IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

Case No: 1497/2024
Date Heard: 12 September 2024
Date Delivered: 06 November 2024

In the matter between:

LAMBERTUS VON WIELLIGH BESTER N.O.	**FIRST PLAINTIFF**
JOHNNY BASSON N.O.	**SECOND PLAINTIFF**
OCTOX (PTY) LTD (IN LIQUIDATION)	**THIRD PLAINTIFF**
CHRISTIAN FINDLAY BESTER N.O.	**FOURTH PLAINTIFF**
LALIA ESSOP N.O.	**FIFTH PLAINTIFF**
IMAGINA (PTY) LTD (IN LIQUIDATION)	**SIXTH PLAINTIFF**

and

ORGIE VOSLOO	**DEFENDANT**

JUDGMENT

MULLINS AJ:

[1] This is an application for summary judgment, which has its genesis in the liquidation of two companies, Octox (Pty) Ltd and Imagina (Pty) Ltd, in the Western Cape High Court.[1] The First and Second Applicants are the liquidators of Octox and the Fourth and Fifth Applicants of Imagina.

[2] Alleging that the Defendant was the recipient of monies from a "*ponzi-type investment scheme*", more commonly known as a pyramid scheme, on 24 April 2024 the liquidators of the Companies issued summons against the Defendant claiming the following relief:

> "WHEREFORE the First and Second Plaintiffs[2] claim:
>
> (a) An order setting aside the dispositions in terms of Section 26 read with Section 32 of the Insolvency Act;
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> (b) An order declaring First and Second Plaintiffs to be entitled to payment of the amount of R398,146.20;
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> (c) Payment of the amount of R398,146.20;
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> (d) Interest on the said sum at a rate and from a date which the court deems just in terms of the provisions of Section 2A(5) of the Prescribed Rate of Interest Act, No. 55 of 1975; alternatively a *temporae morae* in terms of the provisions of the Prescribed Rate of Interest Act No. 55 of 1975;
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> (e) Costs of suit;

[1] Which will be referred to as "Octox", "Imagina" or the "Companies", depending on the context.
[2] The liquidators of Octox.

(f) Further and/or alternative relief.

WHEREFORE, and in the alternative to the First and Second Plaintiffs' claims, Fourth and Fifth Plaintiffs' claim:

(g) An order setting aside the dispositions in terms of Section 26 read with Section 32 of the Insolvency Act;

(h) An order declaring First and Second Plaintiffs to be entitled to payment of the amount of R398,146.20;

(i) Payment of the amount of R398,146.20;

(j) Interest on the said sum at the prescribed rate a *temporae morae* from date of judgment to date of payment;

(k) Costs of suit;

(l) Further and/or alternative relief."

[3] The Defendant defended the action on the merits and, in addition, took two special pleas, namely, prescription and lack of *locus standi.*

[4] As a result of the plea the First to Third Plaintiffs[3] applied for summary judgment, the relief claimed being as set out in (a) to (e) above, the claim for interest (d) being the alternative option.

[5] The Defendant opposed the application for summary judgment, raising the same defences as contained in the plea, plus taking an additional point that the application is brought in the name of the First to Third Plaintiffs only (the liquidators of Imagina not being cited). The late filing of a confirmatory affidavit is also objected

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[3] The reference to the Third Plaintiff (Octox) is unnecessary. Nothing turns on this.

to and on this basis alone the Defendant submits that summary judgment stands to be dismissed as there is no application before court.

[6] As is so often the case when it comes to pyramid schemes (and illegal investment schemes in general) the manner in which the Companies presented their investment model to the public was complicated and confusing. Fortunately, as a result of certain undisputed allegations and certain admissions made in the Defendant's plea and opposing affidavit it is not necessary to unravel this spider's web. Suffice it to record that it is admitted by the Defendant that:

(a) Pursuant to an investment agreement concluded with Imagina he paid R240,000.00 into the bank account of Octox;

(b) Octox paid him out R638,146.20;

(c) The scheme was unlawful;

(d) He accordingly received R398,146.20 in excess of what he had invested in the scheme.

[7] In response to the allegations in the particulars of claim dealing with the liquidation of the Companies and the fraudulent nature thereof the Defendant pleads "*no knowledge*" and puts the Plaintiffs to the proof thereof.

[8] However, in response to the allegation that the Defendant was one of the investors in the unlawful scheme which, as a result of the unlawfulness thereof the agreements concluded with the Defendant were void *ab initio,* the Defendant pleads:

> "The Defendant pleads that he was an investor and admits that any agreement was void *ab initio.* The rest of the paragraph is not admitted and the Plaintiff is put to the proof thereof."[4]

[4] As the entire paragraph is admitted what is not admitted is unclear.

[9] The Defendant pleaded that as the payments to him were based on agreements that were void *ab initio* the Plaintiffs are not entitled to repayment and pleads further that the Plaintiff should have summonsed him based on enrichment.

[10] I turn now to the technical points raised by the Defendant. The objection to the lateness of the confirmatory affidavit can be disposed of without difficulty. The founding affidavit, which was attested to by the Second Plaintiff was filed timeously, but due to the fact that the First Plaintiff was abroad his confirmatory affidavit was filed a few days out of time. In paragraph 3 of the founding affidavit the Second Plaintiff alleges that he is duly authorised to bring the application on the First Plaintiff's behalf. In response the Defendant merely "*notes*" this allegation. In paragraph 6 the Second Defendant states that as the First Plaintiff was in Spain at the time he was unable to file a confirmatory affidavit, but would do so on his return. Again, in response the Defendant "*notes*" the allegation.

[11] Not only did the Second Applicant have the necessary authority to represent the First Applicant, the lateness of the First Applicant's confirmatory affidavit is fully explained. In addition, it does no more than confirm that the Second Applicant has his authorisation to bring the summary judgment application, which the Defendant does not deny. Finally, the Defendant does not allege any prejudice, nor is there any. In **SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO**,[5] with regard to a failure to comply with the Rules the following was stated (at 333H – 334D):

> "I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed. A party who takes a procedure step which advances the finalization of the case may not, unless he is unaware of the irregularity, ask for the setting aside of the relevant irregularity. It may even be correct to infer that the situations which have been regarded as beyond the scope of Rule 30(1) were instances where the relevant objection could be adequately raised at an

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5 1981 (4) SA 329 (A).

appropriate stage whilst the cause of objection constituted no hindrance to the ordinary course of the litigation process. Cf *Enslin v Slabbert, Verster & Malherbe (Noord-Oos Kaap) (Edms) Bpk en 'n Ander* 1979 (2) SA 983 (O) at 986D; *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) at 508E. Even if this generalization needs qualification, the exercise of the Court's discretion has been consistently led by the presence or absence of prejudice in relation to the exercise of a party's procedural right or duty to respond to a communication received, or to the taking of a next step in the sequence of permissible procedures to ripen the matter for proper orderly hearing. Where such prejudice is absent, a decision to set the irregular proceeding aside will not be given. On the contrary, the irregularity may be overlooked. Cf Herbstein and Van Winsen *The Civil Practice of the Superior Courts in SA* 3rd ed at 386 and in particular the decisions in *Distins Seed Cleaning and Packing Co (Pty) Ltd v Stuart Wholesalers* 1954 (1) SA 283 (N); *Marais v Century Insurance Co Ltd* 1960 (3) SA 33 (W). In *Theron v Haylett* 1917 WLD 140 the Court, whilst emphasising the need for precision in regard to a summons, said:

> "the principle is that unless the person on whom a summons is served can show he has been prejudiced by formal defects the summons should stand".

Such an approach would be in accordance with the view that:

> "objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits." [Underlined for emphasis].

[12] I should add that, in my view, the filing of a confirmatory affidavit by the First Plaintiff – which merely confirmed the Second Plaintiff’s authority – was unnecessary.

[13] In the circumstances there is no merit in the Defendant’s contention that the late filing of the confirmatory affidavit means that there is no summary judgment

application before the court. Insofar as it is necessary, the late filing thereof is condoned.

[14] Insofar as the objection to the application for summary judgment being brought in the names of the First and Second Plaintiffs only (and the Third Plaintiff), it is not in dispute that although the Defendant invested in Imagina, the money he paid was to Octox and he was refunded by Octox. The relief sought in the particular of claim is framed in such a way that either the First and Second Plaintiffs (on behalf of Octox) or the Fourth and Fifth Plaintiffs (on behalf of Imagina) would be paid.

[15] In the circumstances I am of the view that nothing turns on this issue: Octox was a party to an illegal scheme; Octox was the recipient and payee of the monies: None of this is in dispute.

[16] The Defendant also alleges that the claim has prescribed. The basis for this defence is the following:

(a) Imagina and Octox were finally liquidated on 9 November 2020 and 22 January 2021 respectively;

(b) The last payment to be received by the Defendant was on 18 November 2019;

(c) Therefore summons should have been served on or before 18 November 2022.[6] It was, however, served in April 2024.[7]

(d) As more than three years had elapsed since the last payment had been received by the Defendant the claimed had prescribed.

[17] In both a replication to the Defendant's plea and in the founding affidavit the Plaintiffs take issue with prescription. They state:

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6 Actually 17 November 2022.
7 Actually 26 April 2024.

(a) The liquidators of Octox (the First and Second Plaintiffs) were finally appointed on 3 June 2021; and/or

(b) It was only at the second meeting of creditors on 27 August 2021 that the liquidators of Octox were granted the necessary authority to institute legal proceedings. It was on this date that prescription began to run; and/or

(c) The liquidators required time in which to investigate the matter and only acquired the requisite knowledge as envisaged in section 12(3) of the Prescription Act, 68 of 1969 at a much later date.

[18] Section 12(3) of the Prescription Act reads:

> "(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge <u>if he could have acquired it by exercising reasonable care</u>." [Underlined for emphasis].

[19] I will deal with the third contention first. According to the replication the Plaintiffs only acquired the requisite knowledge as contemplated in section 12(3) "*… on conclusion of the identification, forensic investigation into and reconciliations of the transaction(s) of the defendant with Octox, alternatively, Imagina, during the course of 2023."*

[20] The Plaintiffs do not elaborate as to what identification was necessary, what the forensic investigation consisted of and why the reconciliation of the transactions took until August 2023 to finalise. Bearing in mind that the provisional appointment was on 26 January 2021 and the final appointment on 3 June 2021 they would have to do more than make bald allegations that the matter was being investigated. That prescription commenced running only in August 2023 can be rejected.

[21] The second contention is equally problematical. Taken to its logical conclusion, if the creditors never meet (for whatever reason) prescription can never commence running. This argument must also be rejected.

[22] Fortunately for the Plaintiffs the first contention has merit. Section 359(1)(a) of the 1973 Companies Act provides as follows:

> "359. Legal proceedings suspended and attachments void. – (1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-
>
> (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator;"

[23] Ironically, in a very closely related matter Wille J stated the following in **Bester NO and Others v Massyn**:[8]

> "[7] The respondent contends and puts up a shield to the effect that any portion of the applicant's claim, which related to payments that were made to her, prior to the 4th of June 2018, have since prescribed due to the effluxion of time.
>
> [8] The application for the liquidation of the third applicant was presented to court on the 30th of November 2020. It is further trite in terms of the Companies Act, once a court has made an order for the winding-up of a company, all civil proceedings by the company remain in abeyance and suspended until the appointment of the liquidators of the company, so liquidated.
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> [9] Moreover, in terms of the Prescription Act, a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor

[8] Bester N.O and Others v Massyn (9530/2021) [2021] ZAWCHC 204 (15 October 2021).

and of the facts from which the debt arises. It is trite law that prescription in respect of statutory claims in liquidation can only start running from the date of the appointment of the liquidators and once the liquidators are appraised of all the facts of the claim, or could reasonably have been expected to have known such facts.

[10] The liquidators were provisionally appointed on the 16th of October 2020 and finally on the 3rd of June 2021. This application was launched and served on the 4th June 2021. The prescription defences are accordingly euthanized."

[24] The fact that the last payment to the Defendant occurred during 2019 is irrelevant. The cause of action which the Plaintiffs rely on is based on section 26, read with section 32, of the Insolvency Act, which cause of action only arose on liquidation and, as already stated, prescription does not commence running until the liquidators' appointment was made final.

[25] The liquidators of Octox received their final appointment on 3 June 2021. Summons was served on 26 April 2024, which is within the three year period provided for in section 11(f) of the Prescription Act. Accordingly I find that the claim against the Defendant had not prescribed on the date upon which summons was served.

[26] The final technical point taken by the Defendant is that because the Plaintiffs have not proven a claim <u>against</u> Octox they do not have *locus standi* and any proceedings against the Defendant are premature.

[27] The Plaintiffs, who are the duly appointed liquidators of Octox, represent that entities' creditors, who comprise the *concursus creditorum*. They step into the shoes of the directors of Octox. It is their job to, *inter alia*, establish who is indebted to Octox and who it is indebted to and to take whatever steps they deem necessary to recover those debts, where Octox is owed, or to pay where Octox is found to be owing, or to dispute the claim, as the case may be.

[28] The liquidators' function is to wind up the affairs of a company. It is not their function, and it is illogical to suggest, that the Plaintiffs should have first proven a claim against Octox before proceeding against the Defendant. This point is, likewise, without merit.

[29] Although raised in passing in the plea, neither in his affidavit in opposition to the application for summary judgment nor in the heads of argument is the enrichment issue raised by the Defendant. Therefore no more need be said in that regard. Suffice it to state even if a claim based on unjustified enrichment was available to the Plaintiffs (and I express no view) that does not preclude the claim based on section 26.

[30] I turn now to the merits of the Plaintiff's claim. In order to succeed with a claim in accordance with section 26 of the Insolvency Act the Plaintiffs must prove on a balance of probabilities that the disposition was made not for value, and:

(a) if made more than two years prior to the liquidation it is proved that immediately thereafter the liabilities exceeded the assets; or

(b) If within two years of the liquidation the beneficiary of the disposition is unable to prove that, immediately after the disposition, the assets exceeded the liabilities.

[31] There is a proviso to section 26 which neither party relied upon, and is not relevant for present purposes.

[32] The effect of the two year cut-off date is that in the first scenario the onus is on the Plaintiff and in the second it is on the Defendant.

[33] In this regard the particulars of claim states that of the R636,146.20 paid to the Defendant:

(a) R466,633.40 was received more than two years prior to the liquidation; and

(b) R171,482.80 was received within two years of the liquidation.

[34] The amount claimed, namely R397,146.20, is arrived at by subtracting the payments to the Defendant from his original "investment" of R240,000.00.

[35] The Defendant pleads as follows to these allegations:

> "The Defendant admits that these monies were received and pleads that as these payments were based on a void *ab initio* agreement the repayment is not enforceable. It is further pleaded that the Defendant should have been summoned for enrichment.[9]
>
> The Defendant denies being liable for any monies to the Plaintiffs and the Plaintiffs are put to the proof thereof."

[36] Because of the conclusion I have come to the divided onus is of no moment.

[37] At the end of the day, on a careful analysis of the Defendant's case, as set out in his plea and opposing affidavit, he does not place anything in dispute or, at least, not seriously so. His defences are either technical or bad in law. The common cause facts are that the Defendant received the sum of R398,146.20 in excess of the amount he invested in the illegal pyramid scheme.

[38] In **Fourie NO and Others v Edeling NO and Others**,**[10]** dealing with a pyramid scheme, the following was stated (at para [18]):

> "[18] <u>A disposition, it has been decided on more than one occasion, is not made for value if the payment is illegal</u>. *Estate Jager v Whittaker and Another* 1944 AD 246 dealt with the payment of usurious interest. 'No obligation of any sort,' said Watermeyer CJ at 251-52, 'to pay a higher rate of interest than that permitted by the Act can arise from a promise to pay a

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[9] As already alluded to, enrichment is no longer an issue.

[10] [2005] 4 All SA 939 (SCA)

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 sec. 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." [Underlined for emphasis].

[39] In the same judgment (at para [13]), the observation is made that:

"The nature of the scheme dictated its insolvency."

[40] **Fourie v Edeling** dealt, *inter alia*, with a claim for the repayment of what was referred to as the "*actual payment of the accumulated gains*", in other words the amount which an investor received over and above his/her investment (paragraph [19]). In the present matter it is common cause that that amount is R397,146.20.

[41] The grounds upon which summary judgment may be granted are trite and need not be rehashed here. I am satisfied that the Defendant does not have a *bona fide* defence to the Plaintiff's claim and that summary judgment should be granted.

[42] Insofar as costs are concerned, the matter was rendered more involved by the many defences raised by the Defendant. Accordingly, I intend to order counsel's fees to be taxed on scale B.

[43] The following order shall issue:

1. The dispositions to the Defendant in terms of Section 26 read with Section 32 of the Insolvency Act, 24 of 1936 are hereby set aside.

2. It is declared that the First and Second Plaintiff’s are entitled to payment of the amount of R398,146.20.

3. The Defendant is hereby ordered to pay the First and Second Plaintiffs the amount of R398,146.20.

4. Interest shall be payable on the amount referred to in paragraph 3 above *a tempore morae* from the date of judgment to the date of payment.

5. The Defendant is to pay the costs of this application, and costs of suit, in terms of scale B of Uniform Rule 67A, read with Rule 69.

NJ MULLINS
ACTING JUDGE IN THE HIGH COURT

DATE:

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