IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE PROVINCIAL DIVISION, BLOEMFONTEIN

CASE NO: 2858/2012

In the matter between:

MARISSA VOGEL OOSTHUIZEN	Plaintiff
and	
JOSE FRANCISCO CASTRO	Defendant
CENTRIQ INSURANCE COMPANY LIMITED	Third Party

THIRD PARTY'S NOTICE OF APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE THAT the third party hereby makes application for leave to appeal to the Supreme Court of Appeal, alternatively a full bench of the Free State Provincial Division of the High Court against the judgment of the Honourable Mr Justice Daffue handed down on 18 September 2017 in terms of which the learned judge ordered that the third party is liable to:

1. indemnify the defendant against his liability to the plaintiff, subject to the limit of R2 490 000.00, in respect of the 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.

2. pay the defendant's costs in respect of the third party action as well as the costs relating to the application to join the third party.

TAKE NOTICE FURTHER that the application is based on the following grounds:

1. should leave to appeal be granted an appeal would have reasonable prospects of success; and

2. the nature of the exclusion clause relied upon by the third party has to date not been the subject of judicial consideration by South African Courts with the result that there are compelling reasons why the appeal should be heard as understood within the meaning of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013.

There are reasonable prospects that an appeal would have success based on the following grounds:

1. Having summarised the current state of South African law regarding the interpretation of documents, including contracts, as set out in **Natal Joint Municipal and Pension Fund v Endumeni Municipality** 2012 (4) SA 593 at paragraph 18 and **Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA) at paragraph 11, the learned judge:

1.1. did not conduct an analysis of the correct interpretation of the exclusion clause;

1.2. failed to provide a reading of the words used in the exclusion clause that would exclude the claim proffered in the name of the plaintiff from the application of the exclusion clause *per se*.

2. The learned judge erred in reasoning that:

2.1. if an insured person advised a third party client that an investment would appreciate by a set percentage per annum but it did not or depreciated in value between five and ten percent, the exclusion clause would apply on the basis of a failure to appreciate; but that

2.2. the exclusion clause was of no application where the insured person was grossly negligent by placing the third party client's funds with a Ponzi scheme resulting in a total loss of the investment.

3. The aforesaid distinction does not determine whether the exclusion finds application because it, by its plain reading, applies regardless of the degree of negligence of the insured and regardless of the degree to which the investment depreciates.

4. On the basis of the aforementioned reasoning the learned judge erred in that:

4.1. the learned judge failed to consider that a "*depreciation*" in the value of any investment is not limited the reduction in the value of an asset over a prolonged period of time but is of equal application in the case of an investment that devalues rapidly, or that becomes worthless the moment the investment is first made.

4.2. the exclusion clause is of application irrespective of the degree of negligence on the part of the insured person or the extent of the loss as it is based on the insurer's refusal to underwrite:

4.2.1. the risk of any third party client claim arising from or contributed to by a depreciation (or failure to appreciate) in the value of any investment;

4.2.2. the risk of any third party client claim as a result of any actual or alleged representation by the insured person as to the performance of any investment.

4.3. the distinction drawn by the learned judge in paragraphs 75 to 76 of the judgment, between the limited instances of application of the exclusion clause and the circumstances of the claim proffered in the name of the plaintiff, is not based on the wording of the exclusion clause or on the business-like consideration that entitles an insurer to exclude all forms of investment risk from the ambit of its insurance cover;

4.4. the learned judge failed to undertake a business-like interpretation of the exclusion clause with a restrictive interpretation only arising in the event that the exclusion clause is ambiguous which was not the case in the instant proceedings.

5. The learned judge failed to have proper regard to the decision of 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 is of considerable persuasive value in that the exclusion clause was similarly worded.

6. The learned judge ought to have found that like in **QBE Insurance**, the plaintiff's claim had its origin in the diminution in the value of her investment in the Villa 2 Sharemax syndicated property investment which was the primary underlying factor in her claim against the defendant with the result that there would have been no claim on the basis of the defendant's alleged breach of contract or negligent breach of his duties alone as these breaches would not have been of any consequence had it not been for the loss in investment value.

7. The learned judge ought to have found that the judgment in **QBE** was a final pronouncement insofar as the construction of the relevant exclusion clause was concerned.

8. The learned judge erred in finding that the exclusion clause was of no application by virtue of the fact that he did not have regard to the following

aspects which ought to have informed a proper construction of the exclusion clause:

8.1. the third party was entitled to choose what type of risk it was not prepared to insure and at what premium;

8.2. the insurance contract in question applied to a broad spectrum of financial intermediaries including investment advisers and brokers, long-term insurance brokers, short-term insurance brokers and brokers selling employee benefits such as medical aid, disability cover and income protection cover;

8.3. the exclusion clause is of application, firstly, in the event of a claim proffered in the name of a third party client that arises from or is contributed to by a depreciation or failure to appreciate in the value of any investment, or secondly, where the third party claim is the result of an investment undertaken because of an actual or alleged representation, guarantee or warranty provided by the insured as to the performance of the investment; and

8.4. the proviso to the exclusion clause removes any ambiguity as to the ambit of the risk assumed by the underwriter when the claim of the third party arises from or is contributed to by a depreciation or failure to appreciate in the value of any investment, or secondly, where the third party claim is the result of an investment undertaken because of an

actual or alleged representation, guarantee or warranty provided by the insured as to the performance of the investment.

9. The learned judge ought to have found that:

9.1. the first category of exclusion involves a low threshold, namely that the third party client claim does not have to arise from, but must only be "*contributed to*" by the depreciation or failure to appreciate in value of an investment;

9.2. the second category of exclusion was equally apposite in that the evidence led by the plaintiff showed that she relied on a representation made to her by the defendant which is consistent with the provision of a representation, guarantee or warranty provided by the insured as to the performance of the investment.

9.3. the exclusion clause is not ambiguous and ought to have found application on the facts before the Court on the strength of either of the above categories;

9.4. the application of the exclusion clause did not have the effect of rendering the contract of insurance devoid of all cover as:

9.4.1. the contract of insurance made provision for cover in the event of multiple insured events to which the exclusion clause plainly enjoys no application;

9.4.2. the proviso to the exclusion clause had the effect of providing significant cover when the insured failed to carry out a specific instruction; and

9.4.3. the application of the exclusion would not be repugnant to the purpose of the insurance contract.

10. It is further submitted that the Supreme Court of Appeal is the appropriate Court for the hearing of the appeal by reason of the following circumstances:

10.1. the importance of the matter to the parties;

10.2. the complexity of the legal principles at issue; and

10.3. the administration of justice will be advanced through a hearing before the Supreme Court of Appeal in view of the relative novelty of the issues concerned and more specifically because the exclusion clause relied upon has not previously been considered by South African Courts.

DATED at BLOEMFONTEIN on this 10th **day of OCTOBER 2017.**

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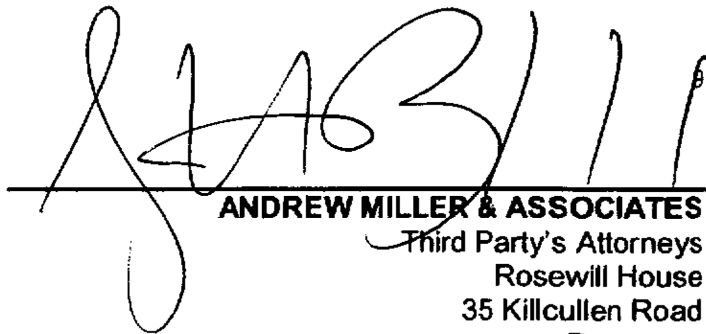

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TO:
THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
BLOEMFONTEIN

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