THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
CASE NO 41/06

In the matter between

MP FINANCE GROUP CC (IN LIQUIDATION)
Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE
Respondent

CORAM: **HOWIE P, NUGENT, LEWIS, VAN HEERDEN JJA et SNYDERS AJA**

Date Heard: **2 May 2007**

Delivered: **31 May 2007**

Summary: **Amounts taken by illegal and fraudulent pyramid scheme constitute amounts 'received' within the meaning of 'gross income' in the Income Tax Act where intention of scheme operator is not to contract with the investors but to appropriate their money to facilitate the fraud.**

Neutral citation: **This judgment may be referred to as *MP Finance Group CC v Commissioner for South African Revenue Service* [2007] SCA 71 (RSA)**

HOWIE P

HOWIE P

[1] For some years beginning in 1998 one Marietjie Prinsloo operated an illegal investment enterprise commonly called a pyramid scheme. As is the pattern with such schemes, it readily parted greedy or gullible 'investors' from their money by promising irresistible (but unsustainable) returns on various forms of ostensible investment. It paid such returns for a while to some before finally collapsing – owing many millions – when the predictable happened and the total amount of supposedly due returns vastly exceeded the total amount of obtainable investment money.

[2] The scheme was conducted by way of successively created entities, incorporated and unincorporated. They were all eventually insolvent. By order of 4 February 2003 made by the High Court at Pretoria, these original entities were, for ease of administration and legal practicality, consolidated into a single entity named MP Finance Group CC (in liquidation) (the CC). The order decreed, among other things, that it did not prejudice claims against an individual entity provided that only assets of that entity could be realised to meet such claims. It laid down, further, that the joint liquidators of the CC (who are also the joint liquidators of the original entities) were to regard claims proved against any of the individual entities as claims against the CC.

[3] Presumably pursuant to that order, the respondent (the Commissioner) has regarded the CC as the taxpayer liable for the taxes respectively due by the original entities. He accordingly assessed the CC to tax in respect of the tax years 2000, 2001 and 2002. (These were revised assessments. It is unnecessary to refer to the original ones.) The

liquidators objected on behalf of the CC. By letter dated 15 December 2003 their attorneys 'accepted that the ... assessments are indeed assessments as contemplated in Part II of the Income Tax Act' but contended, in the main, that investment amounts (referred to by them and in the record as 'deposits', among other terms) were not 'received' within the meaning of 'gross income' as defined in the Income Tax Act 58 of 1962 (the Act). (For convenience I shall refer to the monies paid to, and accepted by, the entities concerned as deposits.)

[4] The objection was disallowed and the CC appealed. The appeal was heard by the Tax Court at Durban, Levinsohn J presiding. The appeal was dismissed, the Tax Court concluding that notwithstanding that the scheme was illegal, as also the investors' transactions in the course of the scheme, the deposits were 'receipts' within the meaning of the Act. With the necessary leave, the CC appeals to this Court.

[5] On behalf of the CC, its counsel advanced two arguments in their heads. The principal one was that, as contended before the Tax Court, the deposits were not taxable because they were not amounts 'received'. The other submission was that any tax payable could not in law be owed by the CC because it was merely a creature of convenience formed after the tax years in question.

[6] The second argument has no merit and was not seriously pressed before us. Not only were the liquidators parties to a consolidation agreement which led to the Court order of 4 February 2003 but, as already stated, they accepted that the assessments in issue were appropriately raised on the CC. In terms of that order it will still be a question of determining which deposits relate to which original entity and

calculating the tax accordingly. The convenience of consolidation will be that the tax can be claimed from the CC.

[7] Reverting to the main contention for the CC, it relied essentially on a passage in a judgment of this Court pertaining to the same scheme in which the question was whether repayments to investors were recoverable by the liquidators in terms of s 30(1) of the Insolvency Act 24 of 1936.[1] On the premise that investors' deposits were loans, the passage in question reads as follows: [2]

'All loans made to the scheme were – in the light of at least the provisions of section 11 of the Banks Act 94 of 1990 and a prohibition under the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 – illegal and therefore void; this proposition of law is uncontested. The scheme never had the least entitlement to retain investors' money until the date which had supposedly been agreed as the due date for repayment. The perpetrators of the scheme knew the investments to be illegal. There is, on the other hand, no evidence that any of the investors knew their investments to be tainted, nothing from which to infer that any of them acted *ex turpi causa.* That being so, no question arises of relaxing the *in pari delicto potior est conditio defendentis* rule ... . Upon receipt of a payment the scheme was liable promptly to repay it to the investor who had a claim for it under the *condictio ob iniustam causam.* Instead it used the money to pay the claims of other investors who had invested earlier. That was the whole idea of the scheme.'

[8] The argument for the CC was that because, on the authority of the quoted passage, the scheme was liable in law immediately to refund the deposits, there was no basis on which it could be said that the deposits were 'received' within the meaning of the Act. They were, it was argued, consequently not subject to tax.

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1 *Fourie NO v Edeling NO* [2006] 4 All SA 393 (SCA).
2 Para 13.

[9] In s 1 of the Act ‘gross income’ means the total amount ‘received by or accrued to or in favour’ of a taxpayer during a tax year. This case is concerned with receipt, not accrual.

[10] To place the CC’s principal argument in proper perspective I would make brief reference to the contents of the statement of agreed facts admitted into the record before the Tax Court. The salient features may be summarised as follows. Prinsloo operated the scheme with the aid of family and employees, as also so-called agents who solicited and transmitted investors’ deposits in return for commission. She controlled the various entities in the names of which the scheme was conducted and procured their printing of a range of convincing-looking documentation issued to investors when they made deposits. This included acknowledgments of receipt, membership certificates and share agreements, all of which purported to pertain to their investments. Most of the money received by the scheme was kept in cash and not banked. This cash float provided the source of payments to investors. However, substantial amounts of it were appropriated by Prinsloo and her accomplices. Some investors received repayment of their investments plus returns. The majority received less or nothing. What is of essential importance in the present matter is that throughout the tax years in question ie 1 March 1999 to 28 February 2002, the perpetrators of the scheme knew that it was insolvent, that it was fraudulent and that it would be impossible to pay all investors what they had been promised.

[11] On those facts the inference must be that whatever intention there was at any time on the part of investors to enter into a contractual relationship with the entities concerned and whatever corresponding intention to contract there might possibly have been on the relevant

entities' part prior to 1 March 1999, there can no longer have been any such corresponding intention after that date. In short, from that date onwards the entities run by Prinsloo made their money by swindling the public. That was their income. It must follow that the amounts they were paid in that period were 'received' within the meaning of the Act. It was for the CC to prove the contrary and that onus was not discharged.[3]

[12] This Court's judgment in the matter of *Fourie NO v Edeling* NO cannot assist the CC. That dealt with the relationship between investor and scheme. This case is about the relationship between scheme and fiscus. Even if, as correctly stated in that matter, with respect, the scheme was legally obliged to repay an investor immediately on receipt, that was because of the legal principles applicable to the parties to an illegal contract, as between themselves. An illegal contract is not without all legal consequences; it can, indeed, have fiscal consequences.[4] The sole question as between scheme and fiscus is whether the amounts paid to the scheme in the tax years in issue came within the literal meaning of the Act.[5] Unquestionably they did. They were accepted by the operators of the scheme with the intention of retaining them for their own benefit. Nothwithstanding that in law they were immediately repayable, they constituted receipts within the meaning of the Act. In other words it does not matter for present purposes that the scheme was not entitled, as against the investors, to retain their money. What matters is that what they took in was income received and duly taxable. The assessments were correctly raised.

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[3] See 82 of the Act.
[4] *Commissioner for Inland Revenue v Insolvent Estate Botha* 1990 (2) SA 548 (A) at 556C-557B.
[5] Ibid at 557I-558A.

[13] In dismissing the appeal before it the Tax Court referred the case back to the Commissioner to consider the quantum of the receipts and if necessary to issue a further assessment. It has not been suggested that such referral was unwarranted if the appeal to that Court was correctly dismissed.

[14] The appeal is dismissed, with costs, including the costs of two counsel.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

NUGENT JA
LEWIS JA
VAN HEERDEN JA
SNYDERS AJA