THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 116/2018

In the matter between:

ATWEALTH (PTY) LTD	First Appellant
ANDREA MOOLMAN	Second Appellant
VAIDRO 172 CC	Second Appellant

and

ALAN KERNICK	First Respondent
FIONA KERNICK	Second Respondent
KERNICK CONSULTING LTD	Third Respondent

Neutral citation: *Atwealth (Pty) Ltd & others v Kernick & others* (116/2018) [2019] ZASCA 27 (28 March 2019)

Coram: Wallis, Zondi and Dambuza JJA and Davis and Rogers AJJA

Heard: 20 February 2019

Delivered: 28 March 2019

Summary: Financial advisor – liability for loss incurred on recommended investments – what constitutes financial advice – whether evidence sufficient to conclude that financial advisor breached her legal duties.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Molony AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court *a* quo is set aside and replaced by:

'The action is dismissed with costs.'

JUDGMENT

DAVIS AJA (Wallis, Zondi and Dambuza JJA and Rogers AJA concurring)

Introduction

[1] This case concerns the liability of an investment advisor who rendered financial advice to her clients. The latter suffered significant financial loss on the investments entered into following a presentation made by the financial advisor.

[2] The first and second respondents are husband and wife while the third respondent is a close corporation owned by them. I will refer to them collectively as the Kernicks. Their case can be summarised thus: during the period 2009 to 2010 second appellant, Ms Moolman, rendered financial advice to them in the course and scope of her employment with first appellant (Atwealth) and thereafter in 2011 with third appellant (Vaidro). The Kernicks contended that the advice given by Ms Moolman was to invest their funds in certain investment products offered by the Relative Value Arbitrage Fund (RVAF) and associated products and MAT Abante UK Relative Value Arbitrage Fund and MAT Worldwide Ltd ('the investment companies'), of which MAT Securities (Pty) Ltd was the fund manager. This range

of potential investments was said to fall under an entity referred to as Abante Capital.

[3] The Kernicks further contended that they were assured by Ms Moolman that these investment companies generated higher returns through legitimate investment vehicles than was the case with alternative financial products. It was common cause that this did not prove to be the case. Mr and Mrs Kernick made the following investments:

Date of investment	Amount	Investment Company
20/01/2010	£100 000	MAT Worldwide
01/08/2010	£70 000	MAT Worldwide
01/07/2011	£45 000	MAT Worldwide
28/10/2011	R700 000	RVAF
01/03/2012	£150 000	MAT Worldwide

Kernick Consulting made the following investments:

Date of investment	Amount	Investment Company
01/09/2009	£50 000	MAT Worldwide
01/10/2010	£100 000	MAT Worldwide
01/02/2012	£50 000	MAT Worldwide

[4] The Kernicks sued appellants on the basis that Ms Moolman, who, at the relevant times, was either in the employ of Atwealth or Vaidro, had failed to comply with the legal duties which she owed to them and had given negligent advice. This failure had caused them significant financial loss as the investment companies in which they invested did not produce positive investment returns but paid returns out of investor funds. On the basis that their investments had been entirely lost, they said that Kernick Consulting suffered damages in the amount of £50 000 as a result of the negligence of Atwealth and Ms Moolman and damages in the amount of £150 000 as a result of the negligence of Vaidro and Ms Moolman. Mr and Mrs

Kernick additionally suffered damages to be paid by Vaidro and Ms Moolman in the amounts of £365 000 and R 700 000.

[5] The court *a quo* upheld all of these claims and granted judgment accordingly together with interest and costs. This appeal is with its leave.

The conduct of the Kernicks' case

[6] Ordinarily, in a case of this nature, the claim is pursued on the simple basis that the investment advisor furnished negligent advice to the investor and the investor suffered loss in consequence of following that advice.[1] For some inexplicable reason that was not the approach adopted by the Kernicks' attorney as is clear from that which follows. The central allegations contained in the particulars of claim were:

'9. The defendants at all material times rendered financial advice to the plaintiffs. For the period 2009 to January 2010 the second defendant rendered such financial advice during the course and scope of her employment with the first defendant and thereafter during the course and scope of her employment with the third defendant.

10. The defendants advised the plaintiffs to invest funds in investment products offered by the Relative Value Arbitrage Fund ('RVAF') and associated products and MAT Abante UK Relative Value Arbitrage Fund and MAT Worldwide Ltd ('The Investment Companies').MAT Security (Pty) Limited was the fund manager of MAT Worldwide Ltd. *The defendants assured the plaintiffs that the investment companies generated high returns and were bona fide legitimate investment vehicles. However this was indeed not the case and the investment companies used investor funds to pay returns to other investors. The investment companies did not hold licences under FAIS and did not invest the funds of investors but paid the investment returns out of investment capital. The investment companies did not produce any financial records.'* (Emphasis added.)

[7] The specific case arising from these allegations was that the investments into which Ms Moolman advised the Kernicks to put their money were not what she

[1] *Durr v Absa Bank Ltd and Another* 1997 (3) SA 448 (SCA); *Centriq Insurance Company Limited v Oosthuizen and Another* [2019] ZASCA 11.

represented them to be. They were part of a scheme under which the investment returns were not genuine, but, when paid, were paid out of the capital invested. Such a scheme can only survive so long as there are sufficient new investments to pay returns not reinvested and to allow for withdrawals. In common parlance, this is known as a Ponzi scheme.

[8] Liability for the losses occasioned by placing the Kernicks' investments in such a scheme was said to arise from the fact that Ms Moolman had given them 'financial advice' and in doing so breached a lengthy list of duties, set out in paragraph 16 of the particulars of claim and said to have been owed by her to the Kernicks. The origin of these duties was that, as a licensed financial services provider, Ms Moolman owed her obligations to the Kernicks in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) and the various codes of conduct promulgated under that Act, which she had breached.

[9] This approach by the Kernicks' attorney, who appeared in the high court and in this court, resulted in the trial very largely being conducted on the basis that what mattered was whether the provisions of the FAIS Act applied to the RVAF and the MAT Worldwide Fund; whether what Ms Moolman amounted to the giving of financial advice as defined in the FAIS Act; and whether she complied with various duties imposed on her by the codes. This proceeded from a misconception that, if Ms Moolman's conduct could be so classified, liability to compensate the Kernicks for their losses followed automatically. That was wrong as a matter of law. Their claim was one in delict based upon negligence. On its own a breach of any obligations owed to the Kernicks by Ms Moolman under the FAIS Act or its codes of conduct would not fulfil all the requirements for a claim based in delict.

[10] The legal problems in relation to the circumstances in which a breach of statutory duty gives rise to a claim for damages in delict were not explored at any stage, including the argument in this court. No proper consideration was given to the issue of negligence. No endeavour was made to ensure that all of the issues relevant to a claim based on negligence were addressed either in evidence or

argument. However, before us it was accepted that, unless a claim based on negligence on the part of Ms Moolman was established, the Kernicks could not succeed. Against that background I turn to the facts.

The facts

[11] On 23 March 2009 Atwealth and Ms Moolman entered into a memorandum of agreement in terms of which Ms Moolman was appointed as a financial advisor by Atwealth 'in the area of Financial Planning and Selling of approved financial products from the commencement date.'[2]

[12] Sometime in 2009, Ms Moolman received a telephone call from Mr Kernick requesting a meeting, which took place in Port Elizabeth at the Kernicks' residence. At this point she was employed by Atwealth. The evidence regarding this meeting is unfortunately devoid of essential detail. To the extent that the content of this meeting can be divined from the evidence it is as follows: Although the Kernicks were primarily resident in the United Kingdom, they had settled in Port Elizabeth in 2009, albeit on a temporary basis. A sister of a friend, Ms Marina Baard, had told them that she 'had done very well' out of investments recommended by Ms Moolman. The Kernicks informed Ms Moolman that they did not want their entire portfolio reviewed. The advice they sought was limited, in that they 'had spare cash available'. They were seeking advice solely on how best to invest this sum.

[13] Ms Moolman made a presentation to the Kernicks, including a description of Abante Capital (Pty) Ltd as 'a South African hedge fund management company: Abante's funds each focus on the core strategy of quantitative arbitrage'. From the documents which she claimed to employ during her presentation, it appears that she introduced them to two specific products, namely RVAF and a product described as Bridgefin.

[14] According to Mr Kernick, Ms Moolman spoke of RVAF as a:

[2] Clause 1 of the Memorandum of Agreement between Atwealth (Pty) Ltd & Andrea Moolman.

'product that was invested in the top twenty shares, sorry forty shares in either the UK or South Africa, depending which fund you were in. Sorry there was the RVA and the MAT Worldwide. And then the top forty shares were traded electronically, which appealed to us, and they were based on sectors so there was a technical sector or a financial sector. And based on fluctuations within a sector which share would be traded, either bought or sold. So they didn't look at it as a day-to-day what shares are doing well, they looked at it by sector.'

[15] Mr Kernick emphasised that it was important to both him and his wife that the RAV fund 'was invested in the top equities in the country or the top shares, so we felt that was more to our liking.' He said of the products which Ms Moolman introduced:

'… [I]t was in equities, and a known asset effectively, not in properties or something. It was known in the top 40 companies on the stock market. The second thing we enjoyed about it was that the trading was very much computerised or we were led to believe computerised and which took the human emotion out of it. We wanted something that would trade, you know, based on fact not on hearsay. And then the third thing was the returns indicated to us, was why we invested [in] it.'

Events following the meeting of August 2009

[16] Following this meeting, on 1 September 2009, Kernick Consulting made an investment of £50 000. According to Mr Kernick:

'I decided after that meeting, two weeks later, to invest £50,000,00, whatever that might be in Rands. Then after further communication with her and advice and further meetings on what other products there are to invest in, I invested more. So it wasn't just on one meeting that I invested R8m. Despite this there was no evidence of any further meetings with Ms Moolman, or any communications and advice received from her before the future investments were made.'

[17] On 21 October 2009 Ms Moolman resigned from Atwealth and on 22 October 2009 entered into an agreement with Vaidro in terms of which:

'VAIDRO 172 t/a VAIDRO INVESTMENTS will appoint the representative as a representative of it, to enable the representative to render financial services to its clients. The FSP [VAIDRO] will [e]ffect registration of the entity as a representative on its licence with the FSB.'

[18] On 19 December 2009 Mrs Kernick emailed Ms Moolman to say that they were back in the United Kingdom after their 18-month sabbatical in South Africa. They wanted to invest some money in 'UK RVAF' in their personal capacities. She asked what they needed to do. In a follow-up email of 11 January 2010 she asked whether Ms Moolman's new email address meant that the latter was no longer working for Atwealth. On 13 January 2010 Ms Moolman replied, writing inter alia the following:

'As Atwealth did not qualify to submit business to Abante Capital, it was decided through discussion with Abante that it would be preferable that I continue representing Abante under our Vaidro logo – I have been representing Abante Capital for a number of years now and they were not at ease with the Atwealth team, and rather wanted me to represent them under my own business capacity. As Abante Capital has always been our core investment, we decided to revert to our original manner of transacting in the interests of investor relations.'

[19] In this email Ms Moolman indicated that they could follow the same procedure as before to make investments in their personal capacities. They did so by way of an investment of £100 000 on 20 January 2010 and an additional amount of £70 000 on 1 August 2010. On 1 October 2010 Kernick Consulting invested a further amount of £100 000, all of which investments appear from the table set out above.

[20] There was no further communication between Ms Moolman and the Kernicks until 27 April 2011 when Mr Kernick emailed Ms Moolman to say that they were thinking of investing some money in South Africa as they planned to come and live here on a more permanent basis. To date they had only invested in the 'UK RAVI'.

When they had first met Ms Moolman, she had mentioned two investments, namely 'RAVI' and Bridgfin. They anticipated that after the initial six months of the investment they would need to draw interest every three months. Mr Kernick asked Ms Moolman to give them 'details and options on what you currently have available'.

[21] On 28 April 2011 Ms Moolman replied, writing the following (corrected for grammatical errors):

'As interest rates are at a historic low in South Africa, fixed interest investment options are not doing well as they are linked to prime interest rate.

Therefore at the moment we are not utilising Bridgfin as the rates currently are below what we feel can be achieved.

What we are doing in the interim is making use of the Ravi South African account, and structuring the investment to meet the income requirements of the client.

For the last tax year (2010-2011), the net return on the Ravi SA Investment was 20% net to the Investor.

Depending on the client's income needs, what we like to do is take 10% off for income, which then will still enable the investment to grow by ± 10% pa. In this way, as the investment capitalizes, the next year's income increases pro rata with the capitalization of the return – effectively exceeding inflation.

However if higher income is required off capital, all returns can be taken, however one's investment is then not going to increase in capital value.

In practice how this would work is the following: we withdraw amounts every 3 months (or 6 months according to client's preference), this allows the remaining capital to capitalize the quarter's return (in a compounding effect).

Another option for a 15% dividend pa (paid annually) in April, is the Avalloy Venture capital deal with Abante/Rolls Royce. However one must always bear in mind the risk associated with venture capital.'

[22] The following day Mr Kernick responded and said 'I think we will go ahead with the RAVI option.' On 4 May 2011 the Kernicks submitted an application in their personal capacity to invest R550 000. In fact three further investments were then made by the Kernicks, being R700 000 on 28 October 2011, £50 000 on 1 February 2012 and £150 000 on 1 March 2012.

The judgment of the court *a quo*

[23] The court *a quo* did not decide the dispute on the basis of the August 2009 meeting, but concentrated on the implications of Ms Moolman's email of 27 April 2011. But that approach overlooked the pleadings, for in the respondents' particulars of claim it is clear that their case was made out thus:

'The defendants at all material times rendered financial advice to the plaintiffs. For the period 2009 to January 2010 the second defendant rendered such financial advice during the course and scope of her employment with the first defendant and thereafter during the course and scope of her employment with the third defendant.'

[24] In the first instance the legal implications of the August 2009 meeting are critical to the disposition of this case; in short, did second appellant furnish negligent financial advice to the Kernicks at that meeting such that it induced the latter to invest? If she did not, that is fatal to all the claims up until the later email of 27 April 2011, after which it is necessary to engage in the same enquiry in relation to the later investments.

Appellants' case

[25] Central to appellants' case was whether Ms Moolman provided advice to the Kernicks and, if so, whether this advice, failed to comply with Ms Moolman's legal duties and caused the Kernicks to invest in ill-fated products. Before the court *a quo* and again in this Court, counsel for both parties focussed their arguments on whether Ms Moolman breached the provisions of the FAIS Act read together with the General Code of Conduct for Authorised Financial Service Providers and

Representatives (the Code).[3] There was some debate before us in regard to the applicability of these provisions as hedge funds were not regulated by the Financial Services Board until 1 April 2015, when they were declared to be collective investment schemes in terms of s 63 of the Collective Investment Schemes Control Act 45 of 2002. Ultimately, however, nothing turned on this, as the provisions of the FAIS Act and the Code referred to hereafter mirror, for present purposes, the legal duties of a financial adviser under our law governing liability for negligent acts.

[26] The Code provides that an authorised financial service provider 'must at all times render financial services honestly, fairly, with due skill, care diligence and in the interests of clients and the integrity of the financial services industry'. The FAIS Act defines financial service to mean any services contemplated in paragraphs *(a)*, *(b)* or *(c)* of the definition of 'financial services provider', including any category of such services.

[27] Financial services provider (FSP) is defined to mean:

'Any person, other than a representative, who as a regular feature of the business of such person-

(a) furnishes advice; or

(b) furnishes advice and renders any intermediary service; or

(c) renders an intermediary service'

[28] 'Advice' is defined in the FAIS Act as follows:

'… [S]ubject to subsection (3)*(a)*, any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients–

(a) in respect of the purchase of any financial product; or

(b) in respect of the investment in any financial product; or

[3] Board Notice 80 2003 issued in terms of the Financial Advisory and Intermediary Services Act.

(c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or

(d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product,

and irrespective of whether or not such advice –

(i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or

(ii) result in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected.'

[29] Subsection 1(3)*(a)* restricts the scope of 'advice'. To the extent relevant, it provides thus:

'(3) For the purpose of this Act –

(a) advice does not include –

(i) factual advice given merely –

(aa) on the procedure for entering into a transaction in respect of any financial product;

(bb) in relation to the description of a financial product;

(cc) in answer to routine administrative queries;

(dd) in the form of objective information about a particular financial product; or

(ee) by the display or distribution of promotional material;

(ii) an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client;'

[30] Ms Moolman's counsel contended that she had merely given the Kernicks objective information about particular financial products and, at best for them, no more than advice on the procedures for concluding an investment transaction. In counsel's submission this did not constitute 'advice' as defined in the FAIS Act. Furthermore, he contended that the Kernicks had invested in a hedge fund, which was structured as an *en commandite* partnership. He submitted that a hedge fund or a partnership of this particular kind did not constitute a 'financial product' as

defined in terms of the relevant law as it existed in 2009 and therefore, whatever Ms Moolman might have told the Kernicks, it could not have constituted 'advice' for the purposes of the FAIS Act read together with the Code.[4] The difficulty with these contentions was that, even if they had merit, on a careful parsing of the language of the FAIS Act, the presentation by Ms Moolman constituted, in ordinary parlance, the giving of financial advice, at least in the form of product information, to the Kernicks. It was advice on which they clearly intended to rely and on which they were entitled to rely, coming as it did from a professional financial advisor from whom they had sought that advice.

[31] Counsel further submitted that Ms Moolman had done no more than render an intermediary service. In her testimony when asked about the emails exchanged between herself and the Kernicks requesting the sending of proof of payment or making other requests, she said of this relationship 'I was their secretary, low paid secretary'. Factually that was incorrect. She had gone to the meeting with the purpose of furnishing information about two investments in which the respondents subsequently invested. She was asked to go to the meeting because of her professed knowledge and experience in this area. That constituted the giving of advice in any ordinary understanding of the term.

[32] That conclusion accords with the evidence given by both Mr and Mrs Kernick, which was that they were given advice regarding investment avenues for their 'spare cash', being the RVAF and the Bridgefin products. In terms of their evidence, the presentation went well beyond a description of financial products. The entire presentation was directed to two products, which would meet their investment needs.

[33] The initial investment took place shortly after the presentation by Ms Moolman to which reference has already been made. It is clear from the documents

[4] In this reference was made to Government Notice 141 of 2015 in which hedge funds were declared as of 1 April 2015 to be collective investment schemes in terms of the Collective Investments Schemes Control Act of 2002. This legislation did not apply retrospectively.

that formed the basis of the presentation that this took the form of a proposal and constituted guidance in respect of the purchase of specific financial products. The conduct went much further than a mere description of financial investments and the mechanism by which the Kernicks could invest therein. In my view, the information furnished was designed to induce them to invest in these particular products, for which Ms Moolman was to receive a commission. That inducement continued to operate in respect of the subsequent investments in 2010 and was compounded by the email of 28 April 2011, quoted in para 21. This in turn continued to operate on the investments made after that date.

Ms Moolman's legal duties

[34] A finding that Ms Moolman gave financial advice gives rise to the further question as to whether she complied with her legal duties to the Kernicks and hence, whether in terms thereof, she acted wrongfully and negligently. The answer depends in the first instance on both the level of skill and knowledge required of an advisor in the position of Ms Moolman and whether someone with the requisite skill and knowledge would have advised the Kernicks differently in the context of the present dispute.

[35] Section 3 of the Code provides guidance as to what is required from the appropriately skilled financial advisor, whether viewed from the perspective of a breach of the Code or from the perspective of a delictual claim. When a financial services provider renders a financial service –

'(a) representations made and information provided to a client by the provider;

(i) must be factually correct;

(ii) must be provided in plain language, avoid uncertainty or confusion and not be misleading;

(iii) must be adequate and appropriate in the circumstances of the particular financial services taking into account the factually established or reasonably assumed knowledge of the client;

. . .'

This provision needs to be read together with the general duty of providers as set out in section 2 of the code:

'General duty of provider

A provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interest of clients and the integrity of the financial services industry.'

[36] These provisions are clearly congruent with the common law duties of a professional investment advisor. These were analysed in *Durr v Absa Bank Ltd & another.*[5] In his judgment,[6] Schutz JA cited with approval a passage from Joubert (ed) *The Law of South Africa*:

'The reasonable person has no special skills and lack of skill or knowledge is not *per se* negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.'

[37] Referring to an investment advisor employed by a bank who had given financial advice, Schutz JA said:

'The Durrs accepted his advice and relied on it. He knew that. It was what he had intended should happen. This, to my mind, defined his duty to the Durrs. He had advised them to embark upon what was in effect moneylending. Lending money is a potentially dangerous activity. He had investigated the debtor and found it sound, he said. Mrs Durr was entitled to see him as a man skilled to advise her on such matters and as one backed by a major bank: not as one devoid of skill in assessing creditworthiness and unready to seek help. The duty is established.'[7]

[38] Following this decision in *Durr v Absa Bank Ltd & another, supra* Neethling, Potgieter and Visser[8] illustrate the legal position in the following passage:

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[5] *Durr v Absa Bank Ltd & another* 1997 (3) SA 448 (SCA) relying on *Van Wyk v Lewis* 1924 AD 438 at 444.
[6] Id at 468E-G.
[7] At 468H-I. See also *Page v First National Bank* 2009 (4) SA 484 (E) paras 13-15.
[8] Neethling, Potgieter and Visser *The Law of Delict* 7 ed (2015) at 147.

'Mention should also be made of the maxim *imperitia culpae adnumeratur*. Taken literally, this maxim means that ignorance or lack of skill is deemed to be negligence. This maxim is, however, misleading because our law does not accept that mere ignorance constitutes negligence. The principle embodied in this maxim applies where a person undertakes an activity for which expert knowledge is required while he knows or should reasonably know that he lacks the requisite expert knowledge and should therefore not undertake the activity in question. An example of this is where X, who has no expertise in piloting an aircraft, flies an aircraft and causes an accident. X's blameworthiness in this example is not to be found in his incompetence in piloting an aircraft, but in the fact that, while he knows or should reasonably know that he is incompetent, he nevertheless attempts to perform the expert activity.'

Breach of duty?

[39] There were undoubtedly limitations to Ms Moolman's knowledge in regard to the nature of the investments to which she introduced the Kernicks. This was exposed to some measure in cross-examination, but the nature of that cross-examination calls for comment. In the first instance, it was misdirected, because it proceeded on the basis that the Kernicks' case lay in a breach of Ms Moolman's duties in terms of the FAIS Act and the Code, with negligence being, at the most, incidental.

[40] Secondly, because of the misconception as to the proper legal basis for the claim, Mr and Mrs Kernick's evidence concerning the crucial meeting in August 2009 was cursory in the extreme. The only questions addressed to Mr Kernick in that regard prompted the answer quoted above in para 14 and the further proposition that Ms Moolman did not use the word 'hedge fund'. The reliability of much of Mr Kernick's evidence regarding the investments was limited as it was prompted by a series of grossly leading questions. One stark example was the following:

'MS MARKS: Could Moolman have foreseen that if the information and advice she gave you was not correct that you would have lost monies in that scheme? Do you think that she

could have foreseen it, that if she gives you information that is not correct and you invest in this kind of scheme? _ _ _ I'm sure she could have foreseen it, yes.
Would you think she could have? _ _ _ Yes.'

No attempt had been made, or was made thereafter, to lay the necessary factual foundation for a later attack on the factual correctness of the advice given by Ms Moolman. Consequently there was very little material available to the cross-examiner to suggest to Ms Moolman that the information she provided was inadequate or misleading, or that she had made any false representations to the Kernicks. In the result no such suggestion was put to her.

[41] In order to lay a foundation for an attack on Ms Moolman's abilities as a financial advisor and on the advice she gave it was essential in the first instance to establish as clearly as possible what she told the Kernicks in regard to these investments. That was not done and the topic was not explored with Ms Moolman because of the cross-examiner's exclusive reliance on the FAIS Act and the Codes. Secondly, it called for evidence on behalf of the Kernicks to identify what a reasonably skilled financial service provider would know about products in the market place; what due diligence they would have done before making a presentation to a prospective client and what sources of information they would have consulted.

[42] One would have expected there to be evidence that in 2009, and again in 2011, such a person would have counselled against investing in the RVAF, or other products marketed and managed by Abante Capital, or advised that they were extremely high risk. No such evidence was called and the cross-examination proceeded on the basis of the attorney's beliefs as to what was required from a financial service provider. There was no factual foundation for those beliefs. The notion, to give one example, that financial institutions such as Abante would be willing, much less obliged, to disclose to advisers such as Ms Moolman details of their investment portfolios, trading activities and their balance sheets was simply far-fetched.

[43] A significant passage in the record reflects this problem. It read:

'MS MARKS: And how did you evaluate that this is true? _ _ _ This is data supplied by Abante Capital.

You didn't evaluate it? Are you aware of a duty on yourself in terms of the discretionary code to only provide true factual information to persons?

MR DALING: M'Lady I just want to ascertain whether my learned colleague is going to call anybody to show that that is not true?

MS MARKS: No I'm not. I'm just going to establish whether or not there is a duty on her to establish factual [information].'

[44] No evidence was led to show that any information provided by Ms Moolman to the Kernicks was in any respect untrue or factually incorrect. The cross-examination about the scope of her obligations was thereby rendered entirely pointless. Unless what Ms Moolman said to the Kernicks was factually incorrect or misleading, whether by commission or omission, it cannot have had any effect on their decision to make these investments. And if she did not mislead the Kernicks – something that was never put to her in cross-examination – her limitations as a financial adviser were irrelevant. Liability in delict arises from wrongful and negligent acts or omissions and there was simply no attempt to establish that there were any on the part of Ms Moolman.

Conclusion

[45] The consequences of the deficiencies in the evidence presented, by the Kernicks are best illustrated by reference to the well-established test for negligence as set out by the court in *Mukheiber v Raath & another*[9] as follows:

'The test for *culpa* can, in the light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A), be stated as follows (see Boberg *The Law of Delict* at 390):

For the purposes of liability culpa arises if –

(a) a reasonable person in the position of the defendant –

(i) would have foreseen harm of the general kind that actually occurred;

[9] *Mukheiber v Raath & another* 1999 (3) SA 1065 (SCA) at 1077E-F.

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps.'

[46] What then is the standard of the reasonable person in this case? The test for negligence must inevitably be grounded upon the factual matrix of the dispute requiring adjudication.[10] Schutz JA in *Durr v Absa Bank Ltd* cited with approval the following dictum from *Van Wyk v Lewis* at 444:[11]

'And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that level.'

[47] Whatever the evidence regarding Ms Moolman lacking the requisite knowledge to conduct a due diligence of the very product she sought to market and sell, her lack of skill and knowledge, was insufficient to find her negligent, except in the abstract sense that she was negligent in embarking on the presentation without properly informing herself about the products. Whether such negligence was actionable depended on the further question whether, had she undertaken the necessary research, her presentation would have been materially different to the one she in fact made and whether the respects in which it might have differed from the one she actually made would have caused the respondents to react differently to the way they did. To put the matter more plainly, a person who embarks on a dangerous activity without having the requisite skill may nevertheless, albeit fortuitously, 'get it right'.

[10] *Durr* fn 6 at 463G-H.
[11] Id at 460H-J.

[48] There has been a debate among legal commentators concerning the absolute or abstract theory of negligence as opposed to the relative theory.[12] As this Court held in *Sea Harvest Corporation v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at 837, in the final analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person.

[49] In the present case, as has been emphasized no evidence was led by the Kernicks regarding what a reasonable financial advisor, possessed of the requisite skills, would have advised them. No evidence was led which engaged with the vital question: what advice would a reasonable financial advisor have given the Kernicks about RVAF and related products in 2009? It was conceded by appellants, in answer to a question as to whether fraud was committed by people in control of Abante, that 'in hindsight' Mr Herman Pretorius, the chairman of Abante Capital, and others, had acted fraudulently, which fraud was the cause of the loss. The collapse of Abante Capital and associated companies, and hence the loss caused to the Kernicks occurred, in 2012. This Court is left in the dark as to what advice a reasonable financial advisor would have given in 2009 about these particular investments. The Court is left without any evidence on the record about the nature of the fraud supposedly perpetrated and what the true state of affairs was concerning Abante and the relevant hedge funds in 2009 on the one hand and 2012 on the other.

[50] No evidence was tendered to explain why the RVAF and MAT Worldwide went insolvent. The court is left without evidence as to whether they were indeed part of a Ponzi scheme as alleged, or when and in what circumstances such scheme had commenced and operated.

[51] Assuming some of the information that Ms Moolman had in her possession, in the documents identified as forming part of her presentation to the Kernicks, was

[12] M Loubser and R Midgley *The Law of Delict in South Africa* 2 ed (2012) at 120-121.

incorrect, that did not mean that she was in any way negligent, unless it could be shown that she communicated this information to the Kernicks in circumstances where she should have been aware of the deficiencies. That would require evidence of what would constitute a proper exercise of due diligence, but such evidence was not led. Overall, any doubts about Ms Moolman's skills and knowledge of financial matters are overwhelmed by the absence of any evidence concerning what occurred at the critical meeting in August 2009, what the situation of Abante Capital and the funds was in 2009 and what led to the collapse in 2012.

[52] It was also common cause that in 2008 Abante Statistical Advantage had won a hedge fund award and that during this period both Old Mutual and Momentum had invested in Abante products. Ms Moolman had visited Abante's head office and observed the trading operation. There is no evidence that in 2009 Abante was not in fact following the trading strategies which impressed the Kernicks. There is no evidence that it was not in fact making the returns which Ms Moolman represented. There is no evidence that the entire operation was vitiated by fraud as early as 2009. Such slender indications as there are in the record suggest that Abante's hedge fund products had been in existence for a number of years by 2009. There is no evidence which even suggests that different advice would have been given in 2009 by a reasonable financial advisor concerning these particular investments or that it would have been sufficiently different to deter the Kernicks from making their investments.

[53] In summary, the limited evidence concerning the contents of the critical meeting of August 2009, which induced the Kernicks to invest, cannot be employed to assess what a reasonable advisor would have counselled during the relevant period, from August 2009 to 2010. The failure to produce any expert evidence concerning what advice would reasonably have been given in 2009 concerning RVAF means that it is not possible to find in favour of the Kernicks. It is they who bore the onus to show that a reasonable financial advisor, dispensing financial advice to respondents in 2009 concerning RVAF and related investments, would

have sounded warnings of a kind that would have caused them to refrain from investing in hedge funds operated by Abante Capital .

[54] In this respect, the difference between the present case and *Durr* is striking. In *Durr* the plaintiff had called two experts while the defendants had called another expert. One of the plaintiff's experts provided the court with a detailed analysis of the true state of affairs within the Supreme Group at the time the plaintiff made her investment and subsequently, and all three experts gave evidence as to what a reasonably competent financial advisor would have concluded concerning the Supreme Group at the time the plaintiff was advised to make her investment. Such evidence is altogether lacking in the present matter.

[55] It follows that the Kernicks have not discharged the requisite onus of proving that any negligence Ms Moolman may have displayed, by making a presentation without adequate knowledge of the proposed investments, resulted in advice materially different from that which a reasonably competent advisor would have given.

[56] The appeal is upheld with costs. The order of the court *a quo* is set aside and replaced by:

'The action is dismissed with costs.'

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D Davis

Acting Judge of Appeal

APPEARANCES:

For the Appellant:	M Daling Instructed by: Laas & Scholtz Attorneys, Durbanville Webbers, Bloemfontein
For the Respondent:	JS Marks of: June Stacey Marks Attorneys, Sandown Claude Reid Incorporated, Bloemfontein