IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: 2858/2012

In the matter between:

OOSTHUIZEN, MARISA VOGEL Plaintiff

and

CASTRO, JOSE FRANSISCO Defendant

And

CENTRIQ INSURANCE COMPANY LTD Third Party

HEARD ON: 9 & 10 MAY 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 18 SEPTEMBER 2017

I INTRODUCTION:

[1] The following warning of Schutz JA in *Durr v Absa Bank Ltd & Another* 1997 (3) SA 448 (SCA) at 453 D applies *in casu* as well. The learned Judge of Appeal said: "Hindsight is not vouchsafed the common man as he picks his course through life. This must be kept constantly in mind in a case like this one, where all is so obvious now.

[2] *In casu,* the court is confronted with mainly two issues, the one relatively evident although the warning *supra* will be heeded, but the other is far more vexed and contentious. The case is about the loss sustained by a widow who invested a large sum of money on the advice of a financial services provider ("FSP") and an insurance company's obligation to indemnify the FSP. I shall interchangeably refer to FSP and broker, the reason being that the term broker, or insurance broker, is used by authors on insurance law and in many judgments. The terms "financial services provider" or "intermediary services" were seldom if ever used prior to the promulgation of the Financial Advisory and Intermediary Services Act, 37/2002 ("the FAIS Act").

[3] A Sharemax investment that turned out to be lamentably bad triggered the litigation.

II THE PARTIES:

[4] Plaintiff is Marisa Vogel Oosthuizen, a female presently residing in Langebaan, Western Cape, formerly from the Vrede district in the Free State Province. She has been represented in the proceedings before me by Adv JF Mullins SC, duly instructed by Honey Attorneys, Bloemfontein.

[5] Defendant is Jose Fransisco Castro, a FSP duly licensed to act as such in accordance with the FAIS Act with business and residential address in Vrede, Free State Province. Adv PJJ Zietsman appeared for defendant, duly instructed by Blair Attorneys, Bloemfontein.

[6] The third party is Centriq Insurance Company Ltd ("the insurer"), who provided professional indemnity insurance to defendant as a member of the Financial Intermediaries Association of South Africa. Advv CE Watt-Pringle SC and C Bester appeared for the insurer, duly instructed by Andre Muller & Associates, c/o McIntyre & Van der Post, Bloemfontein.

III THE PLEADINGS:

[7] I shall briefly set out the allegations contained in the pleadings, but wish to emphasise that it soon became apparent during the hearing that only two aspects remained in contention as set out in paragraph 2 *supra.*

The particulars of claim:

[8] It is plaintiff's case that she and defendant entered into a written agreement in terms of which defendant advised her generally in respect of investment, and in particular to invest R2 million in the form of an investment offered by Sharemax Investments (Pty) Ltd ("Sharemax") in respect of a scheme described as THE VILLA RETAIL PARK HOLDINGS 2 held in a company, THE VILLA RETAIL PARK HOLDINGS 2 LTD ("The Villa").

[9] As a result of the failure of the Sharemax investment and no prospects of making any recovery, plaintiff claimed damages in the form of loss of capital of R2 million together with *mora* interest on the capital amount from date of investment, less an amount of R1 400.00 received, alternatively R2 838 600.00 being the capital of the investment and a yield based on 7% per *annum* over a period of six years, together with *mora* interest from 27 July 2016 to date of payment and costs as between attorney and client.

[10] Plaintiff's claim is based on defendant's alleged breach of his contractual duties in several instances, some of which are the following:

1. Defendant failed to act honestly and fairly in the interest of plaintiff in recommending the Sharemax investment;
2. Defendant misrepresented to plaintiff that media criticism of investments in Sharemax was motivated by envy insofar as the criticism was intentional, negligent and not honest and fair;

3. The Sharemax investment was not in keeping with plaintiff's risk profile which required minimal risk whereas the investment in Sharemax was an investment of very high risk;
4. Defendant failed to furnish objective financial advice to plaintiff appropriate to her needs and interest;
5. Defendant knew that plaintiff required a safe investment, but advised her to make the Sharemax investment when he ought to know by taking reasonable care that the Sharemax investment was a very high risk investment;
6. Defendant failed to exercise the degree of skill, care and diligence to be expected of an authorised financial services advisor furnishing investment advice.

Defendant's plea**:**

[11] Defendant admitted the agreement relied upon by plaintiff and that he had given financial advice of a general nature, but pleaded that plaintiff elected to make the investment in Sharemax notwithstanding the fact that he had drawn her attention to a recent negative article pertaining to Sharemax in the Rapport newspaper. Any alleged breach of contract was denied.

The third party notice:

[12] Although defendant's plea was filed on 8 October 2012, it filed a notice in terms of Rule 13 of the Uniform Rules of Court some two and a half years later, *i.e.* on 30 February 2015 only. A formal application for condonation and joinder of the insurer was required. An appropriate order was made on 5 March 2015, but

the costs were reserved for later adjudication. Defendant claimed indemnity from the insurer and in so doing relied on the written insurance contract entered into between him and the insurer.

The third party's defence:

[13] The insurer admitted the contract between it and defendant and that it undertook to indemnify defendant against losses arising out of *inter alia* any legal liability arising from claims made against the defendant and reported to the insurer during the period of insurance in connection with the business of defendant by reason of any negligent act, error, or omission committed in the conduct of the business by the defendant. However, it denied liability to indemnify defendant, averring that defendant's claim fell within the parameters of the exclusion clause contained in the insurance contract with specific reference to clause 3(ii).

[14] Clause 3(ii) of the insurance contract relied upon by the insurer reads as follows:

"The Insurers shall not indemnify the Insured in respect of any loss arising out of any claim made against them

1…….

2…….

3 (i)……

(ii) 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 futures transactions, or as a result of any actual of 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 or Employee 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)

IV AGREEMENTS AND INTRODUCTORY SUBMISSIONS:

[15] Mr Mullins presented me with written introductory submissions in terms of Rule 39(5) in support of his opening argument. I do not intend to deal with those submissions at this stage, but will do so when the evidence and arguments are evaluated *infra*.

[16] I was provided with five bundles marked exhibits "A" to "E", being the trial bundle, a photo bundle, a bundle containing extracts of newspapers articles, an insurance bundle and an experts' bundle respectively. The usual status applied to the documents contained in the bundles, *i.e.* that they are what they purport to be without admitting the contents thereof to be true and correct.

[17] Mr Mullins mentioned that the defendant could not concede liability in respect of plaintiff's claim as a result of condition 5 of the insurance contract entered into between him and the insurer which provides that the insured shall not make any admission in respect of any claim against him without the written consent of the insurer. However, defendant would not contest plaintiff's evidence. Therefore the third party was invited to waive such condition so that the trial could continue in order for the court to

adjudicate whether the insurer is liable to indemnify defendant and nothing else. This invitation was declined.

[18] Mr Mullins made it clear that in the event of the insurer not be prepared to waive condition 5, plaintiff will ultimately ask punitive costs against the insurer. Mr Zietsman confirmed that defendant could not, and therefore did not, concede liability, but that defendant would not contest his liability any further. Mr Watt-Pringle stated that the third party only heard that morning that defendant would not put up a defence against plaintiff's claim, but that the insurer was not prepared to waive condition 5.

[19] The parties handed me a written agreement in respect to the *quantum* of plaintiff's damages which agreement I made an order of court by consent. The full agreement reads as follows:

"The parties (Plaintiff; Defendant; Third party) agree as follows on the Plaintiff's damages as against the Defendant:

1. They agree that the capital investment is lost, i.e. that there are no prospects of recovery thereof;
2. They agree further that the Plaintiff has suffered damage (if breach of contract or of duty of care is proven, which is still in dispute) as follows:
   2.1 The capital of R2 000 000,00;
   2.2 With reference to paragraphs 26 and 27 of the Rule 36(9)(b) summary of Mr Heystek (pp 34 - 35 of the Experts Bundle), the return which the Plaintiff would have made had she invested the capital in a relatively safe investment for the mean period of 6 years, at the mean rate of the returns mentioned by Mr Heystek (6% - 8%), i.e. 7% <u>less</u> the R1 400,00 received on 3 August 2010.
3. Questions of mora interest are for the court to determine."

V COMMON CAUSE FACTS:

[20] I shall deal with some of the documents referred to under this heading again when I evaluate the evidence infra, but for purposes of providing the reader with a background, I deem it necessary to refer to documentary evidence which is not in dispute. Plaintiff's evidence is largely uncontested insofar as she was not cross-examined at all by defendant's counsel and Mr Watt-Pringle on behalf of the insurer merely tried to obtain concessions from her in support of the insurer's defence against defendant, i.e. to hopefully show that the defendant's conduct fell within the purview of the exclusion clause. The following is therefore common cause:

1. Plaintiff obtained a diploma in higher education where after she taught for approximately twelve years.
2. In 2001 she married a farmer, Mr Oosthuizen and one child, Benjamin, was born out of the marriage.
3. On 13 March 2010 Mr Oosthuizen ('the deceased") was killed in a shooting incident, leaving the plaintiff a widow with the two and a half year old Benjamin.
4. A policy on the life of the deceased paid out to plaintiff, the proceeds being the amount of R3.4 m of which she set aside R2 m to invest for the future, kept R300 000,00 as a reserve fund and used the balance to purchase calves.
5. She was in a bad emotional state, being confronted with lack of money immediately after the death of her husband and prior to the pay-out of the policy. The executor of the

deceased's estate even cancelled payment of the medical aid premiums and she had to borrow money from her brother to take care of herself and her son. On 27 July 2010, i.e. four and a half months after she was widowed, she had a meeting with defendant who advised her how to invest the amount of R2 m.

6. Plaintiff did not have any experience at all regarding financial products and relied on defendant whom she trusted as he was the deceased's broker prior to his death.

7. During the consultation and after accepting the advice given by defendant, he filled out various forms which were signed by plaintiff and counter-signed by defendant. These are not in contention and were also attached to the particulars of claim as Annexures "A" – "E". The following appears from the one document under the heading "Behoefte Ontleding" (in English: Needs Analysis).

> "1.5.1 Indien wel, hoeveel inkomste benodig u?: Maksimum met lae risiko. (Maximum with low risk.) (The answer is in defendant's handwriting.)

> "8. Enige addisionele oorwegings wat in ag geneem moet word ten opsigte van u beleggings? Om 'n veilige hoë inkomste belegging aan te gaan. (To make a safe high income investment). (The answer is again in the handwriting of defendant.)

8. The "Advies en Tussengangersooreenkoms" (Advice and Intermediary Agreement) stipulates as follows and I merely quote the provisions specifically relied upon by counsel:

"4.2 Waarborge (indien van toepassing):

4.2.1 Die kliënt verstaan dat die beleggings kapitaal nie gewaarborg is nie. Die adviseur sal egter die beste van sy vermoë doen om 'n veilige belegging namens die kliënt te maak. (The advisor shall do his best to make a safe investment on behalf of the client.)

4.4.3 Hierdie portefeulje se oogmerk is om hoër beleggingsopbrengste te behaal oor die langtermyn, wat hoër beleggingsrisiko teweegbring (potensiële verliese oor die kort termyn) en dus nie met meer stabiele portefeuljes vergelyk kan word nie;

4.4.4 Die kliënt verstaan dat, om die beleggingsopbrengs te behaal is dit nie moontlik om die beleggerskapitaal of teikenopbrengs te waarborg nie."

9. Plaintiff testified that she made it clear to defendant that she could not risk losing even two cents as the money was earmarked for her son's upbringing.

10. She was referred to an article that appeared in the Rapport newspaper that was severely critical of investments in Sharemax Products, but was comforted by defendant that several people were merely jealous and that the criticism did not hold any water. She was informed that the investment was "in property" and that "property cannot disappear".

11. Defendant did not explain any other investment products to plaintiff and emphasized that the recommended investment was so good that he did not even want to introduce other financial instruments and/or investments to her.

[21] Several prominent writers on financial matters, including the award winning journalist, the late Mr Deon Basson, criticised the Sharemax investment strategy over many years. As early as 26 May 2004 Basson wrote for the Beeld, an Afrikaans daily newspaper, based on queries received from investors who invested in Sharemax schemes and had lost their capital. He warned against property syndication schemes such as Sharemax and PIC and any person reading financial magazines and the business sections of newspapers will know what eventually happened to these schemes. Another negative article was written in Moneyweb of 22 November 2007. Noseweek published an article in January 2008, mainly relying on the late Mr Basson's investigations wherein he referred to the apparent lack of transparency in respect of Sharemax property syndications. Mr Vic de Klerk, an eminent author on investment products, wrote an article in Finweek of 8 July 2010, a weekly publication which every FSP should read, under the heading *"House of cards collapsing"*. He specifically targeted investments in The Villa and wrote, based on prospectuses received, that Sharemax as promotor had received R1.44bn from the public over two years and that another R2.25bn was needed to complete the shopping mall, hopefully by the end of September 2011. He also referred to the instructions of the Registrar of Banks to Sharemax to discontinue its method of financing which was in violation of the Banks Act as deposits were taken from investors. The cut-off date was 15 July 2010. De Klerk had the following advice for FSP's: "To the marketers of the shares on behalf of Sharemax – of course, you're all registered with the Financial Services Board (FSB) – also just a small warning. The Reserve Bank and the registrar aren't too happy with the

product you're offering. Everyone knows that now,… For your own future careers it may just be a good thing to mention that to your clients, even if it reduces your chances of earning that attractive 6% commission." Mr Jacques Pauw also wrote a similar article for the City Press of 25 July 2010 and he and Ms Anna-Maria Lombard's article to the same effect appeared in the Rapport of 24 July 2010, the article which defendant was well aware of, stating that tens of thousands of investors might have lost their investments in Sharemax. In his evidence the financial expert, Mr Magnus Heystek confirmed the figures received and still needed to complete the shopping complex. This was never contested.

[22] It is significant to mention some of defendant's responses to plaintiff's request for further particulars for purposes of trial, especially bearing in mind the fact that he decided neither to testify, nor to cross-examine plaintiff:

1. In response to a question whether or not defendant offered any comment or observation regarding the newspaper article in the Rapport he replied as follows:

   "2.1 Ja. Verweerder het gesê dat die eiseres nie daaroor hoef te bekommer nie, aangesien hy reeds met Sharemax in verbinding getree het, asook dit met sy konsultant bespreek het en dat hulle aan hom bevestig het dat dit net nog 'n aanslag soos vele vantevore was en dat geen van die inligting waar en korrek is nie."

2. At the end of paragraph 3 of the reply defendant responded as follows:

> "Deur al die ondervinding en die vertroue sedert 2003 in berekening te bring, tesame met die maatskappy se rekord, was daar min, indien enige, opsies wat kon kers vashou by Sharemax."

3. Plaintiff requested further answers from defendant in her rule 33(4) questionnaire served on 14 June 2013, about three years after the investment was made. Even at that stage, and notwithstanding the benefit of hindsight, defendant reiterated that an investment in Sharemax was a low risk investment, bearing in mind the history of Sharemax, and also that it was a safe investment.

[23] It is common cause that plaintiff invested an amount of R2 m as advised by defendant and that, save for an amount of R1 400.00 that she received in August 2010, she received no further interest and/or dividends and that the total amount of the capital has been lost.

[24] Defendant was appointed as representative of the Unlisted Securities South Africa FSP Network (Pty) Ltd (t/a USSA) in order to render financial services regarding unlisted securities such as the financial instruments provided by Sharemax. Defendant is also licensed as a FSP with the Financial Services Board in terms of s 8 of the FAIS Act with effect from 10 June 2008.

[25] Defendant entered into a professional indemnity insurance contract with the insurer, one of the insured events being professional indemnity to the limit of liability of R2.5m per claim, subject to payment of an excess in the amount of R10 000.00. It is this

contract that contains the exclusion clause referred to *supra* and which clause is the real bone of contention in the matter.

[26] Mr Magnus Heystek, an eminent business and investment journalist and investment strategist, gave expert evidence in respect of several aspects; in particular whether the conduct of defendant complied with that which could be expected of a financial advisor (or FSP as I throughout this judgment refer to these persons) in the circumstances, and if not, what type of investment a reasonable financial advisor ought to have suggested in the circumstances. His expert summary provided in terms of Rule 36(9)(b) was presented, largely as his evidence in chief as agreed to by counsel, whereupon he was cross-examined by Mr Watt-Pringle with the apparent intention to show that so-called safe investments are not necessary safe, with reference to *inter alia* banking institutions that have been liquidated, causing investors to lose money. I do not intend to say anything more about Mr Heystek evidence at this stage, but shall deal with it more fully during my evaluation of the evidence.

VI LEGAL PRINCIPLES AND AUTHORITIES:

[27] I intend to firstly mention the legal principles and authorities pertaining to the liability of a financial advisor or broker, throughout herein referred to interchangeably as a broker or a FSP. The *locus classicus* is *Durr supra*. The *Durr*-judgment preceded the FAIS Act by several years, but notwithstanding that, the principles set out in *Durr* are still relevant and to a great extent accepted by the legislature if the wording of the FAIS Act is

considered. In *Durr* Schutz JA said the following on p 455 I-J: "Just about everything that Stuart told the Durrs about Supreme was wrong, not that he knew it, but because he had allowed himself to be misled, as many others also had been, by a series of deceits." The broker assured the plaintiff, Ms Durr, that the investment was entirely safe.

[28] Schutz JA dealt with the duties of a financial advisor or broker such as the defendant *in casu* in no uncertain terms at pp 460 F - 462 D and I quote selectively:

"What did the law expect of Stuart and ABSA?

Imperitia culpae adnumeratur, says *D* 50.17.132 - lack of skill is regarded as culpable. That much is accepted by the respondents. But how much skill, they say. We have shown all the skill that an 'ordinary' or 'average' broker, or a bank employing such a one, need show. What more can be asked of us?

Two questions arise in this case. (1) In general, what is the level of skill and knowledge required? (2) Is the standard required in judging that level that of the ordinary or average broker at large, or is it that of the regional manager of the broking division of a bank professing investment skills and offering expert investment advice?

The answer to the first question is found in the judgment of Innes CJ in *Van Wyk v Lewis* 1924 AD 438 at 444 with reference, as it happens, to medical practitioners:

'It was pointed out by this Court, in *Mitchell v Dixon* (1914 AD at 525), that "a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care". 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.'

(Own emphasis.)

'But the decision of what is reasonable under the circumstances is for the Court; it will pay high regard to the views of the profession, but it is not bound to adopt them.'

(At 448.)

However, the second question is less easy - whether the standard is set by the broking community at large or by a much smaller group of which Stuart is a representative. The Court below opted for the wider and therefore less strict test, … (which the SCA criticised and eventually rejected)

In his evidence Stuart affirmed that he was content that his conduct be measured against the standard of an expert financial and investment advisor.

(When examining the testimony of the expert witness called by Stuart and Absa, Schutz JA continued as follows:)

He (the average broker) would not ask for financial statements, and if provided with them would not be able to read them; he would not know that a prospectus is required for a public offer, or how a prospectus differs from glossy marketing material; he would take a 'secured debenture' certificate at face value; he would be misled by misleading brochures and advertisements such as were issued by Supreme; and, critically for this case, he would not have the skills to analyse or assess 'institutional risk'. This expression is used to denote the soundness or creditworthiness of a prospective debtor. It is used by Wessels in contrast to 'product risk'. A 'product' is part of a broker's stock in trade, like an endowment policy or a fixed deposit. That falls within the 'typical broker's' sphere of competence. But institutional risk is quite beyond him. This means, in plain English, that if he is advising a client to lend money to a new debtor, he lacks the skill to assess the debtor's creditworthiness. That provokes the immediate question whether he should recommend the debtor, without warning his client of his own incapacity." At p 464 A Schutz JA proceeded as follows: "I conclude that the appropriate standard is that of the regional manager of the broking division of a bank professing investment skills and offering investment advice."

[29] At p 469 E Schutz JA referred to the "warning signs, if not flashing lights." Finally, at p 469 H-I the learned judge commented as follows in respect of the broker in that matter:

> "Either he had to forewarn the Durrs where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have recommended Supreme. What he was *not* entitled to do was to venture into a field in which he professed skills which he did not have and to give them assurances about the soundness of the investments which he was not properly qualified to give." (emphasis added)

[30] Jackson & Powell *On Professional Liability* 8th ed at para 15-022 mention the following pertaining to the reasonable care and skill to be exercised by a broker: "In common with other providers of relevant services acting in the course of business, a provider of financial services will be under an implied if not express contractual duty to exercise reasonable care and skill in carrying out the services required of him. The standard of care and skill will be, at least in most respects, that to be expected of a like provider engaged to provide the relevant services."

[31] Simpson (Gen Ed) Professional Negligence and Liability (Informa, 2016) state the following at para 12.55:

> "The contract between the advisor and the client will include an implied term if not an express one, that the advisor will carry out his mandate and the tasks associated with it with reasonable skill, care and diligence. He must exercise that degree of skill, care and diligence that would be exercised in the ordinary and proper course of a similar business and employ the skill usual and necessary in the business for which he receives payment."

[32] As mentioned, since *Durr* the FIAS Act has been promulgated, the date of commencement being 15 November 2002. I quote the following relevant parts of s 16 of the FAIS Act:

"Principles of code of conduct

1. A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitable satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to
   (a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;
   (b) ……..
   (c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;
   (d) act with circumspection and treat clients fairly in a situation of conflicting interests;
   (e) comply with all applicable statutory or common law requirements applicable to the conduct of business.

2. A code of conduct must in particular contain provisions relating to –
   a. the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;
   b. …
   c. avoidance of fraudulent and misleading advertising, canvassing and marketing;
   d. ….
   e. …
   eA. …
   f. ….." (emphasis added)

[33] A code of conduct has been promulgated as well as several amendments thereto to give effect to the provisions of s 16 of the FIAS Act. I do not think it is necessary to deal with any of the provisions contained in the Code. I believe it is necessary to record that registration in terms of FAIS is now required for persons venturing into the business of insurance brokers and financial advisors. Much more professionalism is now required by the legislature, all in the interest of the public, than was the case when *Durr* was decided.

[34] "Advice" is defined in s 1 of the FIAS Act to mean "subject 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
c. …
d. …

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. results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected;"

Section 1(3)(a) of the FIAS Act stipulates what is not included under the definition of "advice", but this does not take the matter any further for purposes hereof.

[35] After having set out the relevant applicable principles in respect of the duties and responsibilities of FSP's, it is necessary to have regard to the rules of construction of contracts in general and insurance contracts in particular. Several recent judgments of the Supreme Court of Appeal should be referred to. In an oft-quoted judgment Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Natal Joint Municipal and Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." Thus, the matter must be approached holistically and context and language must be considered together with neither predominating over the other. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10]-[12].

[36] In *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA) Lewis JA stated the following in a unanimous judgment at para [11]:

> "It is settled law that the contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract …. It is also clear that the position must be given a commercially sensible meaning …"

In *Novartis v Maphil* [2015] ZASCA 111, 3 September 2015, the same learned judge of appeal stated the following at para [28]:

> "[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing." (emphasis added)

[37] E R Hardy Ivamy, *General Principles of Insurance Law,* 6th ed identified and discussed thirteen rules of construction of insurance contracts. I do not intend to deal with all the rules mentioned and discussed as many are recognisable in the South African law reports and the judgments quoted in this judgment, but merely wish to deal with the rule that the written words in an

insurance contract should be given more effect than the printed words. The author relies on several English judgments and continued as follows at p 361-2:

> "But when there is a conflict between the printed and the written clauses, greater consideration will be paid to the written clauses. The written words are the immediate language and terms selected by the parties themselves for the expression of their meaning; the printed words, on the other hand, are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects. …. The printed words are not necessarily intended to stand as part of the contract in any particular case since, through carelessness or in the hurry of business, the parties may have omitted to delete the superfluous or inapplicable words from the form or to alter the printed words so as to make them conform exactly to the contract which they intended to make.
>
> At the same time, the print must be construed with the writing as far as possible; it is not to be rejected if not repugnant to or inconsistent with what is written. If, however, the writing shows it to be inapplicable, the print must be disregarded" (emphasis added)

[38] Birds *et al Macgillivray on Insurance Law* 13th ed, 2015, deal with construction of contracts in chapter 11 and *inter alia* make the point that "the literal meaning of words must not be permitted to prevail where it would produce an unrealistic and generally unanticipated result as, for example, where it would unwarrantably reduce the cover which it was the purpose of the policy to afford…" and furthermore, the construction of an insurance policy should avoid unreasonable results.

[39] I have touched upon the construction of insurance contracts as mentioned in the English authorities and the latest judgments of the South African Supreme Court of Appeal pertaining to

interpretation of contracts in general. The *locus classicus* on construing insurance contracts in South Africa still remains the unanimous judgment authored by Smalberger JA in *Fedgen Insurance Limited v Leyds* 1995 (3) SA 33 (AD) where the learned judge of appeal remarked as follows at p 38A-E:

> "The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise…. Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted …., for it is the insurer's duty to make clear what particular risks it wishes to exclude….. A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against the insurer as drafter of the policy…." (authorities relied upon excluded from quotation)

[40] There is uncertainty and a serious difference of opinion between counsel for plaintiff and defendant on the one hand and counsel for the insurer on the other hand about the real meaning to be attributed to the exclusion clause *in casu*. Therefore, relevant authorities must be considered, although counsel were *ad idem* that there are no reported judgments on all fours with the facts *in casu*.

[41] Exclusion clauses are not unusual in insurance contracts. Some authorities in this regard shall be referred to. Enright and Jess *Professional Indemnity Insurance Law,* 2nd ed, 2007, stipulate at p 524 that a "form of exclusion clause might exclude claims arising from the giving of any express or implied warranty or guarantee relating to the financial return of any investment or portfolio of investments." Such an exclusion clause may make proper commercial sense, be consistent with and not repugnant to the purpose of insurance contracts. This will be addressed during the course of this judgment.

[42] Simpson *Professional Negligence and Liability supra* states the following at para 5.171:

> "An excess clause or deductible is a clause whereby the insured is to bear the first part of any loss, expressed as an amount of money or as a percentage of loss … As such clauses are seen as an exclusion of liability drafted by the insurer, they will be construed strictly against the insurer ."

[43] Hardy Ivamy *supra,* again with reference to several English authorities, expressed himself as follows at p 286:

> "Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost strictness. It is the duty of the insurers to accept their liability in clear and unambiguous terms. (emphasis added)

[44] Colinvaux's *Law of Insurance,* 6th ed, (Editor R Merkin) makes the following submission based on English authority at pp 324-325:

> "As the main purpose of a liability policy is to permit the assured to recover for negligence, the policy presumes that there will have been some misconduct on the assured's part. Consequently, in the absence of any express provision restricting the insurer's liability, the assured will be able to recover unless his liability is attributable to an intentional criminal act on his part. The mere fact of criminality is not sufficient to prevent recovery: the courts have recognised that the true beneficiary of a liability policy is the third party victim, and have, with notable exceptions, allowed the assured to recover despite the criminal nature of his conduct." (emphasis added)

[45] As stated in *Fedgen v Leyds supra* and other authorities quoted, exclusion clauses must be restrictively interpreted. In *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2017] Lloyd's Rep IR 60 (SC), the English Supreme Court found that exclusion clauses do not necessarily have to be narrowly construed; that they must be given a proper meaning. A narrow meaning will often be given in the event of ambiguity or if the context suggests this. Lord Hodge who was part of the majority stated the following at p 63: "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."

[46] Mr Watt-Pringle relied on the New Zealand Court of Appeal judgment in *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608 delivered on 14 December

2010, ("QBE") which he had come across the night before the oral arguments were submitted to me. The exclusion clause in that judgment was also the bone of contention. That court, after having found that it did not have sufficient evidence to evaluate the different contentions of the parties, stated at paragraph [46] of the judgment that the interpretation of the particular policy should take place at a full trial, but then continued to make preliminary comments in the hope that the parties might come to a settlement. The court made it clear that its comments "are not intended to bind any court in any subsequent proceedings."

[47] At paragraph [51] in QBE the court consided, with reference to the clause "depreciation (or failure to appreciate) in value of any investments", that "depreciation" did not mean loss in value from whatsoever cause and proceeded: "It cannot have been the mutual intention of the parties to exclude all coverage for Trustees Executors' investment business."

[48] The court continued at paragraph [53] in QBE as follows: "Our inclination would thus be to categorise the Exclusion clause as excluding what can be broadly described as losses arising from investment forces. The Exclusion clause therefore would not apply, for example, to issues relating to the negligent documentation of mortgages. We recognise that other situations may not be so clear-cut. There may be an issue as to the construction of the words "contributed to" in the Exclusion clause. It may be that these words should not be interpreted in a manner which would rob the cover under the Policy of meaning. Thus, there may be an issue as to whether every investment movement or failure of any investment to appreciate, however slight, should engage the exclusion, even where the occasion for the claim is clearly negligence." At paragraph [58] the court continued: "The question might be whether the loss in value of the Fund was caused by

negligence or by investment forces or both. It may be that the relevant mortgages, because of breaches of the investment guidelines, were from inception, of lesser value and thus any loss totally related to negligence. The comments we make at [53] are relevant if any loss is a combination of negligence and investment forces."(emphasis added)

[49] In QBE the exclusion clause did not contain a similar proviso as *in casu.*

VII EVALUATION OF THE AUTHORITIES, COUNSEL'S SUBMISSIONS AND THE EVIDENCE:

The case against defendant

[50] When I evaluate the role played by defendant in advising plaintiff how to invest her funds I shall keep in mind the words of Schutz JA in Durr *supra* quoted at paragraph [1] of this judgment. I hasten to say that the insurer did not try to show that defendant was not liable to plaintiff. The insurer had a single strategy; a one-pronged line of attack: to show that the consequences of defendant's action and/or advice fell squarely within the parameters of the exclusion clause. I shall deal with this issue in detail *infra.*

[51] The evidence presented by and on behalf of plaintiff is largely undisputed, especially in respect of the first issue, *i.e.* whether a case has been made out to hold defendant liable.

[52] Plaintiff was vulnerable in July 2010 when defendant advised her. She was a widow with a two and a half year old boy. Her husband passed away in tragic circumstances some four months earlier. She experienced financial and emotional difficulties. She had no experience of financial products and/or the financial market. She received the proceeds of an insurance policy and wanted to make a safe investment as the money was earmarked for her son's upbringing. Defendant was her deceased husband's broker and she trusted him fully to advise her in respect of the investment of the sum of R2m.

[53] During the meeting with defendant when several forms – Annexures "A" to "E" to the particulars of claim - relating to the investment were filled out for signature, plaintiff emphasised that she could not afford to lose two cents. Defendant suggested the Sharemax investment and said it was an investment "in property" and "property cannot disappear". This was Sharemax' slogan all along when the articles of financial journalists referred to *supra* are considered. Defendant made it clear that he did not even want to suggest any other investments as the proposed investment was "baie veilig – extremely safe". He referred plaintiff to a bad copy of a newspaper article containing negative comments about Sharemax investments, but informed her that she had nothing to be concerned of as "hulle is jaloers - they are jealous." Plaintiff accepted defendant's assurance immediately without even reading the article. In this regard it is to be noted that according to the pleadings defendant admitted informing plaintiff that she did not have to be concerned as he had spoken to Sharemax as well as his consultant. This was not good

enough. Defendant should have spoken to independent auditors, attorneys or financial analysts. He should have insisted on financial statements, such as income and expenditure accounts, cash flow analyses and a balance sheet. He should have inspected the shopping complex. If he did that, he would know that the investment could not possibly have an income stream at that stage or even in the foreseeable future.

[54] The investment that defendant induced plaintiff to make was a property syndication investment. The Sharemax investment was known as The Villa. The company used as the investment vehicle was registered in 2010 only. This should have been a serious concern as well. The Villa shopping complex was in the process of being built. *Ex facie the* photographs handed in as Exhibit B, the buildings were still incomplete when the photographs were taken nearly six years later in January 2016. Mr Heystek explained the potential dangers of property syndication and also made the point that insofar as the companies involved were unlisted, there was a lack of disclosure making it difficult for financial analysts to make meaningful comparisons. Accordingly, as testified to by him, a FSP "should not advise an investment in something which he is not himself able to fully understand."

[55] Mr Heystek mentioned that defendant clearly did not explain the risks and pitfalls of property syndication to plaintiff. According to his experience properties are often sold at high valuations to the companies that form the vehicle for property syndications, allowing the promotors to make huge profits upfront. High

marketing costs and commissions are paid, whilst the income stream from the underlying assets might be unpredictable and uncertain.

[56] *In casu* several financial journalists and others warned investors over a prolonged period. Defendant, having been aware of the criticism, should have either himself investigated the reliability of the investment or made enquiries from independent and reliable sources. It is amazing that defendant 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. No doubt, a simple investigation or even an inspection of the half-built shopping complex would have been an eye-opener. He should have realised that enormous costs would have to be incurred to complete the project. In fact, it was explained by Mr De Klerk in Finweek of 8 July 2010 *supra* what was received and what was still needed to complete the project. Another R2.25 was required from the public before any income could be earned lawfully. The half-built shopping complex could not earn any income for some time – it was obviously dependent on being completed, the signing of lease agreements and eventual and actual occupation by tenants – but the investment provided for income to be paid to investors from the start. This is apparently what defendant believed would happen. In fact the first (and only) payment of R1 400.00 was made to plaintiff in August 2010. No doubt, defendant failed to present the true facts to plaintiff to afford her an opportunity to make an informed decision.

[57] I agree with Mr Heystek's testimony that all initial payments – at least until income is eventually received from tenants - would have to be paid out of funds put in by investors themselves. Investors therefore paid their or other investors' interest. There were no other sources of income during the construction phase of The Villa. The underlying property – the half-built shopping complex could not produce income on a monthly basis as investors and plaintiff in particular expected. Defendant was in breach of his fiduciary duty towards plaintiff in that he did not take reasonable steps to satisfy himself of the safety of the Sharemax investment. I am also in agreement with Mr Heystek, accepting the ruling in 2013 of the Ombud for Financial Services, Ms Bam, that The Villa "bear uncanny characteristics to a so-called Ponzi Scheme."

[58] If the totality of the evidence is considered, defendant should have seen the red flashing lights, but not only that, he needed to heed and advise plaintiff differently. Defendant offered wrong and unsuitable advice to plaintiff, either through incompetence and/or ingenuousness and/or negligence, or for the lure of a small fortune. It is common cause that he earned a commission of R120 000.00 for an afternoon's effort. This is an enormous amount of money and not market-related. It is a well-known phenomenon that promotors in these types of schemes make use of high commissions to attract brokers and so-called financial advisors to do business. In the process pensioners, widows and other vulnerable people's savings and inheritances are being collected, often to be lost when the house of cards collapses. Defendant should have known that a return on an investment in The Villa was a pie in the sky. His inexplicable, but obviously

poor advice is indicative of lack of skill, care and diligence and did not commensurate with the commission received. The parallels between the facts *in casu* and those in *Durr* are remarkable. Defendant failed to make enquiries himself as did the broker in *Durr,* but notwithstanding this he assured plaintiff that the investment was *"entirely safe,"* as did the broker in *Durr.* Schutz JA said on p 455 I-J of *Durr* that just about everything that the broker told Durr was wrong, not that he knew it, but because he had allowed himself to be misled by a series of deceits. Defendant did not say much to plaintiff, but what he said was false.

[59] Defendant acted contrary to the provisions of s 16 of the FAIS Act and the Codes of Conduct published since then in accordance with the provisions of s 15 and what the law expects of FSP's when he provided the financial advice that led to the R2 m investment. A defence was raised in the pleadings, but defendant elected not to testify in support of the pleaded defence. Although plaintiff's evidence is not contradicted, it does not mean that it should necessarily be accepted. However, I am satisfied that, if considered with the documents – Annexures "A" –"E" of the particulars of claim, particularly the handwritten parts, and Mr Heystek's version, defendant did not act as could have been expected of a reasonable FSP. Mr Watt-Pringle did not contend differently and I have reason to believe that he accepted that plaintiff's case against defendant had been proven on a balance of probabilities.

[60] Much more may be said of the defendant's actions and/or inactions, but I conclude by finding that defendant was negligent, and even dishonest, when he advised plaintiff, by placing no credence on the negative articles in the press and failing to objectively investigate the criticism. He failed to exercise the degree of skill, care and diligence which one is entitled to expect from a FSP. The facts *in casu* are very similar to that in *Durr supra* and the result should be the same.

The third party action

[61] Mr Watt-Pringle submitted that the insurer was perfectly entitled to limit the ambit of its liability and that it has done so in clear and unambiguous language. The insurer chose what risks it was prepared to accept. The policy and the exception make perfect sense. He also agreed that a "businesslike" interpretation is to be preferred, but submitted that the resort to restrictive interpretation only arises if the exclusion sought to be relied upon is ambiguous.

[62] Mr Watt-Pringle extracted facts during cross-examining from both plaintiff and Mr Heystek in order to try and persuade the court that the defendant's claim for indemnification against the insurer falls within the parameters of the exclusion clause and that it should therefore be dismissed. As submitted, he did this to contextualise certain factual issues.

[63] Mr Watt-Pringle submitted that the exclusion clause is triggered by two provisions, firstly, that the plaintiff's claim against defendant arises from or "is contributed to by depreciation (or failure to appreciate) in value" of the investment undertaken by defendant on her behalf or pursuant to his advice; and secondly, the investment was undertaken by defendant on plaintiff's behalf or pursuant to his advice "as a result of [an] actual or alleged representation, guarantee or warranty provided by or on behalf of the insured as to the performance of" the investment.

[64] Mr Watt-Pringle submitted that, regarding the first scenario, plaintiff's shares became worthless. According to him her claim "does not have to arise from, but need only be 'contributed to' by the depreciation or failure to appreciate in value of an investment". Therefore the application of the exclusion was triggered. Secondly, plaintiff testified that the investment in The Villa had been made on the strength of defendant's representations as to the performance of the investment. She indicated that she could not afford to lose two cents of her capital. Therefore, Mr Watt-Pringle submitted that plaintiff relied on a representation which is in line with a representation, guarantee or warranty provided by defendant as the insured as to the performance of the investment, thus triggering the provision of the exclusion clause. The fact that this was not pleaded is immaterial according to him. The court must consider the facts testified to. Mr Watt-Pringle also argued that, absent such averment, defendant would be able to rely on the written documents signed by plaintiff when the investment was made, indicating the uncertain nature of the investment and the heightened risk occasioned by the expectation of above inflation

returns. The argument continued as follows: "The common element in both triggering provisions is that, broadly speaking, the underwriter is not prepared to underwrite either the performance of an investment or the veracity of any representation, guarantee or warranty as to the performance of the investment, which results in a claim against the financial intermediary."

[65] Mr Watt-Pringle heavily relied upon the *QBE* judgment of the New Zealand Court of Appeal quoted quite extensive *supra.* He submitted that it is of considerable persuasive value in the context of this case. He submitted that it represents the only definitive judicial pronouncement where an exclusion clause worded in similar language was considered by a court in circumstances where a claim was made on a financial advisor by an investor who suffered a loss as a result of an investment having been rendered worthless. In *QBE* the court dismissed the appeal, but made it clear that its findings were preliminary. It reiterated that its preliminary comments were not intended to bind any court in any subsequent proceedings.

[66] Mr Watt-Pringle submitted that the proviso to the exception explains when only indemnity should be granted. The loss must be solely as a result of the negligence of the insured (or his/her employee) in failing to effect a specific investment transaction in accordance with the specific prior instructions of the insured's client. The effect hereof, according to him, is obvious. If I may give an example based on his submission: the client instructed the FSP to buy shares in Capitec Bank in say 2008, but the FSP negligently, for example because of finger-trouble, pressed the

wrong button on his computer and bought shares in African Bank instead, and it turned out eight years later that Capitec's shares quadrupled, but African Bank's shares became worthless, then the insurer shall be liable to indemnify the FSP.

[67] Unlike as Mr Mullins contended, to which I shall turn *infra,* Mr Watt-Pringle submitted, based on evidence extracted from Mr Heystek, that the policy at hand is a standard policy providing for all sorts of cover to a wide range of FSP's. Therefore cover against claims based on investment advice is but one of a number of insured events.

[68] Mr Watt-Pringle accused Mr Mullins for not trying to interpret the exclusion clause. The clause is not repugnant to the purpose of the insurance contract if the judgment In *QBE* is considered. It is also not "unbusinesslike". According to him we are confronted with a depreciation in the value of an investment. If plaintiff continued to receive income, the parties would not have been at court.

[69] Mr Mullins, as could be expected, differed completely from Mr Watt-Pringle. He made the point that the insurer who relies on the exclusion must prove that the exclusion applies. He submitted that the cross-examination of plaintiff and Mr Heystek was unsuccessful in that the attempt to show that a representation was made or a guarantee was provided by defendant failed. This is not the case of the plaintiff in the pleadings. Plaintiff never claimed on the strength of a representation, guarantee or warranty, but in any event, the written terms of the agreement between them preclude such

claim. According to Mr Mullins, plaintiff's claim is not one arising from or contributed to by depreciation or a failure to appreciate in value of the Sharemax investment. He also submitted that to suggest that would be to stretch the words "arising from or contributed to by depreciation" far beyond their intended meaning, in a way that would rob the cover of all meaning. He emphasised that "plaintiff's claim on the pleadings and in evidence is that defendant owed her proper advice, that what she required was a relatively safe and low-risk investment, and that the Sharemax investment was anything but that. Her claim is not for an investment return of inflation plus 2% or something of that nature. Nor could she ever have lawfully claimed that, given the terms of Annexures "A" to "D" of the particulars of claim."

[70] Mr Mullins was taken by surprise as he was unaware of the *QBE* judgment until provided with a copy thereof by his opponents, but he tried his best to distinguish it from the facts *in casu* during his oral submissions. He also pointed to the *dicta* at paragraphs [51] and [53] as well as [44] and [45].

[71] Mr Mullins indicated that Mr Watt-Pringle studiously avoided the handwritten statements on Annexure "D" of the particulars of claim. This document outlined plaintiff's requirements as mentioned *supra.* These handwritten notes bolster plaintiff's evidence to the effect that she could not lose any of the capital. As required by the authorities *supra (inter alia Mahmood Investments)* contractual provisions must be read in context, having regard to relevant circumstances known to the parties at the time of entering into the contract.

[72] I considered Mr Watt-Pringle's submissions carefully, but am of the view that he placed too much emphasis on the wording of the

exclusion clause and in doing so, disregarded the purpose of the insurance contract entered into between defendant and the insurer. The heading of the policy is instructive. It reads: "*Professional Indemnity Insurance for Members of the Financial Intermediaries Association."* Seven insured events are tabulated, which may appear at first blush to bolster Mr Watt-Pringle's argument that to disallow defendant indemnity would not be repugnant to the purpose of the insurance contract. I have a different view. I shall explain *infra.* I refer to Colinvaux's *Law of Insurance, supra* and wish to emphasise that the main purpose of an indemnity policy is to permit the insured to recover for negligence. As the author states, an indemnity policy presumes that there will have been some misconduct on the insured's part.

[73] Brokers and financial advisors are now regulated by legislation as is the case with, for example, attorneys. Professional Indemnity Insurance for FSP's is now a reality. Insurers are comforted in that they know that FSP's who apply for indemnity insurance are professional people who have to pass stiff examinations before they may become registered as FSP's in terms of the FAIS Act. Also, insurers do not have to provide indefinite cover and may limit their potential liability as happened here. The other insured events in the particular policy, except the first, to wit Professional Indemnity, apply to any employer who wants to insure against such events. It is not uncommon in the market place for a shop owner to take out insurance in respect of employee dishonesty, computer crime, defamation and like issues. However, the shop owner will not take out professional indemnity insurance. FSP's on the other hand, most definitely need cover insofar as they

often have to give advice that may later be found to have been given negligently. The chances of being sued for huge amounts for wrong and/or negligent advice by far exceed financial losses pertaining to the other insured events. It is thus not a valid argument to submit that defendant will not be robbed of cover if the exclusion clause is interpreted in the way contended for by the insurer.

[74] The insurer has undertaken to indemnify defendant against losses arising out of any legal liability arising from claims first made against the defendant and reported during the period of insurance for breach of duty in connection with his business by reason of any negligent act, error, or omission, committed in the conduct of the defendant's business. I refer to the first paragraph under Insured Events on page 2 of the policy. The insurer admitted this in its plea. This issue must be the starting point of any considerations in respect of the exclusion clause, although I accept that the policy must be considered as a whole together with the circumstances attendant upon its coming into existence. As said by Lewis JA in *Novartis supra*: "A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing." The context is undoubtedly clear: defendant needed indemnity to safe-guard him against losses in the event of a breach of duty by reason of any negligent act, error or omission. He received such cover as is apparent from the clause referred to *supra.* However, in the exclusion clause not a word is said about negligence, error or omission, save insofar as the proviso stipulates that the insured

will be covered if a specific investment instruction of a client is not carried out due to the insured's negligence. It is highly unlikely that such an event may occur, but in any case, it cannot be argued that the insurer should not be held liable for the insured's negligence, error or omission on the strength of this proviso.

[75] In my view the exclusion clause must be interpreted restrictively so that it makes business sense, *i.e.* in the eyes of both insurer and insured. It cannot be applicable where the insured advised a client to invest in a scheme that was a hopeless "investment" from the onset, contrary to legislation and probably a fraudulent and unlawful Ponzi scheme. The purpose of the first leg of the exclusion is to prevent an insured from claiming indemnification if his client has filed a claim because his/her investment had not grown by, for example 20% over a three year period as expected, but only by 15%, or remained static, or worse, depreciated by 5 or 10%. We all know that financial markets are volatile, that several unforeseen market forces may affect investments and therefore, it would be "businesslike" for the insurer to exclude indemnification in such events. Surely, it cannot be expected of a prudent insurer to become embroiled in litigation between the client and the insured FSP in such instances. The same applies to the second leg. An eager FSP should not be heard to admit that he/she has represented or guaranteed to an investor that a particular investment will increase by 100% in a year's time. The insurer will be fully entitled to rely on the exclusion clause and refuse to indemnify the insured if the representation later appears to be off the mark. Again, this is not what occurred *in casu.*

[76] I find the example provided by Mr Watt- Pringle pertaining to the negligent buying of wrong shares contrary to the client's instructions as if that is the only way in which a FSP will have indemnity cover to be repugnant to the purpose of the insurance contract. The FSP must be entitled to indemnification, bearing in mind that the ultimate beneficiary is the client who got wrong advice as *in casu.* Defendant breached all principles upon which a skilled and honest FSP is supposed to conduct himself. It is not a case of depreciation of an investment as the *"investment"* was worthless from beginning to end. The R2m "invested" was not enough to pay the interest of the thousands of "investors" that became involved in the scheme prior to plaintiff. Obviously, not enough "investors" joined the scheme after plaintiff for her to receive any "income' after August 2010. The plaintiff's claim is also not based on a failure to appreciate. Plaintiff does not rely on any representation, guarantee or warranty as to the performance of the investment, notwithstanding Mr Watt-Pringle's valiant effort to extract facts during cross-examination. This was not the case that defendant had to meet or what the insurer had to deal with in the third party action.

VIII CONCLUSION:

[77] In conclusion I find that plaintiff has made out a proper case against defendant in respect of the merits of her claim. The *quantum* has been settled, save for the simple calculation to be made in respect of the expected return on capital which Mr Mullins has calculated and which is not in dispute. There shall

therefore be judgment in favour of plaintiff in respect of the capital of the claim and interest as requested.

[78] Mr Mullins requested an order in terms whereof the plaintiff's costs be paid jointly and severally by defendant and the third party. Obviously, defendant is liable for plaintiff's party and party costs, but the situation in respect of the third party and plaintiff is different, there being no *lis* between them. Mr Mullins warned at the start of proceedings that he intended to do so as he believed that the insurer should have consented to defendant admitting liability. In doing so, he would have closed his case and the effects of the exclusion clause could have been argued without reference to oral evidence. Mr Watt-Pringle's client was not prepared to adhere to this request and it became apparent why. The insurer elected to extract evidence during cross-examination, thereby hoping to show that defendant's claim for indemnification falls within the parameters of the exclusion clause. I am of the view that the insurer cannot be blamed for the stance taken, especially considering that counsel could not find any relevant South African authority on a similar exclusion clause and the insurer's counsel eventually had to rely on New Zealand authority.

[79] I also find that defendant is entitled to be indemnified by the insurer, subject to the limit of R2.5m and deduction of the excess of R10 000.00, and an appropriate order shall be made. The insurer shall pay the costs of the defendant, he being the successful party in the third party action, such costs to include the costs of the joinder application which were reserved.

IX ORDERS:

[80] Therefore the following orders are made:

1. Defendant is ordered to pay to plaintiff the capital amount of R2 000 000.00 and interest calculated to 27 July 2016 in the amount of R718 600.00.
2. Defendant shall pay *mora* interest on the amount of R2 718 000.00 to plaintiff at the rate of 10.5% per *annum,* calculated from 28 July 2016 to date of payment thereof, both dates included.
3. The third party shall indemnify defendant against defendant's liability to plaintiff, subject to the limit of R2 490 000.00, in respect of defendant's capital and costs together with interest thereon at the rate of 10.5% per *annum* from date of judgment to date of payment.
4. Defendant is ordered to pay plaintiff's taxed or agreed party and party costs, such costs to include the following:

   4.1 the costs of Senior Counsel;

   4.2 the reasonable qualifying, preparation, reservation and travelling and accommodation costs of Mr M Heystek, including costs of and associated with his rule 36(9)(b) summary;

   4.3 plaintiff's travelling costs to and from Bloemfontein and her accommodation costs in Bloemfontein in order to testify.
5. The third party is ordered to pay defendant's costs in respect of the third party action as well as the costs relating to the application to join the third party.

JP DAFFUE, J

On behalf of plaintiff:	Adv JF Mullins SC
Instructed by:	Honey Attorneys Bloemfontein
On behalf of defendant:	Adv PJJ Zietsman
Instructed by:	Blair Attorneys Bloemfontein
On behalf of 3rd party:	Adv CE Watt-Pringle SC and Adv C Bester
Instructed by:	Andre Muller & Associates c/o McIntyre & Van der Post Bloemfontein