IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: **13721/2022**

In the matter between:

H BESTER N.O.	First Applicant
A W VAN ROOYEN N.O.	Second Applicant
C J ROOS N.O.	Third Applicant
J F BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
C B S COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of

Mirror Trading (Pty) Ltd (in liquidation))

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

C H MARKS	First Intervening Party
P R BOTHA	Second Intervening Party
THE EDJ INVESTORS	Third Intervening Party
J A FISHER N.O.	Fourth Intervening Party
R N KHARIVHE N.O.	Fifth Intervening Party

(cited in their capacities as the joint trustees of the

Insolvent estate of Cornelius Johannes Steynberg)

This judgment was delivered electronically by circulation to the parties' legal representatives by email on THURSDAY, 9 NOVEMBER 2023.

JUDGMENT

MAHER, AJ

INTRODUCTION

[1] This is the extended return day of an opposed application. The First to Sixth Applicant are cited in their capacities as the joint final liquidators of Mirror Trading International (Pty) Ltd (hereinafter "MTI"). The originally cited sole Respondent is the Master of the High Court, Cape Town.

[2] In terms of an order taken by agreement, and granted by Steyn J on 31 October 2022 the return date of a provisional order, granted on 31 August 2022 was extended to 11 April 2023. The main application was postponed. The order made provision for parties who, as at the date of the order, had applied for leave to intervene to exchange the usual sets of affidavits. The matter was duly set down for hearing on 11 and 12 April 2023.

[3] A total of five parties intervened in these proceedings. The First Intervening Party is C H Marks (The "First Intervening Party" or "Marks"), the Second Intervening Party is P R Botha ("Second Intervening Party"), the Third Intervening Party is a group of investors that refer to themselves as the "EDJ Investors" (and I shall do likewise), the Fourth and Fifth Intervening Party are respectively J A Fisher and R N Kharivhe. The Fourth and Fifth Intervening Parties are cited in their representative capacities as the joint trustees of the insolvent estate of Cornelius Johannes Steynberg. I shall, for the sake of convenience refer to the Fourth and Fifth Intervening Parties collectively as the "Steynberg Trustees".

[4] The Applicant was represented by Mr Terblanche SC, who appeared together with Messrs Lourens and Struwig. The Intervening Parties, in numerical order, were respectively represented by Messrs Alberts, Fürstenberg, Cowley and Smit.

[5] The Respondent, The Master of the High Court, did not participate in the proceedings.

[6] The dispute between the Applicants and the Steynberg Trustees was resolved prior to the hearing as a result of the re-wording of the proposed draft Court Order prepared by the Applicants. The remaining issues, to a greater or lesser extent, remain unresolved, and opposed by the First and Third Intervening Parties.

[7] The Second Intervening Party has withdrawn his opposition. This is recorded in the Second Intervening Party's Practice Note filed on 23 March 2023. The settlement followed upon certain concessions made by the Applicants in their replying affidavit, and the consequential additions and amendments to their proposed draft order, a copy of which was attached to the Applicants' Supplementary Practice Note filed on 10 March 2023.

[8] The Applicants did not object to the intervention of the Second Intervening Party and do not seek a costs order against it. It is also recorded in the Practice Note that the Second Intervening Party had reserved certain rights and these were conveyed to the Applicants. In the circumstances, the Second Intervening Party did not file heads of argument.

BACKGROUND

[9] I consider it unnecessary to deal at great length with the background facts as these are set out in detail in Bester N.O and Others v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI and Others,[1] a judgment by De Wet, AJ in Case Number15426/2021 read with Case Number 19201/2020 (hereafter referred to as "Bester N.O and Others v Mirror Trading International (Pty) Ltd "). It will serve little purpose to regurgitate the lengthy and complex factual matrix as it is redundant in the circumstances. I shall, accordingly, only deal with the salient background facts to contextualise the application, and to set the *mise en scène* necessary for the proper determination of the issues before me.

[10] The Applicants are the liquidators of MTI. MTI was provisionally wound-up on 29 December 2020 and a final order was granted on 30 June 2020. The Applicants issued this application on 17 August 2022 on an urgent and *ex parte* basis. The rule *nisi* issued by Steyn J on 31 did not immediately come into effect, and its operation was suspended. The Applicants duly complied with the requirements of the provisional order, which included directions as to the publication of the rule *nisi*. The return date was 31 October 2022 and this, subsequently, was extended to 11 April

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[1] 15426/2021;19201/2020) [2023] ZAWCHC 83; [2023] 3 All SA 101 (WCC) (26 April 2023).

2023.

[11] Five parties sought to intervene in the application, being the five parties cited herein. There are, effectively, 3 Intervening Parties as the Fourth and Fifth Intervening Parties are cited in their capacities as the joint trustees of the Insolvent estate of Cornelius Johannes Steynberg. The Intervening Parties currently before the Court sought leave to intervene in the main application on 31 October 2022.

[12] The MTI liquidation proceedings are being conducted in terms of the provisions of the Companies Act 61 of 1973 ("the 1973 Companies Act"), the Insolvency Act 24 of 1936 ("the Insolvency Act") and the Companies Act 71 of 2008 ("the Companies Act").

[13] An enquiry into the affairs of MTI was convened, in terms of the provisions of s 417 read with s 418 of the 1973 Companies Act, for the purpose of conducting an investigation into the affairs of MTI. The enquiry was presided over by Judge Fabricius, who was appointed in terms of s 418(1)(a) of the 1973 Companies Act. I shall refer to the enquiry as the "Fabricius Commission". Retired Judge Fabricius issued a total of 4 reports during the course of the enquiry into the affairs of MTI. I shall refer to these reports as the "Fabricius reports".

[14] The findings of the Fabricius Commission and an investigation by the Financial Sector Conduct Authority ("FSCA") were that MTI did not conduct a legitimate business and was established and conducted itself as a fraudulent and unlawful so-called 'Ponzi scheme' and/or a pyramid scheme. The FSCA issued its report on 18 January 2021.

[15] It soon transpired that the liquidation process was going to be a complex process and not a run-of-the-mill winding-up. A number of novel circumstances and issues soon arose that presented the liquidators with difficulties. The liquidators and various of the investors duly sought and obtained legal opinions. These opinions expressed divergent views and the liquidators, notwithstanding their experience and the legal advice they received, have been unable to resolve the issues which arose during the winding-up process, nor could the investors collectively reach an accord with the liquidators.

[16] This impasse is the reason for the Applicants approaching the Court for guidance in terms of s 387(3) of the 1973 Companies Act to obtain directions in relation to the matters that arose during the winding-up process.

[17] The historical backdrop to all of this is that MTI was registered as a private not-for-profit company (NPO) company with limited liability in 2019. It commenced

trading on or about 30 April 2019 and had 2 shareholders, namely Johan Steynberg ("Steynberg") and Clynton Marks ("the First Intervening Party").

[18] MTI initially held itself out to be 'an Internet based crypto-currency club'. It conducted business through a Website. Its official and registered office was located in Stellenbosch, Western Cape. The club members were to benefit by investing in crypto-currency, specifically Bitcoin. The investors Bitcoin investments were purportedly to be 'grown' by way of foreign exchange ("forex") trades, traded via a registered and regulated broker.

[19] The nature of the financial benefits that could accrue to the schemes investors mutated over time, and eventually there were a number of these 'beneficial' categories. The MTI Investment Agreement that constituted the initial investment contract, at the time of MTI's liquidation, purported to provide that the investors' Bitcoin would be 'grown' through forex trading by various registered and regulated brokers. The findings of the Fabricius Enquiry and the FSCA investigation were that the marketing of MTI's business was based on a multi-level marketing ("MLM") or 'pyramid selling' strategy.

[20] In addition to receiving a share of the trading income stream, investors were also purportedly to receive a variety of incentive-based payments for referring new

investors once they became investors, hence the MLM strategy.

[21] The proceeds that an investor could derive from the forex trading profits were regulated by a 'Compensation Plan'. This provided for 5 distinct percentage based income streams, viz. a 40% Members Daily Trading Bonus, a 10% Direct Once-Off Referral Bonus, a 20% Weekly Profit-Sharing Bonus a 2.5% P1 Leadership Bonus and a 2.5% P2 Leadership Bonus.

[22] A number of representations were made to investors and potential investors to lure prospective investors which representations are not relevant for present purposes, save to note that Bitcoin was a common and central feature in these representations. At one stage, MTI represented that it was able to produce positive trading results trading Bitcoin on a daily basis by utilising a unique code compiled by Steynberg, a so-called "bot".[2]

[23] The conduct of the business, which took place over a substantial period of time, is fairly convoluted and complex. However, it is unnecessary to traverse this detail for present purposes. Suffice it to say that members of the public were enticed into investing in the scheme by registering on MTI's Website on the premise

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[2] Essentially, a software application programmed to automatically do tasks based on certain instructions without human intervention.

that their investments would yield returns of 0.5% per day and as much as 10% per month or more. The scheme conducted by MTI was advertised as an opportunity to "grow your Bitcoin", hence its central importance in this application.

[24] The gravamen of the Applicants' factual matrix is that MTI's business was at all material times fraudulent and unlawful. During its investigation into the affairs of MTI, the FSCA kept a record of transactions between MTI and each of its investors. This record was saved on a database hosted by Maxtra Technologies in India. The database included information and details of each investor's Bitcoin deposits in the scheme. The relevant details and information obtained from the MTI database were obtained by TCG Digital Forensics CC, who also compiled a report.

[25] The FSCA, in its report released on 18 January 2021, concluded that MTI's business was unlawful and that MTI operated a massive fraudulent and unlawful investment scheme in disregard of financial sector laws, conducted an illegal and unregistered financial services business in contravention of, *inter alia*, section 7 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act").

[26] It also emerged at the Fabricius Commission and during the FSCA investigation that the funds purportedly invested were misappropriated. The Fabricius reports leave no doubt that the business activities and practices of MTI were fraudulent and

unlawful for several reasons that need not be elucidated here.

[27] The gravamen of the findings were that MTI, notwithstanding its marketing material, was not an Internet-based crypto-currency club that carried on business for the benefit of its investors by growing the value of the assets invested by way of Forex trades using Bitcoin. Both by FSCA and the Fabricius Commission found that virtually no trading was carried out by MTI. MTI, according to their findings, was, in fact, fraudulently used by Steynberg and his accomplices to defraud the public and the investors and to misappropriate the investors' Bitcoin.

[28] In summary form, the reality is that it was nothing more than a fraudulent scheme. The Fabricius Commission's report includes a finding that the investment contracts were void and in conflict with various laws and that as a consequence the dispositions made by MTI to persons, including investors, constituted impeachable transactions under the Insolvency Act. These findings are consonant with the findings established by the liquidators via their own investigations into the manner in which MTI operated.

[29] In the light of the findings in Bester N.O and Others v Mirror Trading International (Pty) Ltd, a judgment delivered subsequent to the hearing, it is unnecessary for me delve into further details. The Court, per De Wet, AJ, as pointed

out earlier, found that the business model of MTI was illegal and unlawful and that all agreements concluded between MTI and its investors in respect of the trading, management/investment of Bitcoin were declared to be unlawful and *void ab initio*.

[30] As a consequence of the fraudulent scheme, MTI incurred significant liabilities to thousands of investors, which it was unable to pay. A large number of Bitcoin cannot be accounted for. As MTI was unable to pay investors, who sought to withdraw their Bítcoin balances, MTI was wound-up in December 2020. At the date of its liquidation there was a shortfall of no less than 6 900 Bitcoin. A total of 1281 Bitcoin were recovered by the liquidators. The current value of the unaccounted for Bitcoin is approximately R2, 789,787,300.00.

[31] When the FSCA initiated its investigation into the affairs of MTI, MTI transferred all its Bitcoin in the trading pool from FX Choice, apparently its appointed trader at the time, to a different trading platform known as 'Trade 300' which was not a licensed Forex trader. Matters then spiralled out of control and became increasingly complicated and divorced from reality. This convoluted 'death spiral' need not be detailed here and forms the subject matter of ongoing investigation and litigation. It is only necessary to record that the final inevitable demise of MTI followed.

RELIEF SOUGHT AND NATURE OF THE APPLICATION

[32] In essence the application is to obtain directives from this Court in terms of s 387 of the 1973 Companies Act to enable the liquidators to know how to proceed with the winding-up of MTI. One of the directives sought is as to how the liquidators should treat the recovered Bitcoin, which constitute the major asset in the insolvent estate.

[33] The directives sought relate, *inter alia*, to the classification of Bitcoin and how it should be treated in the estate of the liquidated company, how different classes of investors should be classified, how claims against the estate should be prepared and treated, and finally what approach should be taken by the liquidators in respect of claims by the estate against the investors.

[34] It is important to note at the outset that the Applicants seek only directives and not declarative relief in any manner or form. This is an important distinction as the nature of the relief sought by the Applicants appears to be misconstrued by some of the intervening parties and this misconception is the motivating force behind their intervention. It should be noted that the intervening parties make up a tiny minority of the total investors in the scheme.

[35] As indicated earlier, the proceedings were initiated by way of seeking an interim order. The relevant[3] relief sought, in its original form and as set out in the Notice of Motion, is the following:

> *"2. That the applicants be permitted to prosecute this application on an ex parte basis.*
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> *3. That a rule nisi ("the provisional order") in the following terms be granted:*
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> *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] Prayer 1 is excluded as it was simply to seek leave to have the matter dealt with on an urgent basis and was couched in the usual terms. I have also excluded the prayers dealing with service and notification as they are irrelevant for present purposed.

3.2.1 The first class of investors are those individual 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 participants 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 Class1 Investors:

3.4.1.1 Class1 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 Investors' 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 sections 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/or31 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 re-vested 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 re-vested 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 Honourable Court, as to why the provisional order, or any part thereof,

should not be made final.

6. ....

....

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."

[36] Pursuant to the issue of the rule *nisi*, the Applicants filed numerous affidavits by Herman Bester N.O. Craig Lionel Pedersen, Adriaan Willem Van Rooyen, Christopher James Roos, Jacolien Frieda Barnard, Deidre Basson and Chavonnes Badenhorst St Clair Cooper in support of their application. As is apparent from the background details, several parties intervened after the rule *nisi* was published and voluminous opposing papers were filed by the intervening parties. As a result the

record consists of almost 2000 pages.

[37] One of the reasons for the Applicants seeking directions is so that they can adopt a uniform approach in respect of the claims against the liquidated estate by the various investors. It is apparent that there are wide-ranging disputes between the investors, classes of investors and individual investors.

[38] I am satisfied that as the parties were unable to resolve their differences and the Master of the High Court declined to provide directions, the Applicants' have made out a proper case to approach this Court for directives to enable the liquidators of MTI to deal with the various claims lodged against MTI's insolvent estate.[4]

[39] Directives are necessary in respect of how the liquidators should treat Bitcoin in the administration of the estate, the approach to be adopted in respect of the treatment of claims by each of the separate classes of investors and the manner in which the claims, in terms of the Insolvency Act 24 1936, by the liquidators against what are labelled the Class 2 and Class 3 investors, should be dealt with by them.

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[4] Section 387(3) of the Companies Act provides that, "Where the Master has refused to give directions as aforesaid or in regard to any other particular matters arising under the winding-up, the liquidator may apply to the Court for directions."

[40] It is important to re-iterate that relief sought will not impact on the litigation currently pending between the liquidators and various parties, who received dispositions from MTI, nor the litigation between the liquidators and parties who were involved in MTI, such as the First Intervening Party, Marks.

[41] The nature of the relief sought is not dispositive of the extant dispute(s) between the liquidators and the Steinberg Trustees in respect of the ownership of Bitcoin that the liquidators received from FX Choice. This much should be stating the obvious but it appears to be a central concern to the Intervening Parties.

[42] Only the First Intervening Party, Marks and the Third Intervening Party, EDJ Investors, oppose the current application, notwithstanding that there were thousands of investors who invested in the scheme.

[43] The EDJ investors filed opposing affidavits and also seek the dismissal of the application, albeit they do so on limited grounds. The Steynberg Trustees, on the other hand, do not seek that the application be dismissed. The Trustees only sought a qualification of the wording of subparagraph 2.1 of the provisional order. The Applicants were amenable to the amendment sought by the Steynberg Trustees and effected the necessary amendments to the satisfaction of the Trustees.

[44] The First Intervening Party, Marks holds a 50% shareholding in MTI. He was its *de facto* director and, so it is alleged, was personally involved in what may amount to fraudulent and/or reckless business practices committed by MTI and the Second Intervening Party, Botha.

NATURE OF THE RELIEF SOUGHT BY WAY OF DIRECTIVES

[45] The first directive sought by the Applicants is the classification of Bitcoin. Their proposal is that Bitcoin in the insolvent estate of MTI should be classified as intangible assets that fall within the definition of "property", as defined in s 2 of the Insolvency Act.

[46] The Applicants' draft order, in its amended form, makes it clear that there is no judicial pronouncement or 'judgment' as regards ownership of the Bitcoin which the Applicant's received from FX Choice. Furthermore, the order is sought in terms that all Bitcoin is to be regarded as intangible assets that constitute property. This would include Bitcoin received from investors and Bitcoin re-transferred to investors, and any Bitcoin that is subject to claims by the liquidators against the recipients of dispositions in terms of ss 26 to 31 of the Insolvency Act. This relief is only opposed by the First Intervening Party.

[47] The second directive relates to the claims by the different classes of investors i.e. Class 1, 2 and 3 investors as set out and described earlier.[5] The Class 1 investors received no returns, the Class 2 investors did receive returns, albeit less than what they invested and the Class 3 investors profited from the scheme and received more than they invested.

[48] The directives sought in respect of the Class 1 investors is less complex than in respect of the Class 2 and Class 3 investors. The Applicants, nonetheless, regard a directive as being of importance for the purpose of quantifying the claims by the claims of the Class 1 investors in the winding-up of the estate of MTI. The directive in respect of the Class 1 investors appears to be uncontentious.

[49] The Third Intervening party, EDJ investors, dispute the correctness or appropriate of the proposals put forward by the Applicants as to how these 3 classes of investors' claims should be treated.

[50] The third directive sought relates to the Class 2 investors. Guidance as to the initial quantification of this class of investors is the same as that sought in respect of the Class 1 investors. The Applicants also seek guidance on the proper approach

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[5] In paragraph 35, *supra*, dealing with the content of the Notice of Motion in its original form and specifically sub-paragraphs 3.2.1 to 3.2.3 thereof.

to apply in respect of the returns to the Class 2 investors in quantifying their claims as against the estate of MTI.

[51] The EDJ investors and the Applicants hold different views as regards the form of the directives sought by the Applicants.

[52] The fourth directive relates to the Class 3 investors who profited from the scheme. The First, Second, Fourth and Fifth Intervening Parties are all Class 3 investors, who overall benefited from their investments in the scheme.

[53] The fifth directive sought is whether claims should be submitted for the number of Bitcoin invested in the scheme or the Rand value of the investments. This directive will effect all the investors in the scheme.

[54] The sixth category of directives sought will only apply if a Court ultimately determines that the investment agreements concluded between MTI and the investors are not void *ab initio*. At the stage when these six category of directives were sought, a Court had yet to pronounce whether the investment agreements were *void ab initio* or not and the application had been argued and judgment thereon reserved.[6] This has changed and, as already pointed out on several occasions,

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[6] Although the Fabricius Commission and the FSCA had made such a finding.

judgment was handed down in Case Numbers 1546/2021 read with 19201/2020 *sub nom* Bester N.O and Others v Mirror Trading International (Pty) Ltd on 26 April 2023. The Court, per De Wet, AJ held that all the agreements concluded between MTI and its investors were unlawful and void *ab initio*.

[55] While it is, therefore, strictly speaking not necessary to provide guidance in respect of the sixth category, I shall nonetheless deal with it and make provision for the possibility of this scenario coming to pass in the order as, ultimately, a Court, albeit unlikely, may hold that the investment agreements are not void *ab initio*. It, therefore, seems prudent to not exclude the directive based on this scenario merely because a Court of first instance has adjudged the agreements to be void *ab initio*. It is beyond the scope of the present enquiry to even venture into this territory and I refrain from doing so, save to point out that it is an unlikely event.

[56] None of the Intervening Parties have, in any event. taken issue with the directives sought in this regard.

[57] The seventh category of directives sought relate to persons who defrauded MTI. There appears to be no opposition to the inclusion and phrasing of the proposed directive sought in respect of this last category by any Intervening Party.

[58] I now turn to deal with the opposition to the directives sought by the Applicants.

GROUNDS OF OPPOSITION BY FIRST INTERVENING PARTY

[59] The First Intervening Party, Marks, raised several objections, one of which was that this Court lacks jurisdiction to hear the matter.

LACK OF JURISDICTION

[60] The contention by Marks that this Court has no jurisdiction to hear the matter is readily disposed of as it has no merit. Section 387(3) of the 1973 Companies Act provides, in express terms, that where the Master of the High Court has refused to give directions (which is common cause is the case) arising under the winding-up, application may be made to "the court" by the liquidators for directions as to how to proceed. The provisional and final winding-up orders in respect of MTI were granted in this Division of the High Court and it follows that this is "the Court" that has the necessary jurisdiction to give directions.[7]

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[7] Henochsberg, op cit Vol 2, APPI-200(1); See also: the definition of "court' in section 1 of the Companies Act.

[61] The registered address of MTI is also within the area of jurisdiction of this Division of the High Court. It is situated at 43 Plein Street, Unit 1, Ground Floor, Stellenbosch, Western Cape, which is an additional ground to establish jurisdiction.

[62] For reasons which follow, I am also of the view that cryptocurrencies such as Bitcoin is a movable intangible asset. Bitcoin is an asset with no link to any particular place, and its situs must accordingly follow the domicile of a person, usually this would be the owner. Bitcoin cannot have a location being incorporeal and digital, located as it were in 'cyberspace'. It must also be borne in mind that Bitcoin is essentially a blockchain i.e. record of transactions maintained across computers that are linked in a peer-to-peer network located anywhere in the world.

[63] As Bitcoin is a movable asset with no specific or identifiable location it must follow the domicile of the owner of the asset as no other party is involved.
This led to a specific amendment to the regulation to include intellectual property in the definition of "capital". However, it appears incorrect to categorize a crypto asset as immovable, as we know that unlike a share register or a trademark register, a crypto asset's record of ownership exists in the blockchain, which does not have a physical location. Ergo, the Bitcoin must be regarded as situated within the jurisdiction of this Court as it is deemed to be located at the registered address of the owner, MTI.

[64] As this Court is clearly vested with jurisdiction on more than one ground it has the necessary jurisdiction to hear this application, and the objection as to a lack of jurisdiction has no merit.

REMAINING GROUNDS OF OPPOSITION

[65] The First Intervening Party objects to the content of prayer 1 of the proposed draft order that Bitcoin should be treated as an intangible asset that is "property" as defined in s 2 of the Insolvency Act. The objection is that the effect of prayer 1, if it is made an order of court, will render ineffective one of his primary legal defences apropos his involvement in MTI and disagreement that it was a "Ponzi scheme".[8] The argument posited is that if a directive is granted that Bitcoin *should be treated as intangible assets and regarded as property for the purposes of the winding-up* cannot, in my judgment, conceivably impact adversely on any defence or avenue of attack he may choose to raise in any legal proceedings. It is simply not so that a directive will render moot any position or view held contrary to the terms

[8] A Ponzi scheme, so named after Italian businessman Charles Ponzi, is a form of fraud where investors are lured into an 'investment' scheme, usually with promises of unrealistic returns and pays profits to earlier investors with funds from subsequent investors. This deception of 'robbing Peter to pay Paul' is what misleads investors by either falsely suggesting that profits are derived from legitimate business activities when there are no such legitimate business, or by exaggerating the extent and profitability of the legitimate business activities, thereby enticing new investments to fabricate or supplement these alleged profits.

of a directive issued for the purpose of ensuring the effective and orderly winding-up of MTI.

[66] I am of the view that there is no merit to the Mark's contentions as that will not be the effect of prayer 1. The classification is simply to enable the liquidators to know how to deal with the Bitcoin in winding-up the insolvent estate. The relief sought is in the form of a directive.[9] It is neither a finding, nor dispositive of the classification of Bitcoin and whether or not it is to be regarded as "property" in terms of the Insolvency Act.

[67] The importance of a finding that Bitcoin is not "property" as defined in the Insolvency Act is that ss 26, 29 a 30 of the Insolvency Act would then find no application.[10] The proposed directive is not determinative of this issue at all. In the event that the liquidators invoke ss 26, 29 and 30 it will be open to any party to oppose the relief sought on the basis that these sections find no application and it will be for the Courts seized with such applications to make findings in this regard. The directive is, at best, a neutral consideration and, in my view, falls short of even

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[9] In order to avoid repetition and unnecessarily burdening what is already a lengthy judgment, I shall deal with this aspect in detail below as it is relevant in respect of all the objections raised by the Intervening Parties.

[10] These provisions respectively deal with voidable preferences, undue preference to creditors and collusive dealings for sequestration.

this.

[68] The First Intervening Party oppose the relief sought in prayer 3.1 of the Notice of Motion[11] and contends that the classification of Bitcoin and whether it is property as defined in the Insolvency Act should not be determined by way of seeking a declaratory order. This objection, again, is premised on the incorrect assumption that the Applicants seek declaratory orders. As I shall demonstrate later, this is based on a misconception of the foundational statutory provision relied upon by the Applicants in bringing this application. The First Intervening Party misconstrues the legal nature of directions or directives that a Court may give in terms of s 387(3) of the 1973 Companies Act.

[69] As regards the relief sought in prayer 3.2, the contention is that this forms part of the dispute between the liquidators and various other interested parties under Case Number 15426/2021. The objection is thus a plea of *lis pendens*. It is unnecessary to consider this objection as, at the time this matter was argued, the objection may have had merit (a point I am no longer required to decide) as judgment in Case Number 15426/2021 was reserved. The judgment, Bester N.O and Others v Mirror Trading International (Pty) Ltd, has since been delivered and it was handed down on 26 April 2023, and *cadit quaestio* as there is no pending *lis*.

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[11] The relief sought in the Notice of Motion is set out in paragraph 35, *supra*.

[70] It follows that this ground of objection is rendered moot by the delivery of the judgment.

[71] I shall deal with the classification is due course and in doing so will provide additional grounds and reasons as to why the objections cannot be upheld.

GROUNDS OF OPPOSITION RAISED BY THE THIRD INTERVENING PARTY: EDJ INVESTORS

[72] The Third Intervening Party persist with their opposition to the application and specifically oppose the relief sought in respect of the Class 1 and 2 investors that a) the value of the Class 1 investors' investments in the scheme should be calculated in South African Rand and b) be determined on the date of investment and that the value of Class 2 investors' investment in the scheme should be calculated on the date of investment.

[73] The EDJ Investors are classified into 3 Classes and they variously object to certain of the relief sought by the Applicants on the following paraphrased bases:

1. *The application is premature as there is yet to be a determination in Case*

Number 1546/2021 as to whether the MTI scheme is an unlawful pyramid scheme.

2. *The terms of the order 'intends' to limit their claims in the insolvent estate to liquidated claims only.*

3. *The Class 1 investors object to prayer 2.4.1.2,1 and its proposal to calculate the claims of the Class 1 investors "in Rand value, as at the date upon which the relevant investor(s) made the relevant investment in the Scheme"; and*

4. *The Class 2 investors object to:*

   4.1 *Prayer 2.4.2.4 and the proposal that the claims of the Class 2 investors should be calculated in Rand value, as at the date of investment; and*

   4.2 *prayers 2.4.2.7 to 2.4.2.10, as they provide that even though "Returns" received by the Class 2 investors must be deducted from their claims, the Applicants reserve a right to claim the repayment of the Returns from the Class 2 investors, as voidable or undue*

preferences, as contemplated in ss 29 and 30 of the Insolvency Act 24 of 1936 ("the Insolvency Act"). The Class 2 investors allege this is objectionable and inherently unfair as if this is allowed they would have to deduct the Returns from their claim and pay it back.

AD THE FIRST OBJECTION

[74] The first objection raised by the EDJ Investors, namely that this application is premature as no determination has been made in the pending case, Case Number 1546/2021, as to the unlawfulness or otherwise of MTI and whether it is a pyramid scheme is again readily disposed of. As indicated variously, judgment[12] in the matter was handed down by De Wet, AJ on 26 April 2023. De Wet, AJ issued the following order:[13]

"1. The business model of Merit Trading International (Pty) Ltd (in liquidation) ("MTI") is declared to be an illegal and unlawful scheme.

2. All agreements concluded between MTI and its investors in respect of the trading/management/investment of bitcoin for the purported benefit

[12] Bester N.O and Others v Mirror Trading International (Pty) Ltd.

[13] I have only quoted the relevant portions of the Order.

of investors, are declared unlawful and void ab initio."

AD THE SECOND OBJECTION

[75] The objection is that the terms of the order 'intends' to limit their claims in the insolvent estate to liquidated claims only. This objection is also premised on a misinterpretation of the relief sought and the form thereof. I, once again, to avoid repetition shall deal with this aspect in due course.

AD THE THIRD OBJECTION

[76] The commonality between the Class 1 and 2 investors is that they suffered a net loss by investing in the scheme. The Class 3 investors are the only ones who financially benefited from the scheme.

[77] The EDJ Investors, so it was argued by Mr Cowley, are entitled to the return of the Bitcoin which they re-invested or invested depending how you phrase it, and not the value thereof. He gave the examples of non-monetary assets such as motor vehicles and a farm tractor *et cetera* and relied on this to argue that such investors were entitled to the return of items and not their monetary value. It is only if the assets no longer exist that a claim is submitted for its value.

[78] This argument is premised on the fact that the Bitcoin can be identified and linked to a specific 'owner' when there was, so everyone was led to believe an 'investment pool' that was actively traded. Secondly, most of the Bitcoin is unaccounted for an therefore no longer exists. It is open to an investor to claim specific ownership should they choose to do so, but the issue may then have to be litigated. Thirdly, the scheme was fraudulent and there was no Bitcoin-based investment scheme. Fourthly, the agreements were void *ab initio* before any fiat currency i.e. Rands were 'converted' into Bitcoin.

[79] The argument is also premised on what was described as a "declaration" issued on 19 October 2022 by the FSCA that crypto-assets should be deemed to be assets comprising a "digital representation of value". The submission was that this definition should be followed as it is authoritative, having been made by the designated authority on the regulation and conduct of financial matters. The final part of the submission was that, following on this definition by the FSCA, Bitcoin did not constitute property as defined in the Insolvency Act based on the FSCA's deeming Bitcoin to be merely a "digital representation of value".

[80] The objection was, accordingly, that the relief sought in prayer 3.1 is in conflict with a Notice issued by the FSCA in terms of the FAIS Act. In the Notice,

which also declares cryptocurrency to be a financial product, crypto asset is defined as follows:

"'Crypto asset' means a digital representation of value that -

(a) is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility;

(b) applies cryptographic techniques; and

(c) uses distributed ledger technology."[14]

[81] The first observation is that parts (a) and (b) of the definition essential describe an intangible property. A cryptocurrency is also described as an "asset". An asset is axiomatically property of some sort. If anything, my interpretation on the plain meaning of the words is that the FSCA's Notice defines cryptocurrencies as movable, intangible property (movable because of the nature of Blockchain and Bitcoin not being located in a physical place). The Notice is also compatible with media releases issued by SARS. By way of example, on 6 April 2018 SARS issued

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[14] See: Government Gazette Notice 1350 dated 19 October 2022.

a media release that deals with the fiscus's stance on the tax treatment of cryptocurrencies and reads thus:

> *"SARS will continue to apply normal Income Tax rules on Cryptocurrencies and will expect affected taxpayers to declare Cryptocurrency gains or losses as part of their taxable income...SARS for Income Tax purposes classifies Cryptocurrencies* ***as assets of an intangible nature****. Whilst not constituting cash, Cryptocurrencies can be valued to ascertain an amount received or accrued as envisaged in the definition of "gross income" in the Act. Following normal income tax rules, income received or accrued from Cryptocurrency transactions can be taxed on revenue account under "gross income". Alternatively, such gains may be regarded as capital in nature as spelt out in the Eighth Schedule of the Income Tax Act for Taxation under Capital Gains."*
>
> (My emphasis)

[82] From the above it is apparent that the existing tax laws on 'normal' tax apply to cryptocurrencies in South Africa.

DATE OF DETERMINATION INVESTMENT OR DATE OF CONCURSUS

[83] The argument or objection continues along the lines that if the Bitcoin could

not be recovered and returned then the value of the Bitcoin should be assessed as at the date of the *concursus*. It was, however, conceded that if this were to be applied, then the returns received by the Class 2 and 3 Investors should be taken into account. The argument continued that fairness dictates that to avoid the anomalies arising from these classes of investors having to account for the return on their investment, the date of assessing their loss should be the date of the *concursus*.

[84] The unfairness, it was argued, was that the result would otherwise be that the Class 2 and 3 investors would be required to pay back in full what they received and then so-to-speak stand in the queue and only receive payment of a dividend down the line. In this regard, the objection was that the proposed draft order resulted in unfairness. I am not sure on what basis this can be construed as unfair as this is the manner in which all creditors are treated in insolvency in similar circumstances. There is an accounting, a pooling and a distribution, and far from being unfair, the result is that save for the exceptions, the ordinary creditors are treated equally and as fairly as the circumstances allow. There are, after all, only losses suffered by creditors in any liquidation or sequestration.

[85] The Class 1 investors object to their claims being translated into a Rand value that is determined on the date of their investment in the Scheme.

[86] However, as Bitcoin is a cryptocurrency i.e. a form of digital money which is not a physical substance and has no physical attributes, its value clearly has to be and should be determined in the form of a fiat currency. The sole purpose of a cryptocurrency is, after all, for the exchange of value, and cryptocurrencies, which includes Bitcoin, have limited functionality, if any, beyond that. The obvious currency to determine the value of Bitcoin in the insolvent estate is in South African Rands. All these investors concede that Bitcoin is 'property' and has value, albeit that it is not accepted that it is property that falls within the definition of s 2 of the Insolvency Act.

[87] The EDJ Investors contend that the date on which the claim for Bitcoin deposited with MTI should be quantified on the date of the liquidation i.e. on the date of the *concursus*, being 23 December 2020. They, accordingly disagree with the Applicants' contention that the valuation of the Bitcoin should be determined as at the date of investment.

[88] In my view, as the agreements were void *ab initio* and the scheme illegal, the date of valuation should indeed be the date of investment. This is also in line with the Insolvency Act and its provisions and the whole notion underpinning the statutory establishment of a *concursus*.

[89] Moreover, as was pointed out by the Applicants in their supplementary heads of argument and in argument, to determine the value as at the date of *concursus* results in a number of anomalies and unequal treatment of the creditors of the insolvent estate.

[90] To my mind it is untenable that the quantification of the creditors claims can be subjected to the vagaries of the market and turn on the establishment of a value by way of what effectively is a lottery based on the market value of Bitcoin on any given day. The investors chose to invest on a specific date and that was a deliberate choice. They could immediately have reclaimed their investment as the agreements were void *ab initio*. The correct approach is to give effect to the law. The fallacy in the EDJ Investors argument immediately becomes apparent if the value of Bitcoin on the date a particular investor happened to invest was higher than at the date of the *concursus* the contrary argument doubtless would be put forward. A pragmatic, workable and fair approach is appropriate and that, in my judgment, on the facts of this matter, would mean that the date to determine value is to use the actual date of investment as that is the amount the investor actually parted with and intended to 'invest'. This is the way to ensure that the general body of creditors is taken into consideration and not the individual investor's considerations.

[91] In Walker v Syfret[15] Innes CJ articulated the basic foundational principle in the law of insolvency, saying the following:

> *"The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtor's rights are vested in the Master or the trustee from moment insolvency commences. The sequestration order crystallises insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."*

[92] The principle aim and purpose is to facilitate a collective debt collecting procedure that ensures fairness and an orderly distribution of the debtor's assets to its creditors where it is insolvent in the form a distribution of a dividend. Upon the liquidation of a company by a Court, a *concursus creditorum* is established, retrospectively to the date upon which the application for its liquidation was

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[15] 1911 AD 141 at 166.

presented.[16] Each investor had a claim against MTI on the date of investment as the investment agreements were void *ab initio* and all the *concursus* does is lay the hand of the law on the estate at that point so that claims may be submitted to the insolvent estate for consideration. The claim then arises as against the insolvent estate not MTI as it is in liquidation. The value of the claim cannot be conflated with the date the claim lies against the insolvent estate.

[93] The *concursus creditorum* is conceptually premised on giving preference to the rights of creditors as a group and not to prefer or advance the rights of individual creditors. It follows axiomatically that unfairness and a notion of 'winners' and 'losers' is anathema to the very concept and legal structures and procedures put in place to ensure an orderly winding-up procedure. As a consequence of the *concursus creditorum* and the rights of every creditor being accounted for, there are only 'losers' but these losses are shared on an equitable basis.

[94] As regards the position they adopt that they should not be limited to claiming under the *condictio* but should also be allowed to seek damages. If it should transpire that the investment scheme is legitimate at some future date (at present the opposite applies in light of the findings by De Wet, AJ), then these 'investors'

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[16] In terms of s 348 of the 1973 Companies Act. See, also: Rennie v SA Sea Products Ltd, 1986 (2) SA 138 (C); Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd, 1988 (2) SA 546 (A) at 566.

are covered in this regard in light of the terms of the proposed draft order. As was pointed out by Mr Terblanche for the Applicants, if these investors wish to claim in delict or enrichment, it is open for them to do so and the relief sought by the Applicants places no restrictions on damages being sought in delict should any party wish to institute proceedings on this basis.

[95] It is for the above reasons that the objections raised by the Class 2 investors also cannot be accepted.

REMAINING ISSUES FOR DETERMINATION

THE NATURE AND LEGAL CLASSIFICATION OF BITCOIN

[96] The first issue in respect of which directions were sought was how the liquidators should treat Bitcoin. The Applicants' view is that Bitcoin should be treated as intangible assets in the estate of MTI that constitute "property" as defined in s 2 of the Insolvency Act.

[97] I shall first deal with the classification of Bitcoin and then the issue as to whether it constitutes 'property' as defined in s 2 of the Insolvency Act. I shall then conclude with a general commentary apropos the objections raised by the Intervening Parties which considerations apply across the board to their objections and to which I have alluded to earlier in the judgment.

THE NATURE AND CLASSIFICATION OF BITCOIN

[98] Cryptocurrencies, such as Bitcoin, are digital currencies generated by cryptographic algorithms. These virtual currencies can be defined as decentralised peer-to peer payment systems that are a digital representation of value and which is capable of being transferred, stored and traded in an electronic form.

[99] The Oxford English Dictionary defines 'cryptocurrency' as '*a digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank*.'

[100] In essence, cryptocurrency is notionally nothing but a limited entry on an electronic database that is unalterable to ensure it is secure, it can only be altered if specific conditions are fulfilled. A cryptocurrency, including Bitcoin has no physical attributes, being entirely digital and made up of strings of bits that make up bytes constituting electronic 'data in a binary form' with a specific function and purpose.

[101] Cryptocurrency is not, however, akin to electronic instances of cash, such as on online bank account held with a consumer bank that is linked to a

physical fiat currency. An online bank account only displays an amount in a fiat currency that is held in a specified bank account. By contrast, cryptocurrency refers to a form of exchange that only exists digitally and is not linked to any physical or fiat currency.

[102] It is thus apparent that Bitcoin is not a fiat currency and not money as traditionally understood. Its intended purpose is, nonetheless, to create an alternative to traditional money, free of regulation and any form of intervention by, for example, a central bank, in the form of cryptocurrency that is readily tradeable and usable as commercial currency that is also secured. In my view, the closest analogy to Bitcoin is money, albeit that it does not have a physical form. It has most of the other traditional characteristics of money and 'money' is frequently used in a non-physical form, such as credit card payments, EFT payments etc where no physical money is ever used an electronic 'ledger' entries are effected to reflect the account balance.

[103] It so happens that SARS uses the phrase 'assets of an intangible nature' to categorize Cryptocurrencies when it comes to taxation of these currencies. Cryptocurrencies are, not however, accepted as official South African tender.

[104] It is by now trite law that intangible property generally includes assets

located in an account, monies, and items which are not physical. It is, however, a common misconception that since money is physical, it is a tangible asset.

[105] Cryptocurrencies, including Bitcoin are a form of digital money and they have no physical substance, but unarguably it has value notwithstanding that Bitcoin only consists of what is known as Blockchain, essentially an immutable 'electronic ledger' with transactions involving Bitcoin being maintained across computers that are linked in a peer-to-peer network.

[106] In Ruscoe v Cryptopia Ltd (in Liquidation)[17] the New Zealand High Court relied on Lord Wilberforce's opinion in the House of Lords in the English case of National Provincial Bank Ltd v Ainsworth,[18] where he said:

> *"Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."*

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[17] [2020] NZHC 728.

[18] [1965] AC 1175 (HL) at 1247–1248.

[107] There are all aspects or characteristics that may be attributed to digital assets which would include cryptocurrencies, digitised audio-books, films and music that resemble corporeal moveable property, tangibility or intangibility generally determines whether property is to be regarded as corporeal or incorporeal and intangible property can best be equated to incorporeal property in South African law. Digital assets can therefore be identified under the category of incorporeal moveable property.

[108] An owner of Bitcoin has rights pertaining to this form of property, it is well-defined and understood as an asset, can readily be transferred or used as it has value and exists permanently in an immutable digital form in the form of a Blockchain. Bitcoin, accordingly, satisfies each of the categories listed by Lord Wilberforce.

[109] In light of the above, the most appropriate classification of Bitcoin is as a movable intangible asset.

IS BITCOIN PROPERTY AS DEFINED BY SECTION 2 OF THE INSOLVENCY ACT?

[110] To answer this question it is of assistance to work somewhat backwards

and first look at what the Insolvency Act provides in respect of voidable dispositions.

[111] The predominant purpose of s 341(2) of the Insolvency Act is to decree that all dispositions made by a company being wound-up are void. This provision must of course be read with s 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court.

[112] De Villiers CJ[19] said that the effect of a winding-up order, 'is to establish a *concursus creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors'. In the same case, Innes JA succinctly stated the legal position as follows (at 166):

> *'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed*

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[19] Walker v Syfret NO 1911 AD 141 at 160

at the issue of the order."[20]

[113] The intention of the Legislature is clear and the wording and ambit of s 341(2) of the Act is unambiguous and wide-ranging in the light of the extensive and all-encompassing definition of 'disposition', *supra*, and the use of the pre-modifier "all" in the section itself i.e. "all" dispositions are included and all rights, obligations and relationships are frozen or crystallised and immutable, thereby establishing the *concursus*.

[114] In Pride Milling Company (Pty) Ltd v Bekker NO and Another[21] the SCA put it thus:

> *"The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law i.e. the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from*

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[20] Pride Milling Company (Pty) Ltd v Bekker NO and Another (393/2020) [2021] ZASCA 127; [2021] 4 All SA 696 (SCA) at para 13

[21] [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA) at para 30

dissipating its assets and thereby frustrating the claims of its creditors."

[115] "Disposition" has the meaning assigned to it by s 2 of the Insolvency Act and means *'any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the Court' and "dispose" has a corresponding meaning.'* [22]

[116] Section 2 of the Insolvency Act, in turn, defines property as follows:

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

[117] It follows from the above that when the concepts of "disposition" and "property" are considered in conjunction, it is apparent from the plain meaning of the words that the concept of what constitutes property is couched in the broadest of terms. It could be said to be all embracing and all-encompassing in its scope and ambit.

[118] In my judgment, Bitcoin is clearly an asset or property as it is a

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[22] See: Henochsburg on the Companies Act, 5th Ed. Vol. 1 p 679.

cryptocurrency that is used for the buying or selling or the delivery of goods or services. A value can be had attached to it and is attached to it. There is no justification I can think of to construe Bitcoin as not constituting property as generally understood, nor as falling within the definition of 'property' on a proper and purposive interpretation of the Insolvency Act. When regard is had to definitions, conceptual notions, various opinions, including those of SARS, I can see no reason why in the case of insolvency, where a trustee steps into the shoes of the debtor and acquires the right to dispose of the latter's assets in order to satisfy the claims of creditors, this would not include Bitcoin as an asset or 'property' which, clearly, at the very least is movable property that has value or readily can have a value attributed to it.

[119] In W H Lategan v Commissioner for Inland Revenue,[23] the Court held that an amount does not need only to include money in the form of hard cash, "*but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a money value*".

[120] The very term incorporeal itself implies an intangible asset such as a right. And if one were to look for an example of an incorporeal form of property on a conspectus of the above, Bitcoin undoubtedly would serve as a classic and clear

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[23] (1926) CPD 203.

example as it exists only on the Internet and attracts ownership rights that can and are valued as an amount in a fiat currency. Therefore, intangible assets such as Bitcoin attract rights *in rem* or *ius in rem* that provide the owner with protection from interference with their assets by anyone, be it either a juristic or natural person.

[121] In the case of Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd[24] the Court, per Hefer JA stated that what was required for an accrual in terms of the definition of 'gross income' was that the person concerned must have become entitled to the amount in question, or to a right capable of being valued in money.[25]

[122] In Commissioner for Inland Revenue v Delfos,[26] Wessels CJ said the following:

> *"The tax is to be assessed in money on all receipts or accruals having a money value. If it is something which is not money's worth or cannot be turned into*

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[24] (244/88) [1990] ZASCA 1; 1990 (2) SA 353 (AD); (22 February 1990) at para 9.

[25] Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd. (244/88) [1990] ZASCA 1; 1990 (2) SA 353 (AD); (22 February 1990)At para 18.

[26] 1933 AD 242 at 251.

money, it is not to be regarded as income."

[123] In the case of Bitcoin, regardless of the fact that it is an intangible asset which exists only in an online form, it is susceptible to ownership and flowing from ownership, as I have already demonstrated, results in the owner being vested with certain rights. These rights can only arise in respect of property and, in my judgment, as Bitcoin is capable of being valued in monetary terms and in a fiat currency, it must constitute property.

[124] The principles relating to statutory interpretation are well-established and were usefully restated in Natal Joint Municipal Pension Fund v Endumeni Municipality[27] by Wallis JA, who said:

'[T]he present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and

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[27] 2012 (4) SA 593 (SCA) at para 18

syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . . The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-businesslike results or undermines the apparent purpose of the document. . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Citations omitted.)

[125] That the text, context and purpose of the legislation must be considered together when interpreting a statutory provision, has been affirmed in various decisions of the Constitutional Court.[28]

[126] The legislature has intended in to cast the net as widely as is conceivably possible when it comes to the Insolvency Act finding application and in defining what constitutes 'property'. The language is broad and all encompassing and the

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[28] See, for example: Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 90 (the judgment of Ngcobo J) quoted with approval in Du Toit v Minister for Safety and Security [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) para 38; Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) para 21; KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) para 129; Kubyana v Standard Bank of South Africa Ltd [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) paras 77-8.

extensive reach of what is meant and intended by what constitutes 'property' is pellucid and overarching.

[127] In the light of the above principles of statutory interpretation applied to the Insolvency Act and when having regard to the nature and characteristics of Bitcoin, it ought for the purposes of insolvency, to be regarded and treated as intangible assets that constitute property as defined in s 2 of the Insolvency Act. This, to re-iterate, is beyond doubt when regard is had to the definition in s 2 of the Insolvency Act of 'Disposition', which, it bears repeating is defined as follows:

> "*'disposition' means any* ***transfer*** *or abandonment of* ***rights to property***[29] *and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and 'dispose' has a corresponding meaning,"* (my emphases)

[128] The owners of Bitcoin clearly own it and regard it as their property and *qua* owner they are free to dispose of it as they wish i.e. they have an indisputable

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[29] This should be read with the definition of 'property' is s 2 of the Insolvency Act. It is trite that "the meaning of 'property' in the Insolvency Act is far wider than under the common law. See: Meskin, Insolvency Law, para 5.1 and Van Zyl and Others NNO v Turner and Another NNO 1998 (2) SA 236 (C) at para 21.

right to their property and the right to do as they wish with it. The fact that it is digital property and has no physical existence does not in any way, manner or form impact on their rights as would be the case with any other type of recognised intangible property. Ownership is usually disposed of by transferring the rights to the property to another. It follows that Bitcoin falls squarely under the definition of 'disposition' in s 2 of the Insolvency Act. Bitcoin is indubitably an asset as an asset is deemed to mean *"any assets which can be applied to the payment of debts"*.[30]

[129] I find further support for my view that Bitcoin is an intangible asset in the findings by the High Court of New Zealand, Christchurch Registry in the matter of Ruscoe v Cryptopia Ltd (in liquidation),[31] to which I alluded earlier. In this matter the Court held that cryptocurrencies are a type of intangible property and that various cryptocurrencies are "property" within the relevant definition of the New Zealand Companies Act (of 1993). The Court referred to cryptocurrency as "digital assets". The Court carried out an exhaustive analysis of International case law and authorities and had regard to these in arriving at its conclusion. It is unnecessary to redo the exercise, suffice it to say that International law appears, on the whole, to be entirely consistent with the findings of the New Zealand High Court.

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[30] See: Ex Part Collins 1927 WLD 172.

[31] See, fn 17, *supra.*

[130] In summary, in my judgment, Bitcoin is as a movable intangible asset that falls within the definition of 'property' in the Insolvency Act. It follows that the liquidators are entitled to a directive that they should treat it as such in the winding-up the insolvent estate of MTI.

GENERAL COMMENTARY AND ANALYSIS OF THE INTERVENING PARTIES OBJECTIONS TO THE RELIEF SOUGHT

[131] The nature of the relief sought in these proceedings is of a limited nature. The Applicants seek directions, as they are entitled to, and it is prudent for them to do so given the nature of the disputes and the disagreements between the parties stop there are thousands of investors that are adversely impacted upon by the MTI Ponzi scheme. It is noteworthy that an insignificant number of investors, who primarily seek to advance their own interests, opposed the relief sought by the Applicants.

[132] While I have attempted to deal with the objections *seriatim,* I am of the view that the objections in any event have no weight. This is principally because the opposition by the Intervening Parties is premised on a misconception of the relief sought by the Applications and a failure to appreciate the limited consequences that follow upon a Court issuing directives for the purpose of enabling and assisting

liquidators to wind-up an insolvent estate.

[133] The Court order will not be dispositive of any issues, nor will it constitute final and binding decisions that conclusively determine the respective parties' rights and obligations. In short, the relief granted in terms of s 387(3) of the 1973 Companies Act is neither final, nor binding in its effect and cannot be construed as being declaratory in any manner or form.

[134] Once regard is had to the true nature of the relief sought, most, if not all, the objections raised by the intervening parties are effectively misplaced and without substance.

[135] The commentary by Blackman, Jooste and Everingham on s 387(3) of the 1973 Companies Act is apposite. Their commentary is lengthy, but as it is comprehensive, it is worthwhile to quote it is full to allay the concerns of the Intervening Parties, and to show that the foundational basis underpinning most of their objections to the relief sough by the Applicants is unnecessary and misplaced. In my view, this exposition of the law is dispositive of most, if not all, the objections they raised. This is what the learned authors have to say:

"*An application for directions is an administrative non-adversary proceeding;*

it is an internal or domestic affair as between the liquidator and the court. The power conferred on the court by s 387(3) is not a power to make binding orders in the nature of judgments. And a direction given pursuant to that section has no effect on the substantive rights of persons external to the winding-up...

The function of a liquidator's application for directions is to give him advice as to his proper course of action in the liquidation. The provision is essentially concerned with future action by a liquidator. Typically, the court will give direction to the effect that the liquidator would be justified in acting in a specified way or on a specified basis....

No fetter is placed on the court's discretion. But it is usually only proper for the court to exercise its power to give the liquidator directions on matters of law or principle, and the court does not usually consider it appropriate to intervene and make the liquidator's commercial decision for him....

Generally, the giving of directions is not appropriate where important facts are in dispute. But the mere fact that some creditor or other person appears at the application and opposes it is not per se a reason not to grant directions if they are otherwise appropriate...

The liquidator should, for his own protection, apply to the court in every case of doubt,' and generally, 'apart from very rare cases... the court should not take the view that it can just leave one of its officers floundering, and that if the liquidator asks for advice, then some advice and directions should be given.

It is appropriate for a liquidator to seek directions as to whether to institute or continue to defend proceedings involving questions of law and In case of real doubt, the proper course for a liquidator to adopt is to seek the court's decision as to whether or not action should be brought, otherwise the costs of proceedings may be incurred which a court might subsequently hold were not properly incurred. On the application seeking such direction, a court is not bound to investigate the evidence in order to make a finding that, on material before it, the proposed proceedings will or will not be successful. It has merely to determine whether or not the proceedings should be taken." (Citations and footnotes omitted)

4. The commentary requires no further elucidation as it sets out the position in clear and plain terms. A further watering-down of the Intervening Parties objections arose as a consequence of the delivery of the judgment in Bester N.O and Others v Mirror Trading International (Pty) Ltd and the objections premised on *lis pendens*

or various decisions still being authoritatively determined are rendered moot.

OBJECTIONS BY THE EDJ INVESTORS

[136] EDJ Investors claim that the entire premise underlying the rule *nisi* is a premature assumption that the claims of the Class 1 and 2 investors are limited to enrichment claim and subject to a finding that the MTI Scheme is an unlawful pyramid scheme and, ergo, that the investment agreements are void *ab initio*.

[137] The difficulty I have with the argument put forward by the EDJ Investors is that it ignores the fact that there never was a *bona fide* investment scheme. From the outset, there was an intention to defraud and not to conduct a legitimate and legally compliant investment scheme in Bitcoin for the purpose of obtaining hoped-for financial returns for the investors. The scheme was fraudulent from the outset and is by now common cause, or not seriously disputed that it was an illegal Ponzi scheme.

[138] This much has now been determined with finality by De Wet, AJ in Bester N.O and Others v Mirror Trading International (Pty) Ltd. The Court expressly held that the scheme was illegitimate from its inception and that all agreements concluded between MTI and its investors in respect of the investment in Bitcoin of

any kind whatsoever were unlawful and *void ab initio*.

[139] On this basis alone, in my judgment, the appropriate date to determine the value of a claim would be the date of the so-called investment as there was no investment contract in existence from the outset. The "investor" was entitled to the immediate return of their investment on the basis of the *condictio ob iniustam causam.*[32] The trite saying is, after all, that "fraud unravels everything."

[140] As was pointed out in Kudu Granite Operations (Pty) Ltd v Caterna Ltd,[33] there is a material difference between suing on a contract for damages following upon cancellation due to breach by the other party and in circumstances where there is a breach by neither party as the contract is of no force or effect. In the first scenario, there is a contractual remedy and restitution may provide a proper measure or substitute for the innocent party's damages. However, in the second scenario, there is no contract from which any rights arise, hence the development in Roman times of the remedy of unjustified enrichment, as an equitable remedy, in respect of which contractual provisions are basically irrelevant and equitable considerations arise.

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[32] See, in this regard, Fourie NO and others v Edeling NO and others [2005] 4 All SA 393 (SCA) at para 13.

[33] 2003 (5) SA 193 (SCA). Hereinafter "Kudu Granite Operations").

[141] In Pucjlowski v Johnstone's Executors,[34] Van den Heever J expanded on the legal position and explained it in these terms:

> *'the object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequently become inoperative.'*

[142] Reverting to Kudu Granite Operations, the SCA confirmed the above legal principle,[35] and, in reference to Wilken v Kohler,[36] extended the principle as applying equally if the contract is void as a result of a statutory prohibition.

[143] *In casu,* the FSCA found that MTI operated a fraudulent and unlawful investment scheme, in disregard of various financial sector laws, conducted an illegal, unregistered financial services business in contravention of, at minimum, s 7 of the Financial Advisory and Intermediary Services Act 37 of 2002 ("the FAIS Act"). The FSCA concluded that the investments made by investors into MTI and the scheme conducted by it were misappropriated. These findings by the FSCA

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[34] 1946 WLD 1 at 6.

[35] At paragraph 15.

[36] 1913 AD 135 at 149-50.

were endorsed, *inter alia*, by the Court in Bester N.O and Others v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI and Others and by the Fabricius Commission.

[144] Reverting to Kudu Granite Operations, a further noteworthy and relevant principle emerges from the judgment and that is this: in the event of a failure of an agreement, the party is not entitled to the return of the physical property in circumstances where the asset has been given a specific monetary value. Nor would either party be entitled to insist on repayment of the difference in value but, by analogy, only the return of the agreed purchase price. *In casu,* as a consequence of the unlawful nature of the purported investment agreements that were found to be void *ab initio* by De Wet AJ i.e. the contracts failed at inception due to their illegality. It follows that any purported subsequent or ongoing "agreements" involving Bitcoin were simply void or invalid as there was no antecedent agreement to render valid the re-investment of Bitcoin or money, and a void agreement cannot be revived. The investment agreements were stillborn and it is simply not possible to breath life into a corpse. At inception and from the point when the investment agreements were void, the money purportedly was 'invested' in SA Rands. On the facts, it also appears that the scheme was an ongoing fraud and there was intention by MTI to "invest" or carry out forex trades to obtain financial benefits or returns for its 'investors'. This was all a charade and the investment 'scheme' was simply

a fraudulent and illegal Ponzi scheme. In any event, the Court has pronounced that the purported agreements did not exist, had no legal effect, and were *void ab initio*.

[145] Courts as a general rule will not and do not enforce illegal agreements and the innocent party is entitled to restitution. This is usually done by way of a *condictio,* usually the *condictio ob turpem vel iniustam causam*.[37] This finding meant that all that the investors forthwith were entitled to the return of the money they invested in an illegal scheme. This, as a matter of logic and pragmatism would mean determining their claims in SA Rand value on the date of each investment.

[146] The Supreme Court of Appeal in Eravin Construction CC v Bekker NO and Others[38] pointed out that section 341(2) of the old Act and section 154 2) of the new Companies Acts are different, and are not concerned with when debts are due and can be claimed, but with when they are owed. The Court held that with reference to section 341(2) of the 1973 Act, it expressly states that the disposition in the terms contemplated by it "shall be void". The Court then pointed out that the recipient then has no right to retain it and, consequently is indebted to the body which made the prohibited disposition. This debt the Court held is owed as soon as

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[37] See: McCarthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA) para 9; Du Plessis Unjustified Enrichment 4-6

[38] 2016 (6) SA 589 (SCA).

the disposition was received by the recipient.[39]

[147] It should be borne in mind and re-iterated that, as there were no investment agreements that were valid in the eyes of the law, MTI did not have a right to dispose or "invest" the money or any Bitcoin that was - or purportedly was (or a portion thereof) 're-invested or 'repaid'. The "asset" in whatever its form remained the property of the investor. MTI had no mandate or authority to do anything with any assets as the 'agreements' were void and the 'scheme' itself was fraudulent and conducted for a purpose entirely unrelated to *bona fide* investment.

[148] As regards whether the Rand value is appropriate in determining the various claims, the liquidation proceedings were brought in terms of the South African statute, all the various claims rose within South Africa, all the investments made by the investors in South Africa and the winding up of MTI is proceeding in terms of South African law. I can see no reason why a claim should not be reduced to a Rand value.

[149] However, even if I am wrong in this respect, and that the legal authorities cited do not determine that, on a proper application of the principles pronounced therein, is incorrect, I nonetheless agree with Mr Terblanche's submission that the

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[39] At paragraph 21.

correct date to determine the value of the investment would be as at the date of investment.

[150] There are sound policy considerations that support a conclusion that the date of investment should be the date of inception. Notions of fairness and justice, seen in the context of the law of insolvency, provide every indication that this is the fairest approach and gives effect to the whole concept of a *concursus* where there is an accounting, a collection and a just and equitable distribution of a single massed estate to the creditors in the form of a dividend.

[151] The further claim in argument is that the claims of the Class 1 and 2 investors will be limited to an amount equal to their investment in the MTI scheme, calculated on the date of investment of a claim premised under the law of enrichment. This, the argument continues, constitutes a limitation of the fundamental right which a person has in terms of section 34 of the Constitution of the Republic of South Africa, 1996, which provides that,

> *"everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". The argument continues that the rule nisi cannot be granted as it will limit the*

cause of action which an investor can institute.

[152] In my view, these arguments are premised on a *non sequitur*. It is open to any party to litigate a dispute of their choice, be it on enrichment or on codiction. This, once again, is premised on a misinterpretation and a misunderstanding of the relief sought by the Applicants. Any of the Intervening parties are at liberty to take whatever further legal steps they deem appropriate without limitation. I refer to the comment I have made *sub verbo* 'GENERAL COMMENTARY AND ANALYSIS OF THE INTERVENING PARTIES OBJECTIONS TO THE RELIEF SOUGHT', *supra*.

[153] The proposed draft order, in my view, is in any event phrased in sufficiently circumspect terms, and is not open to doubt that all the investors' rights remain extant and unaffected by the terms of the order, which order constitutes only directives to assist in the winding-up process, and the directives are not final findings in respect of the rights of any party.

[154] The fundamental purpose of the relief sought is to obtain directions to assist the liquidators in the winding up process. These directions clearly can never be binding and limit any party's right to assert their rights in a court of law and bring claims against the insolvent estate in any manner or form.

[155] As regards the objection that they are deprived of the transfer, presumably meaning the re-transfer of bitcoin, and that they are entitled to the return of their investment i.e. Bitcoin based on the *condictio ob turpem vel iniustam*.

[156] I am of the view that it is unnecessary for me to make any findings in this regard for the simple reason that, regardless as to who is correct on this point, the relief sought is not in the form of a declaratory order. It is, accordingly, not dispositive of the rights of the parties and is not declarative of the rights or obligations of any of the parties. The parties are at liberty to litigate any claims they allege to have and set out the basis or bases for their claims. However, *prima facie*, it appears that much of the Bitcoin is unaccounted for in any event, and cannot be returned.

[157] Be that as it may, all the above legal considerations and the concerns of all the Intervening Parties are rendered moot by the terms of the proposed amended order. In my view, the terms of the amended order, which I shall amend further, put paid to the various grounds of opposition to the interim relief sought as the arguments put forward in support of the opposition to the granting of the order in the terms sought by the Applicants are rendered nugatory by the inclusion of paragraph 7 of the amended court order handed up by the Applicants at the hearing, which reads thus:

"7. None of the above orders constitute a finding of any fact or law against any investor or any other person in any action instituted by the liquidators and no finding is made in respect of ownership of any bitcoin."

[158] The order I propose to make include the additional words in bold which are underlined:

"7. None of the above orders constitute a finding of any fact or law against any investor or any other person in any action instituted, ***or to be instituted*** *by,* ***or against*** *the liquidators, and no finding is made in respect of the ownership of any Bitcoin."*

CONCLUSION

[159] I am satisfied that the Applicants were justified in seeking directives from the Court and that it was prudent to have done so, given the scale and complexities of the winding-up of what is a massive and extensive fraudulent scheme.

[160] I am further unpersuaded that the objections raised by the Intervening

Parties suffice to refuse granting the relief sought by the Applicants. To dismiss the application will simply leave the liquidators in limbo and result in protracted and lengthy litigation. They will, in the interim, be hamstrung in performing their primary functions, which are to recover and reduce into possession all the assets and property of the company, to apply these proceeds in satisfaction of the costs of the winding-up and to settle the claims of the creditors.

COSTS

[161] The liquidators accepted that the intervening parties had the right to make submissions to the Court in respect of the directives which they sought. The legal representatives of each of the intervening parties accordingly submitted heads (save for the Second Intervening Party) of argument and addressed the court at the hearing.

[162] The Applicants do not seek a costs order against the First and Third Intervening Parties, but as against the other Intervening Parties the submission was that costs should follow the result.

[163] I accept that the submissions made on the part of the Third Intervening Party were relevant to the debate and the issues at hand. The Applicants have

indicated that they have no strong objections to the costs of the Third Intervening Party being costs in the liquidation and I believe that this concession was fairly made. In my view, and in exercising my discretion, I believe that it is appropriate that the numerous investors ought to have had opportunity to state their respective points of view, including the First Intervening Party, in light of the novel issues that arose for consideration.

[164] In all the circumstances, it seems to me that as it is only fair that, as each of the Intervening Party was afforded an opportunity to express their opinions and views on issues that will directly impact on them, and as the Applicants had no other option (having exhausted all others) but to approach a Court for directions, it is appropriate that the costs of all the parties should be costs in the liquidation.

[165] I would add that the insolvent estate is substantial and claims similarly substantial and the costs in respect of this matter are unlikely to make much impact on the dividend each investor ultimately receives.

[166] In the circumstances, and in the exercise of my discretion, I am of the view that it is fair that the costs of all the Intervening Parties be costs in the liquidation.

ORDER

[167] Insofar as the relief was sought in paragraph 5 and the subparagraphs thereunder and paragraph 6 of the draft order had been overtaken by events in that it has been found that investment agreements concluded by between the Company and the investors are *void ab initio*, I nonetheless have retained the provisions pertaining to the alternative finding i.e. that they are not void *ab initio*. I did this *ex abudanti cautela* as I cannot preclude the possibility of another Court coming to a different conclusion at some future point. It is thus appropriate and prudent to grant relief inclusive of the alternative scenario, notwithstanding that it is improbable that another Court will arrive at a different conclusion as regards the agreements being declared void *ab initio* as was found in Bester N.O and Others v Mirror Trading International (Pty) Ltd.

[168] In the circumstances, the Applicants have made out a proper case for the relief they sought in its amended form and as subsequently further amended by the Court and I accordingly grant an order as per the order attached hereto marked "X".

A D MAHER

Acting Judge of the High Court

"X"

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

9-11-2023

CASE NO.: **13721/2022**

Before: **The Honourable Mr Acting Justice Maher**

Cape Town: **THURSDAY, 9 NOVEMBER 2023**

In the matter between:

H BESTER N.O.	First Applicant
A W VAN ROOYEN N.O.	Second Applicant
C J ROOS N.O.	Third Applicant
J F BARNARD N.O.	Fourth Applicant
D BASSON N.O.	Fifth Applicant
C B S COOPER N.O.	Sixth Applicant

(cited in their capacities as the joint liquidators of

Mirror Trading (Pty) Ltd (in liquidation)

and

THE MASTER OF THE HIGH COURT, CAPE TOWN	Respondent

C H MARKS	First Intervening Party
P R BOTHA	Second Intervening Party
THE EDJ INVESTORS	Third Intervening Party
J A FISHER N.O.	Fourth Intervening Party
R N KHARIVHE N.O.	Fifth Intervening Party

(cited in their capacities as the joint trustees of the Insolvent estate of Cornelius Johannes Steynberg)

ORDER

AFTER HAVING READ THE PAPERS FILED OF RECORD and having heard counsel for the Applicants and the Intervening Parties, an order is granted, pursuant to the provisions of sub-section 387(3) of the1973 Companies Act, in the following terms:

1. The liquidators should treat Bitcoin ("BTC") in the in the administration of 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").

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

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");

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

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

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.

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:

4.1 In relation to Class 1 Investors:

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;

4.1.2 the value of a Class 1 Investors' 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;

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.

4.2 In relation to Class 2 Investors:

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

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;

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, which ever 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;

4.2.4 the value of a Class 2 Investors' 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;

4.2.5 the value of a Class 2 Investors' Returns 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;

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;

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;

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;

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;

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.

4.3 In relation to Class 3 Investors:

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

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

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;

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;

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, when and where the circumstances so permit.

4.3.3 The value of a Class 3 Investors' 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;

4.3.4 The value of a Class 3 Investors' 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;

4.3.5 in dealing with claims by and against Class 3 Investors in the First Scenario:

4.3.5.1 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;

4.3.5.2 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, when and where the circumstances are so permit;

4.3.5.3 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 re-vested with their initial investment into the Scheme, but not in respect of profit;

4.3.5.4 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.

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:

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, when and where the circumstances so permit;

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;

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";

5.4 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, when and where the circumstances so permit;

5.5 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 re-vested with such dispositions concerned.

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, *inter alia*, on section 26 and/or section 31 of the Insolvency Act, to reclaim dispositions to these individuals by the Company, when and where the circumstances so permit.

7. None of the above orders constitute a finding of any fact or law against any investor or any other person in any action instituted, or to be instituted by, or against the liquidators, and no findings are made in respect of ownership of any Bitcoin.

8. The costs of the application, including the costs of the First, Second, Third, Fourth and Fifth Intervening Parties are costs in the liquidation.

BY ORDER OF THE COURT

COURT REGISTRAR

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