

SOUTH AFRICA / JUDGMENT

Strydom N.O and Others v Brandt (4579/2019) [2021] ZALMPPHC 24 (6 May 2021) [2021] ZALMPPHC 24

COURT

Limpopo High Court, Polokwane

BEFORE

Makgoba JP

CASE / FILE NUMBER

4579/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 4579/2019

REPORTABLE:NO

OF

INTEREST TO OTHER JUDGES:NO

REVISED

Date:6/5/2021

In

matter between: PIETER
HENDRIK STRYDOM N.O
FIRST
PLAINTIFF
HAROON
ABDOOL SATAR MOOSA N.O
SECOND
PLAINTIFF
DEON
MARAIS BOTHA N.O
THIRD
PLAINTIFF
and
NEIL
PETER BRANDT
DEFENDANT

JUDGMENT

MAKGOBA JP

[1] The First, Second and Third Plaintiffs are the joint liquidators of Free Agape Enterprises (Pty) Ltd (in liquidation) (“Free Agape”), duly appointed as such on 7 March 2019. Free Agape was

finally liquidated on 12 June 2018, the effective date of liquidation being 22 March 2018.

The Plaintiff have instituted an action against the Defendant, based on section 26 of the Insolvency Act 24 of 1936, claiming an order that the disposition in terms of which Free Agape paid an amount of R 304 300.00 to the Defendant be set aside and the Defendant be ordered to repay the said amount to Plaintiffs.

[2] On the 13 August 2018 the High Court, Western Cape Division in Case No.11938/2019 granted an order as follows:

2.1. declaring the investment scheme conducted by the directors thereof under the name and style of Free Agape Enterprise (Pty) Ltd (in liquidation) and the respective trading names under which the scheme was conducted, propagated and marketed, namely Choice Lifestyle Change, CLC, Beleggingstrust Free Agape, Choice Beleggingstrust and Induna Holdings, are declared to be illegal, unlawful and void;

2..2.. declaring all investment agreements and related agreements entered into between members of the public or entities as investors with Free Agape Enterprises (Pty) Ltd (in liquidation) null and void.

- [3] The case that was made out by the applicants (the Plaintiffs in this case) in their application for the aforesaid declarators, is that Free Agape conducted an unlawful multiplication or pyramid scheme over an extended period of time, which involved millions of transactions of receiving deposits, styled “investments” and paying out so-called “dividends” to investors. It did so under the various names referred to in the declaratory order. For purposes of the present case, Choice Lifestyle Change, is the most important.
- [4] The Defendant is Neil Peter Brandt, a businessman residing in Polokwane. The Defendant was a member of Choice Lifestyle Change, from which he received a significant amount of money over a period of time, which included repayment of the deposits or “capital payment” he had made and so-called “dividends”.

In this action the Plaintiffs claim repayment of the amounts received by the Defendant, and to this end instituted action against him for an order in terms of section 26 of the Insolvency Act, 24 of 1936 and for judgment against the Defendant.

Factual

Background

- [5] The first witness to testify for the Plaintiffs is Mr Pieter Hendrik Strydom, the liquidator primarily dealing with the litigation arising from the administration of the insolvent estate of Free Agape and also the liquidator who conducted the enquiry under sections 417 and 418 of the Companies Act 61 of 1973 before Retired Judge Eberhardt

Bertelsman in April 2019. The evidence of Mr Strydom follows hereunder.

- [6] The most important role players in the saga preceding the liquidation of Free Agape, were Mr. Maarten Stapelberg and his associate, Mr. Wouter Botha, residents of Polokwane.

They conceived the idea that became known to the public as “Choice Lifestyle Change” and were the incorporators of Free Agape. Choice was described as an affiliate of Free Agape, a division of Free Agape and / or a product of Free Agape.

Members of the public were recruited by Stapelberg and Botha to apply for membership of Choice, which was only available to Christians.

In terms of a recruitment form, a member of Choice was invited to make payments which entitled the member to participate in the business of Choice, whereby Choice, acting through Free Agape, used the funds received from members to make “fixed deposits” with financial institutions. These fixed deposits were purportedly used to issue guarantees in favour of unidentified business entities which required bridging finance for short periods of time and were prepared to pay high rates of interest. The returns were between 14% and 17% per month.

- [7] The scheme attracted hundreds of people who deposited millions of rands into the bank accounts used by the perpetrators. By all accounts they were making good money.

The scheme also attracted attention of the Registrar of Banks and the South African Reserve Bank, who instructed Ernst & Young Advisory Services (Pty) Ltd to conduct an investigation into the legality of the business of Free Agape.

[8] Stapelberg died on 15 December 2017, and predictably, the scheme fell apart and the payments stopped. The executor of his deceased estate placed the company under business rescue and Mr. Herman Bester was appointed as the business rescue practitioner.

While Bester was in the process of establishing whether Free Agape was conducting any business that could be rescued, an urgent application was launched in the High Court, Western Cape Division, for orders setting aside the business rescue, placing the company under final liquidation and convening an enquiry under ss. 417 and 418 of the Companies Act, 61 of 1973.

[9] Mr Strydom testified that upon investigations no record of an entity by the name of “Choice Lifestyle Change” could be found and that the documents evidencing the Defendant’s application

for membership and the contract that he concluded with Choice Lifestyle Change demonstrated that there was no difference, in substance, between Free Agape and Choice. The insolvent company, Free Agape, had no underlying genuine profit producing business activity and the only source of income was the deposits paid by the investors.

The insolvent company had no other income from which to repay the capital investments or the so-called dividends to the investors.

[10] Mr Strydom could not obtain any proof of the alleged bridging finance which was required for the unidentified business. The insolvent company therefore did not receive any proceeds from the alleged bridging finance to generate an income. The insolvent company, upon receipt of a deposit, used the money to pay claims then due, whether capital and / or the interest, of other investors who had invested earlier.

The deposits of the later investors was utilised to pay earlier investors’ capital and “dividends” and also salaries, bonds, bank charges, while the only chance of later investors to recover their capital and interest thereon, was that more investors may contribute further deposits.

[11] In conclusion, Mr Strydom stated that the business model of the insolvent company and the lack of genuine profit producing business activity precluded any benefit accruing to the insolvent or ever being at all likely to accrue in the future.

[12] The second witness for the Plaintiffs is Mr Jakob Jan Dekker, a chartered accountant specializing in forensic accounting investigation. He was called to testify as an expert witness in that field. Mr Dekker conducted a forensic investigation into the assets and liabilities of Free Agape. He analysed the bank statements relating to the insolvent company and in the process did a reconstruction of the transactions between investors and the scheme and could thereby determine the date of insolvency of the scheme.

- [13] Mr Dekker in reconstructing the transactions between the investors and the insolvent, determined that the twelve bank accounts identified and analysed by him were all used in the day to day administration of the insolvent company. He demonstrated that some payments relating to the Defendant, were made to the Beleggintrust account and payments to the Defendant were made from one of the ABSA accounts. In other instances payments were reflected to and from the Defendant on the Standard Bank cheque account from April 2017.
- [14] Mr Dekker described Mr Wouter Botha as a member or co-director of the insolvent company in that he found evidence that Mr Wouter Botha received a monthly salary from the bank accounts utilised by the scheme.
- [15] Mr Dekker testified that the investors did not do anything to deserve the returns which was paid out to them and the payments were therefore not made for value.
- [16] After the closure of the Plaintiff's case the Defendant applied for absolution from the instance. The application was dismissed and the Defendant closed his case without leading evidence in his defence.
- [17] Counsel for the Defendant made the following admissions and / or concessions from the bar:

17.1. That Free Agape was insolvent from at least 18 December 2014 and has been insolvent at all material times thereafter.

17.2. That the dispositions made were received by the Defendant.

17.3. That the dispositions were made not for value.

Section 26 - Dispositions without value

[18] Section 26(1) provides as follows:

(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

[19] “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 therefore, but does not include a disposition in compliance with an order of the Court, and “dispose” has a corresponding meaning[1].

A disposition of property includes every act by which an insolvent parts with an asset in its estate, whether such asset is a corpus, a sum of money or a right of action.[2]

A disposition without value is a disposition for which no or inadequate benefit or value is or has been received or promised as a quid pro quo[3] .

[20] The date upon which the disposition was made, whether more than two years before the liquidation of the estate, or within two years of the liquidation of the estate, is relevant to determining where the onus lies. In the present case, the dispositions that the Plaintiffs seek to set aside were all made within two years of the effective date of winding up of the estate, and therefore the claim lies under section 26(1)(b) of the Insolvency Act.

[1] Section 2 of Insolvency Act, 1936.

[2] See Lane N.O. v Olivier Transport 1997(1) SA 383 (CPD) at 385 G - H.

[3] See Estate Jager v Whittaker and Another, 1944 AD 246 at 250

[4] See Rousseau N.O. v Visser 1989 (2) SA 298 (C) at 307

[5] Annexure “A1” to “A4” to Defendant’s Plea , pages 50-53

[6] Section 26(1)(a), Insolvency Act

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