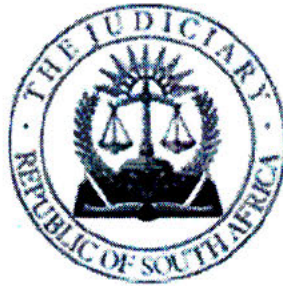


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-021132

- (1) REPORTABLE: YES ☒ NO
(2) OF INTEREST TO OTHER JUDGES:
YES ☒ NO
(3) REVISED: YES ☒ NO

19.5.2025

DATE

SIGNATURE

In the matter between:

CORION CAPITAL (PTY) LTD

Applicant

and

SESHEGO BENEFIT CONSULTING (PTY) LTD

Respondent

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

- [1] This is an application for a money judgment in the amount of R933 278.93 against the respondent.
- [2] The respondent's indebtedness to the applicant arises from the terms of an Investment Advisory Agreement¹ concluded between the applicant and the respondent. The indebtedness more particularly, represents the fees due, owing, and payable by the respondent to the applicant in terms thereof.
 - [2.1] In terms of clause 2 of Annexure B to Investment Advisory agreement, these outstanding fees form part of the fee charged by the respondent to Old Mutual Multi-Managers (hereinafter "Old Mutual" or "OMMM") and are payable monthly by the respondent to the applicant within 5 (working) days of receipt of payment of the fee(s) by the respondent from Old Mutual.
- [3] Having regard to the Investment Advisory Agreement, the relevant calculations had been done, valid tax invoices issued and the required 10-day period had prescribed/lapsed in respect of each of the outstanding fees/invoice amounts in issue²; notwithstanding which, the applicant alleges the respondent has not made payment to the applicant of the fee amounts so invoiced, or any amount at all.
- [4] Both the applicant and respondent are licensed financial service providers in terms of the Financial Advisory and Intermediary Services Act, 2002 ("FAIS") and duty-bound to conduct themselves in terms of the General Code of Conduct for Authorised Financial Service Providers and the TCF ("*Treating Customers Fairly*") principle whilst under the obligations of the Investment Advisory Agreement.
- [5] The applicant in addition is an FSCA (Financial Sector Conduct Authority) approved Hedge Fund Manager (category IIA).
- [6] The respondent's services cover a wide range of activities consisting of investment, benefit structure, regulatory and compliance, as well as risk consulting inputs. Its speciality involves providing benefit and investment "advice" ("advice" as defined in the FAIS Act) to

¹ Annexure FA 10 at 02-89

² Clause 6.2 at

companies or Boards of Management of pension fund organisations ("Boards of Trustees" as defined in the Pension Funds Act, Act 24 of 1956 ("PFA").

- [7] The facts underlying this matter are set out here in under.

FACTUAL MATRIX

i) THE RESPONDENT, ENSIMINI AND OLD MUTUAL- CONSULTANCY AGREEMENT

- [8] From 1 April 2021, the respondent and Ensimini Financial Services (Pty) Ltd ("Ensimini") agreed to combine the life-pooled portfolios that they rendered services on and entered into a Consultancy Agreement ('the agreement' with Old Mutual Life Assurance Company of (South Africa) Limited ("Old Mutual").³
- [9] The respondent and Ensimini agreed to provide investment consulting services to Old Mutual in respect of the life-pooled portfolios, also referred to as the Ensimini portfolios. Old Mutual had agreed to create such life pooled portfolios for the respondent's clients from July 2017, and similarly for Ensimini clients from September 2018, and these mandates were to be amalgamated under a new agreement the Consultancy Agreement⁴ from July 2021. Old Mutual agreed to create such revised life-pooled portfolios in consultation with the respondent and Ensimini and make these portfolios available to the respondent and Ensimini's clients for investment purposes.
- [10] Old Mutual was obliged to set up a Portfolio Construction Committee ('PCC) in respect of the Ensimini Portfolios to enable the respondent's and Ensimini Financial Services, named "*the Consultants*" in the agreement to provide the consulting services to Old Mutual.

³ Annexure AA2

⁴ 02-259

- [11] Authorised representatives of the Consultants were to act as advisors to the PCC in respect of the components of, and percentage allocation to the various underlying investment options.

ii) **AGREEMENT BETWEEN ENSIMINI AND APPLICANT**

- [12] During April 2021, Ensimini Financial Services (Pty) Ltd ("Ensimini") and the applicant entered into a written agreement, in terms of which agreement the applicant would provide non-discretionary advisory services to Ensimini. These services pertained to certain life-pooled portfolios administered by Old Mutual Life Assurance Company (South Africa) Limited (for ease of reference, also referred to as "Old Mutual"). The respondent and Ensimini appointed the applicant as their advisor to provide specialised advice on portfolio construction.
- [13] Ensimini and the respondent had merged their respective portfolios into the "Ensimini Portfolios" on the Old Mutual Platform. The applicant was accordingly providing non-discretionary advisory services to Ensimini in respect of both of its own, and the respondent's portfolios, on the Platform.
- [14] During April 2022 a dispute between Ensimini and the respondent arose.
- [15] Pursuant thereto, on 1 May 2022, and in an informal meeting Mr. Crawford ("Crawford"), a director of the respondent, communicated the following to Mr. Bacher, a director of the applicant:
- [15.1] the respondent would start the process of "*splitting*" his clients from Ensimini's clients;
- [15.2] because Mr. Crawford had introduced Ensimini to the applicant and the respondent's clients' assets were larger than those of Ensimini's clients Mr. Crawford expected the applicant to forthwith terminate its relationship with Ensimini, if the applicant wished to act as a financial service provider to the respondent.

- [16] Mr. Crawford also provided an ultimatum in terms of which he advised Mr. Bacher that if the applicant, did not terminate its relationship with Ensimini when the aforesaid portfolios were split, the respondent would not extend the applicant's mandate to provide advisory services to the respondent ("the ultimatum").
- [17] The ultimatum was unacceptable and anti-competitive to the applicant. It was perceived as unreasonable, inappropriate and contrary to the principles of *"Treating Customers Fairly"* - one of the FAIS Act's (Financial Advisory and Intermediary Services Act 37 of 2002) and the industries' central tenants, which requires and ensures equitable treatment of all parties.
- [18] Mr. Crawford, despite complimenting and acknowledging the work the applicant had done on 16 of May 2022, yet again, restated the abovementioned ultimatum. Mr. Bacher's plea that the unlawful ultimatum was inappropriate was ignored.
- [19] Despite the ultimatum, the applicant continued to render advisory services to both the respondent and Ensimini.
- [20] During May 2023 Ensimini approached the respondent to terminate the agreement with Old Mutual and the parties agreed that the life-pooled portfolio be split on the basis that the respondent would "keep" their clients and Ensimini theirs.
- [21] On 18 May 2023, Mr Jaco Pretorius, the chief executive officer of Ensimini, contacted the applicant via email, informing the applicant that Ensimini and the respondent had resolved to split their respective portfolios as of 1 August 2023.⁵ Ensimini indicated that the applicant, OMMM and it will have to set up relevant agreements in lieu of the split. The following was said in the email to the respondent's Mr Crawford and the applicant's Mr. Bacher:

"We have agreed that 1 August 2023 is acceptable as a proposed date for the split (on my understanding that OMMM would be amenable to this date).

Amongst others, the following actions are required:

1. *Seshego and OMMM to set up a new Consultancy Agreement;*

⁵ Annexure FA8 at 02-86

2. Seshego to contract with Corion for services that will be provided by Corion under the Consultancy Agreement (assuming the same format as is currently in place will be retained):
3. Ensimini, Corion and OMMM to set up relevant agreements." (my underlining)

- [22] On 31 May 2023⁶ and in an email, Mr. Crawford indicated that the respondent and not Ensimini would pay for the applicant's services. Mr. Crawford also wanted a copy of the service level agreement concluded between the applicant and Ensimini, so that the applicant and the respondent could conclude a "*similar agreement*".
- [23] It is also within the same context of the upcoming portfolio split that the applicant was not only invited but compelled to communicate, engage, negotiate, and conclude its own agreement, with Old Mutual to the knowledge of both the respondent and Mr. Crawford.

iii) **APPLICANT AND RESPONDENT – INVESTMENT ADVISORY AGREEMENT**

- [24] On 30 June 2023, the applicant and the respondent entered into an Investment Advisory Agreement⁷. The applicant was to provide non-discretionary advisory services to the respondent in respect of the Seshego Portfolio's. The material, relevant and express terms of the Investment Advisory Agreement for present purposes, include the following:

[24.1] the respondent provided consulting services to Old Mutual respect of certain life-pool portfolios administered by Old Mutual (clause 2.2).

[24.2] the applicant, as "Adviser" would provide non-discretionary advisory services to the respondent in respect of the respondent's aforesaid portfolios as outline in annexure A to the Investment Advisory Agreement (clause 2.3). The services to be provided are defined in clause 5.

[24.2.1] Clause 5 of the Investment Advisory Agreement reads:

"5. SERVICES PROVIDED

⁶ Annexure FA9

⁷ Annexure FA 10 at 02-89

*The services referred to in clause 2 that [Corion Capital] will provide to Seshego are recorded in Annexure A."*⁸

[24.2.2] Annexure A to clause 2 deals with the applicant as the advisor's duties and obligations. It entails investment functions, Portfolio Construction Committee Reporting, Client Reporting and Implementation.⁹

[24.3] The respondent is remunerated by Old Mutual for the consulting services it renders to Old Mutual (as referred to in clause 2.2) (clause 2.4). Clause 6, read with annexure B thereto, deals with the remuneration to be paid by the respondent to the applicant.

[24.3.1] Clause 6 of the Investment Advisory Agreement provides:

"6. REMUNERATION

6.1 *As consideration for the services referred to in clause 2, Seshego shall pay to the [Corion Capital] a fee as recorded in Annexure B.*

6.2 *Such fee will be calculated by [Corion Capital] on the month-end value of the 'Seshego Portfolios' and will be payable on a monthly basis by Seshego within 10 days after receipt of a valid tax invoice from [Corion Capital], subject to Seshego receiving payment of its fee in 2.4 above from Old Mutual."*

Annexure B provides:

"ANNEXURE B

FEE PAYABLE TO THE ADVISOR

1. *In consideration for the services referred to in Annexure A, Seshego shall pay to the [applicant] a*

⁸ 02-100

⁹ 02-100

monthly fee equal to 1/12 of 5 bps (excluding VAT) off the assets held in the "[Old Mutual] Seshego Portfolios".

2. *The fee forms part of the fee charged to [Old Mutual] by Seshego and shall be payable monthly to the Advisor within 5 working days of receipt of payment of the fee by Seshego from Old Mutual Multi-Managers."*

- [24.4] the respondent was prepared to pay the applicant a fee for the clause 5 services the applicant was to provide; which fee shall form part of the of the fee received by the respondent from Old Mutual as referred to in clause 2.4 (clause 2.5);
- [24.5] the Investment Advisory Agreement would take effect on the Commencement Date (being 1 May 2023) and would continue to be in force until termination in accordance with the Investment Advisory Agreement (clause 3.1);
- [24.6] each Party would be entitled to terminate the Investment Advisory Agreement on 60 Business Days' written notice, or such alternative notice period as determined by the Parties (clause 3.2);
- [24.7] the applicant undertook that it was licensed as a financial service provider in terms of the relevant act, and in terms of FSP No. 44523 (clause 4.1);
- [24.8] each party subscribed to, and wherever relevant would, undertake to demonstrably deliver the fairness outcomes as set out in the '*Treating Customers Fairly*' program in all dealings with financial services customers (clause 4.2);
- [24.9] the services to be provided by the applicant to the respondent, and the applicant's duties, obligations and functions are those recorded and set out in annexure A to the Investment Advisory Agreement (clause 5);

[24.10] as consideration and remuneration for the services to be rendered by the applicant in terms of the Investment Advisory Agreement, the respondent would pay the applicant a fee as recorded in Annexure B of the Investment Advisory Agreement, being the following (clause 6.1 read with Annexure B to the Investment Advisory Agreement):

[24.10.1] a monthly fee equal to 1/12 of 5 bps (excluding VAT) of the assets held in the "Old Mutual Multi-Manager Seshego Portfolios (one basis point equivalent to 0.01%)

[24.10.2] the fee forms part of the fee charged to Old Mutual Multi-Managers by Seshego and shall be payable monthly to the Advisor within 5 working days of receipt of payment of the fee by Seshego from Old Mutual Multi-Managers;

[24.10.3] the aforesaid fee would be calculated by the applicant on the month end value of the Seshego Portfolios' and would be payable by the respondent to the applicant, on a monthly basis within 10 days after receipt of a valid tax invoice from the applicant, subject to the respondent receiving payment of its fee from Old Mutual (clause 6.2).

[24.11] The respondent reserved the right to withhold any fees due to the applicant if the applicant was in breach of any of its obligations under clause 4 of the Investment Advisory Agreement, until such time as the breach had been rectified (clause 6.5)

[24.11.1] Clause 4 reads as follows:

"4. COMPLIANCE/FAIS AND TREATING CUSTOMERS FAIRLY

4.1 *The Advisor undertakes that it is licensed as a financial service provider in terms of the Financial Advisory and Intermediary Services Act, 2002 ("FA/S"), in terms of FSP No.44523. The*

Advisor undertakes to advise Seshego in writing immediately if such license is suspended, lapses or is withdrawn.

4.2 *Each Party subscribes to and wherever relevant undertakes to demonstrably deliver the fairness outcomes as set out in the Treating Customers Fairly ("TCF") program in all dealings with financial services customers."*

[24.11.2] The right to withhold payment in clause 6.5 reads as follows:

"6.5 Seshego reserves the right to withhold any fees due to the Advisor if the Advisor is in breach of any of its obligations under clause 4 above, until such breach has been rectified. Save in the circumstances envisaged in clause 15, should the Advisor not rectify the breach within 30 days of Seshego becoming aware and notifying the Advisor in writing of such breach, Seshego may unilaterally terminate this agreement at its sole discretion (notwithstanding the provisions of clause 8) and no fees will be paid to the Advisor from the date of the Advisor having breached any or such obligations."

[24.12] The applicant and respondent undertook to hold in confidence all information received from one another. (clause 7.1);

[24.13] Confidential information is defined in clause 1.1.5 of the agreement:

"1.1.5 Confidential Information" means:

1.1.5.1.1 any information of whatever nature, which has been or may be obtained by either of the parties from the other, whether in writing or in electronic form or pursuant to discussions between the Parties, or which can be obtained by

examination, testing, visual inspection or analysis, including, without limitation, scientific, business or financial data, know-how, formulae, processes, designs, sketches, photographs, plans, drawings, specifications, sample reports, models, Client lists or particulars, price lists, studies, findings, software, software source documents, source codes, proprietary hardware, inventions or ideas;

1.1.5.1.2 analyses, concepts, compilations, studies and other material prepared by or in possession or control of the recipient which contain or otherwise reflect or are generated from any such information as is specified in this definition; and

1.1.5.1.3 personal information as defined in the Protection of Personal Information Act, Act 4 of 2013.”

[24.14] In terms of clause 7.3 of the agreement the recipient of Confidential Information shall immediately return the said information or at the discretion of the original owner thereof, destroy such Confidential Information, and shall not retain copies, examples or excerpts thereof at the termination of the agreement.

iv) TERMINATION OF INVESTMENT ADVISORY AGREEMENT

[25] On 27 August 2023, Mr. Crawford of the respondent called a meeting with Mr. Bacher of the Applicant. The stated purpose of the meeting was to discuss the respondent's intention to terminate the Investment Advisory Agreement. The parties discussed both the respondent's intention to terminate the Investment Advisory Agreement and whether the applicant would be amenable to terminating same on a truncated basis as per Mr. Crawford's request.

[26] Subsequent to the August 2023 meeting, Mr. Crawford transmitted the respondent's formal notice to terminate the Investment Advisory Agreement via email.¹⁰ The

¹⁰ Annexure FA11at 02-104

respondent, care of Mr. Crawford, claimed to do so in terms of clause 3.2 of the Investment Advisory Agreement which states:

*"Each Party shall be entitled to terminate this Agreement on 60 Business Days' written notice, or such alternative notice period as determined appropriate by the Parties."*¹¹

In the same email, Mr. Crawford also requested, on behalf of the respondent, that the applicant agree to the termination of the Investment Advisory Agreement on a truncated basis (being on less than the agreed 60 business day notice period).

- [27] On 30 August 2023¹² the applicant declined, as it was entitled to, the respondent's request for a truncated termination period.
- [28] Accordingly, the termination date, as per the Investment Advisory Agreement, was 20 November 2023; being 60 business days from the respondent's written notice of termination on 28 August 2023 (as per clause 3.2 of the Investment Advisory Agreement).
- [29] Old Mutual Multi-Managers ("OMMM") communicated on 29 September 2023 the policy split changes along with the portfolio changes to be effective 1 January 2024.
- [30] During September 2023, and notwithstanding the aforesaid, Mr. Crawford approached the applicant to discuss the possibility of the applicant continuing to provide services in respect of the respondent's Portfolios.
- [31] The respondent's approach was not considered because as conveyed in Mr. Bacher's email dated 22 September 2023¹³.

"We have been informed by one of your clients that Seshego has sent formal communication to them of the appointment of Riscura as a replacement of Corion. We therefor do not see the merits in attempting to retain an appointment that appears to have already been made."

¹¹ 02-92

¹² Annexure FA12 at 02-105

¹³ Annexure FA13 at 02-106

- [32] Furthermore, the respondent was already at the time substantially indebted to the applicant.
- [33] Mr. Crawford on the respondent's behalf, requested the applicant to begin effecting a "handover", consisting of all mandates and minutes since July 2021.
- [34] Despite the November 2023 termination date of the Investment Advisory Agreement, and notwithstanding (i) the respondent's premature request and ii) its substantial outstanding indebtedness to the applicant and on 6 October 2023:
- [34.1] the applicant transmitted the aforesaid documents (and accompanying information) to the respondent (which would have included any and all Confidential Information) via emails.¹⁴
- [34.2] the documents and information provided by the applicant to the respondent in the applicant's view constituted the Confidential Information.
- [35] Clause 7.3 of the Investment Advisory Agreement had no proviso preventing payment of the advisor's fees. The said clause states:
- "After the termination of this Agreement, for whatever reason, the recipient of Confidential Information shall immediately return same or at the discretion of the original owner thereof, destroy such Confidential Information, and shall not retain copies, examples or excerpts thereof."*¹⁵
- [36] The applicant had complied with all its obligations in terms of the Investment Advisory Agreement, and the applicant was informed that Old Mutual had paid the respondent's relevant fees.
- [37] On or about 20 October 2023, and in response to the applicant's transmission of an invoice for payment of fees as contemplated in the Investment Advisory Agreement, the respondent inexplicably requested the handover documents already transmitted via email by the applicant to the respondent on 6 October 2023.¹⁶

¹⁴ Annexures FA15-FA20 at 02-108 to 02-116

¹⁵ 02-93

¹⁶ Annexure FA22 at 02-118

- [38] The applicant, care of Mr Hall (its Portfolio Manager) advised that the applicant had already provided the (i) requested handover documents, and ii) the recordings, given their size, would be provided via WeTransfer (a document / file sharing platform); which would be provided "*next week*". Mr Hall¹⁷ suggested that its receipt of the emailed documents may have been relegated to the respondent's junk folder. In response¹⁸ the respondent's Mr. Scott Harvey ("Harvey") acknowledged that certain of the emails were indeed found in a junk folder and that he would review same and revert to the applicant thereafter.
- [39] The applicant entered in an Investment Advisory Agreement with Old Mutual on 31 October 2023.¹⁹
- [40] By November 2023, the respondent had transferred all its clients' assets into the newly named "*Coldstream Portfolio's*", but for one remaining client ("*AIG*") in the old Seshego Portfolio. The applicant had to render services in respect of the one remaining client.²⁰
- [41] On 10 November 2023 Mr. Crawford advised that Mr. Harvey would attend at the applicant's premises with a hard drive "*so that [the respondent] can get what we want in the [applicant's files] so that we can square this away*".²¹
- [42] Mr. Harvey sent a further email to the applicant²², requesting further documents that the respondent required in terms of the handover. Those requests were addressed and complied with by the applicant.
- [43] The respondent however insisted on information relating to what was termed '*private meetings and discussions*' between the applicant and Old Mutual.

[43.1] On 13 November 2023 Mr. Crawford in an e-mail to Mr. Montano said:

"Your principal, Seshego, will no longer accept private meetings and discussions with Old Mutual about our agreement, and Corion is

¹⁷ Annexure FA23 at 02-119

¹⁸ Annexure FA24 at 02-120

¹⁹ 04-20 - 04-35

²⁰ Paras 22 - 23, Caselines 02-19

²¹ Annexure FA26 at 02-122

²² Annexure FA27 at 02-124.

required to now provide all information about our portfolios in Corion's possession please²³." (my underlining)

- [44] The applicant opined that there existed no such private meetings and discussions.
- [45] On or about 15 November 2023²⁴ an email was forwarded to Mr. Crawford. There-in the applicant, essentially advised that the applicant would provide the respondent with the requested Old Mutual correspondence. The information would be handed over subject to the respondent confirming that, on receipt of the requested correspondence, the respondent would make payment of its (then) outstanding Investment Advisory Agreement indebtedness to the applicant. On the 14th and 15th of November 2023 the parties agreed to extend the termination of the Investment Advisory Agreement to 31 December 2023.²⁵
- [46] On 16 November 2023, Mr. Crawford provided the respondent's reply to the applicant's email dated 15 November 2023.²⁶ Therein, Mr. Crawford *inter alia* stated that:
- [46.1] the Investment Advisory Agreement had come to an end;
- [46.2] the applicant had acted self-servingly and undermined the respondent in its dealings with OMMM as regards the respondent's portfolios;
- [46.3] the respondent was declaring a breach of contract and "Dispute Notice" under clauses 8 relating to breach and 9.1.7 (resolving disputes by means of discussions and negotiations); (my underlining) and
- [46.4] the applicant, was invited to attend a meeting in Sandton on Tuesday 21 November 2023 to "*clear up matters*" and "*come clean*" with the respondent, as an alternative to litigation.

²³ Annexure FA33 at 02-133

²⁴ Annexure FA29 at 02-129.

²⁵ Annexure FA 34, p. 4, line 3 - p. 6, line 8 at Caselines 02-141 - 02-143 and Annexure FA29 at Caselines 02-12

²⁶ Annexure FA36 at 02-158

- [47] On 18 November 2023, in response to the respondent's letter, the applicant wrote to Mr. Crawford.²⁷ On behalf of the applicant any allegation of impropriety on the part of the applicant was denied. The applicant requested that the respondent provide clarity as to the basis on which it placed the applicant in breach of the Investment Advisory Agreement.
- [48] The applicant did not receive a response from the respondent to the 18 November 2023 email. The applicant followed up with the respondent again via email on both the 24th and 28th of November 2023.²⁸
- [49] The applicant had:
- [49.1] rendered the relevant Annexure A services;
 - [49.2] and rendered the appropriate tax invoices to the respondent.
- [50] In addition, the applicant believed that Old Mutual had remunerated the respondent in respect of the fee amounts outstanding and owed by the respondent to the applicant.²⁹ The payment of fees, was confirmed by Old Mutual in an e-mail dated 11 December 2023. The respondent however contends the Old Mutual's correspondence stating that the evidence was not confirmed by Old Mutual under oath.
- [51] The respondent's aggregate indebtedness to the applicant, and its computation, is evidenced by the statement of account.
- [52] Annexures FA 4.1 to FA 4.6³⁰ are copies of each of the (tax) invoices listed in the statement of account (annexure FA4).³¹ The tax invoices, in turn, list the relevant (advisory) fees due, owing, and payable under and in terms of the Investment Advisory Agreement.

²⁷ Annexure FA38 at 02-160

²⁸ Annexures FA39 and FA40 at 02-161 and 02-02-162

²⁹ Annexure FA3 at 02-71

³⁰ 02-73

³¹ 02-72

- [53] On 29 November 2023, after the notice of the breach of the Advisory Agreement, the applicant responded that they agreed to provide all communications - subject to the respondent agreeing to pay the outstanding balance.³²
- [54] The respondent, after receiving the aforesaid communication indicated that it will be releasing R400 000.00 of the fees due to Corion Capital subject to the applicant agreeing to abide by the contract by providing all correspondence with Old Mutual, and that Corion Capital explicitly agrees to disclose to the respondent all discussions of whatsoever nature with Old Mutual for the remainder of the contract.³³
- [55] On 30 November 2023, Mr. Montana of the applicant, responded and indicated that the applicant would supply the communications with OMMM on the basis that:
- "1. Seshego will immediately pay R400 000 excl. vat. to Corion, thus an amount of R460 000 will be paid, which represents 43% of the amount outstanding.
 2. *On receipt of the payment, Corion will supply the communications with OMMM to you.*
 3. *On receipt of the emails from Corion, we expect you to pay the remaining balance outstanding of R533 278.93."*³⁴ (my underlining)
- [56] The respondent did not find the afore-mentioned acceptable.³⁵
- [57] On 3 January 2024 the respondent again requested the correspondence between the applicant and Old Mutual.³⁶
- [58] On or about 6 February 2024, and when it became apparent to the applicant that the respondent had no intention to settle its indebtedness to the applicant, Mr. Bacher emailed Mr. Crawford to advise him that the applicant had sought legal counsel. He also enquired whether, as opposed to the applicant immediately instituting these

³² 02-164

³³ Annexure FA43 at 02-166

³⁴ Annexure FA44 at 02-167

³⁵ Annexure FA45 at 02-168

³⁶ Annexure FA46 at 02-171

proceedings in recovery of the indebtedness, the respondent was interested in attempting to enter into the prescribed arbitration process per the Investment Advisory Agreement.³⁷

[59] In response, Mr. Crawford advised Mr. Bacher that by failing to disclose to the respondent that it had entered into an "*IMA agreement*" with Old Mutual on 1 December 2023, the applicant had acted contrary to the relevant code of conduct and its enabling legislation.³⁸

[59.1] The applicant alleged that, the portfolio split between Ensimini and the respondent, had necessitated the negotiations between the applicant and Old Mutual. The applicant argued that it did not undermine the respondent but regulated the fall out.

[59.1.1] In an email by Mr. J Pretorius of Ensimini to the applicant, respondent and OMMM one of the actions required, as a result of the portfolio split, was for Ensimini, the applicant and OMMM to set up relevant agreements.³⁹ The applicant consequently entered into an agreement with Old Mutual as advised.

[60] The applicant placed reliance on the arbitration clause – clause 9 – but the respondent was not amenable thereto which necessitated the litigation.⁴⁰

[61] Before evaluating the matter it is important to note that the Applicant in its Founding Affidavit made a *conditional and without prejudice tender* for consideration by the respondent. The tender and its terms are dealt with here in below.

³⁷ Annexure FA49 at 02-174

³⁸ Annexure FA50 at 02-175

³⁹ Annexure FA8 at 02-86

⁴⁰ Annexure FA50

APPLICANT'S WITHOUT PREJUDICE & CONDITIONAL TENDER:

[62] The applicant's tender was to provide the respondent with its correspondence with Old Mutual once it had received payment of its fees from the Respondent. The applicant was clear pay us and we will release the correspondence.

[63] The tender to provide such correspondence was subject to the terms and conditions, and qualified by the following:

[63.1] the tender was made on an entirely without prejudice basis and with full reservation of the applicant's rights;

[63.2] the tender was made without conceding:

[63.2.1] any liability and obligation on the part of the applicant to provide such correspondence to the respondent;

[63.2.2] any entitlement on the part of the respondent to demand and receive a such correspondence;

[63.2.3] that the applicant's entitlement to receive payment, in full of the (admitted on common cause) amounts owed by the respondent is subject to, and/or conditional upon, the respondent's receipt of such correspondence;

[63.2.4] the tender was made subject to the applicant's receipt of payment of the amounts owed by the respondent to the applicant;

[63.2.5] the tender was made subject to Old Mutual formally consenting in writing to the provision of such documents (given Old Mutual's own proprietary and/or confidentiality rights in respect of such correspondence); and

[63.2.6] the tender was without prejudice to the applicant's rights to insist that the respondent was, and remains, liable for the costs of this application in circumstances *inter alia* where, there have been

various *bona fide* and unsuccessful attempts on the applicant's part to breach the payment impasse

[63.2.7] and to avoid the bringing of this application, which attempts the respondent abstained from.

[64] The tender was however unacceptable to the respondent. The respondent insisted that it wanted to receive all the Old Mutual documentation, before it affected payment. The respondent's counsel argued that the applicant was dubious - that there was no assurance that the correspondence would be forthcoming. The respondent argued that the applicant had to rectify its breach first and that it would then release payment of the fees. Considering the rejection of the tender I turn to deal with the facts agreed upon between the parties.

COMMON CAUSE FACTS:

[65] The following facts are agreed on between the parties:

- [65.1] the fact, conclusion, and the express terms of the Investment Advisory Agreement.
- [65.2] that the applicant rendered all the required and necessary services under the Investment Advisory Agreement;
- [65.3] that the applicant rendered the required non-discretionary advisory services fully and satisfactorily to the respondent;
- [65.4] that the applicant had rendered the necessary valid tax invoices to the respondent,⁴¹
- [65.5] that the respondent had received these invoices;

⁴¹ Annexure FA4

- [65.6] that the applicant's invoices have been calculated on the on the month-end value of the Seshego Portfolios;
- [65.7] that the respondent had received payment of its (relevant) clause 2.4 fees from Old Mutual;
- [65.8] that the Investment Advisory Agreement terminated by agreement between the parties;
- [65.9] that the reason underpinning the termination of the Investment Advisory Agreement was the falling out, and the breakdown in the relationship, between the respondent and Ensimini and their decision to part ways and split portfolios (which included the Seshego Portfolios);
- [65.10] that the applicant had nothing to do with the falling out, and the breakdown in the respondent/Ensimini relationship and their decision to part ways and split portfolios.

[66] At the outset prior to dealing with the defences raise it is prudent to canvass the essential, material and relevant clauses of the Investment Advisory Agreement.

RELEVANT, MATERIAL AND ESSENTIAL CLAUSES IN THE INVESTMENT ADVISORY AGREEMENT:

[67] Clause 1 defines a "*Party*" as the advisor (applicant) or Seshego (the respondent).

[67.1] In terms of clause 1.1.1 of the said agreement the applicant is defined as "*the Advisor*".

[67.1.1] An advisor is any individual who provides advice, guidance, or recommendations, particularly in a professional or official context. Advisors are typically subject matter experts who assist others in making informed decisions.

- [68] Clause 2 outlines the relationship between the applicant, the respondent and Old Mutual. It is important to note that the applicant's role is that of an advisor, responsible for providing non-discretionary advisory services to Seshego concerning 'the Seshego Portfolios' as detailed in Annexure A.

CLAUSE 2

"2. RECORDAL

- 2.1 *Old Mutual is a registered long-term insurer in terms of the Long-Term Insurance Act, 1998;*
- 2.2 *Seshego provides consulting services to Old Mutual in respect of certain life-pooled portfolios administered by Old Mutual (the Seshego Portfolios)".*
- 2.3 *The Advisor will provide non-discretionary advisory services to Seshego in respect of 'the Seshego Portfolios' as outlined in Annexure A.*
- 2.4 *Seshego is remunerated by Old Mutual for the consulting services it renders to Old Mutual as referred to in 2.2 above.*
- 2.5 *Seshego is prepared to pay the Advisor a fee for the above-mentioned services as per clause 5.*

Such fee shall form part of the fee received by Seshego from Old Mutual as referred to in 2.4 above." (my underlining)

- [69] The respondent rendered consulting services to Old Mutual in respect of certain life-pooled portfolios administered by Old Mutual ("the Seshego Portfolios") (my underlining).

- [70] Clause 4 deals with compliance with FAIS and "Treating Customers Fairly". There is no dispute that the services were rendered to Old Mutual in respect of the Seshego Portfolios.

- [70.1] Clause 4 records as follows:

"4. COMPLIANCE/FAIS AND TREATING CUSTOMERS FAIRLY

4.1 *The Advisor undertakes that it is licensed as a financial service provider in terms of the Financial Advisory and Intermediary Services Act, 2002 ("FAIS"), in terms of FSP No. 44523. The Advisor undertakes to advise Seshego in writing immediately if such license is suspended, lapses or is withdrawn.*

4.2 *Each Party subscribes to and wherever relevant undertakes to demonstrably deliver the fairness outcomes as set out in the Treating Customers Fairly ("TCF") program in all dealings with financial services customers."*

[71] Clause 6.5 details the withholding of fees due to the applicant as advisor in the event of its breach of its obligations under clause 4 above and reads:

"6.5 Seshego reserves the right to withhold any fees due to the Advisor if the Advisor is in breach of any of its obligations under clause 4 above, until such breach has been rectified. Save, in the circumstances envisaged in clause 15, should the Advisor not rectify the breach within 30 days of Seshego becoming aware and notifying the Advisor in writing of such breach, Seshego can unilaterally terminate this agreement at its sole discretion (notwithstanding the provisions of clause 8) and no fees will be paid to the Advisor from the date of the Advisor having breached any or such obligations."

[72] The Parties further undertook in terms of clause 7 to hold in confidence all Confidential Information received from one another, and not divulge the Confidential Information to any person, including any of its employees, save for employees directly involved in the execution of this Agreement.

[73] Clause 8 – the breach clause provides as follows:

"8 BREACH

8.1 *Save in the circumstances envisaged in clause 15, if any Party breaches any provision or term of this Agreement and, in the case of a breach capable of being remedied, fails to remedy such breach within 20 Business Days of the date of receipt of written notice requiring it to do so, then (without prejudice to any other remedies of the other Parties in terms of this Agreement or any applicable law), the other Party shall be entitled, without notice, to:*

8.1.1 *obtain an interdict against such Party;*

8.1.2 *claim specific performance for any obligation whether or not the due date for performance has arrived, without prejudice to the other Party's right to claim damages;*

8.1.3 *recover such damages as the other Party may be able to prove that it has sustained; and*

8.1.4 *terminate this Agreement on written notice and with immediate effect."*

[74] The aforesaid clause therefore allows for specific performance or cancellation of the agreement in the event of the breach not being remedied.

[75] Clause 9 of the agreement addresses dispute resolution and arbitration as follows:

"9 DISPUTE RESOLUTION AND ARBITRATION

9.1 *Subject to any provision of this Agreement expressly providing otherwise, if any dispute arises between the Parties in regard to:*

9.1.1 *the interpretation of;*

9.1.2 *the validity and/or effect of;*

9.1.3 *the Parties' respective rights or obligations under;*

9.1.4 *the enforceability of*

9.1.5 *a breach of*

9.1.6 *the termination of;*

9.1.7 *this Agreement, the Parties shall endeavor to resolve such dispute ("Dispute") by way of discussions and negotiations. If any Party is of the view that a Dispute requires to be escalated due to failure of discussions and negotiations to resolve such Dispute, such Party shall be entitled to refer such Dispute to the chief executive officer (or equivalent position) of each of the Parties for resolution by way of written notice identifying the subject matter of the dispute to the other Party ("Dispute Notice") in the manner set out in this Agreement, in which event the unanimous decision of such chief executive officers (or equivalent) shall be binding on the Parties and carried into effect..."*

RESPONDENT DECLARING A BREACH AND DISPUTE NOTICE

- [76] In an email dated 16 November 2023, the respondent reported a breach of the Investment Advisory Agreement and issued a dispute notice in accordance with clauses 8 and 9.1.7. It is noteworthy that the respondent did not reference clauses 4, 6.5, and 7.3 of the Investment Advisory Agreement on which it now relies. This email followed requests for payment of the applicant's fees.⁴²
- [77] The respondent more specifically did not identify the breach.
- [78] The applicant on multiple times enquired as to the nature of the breach upon which the respondent relied.⁴³
- [79] The respondent however failed to respond.
- [80] In accordance with clause 8, the applicant had 20 business days from the date of receipt of written notice of the breach on 16 November 2023 to rectify the breach. This period would have extended into February/March of 2024. By this time, the agreement had already terminated.

⁴² FA29 at 02-129 and FA30 at 02-130

⁴³ Annexure FA38 at 02-160 and FA39 at 02-161 and FA 40 at 02-162

- [81] It is clear that the respondent did not intend to engage in the arbitration process outlined in clause 9, as demonstrated by its lack of response to the applicant's request for arbitration.⁴⁴
- [82] I will now, considering the material clauses of the Investment Advisory Agreement and the dispute notice address the defences to the applicant's claim.

RESPONDENT'S OPPOSITION AND EVALUATION:

- [83] The respondent relies upon the following defences, depicted by the applicant under the following headings:
- [83.1] the "All Information" defence;
- [83.2] the "Old Mutual" defence;
- [83.3] the disputed indebtedness defence and
- [83.4] the dispute of fact defence.
- [84] For ease of reference, I will discuss these defences under the afore-mentioned headings.
- [85] The respondent's defence in its dispute notice initially referenced clauses 8 and 9.1.7. It also made mention of clause 7.3
- [85.1] In the event of a breach, the parties were expected to resolve the dispute ("Dispute") through discussions and negotiations.
- [86] In this application, the respondent however utilizes a new stance. The respondent relies on the withholding of fees because of the applicant's alleged breach of clause 4 of the Investment Advisory Agreement.

⁴⁴ Annexure FA49 at 02-174.

- [87] The correspondence between the parties does not support the argument that the respondent intended to withhold the applicant's fees. Instead, it aligns with the claim that the fees were meant to be paid upon delivery of the relevant correspondence.
- [88] In the respondent's supplementary Heads of Argument the respondent contends that the General Code of Conduct' ("the Code") forms part of the Investment Advisory Agreement.
- [89] The respondent refers to a provision of the Code which deals with *conflict of interest*. It submits that the applicant breached the Investment Advisory Agreement as it had a conflict of interest. The reliance on the Code of Conduct and a conflict of interest is an additional stance taken by the respondent and advanced in the respondent's supplementary Heads of Argument.
- [90] A *conflict of interest* means any situation in which a provider as a representative has an actual or potential interest that may, in rendering a financial service to a client-
- a) influence the objective performance of his, her or its obligations to that client; or
 - b) prevent a provider or representative from rendering an unbiased and fair financial service to that client, or from acting in the interests of that client, including, but not limited to-
 - i) a financial interest;
 - ii) an ownership interest,
 - iii) any relationship with a third party;"

Paragraph 3(1)(b) and (c) of the Code reads:

- "(b) *a provider and a representative must avoid and where this is not possible mitigate, any conflict of interest between the provider and a client or the representative and a client*
- (c) *a provider or a representative must, in writing, at the earliest reasonable opportunity-*

- (i) disclose to a client any conflict of interest in respect of that client, including-
 - (aa) *the measures taken, in accordance with the conflict of interest, management policy of the provider referred to in section 3A (2), to avoid or mitigate the conflict;*
 - (bb) *any ownership interest or financial interest, other than an immaterial financial interest, that the provider or representative may be or become eligible for;*
 - (cc) *the nature of any relationship or arrangement with a third party that gives rise to a conflict of interest in sufficient detail to a client to enable the client to understand the exact nature of the relationship, arrangement and the conflict of interest; and*
- (ii) *inform a client of the conflict-of-interest management policy referred to in section 3A (2) and how it may be accessed."*

[91] The applicant alleged that there was no wrongdoing in its communications with Old Mutual. The respondent alleges that the evidence of what transpired between the applicant and Old Mutual is within the applicant's peculiar knowledge and that the respondent can lead no direct evidence on this issue. The applicant's refusal to disclose the correspondence justifies according to the respondent, the inference that it has something to hide, and that it did in fact have a conflict of interest.

[92] The afore-mentioned defences are examined and scrutinised here in below.

EVALUATION OF DEFENCES:

i) THE ALL-INFORMATION DEFENCE:

[93] This defence relies on clauses 4, 6.5, and 7.3 of the Investment Advisory Agreement and was initially introduced in the Answering affidavit.

[94] The respondent asserts that the applicant has violated the Advisory Agreement, specifically clauses 4 and 7.3, by failing to provide confidential information

concerning the applicant's transactions with Old Mutual to the respondent. Consequently, pursuant to clause 6.5, the respondent claims it is justified in withholding payment of the applicant's fees as all relevant information and documents related to Old Mutual and the respondent were not furnished.

[95] The respondent claims that under clauses 4 and 7.3 of the Advisory Agreement, it has the right to all information held by the applicant regarding dealings with the respondent.

[96] The applicant contended that it did not violate the Advisory Agreement, arguing that the email correspondence requested by the respondent regarding Old Mutual does not fit within the definition of "Confidential Information" as defined in the Agreement. The applicant maintains that all Confidential Information was duly provided and therefore contends that clause 4 of the Advisory Agreement was not breached.

[97] To demonstrate that its conduct was not inappropriate, the applicant attached a letter from Old Mutual dated 24 November 2023 as evidence. The letter is not sworn under oath by Old Mutual but states:

"On behalf of Old Mutual Multi-Managers, we hereby confirm that all interactions between Old Mutual Multi-Managers and Corion Capital have been in relation to the management and administration of the portfolios. Since the decision by Seshego and Ensimini to split and create two separate portfolio ranges, the interactions have included the practicalities of how to split the portfolios and the role of each of the parties in the new sets of portfolios.

At no time, has Corion Capital:

- acted in any way that would impact negatively on the portfolios, or the clients invested in the portfolios;*
- acted in any way to undermine Seshego or Ensimini;*
- acted in any way other than to ensure that the portfolios continue to be managed in the clients' interests and to meet their targeted objectives."⁴⁵*

⁴⁵ Annexure FA37 at 02-159

- [98] Upon examining the definition of "Confidential Information," it is evident that it pertains to:

"any information of whatever nature, which has been or may be obtained by either of the parties from the other, whether in writing or in electronic form or pursuant to discussions between the parties, or which can be obtained by examination, testing, visual inspections or analysis, including without limitation, scientific, business or financial data, know-how, formulae, processes, designs, sketches, photographs, plans, drawings, specifications, sample reports, models, Client lists or particulars, price lists, studies, findings, software, software source documents, source codes, proprietary hardware, inventions or ideas;

Analyses, concepts, compilations, studies and other material prepared by or in possession or control of the recipient which contain or otherwise reflect or are generated from any such information as is specified in this definition; and

Personal information as defined in the Protection of Personal Information Act, Act 4 of 2013."

- [99] The information has been or may be obtained by one party from the other. In the Investment Advisory Agreement, it is information between the applicant and the respondent.

- [100] The respondent argues that the e-mail correspondence between the applicant and Old Mutual qualifies as "Confidential Information" because the applicant, acting as the respondent's agent, communicated with Old Mutual on behalf of the respondent, its clients, including AIG.

- [101] According to the respondent, the correspondence between the applicant and Old Mutual would also include, among other things, the following:

- [101.1] The clients name and particulars of the clients of the respondent;
- [101.2] The business and / or financial data of the respondent;

[101.3] The dealings between the applicant and Old Mutual then the applicant was still under the obligations of the Advisory Agreement;

[101.4] The applicant using the information provided to it by the respondent and dealing with such information with Old Mutual, either in respect of the respondent and its client or in respect of using the respondent's information provided to it for its own interest.

[102] It is important to note that the scope of confidential information requested from the applicant had been refined from all information in possession of the applicant related to its interactions with the respondent to specifically all correspondence with Old Mutual. This encompasses all communications the applicant sent to Old Mutual regarding the Ensimini Portfolios, including the division of such portfolios. Additionally, minutes of meetings were also requested.

[103] On 13 February 2024, the respondent requested the applicant to provide all correspondence with Old Mutual.

*"It is common cause that your client was provided with a written undertaking that your client **will be paid in full** once they had handed over to their principal **all correspondence with Old Mutual** (after we have received payment from Old Mutual as is stipulated in the agreement)."⁴⁶ (my emphasis)*

[104] From the correspondence between the parties discussed earlier, it is evident that the applicant provided the respondent with documents and information regarding Old Mutual. These documents and information were given even though the applicant argued that they did not fall under the category of "Confidential Information" as defined in the Investment Advisory Agreement.

[105] The applicant argued that the Old Mutual correspondence did not qualify as "Confidential Information" because it was not exchanged between the parties. The Investment Advisory Agreement defines the parties as the advisor (applicant) and the respondent. The respondent did not provide a satisfactory explanation for why the

⁴⁶ Annexure FA5 at 02-79

applicant's Old Mutual correspondence should be considered confidential, instead relying on agency without proof.

- [106] The respondent claimed that the Investment Advisory Agreement's text, context, and purpose imply that email correspondence between the applicant and Old Mutual is included, as the applicant was acting as the respondent's agent and communicating with Old Mutual on behalf of the respondent and its clients, such as AIG. The applicant refutes this, stating it did not act as the respondent's agent, but as an advisor providing non-discretionary advisory services under the terms of the Investment Advisory Agreement.
- [107] The Investment Advisory Agreement outlines the roles of the parties involved.
- [108] The relationships between Old Mutual, the applicant, and the respondent are comprehensively detailed in clause 2 of the afore-mentioned agreement. The applicant was the advisor and was tasked with offering non-discretionary advisory services to the respondent regarding the Seshego Portfolios, as specified in Annexure A. The respondent provided consulting services to Old Mutual concerning specific life-pooled portfolios managed by Old Mutual (the Seshego Portfolios). The respondent agreed to compensate the Advisor, the applicant, for the services mentioned above in accordance with clause 5. This fee would be included within the fee received by the respondent from Old Mutual.⁴⁷
- [109] It is evident from clause 2 that the applicant held an advisory position and was it was compensated for providing advisory services as explicitly stated. There is no evidence from the primary source, the said agreement, to suggest that the applicant acted in the capacity of an agent. Any assertion of agency would have required substantiation by the respondent in the pleadings.
- [110] In our law, an agent is formally authorized, either explicitly or implicitly, to act on behalf of another party, referred to as the principal. This authorization empowers the agent to undertake juridical acts on behalf of the principal. The agent's authority to act on behalf of the principal is crucial. The existence and extent of the purported

⁴⁷ 02-92

agent's authority, whether explicit, tacit, or implied, must be properly alleged and substantiated.

[111] The applicant denied being the respondent's agent⁴⁸, placing the burden of proof on the respondent. The respondent did not sufficiently allege or prove the existence and scope of the applicant's authority as its alleged agent.⁴⁹ According to the Investment Advisory Agreement, the respondent provided consultancy services to Old Mutual, while the applicant had a non-discretionary advisory role for which the respondent compensated it.⁵⁰ The applicant's duties as an advisor were explicitly outlined in Annexure A.⁵¹ The agreement did not indicate that the applicant would:

[111.1] act as an agent for the respondent,

[111.2] define the scope of the applicant's authority, or

[111.3] state that the applicant would earn fees from any agency relationship.

[112] In addition, the respondent's counsel did not during argument specifically deal with agency and the allegation that the applicant acted as the respondent's agent. In my mind establishing and proving agency would be vital to determine that all the Old Mutual documentation fell within the ambit of "confidential information". There is a golden thread running through agency, "confidential information" and the alleged breach. Absent agency the respondent's defence lacks merit. The respondent is thoroughly aware of this and accordingly disputed the role of the applicant. The primary source to define the applicant's role is the Investment Advisory Agreement. There is no indication whatsoever of agency. The respondent has furthermore not placed any evidence before court to proof agency. Therefore, I am of the firm opinion that the respondent has neither established nor proven the existence of an agency relationship.

[113] The respondent also did not specify the "Confidential Information", as per clause 7.3 or otherwise, which the respondent was entitled to receive but had not yet received.

⁴⁸ Para 79.4 at Caselines 02-34

⁴⁹ Potchefstroomse Stadsraad v Kotze 1960 (3) SA 615 (A).

⁵⁰ Clause 2

⁵¹ 02-100

- [117.1] The first sentence of clause 6.5 should be interpreted, according to the respondent, to permit the respondent to withhold the fees due and for the applicant not to finally forfeit its fees. The respondent contends that the applicant did not fulfil its contractual obligations, allowing the respondent to invoke the "*exceptio non adimpleti contractus*" to refuse performance.
- [117.2] The remainder of clause 6.5 addresses the scenario in which the contract is terminated due to the applicant's non-compliance with the agreement terms following a breach notice.
- [118] I firmly believe that clause 6.5 cannot be interpreted as suggested by the respondent. The interpretation of clause 6.5 must be considered in the context of the entire agreement and the surrounding circumstances rather than to be dealt with in isolation. The test is objective and requires that words be assigned a sensible meaning. Clause 6.5 pertains to remuneration and specifically addresses the rectification of a breach under clause 4, detailing the procedure and timing for such rectification. Payment of fees can only be withheld by the respondent if the applicant is in breach of clause 4, until the breach is rectified. Thus, the primary and sole focus and scope of clause 6.5 is rectification.
- [119] In the matter of *Choisy-Le-Roi (Pty) Ltd v Municipality of Stellenbosch and Another*⁵², Binns-Ward J, with reference to the decision of *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021(6) SA 1 CC held that in a contractual context an enquiry into the meaning of a text should be directed at determining, within the limits defined by the language the parties have chosen to use, what the parties had intended.
- [120] Clause 6.5 clearly stipulates that the respondent is entitled to withhold any fees due to the advisor, the applicant, if the applicant breach clause 4, until such breach has been rectified or cured. The clause specifies that the rectification must occur within 30 days of the respondent becoming aware of the breach and notifying the applicant in writing. Should the breach not be cured within the specified time frame, the

⁵² 2022 (5) SA 461 (WCC)

The court would have expected the respondent to precisely identify the specific required information instead of rendering a general demand.

[114] In order to withhold payment of the fees in terms of clause 6.5 the respondent had to proof the applicant's breach of clause 4 of the agreement.

[115] Clause 6.5 of the Investment Advisory Agreement stipulates that the respondent must proof the following: (the respondent contests the issuing of a breach notice):

[115.1] a clause 4 breach relating to compliance with FAIS and Treating Customers Fairly;

[115.2] notification of the alleged clause 4 breach –

[115.2.1] Clause 8 of the Investment Advisory Agreement provides in the case of a breach capable of being remedied, for a written notice to be given to remedy the breach and to allow for a period of 20 Business Days of the date of receipt of written notice to remedy the breach.

[115.3] the applicant had to address the breach notice within 30 days of the respondent becoming aware of the applicant's breach (clause 6.5)

[115.4] the applicant had to fail to remedy the breach of its clause 4 obligations;

[115.5] the respondent had to, if the applicant had failed to remedy its breach:

i) terminate the Investment Advisory Agreement and

ii) no fees were then payable from the date of breach of the applicant's clause 4 obligations (clause 6.5)

[116] The respondent however argued that there was no requirement for a breach notice in terms of clause 6.5 and that the notice given to the applicant sufficed.

[117] The respondent claimed that the initial sentence of clause 6.5 granted it the right to "withhold" the fees whilst the applicant was in violation of its obligations under clause 4, until such violations had been remedied.

respondent reserves the right to unilaterally terminate the agreement at their sole discretion, and no fees will be remitted to the advisor from the date of the breach.

[120.1] The breach notice is crucial as it defines the rectification period and indicates when the withholding of advisor fees will begin.

[121] The respondent's argument that the absence of a proper breach notice, as determined by clause 6.5, does not undermine their case is unconvincing. There is no evidence that the clause should be interpreted as two separate sentences. It is clear from the reading of the said clause that the withholding of the fees and the rectification are intertwined. The one cannot survive in the absence of the other. Additionally, it would be illogical for the clause to permit the withholding of fees without coupling it to a prescribed breach notice and rectification. The only reason for allowing the withholding of the fees is breach in terms of clause 4. Without a breach notice the applicant could not have been informed of the alleged breach and given an opportunity to rectify same. The said clause dictates that the breach notice had to cater for a specified time for rectification. There is also no indication that forfeiture of the advisor's fees is excluded in the respondent's interpretation of the first sentence of clause 6.5 but included in the remainder of the clause. Such an interpretation is non-sensical and absurd.

[122] The respondent did not persuade this court that clause 6.5 should be read and interpreted in two parts. To the contrary, the respondent has to insist on such an interpretation, because it knew that it had not given a proper notice in terms of clause 6.5 allowing for rectification.

[123] The respondent's interpretation of clause 6.5 lacks coherence and results in ambiguity and doubt.

[124] I firmly believe that without a valid and compliant clause 6.5 demand, the respondent cannot invoke or rely on clause 6.5. As stated earlier, rectification is central to this clause as it determines whether fees can be withheld.

- [125] I agree with the applicant that clause 6.5 required and necessitates a demand by the creditor and for the debtor to be placed in mora.⁵³ The debtor had to be informed of the obligation to perform and the time for the performance.
- [126] The respondent had to proof that:
- [126.1] a demand was made⁵⁴ and
- [126.2] that it had allowed the applicant the specified time within which to perform.⁵⁵
- [127] Despite the afore-mentioned requirements, the respondent did not plead compliance with clause 6.5, particularly in relation to dispatching the crucial breach notice and asserting its right to rely on clause 6.5.
- [128] The respondent failed to notify the applicant of the specific nature and date of the breach of clause 4 of the Investment Advisory Agreement. Furthermore, the respondent did not specify in its pleadings how and when it informed the applicant of this alleged breach.
- [129] The absence of a breach notice, the delivery thereof and the response by the applicant thereto are starkly obvious.
- [130] The respondent did not refer to clause 6.5 until the filing of its answering affidavit, which is significant. This suggests that the defence was formulated at the commencement of this application. The correspondence between the parties also indicates that the respondent did not initially rely upon the withholding of the applicant's fees in relation to clause 6.5. Additionally, the dispute notice does not mention clause 6.5.
- [131] The respondent wanted to justify withholding the applicant's fees in court, which clause 6.5 permitted. Thus, clause 6.5 was cited and relied upon after the fact.

⁵³ Breytenbach v Van Wijk 1923 AD 541 549.

⁵⁴ G & C Shelf 103 (Pty) Ltd v Chemical Specialities (Pty) Ltd 2012 (4) SA 335 (KZD) [26]. CF Combined Developers v Arun Holdings 2015 (3) SA 215 (WCC) [14] [15].

⁵⁵ Ver Elst v Sabena Belgian World Airlines 1983 (3) SA 637 (A); Van Wyk v Botha [2005] 2 All SA 320 (C) 331-4.

[132] In its dispute notice the respondent alerts the applicant that its obligations regarding data and information under clause 7.3 were known the applicant.⁵⁶

[133] Clause 7.3 of the Investment Advisory Agreement reads as follows:

"7.3 After the termination of this Agreement, for whatever reason, the recipient of Confidential Information shall immediately return same or at the discretion of the original owner thereof, destroy such Confidential Information, and shall not retain copies, examples or excerpts thereof." (my underlining)

[134] "Confidential Information" as described in clause 1.1.5 contains the following qualification, namely that the confidential information pertains to (underlining added):

"1.1.5.1 any information of whatever nature, which has been or may be obtained by either of the Parties from the other, ...

1.1.5.2.1 analyses, concepts, compilations, studies and other material prepared by or in possession or control of the recipient which contain or otherwise reflect or are generated from any such information as is specified in this definition;

[135] "Information" therefore provides for material obtained by either party from one another and also include information generated from such information.

[136] Clause 7.1 reads (underlining added):

"7.1 The Parties undertake that they will hold in confidence all information received from one another...."

[137] The "Confidential Information" is accordingly:

[137.1] obtained by either party from one another and/or

[137.2] also materials generated from the information received in [137.1] above

⁵⁶ FA36 at 02-158

[138] It is evident that the "Confidential Information" is specifically limited to materials obtained from the respondent.

[139] The respondent had to:

[139.1] Clearly identify, establish, and verify the specific information required from the applicant, ensuring it falls within the scope of "Confidential Information" as defined in the Investment Advisory Agreement.

[139.2] Additionally, the information had to be acquired directly from the applicant or alternatively generated from the obtained materials.

[140] In order to satisfy the requirements in paragraph 139 above, the respondent had to specify the information with detailed precision. This the respondent omitted to do.

[141] Reliance upon clause 7 does however not justify withholding the applicant's fees. During argument the respondent's counsel stated that the respondent was not relying upon clause 7.

[142] Clause 7 defence was rightly so aborted by the respondent. The "All Information Defence" based on clauses 4, 6.5 was not relied upon in the dispute notice and only came about after the fact in the answering affidavit. This defence has not been pleaded with sufficient particularity. More specifically the respondent's reliance on the Old Mutual Information is reliant on agency between itself and the applicant. The applicant was amenable to hand over the correspondence even though it did not deem the said correspondence as "Confidential Information" between itself and the respondent. The relationship between the parties is regulated by the Investment Advisory Agreement. The said agreement emphasizes the applicant's role as being an advisor. As alluded to here in before the respondent failed to establish agency. The respondent did not satisfy this court, that the Old Mutual correspondence falls within the definition of confidential information. In the absence of an obligation to provide the Old Mutual correspondence there can be no established breach in terms of clause 4. This defence was therefore not proven or established.

ii) OLD MUTUAL DEFENCE

- [143] This defence overlaps with the "*All Information Defence*". Where the respondent initially required all information between the applicant and the respondent it was with time curtailed and tapered to all correspondence between Old Mutual and the applicant. The respondent claims that it is entitled to withhold payment of the amounts due to the applicant until it receives the applicant's Old Mutual correspondence. This information is needed to shed light on what happened between the applicant and Old Mutual.
- [144] As was alluded to in the factual matrix a dispute arose between the respondent and Ensimini. Mr. Crawford wanted the applicant to choose sides in respect of the dispute and future business relationships.
- [145] The applicant became a victim of a dispute in which it played no part.
- [146] It is abundantly clear that the applicant engaged with Old Mutual as a direct result of the demise and separation of Ensimini and the applicant's business relationship, as well as the split of the life pooled Old Mutual Ensimini portfolios.
- [147] Both Ensimini and the respondent instilled upon the applicant the need to make post-split arrangements with Old Mutual and to directly engage with Old Mutual.⁵⁷
- [148] With the mutual knowledge of the respondent and Ensimini, the applicant engaged directly with Old Mutual in respect of a future relationship between them.
- [149] On the pleadings I cannot find that there was anything reprehensible in the applicant's contact with Old Mutual, neither that it was unlawful nor improper as suggested by the respondent. Although not under oath, a letter of Old Mutual dated 24 November 2023. also confirms this.⁵⁸ The applicant's conduct was also not a breach of the Investment Advisory Agreement.
- [150] The Old Mutual Defence must similarly be rejected.

⁵⁷ Annexure RA1 at 02-386 and FA42 at 02-164

⁵⁸ Annexure FA37 at 02-159

iii) THE DISPUTED INDEBTEDNESS AMOUNT DEFENCE

[151] The respondent endeavoured in this application to create a dispute in respect of:

[151.1] the amounts owed and outstanding to the applicant and

[151.2] when the amounts became due.

[152] The correspondence between the parties is indicative of the absolute absence of any indebtedness amount being disputed. The only inference that this court can draw is that prior to this application the respondent did not dispute the amount of indebtedness.

[153] The dispute of the amount of indebtedness is undoubtedly contrary to Mr. Crawford's advises that the invoices were sitting in their payment release system and just needed to be released.⁵⁹ He also informed the applicant that the respondent owed it money, wanted to pay it and that it was undebatable.⁶⁰ Even when the respondent suggested part payment was the indebtedness amount not disputed. During January and February 2024, the respondent still insisted on settling the applicant's fees in the event of the respondent receiving the Old Mutual information.

[153.1] On 4 January 2024 in an email Mr. Crawford stated:⁶¹

"It is simply a case of give us our data and we will settle your bill." (my underlining)

[153.2] On 13 February 2024 in an a-mail Mr. Crawford explicitly stated that the applicant will be paid in full:

"It is common cause that your client was provided with a written undertaking that your client will be paid in full once they had handed over to their principal all correspondence with Old Mutual (after we have received payment from Old Mutual as is stipulated in the agreement)." (my underlining)

⁵⁹ Annexure FA35 at 02-154

⁶⁰ Annexure FA35 at 156

⁶¹ 02-173

[154] The respondent in this application for the first time disputes the aggregated amount claimed by the applicant in that the respondent alleges that:

[154.1] The Advisory Agreement was extended until 31 December 2023 and not 20 November 2023;

[154.2] The applicant in November and December 2023 was only entitled to the 5.75 basis points of the remaining assets in the existing portfolio.

[154.3] The aforesaid calculation is based on Annexure B of the Advisory Agreement which states that Seshego shall pay to the advisor a monthly fee equal to 1/12 of 5 bps (excluding VAT) of the assets held in the Old Mutual Multi-Manager Seshego Portfolios.

[154.4] As a result, the applicant's invoice for the purported November 2023 is based on wrong assets figures in the said portfolio.

[155] The respondent pleaded that the claim is therefore not based upon a liquidated and undisputed amount which is capable of speedy and prompt ascertainment.

[156] The purported invoice for November 2023 according to the respondent also had the following further issues:

[156.1] The invoice indicates it is in respect of the October fees and no mention of November;

[156.2] Even if the invoice relates to the fees for November 2023, it is dated 20 November 2023 - by 20 November 2023 the parties agreed that the termination of the Advisory Agreement was extended until 31 December 2023. As such, the applicant would not have compiled the invoice already by 20 November 2023.

[156.3] No reliance can be placed on FA4.5, being a fabricated document and not a liquidated document.

[157] At the beginning of 2024 (January and February) Mr. Crawford was more than willing to settle the applicant's fees in full despite:

[157.1] the extension of the Investment Advisory Agreement until 31 December 2023

[157.2] and the November 2023 invoice issue raised here in before.

[158] I accordingly believe that the respondent's dispute of the amount of the indebtedness defence is after the fact and a contrived defence.

[159] The respondent's dispute of the amount of indebtedness is refuted by Mr. Crawford's advises that the invoices were sitting in their payment release system and just needed to be released.⁶² He also informed the applicant that the respondent owed it money, wanted to pay it and that it was undebatable.⁶³

[160] Regarding the respondent's complaints about the date of invoice payments and when the amounts claimed became due, the following bears reference:

[160.1] Annexure B, paragraph 2 to the Investment Advisory Agreement provides that the fees "*shall be payable monthly... within five working days of receipt of payment of the fee*" by the respondent from Old Mutual.

[160.1.1] The respondent pleaded that Old Mutual only made payment to the respondent:

[160.1.1.1] of the August 2023 fees on 26 September 2023, therefore payment was not due on 25 September 2023 as alleged by the applicant.

[160.1.1.2] of the September 2023 fees on 15 November 2023, therefore payment was

⁶² Annexure FA35 at 02-154

⁶³ Annexure FA35 at 156

not due on 20 October 2023 as alleged by the applicant.

[160.1.1.3] of the October 2023 fees on 13 December 2023, therefore payment was not due on 9 November 2023 as alleged by the applicant.

[160.1.2] All the abovesaid fees had to be paid as they became payable within 5 working days of *receipt of payment of the fees* by the respondent from Old Mutual therefore on the respondent's version within 5 working days of the 25th of September 2023, 15th of November 2023 and 13th of December 2023.

[161] Therefore, once the respondent had received payment from Old Mutual, it was contractually obligated to make payment of the applicant's fee "*within five working days of [the respondents] receipt of payment*" from Old Mutual. The prescribed five working day periods had elapsed in respect of each of the invoiced amount. As per annexure "FA3"⁶⁴ of the founding affidavit, which has not been countenanced by the respondent, Old Mutual confirmed that the respondent had received payment from Old Mutual of all amounts due to it.

[162] In respect of the respondent's complaint regarding there being two "*October 2023 invoices*" (annexures FA4.4⁶⁵ and FA4.5⁶⁶ to the founding affidavit), the respondent has failed to read and consider the two invoices.

[162.1] Had the respondent done so, it would have seen that there is an error (obvious in the title of the "second October" invoice (annexure FA4.5) it is dated 20 November 2023.

⁶⁴ 02-71

⁶⁵ 02-76

⁶⁶ 02-77

[162.2] The statement of activity in respect of the two invoices is furthermore correct, and correctly calculated, in respect of the respective months of October and November.

[162.3] It is clear that, when properly read and considered, annexure FA4.5 to the founding affidavit is a November 2023 invoice.

[162.4] As to the incorrect reference to "*October*" in annexure FA4.5 in the November 2023 - the invoice was prepared probably using the October 2023 invoices as a template.

[162.5] When the November 2023 invoice was being prepared the need to change the existing invoice title/reference from "*October*" to "*November*" was inadvertently overlooked.

[163] Taking cognizance of the calculation of the quantum/amount due in respect of November and December 2023 fees.

[163.1] The respondent's calculation of the fee amounts as being R9 616.93 and R10 048.31 is premised on the fees owed in respect of respondent's client - AIG - who elected to not move to the respondent's Coldstream portfolio but who remained with the original Ensimini portfolio.

[163.2] The respondent's/Ensimini business relationship was ultimately unbundled, and the Ensimini portfolios split, with effect from 1 November 2023.

[163.3] The respondent's liability for fees to the applicant however remained in place until 20 November 2023; meaning the respondent remained obliged to pay the applicant for the portfolio, not only in respect of AIG; notwithstanding its use or not of the applicant's services under the Investment Advisory Agreement within the context. of the newly named *Coldstream* portfolio.

[163.4] The respondent's renaming of the portfolios to *Coldstream* is both irrelevant and does not absolve the respondent of its liability under the Investment Advisory Agreement. The respondent's liability to the applicant for fees remained in respect of the respondent's life pooled portfolios as per the Investment Advisory Agreement, notwithstanding the notice period and the relabelling of same to "*Coldstream*".

iv) DISPUTES OF FACT DEFENCE

[164] The respondent alleges that there are disputes of fact pertaining to:

[164.1] The amount outstanding in respect of the applicant's fee, if any;

[164.2] whether the applicant acted as the agent of the respondent;

[164.3] the proper interpretation to be afforded to the Investment Advisory Agreement

[164.4] whether the applicant has fulfilled its duties in terms of the Advisor in terms of Agreement and especially in terms of the TC principles, FAIS Act, the General Code of Conduct for Authorised Financial Service Providers.

[164.5] whether the applicant made a full and frank disclosure to the respondent;

[164.6] whether the applicant, whilst still rendering services to the respondent, set up a competing product to the product on which it advised the respondent on. This was material because of the potential prejudice to the respondent's clients that had already transferred to the *Coldstream* Portfolios, which the applicant had declined to be involved with.⁶⁷

⁶⁷ 02-206

[165] The majority of these alleged disputes of facts can be resolved and determined by taking cognizance of the Investment Advisory Agreement, the common cause telephone conversations and the exchanged correspondence. These disputes are not genuinely raised. They are raised after the fact. Prior to this application none of the exchanges, correspondence and interactions between the parties foreshadowed any disputes of fact. It was abundantly clear that payment was to be made of the fees and that the scheduled payments were loaded to be released.

[166] Genuine and *bona fide* disputes of fact are not reliant upon false statements, vague unsubstantiated claims and upon mere speculation.⁶⁸

[167] I pause to note that it is indeed patently clear with reference to the correspondence, as was argued by the applicant, that prior to this application, the respondent did not dispute:

[167.1] its liability to the applicant.

[167.2] the quantum of the indebtedness and

[167.3] did not raise the withholding of the payments in terms of clauses 4, 6.5 and 7.3 of the Investment Advisory Agreement.

[168] Affirmation of the aforesaid is found in Mr. Crawford's own statements to which I refer:

"MR CRAWFORD: ... Please give me the dump [of email correspondence], and I will do the release.

MR MONTANO: OK

MR CRAWFORD: In fact, my understanding is those invoices are sitting in our payment release system, and they just need to be released."⁶⁹

⁶⁸ National Director of Public Prosecutions v Zuma 2009 (2) SA 277 SCA

⁶⁹ Annexure FA35, Case Lines 02-154, line 24

also

"MR CRAWFORD: "... but we owe you money, and we want to pay it, and there is no debate about it, ... Please just give us all the stuff. We will give you the money".⁷⁰ (my underlining)

[169] Although the respondent requested documentation and information from the applicant, as per the exchanged correspondence, the breach of the Investment Advisory Agreement was only raised following the applicant's insistence on receiving payments of its outstanding fees in November 2023.⁷¹

[170] The respondent informed the applicant that it is in breach of the Investment Advisory Agreement on 16 November 2023, when the respondent did not provide the information which the respondent wanted.

"In the interests of transparency, I am looking for specific correspondence with Old Mutual. I am hereby advising you that I will be requiring your Corion Directors to sign a formal confirmation that you have handed across all documents and information after you have attended to your undertaking below. I told you yesterday that I do not believe Corion has acted in good faith.

*Please be advised that I am declaring a breach of contract and Dispute Notice under clauses 8 and 9.1.7. The contract has ended, and I remain continuously asking Corion to hand over all confidential and other information relating to your work for us under our contract with Old Mutual.*⁷² (my underlining)

[171] A real, genuine dispute of fact can exist only where the court is satisfied that the party who wanted to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.⁷³

[172] The amount due to the applicant as advisory fees is in my mind not a fact in dispute. The correspondence between the parties - alerting to the fees being

⁷⁰ Annexure FA35, CaseLines 02-156, line 6.

⁷¹ Annexure FA31 at 02-131 and Annexure FA36 at 02-158.

⁷² Annexure FA36 at 02-158

⁷³ *PMG Motors Kyalami (Pty) Ltd (in liquidation) and Another v Firststrand Bank Ltd, Wesbank Division* [2015] 1 All SA 437 (SCA), 2015 (2) SA 634 (SCA); *Rhodes University v Student Representative Council of Rhodes University and Others (Concerned Staff at Rhodes University as Interveners)* [2017] 1 All SA 617 (ECG) at [68].

loaded to be released - and Mr. Crawford's insistence during January and February of 2024 to pay the claimed applicant's fees upon receiving the required Old Mutual information successfully deals with the "alleged" dispute of fact. It is abundantly clear that the respondent wishes to create a dispute of fact after the fact where there is none.

[173] In *Frank v. Ohlsson's Cape Breweries Ltd.*, 1924 A.D. 289 at p. 294, INNES, C.J., said:

"... But where the facts are really not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion."

In order to determine matters on motion, a Court must decide whether a real and genuine dispute of facts exists. The question always is whether there is a real issue of fact which cannot be determined without the aid of oral evidence. A safe test is whether the applicant is entitled to relief on the facts stated by the respondents, together with the admitted or undisputed facts stated by the applicant."

[174] I have supra dealt with the respondent's contention that the applicant acted as its agent. The Investment Advisory Agreement is the primary source that refutes the notion of the applicant as an agent and enforces the applicant's advisory role.

[175] The interpretation of the Investment Advisory Agreement in respect of clause 6.5. has been discussed and dealt with. Whether the Old Mutual Information falls within the ambit of Confidential Information, despite the difference in opinion between the parties, is also irrelevant as the applicant was amenable to provide same.

[176] The alleged breach by the applicant was, despite the applicant's multiple requests to identify the nature of the breach never named. A breach notice was further not sent in terms of clause 6.5, allowing for rectification of the breach within the stipulated time frame. The respondent had in addition never specifically by name requested and specifically identified the information sought. The nature, extent and scope of the requested Old Mutual information was also not pleaded with exact

precision by the respondent to assess whether the applicant had made full and frank disclosure of all confidential information.

[177] The respondent alleges that a dispute of fact exists as the applicant whilst still rendering services to the respondent, set up a competing product to the product on which it advised the respondent on, whilst still rendering services to the respondent. The non-identification of the competing product by the respondent, the denial of such a product by the applicant and Old Mutual's confirmation thereof effectively deals with the "alleged" dispute raised.

[178] In *Soffiantini vs Mould* 1956 (4) SA 150 (ED) at 154 G – H, the following was held:

'The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

[179] As discussed here in before there are no real and genuine disputes of fact. The defence raised, based upon breach of clause 4 and the withholding of the fees in terms of clause 6.5, was raised after the fact, only in the answering affidavit. In the e-mail⁷⁴ in which the respondent raised the dispute reliance was placed upon clause 8, 7.3 and 9.1.7. No reference was made to Clause 4 or 6.5 of the Investment Advisory Agreement which now form the basis for the defence.

[180] I am of the firm opinion that at the inception of this application there were simply no disputes of fact as is the position now.

[181] The respondent has in my mind clearly attempted to generate disputes of fact after the inception of this application to substantiate its withholding of the applicant's fees.

CONCLUSION:

[182] The respondent clearly understood that:

⁷⁴ Annexure FA36 at 02-158

[182.1] the applicant is entitled to its fees in terms of the Investment Advisory Agreement.

[182.2] It could only withhold the applicant's fees under clause 6.5, in the event of a breach of clause 4 by the applicant.

[183] The evidentiary burden was on the respondent to prove:

[183.1] a clause 4 breach relating to compliance with FAIS and Treating Customers Fairly;

[183.2] notification of the alleged clause 4 breach –

[183.2.1] Clause 8 of the Investment Advisory Agreement provides in the case of a breach capable of being remedied, for a written notice to be given to remedy the breach and to allow for a period of 20 Business Days of the date of receipt of written notice to remedy the breach.

[183.3] that the applicant had to address the breach notice within 30 days of the respondent becoming aware of the applicant's breach (clause 6.5)

[183.4] that the applicant had failed to remedy the breach of its clause 4 obligations;

[183.5] the respondent had to, if the applicant had failed to remedy its breach

i) terminate the Investment Advisory Agreement (termination could not follow as the agreement had ended) and

ii) no fees were then payable from the date of breach of the applicant's clause 4 obligations (clause 6.5).

[184] The respondent had not succeeded to establish and prove a breach in terms of clause 4. The respondent did not satisfy this court that the Old Mutual information was "confidential information" obtained between the parties either directly or that it was generated from information directly obtained between the parties. In addition,

the respondent did not clearly identify, establish, and verify the specific Old Mutual information which it required from the applicant.

- [185] Apart from the lack in pleading a clause 4 breach, the respondent had a more substantial problem and that was the visible absence of a clause 6.5 breach notice to the applicant. The respondent attempted to overcome this obstacle by arguing that clause 6.5 consists of two sentences and that a clause 6.5 breach notice was not necessary. I have dealt with the improbability of such a contention here in before.
- [186] In the absence of a proper clause 6.5 breach notice allowing for rectification within a specified time-period, the respondent simply falters in making out a case for breach in terms of clause 4. The respondent as a result has no right to withhold payment under clause 6.5.
- [187] The respondent has attempted to create the defences after the fact which essentially made compliance with the relevant clauses impossible.
- [188] The court frowns upon the respondent's conduct of itself in this matter. The applicant, as an innocent player was figuratively speaking thrown into the lion's den when it was invited to interact with Old Mutual to the knowledge of both Ensimini and the respondent who where the parties at loggerheads. The respondent knew that it could not keep the applicant's fees unless it, in terms of clause 6.5, could withhold the fees, due to the applicant's breach under clause 4. In terms of clause 6.5 the respondent had to give notice to the applicant to rectify its breach within a specified time span, it knew that although a dispute notice was given it did not meet the requirements as set out in clause 6.5 pertaining to rectification within 30 days of the respondent becoming aware and notifying the applicant. This led to the respondent's ill -conceived interpretation of clause 6.5 which I have dealt with here in above.
- [189] In light thereof the respondent after the fact created the defence in terms of clause 4 and 6.5 and aborted its reliance upon clause 7.3.
- [190] The respondent appreciated and must have accepted, without doubt (with reference to the correspondence between the parties) that its dispute with Ensimini would emanate in engagements between the applicant and Old Mutual. The respondent

had and has no valid reason for withholding the applicant's fees. The defences raised were simply the legally accepted and created approach to substantiate withholding of the applicant's fees. The respondent did not persuade this court that its reliance on clause 6.5 read with clause 4 was fully outlined and proven. To the contrary the respondent's defences evolved after the inception of the matter. The respondent's conduct in this matter is outrageous and a total manipulation of the interpretation of the Investment Advisory Agreement.

- [191] A tender was also made proposing to give the respondent what it requested, which the respondent outrightly rejected. I can simply not find any facts to substantiate the respondent's contention that the applicant's dealing of this matter and the information were dubious, resulting in the rejection of the tender. The court would have expected the respondent to seriously consider the tender. The respondent could for instance have agreed for the applicant to meet up, pay it and simultaneously sought for the applicant to release the Old Mutual information. Any non-compliance could have been catered for in an agreement. The respondent's election to not utilize the proposed tender is not only questionable but speaks for itself.
- [192] The Old Mutual correspondence was given, as pleaded by the applicant, not as "*confidential information*" but as a goodwill gesture, over and above. The respondent was furthermore unsuccessful in persuading this court that the Old Mutual correspondence falls within the ambit of "*confidential information*." There is furthermore non-compliance with section 6.5 in respect of the specified breach notice culminating in the court's rejection of the respondent's claim to withhold the applicant's fees.
- [193] There are furthermore simply no real disputes of fact in this matter. The respondent wanted to create disputes as the matter progressed.
- [194] The respondent has no legal entitlement to withhold the fees and its defences are accordingly rejected.
- [195] In light of the respondent's reprehensible conduct as outlined here in above in this matter, it should be penalised by means of an appropriate costs order.

[196] The respondent disputed the dates upon when the applicant's fees became due in respect of the August 2023, September 2023 and October 2023 invoices. The respondent alleged that the August 2023 fee was paid by Old Mutual only on 26 September 2023, the September 2023 fee on 15 November 2023 and the October 2023 fee on 13 December 2023. The applicant did not deny these dates in its replying affidavit and the court will therefore apply these dates in respect of formulating its order.

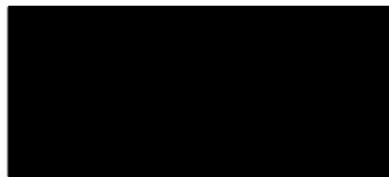
[197] I make the following order:

Order

Judgment is granted against the respondent in the following terms:

- [1] Payment to the applicant in the aggregate amount of **R933 278.93** (Nine Hundred and Thirty-Three Thousand Two Hundred and Seventy-Eight Thousand Rand and Ninety-Three Cents), comprised of as follows:
 - [1.1] **R209 416.72**, which became due and owing to the Applicant on 25 August 2023;
 - [1.2] **R211 200.90**, which became due and owing to the Applicant on 26 September 2023;
 - [1.3] **R201 076.15**, which became due and owing to the Applicant on 15 November 2023
 - [1.4] **R187 612.28**, which became due and owing to the Applicant on 13 December 2023; and
 - [1.5] **R123 972.81**, which became due and owing to the Applicant on 8 December 2023.
- [2] Interest on the aforesaid constituent amounts at 11% *a tempore mora* to date of final payment.

- [3] Costs of this application on an attorney and client scale, inclusive of counsels' costs on scale C.



S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 25 February 2025

Date of Judgment: 19 May 2025