

CORPORATE & COMMERCIAL ALERT

18 AUGUST 2022



INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Recent High Court judgment on duties of collective investment scheme managers in implementing redemptions

The judgment handed down by the *Gauteng High Court in Living Hands (Pty) Ltd N.O. and Others/Old Mutual Unit Trust Managers Ltd* [2022] ZAGPJHC 456 has a notable impact on the asset management industry and the duties upon investment managers when legitimate redemption requests are received.



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Recent High Court judgment on duties of collective investment scheme managers in implementing redemptions

The judgment handed down by the *Gauteng High Court in Living Hands (Pty) Ltd N.O. and Others/Old Mutual Unit Trust Managers Ltd [2022] ZAGPJHC 456* has a notable impact on the asset management industry and the duties upon investment managers when legitimate redemption requests are received.

The facts are: The Living Hands Umbrella Trust (previously, the MATCO Trust) (Trust), held trust assets on behalf of beneficiaries of deceased members of the Mine Workers Provident Fund. The Trust was created and its funds held for the dependents of the fund members, the majority of whom are widows, orphans, guardians of minors, and breadwinners. The former sole corporate trustee and the two current trustees of the Trust are the plaintiffs in this matter.

In 2002, Old Mutual Unit Trust Managers Ltd (Old Mutual), the defendant in this matter, was appointed as an investment advisor to the Trust administration company, Mantadia Asset Trust Company (Pty) Ltd, in respect of the beneficiary trust funds under management. Old Mutual designed the investment portfolio and was contracted to buy, sell, and switch units in the various portfolios forming part of collective investment schemes on instruction of the Trust administration company as and when the need to liquidate units arose.

During the process of Fidentia Holdings Group's (Fidentia) acquisition of the Trust administration company through male fide methods, Fidentia Asset Management (Pty) Ltd (FAM), a wholly controlled subsidiary of Fidentia, was appointed as the discretionary investment manager of the Trust. FAM called up the Trust's entire investment portfolio held with Old Mutual. Prior to paying out the funds, Old Mutual raised concerns to the Trust administration company and FAM regarding the validity, scope and intended impact of FAM's instructions to liquidate the Trust portfolio and transfer such funds to FAM.

After numerous correspondences, and instructions from the Trust administration company, Old Mutual paid over R1,130,319,447.32 to the Trust's account which had come under the control of Fidentia. From the date of receipt of the payments from Old Mutual, the Trust paid an amount of R1,239,842,219.49 into bank accounts held by Fidentia and its controlled companies. The funds were used by Fidentia to defray business

expenses and to acquire property and private equity investments for the Fidentia Group. All assets bought were held in the names of Fidentia owned companies, without any indication that it is held on behalf of the Trust.

In 2006, as a consequence of a broad investigation by the Financial Services Board into the conduct of the Fidentia Group in regard to a number of alleged illegal actions and misappropriation of client funds, the Fidentia Group was placed into final curatorship in 2007. As part of this curatorship process, the plaintiffs were able to recover R272,689,727.00. They sought in this High Court case to recover damages of R861,222,095.12, plus interest at 15,5% per annum from Old Mutual.

THE PLAINTIFFS CLAIM AND OLD MUTUALS DEFENSE

The plaintiffs' claim against Old Mutual is based on a delict, arising from an omission, for pure economic loss. The plaintiffs allege that Old Mutual: (i) had knowledge of the Trust's business and the vulnerable

Recent High Court judgment on duties of collective investment scheme managers in implementing redemptions

CONTINUED

nature of the Trust beneficiaries; (ii) breached duties imposed on it by the Collective Investment Schemes Control Act 45 of 2002, the Trust Property Control Act 57 of 1988 and the Financial Institutions (Protection of Funds) Act 28 of 2001; and (iii) knew or reasonably ought to have known that Fidentia had taken control of the Trust and that it had come under the control of individuals who may not act in the best interests of the beneficiaries.

Although the plaintiffs argued that the loss suffered was a result of Fidentia's wrongdoing, they alleged that Old Mutual did not take sufficient steps to safeguard the funds before implementing the transfer to the Trust's account that was under the control of Fidentia. This should have included Old Mutual satisfying itself that FAM would preserve the funds for the benefit of the beneficiaries and act in a prudent and honest manner when managing the funds and act in accordance with the Protection of Funds Act and Trust Property Control Act.

From the outset, Old Mutual never disputed the facts and the wrongdoing by Fidentia, but disputed its liability. Old Mutual contended that it could not be held liable as the liability for the loss sat with the trustees of the Trust and that the statutory and constitutional duties the plaintiffs relied on did not extend to situations where a financial institution invests trust funds pursuant to a mandate, and then returns those funds following the instruction of its principal, whereafter the principal then misappropriates, dissipates or fraudulently handles the funds. It argued that the legislation does not contemplate that a financial institution should be required to compensate beneficiaries whose interests the principal failed to protect. Old Mutual further argued that the statutory provisions do not impose a duty on a financial institution to second-guess a duly authorised instruction received from its client, it only owed a duty of good faith and proper care and diligence to the Trust in respect of the management and administration of the portfolio.

COURT'S FINDINGS

The Court did not accept Old Mutual's arguments and found that the duty to act in utmost good faith, with due diligence, skill and care went beyond conduct associated with the management and administration of the portfolio, but included the whole value chain of institutional conduct up to the disposal of the portfolio. Given the particular facts of the case, the Court found that the material risks and the detrimental consequences associated with the liquidation of the portfolio were foreseeable and would have been foreseeable by a prudent manager. The plaintiff's case was based on omission and it was contended that it was not, however, the paying over of the money per se that was wrongful, but the paying over of the money without having reported the events. The Court held that Old Mutual should have informed Standard Bank, as trustee of the collective investments schemes, the Registrar of Collective Investment Schemes and the Registrar of Financial Services Providers, of the

Recent High Court judgment on duties of collective investment scheme managers in implementing redemptions

CONTINUED

facts leading up to the disposal of the funds, and of any irregularities. As a result, the Court found there is a real probability that Fidentia's conduct would have been detected early, but for Old Mutual's failure to report the events.

Quoting both public and legal policy considerations, the Court found that it would be reasonable to impose liability based on pure economic loss and it ordered Old Mutual to pay R854,650,643.00 as damages,

and R854,650,643.00 as interest according to the *in duplum* rule where interest ceases to accumulate once it is equal to the outstanding principal debt.

This case sets a notable precedent for the financial services industry. Investment managers should conduct thorough due diligence and precautionary checks before releasing funds to principals, even after receipt of a valid formal instruction to do so, and to report any concerns or irregularities to the relevant regulatory

authorities. Failure to do so may risk the investment manager being held liable for misconduct or frauds committed after they have handed over the administration of the funds.

We note that Old Mutual has applied for leave to appeal the judgment, so this is definitely not the final word to be spoken on this topic.

A copy of the full judgment is accessible [here](#).

**CLAUDIA MOSER,
NUHAA AMARDIEN AND
JOHN GILLMER**

2021 WINNERS OF M&A DEAL FLOW 2021

2021

1st by M&A Deal Flow.
2nd by General Corporate Finance Deal Flow.
2nd by BEE Deal Value.
3rd by General Corporate Finance Deal Flow.
3rd by BEE Deal Flow.
4th by M&A Deal Value.

2020

1st by M&A Deal Flow.
1st by BEE Deal Flow.
1st by BEE Deal Value.
2nd by General Corporate Finance Deal Flow.
2nd by General Corporate Finance Deal Value.
3rd by M&A Deal Value.
Catalyst Private Equity Deal of the Year.

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018

1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

DealMakers



OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:



Willem Jacobs

Practice Head & Director:
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson

Deputy Practice Head & Director:
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com



Sammy Ndolo

Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Roelof Bonnet

Director:
Corporate & Commercial
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis

Director:
Corporate & Commercial
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang

Director:
Corporate & Commercial
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Vivien Chaplin

Director:
Corporate & Commercial
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel

Director:
Corporate & Commercial
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling

Director:
Corporate & Commercial
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange

Sector Head: Agriculture, Aquaculture
& Fishing Sector
Director: Corporate & Commercial
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Andrew Giliam

Director:
Corporate & Commercial
T +27 (0)21 481 6363
M +27 (0)83 359 7069
E andrew.giliam@cdhlegal.com

John Gillmer

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Ian Hayes

Director:
Corporate & Commercial
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com

Peter Hesseling

Director:
Corporate & Commercial
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@cdhlegal.com

Quintin Honey

Director:
Corporate & Commercial
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Brian Jennings

Director:
Corporate & Commercial
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly

Director:
Corporate & Commercial
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman

Director:
Corporate & Commercial
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige

Director:
Corporate & Commercial
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky

Executive Consultant:
Corporate & Commercial
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Nkcubeko Mbambisa

Director:
Corporate & Commercial
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

William Midgley

Sector Head: Commercial Real Estate
Director: Corporate & Commercial
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley

Director:
Corporate & Commercial
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman

Director:
Corporate & Commercial
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Wayne Murray

Director:
Corporate & Commercial
T +27 (0)21 405 6018
M +27 (0)79 691 0137
E wayne.murray@cdhlegal.com

Francis Newham

Executive Consultant:
Corporate & Commercial
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Verushca Pillay

Director:
Corporate & Commercial
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock

Joint Sector Head: Private Equity
Director: Corporate & Commercial
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid

Joint Sector Head: Mining & Minerals
Director: Corporate & Commercial
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Jess Reid

Director:
Corporate & Commercial
T +27 (0)11 562 1128
M +27 (0)83 571 6987
E jess.reid@cdhlegal.com

Megan Rodgers

Sector Head: Oil & Gas
Director: Corporate & Commercial
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith

Director:
Corporate & Commercial
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tamarin Tosen

Director:
Corporate & Commercial
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum

Director:
Corporate & Commercial
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe

Director:
Corporate & Commercial
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Andrew van Niekerk

Head: Projects & Infrastructure
Director: Corporate & Commercial
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Charl Williams

Director:
Corporate & Commercial
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com

Christelle Wood

Director:
Corporate & Commercial
T +27 (0)11 562 1372
M +27 (0)83 498 2850
E christelle.wood@cdhlegal.com

Emma Hewitt

Practice Development Director:
Corporate & Commercial
T +27 (0)11 562 1635
E emma.hewitt@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2022 11434/AUG