

SOUTH AFRICA / JUDGMENT

Benecke and Others v Medbond Fund Managers (Pty) Ltd and Another (B1790/2023) [2023] ZAGPPHC 1860 (30 October 2023)

[2023] ZAGPPHC 1860

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

B1790/2023

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FLYNOTES:

COMPANY – Winding up – Unlawful business –
Licence
and authorisation of financial services provider – In contravention of legislative provisions, applicants' live savings were taken for investment purposes, without having undergone the strict checks and balances – Company at least prima facie conducting unlawful business and demonstrably just and equitable that the unlawful conduct should be terminated by way of a provisional liquidation order – Companies Act 61 of 1973, s 344(h).
IN
THE HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)
REPUBLIC
OF SOUTH AFRICA
Case
Number: B1790/2023
DELETE
WHICHEVER IS NOT APPLICABLE
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED: NO

DATE: 30 Oktober 2023
In

the matter between: ELMARIE
BENECKE
First Applicant
MAARTEN
CORNELIUS BENECKE
Second Applicant
MAARTEN
CORNELIUS BENECKE N.O
Third Applicant
ELMARIE
BENECKE N.O
Fourth Applicant
KARLA
KOCH N.O
Fifth Applicant
HENDRIK
ERATH NEL N.O
Sixth Applicant
MORONE
BOERDERY CC
Seventh Applicant
and
MEDBOND
FUND MANAGERS (PTY) LTD First
Respondent
FINANCIAL
SECTOR CONDUCT AUTHORITY
Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The applicants apply for the provisional liquidation of the first respondent on the grounds that the first respondent is factually and/or commercially insolvent, alternatively, that it is just and equitable, as contemplated in section 344 of the previous Companies Act, 61 of 1973, to do so.

Parties

- [2] The first and second applicants are cited in their personal capacities and in their capacities as trustees of the Maarten Benecke Trust (“the Trust”).
- [3] The third to sixth respondents are cited in their official capacities as trustees of the Trust.

- [4] The seventh applicant, Morone Boerdery CC (“the CC”), is a close corporation situated at the Farm Gerhard Minne Bron, 139, Portion 7, North West Province.
- [5] The first respondent, Medbond Fund Managers (Pty) Ltd (“MFM”), is a company duly incorporated in terms of the Companies Act, 71 of 2008.
- [6] The second respondent, the Financial Sector Conduct Authority (“FSCA”), was established in terms of the Financial Sector Regulation Act, 9 of 2017.

Background

- [7] This application emanates from investments the applicants made in MFM on advice of their financial advisor, Jaco Van Heerden (Van Heerden). The applicants state that the investments are their life savings and were previously invested with Discovery and Old Mutual.
- [8] Van Heerden, being their financial advisor for some time, however, convinced the applicants that MFM, through active investment strategies, would be able to obtain a higher investment return than their current investment platforms. Van Heerden informed the applicants that he is the director of the company and that the company was an authorised financial service provider with FSP No.
48544. The latter assurance, as will appear *infra*, proved to be false.
- [9] Thus assured, the first and second applicants and the Trust entered into written Fixed Term Deposit
- Investment Management Agreements (“the agreements”) with MFM in terms of which the first and second applicants paid an initial deposit of R 3,4 million and the Trust, an initial deposit of R 6 million. According to the applicants it was a term of the agreement between the Trust and MFM that MFM will pay an amount of R 24 000, 00 to the Trust in lieu of a monthly growth withdrawal.
- [10] I pause to mention, that the seventh applicant’s money was invested in another company, and it is common cause that the seventh applicant does not have locus standi to apply for the liquidation of MFM. The remaining applicants will hereinafter be referred to as such or as the applicants.
- [11] Subsequent to the payment of the deposits, the applicants received letters from MFM advising them that their monies had been invested at Lombard International Life (Ltd) Bermuda, that the funds were managed by MFM, and that the administrator was Obit Capital Lichtenstein. The letters, furthermore, stated that the investments were in compliance with the Financial Advisory and Intermediary Services Act, 37 of 2002 (the Act) and that they will on a quarterly basis receive information on the status of their investments.

[12] During 2001 the applicants became concerned about their investments when MFM failed to provide quarterly updates. The applicants endeavoured to address their concerns with Van Heerden, but their calls went unanswered.

[13] Van Heerden's sudden unavailability increased the applicants' concerns and at the beginning of December 2021 they approached Mr Scheepers ("Scheepers"), their attorney of record, for advice. On 3 December 2021 Scheepers addressed a letter to Van Heerden in which he inter alia recorded the following:

"17. Our own search with regard to Medbond has resulted in a press release from the Financial Sector Conduct Authority dated 27 August 2021, in which it is specifically recorded that the license of Medbond Markets (Pty) Ltd and Medbond Insurance Brokers (Pty) Ltd have been provisionally withdrawn.

18. The FSCA has further advised that Medbond Fund Managers (Pty) Ltd is not authorised to conduct financial services."

[14] In paragraph 21 of the letter Scheepers stated the following:

"...we request that you urgently and without delay and by no later than 8 December 2021, provide us with verifiable and concrete proof of the manner place and amount of investments made by our clients and with whom you had invested it, with traceable contact information."

[15] On 8 December 2021 Scheepers received a reply from Mr Oosthuizen ("Oosthuizen"), an attorney who stated that he represents the Medbond Group of Companies. In response to the request for detailed information, Oosthuizen referred to inter alia clause 2 of the agreements between the parties, to wit:

"2.-Authorization of the Fund Manager: The Customer hereby authorises Medbond Fund Managers to enter orders on behalf of the Account for management of the investment deposit. The Customer agree and confirm to the full authority of Medbond Fund Managers, authorising Medbond Fund Managers to transact in any of the Investment deposit in the Customer's Account on the sole discretion of the Fund Manager. Medbond Fund Managers shall have discretionary authority to make full investment and trading decisions for the Account, without prior consultation with Customer and without prior notice to or approval from Customer with respect to such investment, management and or trading decision. ..."

and concluded with the following remark:

"We respectfully submit that the age-old maxim of pacta sunt servanda is applicable here. "

[16] Needless to say, no information whatsoever was forthcoming to allay the concerns of the applicants. Notwithstanding further correspondences between the parties, the applicants were at the time when the application was brought still in the dark as to the whereabouts of the money they have deposited with MFM.

- [17] Faced with the aforesaid difficulties, the applicants embarked on further investigations which, according to the applicants, revealed a bleak picture. It appeared that MFM is one of twenty companies in the Medbond Group of Companies. A certain Jakobus Philip Meyer (“Meyer”) is the common denominator of the companies and it appeared to the applicants that the separate companies were utilised to defraud investors.
- [18] The results emanating from the applicants’ investigations are to a large extent confirmed by Soretha De Bruin (“De Bruin”), the deponent to the affidavit filed on behalf of the FSCA. De Bruin stated that she was instructed on 3 March 2021 and on 28 May 2021 respectively to investigate MFM, Medbond Insurance Brokers (Pty) Ltd, Medbond Markets (Pty) Ltd, Masjamplan (Pty) Ltd, Meyer and Van Heerden. The investigation was finalised on 7 September 2022 and a copy of De Bruin’s draft report is attached to her affidavit.
- [19] De Bruin stated that a copy of the draft report was forwarded to MFM for comment. At the time when De Bruin deposed to the affidavit, no response had been received from MFM.
- [20] Lastly, De Bruin confirmed that whilst the investigative phase has been finalised, the FSCA is still in the process of finalising processes relating to the exercise of its regulatory and enforcement powers.
- [21] In the report, De Bruin discussed her investigations and concluded that Medbond Insurance Brokers, Medbond Markets, Masjamplan and Van Heerden contravened several statutory provisions. In respect of Meyer, De Bruin expressed the view that he misappropriated client funds and acted fraudulently by making misrepresentations that certain investment products were issued by Lombard International.
- [22] De Bruin’s prima facie conclusion in respect of MFM reads as follows:
- “192. I am of the view that Medbond Fund Managers contravened section 7(1) of the FAIS Act in that it conducted financial services as defined in the FAIS Act whilst not authorised. The agreement between Barrish and Medbond Fund Managers reflected that Medbond Fund Managers will manage funds of Barrish and that Medbond Fund Managers will make investment decisions on behalf of Barrish. The funds for Barrish’s investment were paid into the bank account of Medbond Fund Managers.”*
- [23] In the meantime and during 2022, the parties endeavoured to resolve their differences by entering into so-called “buy-back” agreements.
- [24] During February 2023, it became clear that the buy-back agreements were not materialising and when MFM failed to make payments to the Trust in February and March 2023, the present application was launched on an urgent basis to be heard in the urgent court on 25 April 2023.
- [25] The papers filed exceeded the prescribed number of papers for matters in the urgent court and Bam J, referred the application to the Deputy Judge President for the allocation of a date of hearing.

[26] On 10 May 2023, the Deputy Judge President directed that the matter be heard by this court as a special motion on 10 August 2023.

POINT IN LIMINE: LOCUS STANDI

[27] In answer to the application, MFM raised a point of lack of locus standi.

[28] Locus standi in liquidation applications is dealt with in section 346 of the Companies Act, 1973 (the previous Companies Act). The continuous application of the provisions of the previous Companies Act in respect of the winding-up and liquidation of companies, is provided for in Part 1, Item 9 of Schedule 5 of the Companies Act, 71 of 2008.

[29] Section 346(1) provides for the class of persons that may apply to court for the winding-up of a company and in casu the applicants rely on section 346(1)(b) that makes provision for the winding-up of a company by "one or more of its creditors (including contingent or prospective creditors)".

[30] In order to qualify as "creditors", the applicants rely:

30.1 on monies due and payable in terms of the agreements entered into with MFM; and

30.2 on the ground that the agreements are void ab initio which entails that all amounts in terms of the agreements are immediately due and payable.

Monies due and payable in terms of the agreements

[31] The agreements were concluded on 19 August 2019 and is for a fixed term of 5 years. In the result, the monies are only due and payable in August 2024 and the first and second applicants do not have locus standi in terms of the agreements.

[32] The position in respect of the Trust is somewhat different. The allegation that MFM failed to pay the monthly growth withdrawal to the Trust for the months February and March 2023 does bestow locus standi on the Trust for purposes of this application.

[33] MFM admits the monthly payments to the Trust in the past and confirm that no payments were made for February and March 2023.

[34] MFM, however, denies that it is legally obliged to make these payments. According to MFM, these payments can at best be described as ex gratia payments.

[35] In order to determine whether MFM is legally obliged to make the payments, one should have regard to the terms of the agreement between the Trust and MFM.

[36] A careful perusal of the terms of the agreement makes it clear that the agreement does not contain a term that provides for the payment by MFM of a "monthly growth withdrawal" to the Trust. To the contrary, clause 2 of the agreement provides that the Trust "will not be authorised or permitted to make any capital withdrawal for the entire 5 (Five) year period."

- [37] The Trust does not allege that the terms of the agreement were amended to provide for the payment of monthly growth withdrawals and clause 14 of the agreement, furthermore, provides that “No provision of this Agreement may be waived or amended unless the waiver or amendment is in writing and signed by both Customer and MedBond Fund Managers.”
- [38] Consequently, MFM is not legally obliged to make monthly payments to the Trust and is, in terms of the agreement, only obliged to repay the capital amount at the expiry of the 5 year term, to wit in August

2024. This obligation is, furthermore, qualified by clause 10 which provides as follows:

“10.-Term of Agreement; This Agreement will have a minimum duration of 5 (Five) years. Either party may terminate this Agreement, notifying at least ten days before expiration period.....If no notification has taken place, this Agreement will be automatically extended to another 5 (Five) years without notice and the Customer agree and confirm that he/she is aware and understands all of the contents described herein above.”

- [39] In the result, the Trust is similarly not a creditor of MFM and lacks the requisite locus standi to apply for the liquidation of MFM.

Agreements void ab initio

- [40] In *Hubby’s Investments (Pty) Ltd v Lifetime Properties (Pty) Ltd* 1998 (1) SA 295 W, the court held that an applicant who effected improvements on the immovable property of an owner (the respondent) has, in the absence of evidence to the contrary, a claim for unjustified enrichment which entails that something was owing to the applicant. The applicant was therefore a creditor and had the requisite locus standi to apply for the liquidation of the respondent.
- [41] Applying the aforesaid principle to the facts in casu, something will be owing to the applicants, if the agreements between the applicants and MFM is void ab initio due to a contravention of section 7(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 (“the Act”).
- [42] Section 7(1) of the Act, provides that a person may not act as a financial service provider, unless such person has been provided with a license under section 8 of the Act. It is common cause that MFM is not licenced as a financial service provider.
- [43] MFM, however, maintains that it does not fall within the provisions of the Act because the applicants’ investments with MFM is not a financial product as listed in section 1(1) of the Act.

[44] Prior to considering the financial products listed in section 1(1) of the Act, it is apposite to have regard to the financial product that forms the subject matter of the agreements between the parties. The agreements envisage the management of the applicants' money for purposes of investment and in order to achieve the aforesaid object, clause 1 provides as follows:

"1. Customer's Account. Customer hereby open a fixed deposit Investment account as per deposits exceeding 12 months as defined under the banks act for fixed term of 5 (Five) years and the account ("the Account") will be with MedBond Fund Mnagers (Pty) Ltd who will manage the account in terms of the agreement as the fund and asset manager." (own emphasis)

[45] Clause 3 provides that an amount equal to the amount so deposited will be repaid:

3. Investment strategy and managing the Account: MedBond Fund Managers agrees to use its best judgment and efforts for the Customer's

benefit. However, the parties agree that the Customer shall bear all risk of gain or loss in the account except for the guaranteed portion of the capital after commissions, fees, administration costs and charges and all expenses of the Account. No assurance can be given that either MedBond Fund Managers advice will result in profits or will not result in losses for the Customer.

[46] Clause 10 determines that the money will be repaid "upon maturity and expiry of the term".

[47] "Financial product" is inter alia defined in the Act as:

"(f) a deposit as defined in section 1(1) of the Banks Act, 1990 (Act No. 9 1 of 1990);"

[48] "Deposit" is defined in the Banks Act as follows:

"deposit", when used as a noun, means an amount of money paid by one person to another person subject to an agreement in terms of which –

- (a) an equal amount or any part thereof will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and
- (b) no interest will be payable on the amount so paid or interest will be payable thereon at specified intervals or otherwise."

[49] Bearing the aforesaid definition in mind, the financial product that forms the subject matter of the agreements is, in my view and at least prima facie, deposits as envisaged in section 1(1) of the Banks Act.

[50] MFM does not agree and avers that the definition of a "deposit" in the Banks Act is not applicable to the agreements because the agreements do not provide that no interest will be payable. I do not agree. The agreements make no mention of any interest payable and in the absence of such an agreement, it follows logically that the parties have agreed that no

interest will be payable. The parties have, furthermore, expressly agreed that the deposits payable by the applicants are “as per deposits exceeding 12 months as defined under the banks act”

[51] MFM could not, during its submissions for purposes of opposing the provisional winding-up order, explain the contradiction created by the aforesaid terms and its stance that the agreements do not fall within a deposit as defined by the Banks Act.

[52] MFM is, furthermore, of the view that its product falls squarely within section 2(2)(b)(ii) of the Financial Sector Regulation Act, 9 of 2017 which reads as follows:

“(2) The Regulations may designate as a financial product any facility or arrangement that is not regulated in terms of a specific financial sector law if—

(b) the facility or arrangement is one through which, or through the acquisition of which, a person conducts one or more of the following activities:

(ii) making a financial investment;” (own emphasis)”

(own emphasis)

[53] It prima facie appears that the financial product offered by MFM falls within the ambit of the Act and section 2(2)(b)(ii) of the Financial Sector Regulation Act is therefore not applicable to the agreements.

[54] Having found prima facie that the financial product that forms the subject matter of the agreements falls within the meaning of a financial product as defined in section 1(1) of the Act, I agree with the applicants and with De Bruins’s finding that MFM is conducting financial services whilst not authorised to do so in contravention of section 7(1) of the Act. For purposes of a provisional liquidation order, the finding remains prima facie and is not binding on a court considering a final liquidation order.

[55] MFM maintains that, even if its conduct is in contravention of section 7(1), the agreements are not automatically void ab initio due the provisions of section 7(2), which reads as follows:

“Subject to section 40, a transaction concluded on or after the date contemplated in subsection (1) between a product supplier and any client by virtue of any financial service rendered to the client by a person not authorised as a financial services provider, or by any other person acting on behalf of such unauthorised person, is not unenforceable between the product supplier and the client merely by reason of such lack of authority.”

[56] A “product supplier” is defined in the Act as:

“any person who issues a financial product by virtue of an authority, approval or right granted to such person under any law, including the Companies Act. 1973 (Act No. 61 of 1973);”

- [57] MFM has not indicated under which law it has received authorisation, approval or obtained a right to enter into the agreements with the applicants. Section 7(2) is clearly directed at a third-party product supplier and was enacted to protect the rights of an innocent customer. The section does not apply to an unauthorised financial service provider such as MFM.
- [58] In order to determine the consequences of MFM's prohibited conduct it is first of all incisive to have regard to the provisions of the Act. Section 36 of the Act provides that any person that contravenes section 7(1) is guilty of an offence and is on conviction liable to a fine not exceeding R 1 000 000, 00 or to imprisonment for a period not exceeding 10 years, or both such fine and such imprisonment.
- [59] Although the Act imposes a penalty on a person that acts in contravention of section 7(1), it does not follow that the agreements entered into between the parties are void ab initio. The principle has been explained in *Metro Western Cape Pty Ltd v Ross* 1986 (3) SA 181 (A) as follows:

*"As a general rule a contract impliedly prohibited by statute is void and unenforceable but this rule is not inflexible or inexorable. Although a contract is in violation of a statute it will not be declared void unless such was the intention of the Legislature and this is nonetheless the rule in the case of a contract in violation of a statute which imposes a criminal sanction. The legislative intent not to render void a contract may be inferred from general rules of interpretation. Each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other. In the case of *Standard Bank v Estate Van Rhyn* 1925 AD 266 SOLOMON JA at 274 stated the position as follows:*

"what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.3.16) puts it - 'but that which is done contrary to law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it'. Then after giving some instances in illustration of this principle, he proceeds: 'The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law.'"

- [60] Having regard to the object and structure of the Act, it is clear that the Act envisages a system regulating the rendering of financial services to the benefit and protection of the public at large.
- [61] Chapter II provides for the authorisation of financial service providers and section 8 requires that detailed information be submitted by an applicant to satisfy the registrar that the applicant complies with the requirements to be a fit and proper financial service provider. The information includes, the personal character qualities of honesty and dignity, the competence and operational ability of the applicant to fulfil the responsibilities imposed by the Act, and the soundness of the applicant's financial affairs.

- [62] I pause to mention, that the applicants' perception that MFM lacks the aforementioned qualities and do not meet the requirements set out supra, is the sole cause for the present application.
- [63] Chapter III of the Act determines the qualifications of representatives of authorised services providers, Chapter IV sets out a code of conduct and Chapter V deals with the duties of authorised financial services providers, which includes the appointment of compliance officers and the keeping of accounting and audited records.
- [64] The Act is thus structured to ensure a firmly controlled environment for the rendering of financial services in order to protect the trusting public, in as far as possible, against unscrupulous service providers.
- [65] In layman's terms, MFM in contravention of section 7(1), took the applicants' live savings for investment purposes, without having undergone the strict checks and balances in place to ensure that the applicants' money will be properly and safely managed. Furthermore, and most properly because MFM does not need to comply with any of the statutory requirements, the applicants are kept in the dark as to where their money is. The treatment meted out by MFM to the applicants, in this respect, is regrettable to say the least.
- [66] If one allowed the agreements to be enforceable the effect of this would be to undermine the very purpose of the Act, to wit to protect the public from exploitation. [See: Absa Insurance Brokers (Pty) Ltd v Luttig and Another NNO [1997] ZASCA 61; 1997 (4) SA 229 (SCA)]
- [67] In the result, I am of the prima facie view that the agreements are void ab initio.
- [68] This finding, in turn, bestows the requisite locus standi on the applicants to apply for the liquidation of MFM.

GROUNDS FOR LIQUIDATION:

- [69] I am not satisfied that applicants have made out a case for the provisional liquidation of MFM on the ground that it is factually or commercially insolvent.
- [70] In providing financial services without being authorised to do so, MFM is, however, at least prima facie, conducting an unlawful business and it is demonstrably just and equitable, in terms of section 344(h) of the previous Companies Act, that the unlawful conduct should be terminated by way of a provisional liquidation order. [See: Cuninghame and Another v First Ready Development 249 (Association Incorporated under section 21) 2010 (5) SA 325 (SCA)]
- [71] MFM relied on unaudited interim financial statements for purposes of proving its solvency and invoking the provisions of section 81 of the Companies Act, 71 of 2008. Section 81(1)(c) (ii), provides that a solvent company may be wound-up on application by one or more of its creditors if it is just and equitable to do so. MFM submitted that the test for just and equitable under section 81 is narrower than the test under section 344(h) of the previous Companies Act.

ORDER

The following order is made:

1. The first respondent is placed under provisional liquidation.
2. Any person with a legitimate interest in the first respondent's affairs is called upon to present reasons on 22 January 2024 (opposed roll), why the provisional order should not be made final.
3. The provisional order must be published in the Government Gazette and the Citizen Newspaper.
4. The provisional order must be served on the first respondent's employees (if any) and on the trade unions representing them.
5. Costs of the application is costs in the liquidation of the first respondent.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATES HEARD:

10 August 2023

DATE DELIVERED:

30 October 2023

APPEARANCES

For the Applicant:

Advocate JD Matthee

Instructed by:

Scheepers and Aucamp Attorneys

For the 1st Respondent:

Advocate PG Cilliers SC

Assisted by:

Advocate WR de Preez

Instructed by:

Couzyn Hertzog and Horak Inc

For the 2nd Respondent:

Advocate EL Theron SC

Instructed by:

RW Attorneys

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