76/84

CASE NO. 417/82
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

MARY ROBIN — APPELLANT

and

GUARANTEE LIFE ASSURANCE COMPANY LIMITED — RESPONDENT

CORAM: RABIE CJ, KOTZé, TRENGOVE, NICHOLAS JJA et SMUTS AJA

HEARD: 7 May 1984

DELIVERED: 30 May 1984

J U D G M E N T

TRENGOVE/ .....

TRENGOVE, JA

This is an appeal about a life insurance policy (Policy No 451060) which was issued by the respondent on the life of the appellant's husband, Wilfred Robin, on 10 February 1981. In an application in the Witwatersrand Local Division, the appellant, as the owner of the policy, applied for an order: (a) declaring that the respondent was not entitled to claim additional premiums in the sum of R133,33 per month, or any other amount, in respect of the policy; and (b) directing the respondent to refund to the appellant all additional premiums paid under protest by the appellant or her husband in

respect of the policy. The application was, however, dismissed with costs; hence this appeal.

The aforesaid policy came into existence as a result of the exercise by the appellant of her rights under a conversion option clause in a 10 year term insurance policy (Policy No. 67241) issued by the respondent on the said Wilfred Robin's life in 1971. The central issue in this appeal is whether the respondent was entitled to load the premium payable in respect of a life policy issued in consequence of its obligations under the conversion option clause in policy no. 67241. The answer to this question depends, primarily, on the meaning and effect of the said clause and, more

particularly, of paragraph 3 thereof.

The factual background of the dispute between the parties is, in short, as follows. On 19 July 1971, a company, B Owen Jones Limited, applied to the respondent for a 10 year term insurance policy (with a conversion option) for R200 000 on Wilfred Robin's life. Wilfred Robin appears to have been the chairman of a group of companies which were associated with B Owen Jones Limited. In the proposal form, which bears his signature, Wilfred Robin stated that he would accept a loading of the basic premium calculated at the rate of 8 per mille per annum on R200 000, being the sum assured. This came to R133,33 per month. In this connection, he also completed

a questionnaire about the state of his health from which it appeared that he was, at that time, receiving medical treatment for hypertension. It was quite apparent from the particulars contained in these documents that he anticipated and accepted that the premiums payable in respect of the policy to be issued would be loaded on account of the state of his health. On 20 July 1971, the respondent advised B Owen Jones Limited, by letter, that its application had been accepted, and specifically drew its attention to the fact that the monthly premium on the policy would be R312,43, comprising a basic premium of R179,10 and a health loading of R133,33.

The policy (Policy No. 67241) was issued on 23 July 1971. It was a 10 year term insurance policy (with a conversion option) for R200 000 on Robin's life. The commencement date was 1 February 1971, and the monthly premium R312,43. The conversion option clause provided as follows:

> "While this policy is in force the COMPANY will issue without requiring any evidence of insurability a new policy for a Whole Life or Endowment Assurance on the life of the Life Assured subject to the following conditions:
>
> 1. In respect of the new policy a proposal and declaration shall be completed.
> 2. The Sum Assured under the new policy shall not exceed the Sum Assured stated in the Schedule of this policy as altered from time to time.

3. Premiums shall be based on the attained age of the Life Assured at the Commencement Date of the new Whole Life or Endowment Assurance and on the rate then in force and the new Whole Life or Endowment Assurance shall be subject to the policy conditions current at the new Commencement Date.
4. The Sum Assured stated in the Schedule of this policy as altered from time to time shall be reduced by an amount not less than the Sum Assured under the new policy.
5. The rights under this Conversion Option Clause will expire on the expiry date of the term assurance under this policy (unless otherwise stated below) after which they shall not be exercisable."

These conversion rights were at some stage ceded to Wilfred Robin or his nominee. He subsequently nominated the appellant as his nominee in respect of these

rights, and this was accepted by the respondent.

In January 1981 the appellant decided to exercise the option. On 28 January 1981, that is three days before the expiry date, an application by the appellant for the conversion of the Policy No. 67241 into a whole life insurance policy for R200 000 on her husband's life, was forwarded to the respondent, in terms of paragraph 1 of the conversion option clause. The basic monthly premium on such a whole life insurance policy, calculated at the rate then in force, came to R556. The appellant indicated in her proposal form that she regarded this to be the amount of the monthly premium which would be payable in respect

of the converted policy. The respondent was quite prepared to issue the new policy in terms of the undertaking contained in the option clause, but it claimed that any policy effected under that clause would have to bear an extra premium at the same rate as that agreed to by the appellant's husband in the original application of 19 July 1971. This meant, in effect, that the new policy would also have to bear an extra loading of R133,33 per month. As a result of the respondent's attitude the appellant's husband wrote a letter to the respondent, on 30 January 1981, in the following terms:

> "I record that on behalf of my wife, Mary Robin, I am paying to you the

sum/ .....

> sum of R133,33 in cash. This is in addition to her cheque already in your possession. You have agreed to accept this as legal tender. The aforesaid amount of R133,33 is paid to you under protest because it is in excess of the premium payable and all rights are retained to claim from you such excess."

The respondent, nevertheless, persisted in its attitude. It issued the new policy (Policy No. 451060) on 16 February 1981, but fixed the premium at R691,23 per month which included a loading of R133,33 per month. Those are the facts.

The original insurance policy clearly consisted of two distinct but inter-linked elements, namely, the ten year term insurance contract coupled

with the conversion option. Under the option the respondent offered to exchange the term insurance policy for a whole life or endowment insurance policy. The terms upon which this undertaking rests are contained in the conversion option clause which has already been quoted in full.

As I remarked at the outset of this judgment, the dispute between the parties really resolves itself into this: Was the respondent entitled, in the light of the language used in paragraph 3 of the conversion option clause, to load the monthly premiums payable in respect of the policy (Policy No. 451060) effected in consequence of the excercise

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by the appellant of the conversion option? Upon the receipt of the proposal form, submitted by the appellant, on 28 January 1981, in accordance with the provisions of paragraph 1 of the conversion option clause, the respondent became obliged to issue a whole life insurance policy for R200 000 on Wilfred Robin's life "without requiring any evidence of insurability". The respondent committed itself to calculate the premiums to be paid in respect of this new policy on the basis prescribed in paragraph 3. This paragraph provides that premiums "shall be based on the attained age of the Life Assured at the Commencement Date" of the new policy

and/ .....

and "on the rate then in force". According to the plain language used in paragraph 3 (which, it must be remembered, was the language the respondent saw fit to use) these were the only factors to be taken into account by the respondent in fixing the premium payable in respect of the new policy. There is no express reference to any loading of the premiums in paragraph 3, or in any of the other paragraphs in the conversion clause. In relation to insurance, the words "Premiums shall be based .... on the rate then in force" are common words, in every day use, having a perfectly plain and ordinary meaning. The term "premium" is the general term used to describe the

consideration which the insurer receives from the insured for undertaking the obligations under the insurance contract. "The rate" is the factor which if applied to the sum assured yields the premium payable. Thus, the premium is usually charged at a basic rate of so much per R100 on the sum assured. There can, in the very nature of things, be no set rate of loading premiums on health grounds. The rate of loading would in each instance have to be determined in the light of the state of health of the insured concerned. The words "rate then in force", in my view, clearly refer to the basic rate, exclusive of any loading component, in force at the date of conversion.

It/ .....

It was contended on behalf of the respondent that on a proper interpretation of the conversion option clause, read in its context, the premiums payable upon the exercise of the option were to be based on the factors referred to in clause 3, but were not confined thereto. The clear mutual intention of the parties, so it was contended, was to enable the holder of the option mutatis mutandis to convert the term insurance into whole life or endowment insurance. And it was further said that ex facie the conversion option clause the parties never intended to confer upon the option holder more favourable terms under the new insurance than those

held/ .....

held under the original insurance, which would be the result, so it was claimed, if the health loading component of the premiums under the original policy were to fall away on conversion. I cannot accept these contentions.

A policy of insurance must be construed according to the ordinary rules of construction applicable to written contracts. Referring to these general principles of construction, Wessels CJ said in Scottish Union and National Insurance Co. Ltd. v Native Recruiting Corporation Ltd. 1934 AD 458 at pp 465-466:

> "Now in construing a contract we must not only consider the intention of

one party, as we do in construing a will or an Act of the Legislature, but we must see what both parties intended, and we must guard ourselves against making a contract for the parties. We have no right, because we may think that the contract is a hard bargain, to lean towards a construction more reasonable to the insured than the contract constituted by the words of the document. ..... We must gather the intention of the parties from the language of the contract itself, and if that language is clear, we must give effect to what the parties themselves have said; and we must presume that they knew the meaning of the words they used. It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different

> meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more."

The statement in the passage which I have underlined applies, of course, also to the position of the insurer. (See also Worman v Hughes and Others 1948(3) S A 495 (AD) 505; MacGillivray and Parkington on Insurance Law, 7th ed., (1981) paras. 1031 - 1040; Colinvaux, The Law of Insurance, 4th ed. (1979) paras. 2 - 01 - 2 - 05; Ivamy, General Principles of Insurance Law, 3rd ed. (1975),

pp. 312/ .....

pp. 312 - 333; and Gordon, The South African Law of Insurance, 2nd ed. (1969) pp 213 - 215).

The conversion option clause appears, on the face of it, to contain all the terms and conditions upon which the respondent undertook to exchange the term policy for a whole life or endowment policy. These terms and conditions are set out in what seems to be a standard printed form to which nothing was added by the parties. As I have already pointed out, there is no express reference in the clause in question to the loading of premiums. Parties to an insurance contract have to commit themselves to a definite arrangement for ascertaining the premiums payable

in respect of the policy. The rate of the premium or the amount of the premium must be agreed. In the present instance the agreement was that the premiums, i e the consideration for the new policy, would be calculated on the basis laid down in clause 3. In my view, it cannot be inferred from the language used in this paragraph that the respondent and the option holder agreed, at the time, that the premiums would be calculated on any other basis, or that any additional factors would be taken into account in the assessment of the premiums.

I am also unable to accept the contention that ex facie the conversion option clause there was

no intention to grant the new policy on terms more favourable than those applicable to the original policy. Counsel for the respondent maintained that once the original policy was granted on the basis that there was a loading, the respondent was confidently able to allow the conversion option to take place without any evidence of insurability because it was accepted that the premiums payable under the new policy would likewise be loaded. Whatever the respondent's reason or motive might have been for not requiring any evidence of insurability, we are, at this stage, only concerned with what the parties' intention was as expressed in the

conversion option clause. This clause was not simply a renewal clause. It granted the option holder the right to exchange the term policy for an entirely different type of policy to which different considerations apply. The parties would have realised, at the time, that upon conversion the risk to be covered under the new policy would be different; that the duration of the insurance cover would be different; and that the amount of the premiums payable in respect of the new policy would, inevitably, also be different. The respondent was responsible for drafting the terms of the conversion option clause. It undertook to calculate the amount of the premiums on the basis

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laid down in paragraph 3, and this was accepted by the original option holder. If the respondent intended loading the premiums on policies effected in terms of the conversion option clause, this could so easily have been said in paragraph 3. Whatever the parties' true intention might have been, it cannot, in my view, be inferred from the language of the conversion clause that it was agreed between them that, on conversion, the premiums payable in respect of the new policy would be loaded to the same extent as the premiums on the original policy, or at all.

To sum up, thus far. In my judgment,

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the terms of the conversion clause are perfectly clear and unambiguous. On the plain and ordinary meaning of the words of the clause, the respondent was obliged to fix the premium payable in respect of policy no. 451060 on the basis stipulated in paragraph 3, without any additional loading on health, or any other, grounds. It is common cause that the premium fixed by the respondent included a loading of R133,33. It follows that, to this extent, the premiums of policy no. 451060 did not conform to the terms of the conversion option clause.

However, counsel for the respondent submitted that this interpretation would necessarily re-

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sult in absurdity and inequity. He pointed out that, on this interpretation, the option holder would have been entitled to exercise the conversion option on the day after the term insurance contract had been concluded in which event the respondent would have been obliged to issue a new policy without any health loading. He argued that the parties concerned could never have entertained the belief that that was what the respondent had agreed to. I am not persuaded that an interpretation based on the ordinary meaning of the words of the conversion option clause would necessarily lead to any real absurdity or inequity. It is true that on this interpretation the option

holder/ .....

holder could have exercised his option the day after the original policy had been issued, but the parties may well have considered it unlikely that this would happen. The option holder would not have gained any real advantage by exercising the conversion option before the end of the ten year period. This may be why the option was not exercised until the very last moment. Under the original policy the insured was covered for a ten year term at a monthly premium of R312,43 and the option remained open right up to the expiry date, namely, 1 February 1981. If the option holder had exercised the option immediately, he would probably

have/ .....

have paid a much higher premium (even though it was not loaded) for the same amount of cover during the ten year period. But even if the option contract may, in the circumstances, appear to be a hard bargain from the respondent's point of view, that, in itself, is no reason why the court should not give effect to it. Where the language of a contract is clear and unambiguous, as it is in the instant case, the court must give effect to the intention of the parties as expressed in the contract however harsh or unreasonable that may appear to be. (See Scottish Union and National Insurance Co. Ltd. v Native Recruiting Corporation Ltd. supra, 465; and John H Pritchard and Associates (Pty) Ltd./ .....

Ltd. v Thorny Park Estates (Pty) Ltd. 1967(2) S A 511 (D & CLD) 515 A - C; Sleightholme Farms (Pvt) Ltd. v National Farmers Union Mutual Insurance Society Ltd. 1967(1) S A 13(R) 18 B-C; Mac Gillivray and Parkington op cit par. 1065.

I come, next, to the question whether there is any room for importing a tacit term into the contract to the effect that the premiums payable in respect of a policy effected under the conversion clause would be loaded on health grounds to the extent of R133,33. I have considered this question although it was not specifically raised on behalf of the respondent. In my view, there is no room for importing any such term into the contract. The parties have in clear and unambiguous

terms/ .....

terms dealt with the basis upon which the amount of the premiums would be assessed. They have stated categorically that the premiums would be based on (a) the age attained by the insured at the date of commencement of the new policy, and (b) on the rate then in force. A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract. As was said by Van Winsen J A in S A Mutual Aid Society v Cape Town Chamber of Commerce 1962 (1) SA 598 (A) 615D:

"A term is sought to be implied in

> an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See Delmas Milling Co. Ltd. v du Plessis, 1955 (3) S A 447 (A D) at p. 454."

(See also: Mullin (Pty) Ltd. v Benade Ltd. 1952 (1) S A 211(A) 215 D - H; Pan American World Airways Incorporated v S A Fire and Accident Insurance Co. Ltd. 1965 (3) S A 150 (A) 175C; Cape Town Municipality v Silber 1971(2) S A 537 (C) 543 A - D; Christie, The Law of Contract in South Africa (1981) pp. 156 - 158). I should,

perhaps/ .....

perhaps, also mention in passing that the respondent has not sought, nor made out a case for, rectification of the terms of the conversion clause.

To conclude. Upon the exercise of the option by the appellant, the respondent became obliged to issue a new policy in accordance with the undertaking contained in the conversion option clause. In terms of the provisions of this clause the respondent was not entitled to include a loading of R133,33 in the monthly premiums payable in respect of the policy (i e policy no 451060) issued in consequence of the exercise of the option, and to this extent the respondent has failed to do what it was

required/ .....

required to do under the contract. The appellant is entitled to a declaratory order to this effect, despite the form of the order sought.

The following order is accordingly made:

1. The appeal is upheld with costs;

2. The order of the court a quo is set aside and the following order is substituted therefor:

(a) The respondent was not entitled to include a loading of R133,33 in monthly premiums payable in respect of the policy no. 451060 which was issued by the respondent over the life of Wilfred Robin in consequence of the exercise by the applicant of her option under the option conversion clause

in policy no. 67241.

(b) The respondent is directed to refund to the applicant all additional premiums of R133,33 per month paid under protest by the applicant and/or Wilfred Robin in respect of policy no. 451060.

(c) The respondent is directed to pay the costs of this application.

TRENGOVE, JA

RABIE, CJ)
)
KOTZé, JA) Concur
)
SMUTS , AJA)

76184

MARY ROBIN

AND

GUARANTEE LIFE ASSURANCE COMPANY LIMITED

417/82/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MARY ROBIN — Appellant

AND

GUARANTEE LIFE ASSURANCE COMPANY LIMITED — Respondent

CORAM: Rabie, CJ, Kotzé, Trengove, Nicholas, JJA, and Smuts, AJA

HEARD: 7 May 1984

DELIVERED: 30 May 1984

J U D G M E N T

NICHOLAS, JA

In pursuance of an application dated 19 July 1971,

GUARANTEE LIFE ASSURANCE COMPANY LIMITED ("GUARANTEE") issued to

B. OWEN .....

B. OWEN JONES LIMITED on 23 July 1971 an insurance policy No 67241 for R200 000,00 on the life of WILFRED ROBIN (then aged 47 years), who held a key position in that company. The event upon which the sum assured was payable was "the death of the Life Assured before 1 February 1981". The premium payable was R312,43 monthly, ceasing on 1 February 1981. Under the heading "ADDITIONAL BENEFITS" the policy contained the words, "Conversion Option Benefits in accordance with the provisions of Clauses CO 4/68". This clause, which appears to be a standard form of clause, reads as follows:

> "CONVERSION OPTION CLAUSE - CO 4/68
> While this policy is in force the COMPANY will issue without requiring any evidence of insurability a new policy for a Whole Life or Endowment Assurance on the life

of .....

of the Life Assured subject to the following conditions:-

1. In respect of the new policy a proposal and declaration shall be completed.
2. The Sum Assured under the new policy shall not exceed the Sum Assured stated in the Schedule of this policy as altered from time to time.
3. Premiums shall be based on the attained age of the Life Assured at the Commencement Date of the new Whole Life or Endowment Assurance and on the rate then in force and the new Whole Life or Endowment Assurance shall be subject to the policy conditions current at the new Commencement Date.
4. The Sum Assured stated in the Schedule of this policy as altered from time to time shall be reduced by an amount not less than the Sum Assured under the new policy.
5. The rights under this Conversion Option Clause will expire on the expiry date of the term assurance

under .....

under this policy (unless otherwise stated below) after which they shall not be exercisable."

Although this does not appear from the policy itself, the monthly premium of R312,43 was made up mainly of a basic premium of R178,20 and an extra premium of R133,33. The extra premium was a "health loading".

After the issue of the policy, monthly premiums of R312,43 were duly paid until the termination of the policy on 1 February 1981.

Prior to that date, the rights under the conversion option clause had been acquired by ROBIN's wife, Mrs MARY ROBIN.

On 23 January 1981, she made an application to

GUARANTEE .....

GUARANTEE for whole life insurance for R200 00,00 on the life of ROBIN, being "omskakeling van polis Nr 67241 sonder bewys van versekerbaarheid". The premium was reflected in the application as R556,00, and it appears that a cheque for this amount accompanied the application.

GUARANTEE, however, insisted upon payment of an extra premium of R133,33. On 30 January 1981, ROBIN, acting on behalf of his wife, paid that sum to GUARANTEE under protest, "because it is in excess of the premium payable and all rights are retained to claim from you such excess." On 10 February 1981, GUARANTEE wrote to ROBIN a letter in which it was stated inter alia:

> "With reference to our recent meeting, I confirm that any policy effected as

a .....

> a result of the conversion option under policy number 67241 must bear an extra premium at the same rate as agreed by you in your application dated 19 July 1971. I have calculated that the extra premium required for your application amounts to R133,33 per month and you have remitted this sum directly to me in respect of the premium due on 1 February 1981. I confirm that future premiums including the extra premium will be collected under the debit order instructions attached to the application dated 23 January 1981."

The new life policy (Policy No 451060) was issued by GUARANTEE on 16 February 1981 with a commencement date of 1 February 1981. It recited that it was "issued in terms of Conversion Option under Policy No 67241". The sum assured was R200 00,00. The monthly premium was R691,23. The age of the life assured (i.e. ROBIN) was stated to be 58 years.

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In a letter dated 20 March 1981, the attorneys acting for Mrs ROBIN informed GUARANTEE that it was not entitled in terms of the conversion option clause, to "additional premiums in respect of the converted policy representing a loading of R133,33 per month". They demanded a refund of the additional premiums already paid, and that the debit order instructions be amended to exclude any future additional premiums. In its reply dated 8 April 1981, GUARANTEE denied that it was required to refund the additional premium paid; contended that Mrs ROBIN was liable to pay the loading; and stated that any action which Mrs ROBIN might institute would be opposed.

Thereafter by notice of motion dated 29 April 1981

Mrs ROBIN made an application against GUARDIAN in the Witwatersrand Local Division of the Supreme Court in which she sought an order:

> "(a) Declaring that the Respondent is not entitled to claim additional premiums in the sum of R133,33 (one hundred and thirty three Rand thirty three cents) per month or any other amount in respect of Policy No. 451060 issued by the Respondent over the life of WILFRED ROBIN;
>
> (b) directing the Respondent to refund to the Applicant all additional premiums of R133,33 per month paid under protest by the Applicant and/or WILFRED ROBIN in respect of the said Policy;
>
> (c) directing the Respondent to pay the costs of this application;
>
> (d) granting the Applicant further or alternative relief as the above Honourable Court may deem fit."

Affidavits were filed by both parties.

The matter was heard by PHILIPS AJ,who held that Mrs ROBIN was not entitled to the relief claimed and dismissed the application with costs.

With the consent of GUARANTEE, Mrs ROBIN now appeals direct to this Court.

The contention advanced by the appellant's counsel was that on the plain, ordinary, popular and grammatical meaning of the conversion clause, GUARANTEE was not entitled to charge a premium which included the health loading applied in the previous policy: the premium to which it was entitled was one based only on ROBIN's attained age at the commencement date of the new policy and on the rate then in force.

Merely to make that assertion is to beg the ques-

tion. The word only is not contained in paragraph 3 of the conversion option clause: it is counsel's gloss. In interpreting a contract the intention of the parties is to be gathered from the words they have used. It is only when it is necessary for the purposes of contruction that the Court may supply omitted words. There is no such necessity in the construction of paragraph 3.

The conversion option clause is part of a term life insurance policy, and it provides for the issue of a new policy for a whole life insurance "without requiring any evidence of insurability". The clause is, therefore, to be construed as persons acquainted with basic and well-known principles of life insurance would construe it.

In .....

In terms of ss.(1) of s34 of the Insurance Act, No 27 of 1943, a registered life insurer who carries on a business in the Republic is required to furnish the registrar of insurance

> "with a copy of every table or statement of the rates of premium which he ordinarily charges and of the benefits which he ordinarily undertakes to grant in respect of domestic policies insuring the lives of normal individuals".

And in terms of ss(3), such an insurer is prohibited from making use of any other table or statement except upon compliance with certain requirements, including the furnishing to the registrar of a copy of such other table or statement.

By .....

By the "rate then in force" in para 3 of the clause is meant the appropriate rate contained in the table or statement referred to in s. 34, and that is a rate that relates to "normal individuals".

In the case of a "subnormal" or "substandard" life - where, for example, the proposer is suffering from some medical impairment, which, although not immediately fatal, is of such a nature that it might shorten his expectation of life - the insurer will assess the degree of extra mortality which might be experienced, and impose an extra premium called a "health loading". The total or gross premium in such a case is the aggregate of the basic premium derived by the application of the appropriate rate

obtained .....

obtained from the premium tables, and the "health loading".

In such a case the gross premium is "based on ... the rate then in force" within the meaning of paragraph 3. That rate forms the basis or foundation for the calculation of the "basic" premium, to which the superstructure of the health loading is added.

There is, therefore, nothing in paragraph 3 itself which precluded GUARANTEE from imposing a health loading.

Counsel for the appellant relied in support of his argument on the fact that, in terms of the clause, no evidence of insurability was required for the conversion.

"Insurability" in the conversion option clause plainly refers to insurability as at the date of the exer-

cise .....

cise of the option. An option is given to insure regardless of the insurability of the life concerned at the date of the exercise of the option. Protection is thus provided against loss of insurability of the life insured during the intervening period, during which it might become physically impaired to such an extent as to make it impossible for him to secure any other life insurance except, possibly, at an increased rate. This provision has no bearing on the question whether GUARANTEE was entitled to impose a health loading by reason of the fact that ROBIN was a substandard life at the date of the issue of Policy No. 67241.

The conversion option clause is, therefore, silent on the question whether, in a new policy for a whole life, GUARANTEE was entitled to require payment of a premium

which .....

which included the health loading. There is nothing in the language of the clause itself either entitling the insurer to, or disentitling it from imposing such a loading. The question then is whether a term relating to loading should be implied.

In this context, an "implied term" (which is sometimes referred to as a "tacit term") signifies

> "... an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties."

(per CORBETT AJA in his minority judgment in Alfred McAlpine & Son; .....

& Son (Pty) Ltd v. Transvaal Provincial Administration, 1974 (3) SA 506 (A) at 531H-532A). The common intention may be the actual but unexpressed intention of the parties, or it may be their presumed or imputed intention. (See the judgment of RUMPFF ACJ in the Alfred McAlpine case at 526 E, and that of CORBETT JA at 532). In Van den Berg v. Tenner, 1975(2) SA 268(A), BOTHA JA said at 277 D-F

> "(S)oos Regter COLMAN in Techni-Pak Sales (Pty) Ltd. v. Hall, supra op bl 236-7, daarop wys, vereis die toets vir die inlees van 'n stilswyende beding nie noodwendig dat die partye by die ooreenkoms bewustelik die situasie wat later sou ontstaan en die nodigheid van 'n beding daaroor in gedagte moes gehad het nie. Die toets vereis nie dat die partye die stilswyende beding inderdaad moes bedoel het nie. Dit is voldoende indien dit, in die lig van die uitdruklike

bepalings .....

> bepalings van die ooreenkoms en die omringende omstandighede, duidelik blyk dat indien die partye inderdaad die situasie wat later ontstaan het in gedagte gehad het, hulle daarvoor op die voor-die-hand-liggende wyse voorsiening sou gemaak het, en die partye dus geag moet word die stilswyende beding te bedoel het."

The Court does not readily imply a term in a contract. It will not make contracts for people. The applicable principles appear from judgments in cases decided in England, and they have frequently been adopted and applied in cases in this Court.

In the case of Hamlyn & Co v. Wood & Co, 1891 (2) QBD 488, LORD ESHER said at 491:

> "I have for a long time understood that rule to be that the Court has no right to

imply .....

> imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

KAY LJ said in that case at 494:

> "(T)he Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied."

In Reigate v. The Union Manufacturing Company, 118 LT 483,

SCRUTTON LJ remarked:

> "You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties 'what will happen in such a case'? they would have replied 'of course, so and so. We did not trouble to say that; it is too clear'."

(See Mullin (Pty) Ltd v. Benade Ltd, 1952(1) SA 211 at 214-5 and cases there cited.)

The evidential material, on the basis of which the Court decides whether a term should be implied in a contract, is the terms of the contract and admissible evidence of surrounding circumstances. (See for example the Andrew McAlpine case (supra) at 532 H; Van den Berg's

case (supra) at 277.)

The relevant surrounding circumstances appearing from the affidavits filed in the present case are the following.

The first application to GUARANTEE for term insurance on the life of ROBIN was made on 11 February 1971. It was disclosed that ROBIN had, in about March 1970, applied for life insurance to the General Accident Insurance Company and that this was "on medical grounds accepted with a loading". On 15 February 1971 ROBIN was examined by a medical specialist in connection with his application for insurance to GUARANTEE. On 19 July 1971, another application was made. It again disclosed that a proposal for life insurance to "GENERAL ACCIDENT" had been accepted on "loaded terms". In the

application .....

application it was stated: "I hereby accept the loading". The application was accompanied by a "Statement of continuing good health", also bearing the date 19 July 1971. To the question, "Since you completed the above application (namely, the application dated 11 February 1971) have you been ill or required medical advice?", the answer was given, "As a result of the medical in connection with this policy, hypertension has been treated." On 20 July 1971 GUARANTEE sent to B.OWEN JONES LIMITED a notice informing it that the application for insurance had been accepted. The notice set out inter alia the following:

"Basic premium	R179,10
Additional premium	
Extra: Health	R133,33

and .....

and under "Extra Conditions" appeared -

> "The above premium includes a Health loading of R8,00 per mille per annum."

Policy No. 67241 was then issued on 23 July 1971.

It is clear, therefore, that GUARANTEE did not regard ROBIN as a normal life. It required, and ROBIN and B. OWEN JONES LIMITED accepted, the "health loading".

The hypothetical question to be asked is, "What would the parties have replied if, at the time of the conclusion of the original contract, they had been asked, 'what is to be the position regarding the health loading if the conversion option is exercised?'?"

To that question there are two possible answers. Their reply might in theory have been, "Obviously in such a

case no health loading will be payable" ; or it might have been, "In such a case the health loading will of course be payable on the same basis as under this policy".

It is inconceivable that they would have given the first answer. That would mean that, for the purposes of the whole life insurance, ROBIN was to be regarded as a normal life. That is an absurdity which they could not have contemplated. ROBIN was not a normal life, and it was improbable that he would become one with the passage of time - on the contrary, the whole object of the conversion option clause was to afford protection against the possible loss of his then existing insurability.

On behalf of the appellant, however, it was sub-

mitted .....

mitted that there was no absurdity, because a ten year term insurance policy and a whole life policy were of an entirely different nature and consequently different considerations applied to each of them.

A term life insurance policy is one which is issued "upon the terms that death is to be the sole contingency upon which payment is due but the policy is only to run for a specific period so that nothing is payable if the insured survives the period." (Halsbury's Laws of England, 4th ed., Vol. 25, para 548). A whole life insurance policy, on the other hand, is one in terms of which "the insurers undertake, in consideration of premiums being continually payable throughout the life of a particular

person .....

person, to pay a specified sum of money on the death of that person" (op. cit para 547). It is true, therefore, that the two types of policy differ in their nature. Term insurance has been described as an if type of insurance; whole life insurance as a when type. The purpose of term insurance is to provide against loss during the term of the insurance, if death occurs. Under whole life insurance, if the policy is kept in force,the sum insured will become payable whenever death occurs - the only question is when it will become payable. This does not mean, however, that different considerations apply in regard to health loading.

It was submitted that term insurance is a cheap form of insurance over a limited period, and that it cannot be said to be absurd to require a loading in a low-premium insurance policy and not to require one in a high-premium policy .....

hypothetical question is the second one. Considering the conversion option clause in a reasonable and business manner, the implication necessarily arises that the parties must have intended that, in the event of conversion, a health loading would be payable on the same basis as under Policy No. 67241. A term to that effect should accordingly be implied.

It follows that the Court a quo was correct in holding that Mrs ROBIN was not entitled to any of the relief which she claimed. I would dismiss the appeal with costs.

H C NICHOLAS JA

policy. Reference was made to the fact that the basic premium in Policy No. 67241 was R178,20 per month, while the basic premium in Policy No. 451060 is R556,00 per month.

This argument is fallacious. The reason why the basic premium rates differ is two-fold: ROBIN was ten years older; and there are different premium tables applying to the different kinds of insurance - the different rates take into account the smaller benefits under term insurance. A health loading is something added to the basic premium in the case of a substandard life, and it is related not to the basic premium, but to the insurer's assessment of the degree of extra mortality of the substandard life.

In my view, therefore, the true answer to the

hypothetical .....