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

SET DOWN : 31 OCTOBER 2022

Case Number: 13721/2022

In the application for intervention of:

CLYNTON HUGH MARKS	Intervener

In the matter 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 (Pty) Limited (in liquidation)

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the Intervener intends to make application to this Honourable Court on the 31st day of OCTOBER 2022 at 10h00, or as soon thereafter as Counsel may be heard, for orders in the following terms:-

1. That CLYNTON HUGH MARKS (**"the INTERVENER"**) is granted leave to intervene and that he be joined as Second Respondent in the main application between H BESTER N.O. & 5 others (**"the APPLICANTS"**) and THE MASTER OF THE HIGH COURT, CAPE TOWN, instituted on or about 25 August 2022 under the abovementioned case number in this division (**"the main application"**).

2. The INTERVENER is directed to file a further affidavit on the merits of the main application, within a period of fifteen (15) days of the granting of this Order.

3. The APPLICANTS are entitled to file a reply thereto within ten (10) days after receipt of such further affidavit.

4. Directing the APPLICANTS to pay the costs of this application as between attorney and client in the event of opposition to the application to intervene.

5. Further and/or alternative relief.

TAKE NOTICE FURTHER THAT if you intend to oppose the relief sought in this application, you are required:-

(a) To notify the Intervener's Attorneys in writing on or before 17h00 on Wednesday, 26 October 2022; and

(b) To file your Answering Affidavit, if any, on or before 12h00 on Thursday, 27 October 2022;

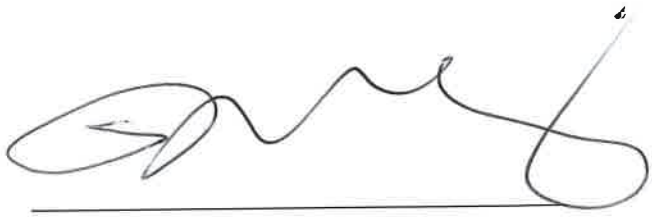
(c) And further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER THAT the accompanying Founding Affidavit of CLYNTON HUGH MARKS will be used in support of this application.

TAKE NOTICE FURTHER THAT the Intervener has appointed the offices of his attorneys of record with details as set out herein as the address where he will accept service of all processes in these proceedings. For purposes of the Interlocutory Application filed herewith, the Intervener will accept notice and service of all documents via e-mail at henry@selzerlaw.co.za.

KINDLY ENROLL THE MATTER FOR HEARING ACCORDINGLY.

DATED AT DURBAN ON THIS 23rd DAY OF OCTOBER 2022



INTERVENER'S ATTORNEYS
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TO: THE REGISTRAR OF THE HIGH COURT
WESTERN CAPE
CAPE TOWN

AND TO: **STRYDOM RABIE HEIJSTEK INC.**
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REF: GvdM

AND TO: **THE MASTER OF THE HIGH COURT**
CAPE TOWN

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

Case Number: 13721/2022

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CLYNTON HUGH MARKS	Intervener

In the matter 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
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(cited in their capacities as the joint liquidators of
Mirror Trading (Pty) Limited (in liquidation)

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

FOUNDING AFFIDAVIT BY CLYNTON HUGH MARKS
INTERLOCUTARY APPLICATION IN TERMS OF RULE 12

I, the undersigned,

CLYNTON HUGH MARKS

do hereby make oath and state:-

THE PARTIES

1. I am adult male businessman and reside at 3 Monteith Estate, 25 Monteith Place, Durban North, KwaZulu-Natal.

2. The facts herein contained are within my personal knowledge, unless otherwise stated or it appears from the context to the contrary and are to be best of my belief true and correct.

3. Where I deal with legal submissions herein, I do so on the basis that those submissions are material and necessary for the purposes of explaining the purpose and merits of this application within the context of the factual matrix pertaining to the various litigation matters referred in this application.

4. The **First Applicant** in the main application is **HERMAN BESTER *N.O***. in his capacity as joint liquidator of MIRROR TRADING INTERNATIONAL (PTY) LIMITED, an adult male insolvency practitioner practicing as such as Tygerberg Trustees, 1st Floor, Cascade Terraces, Tyger Waterfront, Bellville, Western Cape.

5. The **Second Applicant** in the main application is **ADRIAAN WILLEM VAN ROOYEN *N.O.*** in his capacity as joint liquidator of MIRROR TRADING INTERNATIONAL (PTY) LIMITED, an adult male, insolvency practitioner practicing as such as 73 Bond Street, Sunnyside, Pretoria, Gauteng.

6. The **Third Applicant** in the main application is **CHRISTOPHHER JAMES ROOS *N.O.*** in his capacity as joint liquidator of MIRROR TRADING INTERNATIONAL (PTY) LIMITED, an adult male, insolvency practitioner practicing as such as Sebenza Trust, Unit 2A, 43 Estcourt Avenue, Wierda Park, Centurion, Gauteng.

7. The **Fourth Respondent** in the main application is **JACOLIEN FRIEDA BARNARD *N.O.*** in his capacity as joint liquidator of MIRROR TRADING INTERNATIONAL (PTY) LIMITED, an adult male insolvency practitioner practicing as such as Barn Trustees, 310 Soutspansberg Road, Rietondale, Pretoria, Gauteng.

8. The **Fifth Respondent** in the main application is **DEIDRE BASSON *N.O***. in her capacity as joint liquidator of MIRROR TRADING INTERNATIONAL (PTY) LIMITED, an adult male insolvency practitioner practicing as such as Tshwane Trust Co.,1207 Cobham Road, Queenswood, Pretoria, Pretoria, Gauteng.

9. The **Sixth Respondent** in the main application is **CHAVONNES BADENHORST ST CLAIR COOPER *N.O.*** in his capacity as joint liquidator of MIRROR TRADING INTERNATIONAL (PTY) LIMITED, an adult male insolvency practitioner practicing as such as CK Trust (Pty) Ltd, 120 Edward Street, Tygervalley, Bellville, Western Cape.

10. The First to Sixth Applicants are the joint final liquidators of MIRROR TRADING INTERNATIONAL (PTY) LIMITED (hereinafter "MTI") and was appointed on 11 November 2021 and are legally represented by Mostert &

Bosman as well as Strydom Rabie & Heijstek Incorporated. Notice and service of this application is therefore effected on the First to Sixth Applicants by way of service on both these attorneys of record.

11. The existing sole Respondent to the main application is the Master of the High Court, Western Cape, Cape Town.

RELIEF SOUGHT

12. I am seeking leave from this Honourable Court to intervene as the proposed Second Respondent in the main application on the grounds and for the reasons set forth herein.

THE DELAY IN INTERVENING IN THESE PROCEEDINGS

13. I have not prepared the Application at an earlier opportunity for the following reasons:-

13.1 The Applicants ("Liquidators") from inception of the litigation, had access to cash in excess of one billion rand with which to litigate. It is common cause that the Liquidators converted 1281 bitcoins to cash equivalent to R1,058,176,013.69 (ONE BILLION FIFTY EIGHT MILLION ONE HUNDRED AND SEVENTY SIX THOUSAND AND THIRTEEN RANDS AND SIXTY NINE CENTS);

13.2 I have limited means by comparison to the Liquidators to litigate on the grand scale with which legal proceedings with reference to MTI had been dealt with by the Liquidators to date;

13.3 From inception of the originating liquidation application, I have been the only consistent litigant to oppose the proceedings to attempt to place the correct factual and legal position with reference to the affairs of MTI before the Court;

13.4 It is not possible to resolve to oppose every litigation matter pertaining to MTI at a whim, as I cannot possibly be expected to fund expansive litigation on the same scale as the Liquidators are able to do with a billion rand at their disposal;

13.5 Accordingly, when the ex-parte application under case number 13721/2022 presented itself, I did not immediately seek leave to intervene as it would end up being an additional legal expense which frankly appears to be unnecessary costs which was being incurred by the Liquidators;

13.6 The decision to intervene in these proceedings was therefore made at a late stage as I was hoping that another litigant would in fact apply to intervene and alert the Court to the abuse perpetrated, but as it transpires, this did not materialise.

13.7 I therefore belatedly applied to intervene for the reasons mentioned.

14. In either event I am advised that in terms of Rule 12, any person entitled to join as a party may apply for leave to intervene at any stage of the proceedings.

15. I also point out that the interim order of 31 August 2022 in the main application afforded any party the right to apply for such intervention on 31 October 2022.

LEGAL STANDING

16. The registered shareholders of MTI are CORNELIUS JOHANNES STEYNBERG (**"STEYNBERG"**) and me. STEYNBERG is the sole director of MTI.

17. STEYNBERG absconded from the Republic of South Africa on or about 14 December 2020 and until 7 January 2022 his whereabouts were unknown. On or about 7 January 2022 it was reported in the public media that STEYNBERG had been arrested in Brazil, which status continues to date.

18. When a liquidation application was instituted against MTI on or about 23 December 2020, I was forced to assume a putative or derivative role as *de facto* director of MTI in order to answer the allegations made in the liquidation application under case number 19201/2020 in this Division.

19. In a nub, I opposed the said liquidation application because various material allegations were made with reference to MTI in the said application for liquidation which were factually untrue and for example, the Applicant in case number 19201/2020 annexed the incorrect version of the MTI Member Contract containing outdated and therefore misleading Terms and Conditions. I will demonstrate below that the Applicants in the main application, despite placing reliance in litigation under the so-called Ponzi application under case number 15426/2021 on the correct version of the MTI Member Contract, deliberately or recklessly annexed an older version of the MTI Terms and Conditions to the main application. Consequently, the Honourable Court has not been favoured with accurate, reliable and factually truthful representations by the Applicants.

20. I am a 50% shareholder in MTI as more fully evident from the annexed Share Certificate Number 2 dated 30 July 2019 annexed hereto marked **Annexure "CHM1".** It is clear from annexure "CHM1" that I am the registered owner of 500 ordinary shares in MTI.

21. I am also in possession of the original duplicate Share Register of MTI which evidence my status as shareholder in MTI. I will make the original Share Register available to the Honourable Court on request but for the sake of limiting annexures to this application, omit the Share Register for now. I reserve my rights to produce the Share Register into evidence if required.

22. It is self-evident from the documents put up by the Applicants, namely the company records on page 92 of the paginated bundle, that MTI was incorporated with an authorised share capital of 1000 ordinary shares.

23. I am therefore an interested party in the affairs of MTI and by virtue of my status as shareholder, I have a direct and substantial interest in the affairs of MTI.

24. I point out for the sake of full disclosure that in other litigation matters between myself and the Applicants, the Applicants' joined issue with the status of my shareholding in MTI. However, it is instructive that these objections are, with respect, strategic only, and the Applicants have demonstrated that they do not seriously challenge my status as a shareholder of MTI. For example:-

24.1 At the creditors' meeting before the Master of the Western Cape High Court convened on 10 December 2021, the Sixth Applicant was voted in as a joint liquidator of MTI on the strength of my claims against MTI as a Shareholder.

24.2 On 21 October 2022 Strydom Rabie & Heijstek Incorporated addressed a letter to my attorneys of record Selzer Law requesting that I in my capacity as 50% Shareholder must complete and execute a CM100 form for submission as part of the liquidation process i.e. that the Liquidators require my assistance as a Shareholder to detail the affairs of MTI. I annex hereto marked hereto **Annexure "CHM2"**, a copy of the letter

in question dated 21 October 2022 which letter corroborates what is alleged in this regard.

25. As such I submit that I possess legal standing to apply for the relief sought herein on the basis of my capacity as shareholder of MTI alone. However, as demonstrated below, the further ground for my legal standing to intervene in the main application arises from the fact that the relief claimed by the Applicants in the main application is dependent upon the determination of substantially the same question of law or fact pending in case number 15426/2021 in this Division in which case I am a party to such proceedings.

DIRECT AND SUBSTANTIAL INTEREST

26. I am advised that a party seeking to intervene in proceedings can either do so in terms of Rule 12 of the Uniform Rules of Court, or in terms of the common law.

27. The facts detailed herein demonstrate that the requirements of Uniform Rules 10(1) and 10 (3) are satisfied, in that the determination of my dispute with the Applicants in case number 15426/2021 which is pending, depends upon substantially the same question of law or fact as arises in the main application herein wherein I seek leave to intervene.

28. In addition, I am advised that for the reasons detailed herein, wider considerations of convenience favour intervention.

29. Lastly, I submit that the facts detailed herein disclose that I have a direct and substantial interest in the proceedings in the main application.

30. As will be demonstrated below, in relation to the main application:-

30.1 I have a special concern with reference to the issues raised in the main application; and

30.2 the issues raised in the main application are of common interest to me as Intervener; and

30.3 the issues dealt with in the main application overlap with and are substantially the same issues raised in the opposed application between inter alia me and the Applicants under case number 15426/2021 in this Division; and

30.4 my rights (and those of other litigants in case number 15426/2021) will be prejudicially affected by a final judgment of this Court in the main application.

31. As shareholder of MTI, I am a person who has a direct and substantial interest in the main application under case number 13721/2022 because the relief sought in the main application goes further than merely "guiding" the Liquidators in the administration of MTI.

32. In this regard I point out that I am engaged in various litigation matters with the Applicants as evident from the various affidavits filed in those proceedings such as my Answering Affidavit to the originating liquidation application of MTI, my Answer and Supplementary Affidavits filed in the so-called PONZI application under case number 15426/2021 in this Honourable Court as well as affidavits filed by me under case number 12698/2022 in this Honourable Court in which application I together with HENRY ROBERT HONIBALL seek the removal of the First to Sixth Applicants in the main application as liquidators of MTI. The relevant affidavits are not annexed hereto because it would make this interlocutory application extremely *prolix*. I therefore reserve my right to make available to the Court such pleadings as may be relevant and/or requested by the Court, in the event that this application is opposed.

33. The salient point I wish to outline for the Court and the crux of the intervention relief sought, is that the main application cannot be considered in isolation from the pending disputes in other litigation matters where the classification and status of crypto assets within South African Law has been challenged already and argument presented to this Division on that very issue.

34. In case number 15426/2021 the Applicants filed written Heads of Argument on 3 June 2022 in which they submitted to the Court that '*cryptocurrency is to be deemed "movable property" for the purposes of the definition of "property" in section 2 of the Insolvency Act.*' A copy of the relevant written argument is annexed hereto marked **Annexure "CHM3"**.

35. Curiously, the relief sought in the main application and paragraph 2.1 of the interim order of this Court granted on 31 August 2022 grants the same relief.

36. Paragraph 2.1 of the interim order dated 31 August 2022 directs that "*the liquidators should treat Bitcoin (**"BTC"**) in the estate of Mirror trading International (Pty) Ltd ("**the Company**") as intangible assets that constitute "property" as defined in Section 2 of the Insolvency Act, 24 of 1936 ("**the Insolvency Act"**)*".

37. The relief claimed by the Applicants in the main application as is therefore ill founded, irregular and abuse of process.

38. On 22 June 2022 I caused my legal representatives to file a Written Note on the classification and status of bitcoin as directed by Acting Judge Alma De Wet in case number 15426/2022.

39. In the said Note I alleged *inter alia* that :

39.1 The Court *in casu* is asked to determine a material and fundamental factual and legal issue which the respective Parties themselves could not agree and for the determination of which, no accepted standard exists viz. whether cryptocurrency is currently legally recognised as "property" in South African law? (paragraph 3.1);

39.2 There is no *stare decisis* in respect of South African law directly on point in respect of cryptocurrency, which it is common cause, is not regulated at all in South Africa. It is not a question of recognition and the reality of cryptocurrency and its existence of some 10 years or

more, it is the regulation thereof that is the subject matter of this particular legal and factual inquiry. (paragraph 3.2);

39.3 It is common cause that the Legislature to date has not deemed it prudent and necessary to legislate at all on the regulation of cryptocurrency in South Africa. (paragraph 3.3).

40. The issues amplified in the Note were previously raised in my affidavits and written argument filed in case number 15426/2021 on 14 April 2022, to be specific in sections A.1.7 and A.1.8 of such written argument. The contentious issue concerning the definition of "property" was also argued in open court on 31 May 2022 and will again be argued on 8 November 2022 in this Division.

41. The effect of the interim relief granted in the main application is that I am prejudiced in the Ponzi application under case number 15426/2021 because I disputed the right of the Court to exercise jurisdiction over bitcoin transactions in the absence of a contractual nomination of the *lex loci rei sitae*.

42. The interim order granted in the main application :

42.1 Pre-judges the disputes concerning the status of crypto assets in case number 15426/2021;

42.2 subverts and denies a fair outcome in case number 15426/2021 because material aspects of the opposed issues in the Ponzi application are pronounced upon;

42.3 resolves and finally determines issues that are pending before another Judge in this Division, particularly when this Court has not been furnished with all material information and moreso the correct version of the facts (i.e. the MTI Member Contract).

43. There are countless other **pending** litigation matters involving MTI which all have relevance to the subject matter of the main application (and which information is not presently before the Court), to mention but a few :-

43.1 case number **15426/2021** (Intervention and Declaratory orders application) in the Western Cape High Court; and

43.2 case number **20660/2021** (*Boshoff interdict*) in the Western Cape High Court; and

43.3 case number **609/2022** (*Marks interdict*) in the Western Cape High Court; and

43.4 case number **5920/2022** (*Boshoff voidable disposition action)* in the Western Cape High Court and the **numerous similar *pro forma* actions** instituted against the so-called "nett winners" of MTI; and

43.5 case number **12698/2022** (*Liquidators removal application)* in the Western Cape High Court.

44. I am not presently a party to the proceedings in the main application under case number 13721/2022. My participation is further material and relevant to the determination of the main application on the basis that:-

44.1 all litigants under case number 15426/2021 in the Western Cape High Court have a direct and substantial interest in the outcome of the main application herein but it appears that only I am prepared to intervene;

44.2 the interim relief granted in the main application on 31 August 2022 usurps the authority of another Court in this Division which is already seized of the dispute;

44.3 the result of a final order in the main application when considered against the pending other litigation matters between the parties could result in conflicting judgments and in fact constitutes an abuse of the process of the Court on the basis that:-

44.3.1 the main application purports to ask the Master of the Western Cape High Court to act as a Legislator in order to create a legal position which currently does not exist;

44.3.2 the Applicants expects of the Honourable Court in the main application to engineer a legal position with reference to the status of Bitcoin and/or Crypto Assets when such position is not endorsed by the Legislator of the Republic of South Africa as yet; and

44.3.3 The Financial Sector Conduct Authority (FSCA), which is the Authority tasked with financial regulatory matters in the Republic of South Africa themselves declared on 19 October 2022 that Crypto Assets should be deemed to be assets comprising of a "*digital representation of value*" ie. the FSCA as the leading Authority with reference to the regulation and conduct of financial matters in the Republic of South Africa, do not deem Bitcoin or Crypto Assets to constitute property in a simplistic form such as those proposed in the main application.

44.3.4 the interim order purports to "legislate" a position in law that is not even endorsed by the FSCA which as of 19 October 2022 only recognises crypto assets as :

"crypto asset" *means a digital representation of value that – (a) is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility; (b) applies cryptographic techniques; and (c) uses distributed ledger technology.*

A copy of Government Gazette Notice No. 1350 dated 19 October 2022 is annexed hereto marked **Annexure "CHM4"**.

44.3.5 it is needful for me to participate in the main application to correct the abuse of process perpetrated on the MTI members by the relief sought in the main application. The full explanation of the irregular procedure adopted by the Applicants will be ventilated in a substantive Answer once I am granted leave to intervene.

44.3.6 I am advised that I must furnish prima facie proof of my interest (and hence my right to intervene) but that I need not go further to satisfy the Court that I will succeed at the end of the day.

44.3.7 I submit that it is sufficient for me to rely on allegations which, if proved in the main action, would entitle me to succeed.

44.3.8 The aforegoing makes it clear that the disputes in case number 15426/2021 in this Division were made seriously and those disputes are not frivolous.

45. On 20 September 2022, my attorney of record addressed a letter to the Applicants' Attorneys in which was detailed that:-

45.1 The Presiding Judge sitting in case number 15426/2021 in the Western Cape High Court heard argument on 31 May 2022;

45.2 The Presiding Judge then requested written notes from the parties to deal with the uncertainty surrounding the status of Bitcoin, in particular notes on whether Bitcoin or Crypto currencies can form part of the definition of property in South African Law and will particularly for the purposes of Section 2 of the Insolvency Act;

45.3 The application number case number 15426/2021 and the arguments being presented as part of final submissions in order for the Judge to determine the status of Crypto Assets for the purposes of that application, is pending and due to be heard for final submissions on 8th November 2021;

45.4 In the litigation under case number 15426/2021, I challenged the jurisdiction of the South African Courts to deal with issues pertaining to Bitcoin as more fully evident from for example paragraph 146.11 of the Preliminary Answering Affidavit filed by myself in those proceedings.

A copy of the relevant page evidencing paragraph 140.11 is annexed hereto marked **Annexure "CHM5"** but a full set of the papers will be available to hand up to the Presiding Judge in this Interlocutory Application should this be requested.

45.5 I made similar submissions in paragraph 123 of his Answering Affidavit in support of a counter-application namely, to allege that Crypto Assets cannot be brought within the definitions of South African legislation or be regulated by the Provisions of the Insolvency Act ie. that at all material times, Bitcoin is and was unregulated.

I annex hereto marked **Annexure "CHM6"** a copy of the page from the Answering Affidavit in which paragraph 123 appears. Similarly, a copy of the full papers will be available to hand up to the Presiding Judge of the Interlocutory Application but in order to not render Interlocutory Application unnecessary prolix these are not attached at present.

45.6 It is therefore unequivocal that there is a pending dispute before the Presiding Judge in case number 15426/2021 in the Western Cape High Court with reference to the status and definition Bitcoin (Crypto Assets) as a moot point as to whether or not Bitcoin forms part of the definition of property South African law.

45.7 In the present main application under case number 13721/2022, the Applicants seek Declaratory orders in the following terms:-

45.7.1 The Liquidators should treat Bitcoin in the estate of Mirror Trading International (Pty) Limited as intangible assets that constitutes property as defined in Section 2 of the Insolvency Act;

45.7.2 The Liquidators will remain vested with claims against .... Investors for repayment of the returns, in terms of Sections 29 and 30 of the Insolvency Act....

45.7.3 The Liquidators may then pursue the ..... Investors in respect of the returns, in terms of either Sections 29 or 30 of the Insolvency Act.

45.8 In case number 15426/2021 the Applicants already applied for similar relief as follows :

"Leave should not be granted to the liquidators of MTI to approach this Court on the same papers, duly amplified where necessary, for orders setting aside specific disposition as described in 3.4 and 3.5 above, in terms of sections 26 and/or 29 of the Insolvency Act and for orders 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."

I annex hereto is annexed hereto marked **Annexure "CHM7"** a copy of the amended Notice of Motion in case number 15426/2021.

45.9 The Respondents who opposed case number 15426/2021 in the Western Cape High Court are not parties to the proceedings pending under case number 13721/2022;

45.10 Only the Master of the Western Cape High Court is cited as a Respondent;

45.11 The relief sought in case number 13721/2022 and the interim order granted on 31 August 2022 in relation to the declaratory relief pre - amps, pre-judges and prematurely resolves the factual and legal disputes that are pending in case number 15426/2021; But for the relief sought in case number 13721/2022, the disputes under case number 15426/2021 would have remained unresolved and the Presiding Judge in case number 15426/2021 who is ceased of the matter and has heard submissions with reference to these disputes over several days, including having had to read papers that span over 4000 pages without counting the Interlocutory Application and additional annexures, would constitute an abuse of the process of the Court to pre-empt the outcome of those proceedings by securing declaratory orders in advance of that particular application.

45.12 In other words, the purport, and effect of the relief applied for and granted as an interim order case number 13721/2022 is the factual and legal disputes have been removed from the purview of the Presiding Judge under case number 15426/2021;

45.13 The only inference to be drawn from this anomaly is that the relief under case number 13721/2022 was orchestrated intentionally to secure an advantage which the Applicants would not have otherwise enjoyed to subvert, manipulate and direct the legal proceedings in a manner which is patently inappropriate;

45.14 Once the interim orders under case number 13721/2022 are made final, they will settle factual and legal disputes that are pending in case number 15426/2021 without the Presiding Judge in case number 13721/2022 having seen the substantive, material and relevant factual disputes and submissions made in the papers filed under case number 15426/2021.

A copy of the letter from Selzer Law to all the parties is annexed hereto marked **Annexure "CHM8"**

46. On 7 October 2022, the Attorneys of the Applicants responded to my attorney's letter of 20 October 2022 and in effect they alleged that:-

46.1 That the Ponzi application under case number 15426/2021 and the relief sought therein is not dependent on the determination of the question of the status of Bitcoin and that there is allegedly no certainty that the Presiding Judge in case number 15426/2021 will give a judgment dealing with the status of Bitcoin;

46.2 That the status of Bitcoin is obviously and clearly an important consideration as its status will materially affect the manner in which the Liquidators administer the insolvent estate;

46.3 That the operation of the declaratory orders under case number 13721/2022 are suspended and therefore there is no prejudice to any person;

46.4 That the Presiding Judge in case number 13721/2022 was alerted to the appending disputes under case number 15426/2021 in paragraph 98 of the Founding Affidavit. A copy of the Applicants' letter dated 7 October 2022 is attached hereto marked **Annexure "CHM9"**.

47. Insofar as the Applicants referred to having included a disclosure of the proceedings pending under case number 15426/2021 to the Presiding Judge in case number 13721/2022, I respectfully point out that the actual disclosure comprises of one paragraph in vague and uncertain terms as follows:-

> *" 98. Based on the above grounds, the provisional liquidators (at that stage) brought an application to this Honourable Court under case number 15426/2021, for the relief set out in the copy of the Notice of Motion attached hereto as annexure "FA10" ("the Declarator Application"). This application was opposed by some of the biggest protagonist of the scheme, including Marks. It was argued over a number of days. An oral argument was eventually concluded on 31 May 2022, whereafter judgment was reserved.*

48. I deny that this constitutes a proper disclosure.

49. No mention is made about the fact that the Applicants requested a declarator in case number 15426/2021 that crypto assets form part of the definition of "property" for the purposes of section 2 of the Insolvency Act nor that the parties to case number 15426/2021 joined issue on such request.

50. Other than the abovementioned so-called "disclosure", it is clear that the insertion of paragraph 98 occurs in between a narrative constructed in the Founding Affidavit under case number 13721/2022 wherein the Applicants at length detail submissions and propositions pertaining to the alleged unlawful Ponzi or pyramid investment scheme supposedly conducted by MTI.

51. In illustration of how the factual and legal debates in case number 15426/2021 are material and relevant to determining the outcome of the main application under case number 13721/2022, one simply has to consider that the Applicants allege for example in the Founding Affidavit under case number 13721/2022 and particular paragraph 99 that MTI being an unlawful type scheme, was insolvent from inception because once an Investor made an investment, pursuant to a fraudulent and void investment agreement, that Investor will immediately be entitled to claim restitution of what was performed in terms of the void investment agreement.

52. I repeat what is explained hereinbefore with reference to my submissions communicated on 20 September 2022, that all material times during the affairs of MTI and at present, there was and is no primary legislation identifying the status and regulation of Crypto Assets. In case number 15426/2021 there are extensive submissions pertaining to the fact that Crypto Assets are transacted

in cyberspace on what is known as the blockchain and there is no clear jurisdiction with reference to where those transactions had taken place.

53. It is also debated in case number 15426/2021 that the only logical basis on which a South African Court would exercise jurisdiction over such a transaction would be on the basis of domicilium of the Defendant alternatively, on the basis of a written contract concluded between the parties which grants jurisdiction to the South African Courts.

54. On the basis of the averments made in paragraph 99 of the Founding Affidavit, the MTI Liquidators wish to assert that there is no valid agreement in existence and on that basis the scheme is supposedly insolvent from inception.

55. It is needful for the Court to accept that without insight into factual and legal disputes dealt with in case number 15426/2021, that various issues will potentially be "swept under the carpet" without affording the litigants who opposed the relief in case number 15426/2021 to have their "day in Court".

56. It is by now common knowledge between the litigating parties in case number 15426/2021 that the Liquidators have been grappling with the dilemma of attempting to find a legal basis to enforce recovery of Bitcoins from MTI members without having to rely on the MTI contract, the reason being that the MTI contract grants jurisdiction to the South African Courts but also contains express provisions with reference to disclaimers declared by MTI members in favour of MTI, which would negate any assertion that MTI was a Ponzi application order that was obliged at all material times to make a profit for the

Members as supposed to speculating with Crypto Assets i.e. the MTI member contractually agreed to accept the profit and losses whatever the outcome might be.

57. There is a further primary reason why the intervention relief should be permitted and that is that the Applicants in the main application have misled the Court by attaching the incorrect version of the MTI terms and conditions to the Founding Affidavit.

58. The terms and conditions detailed on page 101 as attached by the Applicants in the main application herein, are not the version which have been put up by the parties litigating under case number 15426/2021.

59. On this basis, without suggesting that the entire outcome of the main application herein will turn on the version of the terms and conditions put up, it is clearly needful for me to have an opportunity to respond in detail to the submissions made in the Founding Affidavit and to detail and deal with the annexures put up by the Applicants in the main application.

CONCLUSION

60. It is submitted that my intervention will assist the Court in considering the merits raised in the main application.

61. No final order can be granted under case number 13721/2022 because it is an abuse of process but more so because the Presiding Judge granting such

a final order should have read all the papers filed under case number 15426/2021 and permit argument on an opposed basis to be directed with reference to the material disputes of fact and law as raised in case number 15426/2021 with direct reference to the status of Bitcoin and the fact that absent legislation granting regulatory oversight of Crypto Assets, the Courts can only possibly have jurisdiction to entertain Crypto Assets disputes when there is a contract between the parties.

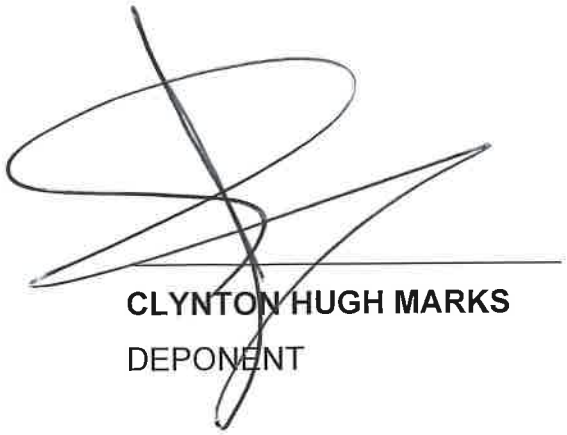
62. It is instructive that in case number 15426/2021, the Applicants allege that the MTI contract between the company and its members is *void ab initio* and unenforceable. In other words, on their own version in case number 15426/2021, there is no contractual regulation of the basis upon which a Court could be seized of the matter to entertain disputes between MTI (liquidators) and the MTI members.

63. The relief in the main application therefore "hijacks" the pending similar disputes in this Division under case number 15426/2021 in which matter I am a party.

64. In order to not render the present Interlocutory Application unnecessary lengthy, I do not deal with each and every allegation in the Founding Affidavit herein as I am advised that for the purposes of Rule 12 that this is not required.

65. I submit that the facts detailed herein demonstrate that a proper case has been made out herein by me that satisfies the requirements of Uniform Rule 12.

66. I accordingly pray for the orders as set forth in the Notice of Motion prefixed.



CLYNTON HUGH MARKS
DEPONENT

I CERTIFY:

THAT the deponent has acknowledged that he knows and understands the contents of this affidavit;

THAT I duly administered the oath in the manner prescribed by Regulation R1258 of 21st July 1972;

AND THAT thereafter the deponent in my presence signed this affidavit at DURBAN on this **23rd** day of **OCTOBER 2022**.

COMMISSIONER OF OATHS

FAIZEL KARA ATTORNEYS
COMMISSIONER OF OATHS
PRACTICING ATTORNEY
11 Cambridge Drive, Athlone, Durban North, 4051
Tel: 031 564 6639 Cell: 083 699 5257
Email: faizel@fkara-attorneys.co.za

Certificate Number

TWO

SHARE CERTIFICATE

Number of Shares

500

Mirror Trading International (Pty) Ltd.

Reg. No. 2019/205570/07

Registered Office:
341 Beyers Naude Street,
Windsor Park
JOHANNESBURG
GAUTENG 2194

Postal Address:
341 Beyers Naude Street,
Windsor Park
JOHANNESBURG
GAUTENG 2194

This is to certify that the undermentioned is the Registered Proprietor of 500 ordinary no par value Fully Paid Shares each numbered in the above-named Company, subject to the Memorandum of Incorporation and the Rules and Regulations of the Company.

NAME AND ADDRESS	CLASS OF SHARE	NOMINAL AMOUNT	REF. No.	DATE	CERTIFICATE No.	Number of SHARES
CLYNTON HUGH MARKS 22 MALACHITE STREET, KLOOFENDAL EXT. 4 ROODEPOORT GAUTENG 2195	ORDINARY SHARES	NO PAR VALUE	A1	30/07/2019	TWO	500

Given on behalf of the Company at JOHANNESBURG on 30th JULY 2019.

Secretary

Director

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STRYDOM, RABIE
& HEIJSTEK INC.
ATTORNEYS · CONVEYANCERS · NOTARIES

Our Ref: S Strydom/MTI1/0001
Your Ref: Henry Selzer/MTI/hm
Date: 21 October 2022

SELZER LAW
BY EMAIL: henry@selzerlaw.co.za; mia@selzerlaw.co.za

Sir

RE: INSOLVENT ESTATE: MIRROR TRADING INTERNATIONAL (PTY) LTD (*"MTI"*)
MASTER REFERENCE NUMBER: C000906/2020

1. The above matter as well as your letter of 13 October 2022 refer.

2. Your client, as the 50% shareholder and director of MTI, is in the position to compelte the CM100, as the CM100 is a statement of affairs of MTI, which he is to confirm under oath. The CM100 should reflect the position of MTI as at date of liquidation.

3. My clients are not in a position to complete the CM100 on behalf of your client, as you rightly stated, your client has to confirm the correctness thereof under oath.

4. My clients can not advise your client on how to complete the CM100 in respect of the creditors of MTI and/or the nature of the debts owing to MTI at date of liquidation.

5. Writer awaits the duly completed and commissioned CM100 from your client and in the meantime our clients' rights remain reserved.

Yours faithfully

S Strydom

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ON THE SEMI-URGENT ROLL: TUESDAY 31 MAY 2022
BEFORE ACTING JUCTICE DE WET

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

In the matter between:

HERMAN BESTER N.O.	First Applicant
ADRIAAN WILLEM VAN ROOYEN N.O.	Second Applicant
CHRISTOPHER JAMES ROOS N.O.	Third Applicant
JACOLIEN FRIEDA BARNARD N.O.	Fourth Applicant
DEIDRE BASSON N.O.	Fifth Applicant
CHAVONNES BADENHORST BT CLAIR COOPER N.O.	Sixth Applicant

and

MIRROR TRADIG INTERNATIONAL (PTY) LTD (IN LIQUIDATION)	First Respondent
CLYNTON HUGH MARKS	Second Respondent
HENRI ROBERT HONIBALL	Third Respondent
CECIL JOHN JACOB ROWE	Fourth Respondent
ALL MEMBERS/INVESTROS OF MIRROR TRADING INTERNATIONAL (PTY) LTD (IN LIQUIDATION)	Fifth Respondent
FINANCIAL SETOR CONDUCT AUTHORITY (FSCA)	Sixth Respondent

APPLICANTS' NOTE ON DEFINITION OF PROPERTY IN THE CONTEXT OF THE INSOLVENCY ACT, PARTICULARLY RELATING TO DISPOSITIONS

INTRODUCTION:

1.

At the hearing of this matter, it was argued on behalf of the Second Respondent, and without it having been raised before, that bitcoin (and other cryptocurrency) does not fall within the definition of "property" in

the context of the Insolvency Act, 24 of 1936, particularly with reference to disposition of property in the context of Sections 26. 29, 30, 31, 32 and 33 of the Insolvency Act.

2.

These notes, consequently, relate to the issue of whether dispositions of bitcoin (or other cryptocurrency) can be set aside as dispositions of property in terms of, *inter alia*, Sections 26 and 29 of the Insolvency Act.

PROPERTY, IN GENERAL, IN THE CONTEXT OF THE INSOLVENCY ACT:

3.

Section 2 of the Insolvency Act (dealing with definitions) defines a "disposition" as follows:[1]

"***'disposition'*** *means 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; and* ***'dispose'*** *has a corresponding meaning.*" (own emphasis)

4.

Dispositions of property, considering the definition thereof, is, consequently, to be interpreted very wide.

---

[1] Insolvency Act, 24 of 1936, Section 2 "disposition"

5.

The definition "property" in terms of Section 2 of the Insolvency Act is the following:[2]

"***'property'*** *means movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a fidei commissary heir or legatee.*"

6.

We submit that it cannot be disputed seriously that bitcoin (and other cryptocurrency) fall within the definition of "property", particularly in the context of the Insolvency Act. It is trite that "*the meaning of 'property' in relation to the provisions of the Insolvency Act, in the light of the definition thereof in section 2, is much wider than under the common law.*" [3]

Meskin continues to state:

"*By 'movable property', in this context, is meant 'every kind of property and every right or interest which is not 'immovable property' ...*

7.

We submit, however, that even on the strictest interpretation,

---

[2] Insolvency Act *supra*, Section 2, "property"

[3] Meskin, Insolvency Law, para 5.1 at 5-1 and **Van Zyl and Others NNO v Turner and Another NNO** 1998 (2) SA 236 (C) para [21]

cryptocurrency is similar to currency (money), and the transfer/disposition thereof, would, consequently, still fall within the definition of "disposition", for the purpose of the Insolvency Act.

8.

Money falls within the definition of movable property and will be included in a debtor's insolvent estate.[4]

CRYPTOCURRENCY AS PROPERTY:

9.

It is submitted that, in general, cryptocurrency possesses the following characteristics:

9.1 It is a thing;

9.2 incorporeal;[5]

9.3 intangible;

9.4 fungible;

9.5 divisible;

9.6 moveable.

---

[4] **Land – en Landboubank van Suid Afrika v Joubert N.O.** 1982 (3) SA 643 (C) at page 653

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

10.

In the High Court of New Zeeland, in the matter of **David Ian Rusco and Melcolm Russel Moore v Cryptopia Limited (in liquidation)**,[6] the court held that cryptocurrencies are a type of intangible property and that various cryptocurrencies are "property" within the relevant definition of the New Zeeland Companies Act (of 1993). The court, significantly, referred to cryptocurrency as "digital assets".

11.

The South African Revenue Service has demanded that gains and losses on cryptocurrency be declared and classifies cryptocurrency as intangible assets, which is subject to taxation.[7]

12.

In the United Kingdom, in the matter of **Robertson v Persons Unknown**[8] Justice Moulder granted an asset preservation order in respect of cryptocurrency on an exchange, Coinbase UK Limited, holding that bitcoin is to be treated as "property".

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[6] CIV-2019-409-00544 [2020] NZHC 728

[7] https://www.sars.gov.za/wp-content/uploads/IFWG-CAR-WG-Position-paper-on-crypto-assets.pdf

The result of internet searches (especially relating to a public entity such as SARS) is admissible. See, in general, **Tonelaria Nacional RSA Pty Ltd v CSARS** 2021 (2) SA 297 (WCC) - fn6

[8] CL – 2019 - 000444

13.

In **AA v Persons Unknown**[9] Justice Bryan held that crypto assets were "property" for the granting of proprietary relief.

CONCLUSION:

14.

It is submitted that cryptocurrency (like money in a bank account) clearly is movable property for the purpose of the definition of "property" in section 2 of the Insolvency Act.

15.

The disposition thereof falls to be set aside in terms of the Insolvency Act, particularly Sections 26 and/or 29 thereof.

Rudi van Rooyen SC and Rinier Raubenheimer
Counsel for the Applicants
Chambers, Cape Town and Pretoria
3 June 2022

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[9] [2019] EWHC 3556 (Comm)

FINANCIAL SECTOR CONDUCT AUTHORITY

GENERAL NOTICE 1350 OF 2022

FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT, 2002

DECLARATION OF A CRYPTO ASSET AS A FINANCIAL PRODUCT UNDER THE FINANCIAL ADVISORY AND INTERMEDIARY SERVICES ACT

1. Definitions

In this Notice, **"the Act"** means the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002), any word or expression to which a meaning is assigned in the Act shall have that meaning, and –

"crypto asset" means a digital representation of value that –

(a) is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility;
(b) applies cryptographic techniques; and
(c) uses distributed ledger technology.

2. Declaration

The Authority, under paragraph (h) of the definition of "financial product" as defined in section 1 of the Act, hereby declares a crypto asset as a financial product for purpose of that definition.

3. Short title and commencement

(1) This Notice is called the Declaration of a crypto asset as a financial product under the Financial Advisory and Intermediary Services Act, 2022.

(2) This Declaration takes effect on the date of publication.

UNATHI KAMLANA
COMMISSIONER
FINANCIAL SECTOR CONDUCT AUTHORITY

CHM

140.8 MTI also did not render any financial services in respect of advice or intermediary services pertaining to any "financial products" as defined in the FAIS Act, nor did MTI, nor its members and/or its Management Team, purport to be financial advisors in respect of any existing member utilizing the MTI online trading platform.

140.9 Clause 6 of the TERMS AND CONDITIONS declared that MTI members and proxy members utilise the services provided on the MTI online trading platform ***ENTIRELY AT THEIR OWN RISK, WITHOUT ANY LIABILITY BEING LEVELLED TOWARDS MTI FOR ANY ACTIONS CONDUCTED BY THE SAID MEMBERS AND PROXIES WHATSOEVER.*** These express provisions as detailed in clause 6.3 made it patent that proxies or brokers were used to trade and hence the indemnity subscribed to by MTI members.

140.10 Legal argument will be presented found on these particular contractual terms at the hearing of this Application, as it is respectfully submitted on behalf of MTI, that the legal standing of members to seek recourse against MTI had been contractually, consensually and legally excluded.

140.11 Likewise, the unregulated status of Bitcoin renders the suggested application of the statutes referred to by Deponent impossible and

of zero application to the business activities of MTI. Legal argument will be presented on these fallacies put up by the intervening parties who respectfully are misleading the court into believing that crypto currencies somehow find application within ordinary and established legal principles.

140.12 Legal argument will be presented on the legal submission that BITCOIN, as a cryptocurrency, is not legally a "debt" or "goods" or a "*merx*" in terms of the law.

140.13 The correct legal position is that crypto assets hold value only for those who consent to trade in them, acquire them or sell them. Thus crypto assets possess value only for a restricted and limited group of persons who subscribe to its risks and potential profits. The entire point of crypto assets is to speculate in cyber space that other likeminded persons would also speculate and in so doing increase the value of the crypto assets.

140.14 The entire premise of crypto assets is therefore speculative trading as opposed to investing in a certainty.

140.15 For MTI members this represented speculation in terms of the express provisions of the MTI TERMS AND CONDITIONS. Clause 13 of the TERMS AND CONDITIONS contractually expected

CHM6

123. It is my respectful submission that the ambitious attempt by the intervening parties to suggest that crypto assets can be brought within the definitions of South African legislation or be regulated via the provisions of the Insolvency Act, is a disingenuous attempt to mislead the court into believing that some semblance of control can be exercised over bitcoin despite it not being regulated under the law. This entire premise that bitcoin is a tangible asset and subject to consequences is a fallacy.

124. The allegations in paragraph 33.3 are denied in amplification of this denial I point out that the deponent puts up annexure "AvR3" on page 178 of the indexed bundle and proceeded to mislead the court by selectively substituting some pages with unrelated material and deliberately omitting certain pages of the complete set of the marketing materials.

125. I digress to point out that the relevant marketing material appeared to originate from 2019 and was not a presentation put up by Cheri Marks as it is common cause that she was only appointed the Communications and Marketing head after July 2020.

126. In further amplification of this misleading evidence, I point out that all marketing material used by MTI was divided into five sections namely, information pertaining to the company, a disclaimer, basic bitcoin introduction, the service (trading in crypto currency with bitcoin as the base) and then finally the optional compensation plan.

127. Annexure AvR3 includes the old 2019 company details, an added document on page 179 dealt with below and extracts of the optional referral

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COPY

HC 97

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 No. 2019/205570/07)

Registered office at: 43 Plein Street, Unit 1, First Floor,

Stellenbosch, Province of the Western Cape

FINANCIAL SECTOR CONDUCT AUTHORITY (FSCA) Second Respondent

and

ADRIAAN WILLEM VAN ROOYEN NO First Intervening Party

HERMAN BESTER NO Second Intervening Party

CHRISTOPHER JAMES ROOS NO Third Intervening Party

JACOLIEN FRIEDA BARNARD NO 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 provisional liquidation)]

AMENDED NOTICE OF MOTION: THE INTERVENING PARTIES' APPLICATION TO INTERVENE IN THE LIQUIDATION/APPLICATION IN RECONVENTION

TAKE NOTICE THAT application will be made on **31 MAY 2021** at **10h00** or as soon thereafter as counsel for the Intervening Parties may be heard for an order in the following terms:

1. That this application be heard as a matter of urgency and that the Intervening Parties' failure to comply with the time limits, forms and procedures prescribed by the Uniform Rules of Court be condoned in accordance with Rule 6(12)(a).

2. That the Intervening Parties are granted leave to intervene in the application for First Respondent to be placed in final liquidation. Alternatively, that the Intervening Parties are granted leave to seek the relief herein under the above case number 19201/2020 and to rely on the affidavits filed under the above case number.

3.1 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;

3.2 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*;

3.3 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;

3.4 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"**);

3.5 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 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;

3.6 Leave should not be granted to the liquidators of MTI to approach this court on the same papers, duly amplified where necessary, for orders setting aside specific dispositions as described in 3.4 and 3.5 above, in terms of sections 26 and/or 29 of the Insolvency Act and for orders declaring that the liquidators of MTI are entitled to recover the aforesaid dispositions, alternatively the value thereof at the date of each disposition or the value thereof at the date on which the respective dispositions are set aside, whichever is the higher, as provided for in section 32(3) of the Insolvency Act.

4. 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.

5. That further and/or alternative relief be granted.

TAKE NOTICE FURTHER THAT the Intervening Parties have appointed Mostert and Bosman, Fourth Floor, Madison Square, *Cnr.* of Carl Cronje and Tygerfalls Boulevard, Tygerfalls, Bellville to be the address at which they will accept service of all documents and process in these proceedings.

TAKE NOTICE FURTHER THAT the founding affidavit of **ADRIAAN WILLEM VAN ROOYEN** and the confirmatory affidavits of **HERMAN BESTER**,

CHRISTOPHER JONES ROOS, JACOLIEN FRIEDA BARNARD, DEIDRE BASSON and **PIERRE DU TOIT** will be used in support of this application.

TAKE NOTICE FURTHER THAT if you intend to oppose this application, you are required:

(i) to notify the Intervening Parties' attorneys in writing on or before Wednesday 12 May 2021 of such intention to oppose;

(ii) to deliver your answering affidavit(s), if any on or before 24 May 2021; and

(iii) to appoint, in the notification referred to in (i) above, an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

Dated at BELLVILLE on this the 14th DAY OF JULY 2021.

p.p.

Per: **PIERRE DU TOIT**

MOSTERT & BOSMAN

Attorneys for Intervening Parties

4th Floor, Madison Square

Cnr Carl Cronje Drive &

Tyger Falls Boulevard,

Tyger Falls

BELLVILLE

(Ref: **PDT/Antoinette/WI7913**)

c/o MACROBERT INC.

The Wembley, 3rd Floor

Solan Road, Gardens

CAPE TOWN

Ref: GvdM

TO: **THE REGISTRAR**

HIGH COURT

CAPE TOWN

AND TO: **COOMBE COMMERCIAL INC.**

c/o **VEZI & DE BEER INCORPORATED**

Applicant's attorneys of record

3rd Floor, Equity House

107 St Georges Mall

CAPE TOWN

(Ref: Y.Alli)

E-mail: mat@coombe.co.za

AND TO: **MESSRS SELZER LAW**

Attorneys for First Respondent

Stellenbosch

c/o DE KLERK & VAN GEND

3rd Floor, Absa Building

132 Adderley Street

CAPE TOWN

(Ref: H Selzer/MTI)

E-mail: henry@selzerlaw.co.za

AND TO: **FINANCIAL SECTOR CONDUCT AUTHORITY**

Second Respondent

E-mail: Stefanus.Rossouw@fsca.co.za & **BY E-MAIL**

Gerhard.vandeventer@fsca.co.za

CHM 8

SELZER LAW

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WEB www.selzerlaw.co.za
HENRY SELZER BA LLB LLM

YOUR REF : MTI1/0003
OUR REF : HENRY SELZER/MTI/hm

20 September 2022

STRYDOM RABIE HEIJSTEK & FAUL
Per email : susan@srhf.co.za

Dear Sirs/Madams

CASE NO. 13721/2022 : BESTER NO & 5 OTHERS vs MASTER OF THE HIGH COURT

Acting on instructions from our client Clynton Marks, we address you *ad seriatim*.

1. Acting Judge Alma De Wet as the presiding Judge in case number 15426/2021 in the Western Cape High Court heard final arguments on 31 May 2022 from the parties and then requested written Notes from the parties to deal with the uncertainty surrounding the status of Bitcoin i.e. NOTES ON WHETHER BITCOIN (CRYPTOCURRENCY) FORMS PART OF THE DEFINITION OF PROPERTY IN SOUTH AFRICAN LAW.

2. Pursuant to the directive from the Judge the Liquidators and the Respondents filed their respective NOTES in case number 15426/2021. Our client, the Second Respondent, averred in para 3.1 of his Note dated 22 June 2022 that "*the Court in casu is asked to determine a material and fundamental factual and legal issue which the respective parties themselves could not agree and for the determination of which, no accepted standard exists viz. whether cryptocurrency is currently legally recognised as 'property' in South African law?*"

3. It was also made manifest throughout the litigation in case number 15426/2021 that the jurisdiction of the Court was questioned because Bitcoin, on our client's version, was not regulated at the material times. For example, :-

   3.1 In para 140.11 of our client's PRELIMINARY ANSWERING AFFIDAVIT TO THE INTERVENTION it was expressly alleged that "*the unregulated status of Bitcoin renders the suggested application of the statutes referred to by the [Liquidators] impossible and of zero application to the business activities of MTI*";

3.2 In para 123 of our client's ANSWERING AFFIDAVIT IN SUPPORT OF THE COUNTER APPLICATION it was also alleged that "*the ambitious attempt by the [Liquidators] to suggest that crypto assets can be brought within the definitions of South African legislation or be regulated via the provisions of the Insolvency Act, is a disingenuous attempt to mislead the court into believing that some semblance of control can be exercised over Bitcoin despite it not being regulated under the law*";

3.3 The same objection concerning the status of Bitcoin is repeated elsewhere in Affidavits filed by our client in case number 15426/2021;

4. These disputes are pending before Judge De Wet in case number 15426/2021 in the Western Cape High Court.

5. On 17 August 2022, under case number 13721/2022 in the Western Cape High Court, the Liquidators launched a further application for certain declaratory orders. In this further application, they seek declaratory orders, in summary, which read as follows :-

5.1 That the Applicants be permitted to prosecute this application on an ex parte basis.

5.2 That a rule nisi ("the provisional order") in the following terms be granted:

5.2.1 The liquidators should treat Bitcoin in the estate of Mirror trading International (Pty) Ltd as intangible assets that constitute "property" as defined in Section 2 of the Insolvency Act;

5.2.2 The Liquidators will remain vested with claims against ..... Investors for repayment of the Returns, in terms of section 29 and 30 of the Insolvency Act .....;

5.2.3 The Liquidators may then pursue the ..... Investors in respect of the Returns, in terms of either 29 or 30 of the Insolvency Act;

5.3 That the provisional order shall be of no effect, until and unless confirmed by this Honourable Court, in whole, part or in any amended form, on the return date.

5.4 That any person with an interest in this application and/or the provisional order be called upon to show cause on a date to be determined by this Honourable Court, as to why the provisional order, or any part thereof, should not be made final.

5.5 That the costs of this application form part of the costs in the winding up of the Company .....

6. None of the Respondents in case number 15426/2021 are cited as Respondents in case number 13721/2022 and only the Master of the High Court is the Respondent.

7. The relief sought in case number 13721/2022 and the interim order secured on 31 August 2022 in relation to the declaratory relief, pre-empted, pre-judged and seeks to prematurely "resolve" the following factual and legal disputes pending in case number 15426/2021 :

   7.1 whether MTI was an unlawful Ponzi scheme?
   7.2 what is the correct legal status of Bitcoin?
   7.3 whether Bitcoin is part of the definition of "property" in South African Law?
   7.4 whether the Court has jurisdiction over crypto disputes in the absence of a contract between the parties granting the Court jurisdiction?
   7.5 whether the MTI Member Contract if declared void *ab initio* as sought by the Liquidators, would have the consequence that the Court then has no jurisdiction?
   7.6 whether the Liquidators are entitled to orders from the Court to proceed against so-called "net winners" of MTI in terms of a set procedure for recovery of returns based on sections 26 and/or 29 and/or 30 of the Insolvency Act?

8. These questions of fact and law (**hereinafter the "factual and legal *disputes*"**) are all as yet unresolved under case number 15426/2021. Once the relief under case number 15426/2021 commenced before Judge De Wet, she was seized of the *factual and legal disputes* and had to adjudicate upon the *factual and legal disputes*, and that application before her was supposed to bring to a conclusion the *factual and legal disputes* in question as opposed to duplicating the *factual and legal disputes* before another Judge of the same Division of the Western Cape High Court.

9. The purport of the interim relief under case number 13721/2022 is that the *factual and legal disputes* have been removed from the purview of Judge De Wet under case number 15426/2021 by orchestrating the interim relief *ex parte*. This is highly irregular and a clear abuse of the process of the Court.

10. The potential and/or actual consequences of the relief sought and granted under case number 13721/2022 are that :

    10.1 once the interim orders under case number 13721/2022 are made final, they may ultimately settle the *factual and legal disputes* that are pending in case number 15426/2021;

    10.2 the orders under case number 13721/2022 may, through an abuse of process, bring about *res judicata* in relation to the *factual and legal disputes*;

10.3 the Respondents in case number 15426/2021 have been severely prejudiced by the granting of *ex parte* orders which affect them adversely and materially;

10.4 the application and the relief opposed under case number 15426/2021 have been manipulated on account of the impact the orders granted under case number 13721/2022 may have for the Court and the parties to case number 15426/2021.

11. In the Founding Affidavit to case number 13721/2022 the Liquidators averred in para 31 that "*we have established that MTI in truth and in fact conducted a fraudulent unlawful Ponzi-type investment scheme*". This is a *factual and legal dispute* that is by no means common cause or an established fact. Nowhere in the Founding Affidavit under case number 13721/2022 do the Liquidators disclose the pending *factual and legal disputes* under case number 15426/2021.

12. In paragraph 36 of the Founding Affidavit under case number 13721/2022 the Liquidators averred that as officers of the Court they require guidance from the Court with reference to the matters detailed in para 37, *inter alia* the status of bitcoin. Likewise, as officers of the Court, the Liquidators and their legal representatives had a duty to disclose the pending *factual and legal disputes* under case number 15426/2021 to the Court hearing the application under case number 13721/2022.

13. These legal issues referred to by the Liquidators in case number 13721/2022 are in substance the same *factual and legal disputes* and disputed questions of fact and law that are pending as an opposed application under case number 15426/2022. For example, :

13.1 The averments in paragraphs 41 to 114 of the Founding Affidavit under case number 13721/2022 repeat the factual allegations relied on in case number 15426/2022 with reference to MTI and the alleged Ponzi scheme;

13.2 The declaratory orders sought in case number 13721/2022 seek relief from the Court with reference to the subject matter of the *factual and legal disputes*;

14. The Liquidators or their attorneys when preparing the application under case number 13721/2022 and the relief sought therein must have known that the relief sought under case number 13721/2022 :-

14.1 was/is *lis alibi pendens* under case number 15426/2021 when the Liquidators knowing this as a fact, proceeded regardless to institute case number 13721/2022;

14.2 involves a judicial determination of the same or similar questions of fact and law pending before the Court under case number 15426/2022;

14.3 cannot be said to be in the interests of justice to develop the common law because Acting Judge De Wet was already asked to deal with the *factual and legal disputes*;

14.4 is an abuse of the process of the Court because of the pending litigation between the same parties, based on the same cause of action, in respect of the same subject matter, under case number 15426/2021.

15. Our client submits that the Liquidators and their legal representatives, as officers of the Court, had a duty to inform the Court in case number 13721/2022 of the *factual and legal disputes* pending under case number 15426/2021.

16. The Respondents in case number 15426/2021 incurred considerable legal costs in opposing the declaratory orders sought in that application. An abuse of the process of the Court resulted in the *factual and legal disputes* being prematurely dealt with in an *ex parte* application which can only be opposed by the Respondents who are party to the *factual and legal disputes,* by intervening and repeating the same objections already made in case number 15426/2021 in relation to the *factual and legal disputes*, all at great and unnecessary legal expense.

17. Our client reserves his rights with reference to the conduct of the Liquidators under case number 13721/2022 and particularly reserve his rights to supplement the Affidavits filed by our client under case number 12698/2022 wherein our client seeks the removal of the Liquidators.

18. The conduct complained of herein also bolsters the claims already made in case number 12698/2022 that it is against the interests of the liquidation that the Liquidators remain in office and that they are unsuitable persons to proceed in that office and that they stand to be removed as such.

19. Our client's rights remain fully reserved.

Yours faithfully

"*Electronically transmitted without signature*"

HENRY SELZER
SELZER LAW

CC MOSTERT & BOSMAN
Per email : Pierred@mbalaw.co.za

CC All interested parties under case number 15426/2021

STRYDOM, RABIE
& HEIJSTEK INC.
ATTORNEYS · CONVEYANCERS · NOTARIES

Our Ref: S Strydom/MTI1/0003
Your Ref: Henry Selzer/MTI/hm
Date: 07 October 2022

SELZER LAW
BY EMAIL: henry@selzerlaw.co.za

Sir

RE: **CASE NO: 13721/2022: BESTER NO & 5 OTHERS / MASTER OF THE HIGH COURT**

1. We refer to the above matter and to your letter of 20 September 2022.

2.

2.1. It is noted that your client elected to raise a number of issues in your letter under reply which fall to be appropriately dealt with in the papers in the pending application.

2.2. Our clients have no intention to litigate this application through correspondence with you and your client and consequently, save for our limited responses below, we refrain from dealing with and debating each and every allegation in your letter herein.

2.3. The fact that we do not expressly deal with all the allegations in your letter under reply herein should therefore not be construed as an admission by our clients of the correctness thereof. Our clients' right to deal with all these allegations in the pending application, if it becomes necessary to so, is reserved in full.

3. We are instructed by our clients to briefly respond to selected allegations in your letter as set out below.

4. Ad paragraph 1 and 2 thereof:

4.1. We are aware that Acting Judge De Wet requested the parties to the case pending before ("**the Ponzi application**") her to file notes on the question of what the status of bitcoin is.

4.2. The Ponzi application, and in particular the relief sought therein, is not dependent on the determination of that question. Moreover, despite the fact that the Judge requested notes from the parties in respect of that question, there is also no certainty that the said question will be decided in that matter.

4.3. Moreover, the fact that your client, in his notes to the Judge, asked the Court to decide the question is of no moment – the question remains irrelevant to the relief sought in the Ponzi application, and your client's request for the Court to decide the question in a note does not elevate it to the status of a material disputed issue which requires determination for the relief sought in that application to either be granted or refused.

4.4. The status of bitcoin is obviously and clearly an important consideration as its status will materially effect the manner in which the liquidators administer the insolvent estate. It is, for these reasons, both important and necessary to have approached the Court, as our clients did, under case number 13721/2022 ("**the declarator application**").

5. Ad paragraph 3 thereof:

5.1. Your client is clearly confusing the regulation of bitcoin in South Africa with the status of bitcoin as an asset.

5.2. Either way, if your client persists that the Court lacks jurisdiction for any reason whatsoever, this is something which he is required to formally raise in Court proceedings.

5.3. It takes the matter no further to debate the question of jurisdiction of the Court by way of correspondence, as your client clearly seeks to do. For the avoidance of any doubt, we dispute that your client's assertions concerning the Court's jurisdiction is correct.

5.4. The Court, as the Court which granted the winding-up order, is the only Court which has jurisdiction to give the directives sought by our clients.

6. Ad paragraph 4 thereof:

As explained before, we dispute that these issues are issues which stand to be determined by the Court in the Ponzi application. Even if Acting Judge De Wet decides these issues as part of her *ratio decidendi* in due course, this will only result in that issue being *res judicata* between the parties to that application.

7. Ad paragraph 7 and 8 thereof:

7.1. Our clients disagree with your client's allegations in these paragraphs.

7.2. Suffice it to mention that the determination of the question posed in paragraph 7.1 is only sought in the Ponzi application and not in the declarator application and further, that the only potential overlap between the respective applications, concerns the relief sought in each of them pertaining to proceedings to impeach dispositions made to investors in terms of the relevant provisions of the Insolvency Act, 1936 (but this notwithstanding, the questions to be determined concerning the relief pertaining to such proceedings in the Ponzi application and the declarator application materially differ), the remainder of your client's contentions herein have been addressed above.

7.3. It is, of course, open to your client to raise these issues in the papers in the declarator application, whether *in liminé* or otherwise.

7.4. We mention that, had your client properly considered the purpose of the declarator application, he would have realised that it seeks the attainment of Court directions to assist our clients in administering the estate and treating investors' claims. This the Ponzi application does not seek to do, and there can be no debate that the issues raised in the declarator application are indeed necessary.

8. Ad paragraph 9 thereof:

Your client's vexatious and irresponsible allegations in this paragraph are denied by our clients with the contempt it deserves. The declarator application serves a necessary and useful purpose concerning the administration of the insolvent estate, which the Ponzi application does not seek, and was necessary. Your client's insinuation that the application was made for an ulterior purpose is incorrect.

9. Ad paragraph 10 thereof:

The provisional order is, at present, ineffective as its operation is suspended, as provided for in paragraph 3 therein. There can therefore not be any prejudice to any person at this time, and any such persons are at liberty to oppose the confirmation of the provisional order. Save as aforesaid, the remainder of the allegations herein have already been dealt with hereinbefore.

10. Ad paragraph 11 and 12 thereof:

10.1. We refer your client to paragraph 98 of our clients' founding affidavit in the declarator application and also, to Annexure "FA10" thereto. The fact that the Ponzi application existed and remained pending was indeed properly disclosed in our clients' founding papers.

10.2. In any event, if your client takes issue with anything stated in the founding papers of our client, it is his good right to ventilate such a dispute in his answering affidavit.

11. Ad paragraph 13 thereof:

Suffice it to state again that, on a plain and simple reading of the respective notice of motions in the applications, the relief sought in each of them are different from the other, we refer your client once more to what is contained above in this letter. Our clients' dispute your client's contentions herein.

12. Ad paragraph 14 thereof:

12.1. The relief sought in the declarator application is not *lis pendens* as alleged. However, there is no point in debating this with your client in correspondence and our client will deal therewith should your client raise this in his answering affidavit.

12.2. Save as aforesaid, the remainder of the allegations herein which are repeated in your letter *ad nauseam* have been dealt with before and remain denied.

13. Ad paragraph 15 thereof:

Your client's submission is incorrect and fails to take into account the fact that the existence of the Ponzi application was disclosed in the declarator application. Either way, this is again something which our clients will deal with in the papers in the declarator application should it become necessary for them to do so.

14. Ad paragraph 16 and 17 thereof:

14.1. Your client's threat in these paragraphs is noted. Your client should do as he deems fit in the circumstances.

14.2. We mention, however, that the conclusions your client reaches in these paragraphs are incorrect but moreover, they are spurious. Our clients will formally respond thereto in their affidavits in the pending application, should it become necessary for them to do so.

15. All our clients' rights remain reserved *in toto*.

Yours faithfully

S Strydom