

HC97

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

Case No. 1612/2024

and

194 other case numbers listed in Annexure "A" to the Notice of Motion

In the matters between:

HERMAN BESTER N.O.

First Applicant

ADRIAAN WILLEM VAN ROOYEN N.O.

Second Applicant

CHRISTOPHER JAMES ROOS N.O.

Third Applicant

JACOLIEN FRIEDA BARNARD N.O.

Fourth Applicant

DEIDRE BASSON N.O.

Fifth Applicant

CHAVONNES BADENHORST ST CLAIR COOPER N.O.

Sixth Applicant

KEVIN TITUS N.O.

Seventh Applicant

DANIEL SANDILE NDLOVU N.O.

Eighth Applicant

(Cited in their capacities as the joint liquidators of

MIRROR TRADING INTERNATIONAL (PTY) LTD

(in liquidation))

And

ANMARIE BARNARD

First Respondent

And the other 194 parties named in items 2-195

in Annexure "A" to the Notice of Motion

2nd - 195th Respondents

APPLICANTS' REPLYING AFFIDAVIT

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I, the undersigned

HERMAN BESTER

do hereby make oath and say that:

1. I am an insolvency- and business rescue practitioner, practising as such at Tygerberg Trustees, situated at First Floor, Cascade Terraces, Waterfront Road, Tyger Waterfront, Tygervally, Bellville, Western Cape.
2. The facts deposed to herein are within my personal knowledge and belief, save where the context indicates otherwise and are, to the best of my belief, true and correct. Where I refer to matters of law, I do so on advice of the applicants' legal representatives, which advice I believe to be correct.
3. I deposed to the applicants' founding affidavit and am duly authorized to depose to this replying affidavit on behalf of the second to eighth applicants.

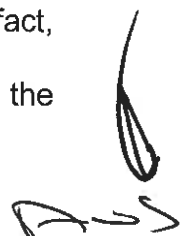
ESSENCE OF THE RESPONDENTS' OPPOSITION – PARAGRAPH 8

4. The essence of the respondents' opposition is dealt with in paragraph 8 of the answering affidavit. I will reply thereto first before replying to the balance of the contents of the answering affidavit *seriatim*.
5. It is glaringly obvious that the respondents' attorney who deposed to the answering affidavit, with a confirmatory affidavit from only one of the 195



respondents, is so set on raising as many contentious points as possible, that he loses sight of the following cardinal considerations:

- 5.1. It will be a substantial burden on this Honourable Court if 195 actions have to be heard separately, with a substantial part of the issues being the same. Consequently, the same evidence will be dealt with 195 times instead of once. The difference in Court days (without taking into account the time that different judges will have to spend on preparation and writing individual judgments) will amount to hundreds, if not thousands, of days. That translates into several years of hearings.
- 5.2. It will be a substantial financial burden on MTI (in liquidation) and, as a result, will prejudice the concursus of creditors, if 195 separate hearings and pre-trial procedures are to be conducted instead of one. The difference in costs will probably amount to hundreds of millions of Rands.
- 5.3. Importantly, it will be a substantial financial burden on each of the 195 respondents if they each have to finance a separate hearing and pre-trial procedures instead of 195 respondents contributing to one hearing and one set of pre-trial procedures. Besides, they are represented by the same attorney. Individually, they will probably have to pay millions of Rands each in the absence of a consolidation.
- 5.4. Some of the points raised by the respondents' attorney, in fact, support the applicants' case because they demonstrate the

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commonality of factual evidence that will be adduced in all 195 matters.

5.5. On a balance, the convenience to the Court and all the parties in the event of a consolidation, will outweigh the arguments put up by the respondent's attorney by far. A consolidation will therefore be in the interests of justice.

6. I will now deal with the grounds for opposition raised in paragraph 8 (at pages 3-10) of the answering affidavit.

Ad paragraph 8.1

7. The applicants' case in response to the plea of prescription, set out in paragraph 63 of the founding affidavit, is that the applicants, despite exercising reasonable care, did not have, and could not have acquired, knowledge of the identity of the respondents and of the facts from which the debt relied on by the applicants arose, until, at the earliest, 1 June 2022, alternatively on a date less than three years before the date of the service of the summons on the respondents.

8. The summonses against all the respondents were served on them within a period of less than three years after 1 June 2022.

9. Consequently, the evidence relating to prescription will be the same in respect of every respondent who raises prescription. That evidence will be

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interlinked with the evidence on the merits because it involves the MTI database, when it was obtained and the process followed by experts to obtain the evidence relevant to the merits of all the matters.

Ad paragraph 8.2

10. A discovery affidavit which applies universally to all 195 matters, have been finalised and delivered at the time of signing this affidavit. Except for the specific back-office data recorded by the so-called MTI Maxtra database for each defendant, the discovery in all 195 matters is the same.

Ad paragraph 8.3

11. It is explained in the founding affidavit that, in addition to prescription, only two other special pleas have been raised, i.e. *lis pendens* and section 32 of the Insolvency Act, 24 of 1936.
12. In respect of *lis pendens*, it is explained in paragraph 56 of the founding affidavit that the proceedings relied on by the repondents have been completed and that appeal remedies have been exhausted. Consequently, the basis for this special plea has fallen away.
13. In respect of the section 32 special plea it is explained in paragraph 60 that the provisions of section 32 are peremptory. This is a matter for legal argument and no evidence will be adduced for that purpose.



Ad paragraph 8.4

14. Save for the difference in formula used for the calculation of claims against the two classes of investors, the issues relating to the two classes and in respect of which evidence will be led, are the same.

Ad paragraphs 8.5-8.11

15. The issue of ownership was raised and decided in the "Ponzi judgment" referred to in paragraph 33 of the founding affidavit in this matter. That is evident from paragraph 40.1 of that judgment. In paragraph 51 the Court found that investors lost ownership of their bitcoin whilst acquiring personal rights against MTI in whose name the bitcoin were held by brokers.
16. It is denied that the FSCA or Judge Fabricius (as a Commissioner) confirmed that the bitcoin belonged to Steynberg. The correct facts are that Steynberg and his co-director in MTI, Mr Clynton Marks applied with FX Choice to open a corporate account for MTI. Mr Steynberg remained the contact person and responsible individual with FX Choice, but the specific account, account number 174850, was MTI's designated account. The deponent to the answering affidavit conveniently ignores the following:

- 16.1 Mr Daniel Stephenson, being the administrative director of FX Choice, declared under oath as long ago as 28 October 2020 that the specific account was utilised by MTI for live trading purposes. This affidavit



was part of the application papers in the matter ("the **ponzi application**") where the ponzi judgment was delivered;

- 16.2 The trustees of the insolvent estate Steynberg did not proceed with the intervention application;
- 16.3 There is no pending court proceedings for the recovery of the bitcoin received by the liquidators from FX Choice;
- 16.4 All the bitcoin received from FX Choice were sold by the liquidators during 2021, for a total amount of approximately R1,058,176,013.69;
- 16.5 The South African Revenue Service ("**SARS**") lodged a claim in the amount of R931,121,989.35 against the estate of MTI, *inter alia* based on the proceeds of this bitcoin;
- 16.6 The first Liquidation and Distribution Account in MTI, which laid open for inspection from 13 October 2023, *inter alia* duly accounted for the proceeds of the aforesaid bitcoin and the claim of SARS, which was settled with SARS for a total amount of R283,428,110.70 and duly paid. The first L & D Account was duly confirmed by the Master of the High Court on 27 November 2023;
- 16.7 The settlement with SARS, was duly sanctioned by this Honourable Court in terms of an application by the liquidators for directions in terms of Section 387 of the 1973 Companies Act, under High Court case number: 7689/23;
- 16.8 As dealt with in the ponzi application, both Mr Steynberg (in his interviews under oath with the FSCA) and Mr Marks, in his answering affidavits deposed to in the ponzi application, confirmed that the bitcoin that remained with FX Choice, belonged to MTI.



17. In any event, the Ponzi judgment brought finality to this issue after the intervention application had been launched. In the Ponzi matter the Court record included an affidavit deposed to by a representative of FX Choice who detailed the accounts in the names of Steynberg and MTI respectively and confirmed that the only remaining bitcoin held by FX Choice was in the account of MTI.
18. Furthermore, the ownership of the bitcoin held by FX Choice and subsequently released to the liquidators of MTI, is irrelevant to the claims against the 195 defendants. The dispositions made to them and sought to be recovered in the 195 actions, were not made from the bitcoin held in the account with FX Choice.
19. In the unlikely event that a court in the future may find that the bitcoin held by FX Choice, did not belong to MTI, it would also not assist the respondents in this matter. Such a finding will have the effect that the liabilities of MTI will exceed its assets by a further approximately R1,058 billion.
20. Further, and in any event, any evidence to be led in this regard will be relevant to all the respondents.

Ad paragraph 8.12

21. The whole point of this application is that all the respondents are represented by the same attorney which makes it easier to co-ordinate and expedite proceedings.

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Ad paragraph 8.13

22. The purpose of this application is not only to obviate a multiplicity of hearings but also a multiplicity of pre-trial procedures, including discovery. As confirmed above, an universal applicable discovery affidavit has now been delivered. I am also advised and respectfully submit that the finalisation of discovery and the closing of pleadings, are not a prerequisite for the consolidation of matters.

Ad paragraph 8.14

23. It has been explained earlier herein that the respondents will be prejudiced if consolidation is not ordered because it will be a substantial financial burden on each of the 195 respondents if they each have to finance a separate hearing and pre-trial procedures instead of 195 respondents contributing to one hearing and one set of pre-trial procedures.
24. It is repeated that a substantial part of the issues in all the matters is the same.

Ad paragraph 8.15

25. One "*complex case of long duration*" occupying one judge certainly is preferable to 195 complex cases of long duration occupying different judges, in total taking up years of court time.

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26. The contention that the liquidators should simply apply set-off in respect of class 2 investors not only disregards the duty of the liquidators to act in the interest of all creditors, but is also not legally permissible. If set-off is applied in respect of class 2 investors, it means that they will suffer no losses whereas investors who withdrew no bitcoin will probably suffer losses as there will probably be insufficient funds to satisfy the claims of all investors who made no withdrawals.

Ad paragraph 8.16

27. The "*impression*" expressed by the deponent, an attorney, is alarming. The duty of the liquidators to all creditors, explained above, is trite.
28. Similarly, the comment about the "*paydays*" of the liquidators' legal teams reflects, at best for the deponent, ignorance of the law on the duties of liquidators.
29. The deponent simply brings into the equation the rise in value of bitcoin, ignoring the benefit that the investors, who withdrew bitcoin, have enjoyed from the proceeds of the withdrawal while those who made no withdrawals will probably suffer losses. In any event, the liquidators are simply applying the law, as they should.

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Ad paragraph 8.17

30. The total sum paid to the liquidators' attorneys reflected in the L&D account relates to "*legal costs*" as stated in the L&D account and not legal "*fees*" referred to by the deponent. I would expect of the deponent, an attorney, to know the difference between the concepts. Those costs arose from a multiplicity of protracted and complex investigations, insolvency enquiries and litigation in different jurisdictions, including many actions abroad, which necessitated the services of experts and the employment of several counsel.
31. The purpose of this application is to reduce further multiplication of litigation and concomitant costs.
32. It is correct that dividends have not been paid yet, pending collection steps, including these actions, for the benefit of all creditors of MTI.

Ad paragraph 8.18

33. I fail to understand how a consolidated hearing can take longer to finalise than the finalisation of 195 actions, heard individually.
34. Any "*complexity*" that needs to be addressed in a consolidated hearing, needs to be addressed in separate hearings too.

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AD SERIATIM REPLY**Ad paragraph 2 thereof (at page 2)**

35. The respondent's attorney is dealing with a total of 515 different actions instituted by the liquidators against investors. Instead of attending to 515 different sets of pre-trial proceedings, it will be in the collective interest of the respondents that the deponent focuses on them all in equal measure in one consolidated matter.

Ad paragraph 3

36. It is denied that all the facts referred to by the deponent are true.

Ad paragraph 4

37. Only the first respondent deposed to a confirmatory affidavit. I am therefore not in a position to admit this paragraph except for its reference to the first respondent.

Ad paragraphs 6-7

38. It has been demonstrated earlier herein why there is no substance in the contents of these paragraphs which are denied.

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39. The deponent has to consult with all the respondents in any event, whether there is a consolidation or not. In addition, I assume that he has already taken instructions from them before, especially in those instances where pleas have been delivered.

Ad paragraph 9

40. It has been demonstrated earlier herein why there is no substance in the contents of this paragraph which are denied.

41. The deponent is in favour of "*test cases*". A consolidation will be exactly that, without fragmented proceedings.

Ad paragraphs 10-11

42. It has been demonstrated earlier herein why there is no substance in the contents of these paragraphs which are denied.

FURTHER AD *SERIAM* REPLY (WITH REFERENCE TO THE RE-NUMBERING COMMENCING AT PAGE 11)

Ad paragraph 2

43. The applicants will include all the deponent's clients against whom the applicants have issued summons in this Honourable Court and, to that end, will seek an amendment of the relief sought in the notice of motion.

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Ad paragraph 3

44. It has been explained why a consolidation as soon as possible will be convenient. The closing of pleadings or not in 23 of the matters listed in annexure A to the notice of motion should therefore not detract from a consolidation. An universal discovery affidavit have now been delivered and the relevant expert notices and expert summaries will be filed very shortly.

Ad paragraph 6

45. It is repeated that the bitcoin was held in the name of, and belonged to, MTI.
46. In any event, if this is an issue to be decided in the pending actions, it is relevant to all the actions and another reason why a consolidation will be convenient.

Ad paragraph 8

47. In paragraph 37 of the Ponzi judgment it was found that, from July/August 2020, the *de facto* directors of MTI were Steynberg, Marks, Ward and Coetzee.

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Ad paragraph 10

48. The liquidators do not have the information referred to. That much is clear from the finding in paragraph 127 of the Ponzi judgment. That judgment was referred to in the applicant's founding affidavit and, had the deponent read it, he would have known that the liquidators cannot be accused of failing to take this Court in their confidence. All the information regarding the flow of bitcoin that the liquidators manage to establish to date, will be dealt with in the expert reports of the liquidators' digital forensic and accounting forensic experts to be delivered shortly.

Ad paragraph 11

49. The statement made in this paragraph is perplexingly false, bearing in mind that it is made by an attorney.
50. The words "*pyramid scheme*" repeatedly appear in the judgment and it is evident from the context of paragraphs 101 and 109-120 of the judgment that the Court found that MTI had conducted a pyramid scheme contemplated in sections 42 and 43 of the Consumer Protection Act, 68 of 2008 "*CPA*"). In paragraph 101 the Court found the following: "*On a conspectus of the evidence, it cannot seriously be argued that MTI did not conduct a pyramid scheme in contravention of ss 42 and 43 of the CPA, if one considers the evidence of Steynberg himself*".

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Ad paragraph 12

51. In paragraph 96 of the Ponzi judgment the Court found: "*I am nonetheless of the view that MTI, as found by the FSCA, breached several statutory provisions, such as s 7 of the FAIS Act, in that it rendered financial services without a licence*". In paragraphs 101 and 109-120 it was found that provisions of the CPA had been contravened.

Ad paragraph 13

52. The effect of the judgment is exactly what is stated in paragraph 28 of the founding affidavit, considered in the context of this application.

Ad paragraph 15

53. The Court refused to make such a finding in motion proceedings. This is the main issue in all the pending actions that will be decided on the exact same facts. This, therefore, is a compelling reason for a consolidation.

Ad paragraph 17

54. Far from being misleading, the wording used in paragraph 33 of the founding affidavit, is the exact wording used in the judgment. In paragraph 100 of the judgment it was found: "*MTI's business amounted to an unlawful and fraudulent scheme...*". In paragraph 120 it was found, with reference to the

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CPA: *"the fact that a contravention of the Act constitutes a criminal offence, render the business operations of MTI illegal and unlawful ..."*

Ad paragraph 19

55. The calculations are simple mathematical exercises that will require minimal evidence.

Ad paragraph 20

56. This is an issue in all the pending actions that will be decided on the exact same facts. Therefore, this too is a compelling reason for a consolidation.

Ad paragraph 22

57. Again, the accusation that the liquidators are misleading this Court, is ill-informed. It has been shown that it was found in the Ponzi judgment that MTI had conducted a pyramid scheme.
58. It is repeated that the Court refused to make a finding of insolvency in motion proceedings and that this is the main issue in all the pending actions that will be decided on the exact same facts.

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Ad paragraph 23

59. What is stated in paragraph 45 is an issue to be decided in all the pending actions. By now the unjustified accusations that the liquidators are misleading the Court, sound (and are) hollow.

Ad paragraph 24

60. It is not clear what the material difference is between the contents of paragraph 46 of the founding affidavit and what is stated in this paragraph of the answering affidavit.

61. In any event, I fail to understand how this can lead to the conclusion that this *“underlines that pleadings are not finalised and this application is premature and not in the best interest of justice”*. This conclusion is denied.

Ad paragraph 25

62. For the reasons set out above, the contents hereof are denied.

Ad paragraphs 26-27

63. These are issues to be decided in all the pending actions.

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Ad paragraphs 29-31 and 33

64. A contemplated amendment does not equate to pleadings not being closed.
65. For all the reasons set out above it is denied that this application is premature and not in the best interest of justice.
66. The special plea based on section 32 of the Insolvency Act is a matter for legal argument and no evidence will be adduced for that purpose. No "*confusion*" will be created as contended in paragraph 33.

Ad paragraph 34

67. Amendments will have no bearing on the question of consolidation.

Ad paragraphs 35-37

68. It has been explained earlier herein that:

68.1. The applicants' case in response to the plea of prescription, set out in paragraph 63 of the founding affidavit, is that the applicants, despite exercising reasonable care, did not have, and could not have acquired, knowledge of the identity of the respondents and of the facts from which the debt relied on by the applicants arose, until, at the



earliest, 1 June 2022, alternatively on a date less than three years before the date of the service of the summons on the respondents.

68.2. The summonses against all the respondents were served on them within a period of less than three years after 1 June 2022.

68.3. Consequently, the evidence relating to prescription will be the same in respect of every respondent who raises prescription. That evidence will be interlinked with the evidence on the merits because it involves the MTI database, when it was obtained and the process followed by experts to obtain the evidence relevant to the merits of all the matters.

Ad paragraph 38

69. It is repeated that only the special plea of prescription will require evidence and that evidence will be interlinked with the evidence on the merits because it involves the MTI database, when it was obtained and the process followed by experts to obtain the evidence relevant to the merits of all the matters.

Ad paragraph 39

70. Amendments will have no bearing on the question of consolidation.

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Ad paragraph 42

71. Save to say that all the requirements for consolidation have been met, this is a matter for legal argument that will be presented at the hearing of this matter.

Ad paragraph 45

72. The contents of this paragraph do not address the statement relating to the commonality of causes of action raised in paragraph 69.2 of the founding affidavit.

Ad paragraph 46

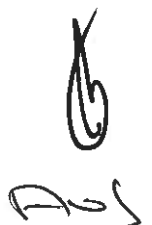
73. Amendments will have no bearing on the question of consolidation.

Ad paragraph 47

74. The contents of this paragraph do not address the contents of paragraph 69.4 of the founding affidavit.

Ad paragraph 48

75. It has been shown that it was found in the Ponzi judgment that MTI had conducted a pyramid scheme.

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Ad paragraphs 49-50

76. This is matter for evidence to be led in all the pending actions.

Ad paragraphs 51-52

77. The deponent is in favour of "test cases". A consolidation will be exactly that, without fragmented proceedings.

78. The selection of four test cases as proposed by the deponent will burden four respondents with millions of rands in legal costs whereas 195 respondents will be contributing to one hearing and one set of pre-trial procedures in the event of consolidation.

79. There is no substance in the anticipated scenario of the Courts "*being overrun with cases relating to MTI, especially with the many possible sequestrations and insolvencies which may flow from the way the Applicants and legal teams intend to handle the matter*".

80. It is repeated that the contention that the liquidators should simply apply set-off in respect of class 2 investors disregards the duty of the liquidators to act in the interest of all creditors. If set-off is applied in respect of class 2 investors, it means that they will suffer no losses whereas investors who withdrew no bitcoin will probably suffer losses as there will probably be

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insufficient funds to satisfy the claims of all investors who made no withdrawals.

81. It is denied that a consolidation will “confuse” matters and will not be in the “best interest of justice”.

Ad paragraph 53

82. The deponent's reference to the WhatsApp message with the Applicants' attorney, was in respect of the deponent's WhatsApp message to our attorney on 24 January 2025, which reads as follows: *"This is a substantive application it is not in essence interlocutory and cannot be dealt with as semi urgent"*. The actual response of the Applicants' attorneys to this was as follows: *"With respect, we do not agree. We will deal with this in court on the 29th."*

Ad paragraph 54

83. It has been shown why a consolidation will be beneficial to the Court and all interested parties.

Ad paragraph 55

84. For the reasons set out above, the contents hereof are denied.

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Ad paragraph 56

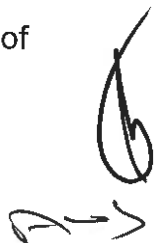
85. The contents of this paragraph do not address the contents of paragraph 70.3 of the founding affidavit.

Ad paragraph 57-59

86. It has been explained why "*a few selected test cases*" is not a viable solution and that it will burden a few respondents with millions of rands in legal costs whereas 195 respondents will be contributing to one hearing and one set of pre-trial procedures in the event of consolidation.
87. A planned consolidation of matters in Gauteng has no bearing on this application.

Ad paragraph 59

88. I repeat that a few selected test cases is not a viable solution.
89. I deny that the liquidators have conducted any unnecessary litigation and that there is any chance of "*a repeat of the Krion case*".
90. Earlier herein I have explained why the deponent's reliance on the costs reflected in the L&D account is a distortion. It demonstrates a lack of

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understanding for the magnitude of the services rendered by the liquidators and their legal representatives over years.

Ad paragraph 60

91. A case has been made out for the relief sought by the liquidators.

Ad paragraph 62

92. I repeat that a few selected test cases is not a viable solution.

Ad paragraph 63

93. The contents hereof are denied and the liquidators contend that a case has been made out for the relief sought in the notice of motion.


HERMAN BESTER

Sworn to and signed in my presence at Tyger Valley on this 11 day of April 2025 by the deponent who declared that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to the taking of the prescribed oath;
- (c) considers the oath to be binding on his conscience;



and uttered the words: *"I swear that the contents of this affidavit are true, so help me God."*


COMMISSIONER OF OATHS

ANDRIES JOHANNES VAN GREUNEN
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