

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2349/11
Case No. : 3006/11
Case No. : 3008/11

In the matter between:-

M L STEWART N.O.

First Plaintiff

W PARKER N.O.

Second Plaintiff

and

T BEKKER

First Defendant

T I FERREIRA

Second Defendant

J BEZUIDENHOUT

Third Defendant

HEARD ON:

6 NOVEMBER 2012

DELIVERED ON:

4 DECEMBER 2012

JUDGMENT

MOCUMIE, J

- [1] The first and second plaintiffs (*“the plaintiffs”*) are insolvency practitioners and administrators of insolvents estates. They were appointed joint trustees of the insolvent estate of Graeme Minne and Carolina Frederika Minne (*“the Minnes”*). They are cited in their capacity as the joint trustees of the

consolidated insolvent estate of Graeme Minne and Carol Minne (*“the estate”*), duly appointed as such in terms of a certificate of appointment issued by the Master of the High court, Cape Town, on 18 November 2010 under the Master’s reference number C613/2010.

- [2] The first, second and third defendants (*“the defendants”*) are members of the public (*“investors”*) who invested in the illegal pyramid scheme conducted by the Minnes during the period 30 July 2002 to 27 November 2009.
- [3] It is common cause between the parties that the Minnes solicited and received loans from investors on false verbal representations on the basis that such loans would be utilised for legitimate foreign currency exchange market trading by the Minnes, in particular Graeme Minnes, from which the investors would receive a fixed monthly or an annual return and that the investors would be repaid the capital amount of the loans at the end of the terms of the loans.

- [4] The loans made by investors were paid into a banking account in the name of CF Minne trading as “**Minne Opleiding**” held at ABSA Bank Limited. These loans were documented as written loan agreements entered into between the investors and Graeme who personally accepted liability to repay the loans and the return of the payments to the investors.
- [5] It is further common cause that at that stage the Minnes were virtually insolvent in that their respective liabilities exceeded their respective assets. Furthermore the loans of certain investors who made loans to the scheme were not repaid. Thus they contravened section 11 (1) of the Banks Act 94 of 1990 by conducting the business of a bank through soliciting and accepting loans from the general public as a regular feature of the scheme when they were not a public company or registered as a bank.
- [6] The scheme furthermore constituted a harmful business practice as defined in Notice 1135 of 1999 (Government Gazette no 20169 dated 09 June 1999), promulgated in

terms of s12 (6) of the Consumers Affairs Act 71 of 1988, and was declared unlawful in terms of the said Notice.

[7] This scheme of loans and payments between individuals outside the framework of banks is an illegal pyramid scheme, now commonly known as Ponzi/pyramid scheme.¹ The loans and payments made between the Minnes and the investors constitute dispositions of another's property within the meaning of s2 of the Insolvency Act 24 of 1936 (the Insolvency Act.)²

[8] The plaintiffs instituted action against the defendants in three separate actions (Case no 2349/11; 3006/11 and 3008/11), which were later consolidated as the cause of action and the defences in the three matters were similar, the only material

¹ “Ponzi schemes are ostensibly fraudulent investment operations that pay returns to investors from the monies, which they invest rather than from profit earned. In order to entice unsuspecting investors, they typically offer returns — in the form of short-term returns that are either extraordinarily high or peculiarly inconsistent — that other investments cannot guarantee. The perpetuation of the returns that a Ponzi scheme advertises, and pays to investors, requires an ever-increasing flow of money from credulous investors in order to keep the scheme going. The system is destined to collapse because the earnings, if any, are less than the payments.” (See **Paredes-Tarazona v Cobalt Capital (Pty) Ltd** (2009/44215) [2012] ZAGPJHC 75 (23 April 2012))

² Section 2 of the Insolvency Act provides : '**disposition**' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court; and '**dispose**' has a corresponding meaning;

difference being the monies received by the various investors/defendants. For purposes of this application, reference will be made to Case No 3008/2011, **ML Steward N.O and W Parker N.O and J Bezuidenhout**, as the same principles will be applicable to all the other matters.

[9] The merits of the matters became settled to the extent that the parties agreed that the first defendant pays the amount of R30 000, 00 to the plaintiffs; second defendant pays the amount of R130 000, 00 to the plaintiffs and third defendant pays the amount of R136 000, 00 to the plaintiffs.

[10] The remaining issue that had to be determined by this Court was the appropriate costs order to be made having regard to the circumstances of the each case.

[11] The estate of the Minnes was provisionally sequestrated on 8 June 2010 and finally sequestrated on 6 July 2010. After the plaintiffs were appointed as Trustees, they conducted insolvency interrogations. In respect of third defendant the interrogation was held on 6 April 2011 as is evidenced on pages 3000086 to 3000089 of the discovered documents.

The plaintiffs thereafter issued summons claiming from Bezuidenhout the amount of R536 000.00. This amount was arrived at from calculating all the various amounts that appear on page 10, para [3], of the Particulars of Claim.

[12] In his plea the third defendant admitted the particular amounts invested in the scheme and pleaded that he was entitled to retain those amounts. The third defendant furthermore filed a counter claim in which he claimed payment of the capital amount he had invested. The plaintiffs in their plea to the counter claim denied that the third defendant was entitled to repayment of any amount whatsoever.

[13] Section 26 of the Insolvency Act, No 24 of 1936, provides as follows:

“26 Disposition without value

(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.”

[14] On 4 September 2004 the Supreme Court of Appeal in the case of **Fourie N.O. and others v Edeling N.O. and Others** 2005(4) ALL SA 393 (SCA) at page 399d stated as follows with regard to fraudulent investment schemes commonly known as pyramid schemes and setting aside of any payments made to investors:

“Upon receipt of a payment the scheme was liable promptly to repay it to the investor who had a claim for it under the *condictio ob iniustam causam*.”

[15] The Court at page 402 further held that

“All actual payments, whether as profit or interest, from and after 1 March 1999 by the aforesaid investment scheme to the second, third, fourth, fifth and further respondents, in so far as they exceed the investment of each particular investor are set aside under s26 of the Insolvency Act as dispositions without value by the scheme to investors at times when liabilities exceeded its assets,...”

[16] The result of this decision was firstly that after 1 April 2004 an investor who invested monies in an illegal scheme would repay monies he had received to the extent of the investment made and secondly that a trustee was not entitled to claim these monies back. In other words, if an investor invested R400 000,00 in the scheme and received R700 000,00 in return for his investment, he would be entitled to retain only the R400 000,00. A trustee representing the insolvent estate would be entitled to get back only R300 000,00. Not the whole R700 00.00.

[17] Mr Steyn, on behalf of the plaintiffs, submitted that the defendants knew from the outset when they were challenged with the facts that they had to return a certain percentage of the monies they had received from the plaintiffs as those

payments were dispositions without value in terms of s26. He submitted further that had the defendants not refused to pay back the amounts as requested by the plaintiffs and before interrogations were conducted the plaintiffs would not have come to court to enforce what was legally due to the estate.

[18] Mr Steyn also submitted that until the day before the trial on 6 November 2012 the third defendant was still opposing the application and insisting that he was entitled to the full returns of all his investment. He also argued that in the light of the pleadings and the settlement itself, the plaintiffs had succeeded on all the issues raised; therefore Spies should be declared a necessary witness and the defendants should pay the costs; such costs to include Spies' costs to the extent of his preparation of the report, his time set aside to testify in court before he was informed not to attend court.

[19] The plaintiffs also argued that the defendants did not tender the amount for which they ultimately settled, either through the formal tender process provided for in Superior Courts Practice Rules, in their pleadings or in their plea. Instead

they filed counter claims which forced the plaintiffs to continue with the applications and answer to those counter claims.

[20] Mr Pretorius, on behalf of the defendants, urged this Court to order that each party pay its own costs on the basis that the matters were settled as already discussed above. The appointment of Spies was not necessary. In fact, as he submitted, by the time the third defendant was interrogated in June 2011, the plaintiffs had become well aware of the total he had received in return for his investment and the amount which he ought to return in line with the **Fourie vs Edeling** principles, yet they insisted on the whole amount which forced the third defendant and others to continue resisting the applications.

[21] The first defendant invested R250 000, 00 and received R280 000, 00 in return for his investment from the Minnes. The first defendant therefore received R30 000, 00 more than what he had invested. The second defendant invested R600 000, 00 and received in return R730 000, 00. The second defendant therefore received R130 000, 00 more

than what he had invested. The third defendant invested R400 000, 00 and received R536 000, 00 in return for his investment from the Minnes. He therefore received R136 000, 00 more than what he had invested.

[22] When one applies the principles set out in **Fourie v Edeling**, the plaintiffs were entitled to claim and receive back monies from defendants as follows:

22.1 In respect of the first defendant - R30 000, 00.

22.2 In respect of the second defendant - R130 000, 00.

22.3 In respect of the third defendant – R 136 000, 00.

[23] Yet in their summons the plaintiffs claimed R536 000, 00 from the third defendant without making any reference to the amount of R400 000, 00 which he had invested originally. In other words the plaintiffs claimed what the third defendant had invested (R400 000.00) plus what he had received in return (R136 000.00).

[24] It is clear that when the plaintiffs instituted these proceedings against the defendants they were themselves, not certain of the amounts they were entitled to claim. They thus claimed

all the monies, i.e. the invested amount plus what the defendants had received in return.

[25] In my view, had the plaintiffs not insisted on the return of all the monies, but only the monies that the defendants received in addition to their investments; in line with the **Fourie v Edeling** decision, the defendants would not have contested the plaintiffs' case as vigorously as they did and correctly so.

[26] The negotiations that were undertaken during the pre-trial meetings indicated that the parties only came to a common understanding on 12 September 2012 during the pre-trial conference. The plaintiffs' case was not as clear and crisp as on the day on which the first, second and other investors accepted their responsibility and undertook to return what was due to the estate. I mean, even in the third defendant's case, the plaintiffs were persisting with their claim for R536 000, 00 instead of claiming only the returns regardless of his counter claim to that effect.

[27] The general rule applicable in civil matters is that the successful party should be awarded its costs except in

special circumstances. It is trite law that the award of costs is a matter which falls within the court's discretion, which must be exercised judiciously and with due regard to the facts of each case and fairness to the parties.

[28] It is correct that the matter became settled but to the limited extent as set out in paragraph [9] above. This is where this matter differs from that decided by **Revelas J** in **Stewart N.O. Michael Lawrence and Another v P E Henry and 4 Others**, Case No 1431/2011; 1430/23011; 1824/2011 and 2196/201. In the **Revelas** matter the settlement was an outright settlement between the parties. In this case the settlements were reached piece-meal until the day before the commencement of the trial on 6 November 2012. The argument that, at the end of the day, the defendants were successful in their counter claim cannot take away the reality that the plaintiffs had to come to court to get the estate's money back. In the same breath, the defendant had to come to court to protect their rights as plaintiffs made claims contrary to the **Fourie v Edeling** decision. In my view both parties were relentless and not prepared to make concessions as and when the correct information became

available. Both are to blame for this protracted litigation. This is a classic case where each party must bear its own costs.

[29] The issue of the counter claims as well as the costs related thereto fell by the side way as a result of the settlement set out above in para [9].

[30] Lastly, in my view, the appointment of Spies was necessary. These fraudulent pyramid schemes come in different forms. Trustees appointed to recoup the monies from investors in pyramid schemes are not experts in pyramid schemes. The schemes need to be thoroughly investigated and researched before the trustees can confidently say they have a claim against anyone. The interrogation against the third defendant was but part of an investigation which still needed to be considered by an expert in the field in order to give the plaintiffs sound advice on what step(s) to take.

[31] Furthermore, based on the defendants' not being prepared to settle the matter soon, Spies had to be available for the dates set down for trial. Had, the third defendant, for

example, not taken so long to settle the matter, Spies would have been released from the committed trial dates as early as the pre-trial conference on 12 September 2012. It is only fair that the defendants bear these costs, i.e. costs of preparing the report and his probable attendance for one day on party-to-party scale.

ORDER

[31] In the result the following order is granted.

1. The first defendant is to pay the plaintiffs the sum of R30 000,00 together with interest calculated from the date of issue of summons.
2. The second defendant is to pay the plaintiffs the sum of R130 000,00 together with interest calculated from the date of issue of summons.
3. The third defendant is to pay the plaintiffs the sum of R136 000,00 together with interest calculated from the date of issue of summons.
4. The defendants to pay the qualifying costs of the plaintiffs' expert, Mr Jaco Spies, including preparations of his report and his attendance for one day, 6 November 2012.

B.C. MOCUMIE, J

On behalf of plaintiffs: Mr J W Steyn
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