its value generally increased from the period when investors made withdrawals (for example during 2020) the opposite applies in MTI. Should an investor not be in a position to return the actual number of bitcoin that he received, he will be obliged to pay the value of bitcoin at the highest rate either at the date when the withdrawal was made, alternatively the date that the court orders the return.
12. This is viewed by many investors as extremely unfair. However, one should consider this scenario in the appropriate context. If for example an investor withdrew the bitcoin and retained it, he now simply has to return the bitcoin which he withdrew (he will therefore then not be affected by the fluctuation in the value of the bitcoin). The problem obviously arises where investors sold their bitcoin and now has to either buy bitcoin, at its current higher price to return to the liquidators, alternatively having to pay the current value of bitcoin to the liquidators.

Application of the legal principles on the factual position of Mr Janse van Vuuren

13. It is important to keep in mind that investors in MTI could only deposit and withdraw bitcoin, i.e. not money. For the sake of this explanation, let us assume that Mr Janse

van Vuuren initially invested 0.12 bitcoin at a value of R20,000.00 at the time. Let us further assume that when he called up his investment in October 2020, his investment showed a fictitious growth of 0.01 bitcoin, meaning that his investor statement would reflect the value of his investment at the time of withdrawal as 0.13 bitcoin. Mr Janse van Vuuren would then have withdrawn and received the full 0.13 bitcoin which, for the sake of this example, had a total value of R21,000.00 in October 2020.

14. As Mr Janse van Vuuren's withdrawal was made within six months from the liquidation of MTI, the liquidators are entitled to claim from him the return of the full 0.13 bitcoin, in the alternative, should Mr Janse van Vuuren not be in a position to return 0.13 bitcoin, the value of 0.13 bitcoin either at the date of the withdrawal (in our example the amount of R21,000.00), or the value of 0.13 bitcoin at the date when the matter is before the court (for example, let's assume that 1.1 bitcoin is now worth R97,000.00), whichever is the higher amount. As the current value of 0.13 bitcoin is higher than what it was at October 2020, the liquidators have a claim for R97,000.00, should Mr Janse van Vuuren fail to return to the estate the 0.13 bitcoin.
15. Once Mr Janse van Vuuren had returned the 0.13 bitcoin to the liquidators, alternatively had paid the amount of R97,000.00, he will be entitled to prove a claim against the insolvent estate for his initial 0.12 bitcoin investment. It is important to note that this claim will be for the value of the 0.12 bitcoin at the time when the investment was made (i.e. R20,000.00) and not the current value of bitcoin. This is because an investor in an unlawful investment scheme has a claim immediately upon making an investment in an unlawful scheme, for the amount that he invested.
16. It is furthermore important to note that the aforesaid claim against the estate is a concurrent claim, which means that Mr Janse van Vuuren will receive a pro rata dividend in respect of his claim, calculated as a percentage of his claim in relation to the claims of all investors who had proved claims against MTI.
17. I trust that the above will be of assistance.

Regards.

HERMAN BESTER