Purpose and simple language take precedence

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Polity

On 14 March 2019, the Supreme Court of Appeal (SCA) dismissed an appeal by Centriq Insurance Company Ltd (Centriq) against a ruling of the Free State High Court holding liable a financial advisor under a professional indemnity insurance policy.

The SCA held that Centriq could not rely on an exclusion in the policy that was at odds with its purpose, which was to indemnify a financial advisor for breach in connection with negligent financial advice.

The financial advisor, Mr Jose Francisco Castro (the insured), had advised a widow, Mrs Marisa Vogel Oosthuizen (Oosthuizen), to invest the proceeds of her deceased husband's policy in an amount of ZAR2 million in Sharemax Investments (Pty) Ltd (Sharemax) in a property development scheme known as "The Villa Retail Parks Holding 2". The villa was a yet to be completed shopping complex, a fact that the insured did not draw to Oosthuizen's attention. The development failed following a Reserve Bank investigation, which found that Sharemax was contravening the Banks Act 94 of 1990 by taking deposits illegally.

Oosthuizen lost almost everything. She sued the insured, who in turn claimed the indemnity from 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 exclusion clause read as follows:

> "The insurers shall not indemnify the insured in respect of any loss arising out of any claim made against them:
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> In 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 future 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 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."

Centriq relied on an exclusion clause that excluded it from having to indemnify an insured member in respect of any third party claim arising from or contributed to by depreciation in value of any investments, or as a result of any representation as to the performance of any such investments.

The SCA confirmed the finding of the High Court that the investment was not viable at all and that Oosthuizen's complaint was neither that that the investment had depreciated, nor performed inadequately, but rather that it was not a safe investment having regard to her needs. The court remarked that the onus rested on Centriq to bring the claim within the exception by proving that Oosthuizen's investment initially had a material value which then declined, without decline there is no depreciation and it did not discharge the onus. On this score, the court held that:

> "Depreciation usually refers to the diminishing of value over time 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*. 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.
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> 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."

The issues raised in this case 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. The

courts will interpret exclusion clauses in professional indemnity policies restrictively, in particular, if the language used is vague and unambiguous and goes against or its odds with the purpose for which cover is sought. While the judgment re-emphasises the right to claim against a professional indemnity policy, evidently every case will be judged on its own merits.

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