MARTHA WILKE versus SWABOU LIFE ASSURANCE CO. LTD

CASE NO. FA 13/97

Mtambanengwe, J *et* Silungwe. J *et Mainga, J.*

2000.05.05

INSURANCE: Generally - applicable legal principles- requirement of ***uberrimae fidei*** imposes duty on proposer for insurance to disclose material facts - False replies to questions in proposal form - Insurer disclaiming liability on ground of non-disclosure - materiality defined - False answers to questions in proposal form resulting in non-disclosure of the fact that the insured was in poor health in that he had, ***inter alia,*** suffered from *"alcohol damage to the liver";* migraine attacks, and alcoholism which *"preceded or co-existed with"* his *"immediate cause of death",* namely, myocardial infarct - such information likely to affect insurer's determination of the premium - false answers having materially affected the assessment of the risk.

EXPERT WITNESS -- Although an expert may refer to a passage in a text book or an article to refresh his/her memory or to confirm his/her opinion, such passage is not evidence ***per se*** **-** It is irregular for a party or his/her legal representative to attempt to produce, on appeal, evidential material, e.g., a passage from a text book or an article which has neither been referred to nor expressly or implicitly adopted by an expert witness.

CASE NO. FA 13/97

IN THE HIGH COURT OF NAMIBIA

In the matter between

MARTHA WILKE
(born **SWARTZ) N.O** **APPELLANT**

and

SwABOU LIFE ASSURANCE COMPANY LIMITED **RESPONDENT**

CORAM: MTAMBANENGWE, J. et SILUNGWE, J, et MAINGA, J

Heard on: 1999-05-24

Delivered on: 2000-01-20

JUDGMENT

SILUNGWE, J: This is an appeal against the whole of the judgment of Teek, J (as he then was) wherein he dismissed, with costs, the Appellant's claim under a Mortgage Bond Policy (henceforth referred to as the policy) which provided life assurance in the sum of NS62,000-00 on the life of the now late Christiaan Peter Friedrich Walte Wilke (hereafter

referred to as the deceased) for a period of 20 years, payable upon his death or total and permanent disability.

The appellant, who was the plaintiff in the Court ***a quo,*** is an adult female who had been married to the deceased and who sued in her capacity as an executrix of the deceased's estate. She is represented by Mr Bloch. The respondent, then defendant, is a registered limited insurance company and it is represented by Mr Coetzee.

As it was common cause that the onus of proving the defences pleaded lay upon the respondent, it is was agreed between the parties before the commencement of the trial that the respondent would present it's evidence first. Accordingly, the respondent led evidence of three witnesses but the appellant adduced no evidence at all. Mr Coetzee has raised two points ***in limine*** the first of which reads:

> "1. The appellant failed to comply with the provisions of rule 49(7)(a) of the Rules of Court in that the record filed by the appellant does not include copies of all documents and exhibits that were referred to in the Court ***a quo.***
>
> 2. In particular the appellant failed to include copies of the following documents:

2.1 copies of the translation of the notes of Doctor Laurie, …

2.2 Notes by Doctor Laurie to MediCity Hosptial dated 13 September 1995,…

2.3 Laboratory report dated 18 September 1995, …

2.4 Copies of the notes made by Doctor H.K. Weimann, …

3. Failure to comply with the provisions of this sub-rule may result in the appeal being struck off the roll."

In response to the first point ***in limine,*** Mr Bloch concedes the appellant's failure to include, in the record filed, copies of the documents referred to in paragraph 2.1 above. He contends, as regards 2.1 that the translation from Afrikaans into English was not a sworn translation but a free one made by the defendant's respondent's counsel which was neither numbered by the Court, as was the case in other instances, nor admitted as an exhibit. However, and apart from the original documents, the translation was not even referred to (by the defendant's/respondent's counsel) either in examination-in-chief or cross-examination. These are the reasons advanced for the omission of the translation from the record which I find to be reasonable and acceptable.

The next omission for consideration relates to Dr Laurie's notes (2.2) to MediCity Hospital dated September 13, 1995. Those notes are about two dates (in March and September 1995) of the deceased's admission to hospital for the purpose of "drying him out" by which

time the deceased was indisputably an alcoholic. The omission of the said notes is thus not necessarily material.

With regard to the omission of the laboratory report dated September 18, 1995 (2.3), this is regretted by Mr Bloch. It is asserted, however, that the defendant/respondent is not prejudiced thereby, but that the appellant is. The document at issue, which is annexed to Mr Bloch's Heads of Argument, is admitted as an integral part of the record of appeal.

The last part of the first point ***in limine*** touches on copies of notes made by Dr W.K. Weimann. Mr Bloch explains that those notes were omitted from the record because they had not been admitted since Dr Weimann was never called as a witness to prove them and to be cross-examined. This argument is sound and acceptable.

It follows from what has been said above that the first point ***in limine,*** with the exception of 2.3, cannot be sustained.

The second point ***in limine*** is in these terms:

> "4. It trite law that a party to an appeal may not include evidence in his or her Heads of argument.
>
> 5. Section D of the Appellant's Heads of Argument consists of extracts from a textbook allegedly dealing, ***inter alia,*** with the "identifying (of) alcohol

problems in the individual."

6. Over and above the fact that a litigant is ***not entitled to present*** evidence in his Heads of Argument, the 'evidence' ***that*** the Appellant attempts to slip in at ***this*** stage is without any ***doubt inadmissible....***"

This point ***limine*** is directed at Section D of Mr Bloch's Heads of Argument which is headed:

"D. Objective and Biochemical ***Tests*** for Alcoholism."

The heading is undoubtedly derived ***from*** the 7'" chapter of a book ***which*** carries the title: 'Alcohol, Employment and Fair Labour Practice' by ***Chris*** Albertyn, a Labour Law Lawyer of ***South Africa,*** and Mike McCann, a member of the Faculty of Occupational Medicine of the Royal College of Physicians in London, England, ***with*** a forward by Mr Justice R. Goldstone, a member of the Appellate Division in South Africa, who ***states that*** "the book is the product of a ***sound*** theoretical and practical approach and a thorough ***appreciation*** of knowledge of the medical and scientific causes, problems and treatment of alcohol abuse. Mr Bloch makes no ***bones about the fact that*** the book was not available to him ***until aft*** the trial. He concedes that the first two pages of Section D of his Heads of Argume which contains passages from the book aforesaid, should be ignored. He ***contei*** however, that the next three pages do not deal ***with evidence,*** they deal with scientific fa

I have no hesitation in holding that Mr Bloch's contention is misconceived because he is clearly attempting to use material from the excerpts of the book to bolster his argument on the facts of the case which is quite improper as it is tantamount to making an effective use of the first two pages of Section D which he himself concedes should be struck out of his Heads of Argument.

It is common cause that the book on which Section D rests was never referred to during the proceedings before the Court ***a quo,*** that is, the relevant passage was never put to the expert witnesses called at the instance of the respondent (the appellant called no witnesses, as previously indicated).

The crux of the matter is that it is irregular for a party or his legal representative to attempt to introduce material, for instance, from a book or an article (or portions thereof) which has neither been referred to nor expressly or implicitly adopted by an expert witness, as ***in casu.*** See ***S v Collop*** 1981(1) SA 150(A) at 167 B (per Diemont, J.A); ***Menday v Protea Assurance Co. Ltd*** 1976(1) SA 565 (E) 569 H. It is trite law that an expert who relies on information contained in a textbook or an article written by someone who is not called as a witness may be permitted to make use of such hearsay provided he can, by reason of his expertise, affirm, at least in principle, the correctness of the statements contained in the book or article and that such book or article is reliable. See ***Menday, supra,*** at 569H. The following passage from Hoffmann's and Zeffertt's South African Law of Evidence, 4th ed. at p. 101, is both pertinent and instructive:

> "If the expert refers to books or articles in support of his views, they become evidence only so far as he has adopted them, with or without comment, as part of his evidence. The Court is not entitled to treat the author or the book or article as another witness and make use of passages to which the expert has not referred or which have not been put to him in cross-examination."

A useful illustration is offered by ***R*** v ***Mofokeng*** 1928 AD 132 where a conviction was set aside on the ground that the judge had read to the jury a passage from a work on medical jurisprudence which seemed to contradict what had been testified by a witness, but which had not been put to the witness in the course of his evidence. As Diemont, JA said in ***S*** v ***Collop,*** supra, at 167 B:

> "Although an expert may refer to text books and a doctor to medical treatises to refresh his memory, or to correct or confirm his opinion, such books are not evidence ***per se."***

As the excerpts from the book in question were neither referred to nor adopted by expert witnesses in the matter under consideration, the whole of Section D of the appellant's Heads of Argument is tainted with inadmissible hearsay evidence and, inevitably, it is disallowed. In any event, it is highly improper for a party or his/her legal representative to introduce evidence in Heads of Argument. Unquestionably, argument is not presented as, or through, evidence. As a matter of fact, argument regardless of however powerful it may be, does not

amount to evidence; it is merely a persuasive comment by parties or their legal representatives on questions of fact or law.

For the reasons given above, the whole of Section D of the appellant's Heads of Argument is disallowed.

With both points ***in limine*** out of the way, I will now turn to the merits of the case. I propose to consider, firstly, the submissions on the facts and, secondly, the relevant legal issues.

It is common cause that the deceased's application for the policy is dated March 26, 1993, and that the policy itself took effect on May 24, 1993, and was anticipated to run until it's maturity on May 24, 2013.

On September 21, 1995, the deceased died as a result of a myocardiac infarction (heart attack). The value of the policy then was N$60,580-20. The appellant claimed this sum as well as interest thereon at the rate of 20% per annum, effective from the date of the deceased's death until full payment was made, plus costs.

The Respondent, who had repudiated the policy on January 3, 1996, denied liability and pleaded as follows:

"5.1 In terms of paragraph 39(b) of the application for insurance … the acceptance of the application by the Defendant was conditional upon, ***inter alia,*** the life to be insured, Wilke, not having consulted any medical practitioner or having received any medical advice between the date of the application (26 March 1993) and the date of payment of the full amount due in respect of the premium (24 May 1993).

5.2 The insured life (Wilke) did in fact consult a medical pracititoner, Dr G Scholtz, on 13 April 1993 and received medical advice from the said Dr Scholtz on the aforementioned date.

5.3 In the premises the insurance policy applied for never came into operation and was never of any force and effect.

5.4 In the alternative to the above, and in any event, the Defendant pleads that, in terms of paragraph 39(a) of the said application for insurance, the statements and answers contained therein constituted the basis of the contract of insurance and it was agreed that if Wilke withheld any material information the benefits and all monies paid to the Defendant shall be forfeited.

5.5 Wilke failed to give details of the fact that he was an alcoholic, alternatively that he used excessive amounts of alcohol and furthermore gave false, alternatively incomplete replies to questions 28, 31(c), 31(f), 32(a), 32(c) and 34 contained in the application for insurance.

5.6 The aforesaid failure to give full details of his habits and the incorrectness

> and incompleteness of the answers given were of such a nature as to materially affect the assessment of the risk assumed by the Defendant under the said contract and if the full facts have been disclosed the Defendant would not have issued the said policy on the terms offered or at all.

As previously stated, the single judge of this Court dismissed the appellant's claim and thereby triggered off this appeal.

Although many grounds of appeal are listed, there is in substance one ground only with it's derivatives. The ground is that the Court *a quo* "erred in holding that the deceased gave false and/or incomplete replies to questions contained in the application for insurance (in the sense that such replies were material to the assessment of the risk) - there being no evidence to establish or support such a finding." The only subsidiary ground worthy noting is that the trial Court "erred in holding that the deceased failed to give details of the fact that he was an alcoholic or used excessive amounts of alcohol at the time that he applied for the policy - there being no evidence to establish such finding."

Paragraph 39(b) of the Deceased's application for insurance reads:

> "I agree that:
>
> (b) should this application be accepted by SWABOU LIFE such acceptance shall be conditional upon there having been no material alteration in the facts upon which the decision of SWABOU LIFE was based and the life to

be insured not having suffered any illness or injury, consulted any medical practitioner or received any medical advice between the date of this application and the date of payment of the full amount due in respect of (sic) the premium."

In her amended Replication, the appellant admitted the contents of paragraph 39(b) of the deceased's application and further averred as follows:

"(ii) The Plaintiff further admits that the date of the application was the 26th March, 1993 and the Plaintiff further admits that the date of payment of the full amount due in respect of the premium was the 24th May, 1993.

(iii) The Plaintiff admits further that WILKE consulted a medical practitioner, DR G SCHOLTZ, on the 13th April, 1993.

(iv) The Plaintiff avers that on a proper interpretation of paragraph 39(b) of the Application for Insurance, the acceptance of the application by the Defendant was conditional upon WILKE not having consulted any medical practitioner in regard to any illness or injury which would materially affect the risk accepted by the Defendant and/or which constituted a material variation of the facts upon which the Defendant based its acceptance of the application.

(v) The Plaintiff states that WILKE consulted DR G SCHOLTZ, on 13th April, 1993 in regard to a nose bleed which illness did not materially affect the risk accepted by the Defendant or constitute a material variation of the facts upon

which the Defendant accepted the application,

(vi) Alternatively, and in any event, clause 39(b) of the application for insurance constitutes a representation. Accordingly any incorrectness contained therein is protected by Section 63(3) of the Insurance Act 27 of 1943 as such incorrectness is of such a nature as to be unlikely to have materially affected the assessment of the risk at the time of the issue of the policy."

It is obvious, on the facts of the matter, that the deceased's application was duly accepted by the respondent. Further, it is common cause that the deceased consulted a medical practitioner, Dr G Scholtz, and received medical advice from him in connection with epistaxis, which, in ordinary parlance, means a "nose bleed", during the period when such action was prohibited in terms of paragraph 39(b) aforesaid.

Mr Bloch contends that paragraph 39(b) concerns itself with material alterations in the facts upon which the respondent's acceptance of the risk was based; and that it was this that was the purpose of that paragraph. He goes on to say that the intention of the parties is to be gleaned from the contract as a whole, having regard to the purpose of the agreement and its particular clauses. It is further argued that where the meaning is not clear, the Court should tend towards that interpretation which favours the insured, namely, the ***contra preferentum*** rule which requires a written document to be construed against the party that drew it up; and the doctrine which favours the upholding of the policy rather than it's forfeiture. In addition to the foregoing, Mr Bloch claims that the onus was on the respondent to prove

that the "nose-bleed" created a material alteration in the facts upon which the acceptance of the policy was based.

In a counter argument, Mr Coetzee points out, ***inter alia,*** that:

(1) paragraph 39(b) is clear and unambiguous, and should be given its grammatical and ordinary meaning;

(2) the ***contra proferentem*** rule is irrelevant as it is only applicable where the wording of an agreement is incurably ambiguous; and that the rule which favours the upholding of the policy rather than its forfeiture also applies where the language of the policy is not clear and unambiguous. In the circumstances, Mr Coetzee urges the Court to uphold the finding of the Court ***a quo*** on the point at issue.

It is a primary rule of interpretation that words should be given their ordinary, literal, grammatic or natural meaning and adhered to. But where the literal interpretation would, for example, be misleading, or lead to an absurdity or a result which would be unjust, unreasonable or inconsistent with other provisions or repugnant to the general object of the instrument, the Court may deviate from the literal rule and apply the golden rule. See ***Venter*** v ***R*** 1907 TS 910 at 913; ***Scottish Union & National Insurance Co Ltd*** v ***Native Recruiting Corp. Ltd*** 1984 AD 458.

In applying the contents of the preceding paragraph to the case under consideration, the question that readily comes to mind is whether the expression in paragraph 39(b):

> "… and the life to be insured not having suffered any illness or injury, consulted any medical practitioner or received any medical advice..."

is directly linked to a "material alteration in the facts upon which" the respondent's acceptance of the policy was based. In substance, Mr Bloch answers the question in the affirmative, and properly so, in my view. He maintains that this is the purpose of paragraph 39(b) and that, as such, the onus is upon the respondent to prove that the "nose-bleed" would have materially affected the facts on which the decision to accept the life insurance applied for was based.

Supposing the deceased had suffered from common cold or sustained a minor cut on his ear, as a result of which he had consulted a medical practitioner or received medical advice during the relevant period, would a reasonable person have come to the conclusion that this constituted a material variation of the facts upon which the deceased's policy had been accepted? In my opinion, the answer should be in the negative; any answer to the contrary would glaringly be absurd.

The question that now arises is whether the deceased's "nose-bleed" in connection with which he consulted Dr Scholtz and received medical advice from him materially affected

the facts upon which the decision to accept the policy was based? During Mr Bloch's cross-examination of Dr Scholtz, the following questions and answers appear at pages 29 and 30 of the record of appeal:

Q: Basically nose bleed is in your rules as a Doctor a very serious complaint?

A: It is.

Q: It is a serious complaint?

A: It can be a serious complaint.

Q: But you would not have regarded his epistaxis as you saw it then as life threatening or (which) might affect his future living?

A: In that case, I would have admitted him to hospital.

Q: If it was?

A: Yes.

From the above excerpt, it seems clear to me that although a nose-bleed can be a serious complaint, it was not so in the instant case, otherwise Dr Scholtz would have admitted the deceased to hospital.

Further, during Mr Bloch's cross-examination of Mrs Horn, the respondent's underwriter and head of the Claims Department, she testified that if the doctor had told her that the deceased's "nose-bleed" was a problem, she would have sought more information on the matter. The cross-examination continued as follows, at pages 44 and 45:

Q: But the doctor told us this morning the nose bleeding he had wasn't a problem he dealt with it quite simply.

A: Okay. Then I will accept it.

Q: In fact the Doctor said if it had been serious he would have admitted him into hospital. And if he had told you that you would have wanted more information.

A: Yes.

Q: That's right. Okay, in fact 2 years before that he had an infection of the nose tissue and the doctor said he gave him a medicine to put in his nose and he cured it quickly. Would that have bothered you?

A: No.

What the preceding two paragraphs demonstrate is that the deceased's "nose-bleed" on April 13, 1993, concerning which he consulted Dr Scholtz and received medical advice from him, was not a serious illness and could thus not have created a material alteration in the facts upon which the respondent's acceptance of the policy was based. It follows that the deceased's non-compliance with paragraph 39(b) could not invalidate the policy and was thus not fatal in law. In any event, in terms of Section 63(3) of the Insurance Act, Act 27 of 1943 (hereafter called the Insurance Act), unless that representation was material to the assessment of the risk (which, as previously found, it was not) the respondent could not repudiate liability for that reason alone. I am satisfied that the respondent failed to discharge its onus of proof in this connection. For this reason, it was a misdirection for the

Court ***a quo*** to find that it was irrelevant whether or not this was a serious illness.

In view of my decision on the merits of paragraph 39(b) of the application, it is unnecessary for me to consider other points raised by Mr Bloch in connection with this sub paragraph.

The principal ground for consideration is that the Court ***a quo*** erred in holding that the deceased had given false and/or incomplete replies to questions contained in the application for the insurance (in the sense that such replies were material to the assessment of the risk) - there being no evidence to establish or support such finding. The material replies relate to questions 28,31(c) and (f), 32(a) and (c) and 34.

The respondent pleaded in it's defence that the basis of the contract of insurance between the parties is paragraph 39(a) of the deceased's application for insurance, the relevant portion of which provides:

> "39. I declare that the foregoing questions have been fully considered by me and statements given in this application and all documents that have been or will be signed by me in connection with this application whether in my handwriting or not ***are strictly true and complete.***
>
> I agree that:
>
> (a) This application and the declaration together with all relevant documents

> that have been or will be signed by me shall be the basis of the contract between SWABOU LIFE and myself and that if ***any material information is withheld*** the benefits and all moneys paid to SWABOU LIFE shall be forfeited."

(the emphasis provided is mine).

Paragraph B of the appellant's amended Replication reads:

> "The Plaintiff admits that in terms of paragraph 39(a)of the application for insurance … the statements and answers contained in the application for insurance constituted the basis of the contract of insurance and that WILKE agreed that if any material information had been withheld, the benefits and all monies paid to the defendant shall be forfeited."

As a matter of convenience, I propose to consider this ground, firstly, in relation to paragraphs 31(c) and (f), 32(a) and (c), and 34; and secondly, with regard to paragraph 28.

The terms of paragraph 31(c) are as follows:

31. MEDICAL HISTORY (supply full details in 34 below for any answers in the affirmative). Do you have, or have you ever had, trouble with or disorders of:

(c) your digestive system and liver (e.g. recurrent indigestion, ulcers, bleeding from bowels hepatitis, gallstones)? -

The deceased's reply was: "No". To this response, the Court ***a quo*** remarked:

> "This answer was clearly wrong, because according to the medical evidence adduced the deceased had a recurrent gastritis problem and liver damage long before the completion of the application form"

According to Mr Bloch, the trial Court fell into error in making this finding and in using, ***inter alia,*** the expression: "recurrent gastritis". He goes further to state that from Dr Scholtz's records, "the word 'gastritis' (and pyloric spasm is included)" appears on April 12, 1991 and December 29, 1992 when the deceased visited him) (see Exhibits pp. 31 and 39 of the record); and that Dr Laurie's diagnosis of "gastritis" on three occasions took place only after the deceased had signed the application form. Mr Bloch claims that the trial Court's conclusion that "gastritis" was recurrent because of the deceased's two visits to the doctor is clearly an error.

We are, of course, here mainly concerned with the deceased's state of health at the time that he signed his application form. Dr Scholtz spoke of "gastritis" as a "digestive problem"; and also as an inflamatory process of the lining of the stomach. It is stress related. He further testified that "gastritis" and "pyloric spasm" could be related. In point of fact, his

medical report (Exhibits at p. 39) reflects that he diagnosed "gastritis" both on April 12, 1992 and December 29, 1992, when the deceased visited him; and yet his letter addressed to Mr Bloch, dated October 15, 1996, and his evidence, both reflect "gastritis" and "pyloric spasm" separately. In any event, he stated that pyloric spasm (like gastritis) is also a "digestive problem". Dr Laurie, who subsequently (i.e. after the deceased's application) treated the deceased for gastritis in March and December 1994 and in March 1995, testified that "pyloric spasm is usually an outflow of gastritis and access acid" in the stomach. It is noteworthy that Dr Laurie diagnosed the deceased with an abdominal problem when he first saw him on December 4, 1989 (Exhibits P). Furthermore, Dr Weimann had seen the deceased "three times for abdominal related problems", according to Dr Laurie's testimony. He (Dr Laurie) stated that alcohol abuse can cause gastritis; and that recurrent gastritis is "definitely material to the risk of insurance but also in medical terms". Dr Scholtz confirmed the evidence of Dr Laurie by testifying that "the most common" cause of gastritis "is usually alcohol". This is demonstrated by his SWABOU LIFE Medical Attendant's Report (Exhibits p.38) where, in answering the question: "What has been the Applicant's general state of health since you have known him?" stated: "Acceptable but possible alcohol problem - gastritis". And in answer to a question (Exhibits p.39, i.e. the SWABOU LIFE Medical Attendant's Report) which required an indication of any unfavourable features of the deceased known to him, Dr Scholtz wrote: "Gastritis on several occasions". On account of this condition, Dr Scholtz indicated that the deceased was, to his knowledge, not eligible "for assurance as a first class life".

As the deceased's stomach problems occurred at least twice prior to the completion of his application and thrice thereafter, I would uphold the trial Court's finding that this condition was recurrent and, therefore, serious.

The other aspect of paragraph 31(c) that needs to be addressed is the deceased's negative reply in relation to whether he had, or ever had, trouble with his liver. It is pertinent to examine what Dr Scholtz and Dr Laurie had to say about this.

In July 1991, Dr Scholtz was responsible for a liver test that was done on the deceased and reported upon by Pathologist Dr Jamie Van Zyl on July 15, 1991 (see Exhibits p.34). The results of the test show three items of interest to us which are reproduced hereunder:

MICROSCROPIC APPEARANCE	RESULTS UNITS	NORMAL RANGE
Gamma GT	88.00 u/1	8.00-38.00
ALT (SGPT)	47.00 u/1	2.00-30.00
AST (SGOT)	46.00 u/1	2.00-30.00

These results speak for themselves.

Obviously, the difference between the results and the normal range was not "small" as Mr Bloch endeavoured to show during his cross-examination of Dr Scholtz. According to Dr Laurie, a Gamma GT is usually used and it is a much more sensitive test; in the deceased's case, one could "certainly assume" that the deceased had "liver problems".

The relevant questions and answers during examination-in-chief of Dr Scholtz read:

Q: And (page) 34?

A: That is a liver function test and meaning that only three of them were outside the normal range those with asterix.

Q: And what does that indicate to you?

A: That indicates liver damage.

Q: Liver damage, to what extent?

A: Slight.

It is clear from the contents of page 31 of the Exhibits compiled by Dr Scholtz that the deceased saw him on January 10, 1991, when lymphangeitis was diagnosed for which Riostatin and Narobic were prescribed. At that point in time, Dr Scholtz did not suspect that the deceased had a liver problem otherwise he would not have prescribed Narobic. The Doctor was next seen by the deceased on July 12, 1991, when a normal check-up was done and the deceased was given a note to take to a laboratory for a liver function test but the deceased apparently presented himself for the test on July 15, 1991. The next time the deceased saw Dr Scholtz again was on October 21, 1991, when hayfever was diagnosed.

The record of appeal shows the following questions and answers during cross-examination:

Q: That means when you got the results I am sure as a professional man you looked at the results and you felt that this man (sic) … was Okay and there was nothing serious to report to him and he only came back to you three

months later. Is that correct?

A: That's correct.

This answer is obviously ambiguous as it is not clear whether it relates to the first question:

(1) Q: ... there is nothing serious to report to him … Is that correct?

Or to the second one:

(2) A: … he only came back to you three months later … Is that correct?

or to both? In these circumstances, it is safe not to take much notice of the answer.

The record goes on:

Q: There was nothing serious, he was a normal man having little problems which you (sic) had treated with these medicines. Is that correct?

A: That's correct.

It seems doubtful whether, on the strength of Dr Scholtz's testimony, and regard being had to the evidence of Dr Laurie, one can properly say that there was "nothing serious" with the deceased and/or that "he was a normal man having little problems."

The record goes further:

> Q: "And you would not have regarded them as serious nor explained to him that it was serious..."

Thereafter, and before an answer could be given, Mr Bloch surprisingly changed the subject. It would appear that this was an attempt by him to get Dr Scholtz to say that the deceased's liver damage was so insignificant that it was not worthy communicating to him the result of the laboratory investigation. In reality, he failed to achieve this objective. In the circumstances, it is not open to him to argue that:

> '... at no time did his Doctor ever indicate that there was anything wrong with his liver nor could the deceased have known thereof."

It seems to me likely that Dr Scholtz communicated the result of the liver function test to the deceased when the latter saw him on October 21, 1991, if this had not been done earlier, for instance, by telephone, as it is common knowledge that medical doctors ordinarily do communicate results of laboratory tests to their patients concerned, regardless of whether or not such results are favourable to those patients.

It is significant to observe that when the results of the liver function test were drawn to the attention of Dr Laurie by Mr Coetzee, during the doctor's examination-in-chief, he asserted

that they were "definitely" an indication of damage to the liver. When cross-examined by Mr Bloch, he maintained that he would "most definitely" say that the blood test results showed "alcohol damage to the liver". This evidence, which shows that the deceased's liver was damaged, at least by July 15, 1991, was accepted by the Court ***a quo.*** I am satisfied that there was no misdirection about the Court's finding on that score. In any event, it was important for the deceased to disclose to the respondent that he had undergone laboratory tests.

From the picture that emerges, it is inescapable for me to come to the conclusion that the deceased knowingly gave a false answer concerning the state of his digestive system and the liver which answer was material to the assessment of the risk that was to be undertaken by the respondent; this did not only constitute a violation of paragraph 31 (c) of the application but also of the deceased's declaration made under the principal part of paragraph 39, namely: "that the statements given in this application … are strictly true and complete".

Next for consideration comes paragraph 31(f) whereby the deceased was requested to indicate whether he had or ever had trouble with, or disorders of, his eyes (excluding errors of refraction) ears, nose or throat e.g. deafness, ear discharge)?
The deceased's reply was in the negative.

It is submitted by Mr Bloch that the eyes and ear problems were relatively unimportant and very simply treated and that the respondent was, therefore, concerned with serious, not

trivial, infections. This submission is based on the following questions he put to Dr Scholtz and the answers thereto:

> Q: Overall looking at page 31 . . . which is a summary of the times you saw him (the deceased), all the matters that are dealt with here are relatively unimportant and can all be treated by normal everyday diagnosis and treatment by a general practitioner?
>
> A: Yes.
>
> Q: There was nothing really important?
>
> A: Ok.

In my view, this was too general a question that covered the period December 27, 1990, up to April 13, 1993, which included such medical conditions as gastritis, liver damage, use of alcohol in excessive amounts and pyloric spasm. To generalise all such medical problems as for instance "relatively unimportant"; "trivial disturbances", is tantamount to glossing over serious, and in some cases, life threatening diseases. I find this kind of generalisation unacceptable. Faced with specific items, why on earth was it found necessary to rest the matter on a generalisation? Specific issues are best addressed in specific and clear terms. This Mr Bloch failed to do. In the circumstances, I am not in a position to accept his argument on the matter.

Mrs Horn testified that it is important for the insurer to know of any problems concerning the applicant's eyes and ears for purposes of a disability claim. Once any such problems are revealed by the applicant, the insurer would then decide whether he should, for instance, undergo medical tests or be made to pay a higher premium?

Here, it is not in dispute that the deceased's answer was untrue because, he had actually seen, not only Dr Weimann on November 19, 1992, for painful red eyes (slightly purulent), but also Dr Scholtz on February 11, 1993, for an ear problem (barotitis) prior to the signing of the application.

In the result, the trial Court's finding as to the falsity of the deceased's answer was justified. I am further satisfied that the answer was material to the respondent's decision to accept or reject the risk.

This brings me to paragraph 32 (a) and (c) which posed the following questions:

> "32(a) Have you sought medical advice during the past 5 years in connection with any symptom or condition or been a patient in a hospital or nursing home or undergone any medical examination including ECG, X-Ray examination or specialised laboratory tests) not mentioned above?
>
> (c) Are you aware of any other features concerning your health (e.g. ailments, diseases, injuries, physical abnormalities) not mentioned above which could

affect the risk of the proposed insurance?"

The response to (c) above was, "No" but that to (a) was: "Yes"; and, in giving his particulars to the question posed in 32(a), in terms of paragraph 34, he stated in the Afrikaans language which, in an English translation, reads:

Light abdominal problem, 100% cured by Dr Scholtz on 01 January 1993.

This translation is not disputed.

The learned trial Judge commented, properly in my view, that the answers given by the deceased were clearly incorrect. Dr Scholtz didn't see him on 1 January 1993, but on 29 December 1992, for pyloric spasm, an ailment similar to gastritis (a stomach problem). He found the deceased's reply to the effect that he had been cured 100% to be incorrect as he had subsequently been seen by Dr Laurie on various occasions for gastritis.

This finding is attacked by Mr Bloch on the ground that the deceased, not being a medical doctor, believed that he was 100% cured. He adds:

"His trouble was behind him. Would a reasonable man not say he was 100% cured?

This approach by Mr Bloch begs the question. A reasonable man in the deceased's position might say he feels cured; but to say that he is 100% cured, in the absence of any medical/scientific proof to that effect, is obviously an overstatement and, therefore,

unreasonable. Indeed, it is common cause that the deceased was treated by Dr Sholtz for gastritis and pyloric spasm on April 12, 1991, and December 29, 1992, respectively, well within the 5 year time frame covered by paragraph 32(a) supra. It is further common cause that, subsequent to the signing of the application on March 26, 1993, the deceased was treated by Dr Laurie for gastritis on March 23, 1994; December 27, 1994; and March 9, 1995, which is proof enough to demonstrate that the deceased had not been 100% cured since his "trouble with or disorders of the digestive system persisted.

Moreover, the deceased's particulars in paragraph 34 that he had had a slight stomach problem 100% cured by Dr Scholtz were false in that he had had several consultations with at least 3 medical doctors within the applicable period of 5 years. As Mr Coetzee points out, the deceased consulted Dr Laurie once on December 4, 1989; Dr Scholtz on 9 occasions during the period December 27, 1990 and February 11, 1993; and Dr Weimann on 22 occasions covering the period November 7, 1988 to November 19, 1992; which brought the total number of consultations to 32 during the 5-year period. All these consultations were within the deceased's knowledge as he himself had made and experienced them. In any event, sight must not be lost of the fact that the deceased was treated by Dr Laurie for migraine attacks which, according to the doctor, are "definitely relevant" for purposes of life assurance and disability insurance. The deceased failed to disclose this in paragraphs 31(a) and (c) and 34.

It is not in dispute that the deceased failed to furnish particulars (in paragraph 34) of his laboratory tests which revealed, ***inter alia,*** that he had liver damage. Following upon what has been discussed above, it is quite clear that the deceased gave false and/or incomplete replies to paragraphs 32(a) and (c) and 34 of the application in an attempt to present himself as one who had seen a doctor once for a light stomach problem over a period of 5 years and was thus a very healthy person worthy of being granted the insurance policy. Mr Bloch's criticism that the trial Court's finding on the matter was a complete misdirection is, therefore, clearly misconceived.

Besides the fact that paragraph 28 of the application is also part and parcel of the substantive ground of appeal, it specifically touches upon the subsidiary ground previously referred to, namely, that the deceased failed to give details (obviously in paragraph 34 which calls for particulars) of the fact that he was an alcoholic or that he used excessive amounts of alcohol at the time that he applied for the policy.

The questions posed in paragraph 28 and the deceased's replies thereto are as follows:

28 HABITS

(a) Do you partake of any alcoholic liquor? If yes, state quantity and type consumed per week . "Yes. 6 Beers."

(b) Have you ever habitually taken more in the past? If yes, state quantity and type of liquor consumed per week. "No".

(c) Have you ever received medical advice to reduce or discontinue your liquor consumption? If yes, state reason and give name of doctor concerned. "No".

In it's judgment, the Court ***a quo*** found, ***inter alia,*** that:

> "Although the defendant did not produce any direct evidence that the deceased in fact was an alcoholic prior to the signing of the contract, the evidence of Dr Laurie called by the defendant established facts upon which a reasonable inference may be drawn that the deceased knew he had an alcoholic problem for which he sought treatment prior to the signing of the contract with the defendant. During May 1994 the deceased was an admitted alcoholic. An implant was done on him and he was also taken up in hospital to dry out. Dr Laurie was of the opinion that he found it improbable that at the time of the signing of the contract that the deceased was unaware of his alcoholism".

Mr Bloch is highly critical of these findings. He submits that there is no evidence to show or even suggest that prior to the signing of the application, the deceased knew he had an alcoholic problem.

The question for decision is whether the deceased was already an alcoholic or used excessive amounts of alcohol at the time that he completed the application form?

As a starting point, it is common cause that when the deceased saw Dr Laurie on May 9, 1994, he admitted that he had an alcohol problem for which he had previously been given injections by another doctor. According to Dr Laurie's testimony, the deceased told him that the alcohol problem had come after his divorce. There was, however, no indication as to when the divorce had occurred. The deceased then requested Dr Laurie to implant anti-abuse implants which he himself had brought with him for the purpose. The doctor testified that an anti-abuse implant serves to discourage alcohol consumption. Over and above this, he admitted the deceased to hospital on two occasions for "drying out", that is, to distance the patient from the source of obtaining alcohol, and possibly to help him get ever his withdrawal phase. After the deceased's second admission to hospital on September 13, 1995, he succumbed and died 8 days later (September 21) at the age of 50 years.

Dr Laurie's Certificate of Medical Attendant shows, *inter alia:*

2(a) Immediate cause of death: Myocardial infarct (heart attack).

3(a) Diseases or conditions which preceded or co-existed with the immediate cause of death: Alcoholism.

(b) Date of commencement: 1993

(c) (iii) habits: Alcohol

7. Was the deceased intemperate in the use of alcohol, drugs, or tobacco: Alcohol.

Dr Laurie told the Court *a quo* that alcohol had definitely played a very substantial role in the deceased's death. He averred further that alcohol could cause gastritis and that it affects various organs such as the liver and the heart. Once the muscle of the heart is so affected and rhythm disturbances occur, that, he said, could lead to sudden death. Upon his admission to hospital on September 13, 1995, the deceased had delirium tremors: these are symptoms of withdrawal from alcohol.

Commenting upon the date of commencement of the deceased's alcoholism, Dr Laurie testified that it was "most possibly earlier than 1993... On (sic) probabilities it (sic) was earlier than 1993". In answer to a question by Mr Coetzee whether, taking into account the evidence of Dr Scholtz, he would say that, on probabilities, the deceased had had an alcoholic problem before March 26, 1993, when the application fonn was signed? Dr Laurie stated: "Most probably". In his opinion, 6 beers per week would not be enough - would be unlikely - to cause an alcohol problem. He even testified that the deceased had been using excessive amounts of alcohol ever since he first become a patient of his (in December 1989). A SWABOU LIFE form completed by Dr Laurie shows (Exhibits p.68) that the deceased "used alcohol excessively" and that, in his opinion, the deceased was not "eligible for assurance as a first class" because of his alcohol abuse. When asked by Mr Coetzee:

> "And is that still your opinion that in March 1993 this person was not a first class life as they put it here for assurance purposes?"

Dr Laurie's response was: "Yes that is correct." He stated that alcoholism is a

progressive chronic disease that gets worse and worse. "It is classified as a medical disease with genetic predispositions so he had in him to turn into an alcoholic one day and it is usually fatal also."

Dr Laurie's opinion that the deceased was an alcoholic probably earlier than the completion of the application is bolstered, not only by the deceased's first consultation with him on December 4, 1989, followed by the September 20, 1993 consultation, but also by the laboratory test results of July 15, 1991.

When the deceased saw Dr Laurie in December 1989, he complained of migraine attacks which he frequently got and which he had had in previous years. The deceased's next visit to Dr Laurie was in September 1993 when he once again complained of migraine attacks and the complaint was confirmed by the doctor's diagnosis. On that occasion, the deceased admitted that he used alcohol to stop his migraine. It (migraine) "was especially better after he took some alcohol". But Dr Laurie's comment was that alcohol ***"aggravates migraine but if you drink enough then the headache doesn't matter anymore.'"*** (Emphasis is provided). It will be recalled that the deceased had admitted during the first consultation with Dr Laurie that he had been having frequent migraine attacks well before 1989.

And, commenting on the deceased's July 15, 1991 laboratory test results, Dr Laurie testified in cross-examination that he would "most definitely" say that the results (Exhibits pp.32 and 33) showed "alcohol damage to the liver". This was followed by the following

questions and answers:

Q: You say what?

A: Alcohol damage to the liver.

Q: Alcohol damage?

A: Yes.

Q: That's interesting. Now why would you say that?

A: It is common among the doctors to use MCV that is in this case 101.62 and the Gama GT that's 88, if those two are raised together then it points to alcohol without any doubt.

Q: But not necessary ... Do you agree, not necessary?

A: If I get those kind of results I would specifically ask somebody about his alcohol habits.

Q: You would what?

A: I would specifically ask the patient about his alcohol habits.

Thus, in the light of his personal observations and treatment of the deceased, coupled will all the data at his disposal, showing, for instance, that prior and subsequent to the completion of the application form, he had been treated for gastritis which is usually caused by alcohol (or other substances); he had suffered from "alcohol liver damage"; he had been suffering from migraine attacks before 1989 which persisted even after the application had been signed and in respect of which he admitted the use of alcohol to ameliorate his

condition (but, as alcohol aggravates migraine, this necessarily entailed more consumption of alcohol); the results of the July 1991 laboratory blood tests which not only "pointed to alcohol without any doubt", not to mention the liver damage, but also that in September 1994, he admitted he was an alcoholic and that he had previously used anti-abuse implants; and that in September 1995, alcoholism played a major role in the deceased demise; Dr Laurie was of the opinion that not only had the deceased been an alcoholic probably before March 1993, but also that he had been abusing alcohol since December 1989. Furthermore, Dr Laurie was of the opinion that it was improbable that at the time of signing the application, the deceased was unaware of his alcoholism.

Mr Bloch contends that much of Dr Laurie's evidence should be ignored on the ground that it relates to a period subsequent to the signing of the application. However, there is no substance in this contention as Dr Laurie's evidence on the matter is not confined to the post-March 26, 1993 period.

It is a matter for observation that Dr Laurie's evidence does not stand alone. Dr Scholtz testified that he had a strong suspicion since the deceased's second consultation with him on April 12, 1991, when gastritis was diagnosed, the most common cause of such condition being alcohol. This suspicion was strengthened at subsequent consultations with the deceased. The question and answer that followed were these:

Q: The suspicion that you refer to as high can you tell us on what basis you found that suspicion?

A: Your Lordship that is a clinical impression it is difficult to describe if a person walks into a doctor's room quite so often gets a suspicion there (sic) are certain things that you pick up like tremors, … uneasy looking at a person, unsure speech that and (sic) little things and twitching that give you an impression that something is wrong as well as with the diagnosis then it was confirmed in that regard.

But under cross-examination, he stated that, apart from suspicion, there was nothing positive at that stage to show that the deceased was an alcoholic.

In contradiction to Dr Laurie's testimony, Dr Scholtz, on being asked in cross-examination concerning Gama GT, ALT and AST (Exhibits p. 34) namely: that the amounts "are not normal are trifling, they are very small amounts above the normal" would he agree? It is not too much worrying; responded: "I would agree". This was seemingly astonishing since the available data spoke for itself, clearly showing marked differences between the normal state and the results.

However, when he completed a SWABOU LIFE Personal medical Attendant's Report in respect of the deceased on December 5, 1995, Dr Scholtz, in answering the question:

"What has been the Applicant's general state of health since you have known

him...?

stated: "acceptable, but possible alcohol problem - gastritis".

And responding to the question whether the deceased had ever received medical or other treatment for excessive consumption of alcohol? Dr Scholtz wrote: "He was warned to contain himself. In his viva voce evidence, the doctor averred that he had warned the deceased about his drinking or smoking habits.

It is Mr Coetzee's submission that the most probable inference to be drawn on the totality of the evidence is that the deceased was already an alcoholic at the time of the completion of the application form; alternatively, that at that stage, he was already consuming excessive amounts of alcohol. Mr Coetzee further submits that the respondent made out at least a ***prima facie*** case concerning the deceased's alcohol problem at the material time which called for an answer and that, in the absence of any explanation, constitutes sufficient proof: (Hoffmann & Zeffert, The South African Law of Evidence, 4th ed. at p. 520). In this connection, Mr Coetzee invites the Court to note that the appellant certainly could have given direct evidence of the deceased's drinking habits during the period prior to the completion of the application form. Although present throughout the trial, she was never called to testify; and this, so argues Mr Coetzee, certainly calls for an adverse inference against the appellant.

Mr Bloch's reaction to all this is that there was no evidence to establish that the deceased was either an alcoholic or that he used excessive amounts of alcohol at the time that he completed the application for insurance. He asserts that Dr Laurie's opinion that he found it improbable that at the time of signing the application, the deceased was aware of his alcoholism, cannot be accepted as there is no evidence to support that view. The improbability referred to by Dr Laurie, Mr Bloch says, is as much a lack of probability as our Civil Law requires the respondent to establish. Mr Bloch does not take kindly to Mr Coetzee's criticism that the Appellant was not called upon to testify when the respondent had itself not called Dr Weimann to testify in respect of the period covering January 1990 - January 1993.

I will first of all deal with the latter part of the submission concerning the appellant. With due respect to Mr Bloch, there is a sharp contrast between his position and that of Mr Coetzee in relation to Dr Weimann and the appellant. The evidence of the medical experts, and particularly that of Dr Laurie, markedly points to the deceased's alcoholism or use of excessive alcohol, prior to the completion of the insurance proposal. According to Mr Coetzee, and I agree with him, the evidence adduced by the respondent concerning the deceased's alcohol problem, constitutes a ***prima facie*** case that calls for an explanation by the appellant by way of direct evidence as to the deceased's drinking habits or by calling an expert witness to contravert Dr Laurie's evidence.

In his own submission, Mr Bloch states that we have the evidence that the deceased's drinking started after his divorce and that the history of this case clearly leads us to the

conclusion that the alcoholic problems started after the signing of the application. What he does not say, however, is that the dates upon which the marriage between the deceased and the appellant got dissolved, and the deceased's drinking habits started to grow from bad to worse, are, or ought to be, within the appellant's personal knowledge. In the circumstances, it would not be amiss to draw an adverse inference against the appellant and I do so.

The critical question yet to be addressed is whether the respondent discharged the burden of showing that the deceased was an alcoholic at the material time? In considering this question, the fact of the appellant's lack of explanation is no more than a factor to be taken into account. The standard of proof required in a civil matter, such as this one, is proof on a balance of probabilities. If the Court finds that the totality of the respondent's version is more probable than not, then it's burden is discharged. On the merits of this case, I am satisfied, on a balance of probabilities, that the probable inference that may reasonably be drawn is that the deceased was aware that he was an alcoholic or, alternatively, that he used excessive amounts of alcohol at the time that he completed his insurance proposal form. The Respondent's onus has thus been discharged in this regard.

Taking the case as a whole, it is quite clear to me, and it is inescapable to come to the conclusion, that the deceased gave false and/or incomplete replies to questions 28, 31(c) and (f), 32(a) and (c), and 34; and that, in terms of paragraph 39(a) and (b), he was legally bound by the declaration therein contained and also by 39(a); however, the reply to 39(b), though false, did not adversely affect the deceased, for the reasons already given.

I will now reflect on the legal issues which arise in this case. At the expense of recapitulation, the appellant's amended Replication reads, ***inter alia:***

> "The Plaintiff admits that in terms of paragraph 39(a) of the application for insurance, the statements and answers contained in the application for insurance constituted the basis of the contract of insurance and that WILKE agreed that if any material information had been withheld, the benefits and all moneys paid to SWABOU LIFE shall be forfeited."

In this regard, the Court ***a quo*** remarked in it's judgment:

> "The deceased in fact guaranteed that the answers given by him are true, correct and complete in all respects. In other words the deceased gave a warranty..."

The fact that the deceased was guilty of non-disclosure of information is evidently indisputable. With reference to the just quoted passage from the Court ***a quo's*** judgment, the question that naturally springs to mind is whether the said non-disclosure constituted warranties or representations? To answer this question, it is necessary to examine, albeit succinctly, the import of the terms: "warranty" and "representation".

With particular reference to insurance, a "warranty" is a term of the insurance contract upon breach of which the insurer (or the insured, as the case may be) can repudiate the contract. A warranty is thus part of the contract. See ***Small v Smith*** 1954(3) SA 434 (SWA) at 436 - 437; ***Wright v Pandell*** 1949(2) SA 279 (C) at 285. Warranties must be strictly complied

with. In ***Lewis v Norwich Union Fire Insurance Co Ltd*** 1916 AD 509, Innes, CJ observed at 514-515:

> "Now a warranty, in the sense in which that term is used in insurance transactions, is a statement of stipulation upon the exact truth of which, or the exact performance of which, as the case may be, the validity of the contract depends. Courts of Law will construe such stipulations as they would any other conditions of the policy; but when once the meaning has been ascertained a warranty must be exactly complied with, whether it is material to the risk or not... A strict observance of it's terms is a condition precedent to the incidence of liability".

On the other hand, a "representation" has been judicially defined in these terms:

> "A representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstances relating to it."

per Herbstein, J, in ***Wright v Pandell,*** supra, at 285. In ***South African Eagle Insurance Co Ltd*** v ***Norman Welthagen Investments (Pty) Ltd*** 1994(2) SA 122 (A), Nestadt, JA, (with whom Joubert, JA; Hoexter, JA; Smalberger, JA; and Vivier, JA concurred) had this to say with reference to the meaning of "representation" at pp. 125 H-J - 126 A:

> "Representation in the present context is a well-established, indeed, basic juristic concept. It is a statement made to induce another to enter into a contract. In relation to insurance, ***American Jurisprudence*** Vol 43 2nd ed. para 734 gives the following useful definition:

> 'A "representation", in the law of insurance, is an oral or written statement by the insured or his authorised agent to the insurer or it's authorised agent, made prior to the completion of the contract, giving information as to some fact or state of facts with respect to the subject of the insurance, which is intended or necessary for the purpose of enabling the insurer to determine whether it will accept the risk, and at what premium. Stated differently, a representation is not strictly speaking, part of the insurance contract, but is collateral thereto. It is a statement made to the insurer before or at the time of making the contract, presenting the elements upon which the risk is either accepted or rejected."

He continued at p. 126 B - C:

> "What is clear (and important for our purposes) is that a representation is a pre-contractual statement and, unlike a term, does not become part of the contract. This is the ordinary meaning of a representation and this is the sense in which it is unambiguously used in the section."

The section referred to in the excerpt above, and one that is also relevant to the instant matter, is section 63(3) of the Insurance Act which provides:

> "Notwithstanding the contrary contained in any domestic policy, or any document relating to such policy, any such policy issued before or after the commencement of this Act, shall not be invalidated and the obligations of the insurer thereunder shall not be excluded or limited and the obligation of the owner thereof shall not be

> increased, on account of any representation made to the insurer which is not true unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of the issue or any reinstatement of renewal thereof."

If a representation is incorrect, it is a misrepresentation; and anyone relying on such misrepresentation must show that the representation "was false in fact". See ***Trust Bank of Africa Ltd v Frysch*** 1977(3) SA 562 (A), (per Corbett, JA, as he then was, with whom Jansen, JA concurred). The questions of fraud and misrepresentation are common to all contracts. Non-disclosure, however, is peculiar to a class of contracts of which the insurance contract is the prime example. An insurer can avoid an insurance contract if it was induced to enter into it by a misrepresentation of the fact made by the proposer which was false in a material particular. Historically, misrepresentation, in strict terms, has not been of particular importance in the insurance context, mainly because the extreme breadth of the duty to disclose material facts has meant that often non-disclosure has subsumed questions of misrepresentation. For the purposes of this judgment, the terms "non-disclosure" and "misrepresentation" will be used interchangeably.

It is as clear as daylight that we are here concerned with the deceased's representations as contained in his application/proposal for insurance which, in terms of paragraph 39(a), was "the basis of the contract" of insurance that was consequently entered into between the parties.

The contract of insurance is the primary illustration of a category of contracts described as ***uberrimae fidei,*** that is, of the utmost good faith. Consequently, potential parties to it are duty-bound to volunteer to each other, before the contract is concluded, information which is material. In other words, the requirement of ***uberrimae fidei*** imposes a duty of disclosure on the insured as much as on the insurer. However, applications of the duty of disclosure on the insurer are few and far between, as opposed to those pertaining to the insured. An applicant for insurance is thus under a duty to disclose to the insurer, prior to the conclusion of the contract, all relevant, that is, material, facts within his knowledge, even though he does not appreciate their materiality, and which are material for the insurer to know. What information is material for the insurer to know is information that may influence his opinion as to the risk that he is incurring and, consequently, as to whether he will take it, or what premium he will impose. See ***Fransba Vervoer (EDMS) BPK*** v ***Incorporated General Insurances Ltd*** 1976(4) SA (W) at p. 976.

In the words of Lord Mansfield in ***Carter v Boehm*** (1766) 3 Burr 1905.

> "Insurance is a contract upon speculation. The special facts, upon which the contingent chance to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist".

A failure to disclose material facts entitles the insurer to avoid the contract.

A fact is material for the purposes of non-disclosure and misrepresentation if it is one which would influence the opinion of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premium to stipulate; and/or whether to impose particular terms. See ***President Versekeringsmaatskappy BPK v Trust Bank Van Africa BPK En*** TV ***Ander*** 1989 (1) SA 208(A) at 209 I; ***Lambert v Co-Operative Insurance Society*** (1995) 2 Lloyds Rep. 485. And, in ***Pillay v South Africa National Life Assurance Co-Ltd*** 1991(1) SA 363 D Didcott, J, at p.369, made reference to an essay writted by Professor Leon Trakman of Nova Scotia and published in 1983 7 South African Insurance Law Journal (at 95 - 6):

> "Materiality is often defined as a contingency, state of affairs or event which has a fundamental effect upon the insurance risk. More specifically, a material non-disclosure or false disclosure is conceived of as a contingency which has so fundamental an effect upon the risk that it undermines the willingness of the insurer to provide insurance cover either ***in toto*** or at the premium originally stipulated. In each case the result may well be the same .... (T)he insured may find himself or herself unprotected at the time of a loss, ... irrespective of the fact that the insurance company may still have provided some form of insurance had it known of the true circumstances ... Materiality has a single connotation ... (I)t involves something fundamental or vital to the risk, something without which a particular state of affairs would not exist. Thus a material non-disclosure exists because the insured has failed to disclose fundamental or vital information which the insurance company

requires in order to determine, firstly, whether or not to assume the risk of insurance and, secondly, upon what terms to do so".

With reference to section 63(3) of the Insurance Act, ***supra,*** Kxiegler, AJA, said in ***Qilingele v South African Mutual Life Assurance Society*** 1993 1993(1) SA 69(A) at 74:

"Materiality is not a relative concept; something is either material or it is not. Etymologically the word 'material' ... denotes substance, as opposed to form. In legal parlance it bears a corresponding meaning:

'Of such significance as to be likely to influence the determination of a cause'..."

He added, at p. 75:

"That such a significance relates to a risk is clear.

In determining whether undisclosed facts were material or not, the Court's function is to decide the issue objectively from the standpoint of a reasonable and prudent person: ***Mututal and Federal Insurance Co Ltd v Oudtshoorn Municipality*** 1985(1) SA 419 (A) at 435.

It is abundantly clear that the deceased flagrantly violated the tenets of ***uberrimae fidei,*** through his representations which were not only material but also false. When he approached the respondent with his insurance proposal, he knew he was doing so with unclean hands. Potential insurance proposers will do well to take serious note of the fact

that those who make material misrepresentations to their potential insurers do so at their own peril, in other words, they dig their own graves or those of their estates, as the case may be.

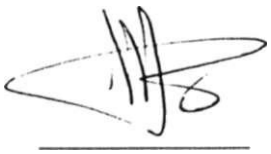
Applying the law to the facts and findings in the instant case, it is incontrovertible that the deceased was duty-bound to disclose in the proposal for insurance all material information within his knowledge; that he gave representations; that those representations, though guaranteed to be "strictly true and complete", were in fact false and/or incomplete; that a reasonable person, standing in the shoes of the deceased, let alone those of the respondent, would have considered those representations to be material for the purposes of the risk that was to be undertaken; that, as such, those representations were material misrepresentations. In the circumstances, the Court ***a quo's*** decision to dismiss the appellant's claim was justified and it is accordingly upheld.

As a direct consequence of the deceased's misrepresentations of material facts in this matter, the respondent is entitled to avoid the resultant contract of insurance between the parties; and "all moneys paid" by the deceased to the respondent are declared forfeited, pursuant to the provisions of paragraph 39(a) of the insurance proposal.

I make the following order.:

1. The appeal is dismissed with costs.

2. All moneys paid by the deceased in connection with the policy are hereby forfeited to the respondent.



SILUNGWE, J

I agree.

MTAMBANENGWE, J

I agree.

T

ON BEHALF OF THE APPELLANT	**MR BLOCH**
Instructed by:	**BASIL BLOCH**
ON BEHALF OF THE RESPONDENT	**MR COETZEE**
Instructed by:	**F, Q & PFEIFFER**