HC97

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

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that the abovenamed applicants will make application to this Honourable Court on **31 AUGUST 2022** at **10H00** or so soon thereafter as counsel may be heard, for an order in the following terms:

1. That the applicants' non-compliance with the rules of court concerning forms, service and time periods otherwise applicable be condoned, that such rules be dispensed with and that this application be heard and adjudicated upon as an urgent application in terms of uniform rule 6(12).

MOSTERT & BOSMAN ATTORNEYS
PER: PIERRE DU TOIT
TELNR: 021-914-3322
E-MAIL: antoinettee@mbalaw.co.za

2. That the applicants be permitted to prosecute this application on an *ex parte* basis.

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

3.1 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"**);

3.2 The liquidators, in dealing with claims by and against those who deposited BTC with the Company, are required to take specific cognisance of the following classes of Investors in the so-called Investment Scheme operated by the Company (**"the Scheme"**):

3.2.1 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"**);

3.2.2 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; and

3.2.3 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**");

3.3 Those individuals who deposited BTC with the Company and who intend to submit claims in the winding up of the Company and prove same as contemplated by section 44 of the Insolvency Act, are required to submit their claims with the Company in Rand value;

3.4 In the event that the investment agreements concluded by and between the Company and Investors are void *ab initio* as a consequence of the alleged illegality of the Company's business ("**the first scenario**"), then:

3.4.1 In relation to Class 1 Investors:

3.4.1.1 Class 1 Investors should be permitted to submit a claim against the estate in an amount equal to their investment in the Scheme;

3.4.1.2 the value of a Class 1 Investor's investment in the Scheme should be calculated in Rand value, as at the date upon which the relevant investor(s) made the relevant investment in the Scheme;

3.4.1.3 insofar as their claims are properly proved in compliance with section 44 of the Insolvency Act, their claims should be accepted by the Liquidators;

3.4.2 In relation to Class 2 Investors:

3.4.2.1 they will have to account towards the estate for any Return(s) on their so-called investment(s) in the Scheme;

3.4.2.2 the Liquidators must 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 MTI;

3.4.2.3 Class 2 Investors should be permitted to submit a claim against the estate in an amount equal to their impoverishment or the Company's enrichment, whichever is the lesser, which is in turn to be quantified by subtracting the properly quantified Return(s) from the properly quantified investment(s) of the relevant Investor(s), the result of which will represent either one or both of the Investors' impoverishment or the Company's enrichment;

3.4.2.4 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 investor(s) made the relevant investment in the Scheme;

3.4.2.5 the value of a Class 2 Investor's Return should be calculated in Rand value, as at the date upon which the

relevant Return or portion thereof was paid by the Company to the relevant investor;

3.4.2.6 to the extent that a Class 2 Investor submits a claim in the estate that complies with section 44 of the Insolvency Act, that represents the Rand value of the lesser of that Investor's impoverishment or the Company's enrichment, in a manner that corresponds with the Liquidators' independent assessment, such claims should be accepted by the Liquidators;

3.4.2.7 the Liquidators will 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 may have been reduced to account for the same Return when that Investor proved a claim in the estate, provided that the jurisdictional requirements of those sections can be satisfied;

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

3.4.2.9 when a 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;

3.4.2.10 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;

3.4.3 In relation to Class 3 Investors:

3.4.3.1 Class 3 Investors will initially not have a claim against the Company;

3.4.3.2 The Liquidators will be vested with claims against Class 3 Investors premised:

3.4.3.2.1. 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, provided that the jurisdictional requirements of those sections can be satisfied;

3.4.3.2.2. On sections 29 or 30 of the Insolvency Act, on the very same basis that they have claims against the Class 2 Investors under these sections, provided that the jurisdictional requirements of those sections can be satisfied;

3.4.3.2.3. On section 31 of the Insolvency Act in the case of those individuals who colluded to dispose of the property belonging to MTI in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another.

3.4.3.3 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 investor(s) made their investments in the Scheme;

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

3.4.3.5 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 or 30 and/or 31 of the Insolvency Act, should be rejected;

3.4.3.6 The Liquidators may pursue the Class 3 Investors in respect of 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 and/or 31 of the Insolvency

Act, provided that the jurisdictional requirements of those sections can be satisfied;

3.4.3.7 The Liquidators, once successful in procuring the 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;

3.4.3.8 The Liquidators should not permit 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.

3.5 In the event that the investment agreements concluded by and between the Company and Investors are not void *ab initio* (**"the second scenario"**), then:

3.5.1 Investors will in the Second Scenario acquire the status of a creditor of the Company on a contractual basis and the Liquidators are 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;

3.5.2 claims submitted by Investors should be admitted insofar as they comply with section 44 of the Insolvency Act, provided that such claims are properly formulated and proven;

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

3.5.4 the Liquidators may 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, provided that the jurisdictional requirements of those sections can be satisfied;

3.5.5 the Liquidators, once successful in procuring the 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;

3.6 In relation to individuals that defrauded MTI itself, they will not have any claims against the Company emanating from such conduct and that the Liquidators are vested with a cause of action against these individuals premised on section 26 and likely also section 31 of the Insolvency Act, to reclaim dispositions to these individuals by the Company, when and where the circumstances so permit.

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

5. 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 Hounable Court, as to why the provisional order, or any part thereof, should not be made final.

6. That the provisional order, together with a copy of this application:

   6.1 shall be published on the website of Investrust, who attends to the lodgement of claims in respect of MTI being https://investrust-mticlaims.co.za:

   6.2 shall be distributed to all known interested and affected persons of the Company by e-mail, to the extent that their e-mail addresses are known to the applicants; and

   6.3 shall be distributed to all known interested and affected persons of the Company by Whatsapp on, to the extent that their particulars are known to the applicants, and published on the Whatsapp Groups employed by the applicants to communicate with such individuals;

7. That the provisional order be published in two nationally circulated newspapers;

8. That notice and service of the application and the provisional order in the aforesaid manner shall be effected no less than 30 court days in advance of the return date;

9. That the costs of this application form part of the costs in the winding up of the Company, save in the event of it being opposed, in which event the applicants will pursue an order that any opposing party pay the costs of this application on

the scale as between attorney and client, including the costs consequent upon the employment of two counsel where so employed.

10. Such further and / or alternative relief as may be required.

TAKE NOTICE FURTHER THAT the affidavits of **HERMAN BESTER N.O.** and the annexures thereto as well as **CRAIG LIONEL PEDERSEN, ADRIAAN WILLEM VAN ROOYEN, CHRISTOPHER JAMES ROOS, JACOLIEN FRIEDA BARNARD, DEIDRE BASSON AND CHAVONNES BADENHORST ST CLAIR COOPER** will be used in support of this application.

TAKE NOTICE FURTHER THAT the applicants have appointed SRH Inc Attorneys, with its address as appears hereunder, as their attorneys of record and will receive service of all papers related to this action at the address of their attorneys set out hereunder.

KINDLY ENROL THE MATTER FOR HEARING ACCORDINGLY.

DATED AT BELLVILLE ON THIS _____ DAY OF AUGUST 2022.

STRYDOM RABIE & HEIJSTEK INC
(SRH INC ATTORNEYS)
ATTORNEYS FOR THE APPLICANTS
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REF: MTI1/0003

c/o MOSTERT & BOSMAN ATTORNEYS

4th Floor, Madison Square

c/o Carl Cronje & Tygerfalls Boulevard

Tyger Valley

BELLVILLE

(Ref: Pierre Du Toit)

Service Address:

MACROBERT INCORPORATED

The Wembley

3rd Floor, Solan Road

CAPE TOWN

(Ref: G. van der Merwe)

TO: **THE REGISTRAR OF THE HIGH COURT**
CAPE TOWN

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

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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

FOUNDING AFFIDAVIT

I, the undersigned,

HERMAN BESTER N.O.

do hereby make an oath and say that:

1. I am an insolvency practitioner and liquidator of Tygerberg Trustees, First Floor, Cascade Terraces, Tyger Waterfront, Bellville, Western Cape and I depose to this application in my capacity as one of the duly appointed joint

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liquidators of Mirror Trading International (Pty) Ltd [registration number: 2019/205570/07] (in final liquidation) ('**MTI**').

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

3. Strydom Rabie & Heijstek Incorporated ("**SRH**"), of Delmondo Office Park, 169 Garsfontein Road, Ashley Gardens, Pretoria, Gauteng Province are the duly appointed and authorised attorneys of record of the applicants and our address for the purposes of these proceedings.

4. All steps taken by SRH in relation to this matter are and have been duly authorised and are furthermore, to the extent necessary, ratified.

5. Where I make submissions of a legal nature in this affidavit or where I refer to legal advice, such submissions and advice emanate from the legal advisors who assist the applicants in this matter, the reference to which is not and should not be construed as a waiver of any legal professional privilege that may apply.

6. To the extent that any party wishes to contend that any averment made in this affidavit constitutes hearsay evidence, and it be found as such by this court, the Liquidators apply to this Court to notwithstanding admit such evidence in terms of section 3 of the Law of Evidence Amendment Act,

[A] THE PARTIES:

(i) The applicants:

7. I am the first applicant in this application.

8. The second applicant is **ADRIAAN WILLEM VAN ROOYEN N.O.**, an insolvency practitioner and liquidator of Investrust, 73 Bond Street, Sunnyside, Pretoria, Gauteng.

9. The third applicant is **CHRISTOPHER JAMES ROOS N.O.**, an insolvency practitioner of Sebenza Trust, Unit 2A, 43 Estcourt Avenue, Wierda Park, Centurion, Gauteng.

10. The fourth applicant is **JACOLIEN FRIEDA BARNARD N.O.**, an insolvency practitioner and liquidator of Barn Trustees, 310 Soutpansberg Road, Rietondale, Pretoria, Gauteng.

11. The fifth applicant is **DEIDRE BASSON N.O.**, an insolvency practitioner and liquidator of Tswane Trust Co., 1207 Cobham Road, Queenswood, Pretoria, Gauteng.

12. The sixth applicant is **CHAVONNES BADENHORST ST CLAIR COOPER N.O.**, an insolvency practitioner and liquidator of CK Trust (Pty) Ltd, 120 Edward Street, Tygervalley, Bellville, Western Cape.

13. The second to sixth applicants and I bring this application in our capacities as the duly appointed joint liquidators of MTI. In confirmation of our aforesaid appointment as such, I attach hereto a copy of the Master's relevant certificate of appointment, as issued to us, as annexure **FA1.1**, together with a Windeed status report in respect of MTI as annexure **FA1.2**, and I will henceforth refer to the applicants collectively as "**the Liquidators**".

14. The Liquidators are acting jointly in pursuance of this application and in this regard I refer this Honourable Court to the supporting affidavits of the second to sixth applicants filed simultaneously herewith.

(ii) The respondent:

15. The respondent is **THE MASTER OF THE HIGH COURT, CAPE TOWN** (**"the Master"**), with its principal place of business situated at Dullah Omar Building, 45 Castle Street, Central Business District, Cape Town, 8001.

16. The Liquidators do not, in terms of this application, pursue relief against the Master, who has been joined in these proceedings and cited herein because of the interest that the Master may have in the subject matter and any order that may ensue pursuant to this application.

[B] INTRODUCTION, PURPOSE OF THIS APPLICATION AND THE STRUCTURE OF THIS AFFIDAVIT:

(i) Introduction:

17. In terms of Item 9 of Schedule 5 to the Companies Act, 71 of 2008 (**"the 2008 Act"**), Chapter XIV of the Companies Act, 61 of 1973 (**"the 1973 Act"**) remains applicable, notwithstanding the inception of the Companies Act, 71 of 2008, to companies that are commercially insolvent.

18. MTI was provisionally liquidated by this Honourable Court on 29 December 2020 and, in confirmation thereof, I attach hereto a copy of the relevant order as annexure **FA2** (**"the Provisional Order"**). The Provisional Order

was made final on 30 June 2021 and a copy of the order placing MTI in final liquidation is attached hereto as annexure **FA3** ("**the Final Order**").

19. The winding up of MTI was sought and this Court placed MTI in final liquidation inter alia on the basis that it was unable to pay its debts and that the circumstances attendant upon MTI rendered it just and equitable to do so.

20. The petitioning creditor presented its application for the liquidation of MTI to this Honourable Court on 23 December 2020 and, in terms of section 348 of the 1973 Act, the MTI liquidation proceedings are retroactively deemed to have commenced on this day ("**the S348 Date**").

21. MTI is a company, which at all material times and still is, unable to pay its debts within the meaning of section 339 and 340 of the 1973 Act, as read with Item 9 of Schedule 5 of the 2008 Act and, accordingly, the provisions of the Insolvency Act, 24 of 1936 ("**the Insolvency Act**") apply to the winding-up of MTI, insofar as it may be appropriate.

22. Although I expand on the aforesaid later in this affidavit, it is important to note same at the outset and to keep in mind, throughout this application, that the MTI liquidation proceedings are, in the circumstances, conducted in terms of the provisions of the 1973 Act, the 2008 Act and the Insolvency Act.

23. An enquiry into the affairs of MTI as contemplated by section 417 read with section 418 of the 1973 Act ("**the enquiry**"), has been convened by this Court, for purposes of conducting an investigation into the affairs of MTI and

retired Judge H Fabricius was appointed, among others, to act as the section 418(1)(a) contemplated commissioner, to preside over the enquiry ("**the Commissioner**").

24. Some of the evidence contained in this affidavit emanates from the enquiry, which has run over a number of weeks with the testimony of numerous witnesses having been received thereat. It is not only practically impossible to condense all evidence tendered at the enquiry into this affidavit, but it is also inappropriate to do so, for reasons that appear from what follows.

25. To retain the effectiveness, integrity and secrecy of the enquiry, expressly provided for by section 417(7) of the 1973 Act, I deal with the matters emanating therefrom in sufficient detail in order to bring the material information relevant to this application to the Court's attention and, simultaneously, with the least detail possible in order not to compromise the future conduct and effectiveness of the enquiry.

26. Because of the section 417(7) statutory confidentiality regime imposed upon enquiries in terms of sections 417 and 418 of the 1973 Companies Act, I respectfully ask the leave of the Court, to the extent that it may be necessary, to refer to this evidence for the purpose of advancing the relief that the applicants seek. The Liquidators contend that it is in the interests of justice that such leave be granted.

27. The evidence disclosed in terms of this affidavit is furthermore included herein with the consent of the Master and the Commissioner, which consent was granted in terms of annexures **FA4.1** and **FA4.2** hereto.

28. Against this prelude I turn to deal with the purpose of this application.

(ii) The purpose of this application:

29. MTI initially described the nature of its business as *'an internet based crypto-currency club which performs its business through the website www.mymticlub.com and its official offices in Stellenbosch, Western Cape, South Africa. The benefit of members is in the form of the crypto-currency Bitcoin where member's Bitcoin grows through forex trading* (my emphasis) *by a registered and regulated broker.'*

30. In pursuance of its self-stated purpose, MTI would invite members of the public to register on its website, and once registered, to move Bitcoin from the crypto currency wallets of these members to designated crypto currency wallets held by and under the control of MTI. In this manner, MTI and its protagonists were afforded the right to apply and dispose of investors' Bitcoin at their absolute and sole discretion.

31. However, stripped to its core, seeing it for what it is and ignoring for the moment what seems to be nothing more than nomenclature employed by the MTI protagonists to conceal the true reason for MTI's existence, we have established that MTI in truth and in fact conducted a fraudulent unlawful Ponzi-type investment scheme ("**the Scheme**").

32. MTI lured hundreds of thousands of individuals ("**the Investors**") to "invest" Bitcoin in the Scheme, on what we have concluded to be on an unlawful and fraudulent basis. The business model of MTI was at all material times,

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illegal and effectively constituted an unlawful and fraudulent Ponzi-type or pyramid-type scheme.

33. In pursuance of our appointment as liquidators of MTI, and in the performance of the duties and responsibilities bestowed upon us consequent upon our appointment, we proceeded to investigate the affairs of MTI and, ultimately, had to decide upon the most appropriate and beneficial manner in which to approach and conduct the liquidation proceedings.

34. But the MTI liquidation proceedings soon proved to be an estate like no other and the first of its sort in a South African context.

35. The Liquidators have obtained various legal opinions from eminent legal practitioners, but there are diverging views surrounding certain pertinent and central issues that arise in the MTI liquidation proceedings, primarily as a consequence of the novel legal concepts that we are faced with.

36. It suffices to state that the MTI liquidation proceedings pose a number of pivotal, contentious, and involved questions in respect of which the applicants:

36.1. as officers of this Court and as seasoned and experienced liquidators with decades of collective experience between them;

36.2. despite having obtained legal advice and guidance on these issues to date;

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36.3. still *ex abudante cautela* require of this Honourable Court to issue them with such guidance as the circumstances may require, to ensure that the MTI liquidation proceedings are conducted with efficacy, expedience, and legal certainty, and also to render the steps taken in pursuance of the liquidation proceedings beyond subsequent reproach; and

36.4. approach this Court for guidance in terms of of section 387(3) of the 1973 Act, which permits the Court to 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 liquidators should, for their own protection, approach the Court.

37. The questions on which the Liquidators request this Court's guidance are, in broad terms, the following:

37.1. What is the nature of Bitcoin and what is its classification in an insolvent estate?

37.2. What claims, if any, do the different types of Investor Creditors [to whom I return shortly] have against the MTI estate and, if they have any claims, what is the legal basis of such claims and what is to be claimed by such Investor Creditors?

37.3. How should the claims of Investor Creditors be quantified, with particular reference to the dates to be used for the quantification of the claims [i.e. for purposes of quantification of such claims, whether the date of the deposit, the date of repayment to the investor and/or the

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date of the liquidation of MTI etc assume significance and in what respect]?

37.4. How should the Liquidators go about when dealing with claims submitted in the MTI liquidation proceedings by Investor Creditors?

38. The Liquidators apply to this Court to issue it with directions on the aforesaid issues, first on a provisional basis, in the form of a *rule nisi* ("**the Provisional Order**").

39. Once this Court has issued the Liquidators with the directions required, in whatever form this Court deems fit, the Liquidators intend to publish the Provisional order in the manner dealt with later in this affidavit, so as to provide all individuals who may have an interest in the Provisional Order, to participate in this application on the return day of the Provisional Order.

(iii) The structure of this affidavit:

40. For the relief sought to be placed in proper context, I will structure this affidavit to, in broad terms, topically and sequentially deal with the following:

40.1. First, I deal with the factual matrix within which this application should be adjudicated upon;

40.2. Secondly I deal with the Liquidators' principal contention that the business operated by MTI was at all material times unlawful;

40.3. Thirdly I deal with the financial status of MTI and with the reasons why it is considered insolvent, unable to pay its debts and the basis upon which it is contended that its liabilities exceed its assets;

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40.4. Fourthly, I deal with the issues on which the Liquidators require this Court's guidance;

40.5. Fifthly, I deal with the issue of urgency and the proper manner in which the Liquidators submit this application ought to be dealt with;

40.6. Lastly, I conclude by dealing with the specific relief sought as set out in the notice of motion.

[C] THE FACTS RELEVANT TO THIS APPLICATION:

41. MTI was registered in 2019 as a private for-profit company with limited liability as contemplated by the 2008 Act, whereafter it formally commenced trading on or about 30 April 2019. The company, at all material times had two shareholders, being Mr. Johan Steynberg ('**Steynberg**') and Mr. Clynton Marks ('**Marks**'). Steynberg and Marks were also the principal protagonists of MTI and in primary control of the affairs of the entity, despite the fact that MTI had a board of directors and a management team.

42. MTI's board of directors, at the time, consisted of Steynberg, Marks, Mr Charles Ward (non-executive) and Mrs. Monica Coetzee (non-executive). Its board of directors however later expanded to also include other individuals, as appears from the CIPC company status report in respect of MTI, referred to above.

43. The MTI management team, in turn, appears to have been comprised of Steynberg [Head of Technical and Research and Development Department], Marks [Head of Referral Program and Members], Charles Ward [Head of Stretegy Implementation], Monica Coetzee [Head of

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Corporate Services], Romano Samuels [Head of Members Support], Cheri Marks [Head of Communications and Marketing and the wife of Marks], Vincent Ward [Head of International Expansions] and Leonard Gray [Head of Legal Department].

44. As aforesaid, MTI initially contended that it conducts *'an internet based crypto-currency club which performs its business through the website www.mymticlub.com and its official offices in Stellenbosch, Western Cape, South Africa. The benefit of members is in the form of the crypto-currency Bitcoin where member's Bitcoin grows through forex trading* (my emphasis) *by a registered and regulated broker.'*

45. MTI itself professed as such in an electronic document uploaded to the official MTI website, which was ostensibly intended by the MTI protagonists to regulate the contractual relationship between MTI and its Investors. A copy of this document is annexed hereto, marked as annexure **FA5** ("**the MTI Agreement**").

46. The financial benefit that Investors could expect to receive from the Scheme eventually, and as time went on, resorted in a number of categories. It is in this respect of importance that I point out that the MTI Investment Agreement, at the time of its liquidation, purported to provide that:

46.1. Investors' Bitcoin would grow through forex trading by various registered and regulated brokers.

46.2. The marketing of MTI's business was based on a multi-level marketing strategy. In addition to receiving a share of the trading profits,

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Investors would also receive a variety of incentive-based remunerations, triggered by the referral of new individuals who also joined MTI and made an investment in the Scheme.

46.3. The proceeds that an Investor would derive from trading profits, would be regulated by the MTI compensation plan, as dealt with and explained in sections 6 and 7 of the MTI Agreement, which consisted of the following five income streams:

46.3.1. 40% Members Daily Trading Bonus;

46.3.2. 10% Direct Once-Off Referral Bonus;

46.3.3. 20% Weekly Profit-Sharing Bonus;

46.3.4. 2.5% P1 Leadership Bonus; and

46.3.5. 2.5% P2 Leadership Bonus ("**the Investor Benefits**").

46.4. Payment by MTI in respect of the Investor Benefits would be made from MTI's daily profits, generated through its trading activities, and not from any of the Bitcoin invested by investors.

47. MTI furthermore summarised its operations in the online presentation, which was applied by MTI in pursuance of luring new Investors, attached hereto as annexure **FA6** and which contains a useful summary of MTI's business and the compensation structure between MTI and its members.

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48. In pursuance of its business, MTI and its protagonists, particularly its management and marketing team, continuously represented to existing investors of MTI, and prospective investors of MTI, the public at large, that:

48.1. The bitcoin of all of the investors of MTI were pooled and were all held in one account with a broker;

48.2. MTI is trading extremely profitably on trading platforms, making daily profits;

48.3. MTI's trading history is such that it has never made a loss;

48.4. The bitcoin trading pool is growing every day;

48.5. MTI's bitcoin investments are showing a continuing growth of at least 1,5% per month;

48.6. That each investor's so-called bitcoin wallet (an account created for the investor within MTI, reflecting the number of bitcoin standing to the credit of each MTI investor within MTI) would accrue daily in fractions of percentages based on the alleged trading profit;

48.7. The bitcoin wallet would also reflect referral commissions for direct referrals by existing MTI members of other members to MTI, and various bonuses, depending on the number of investors resorting under a particular MTI investor in binary trees created by investors by introducing new investors to MTI. These commissions and bonuses would be credited also in fractions of percentages, based on the trading profit, to each MTI investor's wallet on a daily basis;

48.8. Each investor is able to follow the trading results of MTI, and the status of each investor's MTI wallet in an online electronic forum known as the MTI back office (hereinafter "the back office"), which was represented to investors as an accurate reflection, in every respect, of MTI's business and trading results;

48.9. MTI had been able to produce positive trading results every day, due to an exceptional electronic code coded by Mr Steynberg, and which was referred to by MTI as a so-called "*bot*" (herein also referred to as such), which possessed of artificial intelligence and was able to project foreign currency trades with such accuracy, that it would with great precision predict trading activity in foreign currency (forex) markets, and open and close on trading positions in forex markets that MTI never made any losses, and the predictions of the bot were so accurate, that it resulted in daily profits;

48.10. Due to the alleged daily profits, the wallets of investors grew on the data reflected in the back office, exponentially daily;

48.11. The bot had a built-in risk management programme, ensuring that only limited funds of the pooled bitcoin of MTI, were being traded with, between 3% and 5% of the total funds; and

48.12. Each trade embarked on by the bot had a built-in stop loss, limiting any loss of an investment to 8% at any given stage.

49. But what the MTI protagonists purported to convey to the outside world did not, to their knowledge, correctly represent the true state of MTI's affairs.

50. In summary, MTI's business should, to best understand what culminated into its liquidation, be dealt with reference to three particular periods:

50.1. The first relevant period is during April 2019 to July 2019, the formative period:

50.1.1. during which MTI Investors had linked sub-accounts on a trading platform called the FXChoice platform;

50.1.2. on which MTI traded on the Foreign Currency Market;

50.1.3. in pursuance of which human traders' trades were "mirrored" onto each client's sub-account (the so-called '**MAM accounts**');

50.1.4. which preceded the launch of MTI's website and the implementation of the MTI Agreement.

50.2. The second relevant period is August 2019 to October 2020:

50.2.1. during which MTI launched its website and implemented the MTI Agreement;

50.2.2. when MTI supposedly traded in forex through its regulated broker FXChoice on its regulated platform, under the exclusive supervision of Steynberg;

50.2.3. which period is central to the events that ultimately culminated in MTI's liquidation;

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50.2.4. during which MTI traded in contracts for a difference ('**CFD**') based on forex pairs at substantial losses.

50.3. The third relevant period is between October 2020 and December 2020:

50.3.1. during which period Steynberg alleged to have:

50.3.1.1. transferred all of the Bitcoin in the pool of members' Bitcoin from FXChoice to a new, 'unregulated broker' called Trade 300; and

50.3.1.2. traded on CFD's based on crypto currency pairs;

50.3.2. in respect of which it has been conclusively proved that neither the transfer of Bitcoin, nor the trading through Trade 300, ever occurred – in fact, Trade 300 was a fictitious platform created by Steynberg.

51. With this context in mind, I emphasise that despite the protestations of the MTI protagonists, its Board of Directors and Management, MTI's business activities were unlawful on various grounds.

52. In pursuance of its business, MTI in truth and in fact lured members of the public in to invest in the Scheme by registering on MTI's website, on the initial promise to Investors that their investments would yield massive returns, of 0.5% per day as much as 10% or more per month. It is in this sense that the Scheme conducted by MTI was advertised as an opportunity to "*grow your Bitcoin*".

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53. Once registered, these Investors would be able to deposit such investor's own Bitcoin from such Investor's own crypto currency wallet(s) to designated crypto currency wallets held by and under the control of MTI.

54. The Investors of MTI are referred to as members of a so-called *"MTI investors club"* – which is in truth and in fact the Scheme referred to above, whilst the "members" of the "MTI investors club" are in truth and in fact Investors in the Scheme.

55. The investments by Investors into the Scheme occurred in the form of Bitcoin, which is understood as being a type of intangible virtual crypto representation of value *or a type of* crypto currency.

56. A crypto currency is commonly defined as a digital or virtual currency that is secured by cryptography and which is mostly decentralised (i.e. not regulated by any government), networks-based on blockchain technology and maintained on a network that is distributed across a large number of different computers.

57. Blockchain, in turn, has been described as a digital ledger of transactions that is duplicated and distributed across the entire network of computer systems on the blockchain, ensuring the integrity of digital transactional data.

58. Bitcoin is typically acquired by opening a crypto account with a crypto currency exchange. Prominent crypto currency exchanges in South Africa include companies such as Luno, AltCoin, Valr and Exodus.

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59. A unique crypto wallet is then created for each Bitcoin acquirer and Bitcoin is purchased by paying the quoted amount in fiat currency (i.e. South African Rand in the instance of Luno South Africa) into the selling/trading platform's nominated bank account The acquiror's wallet is then credited with the corresponding amount.

60. Bitcoin is then purchased by placing an order to buy on the crypto exchange platform. The acquiror's wallet will then be debited with the relevant amount of South African Rand and the wallet will be credited with the corresponding amount of Bitcoin purchased.

61. Crypto currency can be freely transferred from one person's crypto wallet to another crypto wallet, free of any regulatory oversight of any government, even if a transfer is made to a wallet in another country.

62. Ultimately, the Bitcoin in a wallet is owned and controlled by the person in whose name that wallet is registered.

63. The MTI members/investors therefore transferred their Bitcoin to MTI, in pursuance of investing in the Scheme. To assist this Honourable Court in dealing with the relevant industry specific and recognised terminology, the Liquidators, with the assistance of a forensic digital asset expert, Adv Vaughn Victor ("**Adv Victor**'), have prepared what we refer to as a terminology sheet, which sets out and explains the terminology applicable to the digital trade in question. A copy of the terminology sheet is annexed hereto as annexure **FA7**.

64. In relation to MTI, Investors, lured to invest in MTI's Scheme, would deposit their Bitcoin with MTI, to form part of an MTI investment pool.

65. The Bitcoin deposited in these investment pools would then be traded with on the Foreign Exchange Markets and when the Forex positions taken on the market were in the money, the proceeds of such trading activities would then be divided amongst the relevant pool members.

66. But the implementation of a referral fee entitlement, during April 2020 and as part of the Investor Benefits, sunk the MTI Titanic ("**the Referral Bonus System**"). In terms of the Referral Bonus System, the founding members and certain Investors of MTI would apparently qualify for a 10% referral bonus, also compensable in Bitcoin, in the event that they were the effective cause for new Investors investing in the Scheme.

67. It is the Referral Bonus System, in conjunction with the lack of any legitimate and sustainable business, that expose the Scheme as an illegitimate Ponzi-type scheme.

68. A Ponzi scheme is a form of fraud that lures investors into investing in a scheme and essentially operates by paying returns/profits to earlier investors with funds generated from investments made by more recent investors.

69. Such a scheme leads victims to believe that profits are coming from product sales or other means [trading on the Forex market in this case], whilst they remain unaware that the benefits that they derive from participating in the scheme, in fact, emanates from investments by more recent investors who

are the source of the subsequent investments that ultimately sustain payment of the returns on earlier investments.

70. At the core of such a scheme is a promise of high returns on investments, associated with little risk and it is as such based on using new investors' funds to make payment in respect of earlier investors' returns.

71. In short, new Ponzi scheme income is used to pay original investors their returns, but represented as a profit from an underlying purported legitimate transaction.

72. Ponzi schemes rely on a constant in-flow of new investments in order to continue to provide returns to older investors. These schemes eventually bottom out and collapse when income from new investors become insufficient to sustain payment of returns to earlier investments, at which point such schemes unravel and fall apart.

73. This is precisely what the Scheme operated by MTI became and MTI, from April 2020 onward, never operated a sustainable business because, not only did it not trade as was represented to the Investors, but the 10% referral bonuses were also funded from new Bitcoin investments made into the Scheme, thereby commensurately diluting, and eroding the pooled, and ever decreasing, Bitcoin deposited with MTI.

74. It is in this sense that the advertised entitlement to the 10% referral bonuses soon outgrew and assumed greater significance than even the disproportionate returns promised to the Investors by MTI itself, as

encouragement for Investors to invest in the Scheme and to aggressively procure new Investors for the Scheme.

75. But the inevitable consequence of this business model was that the animal created by the MTI protagonists would soon assume a life of its own and ultimately devour itself, in a full-circle of self-destruction.

76. Then, if this was not enough, certain Investors soon devised their own strategy within the Scheme. They proceeded to establish their own little fraudulent schemes within the Scheme, through what we now refer to as ghost accounts. Essentially, these Investors would represent to MTI and the Scheme that they had secured new investors for the scheme whilst these "new investors" in truth and in fact never existed. These accounts were in fact opened by the same investors under one of more pseudonyms and therefore one investor held more than one account, albeit under different names. In this manner, these investors, in fraud of the Scheme itself, drew 10% referral bonuses from the MTI investment pools pools on their own accounts – effectively stealing Bitcoin from MTI and other investors.

77. By June 2020, MTI was presenting with a substantial growth in Investors, with substantial investments being made into the Scheme. However, by then, the the Bitcoin invested in the Scheme and deposited into the MTI investment pools, was already not being traded with profitably at all (and used for other fraudulent purposes),. being eroded through the payment of referral bonuses and diluted because of the ghost accounts referred to above. This was, however, not disclosed to new Investors, for obvious reasons.

78. Around this time, MTI's broker, FxChoice became concerned about the manner in which MTI was trading and when MTI did not satisfy its requests to clear up these concerns, FxChoice terminated MTI's access to its trading account and banned MTI from its trading platform, thereby freezing 1281 MTI Bitcoin in that account, which at the time was worth approximately R221 million (**"the Frozen Bitcoin"**).

79. But this too was not disclosed to existing or prospective Investors. It was rather concealed by MTI, who introduced an "unregulated broker" Trade300 as substitute for FxChoice, creating the impression that the Frozen Bitcoin had been transferred to Trade300, when it was in truth and in fact not.

80. The Financial Sector Conduct Authority ("*FSCA*") in the meantime caught wind of MTI's operations during July 2020, pursuant to which it initiated its own investigation into the trade and dealings of MTI.

81. Manifestly alive to the true circumstances prevalent upon MTI and its looming collapse, the top tier Investors of MTI who knew about the true state of MTI's affairs, then started to rapidly liquidate their investments in the Scheme, in anticipation of what the future held for MTI.

82. But the amount of MTI Investors continued to grow until the Scheme, and MTI, self-destructed. MTI was simply doomed in that the illegalities that plagued its very existence could never be countered by any lawful trading endeavours open to it.

83. Despite the MTI protagonists' protestations to the contrary, from 29 January 2020 to 3 June 2020 the Bitcoin traded by MTI through FxChoice presented

with a capital loss of 30% on the total 1846.72 Bitcoin that MTI traded through its broker, representing an approximate value of R80 million at that point in time.

84. This too was not disclosed to the MTI Investors.

85. MTI was eventually liquidated as aforesaid.

86. Fortunately, MTI kept record of transactions between it and each of its Investors on a database hosted by Maxtra Technologies in India ('**the MTI database**'). Stored on this database is information concerning the details of each Investor's Bitcoin deposit(s) with MTI in the Scheme, the purported referral commissions, bonuses and profits credited to Investors' crypto currency accounts (in Bitcoin), as well as the actual number of Bitcoin that each member withdrew from his or her 'investment' in MTI.

87. The relevant information obtained from the MTI database is dealt with in an affidavit of Mr. Craig Pedersen ('**Pedersen**') of TCG Digital Forensics CC ('**TCG**'), which is attached hereto as annexure **FA8** and the entire contents of which are incorporated herein as if specifically recorded and will be relied upon in support of this application.

[D] MTI'S BUSINESS WAS AT ALL MATERIAL TIMES FRAUDULENT AND UNLAWFUL:

88. After the Financial Sector Conduct Authority ("*FSCA*") had started an investigation into the affairs of MTI during July 2020, and interviewed Mr Steynberg on 20 July 2020, Mr Steynberg and the main promotor of MTI, Cheri Marks, represented to the FSCA, and to all of MTI's investors, widely

by way of circulars, website notices, YouTube clips and on public social media forums, that:

88.1. Due to concerns expressed by the FSCA concerning the lawfulness of the activities of MTI, MTI had moved the entire bitcoin trading pool of MTI from the trader where it was allegedly held (FX Choice, at the time) to a new trading platform known as Trade 300, in anticipation of a fear expressed by Mr Steynberg that FX Choice may freeze all the bitcoin held by it pursuant to a cease and desist notice MTI had received from the Texas State Security Board;

88.2. The said Trade 300 was not a licensed Forex trader and having been registered in Nevis, it did not require Forex trading licenses;

88.3. The bitcoin frozen at that stage in the FX Choice account, amounting to approximately 1282 bitcoin, were not part of MTI investors' bitcoin, but belonged to MTI and Mr Steynberg; and

88.4. MTI had moved the bitcoin held by it in the trading pool, previously held at FX Choice, to Trade 300, in four transfers over a period from 21 July 2020 to 24 July 2020, with the number of bitcoin allegedly transferred to Trade 300 being 16444 bitcoin.

89. All of the above representations made by MTI, Mr Steynberg and the management and marketing team, to the investors of MTI, were false in one or more of the following respects:

89.1. MTI had not moved the bitcoin from FX Choice because MTI's account with FX Choice had been frozen and the bitcoin could not be moved;

89.2. Trade 300 was not a broker but was no more than an alter ego for Mr Steynberg;

89.3. The bitcoin frozen by FX Choice was not the property of Mr Steynberg, but belonged to MTI and formed part of the so-called trading pool.

89.4. The bitcoin of the MTI investors, as pooled in MTI, were also not transferred immediately to any FX trader account, but, instead, diverted to accounts under control of Steynberg and the management and marketing team, most notably Marks and his wife Cheri Marks;

89.5. Only a limited number of Bitcoin were traded with by MTI at FX Choice, but for this trading, losses were incurred, in the following approximate respects:

89.5.1. for bitcoin deposited into specified MAM accounts, 50,95 Bitcoin were deposited of which 22 bitcoin were lost;

89.5.2. for a subsequent period from approximately January 2020 to 03 June 2020, a limited number of Bitcoin were deposited with FX Choice in a total number of 1846,72, of which MTI made a loss in trading of 566,68 bitcoin, resulting in an approximate capital loss of 30%.

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89.6. There were no profits on any trading platform;

89.7. All trading reports published daily, of daily trading profits, were false;

89.8. All reports that MTI investors' bitcoin grew every day, as a result of trading profits, by way of trading bonuses, were false;

89.9. All reports that MTI had continuously traded profitably, were false;

89.10. All reports that the trading of MTI's bitcoin was effected by a bot with artificial intelligence, were false;

89.11. Reports that the bot traded in real time were false;

89.12. The report that the bitcoin of MTI that were held at FX Choice were transferred to a new broker, were false. The alleged new broker, Trade 300, never existed and was a platform, a mere sham, created by Mr Steynberg himself;

89.13. Unlike what was represented to MTI investors, and the public at large:

89.13.1. MTI never achieved any growth in bitcoin as a result of trading activities;

89.13.2. MTI could never reflect such growth in bitcoin to MTI investors, as it daily did;

89.13.3. MTI could never, from any *bona fide* trading activities pay investors withdrawing their bitcoin, and growth in bitcoin,

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

90. First and foremost, seeing MTI for what it truly was, and not what its protagonists portrayed it to be, it conducted an unlawful and fraudulent Ponzi-type Scheme. In terms of this Scheme, it defrauded hundreds of thousands of Investors of their Bitcoin, which those benefitting from the Scheme, hiding behind MTI, appropriated and which appropriation they concealed under the ruse of the MTI agreement contemplated Investor Benefits.

91. The FSCA's investigations concluded with a report being issued by it on 18 January 2021 (**'the FSCA report'**). The FSCA report, together with the annexures thereto, is a voluminous document and the attachment of the entire report to this affidavit will unnecessarily render this application prolix. I attach hereto only a copy of the FSCA report itself as annexure **"FA8"** and will ensure that SRH makes a copy of the complete report available to any interested party requesting same, which the Liquidators tender as such.

92. The FSCA report ultimately concludes that MTI's business was unlawful in a number of respects, for numerous reasons and particularly that MTI:

92.1. operated an un-paralleled and massive fraudulent and unlawful investment scheme, in flagrant disregard of the relevant financial sector laws as such and otherwise;

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92.2. conducted an illegal, unregistered financial services business in contravention of (at least) section 7 of the Financial Advisory and Intermediary Services Act, 37 of 2002 (**'the FAIS Act'**).

92.3. That the conclusion is inescapable that the investments made by Investors into MTI and the Scheme conducted by it, were misappropriated.

93. What is more, the Commissioner, a well-respected retired judge of the High Court, has to date issued four reports pursuant to what was established during the enquiry.

94. The first report was issued on 22 March 2021, being an interim report in respect of the evidence produced at the March 2021 enquiry. The second report was issued on 22 April 2021 and the third report was issued on 12 June 2021. Copies of the reports (**'the Fabricius reports'**) are annexed hereto as annexures **FA9.1** to **FA9.4**.

95. The Fabricius reports speak for themselves. I will, in the circumstances, not repeat their contents in this affidavit. Doing so will simply burden these papers unnecessarily. I do, however, confirm that the Liquidators place reliance on the entire contents of these reports in support of the Liquidators' primary contention that the business conducted by MTI and the Scheme itself was at all material times fraudulent and unlawful.

96. Based on the aforesaid exposition of facts, the comprehensive affidavit of Mr Pederson [attached hereto as annexure FA8], the FSCA report and the Fabricius reports, the Liquidators contend that MTI's business activities and

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the Scheme were fraudulent and otherwise unlawful, for one, more or all of the following reasons:

96.1. 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;

96.2. 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 Bitcoin. Ultimately, as found by the Commissioner 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.

96.3. The Commissioner 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.

96.4. The Liquidators have 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 Investors' Bitcoin.

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96.5. MTI offered, sought to and in fact rendered financial services and financial advice to the public and particularly the Investors, despite not being issued with a licence and permitted to do so by the FSCA;

96.6. MTI acted as a so-called over-the-counter derivative provider, as defined by Regulation 2 of the Financial Markets Act, 19 of 2012 ('**the FMA regulations**' and '**the FMA**', respectively), read with section 6(8) of the FMA.

96.7. MTI provided, as its business or part thereof, a financial product, a financial service or market infrastructure in contravention of section 11 of the FSR Act.

96.8. MTI conducted a collective investment scheme as defined in section 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 section 5 of the CISC Act.

96.9. MTI directly or indirectly promoted, knowingly joined, or entered into or participated in a fraudulent financial transaction, as described in section 42(4) of the Consumer Protection Act, 68 of 2008 ('**the CPA**').

96.10. MTI directly or indirectly promoted and conducted a pyramid scheme, as *inter alia* contemplated by section 43(2)(b) read with section 43(4) of the CPA.

96.11. MTI unlawfully conducted the business of a Bank, in want of compliance with the applicable Banks Act, 94 of 1990, and other applicable legislation.

96.12. MTI operated a business that was by design implemented to perpetrate a fraud on members of the pubic by enticing them to invest in an illegal and unlawful fraudulent Ponzi-type scheme:

96.12.1. 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;

96.12.2. ultimately, to divest and deprive them of their Bitcoin, or part thereof;

96.12.3. which offends the common law legality of the entire MTI scheme. 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 Investors' Bitcoin.

97. To this end, the Liquidators contend that any agreements, in whatever form, purportedly concluded between MTI and Investors are unlawful in that they were concluded in the furtherance and as part of an illegal investment scheme, for all of the above reasons, and that they are consequently void.

98. Based on the above grounds, the provisional liquidators (at that stage) brought an application to this Honourable Court under case number

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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 protagonists of the Scheme, including Marks. It was argued over a number of days and oral argument was eventually concluded on 31 May 2022, whereafter judgment was reserved.

[D] MTI IS INSOLVENT AND ITS LIABILITIES EXCEED ITS ASSETS:

99. As a general proposition, an unlawful Ponzi-type or pyramid-type investment scheme, is insolvent from inception, because once an investor makes an investment into such a scheme, 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. Full restitution is invariably impossible, because what was invested from day one will never again be available for return to Investors, due to the nature of the scheme, the theft of what had been invested, costs associated with running the scheme, and repayment of undue 'profits' and the payments made to earlier investors.

100. The effect of the aforesaid is that none of the investments made into the Scheme can be considered as assets of MTI contributing to its solvency, because of the neutralising corresponding liability created and that exists immediately on date of investment.

101. We have established, through our investigations, that MTI's liabilities exceeded its assets from at least since 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, as 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 cohorts.

102. As a result of the aforesaid, MTI incurred a massive liability to Investors, which it could never pay, and a great number of Bitcoin remain unaccounted for. Further, as a result of the unlawful nature of the business of MTI, as pleaded below, MTI could not pay later Bitcoin investors demanding withdrawals of their Bitcoin balances, and this led to the liquidation of MTI in December 2020.

103. 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.

104. The difference between Bitcoin deposited in and withdrawn out of MTI, is at least 6,900 Bitcoin with a present Rand value of approximately R404,317.00 per Bitcoin, representing a total unaccounted-for loss of R2,789,787,300.00.

105. On the contrary, 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. This Bitcoin, at present Rand value of approximately R404,317.00 per Bitcoin, amounts to a total Rand value of R8,984,953,939.72 and would then have represented the total remaining

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pool of investor funds in MTI, if it is assumed that its business was legitimate.

106. It is in the circumstances 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.

107. MTI's insolvency is further demonstrated by the MTI database extracted by Mr. Pedersen, who deposed to an affidavit in the application to declare the entire business model of MTI an illegal/unlawful scheme. A copy of Pedersen's affidavit is annexed hereto as annexure **FA11**. The Liquidators' further investigations into the affairs of MTI and the facts uncovered pursuant thereto, have since overtaken what Mr Pedersen stated in annexure FA11, as is dealt with by Mr Pedersen in annexure FA8 hereto.

108. As appears from annexure FA11, at that stage, the liquidators 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. It follows, according to the MTI database, that a total of 10, 866.87 Bitcoin was known not to have been withdrawn.

109. However, as dealt with in annexure FA8, the liquidators have subsequently established, with the assistance of Mr Pedersen, that there were more withdrawals of Bitcoin and the total amount of Bitcoin withdrawn from the scheme is now known to amount to 32,285 Bitcoin. As with any data analysis, the liquidators and their advisors are working with a collection of

complex data that requires in-depth and extensive consideration, the analysis of which is an evolving process.

110. Save for the 1,281 Bitcoin that the provisional liquidators located and recovered from FXChoice, no further Bitcoin vesting in MTI, or over which MTI has control, could be recovered, notwithstanding extensive attempts by the FSCA, the liquidators and their forensic experts, to do so.

111. The Liquidators have liquidated MTI's recovered Bitcoin, amounting 1,281 Bitcoin, and pursuant thereto sold same for the aggregate sum of R1,058,176,013.69.

112. However, the liquidators have now established that at least 6,853.29 Bitcoin is unaccounted for within MTI. MTI consequently has liabilities to the tune of at least 6,853.29 Bitcoin. But, even if the Liquidators could locate and take into possession further MTI Bitcoin, any such recovery will be met by a corresponding liability, for the aforesaid reasons already dealt with.

113. But even if all the MTI Bitcoin is secured, it is the operational losses suffered by MTI during the period when it purported to trade, as aforesaid, which will retain the position of MTI's liabilities exceeding its assets.

114. MTI's liabilities, on any and every permutation, accordingly, exceed its assets and it is thus evident that MTI is unable to pay its debts as envisaged by section 340 of the 1973 Act.

[E] THE ISSUES:

(i) What is the nature of Bitcoin and what is its classification in an insolvent estate?

115. The first point of departure is the question as to what the nature of Bitcoin is and how it should be seen in an insolvent estate.

116. This question was posed to our legal advisors, and we were advised as follows:

116.1. Bitcoin has been described as:

116.1.1. A peer-to-peer digital currency;

116.1.2. 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;[1]

116.1.3. 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;2

116.1.4. Qualified financial instruments;[3]

116.1.5. Virtual currencies that can be used to buy goods and services, but rely on a ledger and cryptography to secure

1 SARS explanatory note last updated 30 August 2021
2 IFWG Crypto Assets Regulatory Working Group
3 Crypto-currency regulations in the EU

and verify transactions rather than a trusted third party and Bitcoin is the original crypto-currency;

116.1.6. A digital asset, digital currency, digital cash, virtual currency, electronic currency, digital gold or crypto-currency;[4] and

116.1.7. An intangible asset.[5]

116.2. According to the Intergovernmental Fintech Working Group ("IFWG") Crypto Assets Regulatory Working Group:

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

116.2.2. Bitcoin is not e-money;

116.2.3. Bitcoin is not legal tender;

116.2.4. Bitcoin can be used to pay for goods or services;[6]

116.2.5. Bitcoin is not viewed as foreign currency.

116.3. 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)**,[7] the Court, after an extensive analysis of the law and case law in

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4 Wikipedia

5 Wikipedia

6 It functions as a type of barter instrument, but can nevertheless perform money-like functions.

7 CIV-2019-409-000544 [2020] NZHC 728

numerous jurisdictions, held that crypto-currencies are a type of intangible property[8] and that the various crypto-currencies are "*property*" within the definition outlined in section 2 of the New Zealand Companies Act, 1993.[9] In its order the Court referred to the crypto-currency as "*digital assets*".

116.4. 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.[10] **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,[11] 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.

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8 Par [120]
9 Par [133]
10 **Nel v Bank of Baroda**, 2016 JDR 0871 (KZD)
11 At p 285

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116.5. Irrespective of the exact legal nature of Bitcoin, the rights of the owner thereof cleaerly constitute property.[12]

117. The Liquidators, accordingly, require of this Court to provide them with the necessary guidance on this issue, so that they [the Liquidators], correctly deal with the concept that is Bitcoin, in the winding up of MTI.

(ii) The claims of Investors and the Liquidators?

118. Our legal advisors were also engaged on the second and third questions identified herein above, who accordingly advised as set out herein below:

118.1. A liquidated claim is a certain and determined claim resulting from an order of Court, agreement or any other reason.[13] There are two bases upon which the claims of investors can be regarded as liquidated claims, the first being that the transfer of Bitcoin constituted payment[14] in terms of the MTI 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, the investor parted with such intangible property with a market value that was easily determinable.[15]

118.2. The judgment in **Hassan**, *supra*, is on all fours with the present situation and, just like securities listed on a stock exchange, the

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

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

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

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

market value of Bitcoin is easily determinable. It is published in US Dollar and the conversion into Rand is a simple exercise.

118.3. The primary view adopted, and shared by our legal advisors, is that the MTI agreements concluded by and between the Company and Investors are void *ab initio* because of the illegality of the Scheme, in pursuance of which the subject agreements were concluded and the subject investments made.

118.4. Two scenarios accordingly enter the debate and how to properly deal with claims by Investors depends on whether:

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

118.4.2. the said investment agreements are <u>not</u> 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**").

118.5. It is then prudent to distinguish between the different possible classes of Investors who are expected to submit claims in the insolvent estate of MTI.

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118.6. 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**").

118.7. 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.

118.8. 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 participants in the scheme ("**Profit**" and "**Class 3 Investors**").

118.9. 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.[16]

118.10. Investors are, in such circumstances, vested with a claim against the insolvent estate premised on a cause of action in enrichment, particularly the *condictio ob turpem vel iniustam causam*.

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[16] 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*".

118.11. 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.[17]

118.12. On this basis, an Investor would, in principle, be entitled to reclaim the deposits made by the Investor to MTI in pursuance of that Investor investing in the Scheme, calculated as at the date that the Investor concerned deposited the Investor's Bitcoin with MTI.

118.13. The basis for MTI's liability towards Investors will change if the MTI agreements are not considered void *ab initio*. If this is the true and correct position [i.e. that the investment agreements are valid, binding and extant] it will have a direct and substantial bearing on the basis, formulation and quantification of Investor Claims, which would in such circumstances entirely be dependent on the terms of the MTI agreement.

118.14. 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. However, 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 possidentis*) in that the Company is the one who

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

perpetrated the fraud unto its Investors and party to the illegality that plagues the Scheme,[18] unless the identified exceptions[19] can be relied upon by the liquidators, and be proven by them, to relax the application of the maxim.

118.15. Although the now recognised public interest element in insolvency proceedings[20] may perhaps be relied upon to support an argument that the maxim be relaxed, we do not believe that there are reasonable prospects of success in such an argument, regard being had to the circumstances of this case. 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.

118.16. 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. The Returns can consequently not 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.

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[18] 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).

[19] 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).

[20] 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).

118.17. The Liquidators will rather 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:

118.17.1. 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);

118.17.2. 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);

118.17.3. 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;

118.17.4. 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;

118.17.5. As well as possible claims under section 31 of the Insolvency Act;

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

118.18. 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:

118.18.1. the property alienated under the disposition; or in default of such property;

118.18.2. the value of the property alienated under the disposition at the date of the disposition; or

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

whichever is the higher.

119. The Liquidators, accordingly, require of this Court to provide them with the necessary guidance on this issue, so that they [the Liquidators], correctly deal with the concept that is Bitcoin, in the winding up of MTI.

(iii) How should the Liquidators go about when dealing with claims submitted in the MTI liquidation proceedings by Investor Creditors?

120. On this aspect, the advice obtained by the Liquidators, to date, is summarised as follows:

120.1. 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.

120.2. The starting point is that only a liquidated claim may be proved at the first meeting.[21] This means that claims for Bitcoin by investors cannot be proven at the first meeting.[22]

120.3. A liquidated claim is a certain and determined claim resulting from an order of Court, agreement or any other reason.[23]

120.4. In relation to Class 1 Investors, in the First Scenario, we have been advised that 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.

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21 Section 44 of the Insolvency Act.

22 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

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

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120.5. The position with regards to Class 2 and Class 3 Investors, in the First Scenario, is somewhat different.

120.6. In relation to Class 2 Investors in the First Scenario:

120.6.1. 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.

120.6.2. The Liquidators must 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 MTI.

120.6.3. 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, whichever is the lesser.

120.6.4. The appropriate reduction of the full Class 2 Investor Claims can be achieved by properly quantifying the subject Investor's impoverishment or the Company's enrichment, whichever is the lesser.

120.6.5. 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

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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.

120.6.6. 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, in accordance with the SCA's judgment **Fluxmans**.[24]

120.6.7. 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.

120.6.8. To the extent that a Class 2 Investor submits a section 44 compliant claim in the estate, that has already been reduced

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

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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.

120.6.9. 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.

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

120.6.11. 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 100c in the Rand, in the form of a dividend.

120.6.12. 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

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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.

120.6.13. 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 *concursus* and made subject to a proportionate reduction in the calculation of the Return as part of the ultimate dividend to be paid to creditors.

120.6.14. If the setting aside of such dispositions is 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 *concursus*, to the ultimate undue prejudice of other Company creditors, for instance Class 1 Investors.

120.6.15. 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.

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120.6.16. 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.

120.6.17. In dealing with Class 2 Investor claims:

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

120.6.17.2. 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;

120.6.17.3. 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.

120.6.18. In relation to Class 3 Investors in the First Scenario:

120.6.18.1. Class 3 Investors will 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

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Investors being returned to them and because they, on top of that, made a Profit thereon.

120.6.19. The Liquidators will be vested with claims against Class 3 Investors premised:

120.6.19.1. 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;[25]

120.6.19.2. 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; and

120.6.19.3. on section 31 of the Insolvency Act in the case of those individuals who colluded to dispose of the property belonging to MTI in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another.

120.6.20. In dealing with claims by and against Class 3 Investors in the First Scenario, we were advised that:

120.6.20.1. any claims submitted by Class 3 Investors, prior to the finalisation of the Liquidators' claims that are to be

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

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instituted in terms of sections 26 and 29 or 30 and/or 31 of the Insolvency Act, should be rejected;

120.6.20.2. the Liquidators should pursue the Class 3 Investors in respect of 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 and/or 31 of the Insolvency Act;

120.6.20.3. 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;

120.6.20.4. For the purpose of calculating a claim by a Class 3 Investor against the estate, pursuant to returning the disposition(s) to the liquidators as explained in paragraph 120.6.20.3 above, 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 and 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 the date upon which the relevant creditor(s) received same from the Company.

120.6.20.5. 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.

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

120.8. With the relationship between the Company and each Investor being regulated by contract, on this construction, Investors will be required to formulate their claims against the Company in compliance with the MTI agreement, which, in principle, recognise several possible permutations of Creditors.

120.9. 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.

120.10. 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 are 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.

120.11. The appropriate way in which to deal with Investor Claims formulated in the Second Scenario, is as follows:

120.11.1. the claims submitted by Investors should be 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;

120.11.2. 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";

120.11.3. 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;

120.11.4. 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.

120.12. In addition to the Class 1, Class 2 and Class 3 Investors, there are also two additional groupings that require to be considered.

120.13. First, there are those who have earned founders and/or referral bonuses for having established and ensured continuous new investments into the Scheme, without themselves investing anything into the Scheme at all. They literally received proportionate shares of Bitcoin invested in the Scheme.

120.14. The advice obtained in relation to these individuals is as follows:

120.14.1. 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 bonuses without more. The Liquidators are once again on a case-by-case basis, vested with a cause of action in terms of section 29 or 30 of the Insolvency Act, to reclaim such bonuses to these recipients.

120.14.2. In the case of those individuals who colluded to dispose of the property belonging to MTI in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another, the Liquidators will have claims in terms of section 31 of the Insolvency Act, where the circumstances so permit.

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

120.16. If the Scheme was unlawful, and the fraud taints the bargain that the founders struck with the Company from day one, then these individuals cannot lay claim to any future founders bonuses. In regard to founders bonuses transferred to these individuals in the past, the Liquidators will once again on a case by case basis, be vested with a cause of action to procure return of founders bonuses that were transferred to these individuals in the past, in terms of section 26 and/or 31 of the Insolvency Act, when and where the circumstances so permit.

120.17. Second, there are those who established and operated their own "mini" scheme within the Scheme, in fraud of MTI. In relation to these individuals, we have been advised that they will not have any claims against MTI emanating from such conduct and that the Liquidators are vested with a cause of action against these individuals premised on section 26 and likely also section 31 of the Insolvency Act, to reclaim dispositions to these individuals by the Company.

120.18. The Liquidators, accordingly, require of this Court to provide them with the necessary guidance on this issue, so that they [the Liquidators], correctly deal with the concept that is Bitcoin, in the winding up of MTI.

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121. The aforesaid advice emanates from Freek Terblanche SC, Pieter Lourens and SRH and in this respect I attach hereto the relevant memoranda issued by counsel to SRH, redacted where necessary and appropriate, as annexures **FA12.1** and **FA12.2** respectively.

(iv) The guidance sought from this Court:

122. The challenges that arise in the MTI liquidation proceedings require in-depth consideration and need to be pronounced upon by this Court. By way of example, significant issues that have been debated in some depth, within the context of the different permutations of creditor/investor claims, are whether Bitcoin constitutes property as defined by the Insolvency Act and whether the deemed date of commencement of the MTI liquidation proceedings (i.e. the S348 Date), as opposed to the relevant dates referred to herein above, is not the correct date on which the value of an investor's claim (i.e. the enrichment vs impoverishment comparison) is to be calculated.

123. Some of these challenges have invited conflicting legal opinions on certain material matters directly relevant to the aforesaid issues. The legal opinions that have come to conclusions contrary to those of Messrs Terblanche SC and Lourens, are that of Advocates Rudi van Rooyen SC and Adv Jannie van der Merwe SC, whose respective opinions are attached hereto as annexures **FA13.1** (the initial opinion of Adv Van Rooyen SC), **FA13.2** (the conflicting opinion of Adv Van der Merwe SC) and **FA13.3** (Adv Van Rooyen SC's opinion in reply to Adv Van der Merwe's opinion) respectively.

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124. Then, reflecting on the conflicting legal opinions received, a further memorandum was issued by Ms Sune Smit of Honey Attorneys, on behalf of the Liquidators, on 8 June 2022 and a copy of which is attached hereto as annexure **FA14**. The following portion of this memorandum is particularly emphasised:

> *"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 Fluxmans1 and Fourie2, 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*

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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*

4.3. *In conclusion and for ease of reference, once the two opinions have been detailed, a summary of the two differing opinions must be provided – something along the following lines:*

4.3.1. *It is our understanding that Adv. Van der Merwe's opinion that the investors' claims must be calculated at the date of concursus is based on the following:*

4.3.1.1. *MTI is the fraudster and not entitled to benefit from the increase in value of the BTC from the date of the investment to the date of concursus;*

4.3.1.2. *If investors are not allowed to claim the increase in value of the BTC, MTI would benefit as a result thereof.*

4.3.1.3. *Therefore, investors must be entitled to claim the increase in value in BTC;*

4.3.2. *It is further our understanding from Adv. Terblanche's opinion, read in conjunction with the opinion of Adv. Van Rooyen dated 18 January 2022, that the investors' claims must be calculated on the day of the investments based on the following:*

4.3.2.1. *The scheme is illegal;*

4.3.2.2. *A result of the illegality of the scheme is that the contracts are void ab initio and therefore, upon receipt of a payment (investment), MTI was liable to promptly / immediately repay it to the investor, who had a claim for it under the condictio ob iniustam causam (see Fourie supra);*

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4.3.2.3. Therefore, MTI was liable, upon receipt of the BTC, to immediately return the BTC, and the investors' claim arose the moment he paid the BTC to MTI.

4.3.2.4. No party has a right to benefit from an unlawful contract, which includes an investor. Therefore, if BTC is converted at date of liquidation and the value of BTC at that date exceeds the value of BTC as at the date of investment, it will mean the investor benefits from an unlawful contract.

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

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"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 ... "

(I pause to note, that in addition to the points summarised in paragraphs 4.3.1.1 to 4.3.1.3 of Honey Attorneys' memorandum, Adv Van der Merwe in paragraphs 10 and 11 of his opinion (FA13.2) concluded that the authorities that he looked at, provided that an enrichment claim has to be assessed at the time of the institution of the action. However, due to MTI being liquidated, he suggested that the date for the quantification of the enrichment claim cannot be the date of the institution of the claim, but suggested that it seems logical that the appropriate date for the quantification of the enrichment claim of an investor, should be the date of *concursus creditorum.)*

125. The liquidators have, since inception, received thousands of claims from investor creditors. The liquidators, in processing such claims, have generally dealt with the claims submitted and sought to be proved in the estate in accordance with the principles set out in the opinion expressed in Adv Van der Merwe's memorandum, i.e. by quantifying the claims in South African Rand on the date of *concursus.*However, the advice that has since been received necessitate the prosecution of this application so that certainty can be obtained and for any issues arising from the manner in which the liquidators have dealt with claims in the past, if any, to be rectified.

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126. The Liquidators accordingly require the following directives from this Court:

126.1. Bitcoin constitutes property as defined by the Insolvency Act and should be treated as such by the Liquidators in pursuance of the MTI liquidation proceedings;

126.2. The value of a Class 1 Investor's investment in the Scheme in the First Scenario, should be calculated in Rand value, as at the date upon which the relevant creditor(s) made their investments in the Scheme;

126.3. The claims of Class 1 Investors, in the First Scenario, insofar as their claims are properly proven in compliance with section 44 of the Insolvency Act, should be admitted.

126.4. In dealing with Class 2 Investor claims:

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

126.4.2. the Liquidators, if they so decide, may then pursue the Class 2 Investors in respect of the Returns, in terms of either section 29 or 30 of the Insolvency Act;

126.4.3. the Liquidators, if and 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;

126.4.4. 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 their investments in the Scheme;

126.4.5. The value of a Class 2 Investor's reimbursement in respect of their initial investment and/or the Return should be calculated in Rand value, as at the date upon which the relevant creditor(s) received same from the Company.

126.5. In relation to Class 3 Investors in the First Scenario:

126.5.1. Class 3 Investors will initially not have a claim against the Company;

126.5.2. The Liquidators will be vested with claims against Class 3 Investors premised:

126.5.2.1. 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;[26]

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

126.5.2.2. 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; and

126.5.2.3. on section 31 of the Insolvency Act in the case of those individuals who colluded to dispose of the property belonging to MTI in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another.

126.5.3. 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.

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

126.6. In dealing with claims by and against Class 3 Investors in the First Scenario:

126.6.1. 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 or 30 and/or 31 of the Insolvency Act, should be rejected;

126.6.2. the Liquidators, if they so decide, may pursue the Class 3 Investors in respect of 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 and/or 31 of the Insolvency Act;

126.6.3. the Liquidators, if an 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;

126.6.4. 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.

126.7. In relation to claims by Investors in the Second Scenario:

126.7.1. these Investors may 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;

126.7.2. the Liquidators may be vested with claims against Investors in the Second Scenario based on section 29 or section 30 or section 31of the Insolvency Act, provided that the jurisdictional requirements of those sections are satisfied;

126.8. In dealing with Investor Claims formulated in the Second Scenario:

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126.8.1. 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 and contractually;

126.8.2. 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";

126.8.3. the Liquidators may then, if they so decide, 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 or 31 of the Insolvency Act, provided that the relevant jurisdictional facts are established;

126.8.4. the Liquidators, if and 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.

126.8.5. In relation to those who have earned founders and/or referral bonuses for having established and ensured continuous new investments into the Scheme, without themselves investing anything into the Scheme at all:

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126.8.6. If the Scheme was lawful and that was the bargain that they struck with the Company from day one:

126.8.6.1. then they can lay claim to such bonuses, on a contractual basis, provided that their claims are properly proved in terms of section 44 of the Insolvency Act;

126.8.6.2. the Liquidators may, 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 bonuses to these recipients;

126.8.6.3. however, in the case of individuals who colluded to dispose of the property belonging to MTI in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another, the Liquidators will have claims in terms of section 31 of the Insolvency Act, where the circumstances so permit;

126.8.6.4. Once the Liquidators are successful in procuring the return of such bonuses that they are able to reclaim, then they should, once again, permit these individuals to submit a claim in the estate, save in the event that the Liquidators succeed against such individuals under section 31 of the Insolvency Act;

126.9. If the Scheme was unlawful, then:

126.9.1. these individuals cannot lay claim to any future founders bonuses;

126.9.2. in regard to founders bonuses transferred to these individuals in the past, the Liquidators may once again on a case by case basis, be vested with a cause of action to procure return of founders bonuses that were transferred to these individuals in the past, in in terms of section 26 and/or 31 of the Insolvency Act, when and where the circumstances so permit.

126.10. In relation to individuals that defrauded MTI itself:

126.10.1. they will not have any claims against MTI emanating from such conduct and that the Liquidators are vested with a cause of action against these individuals premised on section 26 and likely also section 31 of the Insolvency Act, to reclaim dispositions to these individuals by the Company.

127. The Liquidators, accordingly, require of this Court to provide them with the necessary guidance on the aforesaid issues, and to in these circumstances issue the Liquidators with the aforesaid directives.

128. In the event that the Court is not inclined to issue the Liquidators with any one or more of the aforesaid directives, then the Liquidators pursue such further and/or alternatively directives as this Court may deem fit in the circumstances of this matter.

[F] URGENCY, THE PROPOSED HEARING AND THE PROVISIONAL ORDER:

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(i) An expedited hearing:

129. We bring this application on an urgent basis.

130. I am advised that:

130.1. the question as to whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in the application in due course; and

130.2. whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case.

131. The Liquidators, and the MTI stakeholders, will not receive adequate substantive redress in respect of this application if we are compelled to prosecute same in the ordinary course of this Honourable Court's motion roll. The facts as set out hereinabove convince in no uncertain terms because, and that we are in urgent need for substantive redress.

132. If this application is only adjudicated upon in the normal course of application proceedings, and if it is unopposed, it will only be adjudicated upon in the fourth term of 2022. If the application is heard in the normal course and on an opposed basis it will equally likely only be adjudicated upon in the second term of 2023.

133. A delay of this nature, within the context of the MTI liquidation proceedings, will be catastrophic for the administration of the estate because the

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uncertainty that prevails upon the Liquidators will effectively stagnate the proceedings.

134. A delayed adjudication of this application in and of itself flies in the face of the substantive relief applied for in pursuance of the application, the basis upon which the court is approached as is set out above and the envisaged steps that are intended to succeed this application.

135. The relief sought – which is in and of itself relief to numerous parties concerned – is required now and not in a year or more from now.

136. The facts considered holistically are clearly evident of a need for urgent redress and that the applicants and the other concerned stakeholders will not receive substantial or adequate redress if this application is adjudicated upon in the normal course of motion proceedings.

137. Ultimately, a delay of a number of weeks or months in relation to this matter and the further conduct of the liquidation and insolvency proceedings cannot be absorbed under the circumstances.

138. The extent of the fraud that underlies MTI is almost beyond comprehension and our investigations have only uncovered the proverbial tip of the iceberg.

139. Those investigations, the substantial resources employed in pursuance thereof and our endeavours to date, will however become of little or no value or consequence if it cannot ultimately sound in money and – most materially – a return for creditors upon the finalisation of the insolvency proceedings and particularly also the action.

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(ii) The Provisional Order:

140. As aforesaid, we will first pursue a Provisional Order, setting out the directives of this Court on the aforesaid identified issues. The Provisional Order that we intend to seek will not be one that is immediately operative, but rather one that would only assume effect and operation once confirmed.

141. Once such a Provisional Order is obtained, it will be published in the manner set out herein below, and pursuant thereto all persons with an interest in the subject matter of the Provisional Order will be afforded an opportunity to participate in this application and the question as to whether the Provisional Order should be confirmed, varied or discharged.

142. There is consequently no enduring harm, if any, occasioned upon any person pursuant to the manner in which this application is being brought by the Liquidators.

[G] NOTICE AND SERVICE OF THIS APPLICATION:

143. Service on the Master will pose no problem.

144. However, service of the Provisional Order on the hundreds of thousands of possible Investors may very well pose a problem.

145. These individuals are the persons whom the Liquidators have identified as possible creditors of MTI, from the records of the company as stored on the MTI database.

146. As pointed out above there are more than 250,000 investors in MTI. Many of these investors are foreigners.

147. We believe that it will be necessary to give notice of the Provisional Order to investors and other creditors of MTI who may have a direct and substantial interest in the Provisional Order being made final and becoming operative.

148. We do not presently know the identities of all the investors. Many investors invested in the name of their dogs or fictitious entities and all we know is what we have on the MTI data base.

149. There is a website operated by the Liquidators where the Provisional Order can and will be published. That website is accessible by all persons interested in and affected by the liquidation of MTI.

150. There are also numerous Whatsapp groups of investors where the Provisional Order can be published. Two specific Whatsapp groups assume particular significance in this regard, being the Get-A-Quid and Recovery Action Groups respectively, which collectively have approximately 15,000 participants.

151. We believe that effective notice of this Application and indeed the Provisional Order can be achieved by way of publication on the MTI website, by e-mail notice to all interested and affected parties [to the extent that we in possession of their e-mail addresses] and by publication on the Whatsapp groups of Investors.

152. We furthermore propose that this entire application, together with the Provisional Order, be made available to all Investors in electronic format

and that investors be advised that they have the right to participate in the proceedings and to place their views before the Honourable Court on the return day of the Provisional Order.

153. In addition to the foresaid, we propose that the Provisional Order also be published in two nationally circulated newspapers.

154. The accompanying notice of motion provides for notice to interested and affected persons, particularly investors, in the aforesaid manner, which we submit is the only meaningful way, the circumstances of this matter, that presents with any prospect of effective notice of this application and the Provisional Order, to ensure that this application is brought to the attention of Investors.

155. We verily believe that service contemplated aforesaid is the most expeditious and effective manner in which the Provisional Order and this application can and should be served.

[H] CONCLUSION:

156. It is submitted that a proper case is made out for such relief to ensue, in the circumstances of this matter.

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 BELLVILLE 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.

COMMISSIONER OF OATHS

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