THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 237/2018

In the matter between:

CENTRIQ INSURANCE COMPANY LIMITED **APPELLANT**

and

MARISA VOGEL OOSTHUIZEN **FIRST RESPONDENT**

JOSÉ FRANCISCO CASTRO **SECOND RESPONDENT**

Neutral citation: *Centriq Insurance Company Limited v Oosthuizen & another* (237/2018) [2019] ZASCA 11 (14 March 2019)

Coram: Cachalia, Mbha and Mathopo JJA and Dlodlo and Rogers AJJA
Heard: 22 February 2019
Delivered: 14 March 2019

Summary: Interpretation of insurance contract – professional indemnity insurance for financial advisors – whether exclusion clause purporting to exclude cover for negligent financial advice accords with purpose of policy – policy to be interpreted so as to give it commercial efficacy.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Daffue J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Cachalia JA (Mbha and Mathopo JJA and Dlodlo and Rogers AJJA concurring)

[1] This appeal concerns the interpretation of a professional indemnity insurance policy underwritten by Centriq Insurance Company Ltd (Centriq). The policy indemnified a financial advisor from liability for 'breach of duty in connection with [his] business by reason of any negligent act, error or omission'. The advisor had advised his client to invest in a dubious property development scheme in circumstances described more fully below. The investment failed and she sought to recover her loss from him, who in turn claimed the indemnity from Centriq. It denied liability, relying on an exclusion clause that set out certain situations in which the indemnity did not apply. The defence failed in the Free State Division of the High Court.[1] Centriq now appeals that order with leave of this court. The issues in this appeal are important for insurers who underwrite financial advice on the one hand, and for financial advisors who seek to indemnify themselves against the adverse consequences of their advice on the other.

[1] Daffue J.

Genesis of the dispute

[2] The first respondent, Mrs Marisa Vogel Oosthuizen, became widowed following her husband's death in a shooting accident, leaving her with their two and half year old son. The deceased was a farmer and his life policy secured for her an amount of R3.4 million. Of this amount she set aside R300 000 as a reserve, purchased calves to the value of R1.1 million and decided to invest the balance of R2 million. To this end she sought the advice of Mr José Francisco Castro, who had previously advised her husband and whom she trusted. He was registered as a financial services provider and a broker in terms of the Financial Advisory and Intermediary Services Act 37 of 2002. He advised her to invest the R2 million in Sharemax Investments (Pty) Ltd (Sharemax). The investment was in a property development scheme known as 'The Villa Retails Park Holdings 2'. The Villa was a yet to be completed shopping complex, a fact that he did not draw to Mrs Oosthuizen's attention.

[3] The development failed following a Reserve Bank investigation, which found that Sharemax was contravening the Banks Act 94 of 1990 by taking deposits illegally. With no prospect of recovery from Sharemax, Mrs Oosthuizen sued Mr Castro for the loss of her capital sum of R2 million plus *mora* interest on this amount, less an amount of R1 400 she had received from Sharemax a few days after making the investment. Her claim was that Mr Castro had failed to act honestly and fairly in her interests in recommending the investment; that he had not given her objective financial advice appropriate to her needs; and that he had not exercised the degree of skill, care and diligence expected of an authorised financial services provider.

[4] After the pleadings had closed, Mr Castro joined Centriq as a third party claiming that he was entitled to be indemnified under the policy concluded with Centriq. The policy is styled 'Professional Indemnity Insurance for Members of the Financial Intermediaries Association' and, as is apparent from its name, is offered to all members of the body. Mr Castro was one such member. Centriq denied any obligation to indemnify Mr Castro on the ground that Mrs Oosthuizen's loss fell within the ambit of the specific exclusion contained in clause 3(ii) of the policy. The clause excluded Centriq from having to indemnify the insured member:

'[I]n respect of any third party claim *arising from or contributed to by depreciation (or failure to appreciate) in value of any investments*, including securities, commodities, currencies, options

and futures transactions, *or as a result of any actual or alleged representation*, guarantee or warranty provided by or on behalf of the Insured *as to the performance of any such investments*. It is agreed however that this Exclusion shall not apply to any loss due solely to negligence on the part of the Insured . . . *in failing to effect a specific investment transaction in accordance with the specific prior instructions* of a client of the Insured.' (Emphasis added.)

[5] Following Mrs Oosthuizen's evidence regarding the circumstances in which she came to make the investment and that of Mr Magnus Heystek, who gave expert testimony on whether Mrs Castro's advice was what a reasonable investment advisor ought to have given her, she closed her case. Neither Mr Castro nor Centriq disputed their evidence. I shall narrate their evidence when I set out the background in more detail later. Mr Castro also takes no issue with the finding of the court a quo that he is liable to Mrs Oosthuizen for her loss. Neither does Centriq. But Centriq maintains that its liability as the third party is excluded.

[6] Centriq contends that the exclusion is triggered by two distinct provisions in the exclusion clause. The first is that the claim by the third-party claimant against the insured – ie, Mrs Oosthuizen's claim against Mr Castro – is one that arises from or is contributed to by depreciation or failure of the investment to appreciate in value. The second is that the investment was undertaken by the insured on the third-party claimant's behalf pursuant to a representation, guarantee or warranty by the insured as to the performance of the investment.

[7] The court a quo found neither trigger present. Regarding the first the learned Judge rejected Centriq's contention that the loss in value of the investment was 'contributed to by depreciation' pursuant to Mr Castro's advice. He concluded, on the basis of Mr Heystek's evidence, that the investment was 'hopeless' from the onset, and that the loss arising therefrom was not 'contributed to by depreciation' as envisaged in the clause. In regard to whether Mr Castro's advice constituted a representation, guarantee or warranty as to the performance of the investment the court a quo held that this was not Mrs Oosthuizen's case. She sued Mr Castro because he had failed to give her adequate investment advice, suitable to her needs for a safe investment, and not because the investment had not performed in accordance with the advice she had obtained. Mrs Oosthuizen maintained that the learned Judge's

reasoning in respect of both issues was correct. It will be helpful to place these contentions in their proper perspective by setting out the background and Mrs Oosthuizen's evidence in a bit more detail.

Background

[8] The judgment of the court a quo sets out the circumstances under which Mrs Oosthuizen decided to make the investment and the reasons for holding Mr Castro liable for breach of their financial services contract succinctly. This is common ground, which I shall recount briefly.

[9] Mrs Oosthuizen was left vulnerable and insecure in the immediate aftermath of her husband's sudden death. She was also placed in a financial predicament before she was able to gain access to the proceeds of her husband's insurance policy, having to borrow money from her brother to take care of herself and her son. She was a qualified teacher but had no knowledge or experience regarding financial products, and therefore turned to Mr Castro, who was aware of her situation. They met on 27 July 2010, four and a half months after her husband's passing.

[10] She was required to fill in two documents which Mr Castro had brought to the meeting. One was a 'Needs Analysis' and the other an 'Advice and Intermediary Agreement'. What emerged was that she needed maximum monthly income with 'low risk'. This was what Mr Castro filled in on her behalf. In fact she made it clear to him that she could not afford any risk: as she put it, she could not afford to lose two cents. Simply put she required a safe high income investment. She also accepted, as appears from the 'Advice and Intermediary Agreement', that even though Mr Castro could not guarantee her capital investment or returns in the short term he would direct his best endeavours to making a safe investment for her.

[11] In providing this assurance he also drew her attention to several newspaper articles that were highly critical of the property syndication schemes of Sharemax. One publication referred to it as a 'house of cards collapsing'. Another warned financial advisors, who were registered with the Financial Services Board, that the registrar and the Reserve Bank had serious reservations about the product Sharemax was offering

and that they should be drawing their clients' attention to the problems even at the risk of reducing the attractive commission of six per cent that was on offer.

[12] Mr Castro referred her to these articles, not to warn her of the pitfalls of the investment, but to assure her that there was no substance to any of the criticism. Because, as he explained to her somewhat thoughtlessly and misleadingly: 'property cannot disappear'. He did not tell her that she was not investing directly in fixed property. He created the false impression that she was investing in a developed property and not in an uncompleted development.

[13] The tenuous link between Mrs Oosthuizen's investment and immovable property appears from the prospectus relating to the offer for which Mrs Oosthuizen, on Mr Castro's advice, subscribed. The prospectus related to the issue of shares by a company called The Villa Retail Park Holdings 2 Limited (VR2). The sum VR2 intended to raise by the public offer was R75 million. Ms Oosthuizen would thus be acquiring shares in VR2. The proceeds of her investment and of similar investments by other gullible members of the public were to be used by VR2 to acquire a 60 per cent shareholding in a company called Villa Retail Park Investments (Pty) Ltd (VRPI) and to make a loan to VRPI. VRPI would, in turn, use the money it acquired from VR2 towards paying a modest portion of the purchase price of the immovable property, the total purchase price being R2.9 billion, most which still had to be raised by further public offers. The purchase price was owed by VRPI to a company called Capicol 1 (Pty) Ltd (Capicol). According to the prospectus, it was anticipated that VRPI would take transfer of the property from Capicol in September 2011. Accordingly, and only if the additional funds needed to pay the full purchase price were raised, Mrs Oosthuizen would in due course own a small number of shares in VR2 which would hold 60 percent in VRPI. VRPI would in turn own the property. But the whole scheme folded well before these events (save for the disappearance of Mrs Oosthuizen's money) came to pass.

[14] The scheme required investors to transfer their money to Sharemax's chosen company. The company or Sharemax would then pay their investors interest on this investment without the underlying investment – the property development – having earned anything – and where it was unlikely to do so for years, pending the purchase of the land and the construction of a shopping centre. Only upon the completion of the

construction centre would rental income be realised. Yet the prospectus previously mentioned held out to investors a projected rate of return equal to a 10 per cent after tax dividend from the date of full subscription to the occupation date in September 2011. The 'investment' in fact had all the hallmarks of a Ponzi scheme in which money placed by later investors pays artificially high interest or dividends to the original investors, thereby attracting even larger investment. When there are no longer new investors, which inevitably happens, the scheme collapses. Mrs Oosthuizen was one of the later investors. On any objective analysis the investment was not viable; certainly not having regard to her needs.

[15] As the learned Judge trenchantly observed:

'It is amazing that [Mr Castro] could think for one moment that interest could lawfully accrue from the investment from the first month. I wonder where he thought the magical origin of the income stream would derive from . . . [A] simple investigation or even an inspection of the half-built shopping complex would have been an eye-opener. He would have realised that enormous costs would have to be incurred to complete the project [and that the] . . . half-built shopping complex could not earn any income for some time . . . but the investment provided for income to be paid to investors from the start.'

[16] It was, to be kind to Mr Castro, an investment that he himself did not properly understand. He dismissed the adverse criticism circulating in the media without satisfying himself as to whether there was any substance in it. He quite clearly failed to explain the risks of the investment to allow Mrs Oosthuizen to make an informed decision. The finding by the court a quo that Mr Castro was in breach of his fiduciary duty to his client because he had not taken reasonable steps to satisfy himself of the safety of the investment and to give her adequate financial advice to meet her needs is therefore unassailable. As I have mentioned Centriq does not contend otherwise.

Interpreting insurance contracts

[17] Centriq criticises the judgment of the court a quo for having failed to properly interpret the exclusion clause. It is therefore necessary to revisit the approach to interpreting insurance contracts. As the learned Judge observed, insurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose in what is a unitary exercise. A commercially sensible meaning

is to be adopted instead of one that is insensible or at odds with the purpose of the contract.[2] The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.[3]

[18] But because insurance contracts have a risk-transferring purpose containing particular provisions, regard must be had to how the courts approach their interpretation specifically. Thus, any provision that places a limitation upon an obligation to indemnify is usually restrictively interpreted, for it is the insurer's duty to spell out clearly the specific risks it wishes to exclude. In the event of real ambiguity the doctrine of interpretation, *contra proferentem*, applies and the policy is also generally construed against the insurer who frames the policy and inserts the exclusion.[4] But, like other aides to the interpretation of contracts of this nature, the doctrine must not be applied mechanically, for exclusion clauses, like other contractual clauses, must be construed in accordance with their language, context and purpose with a view to achieving a commercially sensible result.

[19] In this regard the learned Judge's reliance on the following statement from an English case, *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd*,[5] is apposite: 'An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly.'

[20] To this should be added the following statement, also from an English case, *Crowden & another v QBE Insurance (Europe) Ltd*,[6] which bears particular relevance to this appeal:

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[3] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 18.
[4] *Fedgen Insurance Limited v Leyds* 1995 (3) SA 33 (A) at 38A-E.
[5] *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57; [2017] Lloyd's Rep IR 60 (SC) para 7.
[6] *Crowden & another v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (comm); [2018] Lloyd's Rep IR 83 (Q) para 65.

'[T]here may be occasions, where there is a genuine ambiguity in the meaning of the provision, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided. In that event, the Court would be entitled to opt for the narrower construction This result may be achieved not only by the (application) of the *contra proferentem* approach but also the approach that . . . in the case of ambiguity, the Court may opt for the more commercially sensible construction . . . .'

[21] The consequence of adopting a business-like or commercially sensible construction of an insurance policy is that the literal meaning of words read in their context may have to yield to a fair and sensible application where they are likely 'to produce an unrealistic and generally unanticipated result', which is at odds with the purpose of the policy.[7] But a word of caution is warranted: courts are not entitled, simply because the policy appears to drive a hard bargain, to lean to a construction more favourable to an insured than the language of the contract, properly construed, permits. For, if that is what the insured contracted for that is what he is entitled to, and no more. It is not for the courts to construe exclusions in favour of the insured simply because it considers them to be unfair or unreasonable.

[22] I now turn to the interpretation of the exclusion clause at issue in this appeal.[8] The two exclusions with which we are concerned are first, whether the claim was *arising from or contributed to by depreciation (or failure to appreciate) of the investment* and secondly, *as a result of a representation as to the performance of any such investments.* But first, it is important to bear in mind the commercial object or purpose of the policy.

[23] Although the policy covers a wide range of insured events, including: fidelity insurance, loss of documents, negligent conduct by compliance officers, third party computer crimes, defamation and injuria, its main purpose, as the learned Judge a quo observed, is to indemnify financial advisors against their liability for negligent financial advice. This is apparent from the bold heading of the policy, which reads: Professional Indemnity Insurance for 'Members of the Financial Intermediaries

[7] *See generally* Professor J Bird et al *MacGillivray on Insurance Law* 14 ed (2018) paras 11-007–11-008.
[8] Above para 4.

Association', and its insuring provision explaining its purpose as to provide professional indemnity in respect of any legal liability 'for breach of duty in connection with the business by reason of any negligent act, error or omission committed in the conduct of the business'. Its members, as emerged from Mr Heystek's evidence, are financial advisors, who provide financial advice to their clients. Insurance companies offering indemnity insurance to financial advisors take comfort from the fact that these people have to comply with stringent requirements before they are registered. Mr Castro's business not only entailed providing financial advice relating to investments, but also included advice on other financial products including life insurance, short-term insurance and medical aid, which the indemnity covered. With that in mind we must consider the effect of the exclusion.

Contributed to by depreciation in value

[24] Centriq takes issue with the court a quo's findings that the investment was 'hopeless from the onset' and that the purpose of this leg of the exclusion is aimed at preventing an insured from claiming indemnification where the value of an investment has not grown or has reduced in value contrary to expectations. It contends that it was not established as a fact that the investment was 'worthless' at inception and that the fact that Mrs Oosthuizen was paid an amount of R1 400 a few days after her investment indicates that it had some value at inception. As regards the quantum of the loss it is contended that even if there was a total loss of the investment the capital sum must first depreciate in value before this stage is reached. On a plain reading, therefore, the exclusion clause was triggered.

[25] It is unnecessary, in my view, to engage in a semantic debate over whether the investment was worthless or hopeless from the beginning. Mrs Oosthuizen made clear in her further particulars that the investment was not a viable proposition. Mr Heystek confirmed this. It is also apparent that the only payment of R1 400 Mrs Oosthuizen received from Sharemax on 3 August 2010 – a mere five days after she made the investment – was a sweetener to dupe her and other unsuspecting investors into believing in the efficacy of the investment, reminiscent of a Ponzi scheme. No proper financial rationale was given for how this amount was generated or that it represented some intrinsic or residual value. If we test this by attempting to place a market value on the investment at its inception – determined by reasonably informed buyers and

sellers – there is no question that it would have yielded a negative result. The onus rested on Centriq to bring the claim within the exception by proving that Mrs Oosthuizen's investment initially had a material value which then declined – without decline there is no depreciation. Centriq did not discharge this onus. Mr Heystek's evidence strongly suggests that no reasonably informed buyer would have touched this scheme with the proverbial bargepole. But, as will appear from what follows, this is not the only obstacle in Centriq's way.

[26] As regards the distinction the court a quo implicitly drew between a partial loss (depreciation) and total loss, Centriq contends that this is ultimately one without a difference as the extent of the loss (depreciation) cannot logically render the exclusion inapplicable. I accept that the extent of the loss cannot be what determines whether this part of the exclusion is triggered, but this misses the point.

[27] Depreciation usually refers to the diminishing of value over time[9] and not to an investment that is not capable of generating an appreciable value from the beginning. So why does the clause refer to depreciation rather than simply to any loss in value? The court a quo correctly considered the language used as referring to the reduction in value resulting from market or investment forces rather than the type of loss that occurred here. This was also the construction the New Zealand Court of Appeal placed on a similarly worded clause in *Trustees Executors Limited v QBE Insurance (International) Limited.*[10] It makes perfect commercial sense that insurers would seek to protect themselves from claims arising from market fluctuations of investments instead of any loss from whatever cause.[11]

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[9] Concise Oxford English Dictionary 12 ed (2011).

[10] *Trustees Executors Limited v QBE Insurance (international) Limited* [2010] NZCA 608 para 51. The clause read:

'**Securities Exclusion**

Notwithstanding anything to the contrary stated in the Policy or endorsed thereon, it is hereby declared and agreed that this Policy does not provide indemnity against any Claim or Claims arising from or contributed to by depreciation (or failure to appreciate) in value of any investments, including but not limited to, property, shares, securities, commodities, currencies, options and futures or derivative transactions, or as a result of any actual or alleged misrepresentation, advice, guarantee or warranty provided by or on behalf of the insured as to the performance or characteristics of any such investments.'

[11] Ibid.

[28] But even if we accept that depreciation may refer to simple loss of value and not merely to gradual or partial loss, this part of the clause is ambiguous or unclear because it could also refer to gradual or partial loss from market or investment forces on the one hand or to total loss from whatever cause on the other. That being so the clause should be construed *contra proferentem* so as to achieve a commercially sensible result, having regard to the purpose of the contract, which was to indemnify the financial adviser against legal liability. An interpretation that renders the purpose of the indemnity nugatory hardly meets this yardstick and yields an unrealistic and unanticipated result.

Representation as to performance of the investment

[29] Centriq's reliance on the second leg of the exclusion would appear, at first blush, to rest on a stronger foundation. The argument is this: the court a quo's factual finding was that Mr Castro had induced Mrs Oosthuizen to make this unsafe investment. But for his representations as to its performance – ie that it was safe and thus would not decline in value – she would not have made the investment. The exclusion, so it is contended, was therefore triggered. The court a quo dismissed this contention. It held that Mrs Oosthuizen did not rely on representations (advice) regarding the performance of the investment, but as to the safety of it.

[30] I accept that it may be implicit in the advice regarding the safety of an investment that it will perform in a manner that yields this result. However, for the same reason I have held that 'depreciation', in the first leg of the exclusion, is likely to refer to gradual or partial loss from market or investment forces instead of total loss from whatever cause. I think that 'performance' in the context of this clause should be construed similarly.[12] It is quite clear that Mrs Oosthuizen was less concerned with how well the investment would perform but rather with whether it was safe. Most investors accept that there may be loss if an investment does not perform according to expectation. She was not such an investor. Her primary concern was that the investment was safe, that she would not lose anything, and that it would yield a consistent return to meet her needs. This was not the bargain she got. Mr Castro did

[12] Ibid.

not mislead her regarding the anticipated performance of the investment but regarding its fundamental character.

[31] Centriq ultimately accepts that its interpretation means that the purpose of the exclusion is to exclude any investment advice. In response to the criticism of the court a quo that this interpretation effectively emasculates Mr Castro's policy cover, Centriq contended that the policy was not limited to cover based on his business as an investment broker, but that he had in fact been the late Mr Oosthuizen's short-term and long-term insurance and medical broker as well. The policy therefore still indemnifies Mr Castro for negligent advice for other aspects of his business. Centriq was therefore entitled, so the contention goes, to decline to underwrite investment risk of any type, even when the client had done so on the basis of negligent advice or misrepresentation as to the true qualities of the investment.

[32] But there are at least two difficulties with this submission: First, the policy was not framed with Mr Castro in mind. Centriq offered this policy – and presumably still does – to all 'members of the Financial Intermediaries Association', including Mr Castro. Their main business is to offer financial advice. It is difficult to accept that it was the mutual intention of these members and Centriq to exclude all coverage for their investment business.[13] Secondly, if Centriq sought to achieve this type of exclusion, it should have done so with much clearer language. Instead, it chose obscure language. It bears the onus to bring itself within the exclusion, and cannot now complain if it is unable to do so.

[33] I therefore come to the conclusion that the court a quo correctly upheld Mr Castro's claim to be indemnified in accordance with the terms of the policy. It follows that Centriq's appeal must fail. The following order is made:
The appeal is dismissed with costs including the costs of two counsel.

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A Cachalia
Judge of Appeal

[13] *Compare: Trustees Executors Limited v QBE Insurance (International) Limited* fn 10 para 51.

Appearances

For the Appellant:	C E Watt-Pringle SC (with him C C Bester)
Instructed by:	Andrew Miller & Associates, Sandton
	McIntyre Van der Post, Bloemfontein
For the Second Respondent:	J F Mullins SC (with him P J J Zietsman)
Instructed by:	Blair Attorneys, Bloemfontein