

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

3.11.2025

DATE

[Signature]
SIGNATURE

In the matter between:

CORION CAPITAL (PTY) LTD

Applicant

and

SESHEGO BENEFIT CONSULTING (PTY) LTD

Respondent

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

- [1] The Respondent seeks leave to appeal against part of the judgment granted against it on 19 May 2025¹. More specifically, leave to appeal are sought based upon the following:
- [1.1] The decision to reject the Respondent's defence to the invoice attached as Annexure "FA4.5" ²to the Founding Affidavit, and the order that the Respondent must pay this invoice (as part of the order that the Respondent must pay the aggregate amount of R933 278.93);
- [1.2] The order in respect of interest on the abovesaid invoice (paragraph 1.5 of the court order);³
- [1.3] The costs order (paragraph 3 of the order).⁴
- [2] The Respondent accordingly aligns itself with the court's conclusions regarding the remainder of the judgment in respect of the other four invoices, which together with the fifth invoice compose the aggregate amount. In the aforesaid four invoices the Respondent also raised the "*disputed indebtedness*" defence. The Respondent in addition, acknowledge its indebtedness in respect of Invoice 5, however, for a lesser amount.

TEST FOR LEAVE TO APPEAL

- [3] This application is brought under section 17(1)(a)(i) and (ii) of the Superior Courts Act, Act 10 of 2013. These provisions outline the circumstances under which leave to appeal may be granted, and state as follows:

"17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

¹ Case Lines 22-2

² Case Lines 02-77

³ Case Lines 22-55

⁴ Case Lines 02-56

- (ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*" (my underlining)

[4] There are therefore two statutory criteria for granting leave to appeal, namely:

[4.1] the "reasonable prospect of success" test and

[4.2] the "compelling reason" test.

REASONABLE PROSPECT OF SUCCESS TEST

[5] The reasonable prospect of success test in an application for leave to appeal, prior to the Superior Courts Act, Act 10 of 2013, was whether there were reasonable prospects that another court may come to a different conclusion.⁵

[6] Section 17(1) of Act 10 of 2013 has raised the test, as Bertelsmann J, pointed out in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [61]:

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cornwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.' (emphasis added)

[7] The fact that the test for leave to appeal is more stringent under the Superior Courts Act was reaffirmed by the Supreme Court of Appeal in *S v Smith*⁶ where the following was stated:

"In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required than to establish that there is a mere possibility of success, that the case is arguable on

⁵ Section 20(4) of Supreme Court Act 1959.

⁶ 2012 (1) SACR 567 (SCA), para [7].

*appeal or that the case cannot be categorised as hopeless. There must, in other words, be a **sound, rational basis for the conclusion that there are prospects of success on appeal.***" (Emphasis added)

- [8] The standard for granting leave to appeal demonstrates that the modification in wording from "**might**" to "**would**" has established a more rigorous test than was previously in effect. A stricter test,⁷ or "*higher and stringent threshold*" now applies. The Supreme Court of Appeal in the Judgment of *MEC for Health, Eastern Cape v Mkhitha*⁸ eloquently explained the effect of the amendment of section 17(1)(a) as follows:

"[16] *"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that **the appeal would have a reasonable prospect of success; or there is some other compelling reason** why it should be heard.*

[17] *an applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of on appeal. **A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.***

[18] *in this case the requirements of Section 17(1)(a) of the Superior Courts Act were simply not met...". (emphasis added)*

- [9] The mere possibility that a different court could arrive at an alternative conclusion is insufficient to persuade the trial court to grant leave to appeal. In this context, the Supreme Court of Appeal stated as follows:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of

⁷ *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021)

⁸ [2016] ZASCA 176 at paragraphs 16-18.

success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal".⁹

[10] In this matter, the Respondent is required to demonstrate that an appellate court **would** overturn the judgment and orders issued by this Court. In doing so, the Respondent must show that there is "*truly is a reasonable prospect of success*". Should the Respondent fail to meet this standard, leave to appeal ought to be denied.

[11] This Court is tasked with impartially and thoroughly reviewing both the factual record and applicable legal principles in order to reconsider:

[11.1] the evidence; and

[11.2] the arguments advanced by the Respondent when determining whether leave to appeal should be granted.

OTHER COMPELLING REASON:

[12] The second test is "*other compelling reasons*". This may involve conflicting judgments or other special circumstances, such as significant legal questions or issues of public importance, that necessitate an appeal.

[13] In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) Cachalia JA held as follows:

"A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect on future disputes. But here too, the merits remain vitally important and are often decisive. [The applicant] must satisfy this court that it has met this threshold."

⁹ S v Smith 2012(1) SACR 587 (SCA) para 7

CONCISE CONTEXTUAL BACKGROUND AND RELATION BETWEEN ENSIMINI, APPLICANT AND RESPONDENT:

- [14] In April 2021, Ensimini Financial Services (Pty) Ltd and the Applicant signed an agreement for the Applicant to provide non-discretionary advisory services related to certain life-pooled portfolios managed by Old Mutual Life Assurance Company (South Africa) Limited ("Old Mutual").
- [15] Ensimini and the Respondent combined their portfolios into the "*Ensimini Portfolios*" on the Old Mutual Platform. The Applicant then provided non-discretionary advisory services to Ensimini for both its own and the Respondent's portfolios on the Platform.
- [16] In April 2022, a dispute arose between Ensimini and the Respondent. Mr. Crawford, representing the Respondent, asked the Applicant to choose between serving the Respondent or Ensimini.¹⁰
- [17] On 18 May 2023, Mr Jaco Pretorius of Ensimini emailed the applicant confirming that Ensimini and the Respondent agreed to separate their portfolios from 1 August 2023.¹¹
- [18] On 30 June 2023, the Applicant and Respondent signed the Investment Advisory Agreement.¹² The Applicant agreed to provide non-discretionary advisory services to the Respondent regarding the specified portfolios listed in annexure A (clause 2.3).¹³
- [19] The Investment Advisory Agreement defined the Applicant's services and monthly remuneration, which depended on Seshego's Portfolio value and was paid after Seshego received its fee from Old Mutual.
- [20] It is undisputed that the Applicant rendered the service described in Annexure A, submitted invoices, and that Old Mutual was required to pay the Respondent the corresponding fees.

¹⁰ FA6

¹¹ FA8

¹² Case Lines 02-91

¹³ Case Lines 02-92

- [21] The Respondent ended its Investment Advisory Agreement, effective *20 November 2023*, due to its unrelated dispute with Ensimini.
- [22] Clause 3.2 of the aforementioned agreement permits either party to terminate the agreement by providing 60 business days' written notice, or such other period as mutually agreed by the parties.¹⁴ The termination notice was issued via email on *28 August 2023*.¹⁵ The Respondent's entitlement to remuneration continued until *20 November 2023*. Consequently, the Applicant and the Respondent's contractual obligations remained effective until *20 November 2023*.
- [23] Although the Ensimini portfolios were divided as of *1 November 2023*, the Investment Advisory Agreement clearly continued to exist until it was terminated on *20 November 2023*. This is confirmed by paragraph 20 of the Respondent's affidavit.¹⁶
- [24] Given this context, I will now address the Respondent's grounds of appeal.

RESPONDENT'S GROUNDS OF APPEAL:

A. DISPUTED AMOUNT INDEBTED TO THE APPLICANT IN TERMS OF THE FIFTH INVOICE OF R123 972.81

- [25] The Respondent's liability to the Applicant arises under the Investment Advisory Agreement executed between the parties on *30 June 2023*,¹⁷ specifically representing the fees that are due, outstanding, and payable by the Respondent to the Applicant pursuant to the terms of said agreement.
- [26] In respect of the 5th Invoice the Respondent in essence contends that the court erred in respect of the following:

¹⁴ Case Lines 02-92

¹⁵ FA 11 at 02-104

¹⁶ Case Lines 02-197

¹⁷ Annexure FA10 at 02-89

- [26.1] the fee calculation ought to have been calculated only in respect of the Respondent's remaining client, A/G;
- [26.2] the Respondent was only liable to make payment in respect of amounts received by it from Old Mutual and therefore only a lesser amount than claimed by the Applicant and
- [26.3] the Old Mutual confirmation of payment letter that the Respondent received all amounts from Old Mutual was dated *11 December 2023* whilst the Respondent allegedly only received payment on *21 February 2024*.

EVALUATION OF DISPUTED INDEBTEDNESS OF 5th INVOICE

RESPONDENT'S INITIAL ACKNOWLEDGMENT AND NON-DISPUTE OF INDEBTEDNESS

- [27] In its determination, the court found that no disputes concerning quantum or timing had been raised prior to the initiation of litigation. This conclusion was substantiated by the Respondent's consistent acknowledgments of indebtedness and its assurances to make payment following the completion of internal procedures and/or receipt of the requisite documentation from the Applicant.
- [28] The correspondence exchanged between the parties reflects a continuous consensus concerning the existence of the debt obligation.
- [29] Any dispute over the amount owed contradicts Mr. Crawford's statement that the invoices were already in the payment release system and only needed to be released.¹⁸ He also informed the Applicant that the Respondent owed it money, wanted to pay it and that it was undebatable.¹⁹

¹⁸ Annexure FA35 02-154 and 02-155

¹⁹ Annexure FA35 at 02-156

[30] Even when the Respondent proposed a partial payment of R400 000.00, the amount of indebtedness was not contested.²⁰

[31] In January and February 2024, the Respondent remained willing to pay the Applicant's fees upon receipt of the Old Mutual information.

[31.1] On 4 January 2024, Mr. Crawford communicated the following in an email:

"It is simply a case of give us our data and we will settle your bill." (my underlining)²¹

[31.2.] In an email dated 13 February 2024, Mr. Crawford expressly confirmed that the Applicant would receive full payment.

"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)

[32] The Respondent contested the total aggregated amount for the first time in their answering affidavit in response to the Applicant's application.

[33] The Respondent's dispute of *the amount of the indebtedness* as a defence was considered to be raised after the fact and a contrived defence.

DISPUTE IN RESPECT OF 5th INVOICE

[34] The Respondent failed to present any evidence about the amounts it received from Old Mutual, particularly the sums of R9 616.93 and R10 048.31, or the dates when these amounts were received. This absence of evidence to this effect is viewed as highly significant as it specifically pertains to the Respondent's defence raised.

²⁰ Annexure FA43 at Case Lines 02-166.

²¹ Annexure FA48 at Case Lines 02-173

Without any evidence (the Respondent must have bank statements or documentary proof of Old Mutual's payments in its possession) the Respondent's *disputed indebtedness* defence remained unproven.

[35] Taking cognizance of the calculation of the quantum/amount due in respect of the November 2023 fees:

[35.1] The Respondent calculated the fee amounts, specifically *R9 616.93* and *R10 048.31*, based on fees owed by the Respondent's client, *AIG*. *AIG* elected not to transfer to the Respondent's *Coldstream Portfolio* and instead remained with the *original Ensimini portfolio*.

[35.2] The business association between the Respondent and Ensimini was officially terminated, leading to the distribution of *Ensimini Portfolios* as of *1 November 2023*.

[35.3] The Investment Advisory Agreement and its contractual obligations remained binding on both the Applicant and the Respondent until it was terminated on *20 November 2023*.

[35.3.1] The Respondent was required to pay fees to the Applicant according to the following clauses:

[35.3.1.1] Clause 2.3²² states that the Advisor (the Applicant) will provide non-discretionary advisory services to Seshego (the Respondent) in respect of 'the Seshego Portfolios' as outlined in Annexure A.²³

- The Applicant therefore provided non-discretionary advisory services in respect of the *Seshego's Portfolios*.

²² Case Lines 02–92

²³ Case Lines 02-100

- The Seshego Portfolios is defined in clause 2.2 as certain life-pooled portfolios administered by Old Mutual.

[35.3.1.2] The Respondent was prepared to pay the Applicant a fee for the services rendered as per Annexure A.

[35.3.1.3] Clause 6.2 depicts that the remuneration fee will be calculated by the Advisor 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 the Advisor, subject to Seshego receiving payment of its fee in 2.4 above from Old Mutual.²⁴

[35.3.1.4] Annexure B²⁵ in turn reads:

- "1. *In consideration for the services referred to in Annexure A, Seshego shall pay to the Advisor a monthly fee equal to 1/12 of 5bps (excluding VAT) of the assets held in the 'Old Mutual Multi-Manager Seshego Portfolios'.*
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*

²⁴ Case Lines 02-93

²⁵ Case Lines 02-103

*payment of the fee by Seshego
some from Old Mutual Multi-
Managers."*

[35.4] Accordingly, clauses 6.1, 6.2 and Annexure B of the Investment Advisory Agreement stipulates that:

[36.4.1] the Respondent shall pay to the Applicant a fee as recorded in Annexure B." (clause 6.1)²⁶

[36.4.2] the fee will be calculated on a month-end value of 'the Seshego Portfolio' and will be payable on a monthly basis by Seshego within 10 days after receipt of a valid tax invoice from the Advisor, subject to Seshego receiving payment of its fee from Old Mutual. (clause 6.2)

[36.4.3] *Annexure B* allows for calculation of the fee equal to 1/12 of 5bps (excluding VAT) of the assets held in the 'Old Mutual Multi-Manager Seshego Portfolios'. (Annexure B).

[36.4.3.1] Based on the interpretation of these clauses and Annexure B, the Respondent contends and argues that it is clear that:

- The fee payable by the Respondent to the Applicant was to be calculated on the value of the Respondent's only remaining client in the *Ensimini Portfolio*, being the AIG (South Africa) Pension Fund ("AIG").²⁷
- The principles of interpretation of a contract are trite, and has been set

²⁶ Case Lines 02-92

²⁷ Answering affidavit, para 43.4, Case Lines 02-204

out in the seminal case of *Endumeni*²⁸ where Walis JA said:

"The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

- The language of the relevant provisions (in particular paragraph 2 of annexure B to the Investment Advisory Agreement) supports the Respondent argues:
 - ◆ The Respondent's interpretation that:
 - ◆ the *Coldstream Portfolios* did not form part of the assets held in the 'Old Mutual Multi-Manager Seshego Portfolios (see Annexure B to Investment Advisory Agreement).
- The Respondent would make payment once it had received payment from Old Mutual and only based upon what it received from Old Mutual.

²⁸ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

[35.5] Although the Respondent made certain arguments in paragraph [35.4.3.1], it is common cause between the Applicant and the Respondent that their contractual obligations under the Investment Advisory Agreement continued until the agreement was terminated on *20 November 2023*, even though the Ensimini Portfolios were divided on *1 November 2023*.

[35.5.1] The Respondent was required to pay the Applicant's fees until *20 November 2023*, which prompted Mr. Crawford to seek an earlier termination date, effective *1 November 2023*.

[35.5.1.1] The remuneration covered the **entire Seshego Portfolio**, obligating payment for the **overall** portfolio, not just *AIG*. On *1 November 2023*, the *Ensimini Portfolio* was split, and all client pension funds (except *AIG*) were transferred to the "*Coldstream Portfolios*", even though contractual obligations persisted until *20 November 2023*.

[35.5.2] The Respondent's renaming of the *Ensimini* portfolio, save for *AIG*, to *Coldstream* did 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.

[35.5.2.1] Clause 2.3²⁹ states that the Advisor (the Applicant) will provide non-discretionary

²⁹ Case Lines 02–92

advisory services to Seshego (the Respondent) in respect of 'the Seshego Portfolios' as outlined in Annexure A.³⁰

[35.5.2.2] The Seshego Portfolios is defined in clause 2.2 as certain life-pooled portfolios administered by Old Mutual

[35.5.3] By 1 November 2023, the Respondent had moved all client pension assets to the “*Coldstream Portfolios*”, even though contractual obligations continued until 20 November 2023.

[35.5.4] The Applicant was entitled to remuneration based upon the month-end value of the entire Seshego Portfolios. The Seshego Portfolios is defined in clause 2.2 as certain life-pooled portfolios administered by Old Mutual.

[35.6] The Respondent's calculation of the fee amounts as being *R9 616.93* and *R10 048.31* seems to be premised on the fees owed in respect of the Respondent's client *AIG* - who elected to not move to the Respondent's *Coldstream Portfolio* but who remained with the *original Ensimini Portfolio*.

[35.7] The Applicant was nevertheless entitled to remuneration calculated on the month-end value of *the complete Seshego Portfolios*, irrespective of whether the Respondent engaged the Applicant's services under the Investment Advisory Agreement in relation to the newly designated *Coldstream Portfolio*.

[35.8] The Respondent was fully cognizant of the notice period and its associated payment implications, as evidenced by Mr. Crawford's unsuccessful request to shorten the notice period.³¹

³⁰ Case Lines 02-100

³¹ FA11 at Case Lines 02-104

[35.9] It is important to note that remuneration was based upon *the entire Seshego Portfolio* and not only on the *Ensimini Portfolio*.

[36] In summary, renaming the portfolio to "*Coldstream*" did not affect the Respondent's contractual liability to pay, which remained intact regardless of internal restructuring or renaming.

[37] Counsel for the Respondent argued that the Respondent's removal of clients - except for *AIG*- and their placement in a renamed or relabelled *Coldstream* portfolio amounted to mere assertions unsupported by evidence. I disagree, as paragraph 23 of the Respondent's Answering Affidavit clearly demonstrates that this is precisely what transpired:

"23. The respondent, by November 2023, had already transferred all its other client's (pension funds) assets into the newly named "Coldstream Portfolios" (my underlining)

[38] The assets labelled as "*Ensimini Portfolio*", in the *Seshego Portfolios* save for *AIG* was indeed part of the *Ensimini Portfolio* and merely transferred and placed in a newly named portfolio. "*Newly named*" clearly means to give the portfolio a new name. It is crystal clear that, with the exception of *AIG*, the original *Ensmimi Portfolio* was subsequently renamed or rebranded as the *Coldstream Portfolio*.

[39] The Respondent also argued that the portfolio was not renamed or relabelled because:

[39.1] the *Coldstream Portfolio* was no longer covered by the Investment Advisory agreement, and

[39.2] the Applicant was invited to tender services for the *Coldstream Portfolio*.

[40] The Respondent's email to the Applicant dated 28 August 2023 contradicts the claim that the *original Ensimini Portfolio*, save for *AIG*, was not renamed or relabelled to the *Coldstream Portfolio*. Mr. Crawford in his email referenced services described in Annexure A, which was still applicable in respect of the *entire Seshego Portfolio*. The

Applicant's services as per Annexure A were evaluated alongside those of *RisCura* and *MenteNova* regarding the *Coldstream Portfolio*.

"Seshego has not yet made a decision regarding the services detailed in Annexure A of our agreement, and Seshego continues to evaluate your services relative to those of *RisCura* and *MenteNova*. Per the timelines we are working towards, I am hereby giving written notice under clause 3.2 of the attached agreement." (my underlining and emphasis)

- [41] It is evident that the Respondent's decision concerning the Coldstream Portfolio was by the Respondent's own acknowledgment, considered to be a component of "*the services detailed in Annexure A of our agreement*" which refers to the Investment Advisory Agreement.
- [42] The evidence furthermore did not suggest any tender for services to the Coldstream Portfolio merely an evaluation of the Applicant's services – the Respondent was assessing the Applicant's services under Annexure A.
- [43] The Seshego Portfolio was internally restructured in that the Respondent's clients in the *original Ensimini Portfolio*, save for *AIG* were taken from the said *Ensimini Portfolio* and placed in a renamed portfolio – the *Coldstream Portfolio*.

OLD MUTUAL LETTER DATED 11 DECEMBER 2023

- [44] The Respondent additionally argued that the court made a mistake by depending on a letter from Old Mutual, dated 11 December 2023³² as confirmation of Old Mutual's payment to Seshego.
- [45] This argument directly contradicts the Respondent's clear admission of its undisputed indebtedness to the Applicant.³³

³² Case Lines 02-71

³³ Case Lines 02-156, line 6

[46] Paragraph 279 of the Respondent's Answering Affidavit³⁴ clearly shows that the letter's authenticity was neither disputed by the Respondent, nor was any evidence provided to challenge its contents.

[47] Annexure FA3³⁵, in no uncertain terms, states that:

[47.1] all fees due and invoices by the Respondent were paid;

[47.2] no amount due was outstanding and

[47.3] the last invoice was late and was being processed.

"This letter serves to confirm that all fees due to, and invoiced by, Seshego have been paid and no amount due to Seshego is outstanding. By admission of Seshego, they did send us the latest invoice late. Following receipt of this invoice, payment has been processed."

[48] The Respondent's Answering Affidavit does not provide any evidence that the amounts of R9616.93 and R10 048.31 in Annexure FA3 were received on 21 February 2024.

[49] The Respondent's affidavit had to contain and encompass all the evidence on which it relied.³⁶

[50] Given that the amount received concerning invoice number 5 was disputed, it was both essential and critical for the Respondents to substantiate their claim regarding the funds received. Documentary evidence detailing the amounts obtained from Old Mutual and the dates of receipt could have been readily provided to the court. However, this was not done, notwithstanding the fact that the disputed amount was among the primary defences presented.

[51] Even if invoice 5 was raised after the letter by Old Mutual, the court was still left with the Respondent's correspondence and communication to the Applicant evidencing the Respondent's indebtedness to the Applicant which was undisputed. Even when the Respondent proposed partial payment of R400 000.00, was and remained the

³⁴ Case Lines 02-253

³⁵ Case Lines 02-71

³⁶ *Swissborough Diamond Mines v Government of the RSA* 199 (2) SA 279 (W) at 323 H-I

collateral amount of the invoices undisputed. Prior to litigation, the quantum of invoice 5 was never raised nor questioned.

- [52] This court therefore accepted the undisputed evidence as set out in Annexure RA3.
- [53] In respect of Invoice 5, it is clear that although issued after Annexure RA3 dated 11 December 2023, that the aggregate amount of all five invoices, including Invoice 5 remained undisputed. Even in January and February 2024 the Respondent's position to the Applicant was clear - give the Respondent the documentation and the Respondent would pay in full.
- [54] Only in the Respondent's Answering Affidavit does it question the quantum of Invoice 5 alongside the other invoices. It however disputes the indebtedness without any substantial proof of the amounts received from Old Mutual. The existence of such objective evidence must be in possession of the Respondent who elected not to disclose it.

B. SECOND GROUND OF APPEAL - INTEREST ON INVOICE NUMBER 5

- [55] The Respondent's second ground of appeal concerns the interest applied to the fifth invoice. The Respondent contends that, since the court accepted its account regarding the payment dates for the other invoices, it should likewise have acknowledged that the fifth invoice was settled on *21 February 2024*.
- [56] It is a general, well-established rule that once a court has duly pronounced a final judgment or order, it has itself no authority to set it aside or to correct, alter or supplement it. The reasons are twofold:
- [56.1] firstly the court becomes *functus officio* and its authority over the subject matter ceases³⁷;
- [56.2] secondly, the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that

³⁷ *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 176, 178, 186–7 and 192

litigation be brought to finality) dictates that the power of the court should come to an end.³⁸

[57] The Constitutional Court and the Appellate Division have recognized a number of exceptions to the general rule. The exceptions are dealt with in rule 42(1)(b):

“An ambiguity, or a patent error or omission.”

[57.1] Rule 42(1)(b) reads as follows:

“Rule 42

(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.”

[58] An ambiguity or a patent error or omission has been described as an ambiguity or an error or omission as a result of which the judgment granted does not reflect the real intention of the judicial officer pronouncing it; in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself.³⁹

[59] In the judgment the Court did accept the Respondent's version of when payments were received in respect of the respective invoices. The Court however in its judgment omitted to amend the payment date of the 5th invoice to *21 February 2025* as reflected in the Respondent's Answering Affidavit, where it was stated:

*“Payment of this amount was received by the respondent from Old Mutual on 21 February 2024.”*⁴⁰

³⁸ *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at paragraph [28]

³⁹ *Hanna v Mynhardt* 1935 TPD 63; *First Consolidated Leasing Corporation Ltd v McMullin* 1975 (3) SA 606 (T) at 608F; *Seattle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541C; *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C) at 179H–180D; *First National Bank of South Africa Ltd v Jurgens* 1993 (1) SA 245 (W) at 246F; *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) at 680J–681B;

⁴⁰ Paragraph 43.4 Case Lines 02-204

[60] It is noteworthy that while the Respondent mentions the receipt of amounts *R9 616.93* and *R10 048.31* concerning A/G, only a single payment from Old Mutual is referenced.⁴¹

[61] I accordingly *mero motu* in terms of rule 42(1)(b) of the Uniform Rules amend paragraph 1, more specifically paragraph [1.5] to read as follows:

[1.5] **R123 972.81**, which became due and owing to the Applicant on *21 February 2024*.

[62] In revising paragraph [1.5] of the Court Order, I ensure that the judgment corresponds with the court's acceptance of the payment dates specified by the Respondent.

[63] Rescinding the order aligns it with the court-accepted evidence in paragraphs [1.1] to [1.4], without causing prejudice to the Respondent.

C. COSTS ORDER

C1 THE PUNITIVE COSTS ORDER CHALLENGE

[64] The Respondent claims that the court erred in granting punitive costs based upon the following:

[64.1] the punitive costs order was incompetent;

[64.2] that the Respondent's conduct was not reprehensible and

[64.3] the costs order was not exercised judicially.

[65] Punitive costs, also referred to as attorney-and-client costs, represent an elevated scale of costs imposed to penalise a party for conduct deemed egregious or vexatious. Such costs are granted only in exceptional cases and are not awarded routinely. A court must provide clear and reasoned justification for imposing this significant penalty, typically citing factors such as bad faith, abuse of process, or conduct that is reprehensible and manifestly vexatious.

⁴¹ Paragraph 43.4 at Case Lines 02-204

- [66] In this matter, it is clear that before litigation, there was no disagreement over indebtedness or the amount owed. Only during the application proceedings the Respondent created a dispute in respect of the indebtedness and when the amounts became due.
- [67] The correspondence exchanged between the parties clearly showed that there was no dispute about the amount of indebtedness.
- [68] The disputed 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.⁴² He also informed the Applicant that the Respondent owed it money, wanted to pay it and that it was undebatable.⁴³
- [69] 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.
- [69.1] On 4 January 2024 Mr. Crawford stated in an e-mail:
- "It is simply a case of give us our data and we will settle your bill." (my underlining)*
- [69.2] On 13 February 2024 in an e-mail Mr. Crawford stated that the Applicant would be paid in full:
- "It is common course that your client was provided with the 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 had received payment from Old Mutual as stipulated in the agreement." (my underlining)*
- [70] In the application, the Respondent had, for the first time, contested the total amount claimed by the Applicant, asserting that the Applicant's November 2023 invoice is based on incorrect asset figures within the relevant portfolio. The Respondent disputed the November 2023 invoice without providing any supporting objective evidence regarding the amount purportedly received from Old Mutual. The court

⁴² Annexure FA35 at Case Lines 02-154;

⁴³ Annexure FA35 at Case Lines 02-156.

notes with concern the absence of such evidence, particularly given its centrality to the Respondent's defence.

- [71] The court accordingly found that the Respondent's dispute of the amount of indebtedness was after the fact and a contrived defence. Additionally, the Respondent's defences appeared to evolve and change following the commencement of proceedings. The Respondent's conduct in this matter was a total manipulation of the interpretation of the Investment Advisory Agreement.
- [72] A tender was also made to the Respondent proposing the release of the requested Old Mutual documentation upon payment of the indebtedness to the Applicant which was rejected. Additionally, there was no clearly defined and outlined written request as to the exact nature of the Old Mutual Documentation, to support the Respondent's claim that the Applicant's actions or handling of the information were questionable, and which contributed to the rejection of the offer.
- [73] The Respondent's conduct, as detailed in this matter, was deemed inexcusable and was addressed through an appropriate costs order.
- [74] In *Zuma vs Office of the Public Protector and others* (2020) ZASCA 138 paragraph 19 the Court had said:
- "[19] Since there is no appeal against the order dismissing the review, the only question is whether the appeal against the costs order has a reasonable prospect of success. In this regard Mr Zuma faces a formidable hurdle: **in granting a costs order, a lower court exercises a true discretion. An appellate court will not interfere with the exercise of that discretion, unless there was a material misdirection by the lower court**".
- (my emphasis)
- [75] The limited interference in respect of costs orders by an appeal court was also refrained in the case of *Commissioner for the South African Revenue Service v Nyhonyha and Others* (1150/2021) 2023 (6) SA 145 (SCA) (18 May 2023) at paragraphs 17 and 18 where it was held as follows:
- "[17] *It is trite that the scope for interference on appeal with the exercise of a true discretion is limited. The question is not whether the appeal court*

would have reached the same conclusion, but whether the discretion was exercised properly. For present purposes it suffices to say that interference would be called for if the exercise of the discretion was based on a misdirection of fact or a wrong principle of law. See *Ex parte Neethling and Others* 1951 (4) SA 331 AD at 335E and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) (*Trencon*) para 88.10

[18] **A true discretion is one which provides a court with a range of permissible options. Well-known examples are costs orders and awards of damages.** See *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) (*Perskor*) at 800E and *Trencon* paras 84-85. This was articulated as follows in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 113:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range.'(emphasis added)

[76] No misdirection of fact or misapplication of legal principle occurred in awarding costs on an attorney and client scale. The court issued the costs order to express its dissatisfaction with the Respondent's conduct and to indemnify the Applicant against unnecessary expenses resulting from that conduct, which was subject to criticism.

[77] The determination of costs constitutes a "*true discretion*," which is not readily set aside on appeal.

C2 COSTS AWARD INCLUSIVE OF COUNSELS' COSTS ON SCALE C

[78] Rule 67A states as follows:

***67A. Costs**

(1) *Subject to any order of the court awarding costs, the fees and disbursements as between party and party, which may be included in a bill of costs submitted for taxation, shall be—*

- (a) *for attorneys, in accordance with the tariff in rule 70;*
- (b) *for attorneys, which a right to appear in the Superior Courts and who appear in a matter, in accordance with rules 69 and 70, where applicable; and*
- (c) *for advocates, in accordance with the tariff in rule 69: Provided that for services rendered by an advocate referred to in section 34(2)(a)(ii) of the Legal Practice Act, 2014 (Act No. 28 of 2014), for work which is ordinarily performed by an attorney, the fee for such work shall be in terms of rule 70."*

[79] The court indeed made an error by including the counsels' costs on scale C, since it is clear that Rule 67A only applies to *party and party costs*. Nevertheless, I am able to rescind this portion of the costs order, that is, the phrase "*including the counsels' costs on scale C*"- by deleting the phrase under rule 42(1)(b), which would make the court's order consistent with:

[79.1] the court's intention to grant costs on *an attorney and client scale* and

[79.2] the true intention of rule 67A to apply only to *party and party costs*.

[80] The second basis for rescission under rule 42(1)(b) pertains to instances of ambiguity, patent error, or omission. This provision serves as a codification of the court's inherent common-law authority.

[80.1] The error or omission must be attributable to the court.

[81] When it comes to the Court's inherent authority to correct its own judgment, this issue was definitively addressed in *Firestone South Africa (Pty) Ltd v Genticuro AG 1977*

(4) SA 298 (A), where TROLLIP JA explained the matter at length from pages 306F to 307G.

"the general principle now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.....

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the Court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

- (i) the principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant...*
- (ii) the Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order...*
- (iii) the Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention... this exception is confined to the mere correction of an error in expressing the judgment or order, it does not extend to altering its intended sense or substance...*
- (iv) where counsel has argued the merits and not the costs of a case... but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order."*

[82] There is accordingly a patent error and ambiguity which does not align with the true intention of the court to award a punitive costs order. This court can *mero motu* rescind the portion of the costs order to align it with the court's intention.

ASSESSMENT OF REASONABLE PROSPECT OF SUCCESS – DISPUTED AMOUNT AND PUNITIVE COSTS ORDERS

[83] In assessing whether an appeal court would reach a different conclusion on the disputed amount in invoice 5, it is clear that:

[83.1] prior to litigation the Respondent did not dispute the indebtedness to the Applicant and more so acknowledged it.

*“we owe you money, and we want to pay it, and there is no debate about it, but I do not want to enforce that agreement, please.”*⁴⁴

[83.2] the Respondent undertook to make payment once the internal processes were completed and/or all documents had been delivered.

[83.3] the contents of the Respondent’s correspondence, which indicate that the invoices were *“sitting in the payment release system”* and that payment simply required release⁴⁵ contradicts the Respondent’s version put up in the answering affidavit.

[83.4] the Investment Advisory Agreement remained in effect until *20 November 2023*, and all contractual obligations continued to apply up to that date.

[83.5] despite the division of the Ensimini portfolio on *1 November 2023*, the Respondent remained obligated to pay the Applicant for the entire Seshego Portfolio until *20 November 2023*.

[83.6] the Respondent did not contest the Old Mutual Letter or its contents - Annexure RA3-⁴⁶ which confirmed that all payments were made to the Respondent. This is consistent with the Respondent’s correspondence indicating that the invoices had been processed and payment was scheduled for release.

⁴⁴ Case Lines 02-156, line 6

⁴⁵ Case Lines 02-154, line 24.

⁴⁶ Case Lines 02-71

[83.7] the Respondent provided no evidence to verify the amounts received in connection with the fifth invoice or to indicate the date of receipt.

[84] Therefore, there is no reasonable chance of success on appeal regarding the disputed amount defence in respect of Invoice 5. I find it unlikely that another court would reach a different conclusion. The Respondent chose not to provide evidence about the payment related to Invoice 5. It is clear that, prior to litigation, the Respondent never questioned either its debt or the payment of any of the five invoices. This statement is supported by the Respondent's promises and admissions contained in their correspondence with the Applicant. The Respondent for the first time in its answering affidavit raised the *disputed amount defence* in respect of the invoices, which led the court to determine that the disputed amount defence and the other defences were formulated after the fact and were artificial.

[85] Similarly, there is no reasonable prospect of success regarding the Respondent's argument for punitive costs. The appellate court will not interfere with the discretionary nature of the lower court's order, as there is no evidence of any arbitrary exercise of discretion.

[86] The Respondent's conduct was reprehensible and warranted penalisation. It showed the court's displeasure in the manner in which the Respondent dealt with the case, in that:

[86.1] The Respondent developed defences only after litigation commenced; these defences are inconsistent with the Respondent's prior admissions, acknowledgements of indebtedness, and commitments to remit payment on the invoices to the Applicant as outlined in correspondence from the Respondent to the Applicant.

[86.2] The Respondent lacked good faith.

[86.3] The Applicant submitted a tender in an effort to prevent litigation; however, it was declined without sufficient consideration and explanation.

- [87] The court's punitive court order will not be overturned on appeal as it is discretionary. Another court will not come to a different finding.

COMPELLING REASON TO GRANT LEAVE TO APPEAL:

- [88] Additionally, the Respondent relies on a compelling reason to grant leave to appeal primarily due to significant reputational concerns.
- [89] Section 17(1)(a)(ii) requires a compelling reason in law or principle why an appeal should be heard.
- [90] It is important to note at the outset that the Respondent aligns itself with the findings of the court in respect of the remainder of the judgment. The court orders granted were awarded taking cognisance of the legal principals and the conduct of the Respondent.
- [91] I agree with the Respondent's counsel that if subjective reputational impact were considered a sufficient reason for appealability, then every negative cost order and credibility determination would automatically be the subject of an appeal—which is clearly not, and cannot be, the law.
- [92] Any adverse findings regarding the Respondent's conduct or behaviour were made after considering the Respondent's actions as described in the affidavits prior to litigation, during the course of litigation, and any apparent inconsistencies.
- [93] It is standard for courts to make favourability and credibility related findings and remarks concerning one of the parties, typically the unsuccessful party. While such findings may influence perceptions of the party, they do not constitute grounds for appeal under section 17(1)(a)(ii).
- [94] A compelling basis for appealability must rest upon a significant legal question, unresolved legal ambiguity, conflicting authorities, or an issue of substantial public interest. The Respondent has not identified nor satisfied these requirements.

- [95] The Respondent's dissatisfaction with the court's findings is not a statutory requirement as specified under section 17(1)(a)(ii). It is important to note that the court's negative and adverse findings against the Respondent extend to the majority of the judgment not appealed against as well.
- [96] I agree with the Applicant's counsel that should leave to appeal be granted it will:
- [96.1] undermine the rule of law - section 1(c) of the Constitution,
 - [96.2] undermine the need for finality in litigation,
 - [96.3] reward parties who conduct themselves in a manner that attracts judicial censure; and
 - [96.4] open up the administration of justice to a flood of appeals against an ordinary and expected consequence of poor conduct in litigation.
- [97] In addition, all court judgments constitute public documents that are extensively disseminated and established as matters of public record.
- [98] The Respondent's disagreement with the court's determinations regarding credibility and factual matters does not constitute a basis for leave to appeal under section 17(1)(a)(ii). Consequently, this ground is untenable and flawed.

RELIANCE ON TAYLOR JUDGMENT

- [99] The Respondent referenced the decision in *Road Accident Fund v Taylor*⁴⁷ to support its position that judicial decisions with significant reputational and practical implications for affected individuals are, by their nature, subject to appeal.
- [100] I agree with the Applicant's counsel's assertions that in the *Taylor* judgment:
- [100.1] the court referred the individuals' conduct to their respective professional bodies (legal, medical, and actuarial associations.)

⁴⁷ *RAF v Taylor & Related Matters* 2023 (5) SA 147 (SCA)

- [100.2] the referrals carried independent legal consequences, as they triggered regulatory scrutiny and potential disciplinary action;
- [100.3] the referral was done without prior notice and the *audi alteram partem* rule was not adhered to – the individuals were not afforded an opportunity to be heard.
- [101] The present case is distinguishable from *Taylor's* case on the following grounds:
- [101.1] the court did not refer any individual to their professional bodies;
- [101.2] the Respondent was afforded an opportunity to be heard ensuring procedural fairness - (audi alteram partem was adhered to.)
- [101.3] the Respondent was legally represented by senior counsel who comprehensively addressed all relevant aspects before the court;
- [101.4] there has been no professional scrutiny of any professionals nor any disciplinary proceedings;
- [101.5] any criticism of the Respondent arises from the evidence presented and may have collateral consequences, as is common in all matters where an unsuccessful litigant is subject to judicial critique.
- [102] Any court order issued may result in indirect consequences; however, this alone does not render the order immediately appealable.
- [103] All litigants in a court of law are subject to judicial scrutiny, which in itself does not warrant an automatic right of appeal.
- [104] In summary, an appeal court is unlikely to overturn this Court's orders, and further, there are no compelling reasons why an appeal should be heard.

RESCISSION IN TERMS OF RULE 42 (1)(b) – MERO MOTU BY COURT

INTEREST - DUE AND OWING DATE

[105] The court will *mero motu* rescind paragraph [1.5] of the Court Order, to ensure that the judgment corresponds with the court's acceptance of the payment dates specified by the Respondent.

[106] In terms of rule 42(1)(b) of the Uniform Rules the court amends paragraph 1, more specifically paragraph [1.5] to read as follows:

[1.5] **R123 972.81**, which became due and owing to the Applicant on *21 February 2024*.

COSTS ORDER PHRASE – “INCLUDING THE COUNSELS’ COSTS ON SCALE C”

[107] This court also rescinds the portion of the costs order, namely the phrase “*including the counsels’ costs on scale C*”- by deletion of the phrase under rule 42(1)(b), which would make the court’s order consistent with:

[107.1] the court’s intention to grant costs on an attorney and client scale and

[107.2] the true intention of rule 67A to apply only to party and party costs.

CONCLUSION:

[108] In the premises:

[108.1] the Application for Leave to Appeal in respect of the disputed quantum challenge of Invoice number 5 and the punitive costs order is dismissed.

[108.2] the court *mero motu* in terms of rule 42(1)(b) rescinds:

[108.2.1] paragraph [1.5] of the court order dated 19 May 2025 to read as follows:

[1.5] **R123 972.81**, which became due and owing to the Applicant on *21 February 2024*.

[108.2.2] by deletion of the wording "*inclusive of counsels' costs on scale C*" merely to align with rule 67A and also the court's intention of awarding costs on a punitive scale to read as follows:

[3] *Costs of this application on an attorney and client scale*

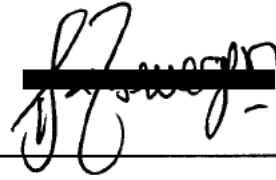
Order

- [1] The Application for Leave to Appeal is dismissed with costs on party and party scale C (including the costs of senior counsel).
- [2] The time period in prayer [1.5] of the judgment granted on *19 May 2025* is rescinded by deletion of the date of *8 December 2023* and substituting it with the date of *21 February 2024* – for prayer [1.5] to read as follows:

[1.5] **R123 972.81**, which became due and owing to the Applicant on *21 February 2024*.

- [3] The costs order in prayer [3] of the judgment granted on 19 May 2025 is rescinded by deletion of the wording "*inclusive of counsels' costs on scale C*" merely to align with rule 67A and read as follows:

[3] *Costs of this application on an attorney and client scale.*



S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 12 September 2025

Date of Judgment: 3 November 2025

For the Applicant: Adv GW Amm SC
instructed by Nirenstein Attorneys Inc.

For the Respondent: Adv P van den Berg SC
instructed by Thyne Jacobs Inc.