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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 19201/2020

In the matter between:

ANTON FRED MELCHIOR LEE	Applicant
and	
MIRROR TRADING INTERNATIONAL (PTY) LTD	First Respondent
T/A MTI	
(REGISTRATION NUMBER: 2019/205570/07)	
Registered office at: 43 Plein Street, Unit 1, First Floor,	
Stellenbosch, Western Cape	
FINANCIAL SECTOR CONDUCT AUTHORITY (FSCA)	Second Respondent
CLYNTON HUGH MARKS	Third Respondent
And	
ADRIAAN WILLEM VAN ROOYEN N.O.	First Intervening Party
HERMAN BESTER N.O.	Second Intervening Party
CHRISTOPHER JAMES ROOS N.O.	Third Intervening Party
JACOLIEN FRIEDA BARNARD N.O.	Fourth Intervening Party
DEIDRE BASSON N.O.	Fifth Intervening Party

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

SUPPORTING AFFIDAVIT: CRAIG PEDERSEN

I, the undersigned,

CRAIG PEDERSEN

do hereby make oath and state that:

1. I am an adult male forensic investigator practising as such at 32 Woodbridge Business Park, 452 Koeberg Road, Milnerton, Western Cape, as the sole member of TCG Digital Forensics CC ("TCG").

2. The facts deposed to herein fall within my personal knowledge and belief, save where the context indicates the contrary, and are furthermore true and correct.

3. I have read the affidavit of Clynton Marks ("Marks") which serves as his founding affidavit in his counter-application and his answering affidavit in the application of the provisional liquidators ("the liquidators") of the First Respondent ("MTI"). I have also read the affidavits deposed to by the First Intervening Party in response to Marks's aforesaid affidavit (**"Van Rooyen's main replying affidavit and Van Rooyen's separate affidavit"** respectively).

4. I am a certified fraud examiner and a certified cyber crime investigator. A copy of my curriculum vitae is annexed hereto, marked **"CP1"**. I have experience in extracting data from electronic databases.

5. TCG accepted the instruction of the liquidators to extract data from the database of MTI ("the MTI database") stored on a server under the control

of Maxtra, a web-hosting company based in India that provides server space to its clients for the hosting of websites, databases and similar services. I have the experience and required skill to execute the instruction of the liquidators and managed a team of experts (consultants and programmers) employed by TCG in the process of extracting information from the MTI database. In summary, the following process was followed: (a) Using password and username combinations provided to us, access was acquired to the data via secured File Transfer Protocol download; (b) A full download was performed; (c) The database was extracted to a secured server so that the data could be inflated and analysed. A temporary server was inflated for this purpose in a secured server environment.

6. I am cognisant of the statutory duty, particularly in terms of the Protection of Personal Information Act, 4 of 2013, to protect personal information of the parties who are reflected as members of MTI in the database. I therefore do not divulge the personal information of members which can be abused, particularly in a multi-networking environment.

7. In what follows, I will set out general relevant information retrieved from the database.

Members

8. According to the database MTI has thousands of members, probably more than 200 000. By virtue of the following facts and circumstances it is not possible to determine the number with accuracy and to establish the identity and contact particulars of all the members:

8.1. There are 304 040 users and, therefore, an equal number of accounts (see paragraph 26.7 of Van Rooyen's main replying affidavit).

8.2. However, the number of members is less because there is a substantial number of potential duplicate accounts where the same individual may be controlling multiple accounts. There are 58 607 such potentially duplicate accounts (see paragraph 26.7 of Van Rooyen's main replying affidavit).

8.3. There are 275 544 users with no address data (see paragraph 28 of Van Rooyen's main replying affidavit).

8.4. There are 3 806 users with no phone number provided (see paragraph 28 of Van Rooyen's main replying affidavit).

8.5. There are 54 695 users with "dormant" accounts (no deposits and no withdrawals).

9. The members are from all over the world. Thirty-nine countries have 500 or more members and the following countries each has more than 5000 members (see paragraph 27 of Van Rooyen's Main Replying Affidavit:

9.1. South Africa: 166 318.

9.2. United States of America: 23 691.

9.3. Namibia: 10 563.

9.4. Canada: 10 028.

9.5. India: 7 704.

9.6. United Kingdom: 6 760.

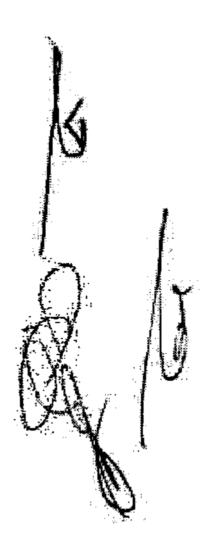
9.7. Nigeria: 5 971.

Notification of liquidators' application to all MTI members (see paragraph 11 of Van Rooyen's main replying affidavit)

10. On the instructions of the liquidators, a formal letter prepared by the liquidators' attorneys, was sent to all e-mail addresses of members of MTI as found on the MTI database. A copy of this letter is annexed hereto marked "**CP2**". Ignoring duplicate e-mail addresses, 250,665 unique e-mail addresses were identified, to which the annexed letter was duly sent on the 11th of August 2021 at 18:12.

11. As appears from "**CP2**", a link was also created, by which a recipient could obtain access to a complete set of court papers in respect of the liquidation application of MTI, as well as the court papers filed up and until that date, in respect of the liquidators' application.

12. In respect of the total number of e-mails sent, 230,161 were successfully delivered to the inboxes of the addressees. This represents 91.82% of the number of e-mails originally sent. Due to the different configurations and settings by different service providers, it is not possible to accurately determine how many of the recipients actually opened and viewed the e-mail. However, I can confirm that at least 26,700 (11.60% of the total e-



mails sent) were definitely opened, as actual confirmation was received from these recipients. The actual number will be a lot higher, but cannot be confirmed for the reasons as explained earlier.

13. From those recipients who received the e-mail, 2,204 recipients accessed the link to the court documents.

Input/output of bitcoin to Marks (see paragraph 35.3 of Van Rooyen's affidavit)

14. According to the database, Marks held at least two accounts which appear to be in his name. These have member numbers 7176010 and 2306852. Based on the rand value of bitcoin on the respective dates when the relevant bitcoin was deposited and withdrawn, Marks profited from his investment with MTI in an amount of at least R34, 334 133.09. I annex hereto copies of these two accounts as referred in the database reflecting total deposits and total withdrawals, marked **"CP3"** and **"CP4"**.

400 bitcoin transferred by Marks (see paragraph 35.4 and 94 of Van Rooyen's main replying affidavit)

15. I have been requested by the liquidators to comment on Marks's allegations in paragraphs 47 to 55 of his opposing affidavit, specifically with regard to the question whether there exists any proof that Marks actually transferred the 400 bitcoin to Steynberg/MTI.

16. I confirm that the MTI database does not reflect any record of such a transaction.

17. As for the so-called crypto graphic proof on the block chain, this information, without additional proof of the identity of the beneficial owner of the receiving and sending wallets, does not prove Marks's allegation.

18. As Marks himself explained in paragraph 521 of his affidavit, this information only serves as proof that the indicated number of bitcoin was transferred from one wallet to another, without any indication of the identity of the sender or the recipient.

Input/output of bitcoin (see paragraph 60 to 62 of Van Rooyen's affidavit)

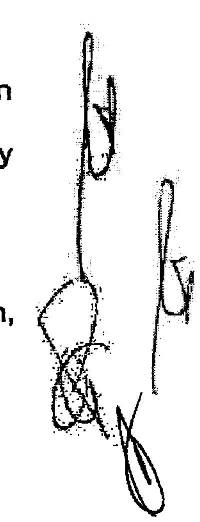
19. According to the database the flow of bitcoin was as follows:

    19.1. Total bitcoin deposited: 39 139.29

    19.2. Total bitcoin withdrawn: 28 272.42.

20. It follows that, according to the database, a total of 10 866.87 bitcoin were not withdrawn.

21. The database does not reflect the whereabouts of the 10 866.87 bitcoin that were not withdrawn. In fact, the database does not reflect any particulars of wallets where bitcoin deposited by members were held.



22. Having regard to the value of bitcoin as at the date of each transaction, the Rand value of the bitcoin deposited and withdrawn is as follows:

22.1. Total Rand value deposited: R6 830 908 978

22.2. Total Rand value withdrawn: R5 791 630 720

Members who deposited and withdrew

23. Members from different countries who deposited bitcoin but have not withdrawn more than they deposited:

    23.1. Number: 196 522

    23.2. Value: R3 107 470 319

24. Members from different countries who deposited bitcoin and have withdrawn more than they deposited:

    24.1. Number: 52 801

    24.2. Value: R2 068 192 061

Balance of bitcoin in members' trading pool (see paragraph 62.3 of Van Rooyen's main replying affidavit)

25. According to the database, MTI should have 22,222.54 bitcoin in its members' trading pool account. This represents the total number of bitcoin that should theoretically have been available, if the scheme were lawful and the trading results as represented to members, were actually achieved, i.e. the number of bitcoin reflected as the credit available to all members.

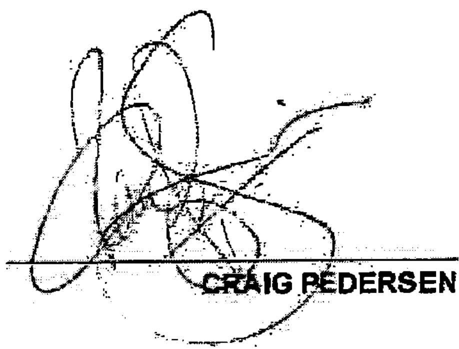
Duplication of members' accounts

26. As explained above, there are approximately 58 607 potentially duplicated accounts. What is meant with duplicated accounts, is accounts which appear to be controlled by the same individual. Although this practice was against the members' rules, the MTI back-office system had no mechanism to prevent members from opening multiple accounts. This enabled them to benefit from the 10% referral commission and the binary bonus structure, without actually having to introduce any new investors.

27. From the back-office data, it appears that Steynberg and Marks also contravened this rule. Steynberg is linked to at least 10 accounts and Marks to at least 2 (see paragraph 110 of Van Rooyen's main replying affidavit).

Top 200 Members (see paragraphs 191 and 218 of Van Rooyen's main replying affidavit

28. According to the database, the top 200 members in MTI, withdrew an amount of approximately R 642 133 667.09 more than what they have invested/deposited in MTI. This is not to be confused with the (fictitious) members' trading pool credit of 22,222.54 bitcoin, which is the balance "due" to members after the profit withdrawals have already been accounted for in the database (see paragraph 62.3 of Van Rooyen's affidavit).



CRAIG PEDERSEN

Sworn to and signed in my presence at Tygervalley on this 20th day of August 2021 by the deponent who declared that he:

(a) knows and understands the conter ts of this affidavit;

(b) has no objection to the taking of the prescribed oath;

(c) considers the oath to be binding on his conscience;

and uttered the words: *"I swear that the contents of this affidavit are true, so help me God."*

COMMISSIONER OF OATHS

Ex Officio COMMISSIONER OF OATHS (RSA)
CHARL THOMAS HAMBRIDGE
(Member) Chartered Management Accountant
Business Consultant
CTH Consulting
25 Dolfyn Street, Yzerfontein
Western Cape, 7351

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"CP1"

2013

CURRENT POSITION

I am the owner and director of Peddy Tech cc Trading as TCG Cape and TCG Digital Forensics. In this capacity I am responsible for the management of our Forensics Division including in-house training and functional tasks in the area of Digital Forensics, Data Acquisition, Data Analysis, Image Enhancement, Report writing and court testimony.

I oversee a staff capacity of 20 team members in total including administrative, technical and lab staff as well as Forensic Investigators (CFE). I actively participate in investigations and case management within the company.

COURSES & QUALIFICATIONS

1995 PEC Systems Admin.(Int. Shell Oil)
1996 Relational Databasing(Int. Shell Oil)
1997 Systems Administration (Int. Shell Oil)
2001 MySql/ Joomla/ Wordpress
2002 E-Safe Anti-Virus & malware specialist
2004 Anti-Virus training United Kingdom
2006 PSIRA - Security Management
2006 Endpoint Security (Dublin, Ireland)
2010 REID Interrogation (Dana Rodden)
2014 IT Management (UCT)
2015 Nexan Fibre Optic Installation
2015 Nexan Fiber Optic Supervisor
2016 Court Aligned Mediator (UCT)
2018 CFE Prep course
2018 Social Media Intelligence / Osint -
2018 MCISA Member
2018 Cognitive Interview Technique
2019 Osint Analyst (IntelTechniques, USA)
2019 Interpol illicit tobacco course
2019 ISS Osint - Law Enforcement (Malaysia)
2019 Interpol Brand Counterfeiting & prevention course
2019 Certified Fraud Examiner (CFE)
2019 Certified Cyber Crime Investigator
2019 DS Certified Mobile Operator

CRAIG L. PEDERSEN

Certified Fraud Examiner
Digital Forensics Examiner

Date of Birth

CFE Registration

CCCi Registration

ASIS Registration

SAAFS Registration
SAAFS039

KEY SKILLS

CONTACT

COURSES PRESENTED

Chain of Custody (1 day program)
Forensics: Acquisition Phase (1 day program)
Osint Introduction workshop (1 day program)
Due Diligence Investigations using Osint
Osint Level 1 (5 day program)
Osint Level 2 (5 day program)
Practical Cyber Crime Investigation for Law Enforcement (5 day program)

PUBLICATIONS & SPEAKING ENGAGEMENTS

Guest Speaker - ASIS Chapter 203 (2011/2013)
Guest Speaker - 2019 ACFE All Africa Conference
Guest Speaker - 2020 ACFE Lesotho
Guest Speaker - 2020 ACFE Regional
Guest Speaker - 2019 ACFE Fraud Week
Guest Speaker - 2020 IDU Africa Conference
Guest Speaker - IAFCI 2019
Guest Speaker - 2020 ASIS Chapter
Guest Speaker - 2019 Law Society SA
Articles: Servamus (June 2020)
Guest Speaker: United Nations Office on Drugs and Crimes (UNDOC) SA.
Guest Speaker - ACFE Africa 2020
Guest Speaker CyberSummit
Guest Speaker SABIC
Guest Speaker UNDOC SA (Investigating and prosecuting cybercrime)
Guest Speaker LSSA - Digital Forensics Trends for 2020
Position: Part Time Lecturer - University of Pretoria (Forensics)

COMMENDATIONS & AWARDS

2004 Area Commissioners Certificate, Diligence as SAPS Instructor
2006 SAPS Milnerton Commendation, Arrest - most wanted CIT suspect
2007 SAPS commendation for service in intelligence led operations
2008 Reservist of the year Award, SAPS Prestige Awards (2nd Place)
2011 Awarded SAPS FIFA 2010 Medal
2012 Awarded SAPS 20 year Service Medal
2016 Commendation, Arrest of suspect known as the "UCT Serial Rapist"
2018 SAPS Prestige Awards Winner -Best Group, Serial & Electronic Crimes
2018 Minister of Polices' commendation - Serial & Electronic Crimes
2019 Nomination - CFE of the year (South Africa)

"CP2"

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MOSTERT & BOSMAN

ATTORNEYS | TRUSTED ADVICE BY COMMITTED PEOPLE

	Date:	11 August 2021
TO ALL KNOWN MEMBERS / INVESTORS OF MIRROR TRADING INTERNATIONAL (PTY) LTD (IN LIQUIDATION)	Our Ref:	P DU TOIT/Antoinette/WI7098
	Email:	antoinettee@mbalaw.co.za
BY E-MAIL	Your Ref:	

Dear Sir / Madam

NOTICE OF HIGH COURT APPLICATION TO HAVE BUSINESS MODEL OF MTI DECLARED UNLAWFUL / ILLEGAL AND RELATED RELIEF

1. We refer to the above and confirm that we act herein on behalf of the joint provisional liquidators of Mirror Trading International (Pty) Ltd (in liquidation) (**"MTI"**).

2. In as far as your contact details, as the recipient of this e-mail, appear in the members' data base maintained by MTI, you may be an interested party in the outcome of a High Court application instituted by our clients in the High Court of South Africa, Western Cape Division, Cape Town under case number 19201/2020, in terms of which our clients seek the following order from the High Court:

   2.1 That the provisional liquidators be granted leave to intervene in the application for MTI to be placed in final liquidation. Alternatively, that the provisional liquidators are granted leave to seek the relief dealt with below, as substantial relief under the abovementioned case number and to rely on the affidavits filed under the aforesaid case number;

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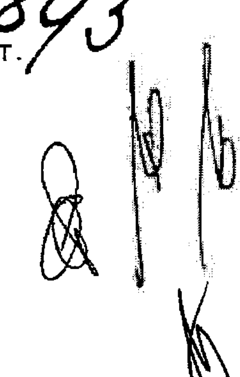

4th floor, Madison Square, Cnr of Carl Cronje & Tygerfalls Boulevard, Tygerfalls, Tyger Waterfront, Bellville, South Africa
PO Box 3355, Tyger Valley, 7536 | Docex 152, Cape Town | info@mbalaw.co.za | www.mbalaw.co.za.
t +27(0)21 914 3322 | f +27(0)21 914 3330

Partners: Herman Botes | Riaan Kunz | Pierre du Toit | Cloete Marais | Richard Dixon | Lee-Anne Ely
Associates: Morné Strydom | Melissa Colyn | Callie Lloyd | Johann Steyn | Michelle Birkenstock
Jacky Wilkinson | Elizabeth Martin | Comé Botha | Kruger van Dyk
Office Manager: Charl Hambridge

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2.2 Declaring the business model of MTI as an illegal/and/or unlawful scheme and/or that MTI at all relevant times operated an illegal and/or unlawful business;

2.3 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*;

2.4 Declaring that MTI is 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;

2.5 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 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"**);

2.6 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 (six) months before the *concursus 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 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 Act;

2.7 Granting leave 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 2.5 and 2.6 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;

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2.8 That, in the event of this application being opposed, the costs of this application be paid by the party/parties who oppose(s) the application;

2.9 That further and/or alternative relief be granted.

(hereinafter referred to as "**the provisional liquidators' application**").

3. Mr Clynton Hugh Marks opposed the provisional liquidators' application, pursuant to which a High Court order was granted by agreement between the parties on 30 June 2021, which provided that:

3.1 The application, launched by the Proposed Intervening Parties (the provisional liquidators), is postponed to the semi-urgent roll for hearing, on Wednesday 8 September 2021;

3.2 By no later than 7 July 2021 Third Respondent (Mr Marks), shall publish this order on the *telegram* social media platform used by First Respondent (MTI) and shall file by no later than 12 July 2021 an affidavit confirming such publication and annexing proof thereof;

3.3 Any party who wishes to oppose any of the relief sought by the Proposed Intervening Parties (the provisional liquidators), shall file their answering affidavits, dealing with all the relief sought by the Proposed Intervening Parties, on or before 30 July 2021;

3.4 The Proposed Intervening Parties shall file their replying affidavits, if any, on/or before 13 August 2021;

3.5 The Proposed Intervening Parties shall file their heads of argument on/or before 24 August 2021;

3.6 Any party who opposes the intervention application (the provisional liquidators' application) shall file heads of argument on/or before 31 August 2021;

3.7 All questions of costs shall stand over for later determination.

4. On 5 July 2021 and in compliance with paragraph 2 (recorded as 3.2 above) of the abovementioned court order, Mr Marks arranged for the publication of the aforesaid court order via the social media platform *Telegram* to the members of MTI, where, according to him, approximately 30 000 MTI members participate.

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5. Notwithstanding the aforesaid publication by Mr Marks via *Telegram*, no MTI member has to date indicated his/her/its intention to oppose the provisional liquidators' application.

6. In order to ensure that as many of MTI's members as possible receive notice of the provisional liquidators' application, this letter is hereby transmitted to all the recipients whose contact details are kept on the aforesaid database.

7. Please also be advised that a complete electronic set of the court papers in the application for the liquidation of MTI and in the provisional liquidators' application filed to date, can be obtained at https://drive.google.com/drive/folders/1JSSGxi-Rb9NybuSvh_bxYoTBwq7cZMpp.

8. If you wish to oppose the provisional liquidators' application, you are advised to seek urgent legal advice, in order to participate in the court proceedings referred to herein. This should be seen in light of the fact that an order granted in the mentioned proceedings will be applicable to all members of MTI, and may influence a possible claim against you if you unduly benefitted from the illegal business carried on by MTI.

9. Please note that it is not possible to respond/reply to this e-mail via its sending address.

Yours faithfully

MOSTERT & BOSMAN

Per: **PIERRE DU TOIT**

"CP3" 371

MTI User Statement

2306852
Bitcoindream
Clynton Marks
xftonfire+1@gmail.com
0

22 Malachite Kloonfendal
Johannesburg
Gau
South Africa

Deposits Recieved

PaymentDate	InwardReference	BTCAmountINward
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	1.04859284
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	1.01204741
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.9996
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.63409128
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.5894921
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.45551965
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.3981716
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.35337111
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.33756414
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.3176
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.27627248
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.27211587
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.26589097
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.26583867
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.25830374
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.24810233
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.23348339
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.20480409
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.18389134
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.14918327
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.13780179
2020-03-31	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.13220283
2020-04-20	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	0.99638802
2020-05-11	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	10.90585484
2020-05-25	39ki7e8coXRNtw8qXiT8sdGjhhSavYS7W4	1.3087188

MTI User Statement

Total Deposits 21.98490256

Withdrawals Processed

posted_date	transaction_no.	description	Pmt Amount
2019-08-26	113238		0.25572225
2019-08-30	100781	1Kh27QJ5PUngYEPsxN8PR	0.05220000
2019-09-02	496438	1KNhasVQ7XNMFJN29VJx	0.1536
2019-09-03	642689	1Bm2zgFHqgZDnuLqpwbp	0.1925
2019-09-14	84313	1Bm2zgFHqgZDnuLqpwbp	0.28399655
2019-09-21	173978	1Bm2zgFHqgZDnuLqpwbp	0.36297415
2019-09-28	447694	1Bm2zgFHqgZDnuLqpwbp	0.41720296
2019-10-05	824024	1Bm2zgFHqgZDnuLqpwbp	0.25584826
2019-10-12	736386	1Bm2zgFHqgZDnuLqpwbp	0.34221441
2019-10-20	212252	1Bm2zgFHqgZDnuLqpwbp	0.39
2019-10-26	396995	1Bm2zgFHqgZDnuLqpwbp	0.49271096
2019-11-02	455948	1Bm2zgFHqgZDnuLqpwbp	0.59967964
2019-11-04	690167	1Bm2zgFHqgZDnuLqpwbp	0.03800390
2019-11-09	812259	1Bm2zgFHqgZDnuLqpwbp	0.54455296
2019-11-16	812855	1Bm2zgFHqgZDnuLqpwbp	0.61624169
2019-11-23	905595	1Bm2zgFHqgZDnuLqpwbp	0.64561191
2019-11-30	336074	1Bm2zgFHqgZDnuLqpwbp	0.70648099
2019-12-08	107537	1Bm2zgFHqgZDnuLqpwbp	0.81906124
2019-12-14	885142	1Bm2zgFHqgZDnuLqpwbp	0.94696595
2019-12-21	67603	1Bm2zgFHqgZDnuLqpwbp	0.87703484
2019-12-28	651430	1Bm2zgFHqgZDnuLqpwbp	1.15238694
2020-04-19	529606	1Bm2zgFHqgZDnuLqpwbp	2.70817359
2020-04-27	443638	1Bm2zgFHqgZDnuLqpwbp	3.37976473
2020-05-03	544586	1Bm2zgFHqgZDnuLqpwbp	4.02545627
2020-06-28	842737	1Bm2zgFHqgZDnuLqpwbp	6.22578113
2020-07-05	272380	1Bm2zgFHqgZDnuLqpwbp	5.67461624
2020-07-12	229634	1Bm2zgFHqgZDnuLqpwbp	5.72429749
2020-07-19	1601	1Bm2zgFHqgZDnuLqpwbp	7.20000000
2020-07-26	586840	1Bm2zgFHqgZDnuLqpwbp	7.28419871

MTI User Statement

MTI Backoffice Sourcedata 2021-08-19

2020-08-02	598522	1Bm2zgFHqgZDnuLqpwbp	8.09887010
2020-08-09	948851	1Bm2zgFHqgZDnuLqpwbp	6.85115318
2020-08-16	979941	1Bm2zgFHqgZDnuLqpwbp	6.73646471
2020-08-23	110416	1Bm2zgFHqgZDnuLqpwbp	6.66272468
2020-08-30	792767	1Bm2zgFHqgZDnuLqpwbp	6.81160971
2020-09-06	865987	1Bm2zgFHqgZDnuLqpwbp	6.72313685
2020-09-13	365815	1Bm2zgFHqgZDnuLqpwbp	7.59416927
2020-09-20	769841	1Bm2zgFHqgZDnuLqpwbp	7.50801848
2020-09-27	535866	1Bm2zgFHqgZDnuLqpwbp	7.21573353
2020-10-04	780902	1Bm2zgFHqgZDnuLqpwbp	7.36918001
2020-10-11	316705	1LyuTwBjw6Ps29JFJty5kpl	7.43174617
2020-10-18	139930	1Bm2zgFHqgZDnuLqpwbp	6.98989482
2020-10-22	478272	1Bm2zgFHqgZDnuLqpwbp	10.00000000
2020-11-23	751057	1Bm2zgFHqgZDnuLqpwbp	5.00000000
2020-11-26	494774	1Bm2zgFHqgZDnuLqpwbp	8.00000000
2020-12-08	811611	1Bm2zgFHqgZDnuLqpwbp	30.00000000
		Total Withdrawal	191.35997927

374

"CP4"

MTI User Statement

MTI BackOffice Sourcedata 2021-08-19

7176010
Daydream
Clynton Marks
xftonfire@gmail.com
0

22 Malachite Kloonfendal Roo

Gau
South Africa

Deposits Recieved

PaymentDate	InwardReference	BTCAmountINward
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.6182978
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.589492096
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.4842
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.42367547
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.34793702
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.24037063
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.12453125
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.11867422
2020-03-31	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	0.00034788
2020-10-29	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	45.5418179
2020-11-02	3NvwzHR4SN44oEVXssV48Iz7zizsf1jeUk	23.6362959
	Total Deposits	72.125640166

Withdrawals Processed

posted_date	transaction_no.	description	Pmt Amount
2019-08-26	223608		0.42435558
2019-08-30	882005	1Kh27QJ5PUngYEPsxN8PR	0.05220000
2019-09-02	285471	1KNhasVQ7XNMFJN29VJx	0.1536
2019-09-03	476984	1Bm2zgFHqgZDnuLqpwbp	0.1925
2019-09-14	113263	1Bm2zgFHqgZDnuLqpwbp	0.13107030
2019-09-21	147793	1Bm2zgFHqgZDnuLqpwbp	0.10392413
2019-09-28	957513	1Bm2zgFHqgZDnuLqpwbp	0.05680418
2019-10-05	332350	1Bm2zgFHqgZDnuLqpwbp	0.10963607
2019-10-12	427616	1Bm2zgFHqgZDnuLqpwbp	0.11851100
2019-10-20	11590	1Bm2zgFHqgZDnuLqpwbp	0.13781856

MTI User Statement

2019-10-26	89304	1Bm2zgFHqgZDnuLqpwbp	0.13781855
2019-11-02	260578	1Bm2zgFHqgZDnuLqpwbp	0.13615502
2019-11-04	691593	1Bm2zgFHqgZDnuLqpwbp	0.06826209
2019-11-09	210108	1Bm2zgFHqgZDnuLqpwbp	0.12903653
2019-11-16	98268	1Bm2zgFHqgZDnuLqpwbp	0.13572662
2019-11-23	937566	1Bm2zgFHqgZDnuLqpwbp	0.13538214
2019-11-30	490534	1Bm2zgFHqgZDnuLqpwbp	0.13752057
2019-12-08	132350	1Bm2zgFHqgZDnuLqpwbp	0.15846550
2019-12-14	794812	1Bm2zgFHqgZDnuLqpwbp	0.17911790
2019-12-21	52009	1Bm2zgFHqgZDnuLqpwbp	0.16843070
2019-12-28	349827	1Bm2zgFHqgZDnuLqpwbp	0.22506180
2020-04-19	153610	1Bm2zgFHqgZDnuLqpwbp	0.48315666
2020-04-27	70900	1Bm2zgFHqgZDnuLqpwbp	0.71465236
2020-05-03	519890	1Bm2zgFHqgZDnuLqpwbp	1.50700911
2020-06-28	379922	1Bm2zgFHqgZDnuLqpwbp	1.09308096
2020-07-05	882171	1Bm2zgFHqgZDnuLqpwbp	0.99062872
2020-08-17	341853	1Bm2zgFHqgZDnuLqpwbp	0.98000000
2020-10-06	396681	1Bm2zgFHqgZDnuLqpwbp	0.57211019
2020-10-11	911434	1Bm2zgFHqgZDnuLqpwbp	5.00000000
2020-10-18	118105	1LyuTwBjw6Ps29JFJty5kpl	5.00000000
2020-10-25	454982	1Bm2zgFHqgZDnuLqpwbp	10.00000000
2020-11-04	940966	bc1q29stqd8e47hw0t5klfv	10.00000000
2020-11-23	919787	1LyuTwBjw6Ps29JFJty5kpi	2:00000000
2020-12-01	176003	1Bm2zgFHqgZDnuLqpwbp	20.00000000
		Total Withdrawal	61.43203524

TO: **STRYDOM, RABIE, HEIJSTEK & FAUL INC.**

REF: **S STRYDOM/BAR2/0003**

IN RE: **LIQUIDATORS OF MIRROR TRADING INTERNATIONAL (PTY) LTD t/a MTI (IN LIQUIDATION) ("*MTI*")**

MEMORANDUM

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1. Instructing attorney represents the provisional liquidators of MTI.

2. We have been requested to consider and advise the provisional liquidators on:

   2.1. The legal nature and classification of Bitcoin;

   2.2. The proof and quantification of claims at the first meeting by investors;

   2.3. The nature and quantification of claims in terms of sections 26, 29 and/or 30 of the Insolvency Act, 24 of 1936 ("*the Insolvency Act*"), against recipients of impeachable dispositions; and

   2.4. The need and/or advisability of approaching the Court for a declaratory order in respect of the aforestated issues.

3. In order to enable us to advise on the aforesaid issues, instructing attorney briefed us with:

   3.1. The original application for the liquidation of MTI;

3.2. The application for leave to intervene in the liquidation by the provisional liquidators; and

3.3. A bundle of very useful publications and position papers with regard to crypto-currencies in general and Bitcoin in particular.

4. The various reports of the Financial Sector Control Authority ("*FSCA*"), the affidavits exchanged in the applications and the reports by the Commissioner appointed in terms of sections 417/418 of the Companies Act, 1973, the Honourable Justice Fabricius (retired), assume particular significance.

5. The evidence contained therein shows that MTI, despite being marketed to the public as an internet based crypto-currency club which performs its business for the benefit of its members in the form of the crypto-currency Bitcoin, where members' Bitcoin grows through Forex trading by various registered and regulated brokers.[1]

6. Despite the self-professed reason for its existence, it was, in reality, no more than a fraudulent scheme calculated to deprive gullible investors of their hard-earned (or maybe not so hard-earned) Bitcoin. Ultimately, as found by the Honourable Justice Fabricius and the FSCA, there was virtually no trading by MTI, which was fraudulently used by Mr Steynberg and his cohorts to defraud the public and investors and to steal their Bitcoin from investors.

1 MTI Terms and Conditions, Annexure "AVR2", p 149.

7. Fabricius J also found that the investment contracts were void and in conflict with various laws and that dispositions made by MTI to persons, including investors, constituted impeachable transactions in terms of the Insolvency Act.

8. The provisional liquidators established, through their own investigations, that the manner in which the business operations of MTI was conducted, proves that it was designed and implemented to perpetrate a massive fraud on its members/investors. These investors are members of the general public who were enticed to invest in MTI, based on a fraudulent and illegal business model with the fraudulent and criminal intent to obtain its investors'/members' Bitcoin.

9. The provisional liquidators accept,[2] and we believe correctly so, that the individual MTI agreements that were concluded with its investors, are illegal and *void ab initio*, as same were concluded in furtherance and as part of an illegal investment scheme.

10. It is evident that MTI's liabilities exceeded its assets from at least since 18 August 2019, being the first day of MTI's so-called second period. We believe that further investigation could well reveal factual and commercial insolvency since before this date. It appears that, apart from trading at a considerable loss, the funds invested with MTI were plundered from the very beginning by Mr Steynberg and his accomplices.

11. We deal with each of the aforementioned questions against the aforegoing background.

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2 As also found by Fabricius J

THE LEGAL NATURE AND CLASSIFICATION OF BITCOIN:

12. Much has been said and argued about this topic.

13. Bitcoin has been described as:

13.1. A peer-to-peer digital currency;

13.2. A digital representation of value that is not issued by a central bank, but is transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility;[3]

13.3. A payment instrument or a payment system, an international remittance instrument, an investment, a means to pool investments, a security, a means of capital raising or a combination of these functions;[4]

13.4. Qualified financial instruments;[5]

13.5. Virtual currencies that can be used to buy goods and services, but rely on a ledger and cryptography to secure and verify transactions rather than a trusted third party and Bitcoin is the original crypto-currency;

13.6. A digital asset, digital currency, digital cash, virtual currency, electronic currency, digital gold or crypto-currency;[6] and

13.7. An intangible asset.[7]

3 SARS explanatory note last updated 30 August 2021
4 IFWG Crypto Assets Regulatory Working Group
5 Crypto-currency regulations in the EU
6 Wikipedia

14. According to the IFWG Crypto Assets Regulatory Working Group:

    14.1. Crypto assets are not money or legal tender and are not recognised or viewed as money;

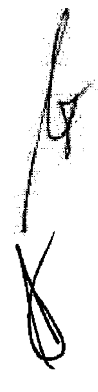
    14.2. Bitcoin is not e-money;

    14.3. Bitcoin is not legal tender;

    14.4. Bitcoin can be used to pay for goods or services;[8]

    14.5. Bitcoin is not viewed as foreign currency.

15. In a very instructive judgment in the High Court of New Zealand, Christchurch Registry, in the matter between **David Ian Rusco and Malcolm Russel Moore v Cryptopia Ltd (in liquidation)**,[9] the Court, after an extensive analysis of the law and case law in numerous jurisdictions, held that crypto-currencies are a type of intangible property[10] and that the various crypto-currencies are "*property*" within the definition outlined in section 2 of the New Zealand Companies Act, 1993.[11] In its order the Court referred to the crypto-currency as "*digital assets*". The aforesaid judgment is instructive and, in our view, of considerable assistance in understanding the nature of crypto-currencies in general and Bitcoin in particular.



7 Wikipedia
8 It functions as a type of barter instrument, but can nevertheless perform money-like functions.
9 CIV-2019-409-000544 [2020] NZHC 728
10 Par [120]
11 Par [133]

16. It is quite clear that Bitcoin, whatever its correct description or legal nature is, falls within the very wide definition of property in section 2 of the Insolvency Act, 24 of 1936 ("*the Insolvency Act*"). Likewise, a wide meaning should be given to the word "*disposition*" to include any act by which an insolvent parts with any asset in whatever form in his estate.[12] **Mars, Law of Insolvency in South Africa,** Tenth Edition by Bertelsmann EA points out at p 276, that a disposition of property includes, for instance, the assignment of a debt, the delivery of promissory notes due to the debtor, negotiation of cheques, the sale of rights under an instalment sale transaction. The learned authors point out,[13] that in the context of section 29, a customer's right of disposal over the amount in his bank account constitutes '*property*', as defined in section 2 and can correctly be described as '*his property*' within the meaning of section 29. The same must be true of Bitcoin.

17. Irrespective of the exact legal nature of Bitcoin, the rights of the owner thereof clearly constitute property.[14]

18. In the light of the view that we take with regard to the proof and quantification of claims by the investors, dealt with hereinbelow, it is not necessary to embark on an academic treatise in order to definitively describe the exact legal nature and classification of Bitcoin. It may take some time for the South African Law to be settled in this regard but, for present purposes, we do not deem it necessary to say more about this issue.

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12 **Nel v Bank of Baroda**, 2016 JDR 0871 (KZD)

13 At p 285

14 See also: **Ensor NO v Nedbank**, 1978 (3) SA 110 (D) at 113E; **De Villiers NO v Kaplan**, 1960 (4) SA 476 (C)

THE PROOF AND QUANTIFICATION OF CLAIMS AT THE FIRST MEETING BY INVESTORS:

19. The provisional liquidators need to know how to approach the claims by investors at the first meeting.

20. In this regard the question is whether each investor has a claim for delivery of Bitcoins or a claim sounding in money, i.e. the value of the Bitcoins invested and, in the case of the latter, whether the value is to be calculated as at the date of the investment, the effective date of the liquidation or as at the date of the first meeting.

21. The further question, which goes hand in hand with the first question, is how the claims of investors who received payments from MTI should be treated. Our instructions are that repayments were made to investors by transferring Bitcoin to them and not by the payment of money. The question thus is whether the claim of an investor who received partial repayment, or possibly overpayment, of his investment by the transfer of Bitcoin, should be reduced by deducting the number of Bitcoin retransferred to him from the number of Bitcoin originally invested by him, or whether such investor's claim should be converted to the Rand value of the Bitcoin invested as at the date of the investment and be reduced by the Rand value of the Bitcoin retransferred to him or her as at the settlement date or, as a further possibility, whether the value of the claim should be determined as at the date of the liquidation or the first meeting by deducting the Rand value of the repaid Bitcoin from the Rand value of the invested Bitcoin as at the date of the first meeting.

22. The dangers inherent in either of the approaches are immediately evident. An investor who received partial payment of his claim at a time when the Bitcoin value was low will be better off, if the value is determined as at the date of the repayment and considerably worse off, if the value is determined as at the date of the liquidation or the first meeting. On the other hand, an investor who received repayment when the monetary value of the Bitcoin was high, could find himself in the difficult position where his claim could have been extinguished and he could have been overpaid if the value of the Bitcoin is determined as at the date of the repayment. As the Bitcoin value is at a high level at the moment, such an investor's position will not differ materially if the conversion is made as at the date of the first meeting, unless something happens between now and then.

23. It is also necessary to consider, for purposes of calculating the claims, what we say with regard to impeachable dispositions hereinbelow. The difficulty with regard to the value of the investor's claim for purposes of proof, does not arise in the case of the quantifications of dispositions, which are impeachable in terms of sections 26, 29 or 30 of the Insolvency Act. As we point out hereinbelow, the disposition of the Bitcoin will be set aside and it will not matter whether the recipient is ordered to retransfer the Bitcoin or, in default thereof, the value thereof as at the date of the disposition or the date of the setting aside, whichever is the higher.[15]

15 See: section 32 of the Insolvency Act

24. The starting point is that only a liquidated claim may be proved at the first meeting.[16] This means that claims for Bitcoin by investors cannot be proven at the first meeting.[17]

25. In addition to the problem with claims for delivery of property, there is no Bitcoin left in the estate. Most of the Bitcoin were stolen before liquidation and what was left at the time of liquidation, was liquidated by the provisional liquidators. Furthermore, the Bitcoin invested or transferred to MTI were pooled and, whilst the Bitcoin transferred in pursuance thereof, could probably be traced to their present whereabouts in wallets all over the world, there is no possibility of the Bitcoin transferred by investors, being returned to them. There are simply no identifiable assets in the form of Bitcoin in the estate which can be returned to the original investors.

26. A liquidated claim is a certain and determined claim resulting from an order of Court, agreement or any other reason.[18]

27. There are, in our view, two bases upon which the claims of investors can be regarded as liquidated claims, the first being that the transfer of Bitcoin constituted payment[19] in terms of the investment agreement, which sounded in money at the prevailing conversion rate on the day of the investment and the second being that, in the event of Bitcoin being regarded as intangible property,

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16 Section 44 of the Insolvency Act.

17 A claim for delivery of property is not competent – **Mars, The Law of Insolvency in South Africa**, Tenth Edition by Bertelsmann *et al*, p 120, par 5.3.3

18 See: **Hassan v Berrange NO**, 2012 (6) SA 329 (SCA) par 35; See also: **Mars, The Law of Insolvency in South Africa**, *supra*

19 The fact that Bitcoin is not legal tender, became irrelevant upon acceptance thereof as payment by MTI.

the investor parted with such intangible property with a market value that was easily determinable.[20]

28. The judgment in **Hassan**, *supra*, is on all fours with the present situation and, just like securities listed on a stock exchange, the market value of Bitcoin is easily determinable. It can be obtained from any crypto-exchange. Payments by Bitcoin occur probably every second of every day and companies record the value of Bitcoin at the time of the purchase in their accounts. The price of Bitcoin is published on a daily and hourly basis. One glance at News24 on 21 October 2021, at approximately 11h30, is enough to see that it traded at $64,650 as of 11h30 am in Hong Kong, after touching a high of almost $67,000 on 20 October 2021. It is published in US Dollar and the conversion into Rand is a simple exercise.

29. There is thus no doubt that the nature of the liquidated claim of each investor is for the Rand value of the Bitcoins transferred as at the date of the transfer. Each claim arose on the date of the transfer by the investor to MTI and value at the date of liquidation and the date of the first meeting is irrelevant.

30. The claim of each investor is thus for the full value transferred as at the date of the transfer.

31. Further to what is stated in paragraph 19 above, we conclude that no deductions should be made from the claims in respect of repayment made to investors. The claims should be allowed at full transfer value. The reason for this conclusion is

[20] See: **Hassan** *supra* at pp 344 to 345, par [35]

that, in order to treat all investors equally, the repayments made should be set aside in terms of sections 26, 29 and/or 30 of the Insolvency Act and, to treat the recipients of dispositions fairly, their claims should not be reduced with the amounts of the dispositions, which they will have to repay to the insolvent estate.

THE NATURE AND QUANTIFICATION OF CLAIMS IN TERMS OF SECTIONS 26, 29 AND/OR 30 OF THE INSOLVENCY ACT AGAINST RECIPIENTS OF IMPEACHABLE DISPOSITIONS:

32. We repeat what we have stated hereinabove. The view expressed by the provisional liquidators[21] that the value of investments must be determined at the day of the investment, is clearly correct, but the quantum of the claims for the recovery of impeachable dispositions, will have to be determined in terms of section 32 of the Insolvency Act.

THE ADVISABILITY OF APPROACHING THE COURT FOR A DECLARATORY ORDER IN RESPECT OF THE AFORESTATED ISSUES:

33. A liquidator may apply to the Court for directions in terms of section 387(3) of the Companies Act, 1973. The Court may give directions in relation to any matter arising under the winding-up. Such matters also include any question of law and in cases of doubt the liquidator should, for his own protection, approach the Court.[22]

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[21] Application to intervene, p 141, par 129

[22] **Henochsberg on the Companies Act, 71 of 2008**, APPI-200(1)

34. As the first meeting will take place on 5 November 2021, it will simply not be possible to approach the Court for directions before then and we are, in any event, not convinced that there is a question of law which requires directions from the Court. There is, furthermore, no need to pre-empt the decisions of the presiding officer at the first meeting. The presiding officer can be trusted to correctly apply the law as stated by the SCA in **Hassan**.

35. Before admitting a claim at the first meeting, the presiding officer must examine it carefully, but he is not required to adjudicate upon the claim as if he were a Court of law.[23] The admission is provisional only, as the appropriate stage to determine the validity of the claim is when the trustees examine the claims proved against the estate.

36. The trustee or his agent may at the meeting at which it is sought to prove a claim, examine the creditor on oath and he should take steps to resist the proof of a fraudulent claim.[24] There is, however, no basis for the provisional liquidators, *in casu*, to oppose claims submitted for proof in accordance with what we have stated hereinabove.

37. After proof, the liquidators should examine all available books, documents and vouchers in connection with the claim proved and satisfy themselves that the estate is indebted to the creditor in the amount of his claim, and if not so satisfied, they should take steps to have the claim expunged.[25]

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23 **Mars, The Law of Insolvency**, *op cit* p 441, par 18.6 and authorities there quoted.
24 **Mars, The Law of Insolvency**, *op cit* p 443, par 18.7
25 **Mars, The Law of Insolvency**, *op cit* p 443, par 18.7

38. As we have stated above, the law appears to be quite clear and there will be no need for the liquidators to, at this stage, approach the Court for directions but, should a question of law arise in the process of investigating the proven claims, then and in that event the liquidators may, before applying to the Master for the expungement or reduction of claims, approach the Court for directions with regard to such question of law. As claims of the nature discussed above are, to a certain degree, *res nova*, it might be prudent for the liquidators to approach the Court for directions in due course.

39. This is in our view the appropriate course of action.

CONCLUSION:

40. We trust that the aforegoing will be of some assistance to the provisional liquidators and we look forward to discussing this memorandum with them. We shall gladly deal with any further questions flowing from this memorandum.

FREEK TERBLANCHE SC
PIETER LOURENS
GROUP 33 ADVOCATES
HAZELWOOD, PRETORIA
22 OCTOBER 2021

389
FA12.2

ADV FH TERBLANCHE SC

&

ADV P LOURENS

25 February 2022

TO: **SHRF INC**
PRETORIA
C/O S STRYDOM

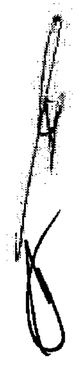
IN RE: **THE LIQUIDATORS OF MTI – APPROACH TO DEALING WITH CLAIMS AGAINST THE COMPANY**

MEMORANDUM

INTRODUCTION:

1 We have been instructed to advise the liquidators of the Mirror Trading International (Pty) Ltd [in liquidation] ("**the Company**" and "**the Liquidators**" respectively) on how to properly deal with claims submitted by investor-creditors of the Investment Scheme conducted by MTI ("**the Scheme**", "**the Investors**" and "**Investor Claims**" respectively), in terms of section 44 of the Insolvency Act, 24 of 1936 ("**the Insolvency Act**") at meetings of creditors.

2 In arriving at the views expressed herein below, we have had regard to what we have been provided with to date, as expanded on during our numerous consultations.



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3 How to properly deal with the Investor Claims, depends on whether:

3.1 the investment agreements concluded by and between the Company and Investors are void *ab initio* as a consequence of the illegality of the Scheme, in pursuance of which the subject agreements were concluded and the subject investments made (**"the first scenario"**); or

3.2 the said investment agreements are not void *ab initio* for the aforesaid reasons - i.e. that the investment agreements are valid, binding and extant as between the Company and the Investors (**"the second scenario"**).

4 We deal with what we consider to be the proper way in which Investor Claims should be dealt with by the Liquidators, in relation to each scenario, topically hereunder. But, it is prudent that before we proceed to do so, to reflect on the different categories or classes of investor creditors that we understand may arise.

THE DIFFERENT CLASSES OF INVESTOR CREDITORS AND THE CLAIMS THAT THE LIQUIDATORS MAY HAVE AGAINST THE DIFFERENT CLASSES:

5 The first class of investors are those individuals who invested in the Scheme, but who did not receive anything – i.e. zero – in return (**"Class 1 Investors"**).

6 The second class of investors are those individuals who invested in the Scheme and who, although having received a return on their investment, received less than what they invested in the Scheme (**"Return"** and **"Class 2 Investors"**). These investors, although having received a Return, did not profit from the Scheme.

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7 The third class of investors are those individuals who invested in the Scheme and who received returns that exceed the amount of capital invested in the Scheme, thereby profiting from being participant in the scheme ("**Profit**" and "**Class 3 Investors**").

8 Transfers of Bitcoin, or portions of Bitcoin, by the Company to the Class 2 and 3 Investors, whether in respect of a Return or a Profit, are all "dispositions" within the meaning ascribed to it by the Insolvency Act.[1]

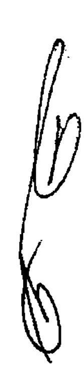
9 For reasons that we deal with hereunder, we are of the opinion that the Liquidators will have claims against the Class 2 and Class 3 Investors, depending on which one of the first or second scenarios find application, for return of such dispositions or repayment in respect of the Return [in the case of the Class 2 Investors] and the Profit [in the case of the Class 3 Investors] in terms of either:

9.1 Section 29 or 30 of the Insolvency Act, in the event of the first scenario finding application and in relation to Class 2 Investors, to reclaim the Return(s);

9.2 Section 26 of the Insolvency Act, in the event of the first scenario finding application and in relation to Class 3 Investors, to reclaim the Profit(s);

9.3 Section 29 or 30 of the Insolvency Act, in the event of the first scenario finding application and in relation to Class 3 Investors, to reclaim the repayment by the Company of the Investor's investment – thus the total transfers received by Class 3 Investors from the Company, minus the applicable Profit(s), which are to be reclaimed under section 26;

[1] It is defined in the Insolvency Act to mean "*any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court*".



9.4 Section 29 and 30 of the Insolvency Act, in the event of the second scenario finding application, in relation to Class 2 and Class 3 Investors;

where the circumstances so permit and the facts satisfy the jurisdictional requirements of the respective sections.

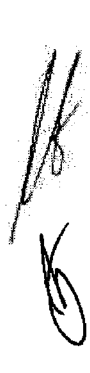
10 But, as section 32 of the Insolvency Act provides, the Liquidators will be able to pursue reimbursement in respect of the repaid portions of the Investor's investments and the Return(s) [in respect of Class 2 Investors] and the Profits [in respect of Class 3 Investors] once the underlying transactions are set aside, in the exercise of a Court's discretion. In such an event, the provisions of section 32(3) would be triggered and the Liquidators would then be entitled under section 26 or section 29, read with section 32(3), to reclaim:

10.1 <u>the property</u> alienated under the disposition; or in default of such property

10.2 <u>the value of the property</u> alienated under the disposition <u>at the date of the disposition</u>; or

10.3 <u>the value of the property</u> alienated under the disposition <u>at the date on which the disposition is set aside</u>;

10.4 whichever is the higher.



HOW TO DEAL WITH THE DIFFERENT CLASSES OF CREDITORS IN THE FIRST SCENARIO:

(i) The nature of the Investor Claims:

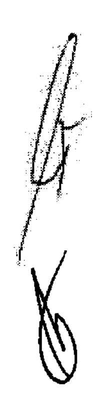
11 In relation to the first scenario, as previously advised, we are of the opinion that investors are, in principle, vested with a claim against the insolvent estate premised on a cause of action in enrichment, particularly the *condictio ob turpem vel iniustam causam.*

12 This cause of action permits the Investors to reclaim performance by them, whether in whole or in part, in respect of the illegal Scheme and the contracts concluded between the Company and the Investors in pursuance thereof.[2]

13 On this basis, an Investor would, in principle, be entitled to reclaim the investment made by the Investor to the Company in pursuance of investing in the Scheme, calculated in Rand and at the value of the investment made by the relevant Investor to the Company on the date that the Investor concerned made the subject investment.

(ii) The Class 1 Investors:

14 In relation to Class 1 Investors, insofar as their claims are properly proved in compliance with section 44 of the Insolvency Act, their claims will likely remain unaffected by subsequent litigation or claims by the Liquidators. Their claims, insofar as they are proved in compliance with section 44 of the Insolvency Act, should be admitted.



[2] First National Bank of SA Ltd v Perry NO 2001 (3) SA 960 (A); Afrisure v Watson 2009 (2) SA 127 SCA.

15 The position with regards to Class 2 and Class 3 Creditors is somewhat different.

(iii) The Class 2 Investors:

16 In relation to the Class 2 Investors, these Investors will also have a claim against the Company based on enrichment, but they will also have to account towards the estate for the Return on their so-called investment in the Scheme. It is how they are to account for these returns that assume significance.

17 Conceptually, Liquidators will, in relation to reclaiming, the payments made by the Company to Class 2 and Class 3 Investors, also be vested with a cause of action premised on the *condictio ob turpem vel iniustam causam* against such individuals.

18 However, in our considered view, the Liquidators will be non-suited to pursue such an enrichment action against these Investors by the *par delictum* rule (*in pari delicto potior est conditio pos sidentis*) in that the Company is the one who perpetrated the fraud unto its Investors and party to the illegality that plagues the Scheme,[3] unless the identified exceptions[4] can be relied upon by the liquidators, and be proven by them, to relax the application of the maxim.

19 Although the now recognised public interest element in insolvency proceedings[5] may perhaps be relied upon to support an argument that the maxim be relaxed,

[3] See MICC Bazaar v Harris & Jones (Pty) Ltd 1954 (3) SA 158 (T); Bhyat's Departmental Store (Pty) Ltd v Dorklerk Investments (Pty) Ltd 1975 (4) SA 881 (A); Afrisure v Watson 2009 (2) SA 127 (SCA).
[4] See Jajbhay v Cassim 1939 AD 537; Kelly v Wright, Kelly v Kok 1948 (3) SA 522 (A); Visser v Rousseau NO 1990 (1) SA 139 (A); Klokow v Sullivan 2006 (1) SA 259 (SCA).
[5] ABSA Bank Limited v Hammerle Group (Pty) Ltd 2015 (5) SA 215 (SCA) at para 13; Investec Bank Ltd & Another v Mutemeri and Another 2010 (1) SA 265 (GSJ); Naidoo v ABSA Bank Ltd 2010 (4) SA 597 (SCA) para 4; Firstrand Bank v Kona & another 203/2014 [2015] ZASCA 11 (13 March 2015).

we cannot find ourselves able to advise that there are reasonable prospects of success in such an argument, regard being had to the circumstances of this case.

20 Regardless, such a pursuit will likely also result in protracted and expensive litigation, particularly if the litigious history of MTI is anything to go by.

21 The effect of the aforesaid is that the Class 2 Investors and the Company [the Liquidators] will not be mutually indebted to each other, on the basis of enrichment, even if the debts were liquid.

22 The Returns can consequently not, in our opinion, be competently or legally "set-off" against the claims that the Class 2 Investors may intend to prove against the Company, in the ordinary sense of the set-off principle, in these circumstances.

23 That being said, the nett effect of what we advise will, in our considered view, achieve the same result, without requiring of the Liquidators to engage the difficulties arising from an intention to apply set-off in the circumstances of the matter.

24 The primarily intended consequence of applying set-off, is to ensure that the Returns are taken into account and subtracted from the investments made by the Class 2 Investors into the Scheme, so that those Returns may ultimately be applied in reduction of their claims against the Company.

25 In pursuance of their claims against the Company, premised on unjustified enrichment, as aforesaid, Class 2 Creditors are permitted to submit a claim against the estate that represents their impoverishment or the Company's enrichment, <u>whichever is the lesser</u>.

26 The Liquidators can achieve the reduction of the full Class 2 Investor Claims, as they intended to do under the [impermissible] set-off proposal, by properly quantifying the subject Investor's impoverishment or the Company's enrichment, whichever is the lesser. This will require a proper quantification of the Returns that were transferred to the respective Class 2 Investors, a quantification of the value of their respective investments into the Scheme and the calculation of the actual impoverishment/enrichment underlying their claims. This, in turn, can be achieved by subtracting the properly quantified Returns from the properly quantified investments of the relevant Investors, the result of which will represent either one or both of the Investors' impoverishment or the Company's enrichment, and commensurately their claims against the Company.

27 It is in this respect that we advise further that:

27.1 The value of a Class 2 Investor's investment in the Scheme should be calculated in Rand value, as at the date upon which the relevant creditor(s) made the relevant investment in the Scheme. This is the date upon which repayment to the Class 2 Investors [or any Investor for that matter] by the Company, on the premise of unjustified enrichment, became due. It was, on this issue, held as follows by the SCA in **Fluxmans:**[6]

"[11] The respondent's claim is based on enrichment. He claims repayment of money paid by him in terms of an illegal and invalid contract (condictio ob turpem vel iniustam causam). As has now been authoritatively decided, lack of knowledge of the invalidity of a contract

[6] *Fluxmans v Levenson* (523/2015) [2016] ZASCA 183 (29 November 2016).

does not postpone the running of prescription, which begins to run immediately after the payment was made."

27.2 The value of a Class 2 Investor's Return should be calculated in Rand value, as at the date upon which the relevant creditor(s) received the Return. This is the date upon which the Company's enrichment / the relevant Creditor's impoverishment was effectively reduced.

28 To the extent that a Class 2 Investor submits a section 44 compliant claim in the estate, that has already been reduced to represent in Rand value only the lesser of that Investor's impoverishment or the Company's enrichment, in a manner that corresponds with the Liquidators' independent assessment, such claims must be accepted by the Liquidators.

29 The Liquidators will still remain vested with claims against the Class 2 Investors for repayment of the Returns, in terms of section 29 and 30 of the Insolvency Act, despite the fact that a Class 2 Investor's claim was reduced to account for the same Return when that Investor proved a claim in the estate.

30 Although this proposition may strike discomfort with some, on first glance, a proper understanding of the principle and what it seeks to achieve, relieves such discomfort.

31 Class 2 Investors cannot, for obvious reasons, be seen to retain the benefits of the Scheme to the detriment of Class 1 Investors, which would be the quintessential example of an unequal treatment of creditors. This is so because Class 2 Investors will in this event enjoy the benefit of their Returns at 100c in the Rand, whereas Class 1 Investors may receive far less if their claims are ultimately paid, at less than R100c in the Rand, in the form of a dividend.

32 When the Return paid to a Class 2 Creditor is set aside by a Court in terms of section 29 or 30 of the Insolvency Act, that Return [in whatever form contemplated by section 32(3) of the Insolvency Act] will be repaid/returned to the estate, to form part of the assets available for ultimate distribution to the creditors in the form of a dividend. As aforesaid, this may include the return of:

32.1 the property alienated under the disposition; or in default of such property

32.2 the value of the property alienated under the disposition at the date of the disposition; or

32.3 the value of the property alienated under the disposition at the date on which the disposition is set aside;

32.4 whichever is the higher; and

32.5 may be calculated in accordance with the Rand value of BitCoin at the appropriate point in time.

33 In such event, the Class 2 Investor concerned should be afforded an opportunity of proving an additional claim against the estate, in relation to the Return in question. The effect of this will be that the benefit derived by the Class 2 Investor as a consequence of the Return is neutralised by the *concurcus* and made subject to a proportionate reduction in the calculation of the Return as part of the ultimate dividend to be paid to creditors.

34 If the setting aside of such dispositions are not secured, and the Company not revested with what was disposed of by it, then it would mean that the recipients of the Returns are effectively immunised against the principles ensuing upon the establishment of a *concurcus*, to the ultimate undue prejudice of other Company creditors, for instance Class 1 Investors.

35 What this approach seeks to achieve is to ensure that all Investors are treated equally [i.e. in pursuance of the concursus being established] by ensuring that all Investors' prospective claims and the benefits that they have received to date from the Scheme, are made subject to the concursus and commensurately the expected proportionate dividend to be paid to creditors at the end of the day.

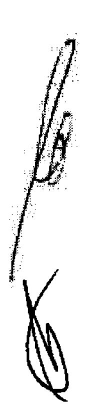
36 It is this principle of fairness and equality that will feature also in the approach advised in respect of the other classes of Investors, as will more fully appear from what follows.

37 We accordingly advise that:

37.1 the claims submitted by Class 2 Investors be admitted insofar as they comply with section 44 of the Insolvency Act, provided that the such claims are only for payment of the lesser of the Investors' impoverishment or the Company's enrichment, properly quantified as aforesaid;

37.2 the Liquidators should then pursue the Class 2 Investors in respect of the Returns, in terms of either section 29 or 30 of the Insolvency Act;

37.3 the Liquidators, once successful in procuring return of the subject disposition(s), should permit the affected Class 2 Investors to prove a further claim in the estate, arising from the Company being revested with the Return concerned.



(iii) The Class 3 Investors:

38 Class 3 Investors will, in our opinion, initially not have a claim against the Company, because their temporary impoverishment/the Company's temporary enrichment would, for all intents and purposes, be extinguished as a consequence of the initial investments made into the Scheme by Class 3 Investors being returned to them and because they, on top of that, made a Profit thereon.

39 In our view, the Liquidators will be vested with claims against Class 3 Investors premised:

39.1 on section 26 of the Insolvency Act, in terms of which the Liquidators can reclaim the Profit(s) transferred by the Company to Class 3 Investors;[7] and

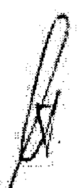
39.2 on sections 29 or 30 of the Insolvency Act, on the very same basis that they have claims against the Class 2 Investors under this section, as set out above.

40 It is in this respect that we advise further that:

40.1 The value of a Class 3 Investor's investment in the Scheme should be calculated in Rand value, as at the date upon which the relevant creditor(s) made their investments in the Scheme.

40.2 The value of a Class 3 Investor's reimbursement in respect of their initial investment and/or the Profit should be calculated in Rand value, as at

[7] Fourie NO and Others v Edeling NO and Others (522/2003) [2004] ZASCA 28 (1 April 2004).



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the date upon which the relevant creditor(s) received same from the Company.

41 We consequently advise that:

41.1 any claims submitted by Class 3 Investors, prior to the finalisation of the Liquidators' claims that are to be instituted in terms of sections 26 and 29 of the Insolvency Act, be rejected;

41.2 the Liquidators should pursue the Class 3 Investors in respect of the all transfers made to these Investors by the Company, including in respect of the Profit(s), in terms of section 26 and 29 or 30 of the Insolvency Act;

41.3 the Liquidators, once successful in procuring return of the subject disposition(s), should thereafter allow the affected Class 3 Investors a further opportunity to prove a claim in the estate, arising from the Company being revested with their initial investment into the Scheme, but not the Profit;

41.4 The Liquidators should not permit, or rather should reject, any claim in terms of which Profit is claimed from the estate – such a claim will in the circumstances be statutorily excluded in terms of section 26(2) of the Insolvency Act.

HOW TO DEAL WITH THE CREDITORS IN THE SECOND SCENARIO:

42 As previously advised, the basis for the Company's liability towards Investors will change in the event that the investment agreements are not void *ab initio*.

43 If this is the true and correct position [i.e. that the investment agreements are valid, binding and extant] it will:

43.1 have a direct and substantial bearing on the basis, formulation and quantification of Investor Claims, changing their nature from an unjustified enrichment claim to a contractual claim; and

43.2 will be necessary to assess the basis of each Investor Claim independently on its terms, as formulated, with reference to the applicable investment contracts and the MTI terms and conditions.

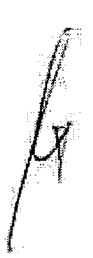
44 With the relationship between the Company and each Investor being regulated by contract, on this construction, Investors will be compelled to formulate their claims against the Company in compliance with the relevant investment agreement, read with the MTI Terms & Conditions, which, in principle, recognise a number of possible permutations of Creditors.

45 We point out that the issue of a possible set-off of Returns or Profits that were transferred to an Investor, from an Investor's claim against the Company, does not enter the debate where the relationship between the Company and the Investors are contractual. The exception would, naturally, be when there was perhaps an overpayment of sorts and a mutuality of debts is established.

46 That being said, the Investors will in the Second Scenario acquire the status of a creditor of the Company on a contractual basis and the Liquidators will, in our view, be vested with claims against Investors in the Second Scenario based on section 29 or section 30 of the Insolvency Act, provided that the jurisdictional requirements of those sections can be satisfied.

47 As aforesaid, such claims will permit the Liquidators to reclaim the return of:

47.1 the property alienated under the disposition; or in default of such property



47.2 the value of the property alienated under the disposition at the date of the disposition; or

47.3 the value of the property alienated under the disposition at the date on which the disposition is set aside;

47.4 whichever is the higher; and

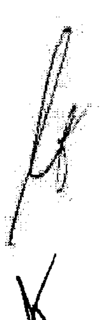
47.5 may in certain instances be calculated in accordance with the Rand value of BitCoin at the relevant point in time, if it was BitCoin that the Company as a matter of fact transferred to Investors.

48 In our view, the appropriate way in which to deal with Investor Claims formulated in the Second Scenario, is as follows:

48.1 the claims submitted by Investors should admitted insofar as they comply with section 44 of the Insolvency Act, provided that such claims are properly formulated with reference to and sustained by the said investment agreements and the MTI Terms & Conditions;

48.2 the claims submitted by Investors as aforesaid should be calculated in Rand value as at the date of liquidation, and such claims are to represent the available balance of the investment(s) in question after taking into account "BitCoin in and BitCoin out";

48.3 the Liquidators should then pursue the Class 2 Investors in respect of the Returns, and the Class 3 Investors in respect of their initial investments and the Profits, transferred to them by the Company, in terms of either section 29 or 30 of the Insolvency Act;



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48.4 the Liquidators, once successful in procuring return of the subject disposition(s), should permit such Investors to prove a further claim in the estate, arising from the Company being revested with such dispositions concerned.

THE TWO OTHER CATEGORIES:

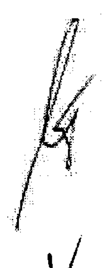
49 There are two other categories of individuals that require attention.

50 First, there are those who established the Scheme and whom have earned founders bonusses for having done so, without investing anything into the Scheme.

51 If the Scheme was lawful and that was the bargain that they struck with the Company from day one, then they can lay claim to such bonusses without more. The Liquidators will, in our view, once again on a case by case basis, be vested with a cause of action in terms of section 29 or 30 of the Insolvency Act, to reclaim such bonusses to these recipients.

52 Once the Liquidators are successful in procuring the return of such bonusses that they are able to reclaim, then they should, once again, permit these individuals to submit a claim in the estate.

53 If the Scheme was unlawful, and the fraud taints the bargain that the founders struck with the Company from day one, then they cannot lay claim to any future founders bonusses. In regard to founders bonusses transferred to these individuals in the past, the Liquidators will, in our view, once again on a case by case basis, be vested with a cause of action to procure return of founders bonusses that were transferred to these individuals in the past, in in terms of section 26 of the Insolvency Act, when and where the circumstances so permit.



54 Second, there are those who established and operated their own "mini" Ponzi scheme within the Scheme, in fraud of the Company. In our opinion, these individuals will not have any claims against the Company emanating from such conduct. The Liquidators will, in our view, once again on a case by case basis, be vested with a cause of action against these individuals premised on section 26 and likely also section 31 of the Insolvency Act, to claim dispositions to these individuals by the Company.

THE ILLEGALITY/PONZI APPLICATION:

55 We have, on a previous occasion and on the specific instance and request of the Liquidators, expressed an opinion with regards to the pending application by the Liquidators to have the Scheme declared unlawful (**"the Ponzi Application"**).

56 Whilst the illegality of the Scheme is a matter that could competently have been dealt with on a case by case basis, as the Liquidators pursue their causes of action against the different Investors in the different scenarios, the Ponzi Application essentially seeks a blanket order to have the Scheme declared an unlawful scheme.

57 The issue of the legality or illegality of the Scheme is a pertinent consideration within the greater approach to be adopted by the Liquidators in pursuance of properly winding up the affairs of the Company, as we have advised herein above.

58 We have furthermore been instructed to prepare an application to the High Court, for purposes of fleshing out, with the assistance of the Court, the proper way for the Liquidators to deal with the claims by Investors, and certain other issues concerning the Company and the Scheme.

59 It seems to us that the issues and the Ponzi Application and the issues in the aforesaid application may be intertwined and that if the Ponzi Application may become postponed, that the intended application and the Ponzi Application ought to be consolidated in one hearing.

60 That, to us, seems to be the best way in which to deal with both applications and such an approach should be seriously considered by the Liquidators.

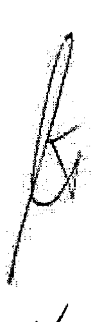
CONCLUSION:

61 We hope to have addressed the most pertinent issues arising from the different permutations of possible claims to be submitted in the estate herein above.

62 We advise accordingly.

FH Terblanche SC

P Lourens



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FA 13.1

MIRROR TRADING INTERNATIONAL (PTY) LTD (IN LIQUIDATION) ("*MTI*")

IN RE: NOTES FROM C COOPER DATED 16 NOVEMBER 2021

MEMORANDUM

1. I have been requested to advise on notes ("the notes") received from one of the liquidators, Mr Cooper, on 16 November 2021.

2. The advice herein ought to be read with the advice in the memorandum dated 23 July 2021, prepared by Advs Raubenheimer, Benade and me.

3. In essence, the stance adopted in the notes is that:

   3.1. The liquidators should not persist with seeking a court order, in the pending court application under case number 15426/2021 ("*the application*"), that all agreements between MTI and investors are void *ab initio*;

   3.2. The claims of innocent investors should be quantified by using the conversion rate (from Bitcoin to Rands) as at the date of liquidation.

4. For the reasons set out herein, I advise against the adoption of that stance.

A. <u>AGREEMENTS VOID *AB INITIO*</u>

5. It is argued in the notes that the liquidators should not persist with seeking a court order that all agreements between MTI and investors are void *ab initio* because:

5.1. From the perspective of innocent investors, their agreements are enforceable;

5.2. There is no need for such an order;

5.3. It will be detrimental for purposes of claims against investors from foreign jurisdictions.

(a) Enforceability of agreements by innocent investors

Reasoning in the notes

6. This stance in the notes is premised on the assertion that, when the Consumer Protection Act, 68 of 2008 ("CPA"), repealed the Consumer Affairs (Unfair Business Practices) Act, 71 of 1988, ("the 1988 Act"), there was a material change in pyramid scheme law.

7. First, it is contended in paragraph 6 of the notes that Regulation Notice 1135 of 1999, published in terms of the 1988 Act, prohibited the operation of or participation in multiplication schemes (offering excessive returns) or pyramid promotional schemes (rewarding those that introduce new participants). That rendered all the transactions prohibited and illegal since it did not distinguish between the operator and the participant, declaring the conduct of both to be illegal.

8. It is then argued in paragraph 7 of the notes that the CPA changed all of that by repealing the 1988 Act and making a new set of rules to govern multiplication schemes and pyramid promotional schemes ("the tainted schemes") in terms of which:

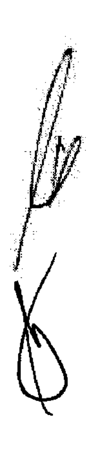
8.1. Mere participation in such a scheme is not prohibited unless the participant has the requisite knowledge. It uses the new phrase "... *knowingly join, enter or participate in . . .* ".

8.2. The CPA does not state that agreements between operators and participants in the tainted schemes are void or unenforceable. The only terms or transactions that are declared to be void are those listed in Section 51 which is mainly a list of unfair terms. That section is not wide enough to declare all transactions in tainted schemes to be void.

8.3. The CPA leaves it to the Court in Section 52, on a case-by-case basis, to make just and reasonable orders in any case where it is alleged that there was unconscionable conduct (Section 40), fraudulent misrepresentations (Section 41) or unfair, unjust contract terms or marketing (Section 48). The Court may then make an order in terms of Section 52(3) including any order the court considers iust and reasonable in the circumstances.

8.4. Section 52(4)(b) also empowers the Court, if a person alleges that an agreement, a term or condition of an agreement, or a notice to which a transaction or agreement is purportedly subject, is void in terms of the CPA or failed to satisfy any applicable requirements set out in section 49, to make any order that is just and reasonable in the circumstances with respect to that agreement.

9. Finally, it is argued that:



9.1. Not all illegality results in voidness. It is necessary to properly interpret the governing legislation to determine whether the lawmaker really intended

the transaction to be void. That is not always an easy task, and leaves much room for disagreement and decisions being overturned on appeal.

9.2. The CPA does not state that all transactions in the tainted schemes are void.

9.3. Many judgments dealing with illegal pyramid schemes refer to transactions that occurred before the commencement of the CPA.

Interpretation in general

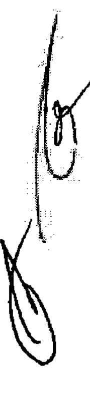
10. Whilst, in *Schierhout v Minister of Justice* 1926 AD 99 at 109, it was said:

"*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 pointed out in *Lupacchini NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA) para 8:

"*... [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 stryd met '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 ulteindelik 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.'"*



11. 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.*" (underlining supplied)

Application of general principles of interpretation

12. In accordance with the aforesaid principles, the following approach will be followed in the process of interpreting the CPA and considering whether it brought about a material change in pyramid scheme law:

    12.1. The point of departure is the language of the relevant provisions themselves:

    a) read in context; and

    b) having regard to the purpose of the provision; and

    c) the background to the preparation and production of the document.

12.2. A sensible meaning will be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the CPA.

CPA – the language in context, having regard to purpose and background

13. Section 43 deals with pyramid schemes and 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).*"
>
> (emphasis supplied)

14. In the notes, heavy reliance is placed on the insertion of the word "*knowingly*" in s 43(2) and it is then argued that:

14.1. *It may well be that those that got referral bonuses are knowing participants, whilst the run of the mill investor that did not introduce any others will not be held to have been a knowing participant - bearing in mind*

also that they may be believed if they say they believed that crypto is completely unregulated (paragraph 9); and

14.2. *The question whether the participant was a knowing participant or not can probably only be decided on a case by case basis, and the respondents may succeed in persuading the court not to make a blanket general declaration of voidness* (paragraph 10).

15. In effect, therefore, the argument in the notes is that, from the perspective of an "*unknowing*" participant, the agreement with MTI is not void. By necessary implication, it means that such a participant may enforce the agreement. In support of that interpretation, reliance is placed on the provisions of sections 51, 52(3) and 52(4)(b).

Language and purpose:

16. Section 43(2) – pyramid schemes:

16.1. It is clear from the wording of s 43(2) that it is illegal to operate a pyramid scheme. A sensible interpretation of the words "*(a) person must not directly or indirectly promote ... a pyramid scheme*" inevitably leads to that conclusion. See too Van Eeden, *Consumer Protection Law in South Africa*, 2nd ed, par 2.3 where it is stated that the CPA prohibits pyramid schemes and par 7.5 where it is stated in respect of pyramid schemes:

> *"Such schemes are not regulated, in the sense that they may be conducted subject to compliance with certain requirements; they are prohibited outright."*

(underlining supplied)

16.2. Section 43(2) does not say that, when a person unknowingly joins, enters or participates in a pyramid scheme, such a person may enforce an agreement with the party who promotes the illegal scheme.

16.3. It cannot be inferred either from the mere fact that, in the 1988 Act, no distinction was made between parties who joined knowingly and those who joined unknowingly. As a result of the distinction in the CPA, the "*unknowing*" category is excluded from *"prohibited conduct"* in respect of which administrative fines may be imposed pursuant to s 112. That may be indicative of the actual purpose of the distinction, particularly in view of the other provisions of the CPA that will be dealt with herein.

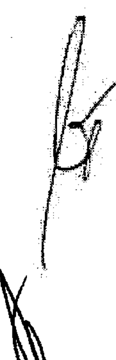
16.4. If an *"unknowing"* investor is permitted to enforce an agreement with MTI, it will give effect, at least in part, to a pyramid scheme that is *prohibited outright* by the CPA.

17. Section 2(9) – interpretation and other statutes:

17.1. The provisions of s 43(2) must be considered in the context of other relevant statutes.

17.2. That is demonstrated by s 2(9) which reads *inter alia* as follows:

> *"If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8)* [the latter subsection is not applicable in casu]—
>
> *(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and*
>
> *(b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision, ..."*



17.3. It has been demonstrated in the liquidators' founding affidavit in the application that the business conducted by MTI contravened provisions of the following statutes other than the CPA:

a) By rendering financial services without the necessary licence being issued by the FSCA, as provided for in s 7 read with s 8 of the Financial Advisory and Intermediary Services Act, 37 of 2002.

b) By acting 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.

c) By providing, 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.

d) By conducting 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.

17.4. In addition, it has been demonstrated in the liquidators' founding affidavit that, 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 and unlawful 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.

17.5. If an "*unknowing*" investor is permitted to enforce an agreement with MTI, it will give effect to a business that is prohibited by the statutes dealt with above and it will give effect to a fraudulent scheme as explained above.

18. Section 3(1) – purpose and policy:

18.1. Section 2(1) provides that:

> "*This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.*"

18.2. Section 3 reads *inter alia* as follows:

> "***3 Purpose and policy of Act***
>
> *(1) 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; ..."

18.3. In respect of "*consumer interest*", Van Eeden par 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."*

18.4. If an "*unknowing*" investor is permitted to enforce an agreement with MTI, it will not be in accordance with the purpose and policy of the CPA set out in s 3.

19. Section 51 – prohibited transactions, agreements, terms or conditions:

19.1. Section 51 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) <u>do anything that is unlawful in terms of this Act</u>; or

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

...

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

..."

(underlining supplied)

19.2. It is contended in paragraph 7.2 of the notes that:

"The CPA does not state that agreements between operators and participants in the tainted schemes are void or unenforceable. The only terms or transactions that are declared to be void are those listed in Section 51 which is mainly a list of unfair terms. That section is not wide enough to declare all transactions in tainted schemes to be void."

19.3. In my view, this contention does not have proper regard to 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*". It clearly is not limited to "*a list of unfair terms*".

19.4. The collective effect of the terms of the agreements between MTI and investors are in conflict with the provisions of s 51(1), particularly the parts underlined earlier herein, and the agreements therefore are void pursuant to s 51(3).

20. Section 52 – powers of court to ensure fair/just conduct, terms/conditions:

20.1. Section 52(1) reads as follows:

"(1) If, in any proceedings before a court concerning a transaction or agreement between a supplier and consumer, a person alleges that—

(a) the supplier contravened section 40, 41 or 48; and

(b) this Act does not otherwise provide a remedy sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability,

the court, after considering the principles, purposes and provisions of this Act, and the matters set out in subsection (2), may make an order contemplated in subsection (3)."

20.2. The mechanism provided for in s 52 relates to limited instances contemplated in sections 40, 41 and 48. Those provisions do not relate to pyramid schemes.

20.3. The assertion, at least implied, in the notes that pyramid schemes too should be dealt with in terms of s 52, is without merit.

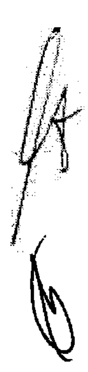
Background:

21. For years before the CPA, pyramid schemes were unlawful in South Africa and agreements between the schemes and investors were null and void.

22. The scourge of such schemes was dealt with in Report 76 of the Business Practices Committee in terms of s 10(1) of the 1988 Act, published on 9 June 1999, and it was stated in paragraph 11:

"... 'pyramid schemes' constitute harmful business practices. There are no grounds justifying these practices in the public interest."

23. There is nothing to indicate that, since 1999, pyramid schemes have become less of a scourge or that they do not offend the public interest. The opposite seems to be true if one has regard to:



23.1. for example, the Krion Pyramid Investment Scheme dealt with in *Fourie NO and Others v Edeling NO and others* [2005] 4 All SA 393 (SCA);

23.2. the fact that, in terms of the CPA too, pyramid schemes are illegal.

24. Courts have found agreements between such schemes and investors to be null and void because the schemes are illegal *per se*; not because participation by investors was included in the definition of "*harmful business practice*". See, for example, *Fourie NO v Edeling NO* and *Griffiths v Janse van Rensburg NO and another* [2016] 1 All SA 643 (SCA) where no mention was made of the inclusion of participation by investors in the definition of "*harmful business practice*".

Sensible meaning

25. In these circumstances, a sensible interpretation of the use of the word "*knowingly*" in s 43(2):

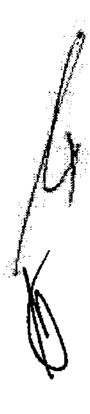
25.1. is to exclude the "*unknowing*" category from "*prohibited conduct*" in respect of which administrative fines may be imposed pursuant to s 112;

25.2. is not to give effect, in part, to an illegal pyramid scheme by giving effect to an agreement in favour of an investor who "*unknowingly*" participates in the scheme.

(b) No need for such an order

26. In paragraph 20 of the notes, it is stated:

"There is no benefit to the liquidators if the transactions should be declared to be void ab initio. There is no need for such a declaration."



27. The liquidators need to know the basis on which investors' claims are to be entertained, i e, do they have claims *ex contractu* or based on enrichment. It may have a bearing on the quantum of the claims.

(c) Jurisdictional issues relating to foreign investors

28. In paragraph 14 of the notes, it is stated:

"If all the transactions are declared to be void it will mean that the agreements never existed. It will follow that the liquidators will be unable to rely on clause 12."

Clause 12 reads as follows:

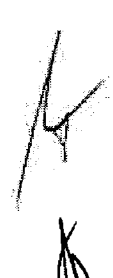
"This agreement and the relationship between the member and MTI shall be governed by the laws of the Republic South Africa and the member agrees to the jurisdiction of the High Court of South Africa (any division) in terms of any legal actions actioned by either the member or MTI."

29. It is the duty of the liquidators to determine what the legal status of the agreements is regardless of the effect it will have on jurisdiction.

30. In fact, if such clarity is not obtained now and the liquidators issue summons against foreign investors in South Africa, the investors may raise a defence that the agreements are void ab initio and, as a result, the liquidators may not rely on clause 12. If such a defence is successful, it will be to the detriment of MTI in liquidation from a costs and delay perspective.

B. <u>CONVERSION RATE</u>

31. In paragraph 26 of the notes, it is stated:



"Whilst the relief in 1.6 to claim the value of impeachable dispositions "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" is supported, the claims of innocent investors for restitution should be at the date of liquidation. Their claim as at date of liquidation was actually for the nett quantity of Bitcoin invested less received back. But because a claim must be stated in Rands, the date of conversion should be date of liquidation."

(underlining added)

32. No party has a right to benefit from an unlawful contract [1]. Consequently, investors have no entitlement to profits, if any, made by MTI.

33. If, therefore, the date of conversion is the date of liquidation and the value of Bitcoin as at that date was more than the value on the date of investment, it will mean that the investor benefits from an unlawful contract.

34. In any event, the following finding in *Fourie NO v Edeling NO* para [13] is apposite and leaves no room for the argument that "*the date of conversion should be date of liquidation*":

"There is ... no evidence that any of the investors knew their investments to be tainted, nothing from which to infer that any of them acted ex turpi causa. That being so, no question arises of relaxing the in pari delicto potior est condicio defendentis rule and the ratio in Visser en 'n ander v Rousseau en andere NNO 1990 (1) SA 139 (A) is not applicable to the facts of this case. Upon receipt of a payment the scheme was liable promptly to repay it to the investor who had a claim for it under the condictio ob iniustam causam"

(underlining added)

35. I pause to mention that the aforequoted reference to knowledge (or not) of investors that their investments were tainted, has no relevance to the underlined reference to the time when an investor's claim, and MTI's liability to repay the investor, arose. In *Visser en 'n ander v Rousseau en andere NNO* 1990 (1) SA

[1] All Pay Consolidated Investment Holdings Pty Ltd v CEO of SASSA 2014 (4) SA 179 (CC) par 30 and 67

139 (A), referred to in *Fourie NO v Edeling NO,* knowledge was merely raised in the context of considering whether an investor with knowledge should be prevented, by the *in pari delicto potior est condicio defendentis* rule, from having a claim. The outcome of that enquiry had no bearing on the timing of a claim. In any event, it appears from *Visser en 'n ander v Rousseau en andere NNO* that knowledge has no bearing on the existence of a claim, based on the *condictio ob iniustam causam,* either.

36. It stands to reason that, if MTI was liable, upon receipt of the Bitcoin from an investor, promptly to return the Bitcoin or repay the value thereof, the investor's claim arose the moment that the investor transferred the Bitcoin to MTI. The value of the enrichment of MTI and the concomitant impoverishment of the investor was determined the moment the transfer from the investor to MTI took place; not when MTI was liquidated.

CONCLUSION

37. I will be available to answer any queries relating to the views expressed herein.

Rudi van Rooyen SC

Chambers, Cape Town
18 January 2022

FA 13.2
424

In re: **THE LIQUIDATORS : MTI**

MEMORANDUM

Dear Pierre,

1. I enclose the following references and cases for your consideration.

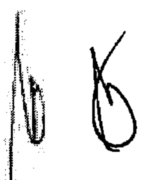
2. The question is how and when is the extent of the enrichment, which a party who claims return of goods or repayment of money which was transferred or paid *indebiti* to be determined.

3. The basic principle is that a defendant's liability is confined to the amount of his or her actual enrichment determined at the time of the commencement of the enrichment action. Authority for this proposition is found in *LAWSA* (updated by F Brand) par 209. LAWSA cites, as its authority for the proposition, passages from *Voet* dealing with the *condictio indebiti*. As is clear in the treatment by LAWSA, the same principles apply to the *condictio ob turpem vel iniustam causam* LAWSA, par 216.

4. The defendant is not liable for benefits that he or she could have derived from the enriching fact but did not. See LAWSA, par 209, which cites *Voet* for that proposition. There is a case against the proposition – *Krueger v Navratil 1952 (4) SA 405 SWA* at 409, but LAWSA concludes that the case was wrong. See *Dilmitis v Nyland 1965 (3) SA 492 (SR)* and *De Vos Verrykingsaanspreeklikheid* 332.

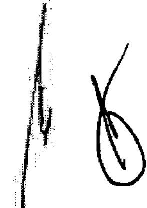
5. It also means that where the defendant's enrichment is diminished or lost before action is instituted, his or her liability is likewise reduced or extinguished subject to certain qualifications, which are (1) the moment that the defendant becomes aware or should have been aware that he had been enriched *sine causa* and (2) where the defendant is in *mora*, reductions do not apply. As authority for that proposition LAWSA cites amongst others *African Diamond Exporters (Pty) Ltd v Barclays Bank International* 1978 (3) SA 699 (A) 709. The latter case at 714B – G is to my mind relevant in respect of what value was to be placed on the diamonds for the purposes of the enrichment claim. In footnote 11 LAWSA says that it is not always easy to determine whether enrichment has actually fallen away or not. For example, where the enrichment consists of the receipt of money or other *res fungibiles,* it has been argued that the receiver must be regarded as being permanently enriched since the value of the received monies added to his or her estate. The old writers were divided on the question, but the Courts have adopted the view that even where *res fungibiles* are involved the defendant's liability is confined to the amount by which he or she is still enriched at the time of the action. LAWSA cites *King v Cohen, Benjamin and Cohen* 1953 (4) SA 64 W, 650 to 651; *Weedon v Bawa* 1959 (4) SA 735 (D) and the *African Diamond Exporters* case (*supra*).

6. As to the extent of defendant's liability under the *condictio ob turpem vel iniustam causam*, LAWSA states that the defendant is liable to restore the transferred thing with its fruits (less production costs) and accessions. Where the thing has been lost or destroyed in the hands



of the defendant, the defendant remains liable to restore its full value. The latter proposition as stated above needs to be qualified to the extent that the defendant's liability is only reduced or extinguished if the thing had been lost, destroyed or damaged at a time when the defendant was unaware of the illegality of the underlying transaction. In the present matter Defendant was a fraudster and the knowledge requirement is therefore satisfied.

7. In paragraph 213 LAWSA describes what is meant by "*fruits*" and "*accessions*" in a bit more detail. LAWSA references only passages from *Voet*. Interest which the defendant may have received on a sum of money paid to him or her *indebite* is apparently not regarded as fruits and need not be restored. For this proposition the case of *Baliol Investment Co. (Pty) Ltd v Jacobs* 1946 TPD 269 where 272 to 274 is cited. In footnote 4 LAWSA says that the issue of interest actually received by the defendants should not be confused with the question whether the defendant is liable for interest *a tempore morae*, but it seems to be accepted that for interest to run on an enrichment claim the defendant should have been placed in *mora*. See *Commissioner for Inland Revenue v First Natinoal Industrial Bank Ltd* 1990 (3) SA 641 (A) citing *Amalgamated Society of Woodworkeers of SA v Die 1963 Ambagsaalvereniging* 1968 (1) SA 283 (T). If the recipient is unable to restore either the thing or its equivalents, its surrogate or value can be recoverd from the recipient. LAWSA cites *Le Riche v Hamman* 1946 AD 846 and *King v Cohen Benjamin & Co* (*supra*) as authority for that proposition.



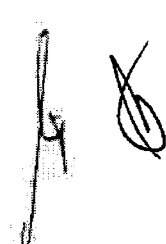
8. The value of the "*investors*" claims against the MTI estate does seem to turn on (1) whether what was transferred was a thing or a *res fungibiles* such as money and (2), at what time the extent of the claim is to be assessed.

9. It seems to me that the Bitcoins were *res fungibiles*, although they do have fluctuating values. The same would apply to foreign currency, for example.

10. It seems to me that the authorities I have looked at all confirm that the claim is to be assessed at the time of the institution of action. See LAWSA above and *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at 971, especially par [29].

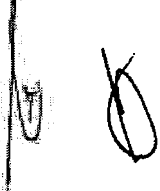
11. Where the entity against which the claims need to be lodged has been liquidated, it is suggested that the date for dermination of the value of the extent of the enrichment cannot be date of institution of the claim. However, applying the above principles, it would seem illogical to calculate the extent of enrichment as at date of payment of the Bitcoin by the investors. Logic seems to dictate that the appropriate date in liquidation cases would be the date of the establishment of the *concursus creditorium*.

12. I am unaware of any authority which is against any of the above general principles. In light of the above I am unfortunately unable to agree with the conclusion in paragraph 32 of the opinion of Van Rooyen SC or the conclusion of Terblanche SC and Lourens which I had sight of today.



13. Van Rooyen SC cites *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC), a Constitutional Court decision, as authority for the proposition that the value of the enrichment is to be assessed as at date that the investor transferred the Bitcoin. *Allpay* was looking at a position very different to the present case. The Court had to consider what order should be made following on the finding that the award of a tender for implementing a social grant system was unlawful, because of the massive public interest in the operation of the social grant system. In that case, the tender awarded to Cash Paymaster was found to be unlawful, but given the massive public interest in the payment of grants, the Court held that Cash Paymaster cannot simply walk away. It had a constitutional obligation to ensure a workable payment system in place until a new one was operational.

14. In that context the Constitutional Court found in paragraph [67] that it is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster (Cash Paymaster was found to have been innocent and not complicit in the unlawfulness of the award of the tender). The Constitutional Court found that the converse was also true in that it had no right to benefit from the unlawful contract. In the foootnote following on that comment the Court *inter alia* held that it also underlies the enrichment claim available to a party in the case of an invalid or illegal contract where the other party seeks to retain benefits from a contract that no longer has legal justification.



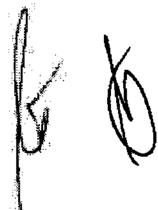
15. In the present case, the Defendant as the fraudster would certainly not be entitled to retain the benefits of the increase in value of the Bitcoin which would be the result if the investors were unable to claim the increased value of the Bitcoin as at date of *concursus*. For that reason I am not able to agree with Van Rooyen SC's opinion in paragraph 32.

16. I am unable to agree with paragraph 3.3 of the memorandum of Terblanche SC and Lourens. For all the reasons that I have stated above, the time for evaluating the value of the enrichment claim must in this instance be the date of *concursus*.

17. For present purposes, please treat this as an internal memorandum between you and me. I have not had an opportunity to talk to Van Rooyen SC about this first and would like to do so before it is distributed.

Best regards

Jannie van der Merwe SC



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14 Maart 2022

RUDI VAN ROOYEN SC & RINIER RAUBENHEIMER SE KOMMENTAAR OP MEMORANDUM VAN JANNIE VAN DER MERWE SC ONTVANG OP 11 MAART 2022

VOORBEHOUD

Jannie se memorandum is beredeneerd, maar ons het ons voorbehoud oor die volgende aspekte:

1. Geld en bitcoin is altwee *res fungibiles*. Waarom dan onderskei tussen rente op geld (wat nie met die *condictio* terug geeïs mag word nie) - sien par 7 van die memorandum - en die waardevermeerdering van bitcoin nadat dit na MTI oorgedra is?

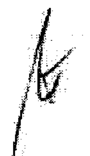
2. *Perry* (beslis in 2001) par [29] waarna verwys word in par 10 van die memorandum, lees soos volg:

   "Whereas ordinarily the existence of enrichment is judged at the time of institution of action, if the defendant becomes aware that he has been enriched sine causa at the expense of another, his liability is reduced or extinguished only if he is able to prove that the diminution or loss of his enrichment was not due to his fault: Lawsa Vol 9 first reissue para 76 p 63. This rule that the enriched party may not with impunity part with the goods after learning of the impoverished party's claim, supports the conclusion reached earlier that once he gains such knowledge he is liable to the extent of his enrichment, that he thereafter, so to speak, holds for the benefit of the original owner."

   Hierdie is 'n geldige oorweging waarna ons sal terugkeer. Ons voorbehoud is:

   2.1. Dit mag so wees tov byvoorbeeld die waardevermeerdering van onroerende eiendom, maar dit blyk dat *res fungibiles* anders hanteer behoort te word. Sien bv die rente op geld wat nie terug geeïs mag word nie.

   2.2. Daardie algemene beginsel moet deeglik oorweeg word in die konteks van piramide skemas en openbare beleid oorwegings. Dit moet veral oorweeg word met verwysing na twee belangrike beslissings na *Perry*, synde *Allpay* (beslis in 2014) en *Fourie v Edeling* (beslis in 2005).



3. *Allpay.*

3.1. Par [67] van *Allpay* lees soos volg:

> *" It is true that any invalidation of the existing contract as a result of the invalid tender should not result in any loss to Cash Paymaster. The converse, however, is also true. It has no right to benefit from an unlawful contract.[47] And any benefit that it may derive should not be beyond public scrutiny. So the solution to this potential difficulty is relatively simple and lies in Cash Paymaster's hands. It can provide the financial information to show when the break-even point arrived, or will arrive, and at which point it started making a profit in terms of the unlawful contract. ..."*

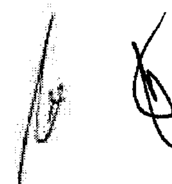
3.2. Jannie merk tereg op dat voetnota 47 (waarna ons later sal terugkeer) behoorlik oorweeg moet word. Dit lees soos volg:.

> *"The dissolution of a contract creates reciprocal obligations seeking to ensure that neither contracting party unduly benefits from what has already been performed under a contract that no longer exists. This is evidenced in cases of rescission or cancellation of a contract where a party claiming restitution must usually tender the return of what she received during the contract's existence or, if return is not possible, explain the reasons for impossibility. See Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd [1998] ZASCA 67; 1999 (2) SA 719 (SCA) at 731D-732D and Van der Merwe et al above n 14 at 116-8. It also underlies the enrichment claim available to a party in the case of an invalid or illegal contract where the other party seeks to retain benefits from a contract that no longer has legal justification. See Visser above n 15 at 442. These diverse applications of restitutionary principles are not rigid or inflexible. See Jajbhay v Cassim 1939 AD 537 at 588 and, in particular, at 544 where the Court held that "**public policy** should properly take into account the doing of simple justice between man and man." See further BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 420A-C, 421A and 427."* (my beklemtoning)

Ons voorbehoud is:

3.3. Waarom sal openbare beleid nie 'n eis vir rente toelaat nie, maar wel 'n eis vir die vermeerdering in waarde van bitcoin?

3.4. Wil openbare beleid nie juis afkeur toon tov piramide skemas nie? Sien *Fourie v Edeling*.



Par [13]: *"Upon receipt of a payment the scheme was liable promptly to repay it to the investor who had a claim for it under the condictio ob iniustam causam."*

En par [19] waar dit duidelik gemaak word dat "*any payment of a profit or interest would have been a disposition not made for value*".

Sien ook, in die algemeen, die bepalings van die *Consumer Protection Act.*

4. In par 15 van die memorandum word die volgende mening uitgespreek:

"In the present case, the Defendant as the fraudster would certainly not be entitled to retain the benefits of the increase in value of the Bitcoin which would be the result if the investors were unable to claim the increased value of the Bitcoin as at date of concursus".

Ons voorbehoud is:

4.1. In die algemeen, is dit korrek om eenvoudig die maatskappy in likwidasie te sien as die bedrieër wat die voordeeel van sy bedrog behou? Is dit nie meer korrek om dit te sien vir wat dit werklik is nie, nl 'n *concursus* wat kollektief al die voordeel kry?

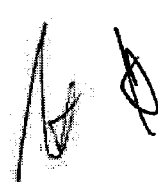
4.2. Soos sake staan, gaan skuldeisers se eise nie ten volle betaal kan word nie en is daar dus geen sprake van enige voordeel wat deur die maatskappy in likwidasie behou sal word nie.

<u>HOE HANTEER DIE LIKWIDATEURS DIE VERSKILLENDE MENINGS?</u>

5. Die likwidateurs se optrede moet uiteraard bepaal word deur wat regtens vereis word.

6. Ten spyte van ons voorbehoude soos hierbo uiteengesit, is ons van mening dat Jannie getoon het dat die vraag aansienlik meer kompleks is as wat dit op die oog af mag blyk.

7. Daar kom 'n punt waar, indien daar verskille is oor regsuitleg, logika 'n belangrike rol speel in likwidateurs se besluite en in die beantwoording van die vraag: Wat is in die beste belang van die *concursus?*



8. Ons is onlangs meegedeel dat, om duisende skuldeisers se eise te bereken soos op die dag van elke belegging, 'n omvangryke en tydrowende taak sal wees.

9. Die berekening van elke skuldeiser se eis met verwysing na die waarde van bitcoin soos op die datum van die skepping van die *concursus* gaan betaling aan skuldeisers bespoedig en sal dus in belang van die *concursus* wees.

10. Derglike werkswyse is regverdigbaar:

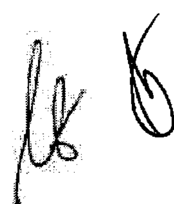
    10.1. Openbare belang word daardeur bevredig aangesien daar in die belang van die *concursus* opgetree word. Sien *Allpay* vn 47 hierbo.

    10.2. Die algemene beginsel waarna verwys is in *Perry* regverdig dit.

    10.3. Alhoewel bitcoin, net soos geld, *res fungibiles* is, het hulle ook verskillende eienskappe. Dus is daar 'n argument uit te maak dat rente op geld (wat nie by wyse van die *condictio* terug geeïs mag word nie) nie gelykstaande is aan die waardevermeerdering van bitcoin nadat dit na MTI oorgedra is nie. Die punt is dat beleggers nie geld nie, maar bitcoin, belê het en dat enige onttrekkings deur beleggers nie in die vorm van geld nie, maar die oorplasing van bitcoin sou geskied.

11. In hierdie omstandighede steun ons die aanbeveling dat die datum van *concursus* gebruik word om die waarde van alle skuldeisers se eise te bereken.

12. Ons sien nie nodigheid vir 'n verklarende bevel om hierdie werkswyse te volg nie. Ons is trouens bekommerd dat, soos die konsep verklaring wat Vrydag aan ons voorsien is tans lees, dit te veel gegiet is in die versoek om 'n opinie (wat uiteraard nie toelaatbaar is nie). Is die beter werkswyse nie die volgende nie: deel skuldeisers mee dat die datum van *concursus* gebruik gaan word om die waarde van alle skuldeisers se eise te bereken. Indien daar besware is, moet die beswaardes regstappe neem, alternatiewelik kan die likwidateurs dan aansoek doen om 'n verklarende bevel, want dan bestaan daar werklik 'n geskil tussen die likwidateurs en skuldeisers.



FA 14 444

MEMO

TO	:	**SUSAN STRYDOM**
FROM	:	**THE LIQUIDATORS OF MTI**
DATE	:	**8 JUNE 2022**

MIRROR TRADING INTERNATIONAL (IN LIQUIDATION)
RE: DECLARATORY APPLICATION

We refer to the above matter, as well as the two opinions as received from Adv. Terblanche SC and Adv. Van der Merwe SC respectively.

We confirm that we reconsidered these opinions and prepared a spreadsheet in order to compare the practical implications of these opinions, which spreadsheet we attach hereto.

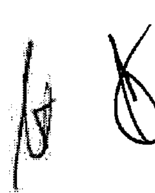
We made certain assumptions in order to calculate the dividend that will be payable based on an illegal scheme.

1. Even though Adv. Van der Merwe did not:
   1.1. distinguish in his opinion between the different classes of investors;
   1.2. deal with the claims the liquidators will have against investors in terms of Sections 29, 26 and 30;

   we applied the principles of Adv. Terblanche's memo regarding these two aspects to both calculations and therefore, once the liquidators have recovered all possible amounts from the investors in terms of the sections listed in 1.2 above, the investors will have a claim (a "2nd claim" for class 2 investors and a "1st claim" for class 3 investors) against the estate to claim their returns, but **not** the profits;

2. Please refer to the "Assumptions" in rows 4 – 25, as well as "further assumptions" for the calculation of dividends in rows 79 – 83.

As you will note from the dividend calculation from rows 76 onwards, investors will receive a better dividend when the opinion of Adv. Terblanche is applied (57c/Rand vs 38c/Rand).



One further question arose during discussions with Pierre, being whether the increase in value of the investors' BTC can be attributed to the fact that they invested in a Ponzi Scheme, alternatively whether it must be attributed to the nature of BTC itself. If it can be attributed to the investment in a Ponzi Scheme, the investors cannot benefit from the increase in value and their claims must be calculated at date of investment. In the event that it is attributed to the nature of BTC, they should be able to claim the increase and their claims must be calculated at the date of *concursus*.

The opinions, calculations and practical implications were discussed in length between the liquidators and, in the event that the increase in value of the investors' BTC can be attributed to the fact that they invested in a Ponzi Scheme, it is the opinion of the liquidators that:

1. Adv. Terblanche's opinion is sound in law as is it is based on the decisions of Fluxmans[1] and Fourie[2], which clearly lays down the principles applicable in a Ponzi Scheme;
2. We have to act in the best interest of the general body of creditors. Even though it might take longer to calculate the claims of investors correctly when the opinion of Adv. Terblanche is applied, this will be to the benefit of the creditors, and especially the loser investors, as a higher dividend will be awarded;
3. Therefore the opinion of Adv. Terblanche must be followed;
4. In the Declaratory Application, the opinion of Adv. Van der Merwe must however be incorporated in the same manner in which the opinion of Adv. Terblanche was incorporated and explained. The Court must therefore be informed of the following:
   - 4.1. That the liquidators received differing / contrasting legal opinions from various Senior Advocates regarding the correct time for determining the value of the BTC for creditors' claims against MTI, i.e. either the date of liquidation or the date of each deposit of BTC;
   - 4.2. These opinions were considered in detail, and that it is the opinion of the liquidators that Adv. Terblanche's opinion (as already detailed in the draft application) should be followed and claims should be calculated as at the date of each deposit of BTC, as this approach is sound in law and will be to the benefit of the creditors

[1] Fluxmans v Levenson (523/2015) [2016] ZASCA 183 (29 November 2016)
[2] Fourie NO and Others v Edeling NO and Others (522/2003) [2004] ZASCA 28 (1 April 2004)

4.3.3. Taking all of the above into account, it is the liquidators' submission that the crux of the matter is the following:

4.3.3.1. If we are successful in the Ponzi application, no investor can be allowed to benefit from the scheme by being allowed to claim for the increase in value of BTC from the date of the investment to the date of *concursus*;

4.3.3.2. By way of example, if Investor A invested BTC to the value of R500,000.00 and at *concursus* his initial investment had increased due to an increase in value of BTC (not as a result of further investments) and was worth R800,000.00, and he is allowed to claim the amount of R800,000.00, he is enriched with R300,000.00 (the dividend thereon) based on an investment in an illegal scheme. If he is only allowed to claim R500,000.00, he does not benefit from the scheme;

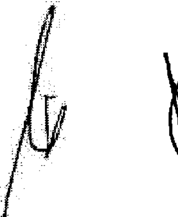
4.3.3.3. MTI will not benefit in the event that the investor is not allowed to claim for the increase in value of BTC (the R300,000.00 as per the above example) as per Adv. Van Merwe's opinion. The reason being that the "benefit" will not be retained by MTI. It will be added to the pooled funds that is available for distribution to the investors and this is why a larger dividend will be payable to investors if claims are calculated at the date of the investment.

4.3.4. Therefore, claims must be calculated as at the date of the investment and the liquidators request that an order be granted that claims be dealt with accordingly; and

5. In the event that the Court grants the Order declaring the scheme a Ponzi Scheme, the reference to "scenario 2" in the draft application can be removed.

Thank you

S Smit
O.B.O. the Liquidators



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: ____________

The application between:

H BESTER N.O.	First applicant
AW VAN ROOYEN N.O.	Second applicant
CJ ROOS N.O.	Third applicant
JF BARNARD N.O.	Fourth applicant
D BASSON N.O.	Fifth applicant
CBS COOPER N.O.	Sixth applicant

(Cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,

CRAIG LIONEL PEDERSEN

do hereby make an oath and say that:

1. I am:

1.1. a senior forensic investigator, certified Fraud Examiner and Certified Cybercrime Investigator, registered Forensic Practitioner;

1.2. appropriately registered with and a member of the Association of Certified Fraud Examiners, the International Association of Financial Crime Investigators and the Institute of Commercial Forensic Practitioners; and

1.3. employed by TCG Digital Forensics of 32 Woodbridge Business Park, Koeberg Road, Milnerton, Cape Town, Western Cape ("**TCG**").

2. The facts deposed to herein are within my personal knowledge and belief, save where the context indicates otherwise.

3. A copy of my curriculum vitae is attached hereto as annexure P1 and I confirm the truth, authenticity and correctness thereof and of the facts stated therein.

INTRODUCTION:

4. The liquidators of Mirror Trading International (Pty) Ltd [in liquidation] ("**MTI**") instructed me to conduct a forensic investigation into certain aspects concerning the business of MTI and, to that end, to analyse the available relevant data underlying its operations.

5. This affidavit:

5.1. deals with the outcome of my forensic investigation in only very confined respects and only to the extent of it being relevant to the application brought by the liquidators for the relief set out in their notice of motion;

5.2. for purposes of consistency consequently employs the references, nomenclature and abbreviations employed in the founding affidavit;

5.3. should be read with the liquidators' founding affidavit to this application, the FSCA report and the Fabricius reports.

6. I confirm the truth, authenticity and correctness of the allegations made by the liquidators in their founding affidavit insofar as that affidavit relates to TCG and our investigations into the affairs of MTI.

MY FINDINGS GERMANE TO THE RELIEF SOUGHT BY THE LIQUIDATORS IN TERMS OF THIS APPLICATION:

7. I have the experience, required skill and expertise to execute the instruction of the liquidators and managed a team of experts (consultants and programmers) employed by TCG in the process of extracting information from MTI's records.

8. In pursuance of our (TCG and my) mandate, we have been investigating and analysing the data on MTI's SQL[1] database known as the "Maxtra" database ("**the MTI database**") since 2021.

9. The MTI database was stored on a server under the control of Maxtra Technologies, a web-hosting company based in India, that provides server space to its clients for the hosting of websites, databases and similar

1 SQL is a domain-specific language used in programming and designed for managing data held in a relational database management system, or for stream processing in a relational data stream management system.

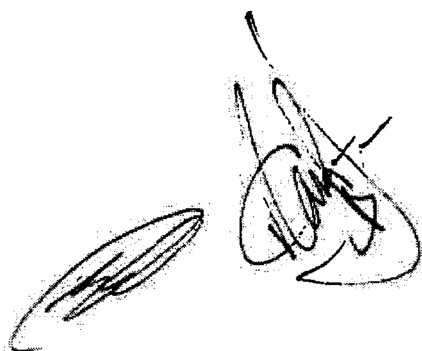
services. Access to the MTI database was procured by using the MTI specific access and login credentials [consisting of access granting password and username combinations], a secure file transfer protocol was downloaded and ultimately a full download of the MTI database was performed. To that end, the MTI database was extracted to a secured server under our control, so that the data could be appropriately processed and eventually analysed, in a secured separate and enclosed server environment.

10. By nature, the MTI database is a Customer Relationship Management ("**CRM**") tool. To this end, it is a database designed to track interaction between users and not a sophisticated, self-automated financial record-keeping and audit system.

11. As far as I am aware, the Maxtra database was designed in an "off the shelf" form by Maxtra Technologies India and was acquired by Mr Johannes Cornelius Steynberg ("**Steynberg**"), who then altered the "vanilla" version thereof by writing custom pieces of code and/ or making adjustments to the database so that it would fit the needs of the MTI scheme.

12. Steynberg is regarded in our investigation as being the Administrator of the MTI database and all indications have pointed to this being a reliable conclusion.

13. Against this prelude, I turn to the variables involved in calculating the flow of funds, liquidity and debtors/ creditors of MTI.



14. To analyse the data available on the MTI database, to interpret same and ultimately arrive at reliable calculations for the purpose of identifying transactions between MTI and investors, to reliably identify debtors/creditors of MTI, which is an extremely complex process.

15. This process begins with a comprehensive extraction of the data stored on the MTI database and analysing same to first understand which tables contain which data and how the different sets of data relate to one another and how they were created and maintained. This requires not only an inspection of the SQL data but also of the front end pages serving the data to match the origin of each field and ensure that the data is refined in terms of accuracy.

16. Initially, more importantly perhaps – without the assistance of Steynberg as the Systems Administrator in our investigations, key assumptions necessarily had to be made and these were tested and refined through the ensuing enquiry into the trade, dealing and affairs of MTI as contemplated by sections 417 and 418 of the Companies Act, 61 of 1973 ("**the Enquiry**"). It was through the Enquiry process that our factual premise for key assumptions could be tested, verified and sanitised with the assistance of the testimony and evidence tendered thereat, so that our analysis of the MTI database and forensic investigation could be commensurately refined.

17. The progress made pursuant to our initial analysis of MTI's records and data, during early 2021, is dealt with in annexure FA11 to the founding affidavit . At this time our calculations were an accurate reflection of the debtors/creditors and value of unaccounted bitcoin according to our

investigation at that point in time, on which I elaborate somewhat hereunder. That being said, it was clear at that time already that certain adjustments would have to be made as our investigation progressed, with no radical changes in the data and resultant calculations being anticipated.

18. During the middle of 2021, our ongoing investigations identified a number of deleted investor accounts. These accounts were inspected and found to have been the accounts of actual users who had closed their accounts as well as users that were removed from the system by Steynberg and/ or users with zero activity. While these accounts had been deleted, as an investigative process it was still noted that those users had actively participated in the scheme, despite their accounts apparently having been deleted. Their interactions with the scheme, through these purportedly "deleted" accounts were in the circumstances of consequence and this data had to be included. These accounts were then cross referenced and added back to the calculations so that provision could be made for what had been transacted on these accounts.

19. An independent data analysis system, called the "MTI Administration and Reporting System" ("**MARS**") was then created, which is a software system that enables one to parameterize and view MTI's investor-specific data, make calculations as required premised on such data and then generate reports premised on such data on an ad-hoc basis, for the liquidators as and when required.

20. The MARS system was built as a data extraction and reporting tool and was transposed onto a copy of the original copy of the MTI database extracted

from Maxtra as aforesaid. The MARS system has proven highly valuable in subsequent 417 enquiries where witnesses (debtors/ creditors) have had the opportunity to compare the data to their own records and confirm same. The degree of accuracy and confirmation of transactions has remained exceptionally high.

21. In the analysis of the data stored on the MTI database, as obtained from Maxtra, it was noted that there was no real attention paid, in IT systems terms, to verifying the identity of individuals participating in the scheme.

22. It soon became evident that a common practice prevailed in the MTI scheme, pursuant to which individuals created subsidiary accounts in other names [thus false identities / alias] to benefit from referral bonuses. In doing so, they would in truth and in fact open "investment accounts" for themselves, but under another name, only so that they could falsely represent to MTI that they had referred another investor to the scheme, only so that they would thereby "earn" a referral bonus in the scheme.

23. This practice brought with it a particular complexity in so far as the MTI system did not feature any form of a reliable Know Your Customer (KYC) verification process. The direct consequence of this cavalier approach to dealing with account holder information is that users were able to claim a 10% referral bonus through creating accounts in the names of children, pets or even fictitious names to claim generous bonuses from referring themselves. This is referred to as the "rolling of accounts".

24. The rolling of accounts for the benefit of referral bonuses necessitated an investigative process of creating individual-specific clusters. A cluster is

defined as a group of accounts in which sufficient commonality is noted (use of the same e-mail/ cellular number/ password etc.) is identified. This is physically inspected by a member of the investigative team and the oldest account traceable in the cluster identified as the most likely Master Account. Once the investigative process is complete, a Master/Slave relationships is recorded between the accounts and the gross value of the collective accounts was calculated.

25. The clustering process is important and central to successfully arriving at final debtors/creditors values as one individual, as master, could hold control over 10 or more slave accounts. This would reflect for example as 6 creditors and 4 debtors and the cumulative cluster would then be either a debtor or creditor. Needless to say, this process was intricate, involved and complex.

26. Through the process of cross-checking, referencing, and calculating the data over the past year, separate legal actions have called for figures at different stages. At each stage the most accurate available values at the time were provided. One must bear in mind that any stated ZAR values are of course directly related to the Bitcoin price either at the date of disposition or at the date on which the figures are required. The price of Bitcoin alone changes with exceptional frequency throughout any trading day or period and by its very nature, alone, directly impacts upon the numbers in question.

27. Ultimately, with the use and benefit of the aforesaid mechanisms, the mountain of MTI data extracted from Maxtra could be processed, analysed and interpreted to come to calculation of the total amount of Bitcoin

deposited into MTI and the total amount of Bitcoin withdrawn from MTI, during its operations.

28. That being said, as at the date of its liquidation and because of the fraud perpetrated by MTI and the theft and loss of Bitcoin, MTI had a shortfall of bitcoin of at least 6,900 Bitcoin, which does not include the 1,281 Bitcoin that the liquidators have recovered to date. The difference between Bitcoin deposited in and withdrawn out of MTI, was at that stage estimated to at least amount to 6,900 Bitcoin. Furthermore, if MTI traded legitimately and the Scheme was not a Ponzi-type scheme, and if all the illegalities and mechanism employed to defraud investors are to be ignored, an amount of 22,222,548 Bitcoin ought to have been held in MTI in December 2020, when MTI imploded and was placed in liquidation. The "pool" figure of 22,222,548 Bitcoin is what the Maxtra backoffice reported as the balance of members funds available at termination in December 2020.

29. At the time of deposing to annexure FA11 to the liquidators' founding affidavit, it was established that a total amount of 39,139.29 Bitcoin were deposited with MTI, of which an amount of 28,272.42 Bitcoin was subsequently withdrawn. Accordingly, a total of 10,866.87 Bitcoin was known not to have been withdrawn.

30. I subsequently established that there were more withdrawals of Bitcoin and the total amount of Bitcoin withdrawn from the scheme is now known to amount 32,285 Bitcoin. As with any data analysis, the collection of complex data, that requires in-depth and extensive consideration, the analysis of which is an evolving process, prolongs finality.

31. As presently advised, we have now established that at least 6,908.21 Bitcoin is unaccounted for within MTI.

32. To this end, the calculations as currently reflected by the MARS system indicate that the MTI database extracted from Maxtra reflects:

32.1. 304,044 User/Investor Accounts;

32.2. That 39,193.29 Bitcoin were deposited into the scheme;

32.3. That 32,285.08 Bitcoin were paid out of the scheme;

32.4. The balance of funds that should be available in MTI as at 23 December 2022 is noted as the differential between deposits and withdrawals, being 6,908.21 Bitcoin.

DEPONENT

I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn before me at MILNERTON on this the 17TH day of AUGUST 2022, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

...............................7023120-6
COMMISSIONER OF OATHS
Sergeant
MW. Gabier

MOGAMAT WALEED GABIER
118 KOEBERG ROAD
MILNERTON
7441

SUID AFRIKAANSE POLISIEDIENS
D3447
17 AUG 2022
FLASH
MILNERTON
SOUTH AFRICAN POLICE SERVICE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13722/22

The application between:

H BESTER N.O.	First Applicant
AW VAN ROOYEN N.O.	Second Applicant
CJ ROOS N.O.	Third Applicant
JF BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
CBS COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

CONFIRMATORY AND SUPPORTING AFFIDAVIT

I, the undersigned,

JACOLIEN FRIEDA BARNARD N.O.

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2022 -08- 1 3
GENERAL OFFICE
WESTERN CAPE HIGH COURT

do hereby make oath and state as follows:

1.

1.1 I am an adult female liquidator with employed under the name and style of Barns Trust, with business address situated at 310 Soutpansberg, Rietondale, Pretoria, Gauteng.

HE HIGH COURT OF SOUTH AFRICA

1.2 I am the fourth applicant herein.

1.3 The facts herein contained fall within my own personal knowledge and belief, and are both true and correct.

2.

I confirm that I have read the founding affidavit of Herman Bester N.O. and confirm the contents thereof as both true and correct as far as it relates to me.

3.

I support the relief sought as set out in the notice of motion attached to the founding affidavit.

DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at Pretoria on this the 17th day of **AUGUST 2022**, the regulations contained in Government Notice R1258 published in the Government Gazette No 3619 dated 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS

BIANCA POTGIETER
Commissioner of Oaths/Kommissaris van Ede
Practising Attorney/Praktiserende Prokureur
Tintingers Inc./Ing.
242 Lange Steet
Nieuw Muckleneuk
Brooklyn, Pretoria
Tel: 012 346 7275
Email: bpotgieter@tintingers co za

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13721/22

The application between:

H BESTER N.O.	First Applicant
AW VAN ROOYEN N.O.	Second Applicant
CJ ROOS N.O.	Third Applicant
JF BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
CBS COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

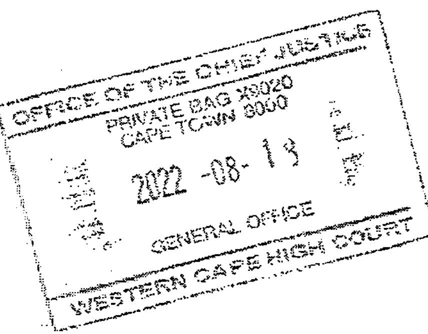
and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

CONFIRMATORY AND SUPPORTING AFFIDAVIT

I, the undersigned,

ADRIAAN WILLEM VAN ROOYEN N.O.



do hereby make oath and state as follows:

1.

1.1 I am an adult male liquidator with employed under the name and style of Investrust, with business address situated at 64 Stella Street, Brooklyn, Gauteng Province.

1.2 I am the second applicant herein.

1.3 The facts herein contained fall within my own personal knowledge and belief, and are both true and correct.

2.

I confirm that I have read the founding affidavit of Herman Bester N.O. and confirm the contents thereof as both true and correct as far as it relates to me.

3.

I support the relief sought as set out in the notice of motion attached to the founding affidavit.

DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at Pretoria on this the 17th day of **AUGUST 2022**, the regulations contained in Government Notice R1258 published in the Government Gazette No 3619 dated 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS

NICOLENE KRUGER
3 MICHAEL ROAD,
VALHALLA, PRETORIA. 0185
COMMISSIONER OF OATHS
9/1/8/2 GAUTENG

463

COPY

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13772/22

The application between:

H BESTER N.O.	First Applicant
AW VAN ROOYEN N.O.	Second Applicant
CJ ROOS N.O.	Third Applicant
JF BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
CBS COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

and

THE MASTER OF THE HIGH COURT, CAPE TOWN Respondent

CONFIRMATORY AND SUPPORTING AFFIDAVIT

I, the undersigned,

CHAVONNES BADENHORST ST-CLAIR COOPER N.O.

do hereby make oath and state as follows:

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2022 -08- 18
GENERAL OFFICE
WESTERN CAPE HIGH COURT

1.

1.1 I am an adult male liquidator with employed under the name and style of Cooper Trust, with business address situated at 14 Reid Street, Westdene, Bloemfontein.

1.2 I am the sixth applicant herein.

1.3 The facts herein contained fall within my own personal knowledge and belief, and are both true and correct.

2.

I confirm that I have read the founding affidavit of Herman Bester N.O. and confirm the contents thereof as both true and correct as far as it relates to me.

3.

I support the relief sought as set out in the notice of motion attached to the founding affidavit.

DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at Bloemfontein on this the 18 day of **AUGUST 2022**, the regulations contained in Government Notice R1258 published in the Government Gazette No 3619 dated 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS

STACY SAFFY
HONEY CHAMBERS BLOEMFONTEIN
KENNETH KAUNDA DRIVE
COMMISSIONER OF OATHS
KOMMISSARIS VAN EDE
PRACTISING ATTORNEY R.S.A.
PRAKTISERENDE PROKUREUR R.S.A.

COPY

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13721/22

The application between:

H BESTER N.O.	First Applicant
AW VAN ROOYEN N.O.	Second Applicant
CJ ROOS N.O.	Third Applicant
JF BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
CBS COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

and

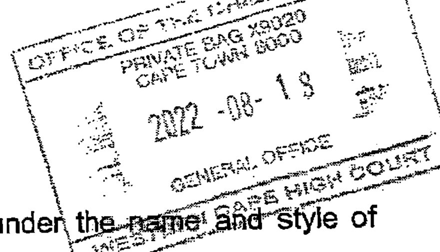
THE MASTER OF THE HIGH COURT, CAPE TOWN Respondent

CONFIRMATORY AND SUPPORTING AFFIDAVIT

I, the undersigned,

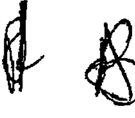
DEIDRE BASSON N.O.

do hereby make oath and state as follows:



1.

1.1 I am an adult female liquidator with employed under the name and style of Tshwane Trust, with business address situated at 1207 Cobham Road, Queenswood, Pretoria, Gauteng Province.



1.2 I am the fifth applicant herein.

1.3 The facts herein contained fall within my own personal knowledge and belief, and are both true and correct.

2.

I confirm that I have read the founding affidavit of Herman Bester N.O. and confirm the contents thereof as both true and correct as far as it relates to me.

3.

I support the relief sought as set out in the notice of motion attached to the founding affidavit.

DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at Pretoria on this the 17th day of **AUGUST 2022**, the regulations contained in Government Notice R1258 published in the Government Gazette No 3619 dated 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS

RIANA REDELINGHUYS
Praktiserende Prokureur/Practising Attorney
Kommissaris van Ede / Commissioner of Oaths
1213 COBHAM RD
COBHAMWEG 1213 QUEENSWOOD
SUID-AFRIKA/SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13721/22

The application between:

H BESTER N.O.	First Applicant
AW VAN ROOYEN N.O.	Second Applicant
CJ ROOS N.O.	Third Applicant
JF BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
CBS COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

CONFIRMATORY AND SUPPORTING AFFIDAVIT

I, the undersigned,

CHRISTOPHER JAMES ROOS N.O.

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2022 -08- 18
GENERAL OFFICE
WESTERN CAPE HIGH COURT

do hereby make oath and state as follows:

1.

1.1 I am an adult male liquidator with employed under the name and style of Sebenza Trust, with business address situated at 43 Estcourt Avenue, Wierdapark, Centurion, Gauteng Province.

1.2 I am the third applicant herein.

1.3 The facts herein contained fall within my own personal knowledge and belief, and are both true and correct.

2.

I confirm that I have read the founding affidavit of Herman Bester N.O. and confirm the contents thereof as both true and correct as far as it relates to me.

3.

I support the relief sought as set out in the notice of motion attached to the founding affidavit.

DEPONENT

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at Pretoria on this the 17 day of **AUGUST 2022,** the regulations contained in Government Notice R1258 published in the Government Gazette No 3619 dated 21 July 1972 (as amended) having been complied with.

COMMISSIONER OF OATHS

ARLENE IMELDA McNAMARA
EX OFFICIO COMMISSIONER OF OATHS
F VAN WYK INC
Delmondo Office Park, Sorrento Building
1st Floor, 169 Garsfontein Rd,
Ashlea Gardens, Pretoria

HC97

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13721/2022

The application between:

H BESTER N.O.	First applicant
AW VAN ROOYEN N.O.	Second applicant
CJ ROOS N.O.	Third applicant
JF BARNARD N.O.	Fourth applicant
D BASSON N.O.	Fifth applicant
CBS COOPER N.O.	Sixth applicant

(Cited in their capacities as the joint liquidators of Mirror Trading International (Pty) Ltd [in liquidation])

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

SERVICE AFFIDAVIT

I, the undersigned,

HENDRIK JACOB PUNT

do hereby make oath and say that:

1. I am a male candidate attorney employed as such at Mostert & Bosman Attorneys, with a principal place of business situated at 4th Floor, Madison Square, cnr Carl Cronje Drive & Tygervalley Boulevard, Tyger Falls, Bellville, Western Cape.

2. Mostert & Bosman Attorneys are the correspondent attorneys for the Applicants' attorneys of record. I am accordingly duly authorised to depose to this affidavit and confirm the contents hereof to fall within my personal knowledge, unless the contrary appears expressly from the context, in which instance I verily believe the statements to be true and correct.

SERVICE ON THE MASTER OF THE HIGH COURT

3. I confirm that on **18 August 2022** a copy of the Index, Issued Notice of Motion, Founding Affidavit and annexures thereto were served on the Master of the High Court, Cape Town by the Sheriff of the court. Service as such is reflected in the sheriff's return of service and annexed hereto marked **"HP1"**.

4. The Master of the High Court was also requested in writing to issue its report in terms of of regulation 17 of the Winding-Up and Judicial Management Regulations timeously. A copy of the letter addressed to the Master is annexed hereto marked **"HP2"**.

5. At the time of deposing to this affidavit the Master's report has not been received. Same will be filed on the court file upon receipt thereof.

HENDRIK JACOB PUNT

SWORN to and **SIGNED** before me at RCZLVILLE on this the 23rd day of AuGust **2022** by the abovementioned Deponent, who I certify, acknowledged that he knows and understands the contents of this Affidavit and that he has no objection to taking the prescribed oath which reads as follows: "I swear that the contents of this Affidavit are true, so help me God", and further that he acknowledges that he regards the prescribed oath as binding on his conscience, which oath was duly administered by me as required by law.

COMMISSIONER OF OATHS

Ex Officio COMMISSIONER OF OATHS (RSA)
CHARL THOMAS HAMBRIDGE
(Member) Chartered Management Accountant
Business Consultant
CTH Consulting
25 Dolfyn Street, Yzerfontein
Western Cape, 7351

IN THE HIGH COURT OF SOUTH AFRICA
CAPE TOWN
WESTERN CAPE DIVISION CAPE TOWN

ORIGINAL

Case number 13721/22
Printed on 19-August-2022

My reference 2208/1324
In the case between:

H BESTER N.O. & 5 OTHERS	APPLICANTS
and	
THE MASTER OF THE HIGH COURT	RESPONDENT

Address as specified:
DULLAH OMAR BUILDING, 45 CASTLE STREET, CAPE TOWN
**********SAME DAY*********

INDEX, NOTICE OF MOTION, FOUNDING AFFIDAVIT, ANNEXURES & SUPPORTING AFFIDAVIT

NATURE OF PROCESS: INDEX, NOTICE OF MOTION, FOUNDING AFFIDAVIT (HERMAN BESTER), ANNEXURES "FA1-FA14" & SUPPORTING AFFIDAVIT (CRAIG LIONEL PEDERSEN)

MANNER OF SERVICE/EXECUTION (RULE 4(A)(II))

On 18-Aug-2022 at 14:40 I served this INDEX, NOTICE OF MOTION, FOUNDING AFFIDAVIT (HERMAN BESTER), ANNEXURES "FA1-FA14" & SUPPORTING AFFIDAVIT (CRAIG LIONEL PEDERSEN) on the RESPONDENT, at DULLAH OMAR BUILDING, 45 CASTLE STREET, CAPE TOWN by handing a copy thereof to MR P.ERASMUS (CLERK), ostensibly responsible, not less than 16 years of age and in control of and under the employ of the RESPONDENT, after exhibiting the original and explaining the nature and exigency of the said process. Aforementioned person accepted service on behalf of THE MASTER OF THE HIGH COURT.

The original return together with the original above mentioned process is dispatched to the mandator.

Note appearance date 31-Aug-2022

DEPUTY SHERIFF NOKWANDA
From: Sheriff Cape Town West
N.N. NTSIBANTU
PO BOX 96; DX 163
DOCEX 163 CAPE TOWN
CAPE TOWN. 8000
Tel: 0210074636 Fax: 0866732831
Email: admin@sheriffctwest.co.za
Account info for bank deposits/transfers:
FNB (CAPE TOWN)
Account name: SHERIFF FOR CAPE TOWN WEST
Account number 62471170870

To: WESTERN CAPE DIVISION CAPE TOWN
CAPE TOWN

MOSTERT & BOSMAN INC (TYGER VALLEY)
PO BOX 3355
TYGERVALLEY 7536
Tel: 021 914 3322 Fax: 021 914 3330
Acc No 257

VAT number {none}
Ref. P DU TOIT/ANTOINETTE

INVOICE NUMBER 152589

DESCRIPTION OF FEES		FEES
Registration		13.00
Return of Service		52.00
Service		84.50
E-mail Sent		8.50
Copies Made		6.50
Telephone		20.00
Same Day Service		450.00
Travelling		36.00
Handling Fees		10.00
Sub-total Fees		680.50
Plus VAT		102.08
TOTAL OWING	R	782.58

VAT number 4410262689

You may require this account to be taxed and vouched within 20 days of the date of issue. VAT included if applicable.

Collection

Hendri Punt

From:	Hendri Punt
Sent:	Monday, 22 August 2022 16:28
To:	'rfourie448@gmail.com'
Cc:	Antoinette Engelbrecht
Subject:	Ex Parte Bester N.O Case number: 13721/22
Attachments:	Return of Service.pdf; Letter to the Master.pdf

Tracking:	**Recipient**	**Delivery**	**Read**
	'rfourie448@gmail.com'		
	Antoinette Engelbrecht	Delivered: 2022/08/22 16:28	Read: 2022/08/22 16:29

Good day Ms. Fourie,

We can confirm that we act herein on behalf of the Liquidators of Mirror Trading International Pty Ltd (in liquidation) (Master's reference C906/2020).

We can further confirm that on 18 August 2022 the Sheriff of the court served the above-mentioned application on the Master's office together with the attached letter addressed to the Master requesting a report in terms of regulation 17 of the Winding-Up and Judicial Management Regulations.

Kindly advise when the report will be available.

We thank you in anticipation and await your advises herein.

Kind regards,

Hendri Punt

From:	Ronel Fourie <rfourie448@gmail.com>
Sent:	Monday, 22 August 2022 16:43
To:	Hendri Punt
Cc:	Antoinette Engelbrecht
Subject:	Re: Ex Parte Bester N.O Case number: 13721/22
Attachments:	RSImage.jpeg; RSImage.gif

Thank you I have received it. I will forward now to Mr Bouwer dealing with the matter

On Mon, 22 Aug 2022, 4:27 pm Hendri Punt, <HendriP@mbalaw.co.za> wrote:

Good day Ms. Fourie,

We can confirm that we act herein on behalf of the Liquidators of Mirror Trading International Pty Ltd (in liquidation) (Master's reference C906/2020).

We can further confirm that on 18 August 2022 the Sheriff of the court served the above-mentioned application on the Master's office together with the attached letter addressed to the Master requesting a report in terms of regulation 17 of the Winding-Up and Judicial Management Regulations.

Kindly advise when the report will be available.

We thank you in anticipation and await your advises herein.

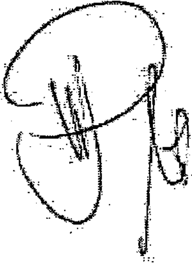
Kind regards,

HENDRI PUNT
Candidate Attorney

t +27 (0) 21 914 3322 | f +27 (0) 21 914 3330
hendrip@mbalaw.co.za
4th floor, Madison Square, Cnr of Carl Cronje & Tygerfalls Boulevard,
Tygerfalls, Bellville, South Africa | view map
PO Box 3355, Tyger Valley, 7536 | Docex 152, Cape Town

A level 2 contributor to B-BBEE
BEE Procurement recognition level 125%

www.mbalaw.co.za | my details | disclaimer



MOSTERT & BOSMAN

ATTORNEYS | TRUSTED ADVICE BY COMMITTED PEOPLE

THE MASTER OF THE HIGH COURT	Date:	17 August 2022
CAPE TOWN	Our Ref:	P DU TOIT/Antoinette/WI7913
BY HAND	Email:	antoinettee@mbalaw.co.za
	Your Ref:	

Dear Sir / Madam

MIRROR TRADING INTERNATIONAL (PTY) LTD (IN LIQUIDATION) ("MTI")

MASTER'S REFERENCE NUMBER: C906/2020

1. We refer to the above and confirm that we act herein on behalf of the joint liquidators of MTI.

2. We hereby serve on you a copy of our clients' duly issued urgent High Court application, in terms of which the liquidators apply to the High Court for directions in terms of Section 387(3) of the 1973 Companies Act.

3. **Kindly note that the application is set down for hearing on an urgent basis on Wednesday, 31 August 2022.**

4. You are kindly requested to provide us with your report in terms of Regulation 17 of the Winding-Up and Judicial Management Regulations, in order for same to be presented to the Court at the hearing of the matter.

EST. 1893

4th floor, Madison Square, Cnr of Carl Cronje & Tygerfalls Boulevard, Tygerfalls, Tyger Waterfront, Bellville, South Africa
PO Box 3355, Tyger Valley, 7536 | Docex 152, Cape Town | info@mbalaw.co.za | www.mbalaw.co.za
t +27(0)21 914 3322 | f +27(0)21 914 3330

Partners: Herman Botes | Riaan Kunz | Pierre du Toit | Cloete Marais | Richard Dixon | Lee-Anne Ely
Associates: Morné Strydom | Melissa Colyn | Callie Lloyd | Johann Steyn | Michelle Birkenstock
Jacky Labuschaigne | Elizabeth Martin | Kruger van Dyk
Office Manager: Chari Hambridge

Now a Level 2 contributor to B-BBEE with a BEE procurement recognition level of 125%

Mostert & Bosman Tygervalley and Mostert & Bosman Swartland are independently owned and operated

5. Kindly advise via e-mail at antoinettee@mbalaw.co.za if you have any further enquiries, alternatively when we may collect your report, alternatively kindly provide us with your report via e-mail.

6. We thank you in anticipation.

Yours faithfully

MOSTERT & BOSMAN

Per: **PIERRE DU TOIT**

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 1372/22

The application between:

H BESTER N.O	1st applicant
AW VAN ROOYEN N.O	2nd applicant
CJ ROOS N.O	3rd applicant
JF BARNARD N.O.	4th applicant
D BASSON N.O	5th applicant
CBS COOPER	6th applicant

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

and

THE MASTER OF THE HIGH COURT, CAPE TOWN Respondent

Master's ref No. C906/2020

MASTER'S REPORT

1. Copies of Notice of Motion, founding affidavit with annexures thereto have been served on me.
2. I have read the papers and noted the contents of the application.
3. The Master is not opposing the application or seeking a qualified Order.

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2022 -03- 25
GENERAL OFFICE
WESTERN CAPE HIGH COURT

4. I abide by the decision of the Honourable Court

ASST. MASTER OF THE HIGH COURT: CAPE TOWN

MASTER OF THE WESTERN CAPE HIGH COURT
CAPE TOWN
2022 -08- 24
A/M: INSOLVENT ESTATES 3
MEESTER VAN DIE WES KAAP HOË HOF