IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/19821
REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES

In the matter between:

WEISSENSEE, KIM	Applicant
And	
STONE-BIRD INVESTMENTS (PTY) LTD (Registration Number: 2011/009111/07)	First Respondent
GOSLETT, RODNEY BRUCE	Second Respondent
KENNEDY, RICHARD LAWTON	Third Respondent

JUDGMENT

MOORCROFT AJ:

Summary

The applicant and the first respondent entered into an asset management agreement. S 7(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002, required a person who acted as a financial services provider to be licenced.

The first respondent did not meet the licence requirements in section 8 of the Act. The agreement was a nullity.

The respondent's counterclaim for rectification of the agreement to reflect the status of the first respondent as an agent of a UK company was dismissed on the facts and on the basis that the agreement as rectified would still not comply with s 7 of the Act and would still be a nullity.

The first respondent was obliged and was ordered to repay the amount of €600,000.00 paid in terms of the void agreement to the applicant.

Because the agreement was void the arbitration clause in the agreement was also void, and there was no dispute to be referred to arbitration in accordance with article 1(3) and 8 of the UNCITRAL Model Law on International Arbitrations reflected in Schedule 1 to the International Arbitration Act, 15 of 2017.

Order

[1] In this matter I make the following order:

1. Leave is granted to the Applicant to file its Supplementary Affidavit dated 2 September 2021;

2. The Asset Management Agreement between the Applicant and First Respondent dated 19 December 2017 and attached to the founding affidavit as KW1, is declared void ab initio;

3. The First Respondent is ordered to pay the Applicant the amount of €600,000.00 (Six Hundred Thousand Euro Only), together with interest on the above amount at the rate of 9.00% per annum from 16 January 2018 to date of final payment;

4. The Second Respondent and Third Respondent are declared to be personally liable to the Applicant under Section 218(2) of the Companies Act, 71 of 2008, jointly and severally with the First Respondent, the one

paying the other to be absolved, for payment of the amount of €600,000.00 (Six Hundred Thousand Euro Only), together with interest on the above amount at the rate of 9.00% per annum from 16 January 2018 to date of final payment;

5. The Respondents' counter-application for rectification of the Asset Management Agreement is dismissed;

6. Costs:

6.1. No order is made as to the costs of the Applicant's application for leave to file a supplementary affidavit;

6.2. Save as aforesaid the Respondents are ordered to pay the costs of the application and of the counter-application, jointly and severally, the one paying the other to be absolved

[2] The reasons for the order follow below.

INTRODUCTION

[3] On 19 December 2017 the applicant entered into an asset management agreement ("the agreement") with the first respondent represented by its asset manager, the third respondent. Both the second and third respondents are directors of the first respondent. Pursuant to the agreement, the applicant paid €600 000 into an account nominated by the first respondent.

[4] The applicant now seeks an order that the agreement be declared void *ab initio* due to non-compliance by the first respondent with section 7(1) of the Financial Advisory and Intermediary Services Act, 37 of 2002 (the 'FAIS Act'), that the €600 000 be repaid within interest, that the second and/or third respondent be declared to be personally liable to the applicant under section 218(2), as read with section 22(1), and section 76(3)(c) and/or section 77(3)(b) of the Companies Act, 71 of 2008 (the 'Companies Act') together with the first respondent for repayment of the €600 000, that the liability of the second and third respondents be joint and several

with the liability of the first respondent, the one paying the other to be absolved, and that costs be paid by the first, second and third respondents, jointly and severally, the one paying the other to be absolved.

[5] The respondents raise an number of defences and bring a counter-application for rectification of the agreement.

THE ASSET MANAGEMENT AGREEMENT

[6] In terms of the agreement –

6.1 The first respondent is identified as the “Asset Manager” and the applicant as the “Client.” The third respondent is also identified as the “Asset Manager” and he signed the agreement on behalf of the first respondent.

6.2 The first respondent has the financial skills for management of international assets coupled with access to credit facilities and structured investment. It works in the sector of project funding and investments and has financial sources like banks, providers and commitment holders. It is ready, willing and able to commence the anticipated transactions.

6.3 The applicant was able to provide a suitable initial capital amount of cash funds in order to start up the transaction.

6.4 The first respondent together with its own financial associates shall be entitled to manage the applicant’s resources.

6.5 The purpose of the parties is to use the proceeds received by the transaction projects and the applicant shall maintain 100% ownership of the projects.

6.6 The first respondent together with its own financial associates shall manage the Asset in the best and profitable way, and shall acquire one or more bank instruments. It has Associates in Europe with whom the first respondent is in a relationship of “association” and “agency” as well as

financial entities within the group and through International Lenders, Monetizers or Buyers. The respondent shall disburse the proceeds and profits to the applicant.

6.7 The first respondent shall cause to be established the necessary and required transaction bank account(s) for the transaction under the sole control of the first respondent. This is identified in Annex [C] to the agreement as the account into which payment was to be made.

6.8 The first respondent or other persons of the first respondent shall have the authority to transact the business of the transaction.[1]

6.9 The applicants shall transfer €600 000 in two tranches from the applicant's nominated bank account situated in the Isle of Man[2] in terms of a set procedure[3] into a nominated Barclays London PLC account in the name of Umberto Lomolino, approved by the first respondent.[4] The first respondent *"certifies that the … account and named person is the fully authorized account for receiving the fees … for the benefit of this transaction"* and *"confirms that the person beneficiary of the transfer … is fully empowered to assist the"* first respondent.

6.10 The first respondent shall facilitate the arrangement, issuing and delivery of bank guarantees issued by a top European Bank. This process shall be managed by the first respondent and its own Financial European Associates. The first respondent shall disburse proceeds and profits to the applicant.[5]

6.11 The agreement shall endure for 15 months from date of signature

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1 Para I, page 4 of agreement.

2 Annex [A].

3 Annex [B].

4 Annex [C].

5 Para V, page 6 of agreement.

unless it is terminated by agreement of extended.[6]

6.12 The *force majeure* rules of the International Chamber of Commerce (ICC), Paris, France shall apply.

[7] Furthermore:[7]

7.1 The clauses in the agreement shall be severable.

7.2 The agreement constitutes the full, entire and integrated agreement and supersedes all prior negotiations, correspondence, understandings and agreements between the parties.

7.3 Any eventual controversy, having as object the interpretation of the clauses will be submitted to ICC conciliation and arbitration in Paris.

[8] The agreement provides for advice in the form of guidance and a proposal for the purchase of bank guarantees, and for intermediary services in the form of the management and administration of the applicant's funds by the first respondent and its associates, and for payment by and to the applicant.

THE CORRECT APPROACH TO THE INTERPRETATION OF THE ASSET MANAGEMENT AGREEMENT

[9] The respondents argue that the agreement must be interpreted in light of the following evidence:

9.1 The applicant intended to raise funding for projects she wanted to launch internationally.[8] She appointed a consultant, Ms Botha, to advise her and to source a firm that could raise funding. Ms Botha approached the first respondent and in December 2017 the applicant provided a letter of intent to Ms Botha in response to a request by the first respondent.

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6 Para VII, page 7 of agreement.

7 Para IX(C), (E), (K), (O), page 9 of agreement.

8 Para 9 *et seq* founding affidavit.

9.2 She envisaged using the financial scheme proposed by Ms Botha and requested a draft agreement prepared by the first respondent.

9.3 By then she already knew that payment would be made to Barclays Bank in the United Kingdom and that a bank guarantee would be issued. She envisaged that the funds would be transferred from her account in the Isle of Man and the account of a third party in the United Kingdom.

9.4 The first respondent provided her with a draft agreement.

9.5 She enquired whether the first respondent held a Financial Services Board licence and she was informed by Ms Botha that the first respondent did not need a licence but that Lomolino who would be the asset manager overseas held an *'international equivalent licence.'*

9.6 She was informed in a telephone conversation with the third respondent that the third respondent had a partnership and/or relationship with an international company by the name of AS Private Equity ("AS"). Lomolino was an officer of this company. He also informed her that a FSB licence was not required as this was a *'private placement.'* She was furnished with a copy of the agency agreement between the first respondent and AS.

9.7 The payment would be used for the purpose of securing a bank guarantee.

[10] The respondents argue that it was *'glaringly obvious'* that the first respondent was the agent of AS, incurred no obligations of its own, and had no standing to be sued. For this reason, it is argued, the joinder of the first respondent constitutes a misjoinder and the failure to join AS constitutes a non-joinder. There are no merit in these contentions. The applicant never sought to make out a case against AS and would have no reason to join the firm. Her case was that she contracted with the first respondent and joining the first respondent does not constitute a non-joinder.

[11] It was argued on behalf of the respondents that the application of the principles set out in the *Endumeni* case[9] leads to the conclusion that the agreement must be read to mean that the first respondent was the agent of AS. This is not so – the case is not authority for reading parties and provisions into a contract that are simply not there, and for abolishing the integration rule in the interpretation of contracts.

[12] The proper approach to interpretation have received the attention of our courts over many years[10] and I refer to only two judgements that provide guidance:

12.1 Innes CJ said in *Glenn Brothers v Commercial General Agency Co Ltd*:[11]

> *"I do not think we should gather from the circumstances what the parties meant, or what it is fair and equitable to think they meant, and then see whether we can ingeniously so read the document as to deduce that meaning from its language. The right method is first to have regard to the words of the document, and if they are definite and clear we must give effect to them. In every case where a document has to be construed so as to arrive at the intention of the parties, if a meaning is apparent upon the face of the document, that is the meaning which should be given to it."*

12.2 A century later Wallis JA said in *Natal Joint Municipal Pension Fund v*

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9 *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA).

10 See amongst others, *Beadica 231 AA and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC); *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) para [21]; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA); *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA); *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] 4 All SA 417 (SCA); 2016 (1) SA 518 (SCA); *South African Football Association v Fli-Afrika Travel (Pty) Ltd* [2020] 2 All SA 403 (SCA).

11 *Glenn Brothers v Commercial General Agency Co Ltd* 1905 TS 737 740–741. See also *Stiglingh v Theron* 1907 TS 998 1002, 1007 and *Cassiem v Standard Bank of South Africa Ltd* 1930 AD 366 368.

Endumeni Municipality:[12]

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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."

IMPORTANT COMMON CAUSE FACTS

[13] It is common cause between the parties that the first respondent is not licensed in terms of section 7(1) of thhe FAIS Act and that the €600 000 was paid, albeit that the respondents say that the first respondent did not receive the money as it was paid to AS.

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[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 (SCA) para [18]. See also *Schoeman and Others v Lombard Insurance Co Ltd* [2019] JOL 44846 (SCA), 2019 (5) SA 557 (SCA) para [22] and *Ma-Afrika Hotels (Pty) Ltd and Another v Santam Ltd (a division of which is Hospitality and Leisure Insurance)* [2021] 1 All SA 195 (WCC).

[14] The first respondent has been doing business for approximately a decade.

THE RESPONDENTS' COUNTER-CLAIM FOR RECTIFICATION

[15] In paragraph 1 of the notice of counter - application the respondents seek an order that the agreement be *"amended"* but it is common cause between the parties that what is intended is a rectification and not an amendment of the agreement.

[16] The respondents seek an order in the following terms -

> 16.1 the insertion of the words *"as agent of AS Private Equity Limited"* following the words *"Stone-Bird Investments (Pty) Ltd"* whenever such words appear in the agreement, and
>
> 16.2 by the deletion of the words *"as Asset Manager"* following the words *"Richard Kennedy"* wherever such words appear in the agreement.

[17] The net effect of the rectification sought is that the first respondent will be identified as the agent of a third party, AS, and the third respondent will no longer be identified as an "Asset Manager" but only as the first respondent's authorised signatory.

[18] In *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd,*[13] Nienaber JA described rectification as follows:

> *"Rectification does not alter the terms of the agreement; it perfects the written memorial so as to accord with what the parties actually had in mind."*

[19] In *Spiller and Others v Lawrence*,[14] Didcott J said:

> *"When a written contract does not reflect the true intention of the parties to it, but has been executed by them in the mistaken belief that it does, it may be*

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[13] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA) para [33].

[14] *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) 307-308.

rectified judicially so that the terms which it was always meant to contain are attributed in fact to it. That, as a general principle, is well recognised by both South African and English law. Each system, while ordinarily forbidding parol evidence in conflict with what appears from the written contract to have been intended by it, allows such evidence for the special purposes of the contract's rectification." [15]

[20] In a 'typical' rectification matter, a deed of sale provides for the sale of *'Portion [....] of the Farm Driepoort'* but it is common cause that there is no Portion [....], that the seller is the owner of Portion [....], and all the evidence points to the fact that subject of the sale was Portion [....].[16] Looking at the deed in isolation, it would appear to be a nullity as the property being sold does not exist, but or as Didcott J so eloquently put it,[17]

"nullity is an illusion produced by a document testifying falsely to what was agreed."

[21] The contract may then be rectified so that it reflects a valid agreement according to the intention of the parties at the time of contracting.

[22] In the present matter the rectified agreement will not reflect a valid transaction. If AS were to be substituted as principal with the first respondent as agent, the agreement will still fall foul of section 7 of FAIS. AS is not licenced and the first respondent will also not be a representative of an authorised financial services provider under section 13 of the FAIS Act. In *Spiller*,[18] Didcott J said:

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15 *Meyer v Merchants' Trust Ltd* 1942 AD 244 253.

16 Compare the facts in *Magwaza v Heenan* 1979 (2) SA 1019 (A).

17 *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) 312B. See also *Spiller* at 311D, *Weinerlein v Goch Buildings Ltd* 1925 AD 282, *Magwaza v Heenan* 1979 (2) SA 1019 (A) 1025B-C and *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA) para [26].

18 *Spiller and Others v Lawrence* 1976 (1) SA 307 (N) 308G. See also the remarks by Buckley L J in *Lovell and Christmas Ltd v Wall* (1911) 104 L T 85 (C A) 93, that: *"In ordering rectification the Court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents."*

"… it was conceded on the defendant's behalf that, if the corrections now sought to the written contract had been made before it was signed, the transaction thereby reflected would have been valid. The defendant accepts, in other words, that rectification in accordance with the claim, if competent, would purge the written contract of all traces of nullity. This is important because one supposes that rectification is futile, and for that reason alone will not be granted, in order to produce a corrected document that continues to record a void transaction."

[23] The claim for rectification must therefore fail.

[24] It must also fail because the evidence does not support the counter-claim for rectification.

24.1 The first respondent as counter - applicant chose to proceed by way of application.

24.2 The parties intended to enter into a written contract and they contracted on the basis as set out in the document signed by them.

24.3 It was not the common intention of the parties that the first respondent enter into this agreement as the agent of AS. There was no mutual, *bona fide* 'mistake' and the applicant never contracted or intended to contract with AS. The reference to the first respondent is not a mere misnomer or misdescription. The applicant contracted with the first respondent.

24.4 The first respondent does not present any evidence as to how the alleged common mistake occurred. In its affidavit in support of the counter - application it says merely that the incorrect description was occasioned by a common error and that the parties signed in the *bona fide* but mistaken belief that the agreement recorded the true agreement. These are conclusions possibly lifted from a textbook, and are denied by the applicant.

24.5 The agreement was prepared by the first respondent and then sent to

the applicant as a draft. The applicant read it and the draft became or evolved into the final agreement. It was explained that the first respondent had a relationship with AS, an overseas company. If a mutual error occurred in the drafting process one would expect some explanation as to what happened to occasion this. There is none.

24.6 The fact that Lomolino was pointed out as the asset manager in discussions when the third respondent is expressly named in the agreement as the person who would be the asset manager is understandable in the context of an agreement that made it clear that the first respondent had associates overseas and there were things to be done in South Africa and overseas. Similarly, the fact that the applicant was furnished with a copy of the agency agreement between the first respondent and AS as an example of a relationship with a foreign firm, does not merit the inference sought. It was explained to the applicant that AS would raise the required bank instrument but that in fact the first respondent would be the asset manager. The third respondent is of course a director of the first respondent and the person at the first respondent that would act as the asset manager.

24.7 There is in principle no impediment in law to a local *'exclusive and sole agent'* in South Africa, contracting with its own clients as a principal.

[25] In the present matter the agreement, whether rectified or not, is a nullity for want of compliance with section 7 of the FAIS Act.

[26] The first respondent's failure to join AS to its application constitutes a non-joinder. AS has a direct and substantial legal interest in the counter-application for rectification and if the claim for rectification were to succeed, it would incur obligations and acquire rights. It might be surprised if it learned that there was a judgment in South Africa in terms of which it had now incurred obligations under a contract entered into in 2017.

[27] The second and third respondents are co-applicants in the counter-application. Their locus standi to bring the application was not disputed and no

separate finding is made.

THE RESPONDENTS' OPPOSITION

[28] The respondents also raise the following defences:

28.1 That the Court does not have jurisdiction because the agreement contains an arbitration clause requiring any *"eventual controversy"* to be submitted to arbitration according to the rules of the International Chamber of Commerce (*'ICC'*);

28.2 The first respondent acted not as a principal but as an agent of the supplier of services, namely AS.

28.3 Liability cannot be imposed on the second and third respondents as directors of the first respondent.

28.4 The first respondent did not render financial services for the purposes of the FAIS Act.

28.5 The law of England must be applied to the agreement.

[29] I deal with the various defences under separate headings.

JURISDICTION AND ARBITRATION

[30] The registered address of the first respondent is in Johannesburg and the second and third respondents reside in Randburg within the area of geographical jurisdiction of the Gauteng Division of the High Court. The attack on jurisdiction *per se* therefore fails.

[31] The respondents' attack on the jurisdiction of the Court is misconceived as the Court's jurisdiction is not excluded by an arbitration clause in an agreement. The law recognises the principle of party autonomy but the jurisdiction of the court to rule on

referral to arbitration is retained.[19]

[32] The parties did not rely on either the domestic Arbitration Act, 42 of 1965, or the International Arbitration Act, 15 of 2017. The respondents in particular did not seek to invoke article 8 of Schedule 1 of the International Arbitration Act. I deal with the matter though as if the arbitration issue is properly before Court.

[33] If a dispute arising out of the agreement were to be referred to arbitration, it would be an international[20] arbitration as defined in article 1(3) the UNCITRAL[21] Model Law on International Commercial Arbitration that applies in South Africa by virtue of section 6 of the International Arbitration Act, 15 of 2017.

[34] The International Arbitration Act provides in section 16 for the recognition and enforcement of arbitration agreements and states that arbitration agreements must be recognised and enforced in South Africa as required by the UNCITRAL Model Law reflected in Schedule 1 to the Act. Article 8 of the Schedule then provides that a Court shall, if so requested by a party, not later than when submitting its first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is -

34.1 null and void,

34.2 inoperative or

34.3 incapable of being performed.

[35] For reasons set in this judgment the asset agreement is indeed void, inoperative, and incapable of being performed, and the reliance on arbitration as a dilatory plea must therefore fail.

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[19] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) 278J–279A; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) 592E–F; *Yenapergasam v Naidoo* 1959 (2) SA 478 (T).

[20] The arbitration clause refers to arbitration in France and a substantial part of the obligations were to be performed in other countries.

[21] The United Nations Commission on International Trade Law.

[36] If I am mistaken in dealing with the matter under the International Arbitration Act, the domestic Arbitration Act and in particular sections 3 and 6 of the Act apply.[22] When there is an arbitration clause in a contract, the parties are bound by their contract and the Court will usually give effect to the arbitration clause in the exercise of its jurisdiction.

[37] However, this is not so when the contract itself is void. There is nothing to refer to arbitration. In N*orth East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*[23] Lewis JA held that:

> *"If a contract is void from the outset then all of its clauses, including exemption and reference to arbitration clauses, fall with it."*

[38] There is a second reason why the reliance on the arbitration clause must fail. Any arbitration clause must be interpreted also to determine whether or not the specific dispute is covered by the arbitration clause.[24] An arbitration clause or arbitration agreement may pertain to all disputes between the parties or to certain disputes.

[39] The clause provides that:

> *"Any eventual controversy, having as object the interpretation of the clauses of the Agreement will be submitted to arbitration, board according to the rules of conciliation and arbitrate of the International Chambers of Commerce (ICC), Paris, France. This agreement, and, any amendments hereto, shall first be governed by and subject to the rules of conciliation and arbitrate of the International Chambers of Commerce (ICC), Paris, France, thereby and automatically superseding any and all (jurisdictional) 'conflict of*

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22 See Van Loggerenberg & Bertelsmann, *Erasmus: Superior Court Practice,* RS 17, 2021, D1-271.

23 *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) paras [12] to [15]. See also *North West Provincial Government v Tswaing Consulting CC* 2007 (4) SA 452 (SCA) paras [13] & [14]; *Wayland v Everite Group Ltd* 1993 (3) SA 946 (W) 951H–I; *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) 14B; and *Heyman v Darwins Ltd* [1942] 1 All ER 337 (HL) 343F.

24 See also *Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A).

laws' issues/matters alleged or deemed applicable thereto."[25]

[40] The dispute now before the court pertains to much more than interpretation of the clauses – it pertains to rectification and the applicability of the FAIS Act. Insofar as the present dispute does not relate to the interpretation of the clauses of the agreement, arbitration is not possible.

[41] The respondent's counsel argued that the scope of the clause is expanded by the second sentence, but this is not so. The first sentence relates to 'any controversy' and then limits the scope, while the second sentence states that 'this agreement' to arbitrate (in terms of the first sentence) shall supersede 'any and all conflict of laws issues.'

[42] Prior to rectification, AS will not be a party to the arbitration as it is not a party to the agreement. It would have a direct and substantial interest in the arbitration but no standing. The second and third respondent will also not be parties to the arbitration but will likewise have an interest in the outcome. Referring the dispute between the applicant and the first respondent to arbitration in France while there is a pending dispute between the applicant and the second and third respondents in South Africa means an unacceptable multiplicity of actions.

[43] For all these reasons referral to arbitration is not ordered.

THE ASSET MANAGEMENT AGREEMENT IS A NULLITY AND IS VOID

[44] Section 7(1) of the FAIS Act provides that no person may act or offer to act as a financial services provider, unless such person has been issued with a licence under section 8. Also, no-one may act or offer to act as a representative, unless appointed as a representative of an authorised financial services provider under section 13. Section 13 provides that one may not render financial services to clients on behalf of any third party who or that is not authorised or exempted from authorisation. Neither the first respondent nor AS is authorised in terms of the Act.

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[25] The clause is not a model of clarity. The word *"arbitrate"* in the third line should obviously be read as *"arbitration"* and the comma between *"arbitration, board"* in the second line makes no sense.

[45] The applicant alleges that the agreement is void because the first respondent is not licensed to provide financial services. The respondents dispute the allegation that the agreement is void. The respondents state that the day is saved because the first respondent is a product supplier in addition to being an asset manager (whether an asset manager as principal or as an 'agent' for AS). In terms of section 7(2) therefore, so the argument goes, the agreement is not unenforceable between the first respondent and the applicant.

[46] In section 1 of the FAIS Act, a product supplier is defined as *"any person who issues a financial product." "Financial product"* in turn means, *inter alia,* a foreign currency nominated investment instrument, including a foreign currency deposit and a deposit as defined in section 1(1) of the Banks Act, 94 of 1990. The respondents rely on these two types of financial products but it is useful to also refer to the others. Financial products also include securities and instruments, including shares, participatory interests in collective investments schemes, long term or short term insurance contracts, pension benefits and health service benefits.

[47] Nothing in the agreement points to the first respondent acting as a product supplier. No financial products issued by the first respondent were identified in argument or on the papers. Rather, the first respondent is expected to give advice and provide intermediary services,[26] and a guarantee was to be obtained from a bank. The bank may be the product supplier.

[48] When one turns to the agency agreement, identified as the agent appointment agreement, it states that AS, a company operating from London, appointed the first respondent as its exclusive and sole agent in South Africa and other African countries for the management of transactions with clients for project funding involving bank instruments to be employed in financial schemes for attuning product funding for clients by means of special operations with AS. AS is not expected to issue these financial products.

[49] Reading section 7, it is clear that the intention is that financial service

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[26] See the definitions in section 1 of the FAIS Act, and *TriStar Investments (Pty) Ltd v Chemical Industries National Provident Fund* [2013] JOL 30617 (SCA), 2013 JDR 0472 (SCA)

providers must be licensed but when a transaction comes into existence between the client and a product supplier, then the transaction between the product supplier and the client is not rendered unenforceable by section 7. One of the purposes of the legislation is clearly to protect the public. It is not the intention as it appears from the Act that the public have less protection than they would have if the Act were not on the statute book.

[50] Thus, when a member of the public falls victim to a service ostensibly offered by an unlicensed person and as a result of this invalid act, a transaction is entered into between the said client and the product supplier, for instance a bank, that transaction remains enforceable as between the client and the product supplier. The client is not prejudiced because, perhaps unknown to it, the service provider it deals with is not licensed. In this way the Act protects the public as the agreement between the client and the bank that issued a financial product will still be valid.

[51] The first respondent may not act as a financial services provider. It cannot perform under the agreement. The agreement is a nullity and is void *ab initio* for impossibility of performance and for illegality.[27] This would be the case if it were a financial service provider under section 7(1)(a) or a representative under section 7(1)(b).

[52] The conclusion that the agreement is void *ab initio*, is supported by the judgments by Van der Byl AJ in *Nelson Mandela Bay Metropolitan Municipality v Watersure (Pty) Ltd*[28] and by Lamont J in *Chemical Industries National Provident Fund v Tristar Investments (Pty) Ltd*.[29]

CHOICE OF LAW

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[27] Compare *Wylock v Milford Investments (Pty) Ltd* 1962 (4) SA 298 (C) 318 and *Heyneke v Abercrombie* 1974 (3) SA 338 (T) 345.

[28] *Nelson Mandela Bay Metropolitan Municipality v Watersure (Pty) Ltd* [2010] JOL 25917 (ECP) para [27], and application for leave to appeal reported as *Watersure (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* 2010 JDR 0069 (ECP) para [23] & [24].

[29] *Chemical Industries National Provident Fund v Tristar Investments (Pty) Ltd* [2010] JOL 25354 (GSJ) para [41]. The judgment was overturned on appeal but not on this ground: *TriStar Investments (Pty) Ltd v Chemical Industries National Provident Fund* [2013] JOL 30617 (SCA), 2013 JDR 0472 (SCA).

[53] There is no evidence on the papers that it was ever in the contemplation of the parties that the agreement would be governed by the law of a foreign country. The agreement itself is silent on choice of law.

[54] In the absence of express or tacit agreement, an intention must be imputed to the parties.[30] The following aspects are important:

54.1 The agreement was signed between parties registered and resident in South Africa.

54.2 The applicant signed the agreement in the Seychelles because that is where she happened to be when she appended her signature. From the context it can be inferred that the respondents signed in South Africa.

54.3 The agreement provided for arbitration in France.

54.4 When the applicant made enquiries as to the licencing status of the first respondent she was informed that Lomolino had an international licence, and that licensing was not required as this was a private placement. There is no evidence that the application of a foreign law was a factor.

54.5 There is no evidence on the record that the applicable licencing and consumer protection laws applicable in the United Kingdom were ever discussed between the parties.

54.6 The agreement refers to banks in the United Kingdom, the Isle of Man, and Europe.

54.7 The agreement came into being because the applicant wanted to launch two projects internationally, one being a property rental and ownership project and focused on increasing home ownership in South Africa and the other a Biotech project.

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[30] See *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171; *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C).

54.8 The first respondent conducts its management activities in South Africa, but in liaison with and using the services of associates in Europe when appropriate.

54.9 The first respondent was going to report to the applicant in South Africa.

[55] The respondents do not tell the Court in their papers what the relevant law of England is. They allege that the agreement must be subject to the law of England but does not set out to prove or state the law of England. Firms operating in the United Kingdom may be subject to similar laws in that domicile and when operating in a foreign country, will have to comply with applicable local requirements imposed by law.

[56] It would however be very surprising if a financial service provider carrying on business in South Africa could escape the controls imposed by the FAIS Act in the public interest merely by making the contract subject to some foreign law. This need however not be decided as it did not happen.

[57] I find that the agreement was always subject to South African law.

DID THE FIRST RESPONDENT RENDER FINANCIAL SERVICES?

[58] It is the case for the respondents that the first respondent did not render financial services and this is said in the context of the allegation that the services were in fact rendered by AS. The case then is that the first respondent merely acted as an agent for AS., and it is therefore not seriously disputed in heads of argument that the provisions of the agreement reflect the provision of financial services. This is confirmed by reading the agreement together with the definitions in the FAIS Act.

RESTITUTION

[59] The right to restitution is a specific instance of a general principle – the right to restore the *status quo ante*. The applicant is entitled to reclaim her performance

under the void contract.[31]

[60] The respondents argue that the first respondent never received the €600,000.00 and therefore cannot repay it. The applicant must exercise its rights, if any, against AS. AS is not mentioned in the agreement but Lomolino is an officer of AS. The first respondent describes itself as an agent of AS.

[61] The applicant did not make the payment to Lomolino in an arbitrary fashion. Lomolino was initially unknown to her. She was directed to pay to Lomolino by the first respondent and the payment was made in part – fulfilment of her perceived obligations under the perceived agreement. She had no reason not to trust the respondents who held themselves out to her as competent and knowledgeable.

[62] Payment to Lomolino was therefore a bi-lateral act involving the applicant and the first respondent. From a reading of the contract, Lomolino was at most an agent of the first respondent and an action for restitution would lay against the first respondent and not against Lomolino.[32] It was the first respondent that was enriched by the payment.

[63] The agreement provides in Annex C for the payment of the applicant's funds into the account of Umberto Lomolino at Barclays Bank PLC for *'Payment of fees and charges start up costs / expenses for Project Funding Internationally on behalf of Kim Weissensee and/or its companies / associates.'*

[64] The first respondent's protestation that the money was paid to AS ring false. It was a term of the agreement that the account into which the money was paid, was under the sole control of the first respondent. The agreement provided:

> *"B) It is further agreed by the Parties that concurrent with (or, in anticipation of) the mutual acceptance and execution of this Agreement, the Asset*

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[31] *Carlis v Mccusker* 1904 TS 917 and *Botes and Others v Toti Development Co (Pty) Ltd* 1978 (1) SA 205 (T). These cases concerned contracts for the sale of land and it was held that the pleadings were deficient in that it was not alleged that the seller was incapable of performing in terms of the invalid agreement. This aspect does not arise in the present matter as performance is not permissible.

[32] *Minister van Justisie v Jaffer* 1995 (1) SA 273 (A) and Baker v Probert 1985 (3) SA 429 (A) 438G.

Manager shall cause to be established the necessary and required Transaction Bank Account(s) for the Transaction under the sole control of the Asset Manager for which this Agreement has been developed, accepted and subsequently executed."

[65] The transaction bank account into which the applicant made payment is then described in more detail in *'Annex [C] Bank Account with Asset Manager.'* This is Lomolino's account. The applicant need not be concerned with the reasons why the account holder was Lomolino – she was told and the agreement was entered into on the basis that the account was under the sole control of the first respondent, and that Lomolino was an associate of the first respondent.

[66] If one accepted that the agreement was not only void but also illegal, the correct *condictio* is the *condictio ob turpem vel iniustam causam.* The money was transferred, the transaction or its performance was illegal, and the first respondent was unjustly enriched. If I am mistaken and the agreement was void but not illegal, the correct *condictio* would be the *condictio indebite*. Those requirements have also been met. The agreement is a nullity. The applicant made the *indebite* payment in the reasonable but mistaken belief that she was acting in terms of a valid agreement. The first respondent was unjustly enriched.

SECTION 218 OF THE COMPANIES ACT, 71 OF 2008

[67] The applicant seeks to hold the second and third respondent liable for her loss, jointly and severally with the first respondent, in terms of section 218 of the Companies Act. The section reads as follows:

218 Civil actions

(1) …

(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

[68] The respondent's defence to the claim under section 218 is that any liability of the second and third respondents in terms of section 22, 76, 77, or 218 of the Companies Act could only be to the first respondent and not to any other class of person.

[69] In the *Grancy* case,[33] Fourie J said that -

"…section 218 (2) of the 2008 Companies Act, provides that any person (this would include a director of a company) who contravenes any provision of the Act, is liable to any other person for any loss or damage suffered by that person as a result of that contravention. It follows that a director who does not comply with the standards of directors' conduct as set out in section 76 of the 2008 Companies Act, would be liable to any person suffering a loss as a consequence thereof."

[70] No-one is expected to know all of the law but people who venture into any area of the law should familiarise themselves with what the law requires. Doing business in the field of financial management and advice requires one to become familiar with the law governing these activities, such as the FAIS Act. The failure to so familiarise oneself would be reckless or at least grossly negligent, particularly for a person who receives money from clients or deal with their money.

[71] It would be reckless or grossly negligent for an unlicenced company or an

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[33] *Grancy Property Ltd and Another v Gihwala and Others; In Re: Grancy Property Ltd and Another v Gihwala and Others* [2014] ZAWCHC 97 para [104]. See also *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ) para [22]; *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others* [2014] 3 All SA 454 (GJ) para [42]; *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA); *Viraland Inc v Ole Media Group (Pty) Ltd and Another* [2016] ZAWCHC 10 para [62]; *Motor Industry Bargaining Council v Botha and Another* [2016] ZAGPPHC 615 para [60].

individual to act or to offer to act as a financial service advisor or as a representative as prohibited in section 7(1)(a) and (b) of the FAIS Act. Doing so requires the company or individual to enter into agreements that it cannot possibly fulfil legitimately. In this matter it is common cause that the first respondent carried on business for at least a decade. It was never licenced.

[72] In terms of section 22 of the Companies Act[34], a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.[35]

[73] Section 76(3) of the Companies Act[36] requires of a director to perform functions in good faith and for a proper purpose, in the best interest of the company, and with the appropriate degree of skill, general knowledge and experience. The director must take reasonably diligent steps to become informed about relevant matters.[37] Had the directors done this, in this instance and perhaps in others, they would have known that the company was entering in to an agreement in terms of which performance by the company was precluded by section 7 of the FAIS Act.

[74] In terms of section 77[38] of the Companies Act a director owes fiduciary duties to the company. A director should not allow the company to enter into agreements that are void and out of which liabilities may arise. Section 77(3) provides that a director is liable for any loss sustained by the company as a direct or indirect consequence of the director having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1).

[75] It is not disputed that the third respondent had a conversation with the

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[34] In interpreting s 22 of the 2008 Act, regard may be had to interpretation by the courts of s 424 of the Companies Act, 61 of 1973. See Delport *Henochsberg on the Companies Act 71 of 2008* p 104 to 105 ("*Delport*") and Meskin *Henochsberg on the Companies Act 61 of 1973* p 911 to 920(3).

[35] See *Kukama v Lobelo* [2013] ZAGPJHC 72, *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ), and *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A).

[36] *Delport* p 294.

[37] S 76(4)(a)(i) of the Companies Act of 2008.

[38] *Delport* p 299.

applicant and explained the nature of the transaction to her. His evidence is that the first respondent acted merely as agent of AS and did not require a licence. This is inaccurate, as the first respondent would then have to be a representative of an authorised financial service provider, and it never claimed to have the backing of an authorised financial services provider. The third respondent also advised her, and this is not denied, that no licence was needed as this was a private placement. This would be palpably false. The question was not whether this was a private placement, but whether section 7(1) required a licence.

[76] The respondents raise two further defences in the context of section 218:

76.1 The section applies only to action proceedings:

76.1.1 The object is to ascertain the intention of the legislature and the intention is clear. The heading may play a role when the interpretation is doubtful but that is not the case here.[39]

76.1.2 The reference to civil actions in the heading is a generic reference and there is no indication that the legislature intended the distinction between actions and applications that one finds in the Uniform Rules of Court.

76.2 The respondents consulted with legal counsel by the name of Raffeale Caravella.

76.2.1 This bald statement is made in heads of argument without reference to any affidavits, and the exact content of the legal advice received is nowhere disclosed.

76.2.2 A bald statement of this nature can not be sufficient for the purposes of section 76(4) and (5) of the Companies Act.

76.2.3 In *Fisheries Development Corporation of SA Ltd v Jorgensen*

[39] *Hammersmith Co v Brand* L R. 4 H L 171.

and another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and others[40] Margo J said:

> *"Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof. Gower (op cit*[41] *at 602 et seq) refers to the striking contrast between the directors' heavy duties of loyalty and good faith and their very light obligations of skill and diligence. Nevertheless, a director may not be indifferent or a mere dummy. Nor may he shelter behind culpable ignorance or failure to understand the company's affairs."*

[77] The first respondent carried on its business recklessly, and the second and third respondents carried on the company's business recklessly and failed to act in good faith and for a proper purpose, and failed to honour their fiduciary duty to the company. The second and third respondent and liable to the applicant in terms of section 218 for her loss.

LEAVE TO FILE FURTHER AFFIDAVIT

[78] The applicant seeks leave by the Court to file a further affidavit, namely an affidavit by the applicant's attorney to which is attached an email by an officer of the Financial Sector Conduct Authority (FSCA). The official expresses the view that the activity set out in a letter to the FSCA (summarising aspects of the founding affidavit) *"is a private equity transaction that require Stonebird to be registered."*

[79] The affidavit is admitted into evidence with the consent of both parties but I do not attach any weight to it. It is an unsubstantiated and bland opinion in a letter on

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40 *Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and others* 1980 (4) SA 156 (W) 166D-E. See also *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) 674A-G and *Cooper and another NNO v Myburgh and others*[2021] 2 All SA 114 (WCC) para [15].

41 Gower *The Principles of Modern Company* Law 4th ed.

the very question the court is required to answer.

CONCLUSION

[80] The respondents points *in limine* must fail and so must its counterclaim for rectification. The applicant is entitled to the orders sought.

[81] There is no reason to deviate from the general principle that the cost should follow the result of the order. I therefore make the order set out in paragraph 1 above.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **17 October 2022**

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DATE OF THE HEARING:	3 October 2022

DATE OF ORDER: 17 October 2022

DATE OF JUDGMENT: 17 October 2022