REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO THE JUDGES: YES/~~NO~~
(3)	REVISED. [redacted]

Signature [redacted]

Date 6/5/2021

CASE NO: 4579/2019

In the matter between:

PIETER HENDRIK STRYDOM N.O	**FIRST PLAINTIFF**
HAROON ABDOOL SATAR MOOSA N.O	**SECOND PLAINTIFF**
DEON MARAIS BOTHA N.O	**THIRD PLAINTIFF**

and

NEIL PETER BRANDT	**DEFENDANT**

JUDGMENT

<u>MAKGOBA JP</u>

[1] The First, Second and Third Plaintiffs are the joint liquidators of Free Agape Enterprises (Pty) Ltd (in liquidation) ("Free Agape"), duly appointed as such on 7 March 2019. Free Agape was finally liquidated on 12 June 2018, the effective date of liquidation being 22 March 2018.

The Plaintiff have instituted an action against the Defendant, based on section 26 of the Insolvency Act 24 of 1936, claiming an order that the disposition in terms of which Free Agape paid an amount of R 304 300.00 to the Defendant be set aside and the Defendant be ordered to repay the said amount to Plaintiffs.

[2] On the 13 August 2018 the High Court, Western Cape Division in Case No. 11938/2019 granted an order as follows:

2.1. declaring the investment scheme conducted by the directors thereof under the name and style of Free Agape Enterprise (Pty) Ltd (in liquidation) and the respective trading names under which the scheme was conducted, propagated and marketed, namely Choice Lifestyle Change, CLC, Beleggingstrust, Free Agape, Choice Beleggingstrust and Induna Holdings, are declared to be illegal, unlawful and void;

2.2. declaring all investment agreements and related agreements entered into between members of the public or entities as investors with Free Agape Enterprises (Pty) Ltd (in liquidation) null and void.

[3] The case that was made out by the applicants (the Plaintiffs in this case) in their application for the aforesaid declarators, is that Free Agape conducted an unlawful multiplication or pyramid scheme over an extended period of time, which involved millions of transactions of receiving deposits, styled "investments" and paying out so-called "dividends" to investors. It did so under the various names referred to in the declaratory order. For purposes of the present case, Choice Lifestyle Change, is the most important.

[4] The Defendant is Neil Peter Brandt, a businessman residing in Polokwane. The Defendant was a member of Choice Lifestyle Change, from which he received a significant amount of money over a period of time, which included repayment of the deposits or "capital payment" he had made and so-called "dividends". In this action the Plaintiffs claim repayment of the amounts received by the Defendant, and to this end instituted action against him for an order in terms of section 26 of the Insolvency Act, 24 of 1936 and for judgment against the Defendant.

Factual Background

[5] The first witness to testify for the Plaintiffs is Mr Pieter Hendrik Strydom, the liquidator primarily dealing with the litigation arising from the administration of the insolvent estate of Free Agape and also the liquidator who conducted the enquiry under sections 417 and 418 of the Companies Act 61 of 1973 before

Retired Judge Eberhardt Bertelsman in April 2019. The evidence of Mr Strydom follows hereunder.

[6] The most important role players in the saga preceding the liquidation of Free Agape, were Mr. Maarten Stapelberg and his associate, Mr. Wouter Botha, residents of Polokwane.

They conceived the idea that became known to the public as "*Choice Lifestyle Change*" and were the incorporators of Free Agape. Choice was described as an affiliate of Free Agape, a division of Free Agape and / or a product of Free Agape.

Members of the public were recruited by Stapelberg and Botha to apply for membership of Choice, which was only available to Christians.

In terms of a recruitment form, a member of Choice was invited to make payments which entitled the member to participate in the business of Choice, whereby Choice, acting through Free Agape, used the funds received from members to make "fixed deposits" with financial institutions. These fixed deposits were purportedly used to issue guarantees in favour of unidentified business entities which required bridging finance for short periods of time and were prepared to pay high rates of interest. The returns were between 14% and 17% per month.

[7] The scheme attracted hundreds of people who deposited millions of rands into the bank accounts used by the perpetrators. By all accounts they were making good money.

The scheme also attracted attention of the Registrar of Banks and the South African Reserve Bank, who instructed Ernst & Young Advisory Services (Pty) Ltd to conduct an investigation into the legality of the business of Free Agape.

[8] Stapelberg died on 15 December 2017, and predictably, the scheme fell apart and the payments stopped. The executor of his deceased estate placed the company under business rescue and Mr. Herman Bester was appointed as the business rescue practitioner.

While Bester was in the process of establishing whether Free Agape was conducting any business that could be rescued, an urgent application was launched in the High Court, Western Cape Division, for orders setting aside the business rescue, placing the company under final liquidation and convening an enquiry under ss. 417 and 418 of the Companies Act, 61 of 1973.

[9] Mr Strydom testified that upon investigations no record of an entity by the name of "Choice Lifestyle Change" could be found and that the documents evidencing the Defendant's application for membership and the contract that he concluded with Choice Lifestyle Change demonstrated that there was no difference, in substance, between Free Agape and Choice.

The insolvent company, Free Agape, had no underlying genuine profit producing business activity and the only source of income was the deposits paid by the investors.

The insolvent company had no other income from which to repay the capital investments or the so-called dividends to the investors.

[10] Mr Strydom could not obtain any proof of the alleged bridging finance which was required for the unidentified business. The insolvent company therefore did not receive any proceeds from the alleged bridging finance to generate an income. The insolvent company, upon receipt of a deposit, used the money to pay claims then due, whether capital and / or the interest, of other investors who had invested earlier.

The deposits of the later investors was utilised to pay earlier investors' capital and "dividends" and also salaries, bonds, bank charges, while the only chance of later investors to recover their capital and interest thereon, was that more investors may contribute further deposits.

[11] In conclusion, Mr Strydom stated that the business model of the insolvent company and the lack of genuine profit producing business activity precluded any benefit accruing to the insolvent or ever being at all likely to accrue in the future.

[12] The second witness for the Plaintiffs is Mr Jakob Jan Dekker, a chartered accountant specializing in forensic accounting investigation. He was called to testify as an expert witness in that field. Mr Dekker conducted a forensic investigation into the assets and liabilities of Free Agape. He analysed the bank statements relating to the insolvent company and in the process did a reconstruction of the transactions between investors and the scheme and could thereby determine the date of insolvency of the scheme.

[13] Mr Dekker in reconstructing the transactions between the investors and the insolvent, determined that the twelve bank accounts identified and analysed by him were all used in the day to day administration of the insolvent company. He demonstrated that some payments relating to the Defendant, were made to the Belegginstrust account and payments to the Defendant were made from one of the ABSA accounts. In other instances payments were reflected to and from the Defendant on the Standard Bank cheque account from April 2017.

[14] Mr Dekker described Mr Wouter Botha as a member or co-director of the insolvent company in that he found evidence that Mr Wouter Botha received a monthly salary from the bank accounts utilised by the scheme.

[15] Mr Dekker testified that the investors did not do anything to deserve the returns which was paid out to them and the payments were therefore not made for value.

[16] After the closure of the Plaintiff's case the Defendant applied for absolution from the instance. The application was dismissed and the Defendant closed his case without leading evidence in his defence.

[17] Counsel for the Defendant made the following admissions and / or concessions from the bar:

17.1. That Free Agape was insolvent from at least 18 December 2014 and has been insolvent at all material times thereafter.

17.2. That the dispositions made were received by the Defendant.

17.3. That the dispositions were made not for value.

Section 26 – Dispositions without value

[18] Section 26(1) provides as follows:

(1) *Every disposition of property not made for value may be set aside by the Court if such disposition was made by an insolvent—*

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess

[19] "Disposition" means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefore, but does not include a disposition in compliance with an order of the Court, and "dispose" has a corresponding meaning[1].

[1] Section 2 of Insolvency Act, 1936.

A disposition of property includes every act by which an insolvent parts with an asset in its estate, whether such asset is a corpus, a sum of money or a right of action.[2]

A disposition without value is a disposition for which no or inadequate benefit or value is or has been received or promised as a *quid pro quo*[3].

[20] The date upon which the disposition was made, whether more than two years before the liquidation of the estate, or within two years of the liquidation of the estate, is relevant to determining where the onus lies. In the present case, the dispositions that the Plaintiffs seek to set aside were all made within two years of the effective date of winding up of the estate, and therefore the claim lies under section 26(1)(b) of the Insolvency Act.

A party claiming under section 26 (1)(b) of the Act must allege and prove[4]:

20.1. that there was a disposition of property;

20.2. that it was made by the insolvent;

20.3. the date of the disposition; and

20.4. that the disposition was not made for value.

[21] The only statutory defence available to the Defendant, provided that the disposition took place within two years of the liquidation, as in the present case,

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[2] See Lane N.O. v Olivier Transport 1997(1) SA 383 (CPD) at 385 G – H.

[3] See Estate Jager v Whittaker and Another, 1944 AD 246 at 250

[4] See Rousseau N.O. v Visser 1989 (2) SA 298 (C) at 307

is that immediately after the disposition was made, the assets of the insolvent still exceeded the liabilities.

The Defendant in the present case has admitted receipt of the payments, the dates upon which the payments were made and that the disposition was not made for value.

Points 20.1, 20.3 and 20.4 above are thus common cause. The only point in dispute is whether the disposition was made by the insolvent.

Was the disposition made by the insolvent/ Free Agape?

[22] The Defendant has placed the source of the payments in dispute. He disputes that the dispositions were made by the insolvent company, Free Agape.

The evidence for the Plaintiffs in the present case shows that the source of the payments to the Defendant was Free Agape.

[23] The uncontroverted testimony of Mr Strydom was that no record of any juristic entity by the name of "Choice Lifestyle Change" could be found.

The documents evidencing the Defendant's application for membership and the contract that the Defendant concluded with Choice Lifestyle Change[5] clearly show that there was no difference – in substance – between, Free Agape and Choice Lifestyle Change.

[5] Annexure "A1" to "A4" to Defendant's Plea, pages 50-53

Mr. Wouter Botha with whom the Defendant dealt with was described as a member or co-director of Free Agape. The latter company appears on the letterhead of Choice Lifestyle.

Consequently, Choice Lifestyle appears to be a trade name of the company known as Free Agape Enterprises (Pty) Ltd.

[24] The declaratory order granted in the Western Cape Division of the High Court in case number 11938/2019 shows clearly that the investment scheme conducted by the directors of Free Agape Enterprises (Pty) Ltd (in liquidation) was also conducted, propagated and marketed under the respective trading names of Choice Lifestyle Change, CLC, Belegginstrust and others.

The use of the different bank accounts of First National Bank, ABSA and Nedbank is simply a feature of a fraudulent scheme.

The analysis of the bank statements by Mr. Dekker, the forensic accountant shows the flow of funds between these bank accounts. It does not matter under whatever name the bank accounts were conducted.

[25] Mr. Dekker in reconstructing the transactions between the investors and the insolvent company determined that the twelve bank accounts identified and analysed by him were all used in the day to day administration of the insolvent company, namely Free Agape Enterprises (Pty) Ltd.

For example, he demonstrated that some payments relating to the Defendant were made to the Belegginstrust account at First National Bank but payments to the Defendant were made from one of the ABSA accounts. Furthermore, payments were reflected to and from the Defendant on the Standard Bank cheque account from April 2017.

[26] In my view the Plaintiffs have presented sufficient evidence to show that the depositions relating to the subject-matter of this action were made by the insolvent company, Free Agape.

Insolvency of Free Agape

[27] It is trite that in the event that the disposition was made more than two years before the liquidation, the Plaintiff bears the onus of proving that immediately after the disposition was made the insolvent's liabilities exceeded its assets[6].

[28] In the event that the disposition was made within two years of the liquidation, like in this instance, the Plaintiff need only prove the disposition without value, and on proof of this alone, the disposition will be set aside unless the Defendant can show that immediately after the disposition was made, the insolvent's assets exceeded its liabilities[7].

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[6] Section 26(1)(a), Insolvency Act

[7] Section 26(1)(b), Insolvency Act

That is the only statutory defence available to a defendant facing a claim in terms of section 26 (1)(b), where the Plaitiff has successfully demonstrated that a disposition was made for no value.

In *casu*, the Defendant conceded that Free Agape was insolvent from at least 18 December 201 and has been insolvent at all relevant times. Furthermore, the Defendant conceded that the disposition was made for no value.

Costs

[29] Mr. Dekker is a qualified charted accountant specializing in forensic accounting investigation.

He was mandated by the Plaintiffs to do a forensic analyses and to address the following specific issues:

29.1. to reconstruct the transactions between investors and the scheme;

29.2. to determine the date of insolvency of the scheme; and

29.3. to identify whether specific investors received beneficial treatment over others.

I am of the view that Mr. Dekker's services and in particular his report, were necessary and served the interests of the estate as whole and the creditors and debtors involved. His services were necessary to enable Plaintiffs to identify and recover from those investors who received more than their investments.

[30] The evidence of Mr. Strydom, the liquidator, was that there are approximately 400 – 500 actions that have been instituted or will be instituted and that this matter is the first to go on trial. The legal issues involved in this matter are of significant importance to the liquidators and the creditors, including other investors whose interests they represent.

[31] I am persuaded that the legal issues involved in this matter and the complexity of the matter merit the attention of the High Court and also the employment of senior counsel.

Conclusion

[32] The Plaintiffs have made out a good case for the relief sought. In the result the following order is granted:

32.1. The dispositions made by Free Agape Enterprises (Pty) Ltd to the Defendant during the period 24 November 2016 to 18 December 2017 in the total amount of R304 300-00 are set aside in terms of section 26 (1)(b) of the Insolvency Act, 24 of 1936;

32.2. The Defendant is ordered to repay the amount of R 304 300-00 to the Plaintiffs in their capacity as duly appointed liquidators of Free Agape Enterprises (Pty) Ltd (in liquidation);

32.3. The Defendant to pay interest on the amount of R304 300-00 at the rate of 7% per annum from date of judgment to date of final judgment;

32.4. Cost of suit, such costs to include the following:

32.4.1. the qualifying costs of the forensic auditor, Mr Jan Decker, including the costs of his attendance at Court to testify in this action; and

32.4.2. the costs of two Counsel.

[redacted]

E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	:	**3 & 4 May 2021**
Judgment delivered on	:	**6 May 2021**
For Plaintiffs	:	**HR FourieSC** **S Venter**
Instructed by	:	**Loubser & Loubser** **c/o Becker Attorneys** **Polokwane**
For Defendant	:	**SVM Van der Hoven**
Instructed by	:	**Wiese & Van der** **c/o Rheeder Attorneys** **Polokwane**