

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 14578/2023

In the matter between:

**JURIE WYNAND VAN DYK t/a VAN DYKS
PROPERTY BROKERS**

Plaintiff

and

M3T DEVELOPMENTS (PTY) LTD

Defendant

Coram: Acting Justice P Farlam

Heard: 23 August 2024

Delivered electronically: 23 August 2024

JUDGMENT

FARLAM AJ:

Introduction

[1] The issue to be determined in this matter is whether the plaintiff, Mr Jurie van Dyk, who trades as Van Dyks Property Brokers (**Van Dyk**), acted as a “financial services provider”, as contemplated in the Financial Advisory and Intermediary Services Act, 37 of 2002 (the **FAIS Act**), in his dealings with the defendant.

[2] In terms of section 7(1)(a) of the FAIS Act, a person “may not act or offer to act as a ... financial services provider, unless such person has been issued with a licence under section 8”. The particulars of claim do not contain an averment that

Van Dyk is an authorised financial services provider (**FSP**) and one can infer from the absence of an amendment that he was not so authorised. If Van Dyk was acting as an FSP when providing the services for which he has sought remuneration from the defendant, his actions would accordingly have been unlawful and, so the defendant alleges, would mean that the contract(s) under which he performed were void. In the defendant's view, the question is therefore potentially determinative of the claim.

[3] The issue has arisen pursuant to an exception by the defendant. The principles relevant to exceptions do not need to be restated in this judgment, as they are well-established. It suffices to record that the contention that Van Dyk acted as an FSP when dealing with the defendants must be construed against the backdrop of the particulars of claim read holistically,¹ and in a benevolent manner.² No facts extraneous to the pleadings may be considered.³ Insofar as there is room for doubt as to the relevant factual matrix, that uncertainty should inure to the benefit of the plaintiff.

[4] The defendant's notice of exception states that the defendant excepts to the particulars of claim on the ground "that it does not disclose a cause of action, *alternatively*, that it is vague and embarrassing". The vague and embarrassing component is however irregular, as well as itself confusing.

4.1. In terms of the proviso to rule 23(1), a vague and embarrassing exception must be preceded by a notice, filed within 10 days of receipt of the pleading, giving the opposing party an opportunity to remove the cause of complaint. There is no indication that such a notice was delivered in this case.

The defendant's notice of exception was moreover served about three-and-a-

¹ *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F.

² An excipient must persuade the court that upon every interpretation which the pleading in question, as well as any document upon which it is based, can reasonably bear, the pleading is excipiable: see e.g., *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C-D (para [6]); *Lewis v Oeanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F; *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500D; *South African National Parks v Ras* 2002 (2) SA 537 (C) at 542B-E.

³ *Barnard v Barnard* 2000 (3) SA 741 (C) at para [10]; *Lockhat & Other v Minister of the Interior* 1960 (3) SA 765 (D) at 777C-B.

half months after the issuing of the summons and thus well outside the time allowed for a vague and embarrassing notice.

4.2. The contention that the particulars of claim are vague and embarrassing is in any event barely motivated and without substance. There is nothing in the particulars of claim which suggests that the plaintiff was an authorised FSP; and there is therefore nothing impermissibly vague about the particulars in that respect. The particulars are framed on the basis that Van Dyk did not need to be authorised under the FAIS Act. If that is wrong, then his claim lacks an averment necessary to sustain the action and would accordingly fall to be set aside pursuant to the defendant's "no cause of action" exception.

4.3. It was submitted by the defendant, with particular reference to a clause in the written agreement between the parties (referred to in more detail below), that it was incumbent on the plaintiff to plead that the FAIS Act did not apply. I do not agree that the plaintiff was required to plead a negative, and to assert that one or more statutes were not applicable, let alone plead that a requirement in the FAIS Act (which was not referred to in the clause in question)⁴ was not triggered. It was for the defendant to raise such a point, should it be so advised, as indeed it did. Insofar as this contention underpinned the defendant's vague and embarrassing exception, it was thus misconceived.

[5] In the circumstances, I shall focus merely on the defendant's no cause of action exception, and give no further consideration to the vague and embarrassing ground.

⁴ As is also mentioned later in this judgment, the clause relied upon by the defendant in this regard – clause 1.4 of the brokerage agreement – stated that: "The Broker shall upon request by the Companies (**Funders**), be required to adhere to any additional requirements imposed upon the companies by the financial services industry or legislation including but not limited to the Financial Intelligence Centre Act and the National Credit Act."

The plaintiff's pleaded case

[6] The plaintiff, who has described himself as “a firm carrying on business as property brokers”, has relied in his particulars of claim on two agreements stated to have been concluded with the defendant.

[7] The first is a verbal agreement defined as “the collaboration agreement”, which he alleges was concluded during or about May 2019, and which is said to contain the following terms:

7.1. the plaintiff was obliged to assist the defendant in securing financing for the defendant's various property development projects by referring and introducing the defendant to potential financiers;

7.2. the plaintiff would receive a commission for its assistance in obtaining financing for the defendant by referring and introducing potential financiers to it; and

7.3. the plaintiff's commission would be calculated at 4% (plus VAT) of the amount of financing obtained by the defendant, unless otherwise agreed upon in writing by both parties.

[8] The second contract is a written agreement defined as “the brokerage agreement”, which is alleged to have been concluded on or around 9 February 2021, and is alleged to have been intended to accomplish at least two things:

8.1. confirm the plaintiff's responsibilities in terms of the collaboration agreement, specifically in relation to the Môreson Development and Fynbos Development projects; and

8.2. revise the terms of the collaboration agreement concerning the commission payable to the plaintiff for the Môreson Development and Fynbos Development projects.

[9] The material terms of the brokerage agreement, which is annexed to the particulars of claim, are averred in the particulars of claim to be:

9.1. that the plaintiff may refer prospective financiers to the defendant from time to time on a non-exclusive basis;

9.2. that the plaintiff shall refer the name and contact details of prospective financiers to the defendant for the consideration of the granting of a loan;

9.3. that the defendant must pay the plaintiff a brokerage fee in the amount of R1 million in the event that the defendant obtains funding in the amount of R30 million for its Môreson Development project, and R2 million in the event that the defendant obtains funding in the amount of R52 million for its Fynbos Development project;

9.4. that the fees payable to the plaintiff in respect of the projects shall be reduced pro rata should the funding obtained for the projects be less than the amounts stipulated above; and

9.5. that the plaintiff's fees are payable upon presentation of the plaintiff's invoice or on the date that the defendant receives funding from its chosen financier, whichever occurs last.

[10] Although not mentioned in the body of the particulars of claim, it is apparent from the brokerage agreement appended thereto that Van Dyk, who is defined therein as "Broker":

10.1. shall, upon request by the financiers, be required to adhere to any additional requirements imposed upon the funders by the financial services industry or legislation, including but not limited to the Financial Intelligence Centre Act (FICA) and the National Credit Act;

10.2. has no power to act as, and is not, an agent of the parties and, in particular, but without limitation, may not incur any liability on behalf of, make any contract binding on, give or make or purport to give or make any warranty or representation on behalf of the funders or in any other way act for the funders; and

10.3. shall have no authority to approve a facility on behalf of the funders, or represent that any funder is likely to approve a loan.

[11] According to the plaintiff, he complied with his obligations under the collaboration agreement and the brokerage agreement by referring the name and contact details of Credit Smith Capital Partners (Pty) Ltd (**Credit Smith**) and an investment analyst of Credit Smith, Chris Davis, to the defendant.

[12] The plaintiff has further alleged that:

12.1. on or about 8 November 2021, Mr Davis sent a final term sheet to the plaintiff and the defendant, confirming that the defendant had obtained funding for its Fynbos Development project in the amount of R30 million;

12.2. the defendant received R14 million in funding from its selected financier for the Fynbos Development project between 8 November 2021 and 10 May 2022, and a further R16 million in funding from the same financier after 10 May 2022;

12.3. as a result, the defendant is liable to the plaintiff for the brokerage fee in relation to the Fynbos Development project.

[13] It is evident from the final term sheet and covering email annexed to the particulars of claim that the R30 million funding for the Fynbos Development was provided to the defendant by a company called Salicure 2 (Pty) Ltd (**Salicure**) (as lender), and that the term sheet was sent to the defendant for signature by Chris Davis (copying in Van Dyk).

[14] The plaintiff alleges finally that, in terms of clause 2.1 of the brokerage agreement, the brokerage fee is R1,153,846.16, and that he has demanded that fee from the defendant which has refused to pay it.

Relevant provisions of the FAIS Act

[15] As mentioned, the defendant has contended in its exception that Van Dyk has performed the services of a “financial services provider”, without being authorised to act as such, and that Van Dyk has thus contravened section 7(1)(a) of the FAIS Act.⁵

[16] The term “financial services provider” is defined in section 1 of the FAIS Act as meaning:

‘any person, other than a representative, who as a regular feature of the business of such person –

(a) furnishes advice; or

(b) furnishes advice and renders any intermediary service; or

(c) renders an intermediary service.’

[17] To fall foul of the section 7(1) prohibition against acting as an FSP without authorisation, Van Dyk would therefore have had to furnish advice and/or render an intermediary service to the defendant.

⁵ As mentioned at the outset, section 7(1)(a) of the FAIS Act precludes a person from acting, or offering to act, as a financial services provider unless that person has been issued with a licence under section 8.

Section 8, headed “Application for authorisation”, regulates applications for, and the granting of, authorisations of FSPs or a representative of an FSP. It is *inter alia* stipulated in subsection 8(1) that an application for authorisation must be accompanied by information to satisfy the Financial Sector Conduct Authority (FSCA) that the applicant complies with the fit and proper requirements.

(The defendant also appears to rely on an alleged contravention of section 13 of the FAIS Act, but that provision is not applicable to Van Dyk, as it deals with persons who carry on business on behalf of others or act as a representative of an authorised financial services provider.)

[18] The word “advice” is defined in section 1 of the FAIS Act as meaning:

‘subject to subsection (3) (a),⁶ 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) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or

(d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product,

and irrespective of whether or not such advice-

⁶ Subsection 1(3)(a) states that:

“For purposes of this Act -

(a) advice does not include-

(i) factual advice given merely-

(aa) on the procedure for entering into a transaction in respect of any financial product;

(bb) in relation to the description of a financial product;

(cc) in answer to routine administrative queries;

(dd) in the form of objective information about a particular financial product; or

(ee) by the display or distribution of promotional material;

(ii) an analysis or report on a financial product without any express or implied recommendation, guidance or proposal that any particular transaction in respect of the product is appropriate to the particular investment objectives, financial situation or particular needs of a client;

(iii) advice given by-

(aa) the board of management, or any board member, of any pension fund organisation or friendly society referred to in paragraph (d) of the definition of 'financial product' in subsection (1) to the members of the organisation or society on benefits enjoyed or to be enjoyed by such members; or

(bb) the board of trustees of any medical scheme referred to in paragraph (g) of the said definition of 'financial product', or any board member, to the members of the medical scheme, on health care benefits enjoyed or to be enjoyed by such members; or

(iv) any other advisory activity exempted from the provisions of this Act by the registrar by notice in the Gazette”.

(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.'*

[19] The term "intermediary service" is defined as meaning:

'subject to subsection (3) (b),⁷ any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

(a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or

(b) with a view to-

(i) buying, selling or otherwise dealing in (whether on a discretionary or non-discretionary basis), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;

(ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or

⁷ Subsection 1(3)(b) is clearly not applicable in this case. It provides that:

'intermediary service does not include-

(i) the rendering by a bank, mutual bank or co-operative bank of a service contemplated in paragraph (b) (ii) of the definition of 'intermediary service' where the bank, mutual bank or co-operative bank acts merely as a conduit between a client and another product supplier;

(ii) an intermediary service rendered by a product supplier-

(aa) who is authorised under a particular law to conduct business as a financial institution; and

(bb) where the rendering of such service is regulated by or under such law;

(iii) any other service exempted from the provisions of this Act by the registrar by notice in the Gazette.'

(iii) receiving, submitting or processing the claims of a client against a product supplier.'

[20] As is apparent from those definitions, the advice or other services which a person cannot provide without being an authorised FSP must pertain to a “financial product”. It is therefore also necessary to refer to the definition of that term in section 1 of the FAIS Act, where it is defined as follows:

*‘ “**financial product**” means, subject to subsection (2)-*

(a) securities and instruments, including-

(i) shares in a company other than a 'share block company' as defined in the Share Blocks Control Act, 1980 (Act 59 of 1980);

(ii) debentures and securitised debt;

(iii) any money-market instrument;

(iv) any warrant, certificate, and other instrument acknowledging, conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);

(v) any 'securities' as defined in section 1 of the Financial Markets Act, 2012 (Act 19 of 2012);

(b) a participatory interest in one or more collective investment schemes;

(c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act 52 of 1998), and the Short-term Insurance Act, 1998 (Act 53 of 1998), respectively;

(d) *a benefit provided by-*

(i) *a pension fund organisation as defined in section 1 (1) of the Pension Funds Act, 1956 (Act 24 of 1956), to the members of the organisation by virtue of membership; or*

(ii) *a friendly society referred to in the Friendly Societies Act, 1956 (Act 25 of 1956), to the members of the society by virtue of membership;*

(e) *a foreign currency denominated investment instrument, including a foreign currency deposit;*

(f) *a deposit as defined in section 1 (1) of the Banks Act, 1990 (Act 94 of 1990);*

(g) *a health service benefit provided by a medical scheme as defined in section 1 (1) of the Medical Schemes Act, 1998 (Act 131 of 1998);*

(h) *any other product similar in nature to any financial product referred to in paragraphs (a) to (g), inclusive, declared by the registrar by notice in the Gazette to be a financial product for the purposes of this Act;*

(i) *any combined product containing one or more of the financial products referred to in paragraphs (a) to (h), inclusive;*

(j) *any financial product issued by any foreign product supplier and which in nature and character is essentially similar or corresponding to a financial product referred to in paragraph (a) to (i), inclusive.'*

[21] Section 36 of the FAIS Act states that any person who fails to comply with *inter alia* section 7(1) of the FAIS Act is guilty of an offence.

[22] The FAIS Act does not regulate the consequences of a contract providing for the provision of financial services by someone who is not an authorised FSP. In accordance with the general rule espoused in a long line of authorities it can however be regarded as implied in this instance that, because it would be an offence to require a person to act as an FSP without authorisation, an agreement which is premised on performance of that kind should be regarded as prohibited and therefore void.⁸

Analysis

[23] Although the exception is not a model of clarity, it appears that the defendant contends in general terms that the plaintiff has furnished advice to the defendant, alternatively rendered an intermediary service, pursuant to the brokerage agreement, read with the collaboration agreement. The defendant further alleges that, as a consequence, the “brokerage agreement is void ab initio as Plaintiff could not render any financial services to Defendant without a valid licence as required in terms of section 8 of the [FAIS] Act”, and “[a]ccordingly the Plaintiff’s Particulars of Claim do not establish a basis in law for the claim due to the non-compliance with the [FAIS] Act”.

[24] In both its exception and its heads of argument, the defendant has focused on clause (c) of the definition of “advice”, and consequently sought to contend that Van Dyk has furnished to the defendant a “recommendation, guidance or proposal of a financial nature ... on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product”. That argument is however unsustainable for at least a couple of reasons.

⁸ For example, *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274-275; *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Schutz and De Jager v Edelstein* 1942 CPD 126 at 131-132; *Pottie v Kotze* 1954 (3) SA 719 (A) at 726-727; *De Faria v Sheriff, High Court, Witbank* 2005 (3) SA 372 (T) at 397; and, see more generally, Bradfield *Christie’s Law of Contract in South Africa* 8ed pp 414-419.

[25] *In the first instance*, it was not sufficient for Van Dyk to have made a recommendation or proposal to the defendant in connection with the conclusion of a loan agreement. What also had to be shown was that the loan was connected with the incurring of liability or the acquisition of a right or benefit “in respect of any financial product” [emphasis added].

[26] The defendant’s counsel submitted that, on a proper interpretation, clause (c) of the definition did not require this, as that clause should be considered to deal with two separate events: (i) the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability; or (ii) the acquisition of any right or benefit in respect of any financial product. As will be apparent from the previous paragraph, I disagree. Neither the context nor the language is, in my view, consistent with such an interpretation. Clauses (a), (b) and (d) of the definition are concerned merely with advice relating to a financial product, and it is highly improbable that clause (c) was intended to be different – all the more so, as an “intermediary service” must also, in terms of its definition, relate to a financial product. It would moreover not be justified on the wording of clause (c) to read it as covering two entirely different scenarios: had that been the legislature’s intention, there would have been two different clauses. On the plain wording of clause (c), it covered advice on the conclusion of a transaction – whether aimed at incurring a liability, or acquiring a right or benefit – in respect of any financial product.⁹ This could possibly have been made clearer by inserting commas in the clause after “liability” and “benefit”, though I do not think that was necessary as the clause is not ambiguous in its current form.

[27] The term sheet concluded between Salicure and the defendant to regulate the furnishing of funds by Salicure to the defendant would not be a “financial product” as contemplated in the definition of that term in section 1 of the FAIS Act (quoted in paragraph [20] above), and the defendant understandably did not seek to contend otherwise. Nor is a secured loan, as entered into between Salicure and the defendant, a “product”, whether financial or otherwise. It would instead be a credit

⁹ Resulting in clause (c) reading as follows: “on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability, or the acquisition of any right or benefit, in respect of any financial product”.

agreement (albeit one which would not in this instance be covered by the National Credit Act, 34 of 2005 (**NCA**) as a result of the defendant being a juristic person and also presumably having a turnover exceeding the threshold in the NCA).

[28] The requirements of clause (c) of the definition of “advice” are therefore not met in the present matter.

[29] *Secondly*, in order for Van Dyk to have furnished “advice” as defined, he would have had to have given a “recommendation, guidance or proposal of a financial nature” in relation to the financial product. Even if one were to assume for the sake of argument that a loan agreement could be a financial product for purposes of the FAIS Act (which, as indicated, I do not believe to be the case), that requirement is not satisfied either.

29.1. Van Dyk’s mandate was, according to the particulars of claim, to refer and introduce the defendant to potential financiers so that it could obtain funds for its projects. Pursuant thereto, what Van Dyk did, according to the particulars, was to refer the defendant to, and provide it with the contact details of, Credit Smith, and more particularly one of its investment analysts, Chris Davis, who then secured a funder. There is no suggestion in the particulars of claim that Van Dyk made any recommendation or proposal to the defendant about any kind of financing, or offered any opinion about how the defendant should raise money for its projects. Nor was that his responsibility; his role was as an intermediary or facilitator, connecting parties who might benefit from working together.¹⁰ Insofar as the defendant was furnished with advice about a loan or other form of financing, this would, on the plaintiff’s case, have been done by Davis or the financiers.

¹⁰ While Van Dyk was, according to the particulars, “obliged to assist the defendant in securing financing for the defendant’s various property development projects”, this was merely “by referring and introducing the defendant to financial financiers”, not in making any representations about what finance might be provided.

29.2. Although the phrase “of a financial nature” is a wide and open-ended one, I do not think that, read in context, the words “a recommendation, guidance or proposal of a financial nature” were intended to encompass a situation in which a person recommended an investment analyst to engage with a client about potential financing and financiers. This is borne out by the exclusion in subsection 1(3)(a), which provides that “advice” for the purposes of the FAIS Act does not include, among other things, “factual advice given merely ... (aa) on the procedure for entering into a transaction in respect of any financial product; (bb) in relation to the description of a financial product; (cc) in answer to routine administrative queries; (dd) in the form of objective information about a particular financial product; or (ee) by the display or distribution of promotional material”. If that kind of factual advice is excluded from the definition of “advice” in the FAIS Act, it cannot reasonably be contended that advice for which an authorisation is needed under the Act would include an introduction to, or referral of, an investment analyst who could then, in turn, discuss financing with the client.¹¹

[30] The defendant’s vague and unparticularised alternative allegation that Van Dyk rendered an intermediary service must be rejected as well; and was understandably not pursued by defendant’s counsel in argument. As noted in paragraph [20] above, with reference to the definition quoted in paragraph [19], an “intermediary service” pertains to a financial product; and as has already been discussed, the term sheet which was concluded between the defendant and

¹¹ I might add that, even if one were to assume for the sake of argument that the loan agreement with Salicure constituted a financial product (which I do not consider to be the case) and that Van Dyk would have made statements about the loan agreement (which would also be wrong, as that would constitute impermissible speculation at the exception stage), one could still not conclude that any statements that Van Dyk may have made in respect of the loan agreement, or the conclusion thereof, constituted “advice”, as they could have fallen within the ambit of “factual advice” covered by subsection 1(3)(a) of the FAIS Act, and thus have fallen outside of the definition of “advice”, pursuant to the qualification in the opening line of that definition.

(As evident from the definition of “advice” as quoted in paragraph [18], what follows in the definition is “subject to subsection (3) (a)”. While the expression “*subject to*” has no fixed meaning, it is often used to establish what is dominant and what is subservient, alternatively to mean “except as curtailed by”, which is what it was seemingly intended to convey in this instance. See e.g., *Premier, Eastern Cape and Another v Sekeleni* 2003 (4) SA 369 (SCA) para [14] (and the cases cited there) and *Steve Tshwete Local Municipality v Fedbond Participation Mortgage Bond Managers (Pty) Ltd and Another* 2013 (3) SA 611 (SCA) para [19].)

Salicure, to record the loan agreement between those parties, does not qualify as such.

[31] The case of *Atwealth*,¹² on which the defendant relied in its heads of argument, does not warrant a contrary conclusion. It is clearly distinguishable on the facts, and so was correctly not pressed in argument.

[32] The differences between *Atwealth* and the present case are readily apparent from the opening paragraphs of the Supreme Court of Appeal's judgment, where Davis AJA noted the following:

'[2] ... During the period 2009 – 2010 second appellant, Ms Moolman, rendered financial advice to [the Kernicks] in the course and scope of her employment with first appellant (Atwealth) and thereafter in 2011 with third appellant (Vaidro). The Kernicks contended that the advice given by Ms Moolman was to invest their funds in certain investment products offered by the Relative Value Arbitrage Fund (RVAF) and associated products, and MAT Abante UK Relative Value Arbitrage Fund and MAT Worldwide Ltd (the investment companies), of which MAT Securities (Pty) Ltd was the fund manager. This range of potential investments was said to fall under an entity referred to as Abante Capital.

[3] The Kernicks further contended that they were assured by Ms Moolman that these investment companies generated higher returns through legitimate investment vehicles than was the case with alternative financial products. It was common cause that this did not prove to be the case. Mr and Mrs Kernick made the following investments:

Date of investment	Amount	Investment company
20/01/2010	£100 000	MAT Worldwide
01/08/2010	£70 000	MAT Worldwide

¹² *Atwealth (Pty) Ltd and Others v Kernick and Others* 2019 (4) SA 420 (SCA).

01/07/2011	£45 000	MAT Worldwide
28/10/2011	R700 000	RVAF
01/03/2012	£150 000	MAT Worldwide

Kernick Consulting made the following investments:

Date of investment	Amount	Investment company
01/09/2009	£50 000	MAT Worldwide
01/10/2010	£100 000	MAT Worldwide
01/02/2012	£50 000	MAT Worldwide'

[33] As is further apparent from the judgment, Ms Moolman's job description, in contrast to that of Van Dyk, was that of financial adviser. More particularly, she had, on 23 March 2009, entered into a memorandum of agreement with Atwealth, in terms of which she "was appointed as a financial advisor by Atwealth 'in the area of Financial Planning and Selling of approved financial products from the commencement date'."¹³

[34] The extent of the financial advice that Ms Moolman gave the Kernicks is also noteworthy. According to the Supreme Court of Appeal judgment:

'[13] Ms Moolman made a presentation to the Kernicks, including a description of Abante Capital (Pty) Ltd as 'a South African hedge fund management company: Abante's funds each focus on the core strategy of quantitative arbitrage'. From the documents which she claimed to employ during her presentation, it appears that she introduced them to two specific products, namely RVAF and a product described as Bridgefin.

[14] According to Mr Kernick, Ms Moolman spoke of RVAF as a —

"product that was invested in the top twenty shares, sorry forty shares in either the UK or South Africa, depending which fund you were in. Sorry, there was the RVA and the MAT Worldwide. And then the top forty shares were

¹³ Atwealth para [11].

traded electronically, which appealed to us, and they were based on sectors so there was a technical sector or a financial sector. And based on fluctuations within a sector which share would be traded, either bought or sold. So they didn't look at it as a day-to-day what shares are doing well, they looked at it by sector."

[15] Mr Kernick emphasised that it was important to both him and his wife that the RAV fund 'was invested in the top equities in the country or the top shares, so we felt that was more to our liking'. He said of the products which Ms Moolman introduced:

"(I)t was in equities, and a known asset effectively, not in properties or something. It was known in the top 40 companies on the stock market. The second thing we enjoyed about it was that the trading was very much computerised or we were led to believe computerised and which took the human emotion out of it. We wanted something that would trade, you know, based on fact not on hearsay. And then the third thing was the returns indicated to us, was why we invested [in] it."

[35] The advice which was considered in the *Atwealth* matter thus unquestionably involved a recommendation, guidance or proposal of a financial nature in respect of a financial product. In stark contrast, the introduction and referral by Van Dyk in the present case did not.

Conclusion and order

[36] The exception is consequently without merit and must be dismissed. Both parties were agreed that costs of counsel should be on scale A.

[37] **I accordingly make the following order:**

The exception is dismissed with costs, including the costs of counsel, which are granted on scale A.

ACTING JUDGE P FARLAM

For plaintiff: Adv A Oosthuizen

Instructed by: Roux Van Dyk Attorneys, E Van Dyk, M Matthee,

For defendant: Adv A Titus

Instructed by: Abrahams Kiewitz Inc., K Kiewitz