IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

CASE NO: 5305/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

SIGNATURE

DATE: 16/09/2025

In the matter between:

PBS CHARTERED ACCOUNTANTS INCORPORATED **APPLICANT**

and

PSG WEALTH FINANCIAL PLANNING (PTY) LTD **RESPONDENT**

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 16 September 2025 at 12:00.

JUDGMENT

Mangena AJ

[1] The applicant is a firm of accountants carrying on business at 1 [...] M[...] Street in Mbombela. Its area of focus is the provision of accounting services to its clients. The respondent is an accredited financial services provider rendering intermediary services to its clients.

[2] The parties concluded written referral agreements in 2017 and 2022 in terms of which the applicant would refer clients (the contract uses the word prospect) to the respondent for advice on financial planning, risk and investments. For simplicity, I will use the word “client” in this judgment.

[3] In return and as payment for the referral, the respondent would pay a referral fee of 30% of the net commission earned by the financial adviser upon a policy being issued to the client or an investment being made by the client following the referral by the applicant.

[4] The agreement sets out the mechanism for the determination of the commission received from the referrals and obligates the respondent to pay the applicant the amount due within 30 days of the funds reflecting in its bank account.

[5] The respondent honoured its obligations towards the applicant, and I am informed that there is no payment outstanding in respect of the period during which the contract was in force.

[6] On 28 May 2024, the respondent, relying on Clause 4 of the agreement, issued a termination notice advising the applicant that the referral agreement shall terminate in 30 days from the date of the written notice. The applicant accepted the termination. Indeed, there does not appear to be much it could have done about it because Clause 4, which deals with termination, tersely provides as follows: “*Any party may terminate this agreement by giving 30 (thirty) days written notice of such termination to the other party”.* (My emphasis.)

[7] Following the termination, the applicant approached this court for a declaratory order in the following terms:

7.1 Declaring an existing and future right in favour of the applicant and an existing and future obligation on the respondent, in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013 that the respondent remains obliged to pay any outstanding commission from and including August 2024 and future commissions as per the referral agreement entered into by and between the applicant and the respondent, to the applicant.

7.2 There are other orders sought in the notice of motion in the event of prayer 7.1 (declaratory order) being granted.

[8] The respondent opposes the relief sought and predicates its defence on the following: that the applicant has not made a case for a declaratory order, and that the referral agreement has terminated and does not make provision for the payment of commission post-termination.

[9] Section 21(1)(c) of the Superior Courts Act regulates the granting of declaratory orders. Before granting the order, the court should conduct a two-stage enquiry, namely, whether the applicant is a person interested in an existing, future, or contingent right or obligation and if satisfied, decide whether the case is a proper one for the exercise of the discretion conferred on it. See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*.[1]

[10] The applicant is an interested party in relation to the referral agreement and seeks to assert its right predicated upon an agreement concluded with the respondent. As I understand Mr Fourie, counsel for the applicant, there is a dispute between the parties regarding the applicant's right to be paid the commission. The applicant firmly believes that this right survives the termination of the agreement and entitles it to approach this court for the relief it seeks.

[1] See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 16.

[11] Mr Van der Berg, counsel for the respondent, advances an opposite position. He says there is no right established by the applicant deserving of any protection by way of a declaration. He says this is so because the contract has been terminated and such termination has been accepted by the applicant. There are no primary obligations existing between them, and on the authority of *Twenty-Third Century Systems (Pty) Ltd and Another v SAP Africa Region (Pty) Ltd*,[2] I should find that the applicant cannot rely on section 21(1)(c) to base its legal claim for payment of future commission. According to him, payment of the commission was a primary obligation the respondent owed to the applicant, and it ceased when the agreement was terminated.

[12] It is true that the agreement was terminated. The fact that it is terminated does not take away the legal interest that the applicant has flowing out of the termination of that agreement. It is beyond dispute that the applicant was the source of business for the respondent and derived direct financial benefit from the agreement. The termination of the agreement directly affects its financial interest. It therefore meets the first stage of the enquiry espoused in *Cordiant Trading supra*.

[13] However, that is not the end of the matter. There is a further enquiry to be made, namely, whether this is a case upon which the court should exercise its discretion in favour of the applicant. Mr Van Der Berg urged me not to do so. He says that there is no contractual or legal basis upon which I can do so, based on the manner in which the applicant formulated its claim. He says that declaratory orders are not granted to answer abstract, academic or hypothetical situations. There is no evidence before the court that there is a commission payable in the future. It was incumbent upon the applicant to place material and relevant facts to substantiate the relief. With this, I agree, the applicant is seeking to establish liability for its future action (if any) by obtaining a declaratory order through the back door and not the usual means of instituting action for the payment of the commission. This should not

[2] *Twenty-Third Century Systems (Pty) Ltd and Another v SAP Africa Region (Pty) Ltd* 2025 JDR 1811 (SCA).

be allowed. See *Tri-Cor Industries (Pty) Ltd v Chairman of the Mpumalanga Tender Board and others*.[3]

[14] Further to the above, the agreement concluded between the parties has terminated and does not make provision for the payment of commission post-termination. For the applicant to find protection under section 21(1)(c), it would need to base its right to claim commission on a clause in the contract itself. The applicant could not direct me to any clause in the contract that entitles it to be paid the commission post-termination. In the absence of any clause upon which to rely to establish a right to claim commission, I decline the applicant's invitation to exercise my discretion in its favour.

[15] There is also another reason why the application should fail. The applicant has accepted the termination of the agreement. By accepting the termination, the applicant signalled its clear intention not to be bound by the contract and its provisions. If the applicant wanted to keep the contract alive, it should not have accepted the repudiation but rather opted to enforce it and continue to draw the benefits flowing from it, such as the referral fee. In this regard, I align myself with the views of the Supreme Court of Appeal in the *Twenty-Third century* judgment when it says:[4]

> ".... when a party repudiates a contract, he breaches that contract. The repudiation of the contract does not terminate the contract. The innocent party has a choice of keeping the contract alive and enforcing it, or of cancelling it by accepting the reputation. If he accepts the repudiation, he manifests an intention neither to accept further performance under the contract from the party who repudiated the contract, nor to further perform his own obligations under the contract, thereby resiling from it. By accepting the reputation, the innocent party brings to an end the duty of the parties to perform their primary obligations under the contract. The effect of bringing an end to the primary obligations is the activation of certain secondary obligations."

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[3] See *Tri-Cor Industries (Pty) Ltd v Chairman of the Mpumalanga Tender Board and others* [1997] 4 All SA 414 (T).
[4] *Twenty-Third century* para 22.

[16] For the above reasons, the application stands to be dismissed with costs on a party and party scale B of the High Court.

MANGENA AJ
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

For the plaintiff: Adv. Herman Fourie
Instructed by : Schoeman Borman Attorneys

For the respondent: P van der Berg SC
Instructed by: Thyne Jacobs Inc.

Date Heard: 02 September 2025
Judgment Delivered: 16 September 2025