

# JUDICIAL PROTECTION OF THE INSURED: THE CASE OF CENTRIQ INSURANCE CO. LTD V OOSTHUIZEN & ANOTHER [2019] ZASCA 11

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## ABSTRACT

*The paper examines the South African Supreme Court of Appeal's decision in Centriq Insurance Co. Ltd v Oosthuizen and Another [2019] ZASCA 11. The matter came as an appeal against a ruling of the Free State High Court. Centriq Insurance Company was held to be liable to Castro, who was the second respondent on appeal, in terms of a professional indemnity insurance policy. Castro had been sued by Oosthuizen, who was the first respondent on appeal, after he had given a wrong advice about the viability of an investment which was made by Oosthuizen. Emphasis is put on the protection of the insured by the court which emanates from the rules of interpretation which it adopted. The paper therefore gives brief facts of the case to appreciate the background of the case. It then notes the decision of the Court followed by its analysis. It justifies why the decision should be commended in South Africa as it adopted rules of interpretation which protect the insured. The paper is motivated by the uneven relationship between the insurer and the insured with the former occupying a stronger position than the later to dictate terms of the contract. Hence it highlights the importance of courts in protecting the interests of the insured.*

**KEY WORDS:** Centriq, Oosthuizen, insurer, insured, purposive rule, indemnity, protection of insured

## FACTS OF THE CASE

The matter came as an appeal by Centriq Insurance Company Ltd against a ruling of the Free State High Court. Centriq Insurance Company was held to be liable to Castro who was the second respondent on appeal. Castro was a registered financial services provider and broker in terms of South Africa's Financial Advisory and Intermediary Services Act 37 of 2002. He was approached

by Oosthuizen, the first respondent on appeal, who wanted advice on a safe and low risk investment she could make.

Castro advised Oosthuizen, who was a widow, to invest the proceeds of her deceased husband's policy in an amount of R2 million in Sharemax Investments (Pty) Ltd in a property development scheme. The scheme was a yet to be completed complex and this fact was not drawn to Oosthuizen's attention. In addition, Castro dismissed adverse media criticism about the scheme without checking its veracity. Hence he was negligent. The scheme failed following an investigation by the Reserve Bank and Oosthuizen lost everything. Oosthuizen sued Castro for the loss caused by his wrong advice. Castro then claimed the indemnity from Centriq Insurance Company Ltd since he had a professional indemnity insurance contract with it. Centric 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 DECISION OF THE COURT**

The Supreme Court confirmed the finding of the High Court that the investment was not viable and that Oosthuizen's complaint was neither that the investment had depreciated nor performed inadequately but rather that it was not a safe investment having regard to her needs. The court held further that the main purpose of the policy was to indemnify financial advisors against their liability for negligent financial advice. In addition, the court noted that the insurer had the onus to prove that it was covered by the exclusion. It was supposed to do this by proving that Oosthuizen's investment had a material value initially which then declined because without decline, there was no depreciation. Centriq failed to discharge its onus in this case. The Court also applied the *contra proferentem* rule as the exclusion from liability clause was ambiguous as to the meaning of "depreciation in value of any investments". It was not clear as to whether it referred to gradual or partial loss from market or investment forces. Hence the Supreme Court of Appeal upheld the decision of the High Court which held Centriq liable to indemnify Castro in terms of the indemnity insurance contract. Centriq was also ordered to pay the costs of appeal.

## **ANALYSIS OF THE DECISION OF THE COURT**

This was a Supreme Court decision and its impact is far reaching in the insurance industry in South Africa. The decision of the Supreme Court also binds lower courts through the application of the

common law doctrine of *stare decisis*. The approach of courts has a direct effect on the protection of the insureds. In the Centriq case, the court took a purposive approach to the interpretation of the insurance contract between Centriq and Castro. The court took this approach because the meaning of the words “depreciation in value of any investments” were ambiguous. This is in line with other authorities which had previously dealt with the purposive rule.<sup>i</sup>

In addition, the decision upheld the principle that where the commercial purpose of a contract is to protect the insured against his own negligence, the insurer cannot evade liability if the loss is caused by the insured’s negligence.<sup>ii</sup> In line with the purpose of Castro’s insurance policy, the exclusion clause was restrictively interpreted since it was the insurer’s duty to make clear provisions.<sup>iii</sup> Thus the Court had to resort to the *contra proferentem* rule which requires a written document to be construed against the person who drafted it.<sup>iv</sup>

An interpretation should not make a mockery of the insurance contract.<sup>v</sup> Further, it should not defeat the whole purpose of entering into such a contract.<sup>vi</sup> Hence the approach of the Court was favourable to the insured as it relied on those aids to interpretation which ensured that Centriq was liable to indemnify Castro. If the Court had not taken the purposive approach to interpretation, Centriq would not have compensated Castro.

## CONCLUSION

The Centriq case has clearly highlighted how courts can play an important role in the protection of the insured. The relationship between the insurer and the insured is not equal. Insurers are usually large companies with the power to dictate terms of insurance contracts. In addition, they are the ones who usually draft insurance contract. It is therefore incumbent upon courts to protect the insureds. The rules of statutory interpretation can do this trick. There are many rules of interpretation with different consequences when applied to similar circumstances. The purposive rule coupled with the *contra proferentem* rule which were applied in the Centriq case ensured that the insurer was found liable and the insured was able to claim an indemnity in terms of the insurance contract.

## REFERENCES

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- <sup>i</sup> Swart v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) 202 and Scottish Union and Insurance Co. Ltd v Native Recruiting Corporation Ltd 1934 AD 458.  
<sup>ii</sup> Peterson v Aegis Insurance Co Ltd 1989 (3) SA 478 (C).  
<sup>iii</sup> Fedgen Insurance Ltd v Leyds 1995 (3) SA 33 (AD).

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- iv Kiptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co. of South Africa Ltd 1961 (1) SA 103 (AD).
  - v M.F.B. Reinecke, J.P van Nierkerk and P.M. Nienaber, South African Insurance Law, LexisNexis, 1<sup>st</sup> ed, 2013, pp 207.
  - vi Nyakambiri Farm (Pvt) Ltd v Zimnat Insurance Co. Ltd 1996 ZLR 473 (HC).

