



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A07/25

In the matter between

PIETER HENDRIK STRYDOM NO

1st Appellant

HAROON ABDOOL SATAR MOOSA NO

2nd Appellant

DEON MARIUS BOTHA NO

3rd Appellant

AND

CECILIA JACOBA LE ROUX

RESPONDENT

ERASMUS J, THULARE J AND HOLDERNESS J

Date of Hearing : 25 July 2025

Date of Delivering : 03 November 2025

JUDGMENT

THULARE J

ORDER

The order of the court of first instance is set aside and substituted with the following order:

1. The dispositions made by Free Agape Enterprises (Pty) Ltd (in liquidation) (Free Agape) to the defendant during the period 21 April 2017 to 14 November 2017 in the amount of R1 044 500-00 are set aside in terms of section 26(1) of the Insolvency Act, 1936 (Act No. 24 of 1936) (the IA).
2. The defendant is ordered to pay the sum of R1 044 500-00 to the plaintiffs in their capacity as the duly appointed liquidators of Free Agape.
3. The defendant is ordered to pay interest on the amount aforesaid at the rate of 11.25% per annum from 15 June 2023 to date of payment.
4. The defendant to pay the costs.
5. The defendant to also pay the costs of appeal, including the costs of two counsel on scale C and B respectively.

[1] This is an appeal against the order and the whole of the judgment of the court of first instance delivered on 9 June 2023 where the court only set aside the dispositions made by Free Agape to the respondent during the period 13 October 2017 to 14 November 2017 in the amount of R240 000-00 and ordered the respondent to pay only that amount to the liquidators plus interest at the mora rate from date of judgment to date of final payment and costs. The court of first instance granted the appellants' the alternative claim in terms of section 29 of the IA, and not its main claim in terms of section 26 of the IA. The respondent had not filed any opposing papers, but had appeared in person and was heard at the hearing of the application for default judgment. The appellants' application for leave to

appeal was dismissed by the court of first instance and the Supreme Court of Appeal granted the appellants' leave to appeal to the Full Court of the Division.

[2] Free Agape was placed under final liquidation by order of the court in this Division on 12 June 2018 and the date of commencement of the liquidation was 22 March 2018. The appellants' were appointed the joint liquidators of Free Agape on 7 March 2019. On 13 August 2019 a court in this Division declared the investment scheme conducted under the name and style of Free Agape and various other trading names, to be illegal, unlawful and void, and further all investment and related agreements entered into between Free Agape and third parties as investors, to be null and void. At all relevant times Agape did no business other than taking deposits from clients, styled investors, which it utilized to repay deposits received from other clients and/or pay out money, described as dividends, to other clients. The liabilities of Free Agape exceeded its assets and Free Agape was unable to pay its debts as contemplated in section 339 read with 340 of the 1973 Companies Act.

[3] During or about the period 21 April 2017 to 14 November 2017 Free Agape effected payments to the defendant in a total of R1 044 500-00. These payments were made by Free Agape to the respondent less than two years before the effective date of liquidation. The appellants' case was that these payments constituted dispositions as intended in section 26(1) of the IA and that they were entitled to reclaim for the benefit of the body of creditors, all actual payments made to the respondent by Free Agape in so far as they exceeded payments made by the respondent to Free Agape. During this period the respondent paid R0.00 to Free Agape. The R1 044 500-00 were dispositions not made for value.

[4] In the alternative, the appellants claim was that during or about 13 October 2017 to 14 November 2017 Free Agape effected payments to the defendant in a total amount of R240 000-00 and that the amount was paid fewer than six months prior to the effective date of liquidation and that the payments constituted dispositions as intended in section 29(1) read with section 2 of the IA. Each of the payments resulted therein that immediately after the payments, the liabilities of Free Agape exceeded the value of its assets, alternatively, the amount by which its liabilities had exceeded its assets before the dispositions were made, was further increased and had the effect of preferring the respondent above the other creditors of Free Agape, alternatively above the general body of creditors of Free Agape. In the premises the dispositions were liable to be set aside in terms of section 29(1) of the IA and the appellants' accordingly claimed an order that the dispositions in terms of which Free Agape paid a total amount of R240 000-00 to the respondent be set aside and that the respondent be ordered to pay the said amount to the appellants'.

[5] The appellants' have since their appointment as liquidators been engaged in the recovery of the funds paid out to investors to ensure an equitable distribution thereof. It was common cause that the respondent was an investor who received substantial payments from Free Agape. Notwithstanding demand alternatively demand by way of summons, the respondent refused, neglected and/or failed to effect payment of the R1 044 500-00 to the appellants. The appellant claimed repayment of the amounts received by the respondent and to this end instituted action against her for orders in terms of section 26 alternatively section 29 of the IA, and for judgment.

[6] The respondent was personally served with the summons. She failed to deliver an intention to defend, and an application was made for default judgment. On 30 October 2022 she appeared in person to oppose the application. The court ordered the matter to be removed from the roll and afforded the respondent an opportunity to file her notice of intention to defend, and her plea within a specified timeframe. The respondent failed to comply with the order. The notice of re-enrolment of the application for default judgment was once again served on her personally. There was correspondence between her and the appellants attorney of record wherein the respondent was requested to provide the attorney with her bank statements to show what happened to the monies received from Free Agape and advised of the appellants' intention to proceed, all of which was disclosed to the court of first instance. The respondent did not provide the bank statements requested. She was present when the default application was heard on 9 June 2023. The court of first instance heard the appellants' counsel and heard the respondent personally. The court indicated that a case had not been made out for judgment in terms of section 26 and granted judgment in terms of the alternative claim under section 29 of the IA. The reasons were later requested and provided.

[7] Section 26(1) of the IA provides:

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.

The appellants' did not specify the provisions, that is, whether they relied on section 26(1)(a) or 26(1)(b) of the IA. However, it is clear from the facts which they alleged that the section which was relevant and operative, was section 26(1)(b) of the IA [*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 27]. The necessary allegations made to support their claim related to dispositions made within two years of the effective date of the winding up of the estate of Free Agape. The appellants' pleaded that the payments they claimed were made by Free Agape to the respondent less than two years before the effective date of the liquidation. The only possible conclusion was that the appellants claim lies under section 26(1)(b) of the IA. The time between the disposition having been made and the date of the insolvency was determinative of where the onus lies. In the event that the disposition was made within two years of the liquidation, the appellant needed only to prove the disposition without value, and on that proof alone, the disposition was susceptible to be set aside, unless the respondent could show that immediately after the disposition was made, the insolvent's assets exceeded its liabilities [*Amlers Precedents of Pleadings*, 9th ed, Harms, p 212; *Rossouw NO v Visser* 1989 (2) SA 289 (C) at 307].

[8] The respondent did not file a plea and did not raise any defence. As indicated, there was only one defence available to her in terms of a section 26(1)(b) claim.

The onus was on the respondent to show that immediately after the disposition was made, Free Agapes assets exceeded its liabilities. The respondent did not discharge this onus which lay squarely on her. The appellants' allegation that the respondent received the amount claimed, for no value at all remained unanswered [*Strydom & Another v Snowball Wealth (Pty) Ltd and others* 2022 (5) SA 438 (SCA) at para 36]. Considering the circumstances under which the disposition was made, the appellants' established that Free Agape received no value for the disposition [*Umbogintwini Land and Investment Co Ltd (in Liquidation) v Barclays National Bank Ltd & Another* 1987 (4) SA 894 (A) at 899F]. There was no benefit for Free Agape and the Free Agapes creditors would be prejudiced. From the facts, the deduction was that Free Agapes business was a pyramid scheme. The payment of current investors was from drawing new investors, which is a classic attribute of such a scheme. The scheme had been declared illegal, unlawful and void. The investments and related agreements entered into between Free Agape and investors including the respondent, were null and void. Free Agape did no other business other than taking deposits from investors, which it utilised to repay deposits received from other clients and to pay our dividends to the other clients [*Visser v Rossouw NO* 1990 (1) SA 139 (A) at 156A]. The respondent's made no payment to Free Agape and the profit was the full amount that she received [*Fourie NO & Others v Edeling NO and Others* [2005] 4 All SA 393 (SCA) at para 18-19].

[9] In the absence of the respondent's version, the court of first instance was bound to accept the appellants allegations. It was not open to the court to speculate about payments that she may have expected the respondent to have made. The respondent did not prove on a balance of probabilities that she had lost a right against another person in return for the disposition which were liable to be set

aside, and that she acted in good faith [section 33(1) of the IA; *Geyser NO and Others v Telkom SA Ltd* 2006 (2) All SA 148 (T)]. The respondent did not plead this statutory defence or any defence at all. The respondent's knowledge of the illegality of the scheme or her intentions at the date of the disposition were of no consequence in determining whether the dispositions were made not for value under section 26. The court of first instance could not *mero motu* have recourse to issues falling outside the pleadings. The court of first instances reliance on *Estate Wege v Strauss* 1932 AD 76 at 84 was misplaced. The respondent received the amount when he had made no investment or payment, and Free Agape had no underlying genuine profit producing business. The respondent did not plead that Free Agape received some value for the disposition.

[10] The deemed date of commencement of the liquidation of Free Agape was 22 March 2018. The appellants' alleged that Free Agape effected the payments in a total amount of R1 044 500-00 to the defendant during or about the period 21 April 2017 to 14 November 2017. It also alleged that these payments were made less than two years before the effective date of liquidation. The respondent did not dispute these allegations. The respondent did not plead the details of the payments, if any, that she made to Free Agape. The respondent did not plead a substantive answer to the allegations and refused to adhere to the request to provide her bank statements for the period [Rule 22(3); *ABSA Bank Ltd v IW Blumberg & Wilkinson* 1997 (3) SA 669 (SCA) at 673-674]. The court of first instance was bound to accept the appellants' version. It was not open to the court to speculate about payments' that the court may have expected the respondent to have made. In computing its claim, the appellants took into account all the payments made during the two-year period before the effective date of liquidation. There was no basis to

find otherwise. In the absence of a lawful defence, the discretion afforded the court of first instance did not mean that it may refuse to set aside an impeachable disposition on any grounds that it regarded as fair or reasonable or simply out of pity for the person before the court. In the absence of a lawful defence, the court must set aside the disposition if the statutory requirements have been proved [*Visser* at 158D-F; *Mars* at p 316]. For these reasons the order is made.

DM THULARE

JUDGE OF THE HIGH COURT

I agree

M HOLDERNESS

JUDGE OF THE HIGH COURT

I agree, it ordered

NC ERASMUS

JUDGE OF THE HIGH

COURT