THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 758/10

In the matter between:

JACOBUS HENDRIKUS JANSE VAN RENSBURG N.O.	**1ST APPELLANT**
PHILIP FOURIE N.O.	**2ND APPELLANT**
JACOB LUCIEN LUBISI N.O.	**3RD APPELLANT**
LILY MAMPINA MALATSI-TEFFO N.O.	**4TH APPELLANT**
ENVER MOHAMMED MOTALA N.O.	**5TH APPELLANT**
RABOJANE MOSES KGOSANA N.O.	**6TH APPELLANT**

and

CHRISTIAAN JOHANNES BOTHA	**RESPONDENT**

Neutral citation: *Janse van Rensburg v Botha* (758/10) [2011] ZASCA 72 (25 May 2011)

Coram: NAVSA, HEHER, SNYDERS, SHONGWE JJA and MEER AJA

Heard: 3 May 2011

Delivered: 25 May 2011

Updated:

Summary: Company – liquidation – corporate entities consolidated into one estate for purposes of liquidation of pyramid scheme – voidable preferences – s 29 of Insolvency Act 24 of 1936 – debtor – who is – effect of illegality of contract giving rise to 'debt'.

_

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Fabricius AJ sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced by the following:

‘1. The payments amounting to R192 710.00 made to the defendant are set aside in terms of s 29 of the Insolvency Act 24 of 1936.

2. The defendant is ordered in terms of s 32(3) of the Act to pay the amount of R192 710.00 to the plaintiffs together with interest thereon at the prescribed rate from date of judgment to date of payment.

3. The defendant is ordered to pay the costs of suit.’

JUDGMENT

HEHER JA (NAVSA, SNYDERS, SHONGWE JJA AND MEER AJA concurring):

[1] This is an appeal against a judgment of Fabricius AJ in the North Gauteng High Court, Pretoria with leave of the learned judge.

[2] The appellants, the joint liquidators of MP Finance Group CC, who are engaged in winding-up the consolidated estate commonly referred to as the Krion pyramid scheme, instituted action under s 29 of the Insolvency Act 24 of 1936 against the respondent, Mr Botha, as an alleged investor in the scheme. They claimed that within six months of the liquidation of the scheme on 5 April 2002 it had paid amounts totalling R192 710.00 to the respondent at a time when its liabilities exceeded its assets and that the effect of those payments was to prefer him above the general body of the scheme’s creditors. They sought orders setting aside the disposition and for payment of the amounts thus disposed of.

[3] The action was defended. The respondent set up various defences. In so far as they remain relevant they were the following:

1. He was not a party to the orders made by Hartzenberg J concerning the consolidation of the various entities involved in the perpetration of the scheme and which purported to confer authority on the liquidators to administer the estates of those as one close corporation, and, consequently was not bound by the terms of those orders.
2. He denied that the Krion scheme carried on any business at all or received any payments from or made dispositions to him.
3. He placed in dispute that MP Finance Consultants CC, one of the entities being administered by the liquidators as part of the consolidated estate, had been involved in the Krion scheme.
4. He pleaded that Ms Marietjie Prinsloo had utilised the corporate entities (other than MP Finance Consultants CC) being administered by the liquidators as well as various unincorporated entities or trading names as a smokescreen for her personal involvement in and control of the pyramid scheme, and that, to the extent that he had invested in the scheme, he was investing with Ms Prinsloo in her personal capacity.
5. He denied that the payments made to him had the effect of preferring him above other creditors in the estate.
6. Because the scheme was unlawful and all obligations incurred or undertaken were void, the scheme could not be a debtor for the purposes of s 29 and he, as an investor, could not be its creditor.

[4] The action proceeded to trial. The liquidators relied upon the expert evidence of Mr Harcourt-Cooke, an auditor who had examined, reconstructed and analysed the affairs of the corporate entities in so far as they could be done in the absence of books of account or bank statements. The first appellant also gave evidence. He had been the deponent in support of the application proceedings before Hartzenberg J in 2003 and his affidavit in that matter was made available to the trial judge. The defendant testified in his own defence and called two former employees of Ms Prinsloo viz Ms Elaine Denysschen and Ms Jessie Denysschen to speak to the relationship between Ms Prinsloo and her businesses. In addition Mr George Ewan, the agent who introduced Mr Botha as an investor and received his payments testified about the role of Ms Prinsloo in operating the investment business.

[5] Fabricius AJ held that:

1. a court is not competent to 'create' either a company or a close corporation or any other statutory entity unless this is done strictly in accordance with the applicable statute, finding, in effect, that Hartzenberg J had acted beyond his powers in consolidating the various entities of the scheme into one for the purposes of liquidation and ordering that the consolidated estate be wound up as a (non-existent) close corporation;
2. the so-called 'consolidation order' could not and did not bind the defendant;
3. the liquidators had not proved the jurisdictional elements required by s 29 of the Act, by which it appears that the learned judge meant that they had not established the debtor and creditor relationship inherent in the right to claim under the section.

[6] The learned judge accordingly held that he had no choice but to dismiss the liquidators' claim.

[7] In the *Steyn* judgment delivered simultaneously with this judgment I have explained the terms, background, and meaning of the orders made by Hartzenberg J. If a defendant in proceedings brought by the liquidators in the course of winding-up the Krion scheme is proved to be an investor in the scheme, the orders made by Hartzenberg J will be regarded as *res judicata* between him or her and the liquidators, save to the extent that the investor brings himself or herself within the exception described by Conradie AJA in *Fourie's* case. The rule assumes that a final binding judgment is a correct judgment whether that be so or not. That applies with equal force to Mr Botha.

[8] In the *Steyn* appeal I have also held that, in accordance with the orders in their context the scheme was a debtor as contemplated in s 29 in respect of any dispositions that it made to investors by repayment of capital or interest arising from the operation of the scheme. That position holds with regard to the action instituted by the liquidators in this matter.

[9] Counsel's argument based on the illegality of the scheme, while superficially attractive, does not withstand closer analysis. In *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'* 1990 (2) SA 548 (A) this very problem arose in the

context of an appeal against a tax assessment issued by the Commissioner on income from 'occasional sales'. The respondent contended that the insolvent had been conducting an illegal lottery, the effect of which was to nullify the effect of all 'sales' which were undertaken in the course of the lottery. Hoexter JA assumed that the Trio scheme constituted such a lottery and went on (at 556A-557B) to explain why the sales were nevertheless not deprived of statutory efficacy:

'Since a contract which is forbidden by statute is illegal and void, a Court is bound to take cognisance of such illegality; and it cannot be asked to enforce or to uphold or to ratify such a contract: *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167 at 170. It is sometimes said that any juristic act performed in defiance of a statutory prohibition is not only ineffective, but further that it should notionally be thought away. Thus in *Schierhout v Minister of Justice* 1926 AD 99, Innes CJ, having cited the *Code* 1.14.5, remarked at 109:

"So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act."

Such general propositions are useful to stress the concept that *inter partes* an illegal jural act is devoid of legal consequence. But from such convenient generalisations it is not to be inferred that because an agreement is illegal a Court will in all circumstances and for all purposes turn a blind eye to its conclusion; or deny its very existence. As pointed out by Van den Heever J in *Van der Westhuizen v Engelbrecht and Spouse; Engelbrecht v Engelbrecht* 1942 OPD 191 at 199:

"When we say a juristic act is void or voidable, we pass judgment upon it from various points of view, basing our judgment upon the degree or direction of its effectiveness...."

And at 200:

"... (J)uristic acts may be impugned from varying directions and to different degrees."

That the above approach is jurisprudentially sound is demonstrated by many everyday practical situations. Obvious examples which spring to mind are sales conducted on a Sunday in violation of provincial ordinances, and agreements pertaining to unlawful dealing in rough or uncut diamonds or unwrought precious metals. To the conclusion of such illegal agreements the law accords recognition for particular purposes. That they are void *inter partes* does not rob them of all legal result. For example, in dealing with a contravention of s 142 of Transvaal Law 15 of 1898, Innes CJ in *R v Goldflam* 1904 TS 794 remarked at 796:

"The detectives proved, and Mr *Stallard* does not controvert the point, that there was an agreement to buy; and that if the transaction had not been forbidden by s 141 it would have been an agreement upon which an action could have been brought. If that be so, it appears to me that H there was a purchase within the meaning of the section."

Cases in point are not confined to the criminal law. In *Van der Westerhuizen v Engelbrecht* (*supra*) Van den Heever J elucidated the logical distinction with which he was there concerned by reference to the facts of *Wilken v Kohler* 1913 AD 135, in which case this Court held that in terms of s 49 of Ord 12 of 1906 of the Orange River Colony an oral contract for the sale of land in the Free State was void. Having mentioned (at 201) that a party to such an agreement was (*qua* contracting party) remediless, Van den Heever J proceeded to say:

"In other directions the contract did have legal effect. It would have been futile for either party to claim, as against the tax collector, that no sale had taken place or against creditors (supposing that had been the object of the transaction) that no disposition in fraud of creditors had been committed."

Assuming that the 'kweekkontrakte' are hit by the prohibition in the Gambling Act, the fact of the matter is that in the instant case the Court is not being asked to 'enforce' or to 'uphold' or to 'ratify' a contract which the law expressly forbids. The Court merely looks at the provisions of the Act in order to see whether the agreement contained in the 'kweekkontrak' comes within the literal language of the Act.'

[10] Thus the fact that the scheme was illegal through and through as a pyramid scheme and a contravention of various statutes, does not necessarily deprive the liquidators of the insolvent scheme of the debtor status contemplated by s 29. The plain wording of that section does not compel such a conclusion. That section is designed to facilitate the administration of an insolvent estate, and, particularly, the recovery of assets disposed of by the insolvent under the circumstances provided for in the section, for the benefit of creditors of the estate. The section, being remedial, should be interpreted to assist the process, not to hinder it. If an insolvent stands in relation to the person to whom he disposes of property as one who owes a debt, why should the illegality of the insolvent's business be permitted to influence the power and duty of a liquidator to rely on s 29 to recover the money or asset disposed of? To allow it to do so would defeat the purpose of the provision, and, as this liquidation process demonstrates, work great inequity on the general body of creditors while favouring individuals who have no claim to favour. It seems to me, in the circumstances of this case, to be essential to a proper winding-up that the underlying illegality of the nature in question should be disregarded when interpreting s 29. To do so will not conduce to the upholding of an illegal contract.

[11] Before I turn to a consideration of the defence evidence certain observations arising

from the evidence of Mr Janse van Rensburg are pertinent. In the first instance, Ms Prinsloo created and operated a pyramid scheme which procured investments from gullible or greedy members of the public. There was only one scheme. Its business commenced with the diversion of funds from the micro-lending business of MP Finance Consultants CC. Thereafter, in an effort to confer legitimacy on the business Ms Prinsloo successfully made use of registered corporate entities (the entities in the consolidated estate). As the consolidation orders emphasised, the pyramid scheme was one ongoing enterprise from beginning to end. Assets and liabilities were moved from one to the next without formality or any trappings of ownership. Cash collected from investors under one name was used to pay investments to other investors in another name (albeit not the name of the entity with which he or she had contracted or 'invested').

[12] The application was brought to deal with the whole scheme. The liquidators had no interest in winding up parts of it. They readily conceded that they could not distinguish between the input and output of the various entities. Neither did they have knowledge of why Ms Prinsloo had used the names of unincorporated entities (save for M & B Co-operative Partnership which seems to have anticipated the registration of a co-operative).

[13] The liquidators applied to liquidate the registered corporate entities – nobody suggests that any such entity that participated in the scheme was omitted. They recognised that Ms Prinsloo had used trading names to further the scheme. Such names were in themselves of little significance since they did not acquire or dispose of investors' money for themselves; they were either the alter ego of Ms Prinsloo or the names under which it suited her to operate the corporate entities. Some were mentioned by the liquidators in the application for condonation; others (Finsure and MP Finance Sacco, for instance) were not. Even Ms Prinsloo had admitted at the s 417 enquiry that she could not disentangle the roles of the various participants. In this context the orders made by Hartzenberg J were directed to a single main object: by consolidating all the apparent operating arms of the scheme into one coherent close corporation the liquidators were to be relieved of the necessity of attribution, especially in relation to the recovery of assets. That is what the order achieved. Before the making of the order the learned judge may or may not have considered whether the role of Ms Prinsloo warranted the inclusion of her (or her estate, since she may by then have been sequestrated) in the consolidation. That did

not happen and the effect of the order was to define the scheme according to the scope of the business conducted under the umbrella of the corporate entities.

[14] This last conclusion does not mean that a defendant in Mr Botha's position cannot, by satisfactory evidence, persuade a court that he contracted with a party or entity outside the ambit of the scheme. In such a case the liquidators will have failed to discharge the onus on them. As I have noted his counsel contended that Mr Botha invested with Ms Prinsloo personally. In order to evaluate this submission it is necessary to analyse the evidence in some depth.

[15] Neither Mr Harcourt-Cooke nor the first appellant possessed personal knowledge of the relationships established between individual investors and the scheme or Ms Prinsloo. Both expressed opinions based upon in-depth study of the affairs of the pyramid scheme as reflected in the investor files, property and bond searches, the creditors claims and the evidence of Ms Prinsloo and others in other proceedings. Nevertheless the evidence of Van Rensburg that all her trading activities were definitely part of the same scheme should not be disregarded. No-one regarded the difference in names as important. They were all an attempt by Prinsloo to legitimise her activities. However it is also clear from all the evidence that 'everybody regarded the investments as made with Ms Prinsloo'.

[16] That the corporate entities (other than Krion Financial Services Ltd towards the end of the life of the scheme) were empty shells in the sense of the absence of proof of assets or liabilities, bank accounts, financial records and minute books is also clear. However those facts do not go very far to establishing the identity of the operator or owner of the investment scheme because of its entirely cash-based business strategy and the total lack of concern showed by Ms Prinsloo and her associates towards distinguishing between the corporate entities. It must also be noted that although there was evidence of a regular division of investors cash received between agents (10%) and Ms Prinsloo and her family members, this is consistent with her general disregard for legal distinctions. She apparently neither contracted in her own name nor used documents which suggested that she intended such an impression to be created in the minds of investors.

[17] Mr Ewan, as a witness, was ambivalent. He does not seem to have been much

aware of legal distinctions. Early in his evidence he said,

'Die dokumentasie het kort-kort verander, maar niks het verander nie . . . daar was nie 'n maatskappy nie, ons het vir Marietjie gewerk . . . jy het jou geld by Marietjie belê. . . [Sy] was die lewe en vlees en bloed van die *maatskappye*.' (My emphasis.)

Later he admitted that, as instructed, he had represented to investors that they were dealing with a 'kapitaal-kragtige' company.

[18] Mr Botha was first approached by Ewan to invest in the cash loan business (of MP Financial Consultant CC). It was represented to him that it was a company for investment and a registered business, and that convinced him to invest in it. The only knowledge he had of Ms Prinsloo's businesses and organisation was derived from what Ewan told him.

[19] Ms Jessie Denysschen who was an employee involved in the administration testified:

'MP Finance het begin met hierdie beleggings en ons het by die cash loans begin te werk, en toe het sy [Ms Prinsloo] oorgegaan na ander maatskappye, na die *beleggings afdeling*.' (My emphasis)

[20] Perhaps more valuable than the recollections of naïve and unskilled witnesses uttered many years after the event are the inferences provided by contemporaneous documents. The investor file of Mr Botha was produced at the trial. As the testimony establish such files were 'meticulously' maintained by the persons administering the scheme. In the file were the following relevant documents:

1. On 8 August 2001 Mr Botha signed what purported to be a subscription for shares in Martburg Finansiële Dienste Bpk at R5000 per unit (paying R20 000);

2. On 15 August 2001 Botha and Ewan signed an 'ontvangserkenning' (receipt) recording that Ewan, as agent for Martburg Finansiële Dienste Bpk had received R70 000 from Botha 'for shares purchased' in that company;

3. (a) On 16 August 2001 Botha, as 'shareholder', signed a 'membership certificate' in 'MP Finance Sacco' for a payment of R70 000 for 12 months at a return of 10 per cent per month. This document was apparently countersigned by Ms Prinsloo (Pelser) under circumstances not explained in evidence.

(b) On the same day Botha, as 'shareholder', signed a 'share agreement' with MP Finance Sacco represented by Prinsloo (who countersigned) in which receipt of R70 000

was acknowledged and which provided for payment of returns at a rate of R7000 per month.

4. On 17 August 2001 Botha and Ewan signed a receipt recording that Ewan had received R170 000 for shares purchased in the same company.

5. On 6 September 2001 Botha purported to subscribe for shares in Martburt Finansiële Dienste Bpk to an amount of R20 000.

6. (a) On 14 October 2001 Botha was ostensibly issued with a 'membership certificate' in M & B Korporasie Bpk for an investment of R62 768,57 for 12 months at a return of 10 per cent per month. The certificate was signed by Botha and H H Prinsloo (the husband of Ms Prinsloo).

(b) On the same day Botha was issued with a 'membership certificate' in M & B Korporasie Bpk for an investment of R20 000 for 12 months at a return of 10 per cent per month. This too bears the signatures of Botha and H H Prinsloo.

7. On 22 October 2001 Botha was issued with a 'membership certificate' in M & B Ko-öperasie Bpk (sic) in return for an investment of R20 000 paying 'dividends' of R2000 per month and bearing his own signature and that of H H Prinsloo.

8. (a) On 18 January 2002 Botha was issued with a 'membership certificate' signed by H H Prinsloo on behalf of M & B Ko-öperasie Bpk in relation to an investment of R170 000 for four months at a return of 10 per cent per month.

9. On 25 January 2002 Botha was once again the recipient of a 'membership certificate' in M & B Ko-öperasie Bpk for an investment of R170 000 bearing a return of R17 000 per month. This document appears to have been signed by Botha, Ewan and H H Prinsloo.

(b) On the same day Botha was issued with a 'certificate of membership' in the same entity reflecting an amount of R20 000 invested for three months at a 10 per cent return each month.

10. On a date not identified Botha purported to apply for membership in M & B Ko-öperasie Bpk, stating that he had had insight into the objectives and operations of that entity 'as set out in the information document and its statutes'. The truth of this acknowledgment was not investigated in evidence bearing in mind that Ms Prinsloo apparently intended to register the co-operative but her application to do so was apparently refused.

[21] Certain of these documents probably represented reinvestments of earlier matured investments.

[22] A consistent element in the administration of the scheme was an accounting to investors on documentation headed ‘MP Financial Services’ but which contained no reference to the entity in which the investment had been made or the identity of the payer of interest or ‘dividends’. It may be assumed as a probable inference that MP Financial Services was merely a vehicle for administration purposes. The use of the name favours the case of neither party.

[23] With the exception of MP Finance Sacco, the recipients of Mr Botha’s investments were entities expressly consolidated into MP Finance Group CC and administered by the appellants as such in terms of the orders of Hartzenberg J.

[24] Counsel for Mr Botha submitted that MP Finance Sacco was, on the probabilities, a vehicle used by Ms Prinsloo to pursue her own personal business agenda. I think the submission is far-fetched. As I have pointed out the orders of Hartzenberg J by which Mr Botha is bound were premised on the acceptance that Ms Prinsloo carried on one seamless scheme under the auspices of the corporate entities. Given the terms, nature, timing and circumstances of Mr Botha’s involvement in MP Finance Sacco it is inconceivable that it was operated outside of the overall scheme.

[25] The probabilities disclosed by the evidence are that Ms Prinsloo intended to operate the whole swindle under the umbrella of the companies albeit subject to her direction and control. The cash brought into the scheme (sometimes apparently as much as R20 million in a day) belonged to the principal represented by the agent who dealt with the investors on each occasion and which was one of the entities included in the consolidated estate, albeit that because such transactions were void and unlawful each investor obtained an immediate right to reclaim his investment. (In fact no-one appears to have exercised that right, being more interested in the returns.)

[26] The payment made to Mr Botha was made by one of the entities in the consolidated estate of the scheme and were dispositions from that estate. That the liquidators were

unable to prove which entity paid the money is of no relevance in the light of the orders, since the scheme was a debtor contemplated in s 29. Mr Botha and the scheme occupied a relationship of creditor and debtor for the purposes of that section.

[27] When the payments were made the liabilities of the consolidated estate exceeded the value of its assets. That was established by the order and repeated in evidence by Mr Harcourt-Cooke.

[28] Mr Botha was an investor in the scheme, which was the subject of the rule nisi published according to the instructions of the High court. However he adduced no evidence which might have had the effect of releasing him from the binding effect of the orders made when the rules were confirmed.

[29] It follows that the appeal must succeed. The following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced by the following:

‘1. The payments amounting to R192 710.00 made to the defendant are set aside in terms of s 29 of the Insolvency Act 24 of 1936.

2. The defendant is ordered in terms of s 32(3) of the Act to pay the amount of R192 710.00 to the plaintiffs together with interest thereon at the prescribed rate from date of judgment to date of payment.

3. The defendant is ordered to pay the costs of suit.’

_____

J A Heher
Judge of Appeal

APPEARANCES

APPELLANTS: F du Toit SC

Strydom & Bredenkamp Inc, Pretoria

Symington & de Kok, Bloemfontein

RESPONDENT: T Strydom

Mills & Groenewald Attorneys,

c/o Van Zyl Le Roux & Hurter Inc, Pretoria

Naudes Attorneys, Bloemfontein