Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Case No: 800/2008
Heard: 21/09/2009
Delivered: 30/10/2009

In the matter between:

DOCTOR KRISHEN MOODALEY — **1st Plaintiff**
TISHEN MOODALEY — **2nd Plaintiff**
YOGIE MOODALEY — **3rd Plaintiff**

and

TIMOTHY JONATHAN KING — **Defendant**

JUDGMENT

KGOMO JP

[1] The Moodaleys, the three plaintiffs, are members of the same family. First plaintiff, Krishen, is a dental practitioner in Kimberley. The second plaintiff, Tishen, is his son who is an accountant and Yogie is his wife and a business women. It is immediately apparent that this is a sophisticated and educated nucleus of people who could not have been as gullible as Dr Moodaley, the first plaintiff, who testified for the family pretended.

[2] The defendant, Mr Timothy Jonathan King, a Kimberley resident, operated what in common parlance has become known as a pyramid or Ponzi scheme. Dispite Dr Moodaley's

unwise denial that he and the family were aware of the dubious nature of the operation the scheme bore all the pronounced hallmarks of an undertaking that was destined, sooner or later, to implode with adverse ramifications for some so-called investors who are at the tail end of the queue while those upfront laugh all the way to the bank. In **Fourie NO and Others v Edeling NO and Others** [2005] 4 ALL SA 393 (SCA) para 1 Conradie JA describes a typical scheme in these terms:

"1. The audacity of its perpetrators and the credulity of its participants combined to produce a gargantuan fraud notoriously known as the Krion Pyramid Investment Scheme. --- [A]s all these schemes do, [it] collapsed when the inflow of funds no longer sustained the outflow of extravagant returns to participants. Each participant on average "invested" in the scheme three times.--- In order to throw regulatory authorities off the trail it was at one time or another conducted by entities called MP Finance Consultants CC, Madicor Twintig (Py) Ltd, Martburt Financial Services Ltd, M&B Koöperasie Beperk and Krion Finacial Services Ltd. The way in which the scheme was conducted made it attractive for investors to invest for periods as short as three months. When the loan capital with "interest" was repaid at the end of the agreed investment period, the investor would more often than not reinvest the capital and interest. The advantage for the investor of doing business in this way was of course that this already enormous interest was compounded. Typically an investor would invest an amount in the scheme having been promised a return of 10% per month, capital and profit repayable within three months. Until the collapse of the scheme, investors received repayment of their capital and their profit when due. Sometimes an investor would leave

the capital and/or the profit in the scheme and this would then have been reflected by means of a book entry as a payment and a new investment. Other investors would take their capital and profit on the due date, some of whom returned after a while to reinvest a similar amount."

[3] Dr Moodaley claims from the defendant an amount of R804 000,00 and his wife and son R27 000,00 each. The three further each claim interest of 15,5% per annum plus costs. In respect of Dr Moodaley there are five claims in respect of investments made between 24 March 2007 and 18 May 2007. Mrs Moodaley and her son's capital investments were made on 24 March 2007. The total investment made by Dr Moodaley was the amount of R468 000,00. The yield on the investment was an agreed fixed amount which was payable within periods ranging from about three to about five months.

[4] Dr Moodaley's overall yield for the stated short periods computed to an astronomical R336 000,00. The other family members' yield that was due and payable on 20 July 2007 was R14 000,00 each, for the period of four months.

[5] Appended to the plaintiff's summons are Annexures "A" to "G" being certificates of investment issued to the plaintiffs by an entity named Sovereign Investment CC and signed by the defendant (TJ King) as "Chief Executive Officer." That the investments were made in the terms set out by the plaintiffs in their Particulars of Claim is common cause, as this is confirmed by the defendant in his plea quoted below.

[6] The defendant's plea is reproduced in full in that he was in default for the trial, was not represented and because Dr Moodaley's views were canvassed thereon when he testified. The defendant pleads that he acted for an entity called Favour Unleashed Investments (Registration No. C/K 2006/137656/23) when the various agreements were entered into (or when the investments were made). He says that *"the defendant specifically pleads that it fully disclosed to the plaintiffs at the time of each investment that the amounts would be paid into the account of Favour Unleashed Investments who would pay the yields as pleaded."*

[7] The plaintiffs adduced evidence and produced proof through its attorney that Sovereign Investments CC (CK Reg No 2006/137656/23) was fake and that the registration number belonged to Favour Unleashed Investment CC, a close corporation which, not surprisingly, had been liquidated. This ploy of juggling entities as also alluded to in the **Fourie NO case** (above) is typical of the conductors of pyramid schemes.

[8] The aforegoing recital gives context to the defendant's plea which runs in part as follows:

"ALTERNATIVELY

7. In the event of the honourable Court finding that the Agreement as pleaded above cannot be rectified as pleaded by the Defendant, then the Defendant pleads that:

7.1 The written Agreements that was concluded between Sovereign Investments CC with Registration Number CK 2006/137656/23, as evidenced in Annexure "A", "B", "C","D","E", "F" and "G" to the Plaintiff's Particulars of Claim, were all illegal Contracts as they were against the provisions of the Usury Act, Act 73 of

1968 which were repealed on 1 June 2006 by the National Credit Act, Act 34 of 2005. Section 5, of Schedule 3 of the Usury Act stipulated that the Usury Act, despite its repeal, would continue in force despite the repeal thereof until the Minister first prescribed maximum rates of interest in terms of Section 105 of the National Credit Act. The Minister only prescribed interest rates to be applicable from 1 June 2007, thus after the conclusion of the Agreements marked Annexures "A" – "G". The investments were in fact a pyramid-scheme in terms whereof investments were solicited from the public through a Close Corporation known as Favour Unleashed Investments CC with Registration Number CK 2006/137656/23 and were at all times operated as a pyramid-scheme.

7.2 The Plaintiffs duly performed in terms of the illegal contracts and paid the amounts as set out in Annexure "A"-"G" to the Defendants.

7.3 The Defendant, being fully unaware of the fact that it was in fact a pyramid-scheme, in good faith paid the monies into the account of Favour Unleashed Investments.

7.4 In the premises plaintiffs are not entitled to restitution of the monies so invested, as the Defendant duly invested the monies as per the plaintiffs' verbal instructions into the account of Favour Unleased Investments.

7.5 In the premises the Defendant is no longer in possession of any of the funds so received from the plaintiffs.

7.6 In the premises the plaintiffs should have realized that the yields so offered [are] not market related, *[are] speculative and amount to gambling, alternatively undue profits, and the Plaintiffs became party to a pyramid scheme.*

7.7 In the premises therefore the Defendant pleads that it would not be in the interest of justice or public policy to require the Defendant under the circumstances pleaded to effect payment of any of the capital so received and transferred into the account of Favour Unleashed Investments to the Plaintiff.

FURTHER ALTERNATIVELY

8.1 Further in the alternative and in the event of the honourable Court dismissing the Defendant's Plea, as well as its alternative Plea as so pleaded, then the Defendant pleads that the Plaintiffs can only be entitled to repayment of their capital invested in terms of Annexures "A" – "G" as the provisions of the Usury Act [were] not repealed prior to the conclusion of the Agreements, alternatively the National Credit Act, if same is found to be applicable, specifically provides that interest cannot be recovered at the rate of 107,6923% which would have been the effective interest rates applicable to the Agreements and therefore pleads that the Plaintiffs can only be entitled to repayment of the capital so invested.

8.2 The Defendant pleads that in terms of Annexures "A" – "G" interest would have been paid on the initial capital amounts invested equal to an interest rate of 107,6923%.

8.3 The National Credit Act prescribes interest at the maximum rate of 36,6% per annum for the time applicable to the Agreement. Since the parties did not agree to payment of an amount of 36,6% the parties' *arrangement pertaining to the payment of interest is illegal, contra bonos mores and against the provisions of the National Credit Act and the Plaintiffs would therefore not be entitled to payment of interest on the amounts so invested."*

[9] The question of rectification which the defendant seems to plead does not arise because he did not produce evidence to establish a cause of action to that end. As far as the extremely exorbitant interest offered by the scheme and claimed by the plaintiffs is concerned Adv Willem Coetzee, for the plaintiffs, was constrained to concede that same was usurious but contended that that fact does not render the whole agreement illegal. Of course Mr Coetzee would be correct if the agreement is not attended by any illegality. See **Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others** 1976 (2) SA 856(W) at 861 A at which point the Court held:

"It is clear that the provisions of the Limitation Act and its precursor, the Usury Act, 37 of 1926, were not intended to render a transaction in which usurious interest is charged a turpis causa, with the result that the lender may recover neither his capital nor interest at the permissible rate. He is entitled to judgment for such amounts, but not for the excessive interest (see ***Radnan v. Rabinowitz****, 1949 (4) SA 497 (C) at pp. 508, 509;* ***Mahomed v. Nagdee****, 1952 (1) SA 410 (AD) at p. 416B; sec. 5 (1) of the Limitation Act)."*

See also **Mndi v Malgas** 2006 (2) SA 182(E) at 188.

[10] It is unquestionable that a pyramid scheme is illegal. In the Fourie NO–case (above) the Court, dealing with dispositions in an insolvent estate, had this to say:

"18. A disposition, it has been decided on more than one occasion, is not made for value if the payment is illegal. Estate Jagger v Whittaker and another 1944 AD 246 dealt with the payment of usurious interest. 'No obligation of any sort,' said Watermeyer CJ at 251-252, 'to pay a higher rate of interest than that permitted by the Act can arise from a promise to pay a higher rate, and it therefore follows that such a promise is a mere nullity, and any payment of such a higher rate in pursuance of such promise is in effect a donation, or disposition not made for value, and is consequently liable to be set aside under section 26 of the Insolvency Act.' In Rousseau en andere v Malan en `n ander 1989 (2) SA 451 (C) at 459I-J this dictum was applied to illegal commission payments from a scheme found to have been a lottery. In Visser en `n ander v Rousseau en andere NNO 1990 (1) SA 139 (A) where the operators of a pyramid scheme paid participants for a useless product such payments were (at 154I – 156F) found to be dispositions without value. ---

19. The promise to reward investors with the returns paid by the scheme was a "mere nullity" and any payment of a profit or interest would have been a disposition not made for value.--- If a "repayment" of capital retained in the scheme by way of a book-entry reinvestment does not qualify as a disposition, then the "payment" of gains retained in the scheme is not a disposition either. Where gains retained were made (in the manner that compound interest might be earned by capitalizing it) only the actual payment of the accumulated gains would be a disposition without value.--- All the parties before court accepted that the repayment of an investor's capital was not a disposition without value: the investor's condictio prevented it from taking on that character: where a disposition was made it was made in discharge of an obligation to return the illegal payment."

This principle applies equally in this case. The plaintiffs are accordingly entitled only to the recovery of their capital investment.

[11] First plaintiff made a capital investment of R468 000,00. He was repaid an amount of R120 000,00 on 02 May 2007. It is immaterial for purposes of this judgment whether the repayment was in respect of the yield/interest or whether it related to the capital investment. Plaintiff is therefore only entitled to recover R348 000,00. Second and Third plaintiffs have not had any repayment on their investments. They are entitled to the R13 000,00 each that they have invested.

[12] There is no reason to legitimize this unlawful scheme by awarding costs to the plaintiffs. However if defendant is not ordered to pay interest from the date of this order there would be no incentive or mechanism for him to liquidate the judgment debt expeditiously. Bank interest rates are currently very low; a rate of 15,5% would benefit the plaintiff unduly. I will allow 10% interest per annum.

[13] **I therefore make the following order against the defendant:**

1. Payment to first plaintiff (Krishen Moodaley) in the amount of R348 000,00.
2. Payment to second plaintiff (Tishen Moodaley) in the amount of R13 000,00.
3. Payment to third plaintiff (Yogie Moodaley) in the amount of R13 000,00.
4. Interest on the above amounts at the rate of 10% per annum from date of this order to date of payment.
5. There shall be no order as to costs.

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

On behalf of the Plaintiff:	**Adv. W Coetzee**
Instructed by:	Towell & Groenewaldt Attorneys
On behalf of the Defendant:	No appearance.