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Maritime, International Trade and Insurance

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On 14 March 2019, in *Centriq Insurance Company Limited v Oosthuizen & Another (237/2018) [2019] ZASCA 11*, the Supreme Court of Appeal ("SCA") delivered judgment in an appeal from the Free State Division of the High Court concerning 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 negligent act, error or omission'.

The *court a quo* considered whether the insured, a financial advisor, was liable to a client whom he had advised to invest in a scheme. The investment did not perform as advised and the client lost her capital investment. In the ensuing action against the insured, his professional indemnity insurer was joined as a third party. The *court a quo* thus considered whether the policy was obliged to respond in the event that it found against the financial advisor.

The claim arose after the insured advised the client to invest in the "Sharemax scheme". The investment was in a property development scheme known as the 'The Villa Retails Park Holdings 2'. The Villa was a 'to be completed' shopping complex development which the SCA likened to a Ponzi scheme. The development ultimately failed due to contraventions by Sharemax of the Banks Act 94 of 1990.

The insured's advice was furnished despite the client's indication that she sought a "safe" investment. The *court a quo* found that the advice furnished to the client by the insured constituted a breach of his fiduciary duties. On appeal, the SCA confirmed that this finding was "unassailable".

The SCA then turned to consider whether the insurer was liable to make payment under the professional indemnity policy.

The insurer, which had repudiated the claim under the Policy, relied on two provisions in the exclusion provisions of the Policy, namely:

1) the first was that the claim arose from or was contributed to by depreciation (or failure of the investment to appreciate) in value; or

2) the second was that the investment in question was undertaken pursuant to a representation, guarantee or warranty by the insured as to the performance of the investment.

The SCA began its analysis by setting out the general principles applicable to the interpretation of insurance contracts. It pointed out that any provision that places a limitation on an obligation to indemnify should be restrictively interpreted.

The underlying rule of the interpretation of any insurance policy is that a business-like or commercially sensible approach should be taken to interpretation but because insurance contracts have "a risk-transferring purpose containing particular provisions" the interpretation of insurance contracts is slightly nuanced. This does not entitle courts to interpret policies in favour of the insured simply because the policy appears to drive a hard bargain. A balance must be struck between what the insured contracted for and is entitled to under the Policy and an interpretation that may produce an unrealistic and generally unanticipated result.

In casu, the SCA concluded that the main purpose of the policy was to indemnify financial advisors against their liability arising from negligent professional advice.

The SCA interpreted "depreciation in value" in the policy to refer to the diminishing of value over time due to market forces. The SCA distinguished the investment in question as one which was *incapable* of generating value. The SCA thus found that the exemption did not apply.

The SCA then turned to the exclusion targeting representations as to the performance of investments. It found that the client did not rely on representations regarding the performance of the investment, but rather the safety thereof. Implicit in that reliance is an expectation that the investment will perform "safely". The SCA found that the client was more concerned with safety than she was with performance, and it concluded that the exclusion had not been triggered.

The insurer advanced a final argument to the effect that the exclusion had been deliberately inserted, as the policy was designed to cover other types of negligence on behalf of the insured (the insured's business was also to broker short term and long term insurance as well as medical aid insurance). The SCA did not accept this, pointing out that the main business of the financial advisor was to render financial advice, and that such activities must necessarily be covered by the policy. If that was not the case, it was for the insurer to employ clear and unambiguous wording in its exclusions.

This case is a sober reminder to insurers of the dangers of ambiguous policy drafting. Coupled with the obligations imposed in the Policyholder Protection Rules, insurers must ensure that their policy wording will withstand scrutiny. Financial advisors are also cautioned to ensure that their professional indemnity insurance is properly tailored to the peculiarities of their business.

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