Case No 21893
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In die matter between

VINCENT CHARLES THERON APPELLANT

and

A A LIFE ASSURANCE
ASSOCIATION LIMITED

RESPONDENT

CORAM: HEFER, VIVIER et SCHUTZ JJA. HEARD: 3 MAY

1995. DELIVERED: 25 MAY 1995.

J U D G M E N T

VIVIER JA/

VIVIER JA:

The appellant is the nominated beneficiary under a life insurance policy issued by the respondent on the life of one Robert Geoffrey Fortuin ("the insured"). The policy provided, inter alia, for basic life cover of R100 000,00 and an additional accidental death benefit of R100 000,00. On 21 July 1985 the insured died as a result of multiple injuries sustained when he was run over by a motor vehicle, and after the respondent had repudiated liability the appellant instituted action in the Cape Provincial Division for payment of the beneficiary's benefit of R200 000,00 in terms of the said policy. In its plea the respondent repudiated liability on the ground, firstly, that the proposal form contained certain material misrepresentations; secondly, that the insured failed to disclose a material fact viz that he was severely mentally retarded; and thirdly, that the insured

lacked the necessary mental capacity to conclude the contract of insurance. The Court a quo (Press AJ) upheld the repudiation based on the third ground and, without dealing with the first two grounds, dismissed the action with costs. Leave to appeal to this Court was granted pursuant to a petition to the Chief Justice.

I must deal first with an application for condonation of the late lodging of the notice of appeal as well as the requisite number of copies of the record. The application was opposed by the respondent. Leave for appeal having been granted on 23 February 1993 the appellant had to lodge the notice of appeal by 23 March 1993; instead of which it was only lodged on 14 May 1993 ie just short of two months late (AD Rule 5 (1) (d)). The record had to be lodged by 22 May 1993; instead of which it was lodged on 22 June 1993 ie one month late (AD Rule 5 (4) (c)). The explanation for the delays furnished by the appellant's attorney in an

affidavit filed in support of the application is the following. As far as the late filing of the notice of appeal is concerned he states that he was under the mistaken impression that the petition for leave to appeal, once granted, constituted the notice of appeal, and that no further notice of appeal was required. On 6 May 1993 he discovered that a notice of appeal was necessary and he immediately took steps to have one prepared and lodged. With regard to the late lodging of the record the explanation consist of nothing more than vague references to obtaining the approval of the Legal Aid Board and difficulties encountered with the preparation of the record. I find the explanation unconvincing and unacceptable. So, for example, it took the appellant's attorney nearly a month to make two telephone calls to the Legal Aid Board before the contractors, Sneller Recordings, were instructed to proceed with the preparation of the record. This lack of diligence

must further be seen against the background, stressed by counsel for the respondent, that the petition for leave to appeal had also been late.

This Court has often warned that there is a limit beyond which a litigant cannot escape the results of his attorney's remissness and ineptitude or the insufficiency of the explanation tendered and that condonation may be refused whatever the merits of the appeal. (See Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others 1985 (4) SA 773 (A) at 787 G H; Ferreira v Ntshingila 1990 (4) SA 271 (A) at 281 D-H; Tshivhase Royal Council and Another v Tshivhase and Another 1992 (4) SA 852 (A) at 859 E-F.) The question is whether the present is such a case. In favour of the application it can be said that the delays in complying with the Rules were not excessive; the application for condonation was made as soon as the appellant's

attorney realised that the Rules had not been complied with; and the administration of justice has not been delayed. (See Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362 F-G). In all the circumstances it cannot be said, in my view, that this is a case in which the Court should refuse the application irrespective of the prospects of success (see Blumenthal and Another v Thomson NO and Another 1994 (2) SA 118 (A) at 121 I - 122 B). I accordingly proceed to consider the merits of the appeal.

The insurance policy concerned was issued on 20 March 1985 pursuant to and on the basis of a proposal form signed by the insured on 26 February 1985. The background facts which are relevant for a consideration of the issues raised in the appeal may be summarised as follows.

The insured was born on 8 February 1961. He first attended school at the age of seven years in the

beginning of 1969 and when he left the Lotus River Primary School at the age of 15 years at the end of 1976 he had not progressed beyond the level of Std 2. By then he had reached the level of Std 2 in certain subjects while in others he was still at the Sub B or Std 1 levels. He thereafter attended the Bridgetown Primary School until he finally left school on 17 January 1979. Little is known about his life from the time he left the Lotus River Primary School until he came to stay with Mrs Marlene Christina Williams ("Williams") in Mitchell's Plain as a boarder during about January 1985. He stayed there until his death in July 1985.

The respondent's case that he lacked the required mental capacity to contract rested mainly on his scholastic performance and the evidence of two of his school teachers; the evidence of Mr Mogamat Yusef Adams ("Adams") a bricklayer who lived opposite Williams and who tried to convert the insured to the Muslim faith;

and that of Dr Fenster, a psychiatrist who never met the insured.

After twice failing the substandard at school, an intellectual and scholastic assessment by a psychologist employed by the Department of Education revealed an intelligence quotient ("IQ") of 61, which resulted in the insured being placed in a socalled adaptation class for mentally handicapped children in the Lotus River Primary School. On 19 August 1974 a second assessment indicated an IQ of 51. At the trial the expert witnesses, Dr Fenster for the respondent and Mr Loebenstein for the appellant, were agreed that according to the authoritative manual on the classification of mental retardation compiled by the American Psychiatric Association, the Diagnostic and Statistical Manual of Mental Disorders ("DSM III"), this placed the insured in the category of the mildly mentally retarded.

Two of the insured's school teachers while he was at the

Lotus River Primary School from about September 1973 to the end of 1976 testified on behalf of the respondent. Both Mrs Schilder and Mr Holmes expressed the view that the insured was severely mentally retarded and both painted a picture of the insured as an open-mouthed idiot with severe motor function problems. Schilder did, however, say that the insured made slow but steady progress while he was at school, that he was not ineducable and that, with proper supervision by someone taking an interest in him he could well have improved further to the level where he was able to live an independent life. Holmes initially said that the insured could never have understood the full implications of taking out an insurance policy, but later conceded that he may well have been able to do so had it been explained to him in simple language. He also conceded that he could not say whether the insured might in later years have developed sufficiently to be able to operate on his

own. Neither of these two witnesses ever saw the insured again after he left their school.

No information of any kind was placed before the trial Court concerning the insured's performance when he attended the Bridgetown Primary School during the years 1977 and 1978. Nor is anything known about him from the time he left school until the beginning of 1985, except that it was common cause that he first worked for a flooring contractor and thereafter for a considerable time as a sweeper on the Railways.

William's evidence as to how the insured came to board with her was not disputed. She told the trial Court that during about January 1985 she decided to take in a boarder as she was divorced with small children and in need of money. She placed an advertisement in an English language newspaper and the insured came to see her personally. She told him that she would provide

full board and lodging but that he would have to do his own washing and ironing. The rent would be R25,00 per week, payable in advance. He agreed and moved in the same day. He stayed with her until the day he died. He always paid the rent on time and did his own washing and ironing. He was able to operate her washing machine and to use the electric iron. Sometimes he made his own meals using the kitchen equipment for that purpose.

Williams testified that the insured did not appear to her to be mentally retarded. He was Afrikaans-speaking but could also speak English to her children although his English was not very good. He liked to watch television, particularly the news. He seemed to understand what he was watching and sometimes commented on it. He bought the Argus newspaper every day and read it. Sometimes she sent him to the shops to buy bread or

milk and he always gave her the correct change. He used to carry a case with him and on occasion she saw that it was rilled with ladies' underwear. He also used to carry a little black notebook in which she saw names recorded. She understood that

he had his own business of selling ladies' underwear.

The learned trial Judge said in his judgment that in the initial stages of her evidence he was considerably impressed with Williams. Three aspects of her evidence, however, gave him "cause for consternation". The first two aspects mentioned by the learned Judge both concern the fact that she knew very little about the insured's business. I have difficulty in understanding why Williams's ignorance of the insured's business activities could in any way reflect on her credibility as a witness, as the learned Judge has suggested. He was no more than a boarder in her home and there is no reason why he should have told her more about his

business. I cannot see how her lack of more detailed knowledge of his business could serve as any indication that she was not a

truthful witness. The third aspect which gave the learned trial

Judge cause for concern has more substance. It relates to an

affidavit Williams made to the police in connection with the

investigation into the deceased's death. The relevant portion of

the affidavit reads as follows :

> "Ek ken die oorledene Robert Fortuin. Hy het by my geloseer tot en met die botsing wanneer hy dan noodlottig beseer was. Tydens die tydperk dat hy by my gewoon het, het hy baie gedrink en was ook baie onbeskof maar omdat hy my gesê het dat hy geen ouers het nie, het ek hom jammer gekry en dus het hy by my gebly.
>
> Ek kan ook sê dat die oorledene vir homself gewerk het, maar waar hy gewerk het en wat se soort werk hy gedoen het, dit weet ek nie.
>
> Ek het vir die oorledene die Vrydag voor die botsing nog

gesien en nie weer nie totdat die polisie my kom sê het dat
hy in 'n botsing betrokke was en dat hy oorlede is. Ek ken
die oorledene goed want hy het lank by ons gebly en dus het
ek horn so goed leer ken. Hy was kortgespanne en het altyd
moeilikheid gesoek. Hy het ook dikwels geryloop na plekke.
Ek het ook nie geweet dat hy 'n polis het nie. Ek het eintlik
niks van hom geweet nie."

Williams testified that she was required to go to the Atlantis charge office from her home in Mitchell's Plain late one evening to give the statement; that the charge office was very busy; that she spoke in English to the policeman who took her statement; and that she was in a hurry to get home and did not read her statement

before signing it. Regarding the nature of the insured's work

Williams testified that she told the policeman that he worked for

himself by selling ladies' underwear, but that she could not say

where he worked or to whom he sold these articles.

The trial Court found that Williams's statement conflicted with her evidence, which was to the effect that the insured was not a heavy drinker; that he was generally well-behaved and on the odd occasion when he was rude to her he always apologised; and that he sold ladies underwear. Williams's explanation for these differences was described as unconvincing and unsatisfactory. In my view the trial Court erred in finding that Williams had made a contradictory statement. If her evidence was attacked on the ground that she had made a conflicting statement that should have been proved by calling the policeman to whom she had made the statement. That was not done and in view of her evidence about what she told the policeman, coupled with her evidence (which the

trial Court accepted) that she did not read the statement before signing it, it has not been shown that Williams made a contradictory statement to the police. Furthermore, for reasons of the case he was investigating, the policeman who took her statement had good reason to emphasise the insured's drinking habits and unacceptable conduct. This could easily account for the differences relating to these aspects. Williams's evidence as to what she told the policeman about the insured's work is corroborated by the fact that he wrote down that the insured worked for himself. In my view the learned trial Judge's criticism of Williams's evidence was not justified and resulted in his attaching insufficient weight to material evidence given by her on the issue of the insured's mental capacity.

Williams's uncontradicted evidence that the insured answered her advertisement for a boarder and contracted with her on the terms testified to by her, is significant in two respects. In the absence of any suggestion that he learned about the advertisement from another source, it must be accepted that he read it himself. This supports Williams's evidence that the insured used to read the Argus. It also raises a doubt about the reliability of the evidence given by Holmes and Fenster that the insured would not have been able to read and understand an English newspaper. Secondly, the insured would appear to have progressed to the stage where he lived an independent, self-sufficient life by the time he came to live in her house. It was common cause at the trial that the insured never received any disability grant from any source. There was further

no suggestion that he was being supported by anyone. In the absence of any indication to the contrary it must be accepted, in my view, that he was earning a living on the open market. Furthermore, Williams's uncontradicted evidence that he did his own washing and ironing and cooked his own meals on occasion showed that there was no longer anything amiss with his motor functions. In my view a totally different picture of the insured emerges from her evidence from the one painted by Holmes and Schilder.

The trial Court did not outright reject Williams's evidence. No doubt because he realised the significance of those portions of her evidence which were not disputed at the trial, counsel for the appellant submitted that her evidence should have been rejected

in toto on the basis that she had been part of a conspiracy to murder the insured. It was suggested that a conspiracy had been formed between, amongst others, Williams, Mr Spencer James Whiting ("Whiting"), who was the insurance agent who sold the policy in question to the insured and the appellant. The suggested plot entailed putting the insured in Williams's house and paying his rent, taking out the policy in his name, murdering him and claiming the benefits due under the policy on the basis of fraudulent evidence that there was nothing wrong with him. In my view there is no factual basis whatsoever for the submission. There was no evidence to that effect, nor was it ever suggested to any of the witnesses.

The trial Court relied heavily on the evidence of Adams who

lived in a house opposite that of Williams and who had been at the Lotus River Primary School with the insured. Although Adams himself failed Sub A and Std 4 he eventually passed Std 8. After they left school Adams lost contact with the insured and only met him again during May 1985 in Mitchell's Plain. Adams was a bricklayer and a lay teacher in the Islamic religion. The insured expressed a desire to know more about this religion and Adams started teaching him, seeing him virtually every night for that purpose. Adams said that the insured was slow of learning and could not be taught with his other pupils. His level of understanding and reading was that of a child in the substandards. Adams had to use simple words to teach him anything and even then it took a long time and much repetition for him to remember

what he had been taught. He tried to teach the insured a verse in the Arabic language which every Muslim must know but he only managed to memorise four or five words after two months. According to Adams the insured had not changed from the time he was at school. He said that the insured could neither speak nor understand English. His Afrikaans was very poor and was like that of someone in Std 1. He never saw the insured with a newspaper and when the news on the television came on he immediately lost interest because he could not understand it. Adams considered that the insured would not have understood "what insurance is all about". Adams said that the insured told him that he did not have his own business but that he helped a certain Rashad carry his bags. The insured also told him that Rashad had opened a bank account

for him and paid his rent and that he never had money of his own. Adam's evidence as to the content of the insured's statements to him falls within the definition of "hearsay evidence" in sec 3(4) of the Law of Evidence Amendment Act 45 of 1988 ("the Act"). The evidence was not objected to and seems to have been admitted without the fact that it was hearsay evidence ever having been considered. It was not contended on appeal that it was admissible in terms of sec 3 (1) (a) of the Act and in my view, had the learned trial Judge applied his mind to the question and exercised his discretion whether to allow the evidence "in the interests of justice" in terms of sec 3 (1) (c) of the Act, he would not have admitted the evidence. In my view the evidence was by its nature unreliable. This is clearly shown by the fact that the insured,

according to Williams, told her quite the opposite from what he told Adams. For the same reason her hearsay evidence in this regard should have been excluded. There was no suggestion that Rashad was not available to testify and it would have been a simple matter for him to tell the trial Court whether the insured had worked for him or not. He was not called as a witness.

Adams's evidence is in stark contrast to the evidence of Reginald Glenville Richter ("Richter") who was the respondent's branch manager in Cape Town during 1985. Richter testified that a man who identified himself as the insured came into the branch one day during the relevant time to pay an insurance premium in cash. The person explained that his premiums were paid by way of debit orders but that he was late in depositing sufficient money

in his bank account to meet the current debit order and that he wanted to pay the premium in cash. The person had no documentation with him but supplied his full names and date of birth from which it was possible to ascertain the policy number.

He then paid in cash and was issued with a receipt. Richter asked him whether he wanted to continue to pay by way of debit order in future but he stated that he was undecided. He then left. Richter said that the person acted quite normally. The trial Judge said in his judgment that Richter made a good impression upon him and that there was no reason to doubt his evidence. He went on to say, however, that in the absence of evidence to confirm that the man Richter spoke to was indeed the insured, or, if he were the insured, that he was not being assisted, the validity of Richter's

evidence was doubtful. I cannot agree with the learned Judge. There was no evidence to suggest that the person Richter spoke to was an impostor or that the insured was accompanied by another who did the talking. Neither was this ever expressly put to Richter by counsel for the respondent. Surely an impostor would have gone there armed with the policy number which this person did not have. On the probabilities the trial Court should have found that it was indeed the insured to whom Richter spoke. The learned trial Judge also said that even if it is accepted that Richter spoke to the insured who was unassisted, his evidence does not take the matter any further. Again I cannot agree. In my view Richter's evidence is significant in that it shows that the insured understood the necessity for timeous payment of the premiums as

well as how to operate a bank account.

Whiting was the final witness to give evidence of a contemporaneous nature. His evidence was that during 1985 he was employed by the respondent as an insurance consultant. He met the insured in the bar of an hotel and told him that he was an insurance agent. When the insured told him that he had his own business he mentioned that he could take out an insurance policy as an investment. The insured expressed an interest and they made an appointment to meet at the latter's home. On 26 February 1985 he went to the given address where he met the insured. He completed the proposal form in the presence of the insured who signed the form on the same occasion. They spoke in Afrikaans

and he recorded the answers on the proposal form in English. He explained to the insured that the policy would provide for basic life cover as well as additional accident and investment benefits. The insured made it clear that his real interest was in the investment benefits and the fact that he could raise a loan on the policy. When they came to section S of the form which provides for authorisation for the payment of premiums by way of stop orders, the insured handed him a card containing details of a bank transmission account. Whiting was able to complete this section from the information appearing on the card and this section was signed by the insured the same day. Whiting's evidence was to the effect that the insured appeared to him to be a perfectly normal person in possession of all his faculties who fully understood the

various aspects of the proposal form.

Whiting's evidence was severely criticised by the trial Judge in a number of respects. Apart from saying that he made "a singularly bad impression" while giving evidence the learned Judge refers to five portions of his evidence which he either finds unacceptable or which he regards as an indication that the insured did not understand the transaction. I shall deal with each in turn.

Firstly, the learned Judge did not believe Whiting's evidence that

he had never met the appellant. Whiting admitted that he once

completed a proposal form in the name of the appellant without

ever meeting him. I find Whiting's explanation a perfectly

reasonable one and in my view there was insufficient reason to

reject his evidence in this regard as false.

Secondly, the learned Judge says in his judgment that, in view of the nature of the policy, he doubted whether any investment benefits were payable under the policy. He could, accordingly, not accept Whiting's evidence that he had explained such benefits to the insured. Elsewhere in the judgment the learned Judge simply assumes that no such benefits were payable. In my view the learned Judge erred in adopting this attitude.

According to section E of the application form the monthly

Vitamagna	R 57-80
Accidental death or injury benefit	18-90
Waiver of premium benefit	1-54
	R 80-24

According to the policy the Vitamagna benefit would seem to be one of the "Vitaseries linked and reinforced endowments". Clauses 2 and 9 of the policy provide that upon the insured surviving to the maturity date the maturity benefits set out in the

schedules will be paid to him. What exactly the benefits were to which the insured would have become entitled was never dealt with at the trial, nor were the schedules placed before the trial Court. Without that information the learned Judge erred in rejecting Whiting's evidence on this aspect.

The next part of Whiting's evidence which was criticised by the learned trial Judge is the following. Whiting was asked in cross-examination whether the following sentence in section Q of the application form was explained to the insured "Ek stem in om die standaard polisbewoording van die A A Mutual Lewens vir die soort versekering waarom aansoek gedoen is te aanvaar". He replied that he told the insured that the standard form of contract would be issued to him and that the insured understood what he was saying. In his judgment the learned trial Judge says that he was

"thoroughly unconvinced" that Whiting understood what was being referred to, and that he has "little doubt that what was being imparted to the insured was other than was intended by the statement in the proposal form". A careful reading of the record shows that when Whiting was first asked whether he had explained the sentence in issue to the insured he misunderstood the question as referring to the standard rates. The question was repeated and the cross-examiner made it clear that he was not referring to the rates but to the actual contract itself. The question, in the end, was a simple one and the answer, as I have said, was in the affirmative. There does not appear to be any basis for saying that Whiting did not understand what the question referred to nor that he conveyed something else to the insured than what was required by

the proposal form.

Fourthly, the learned trial Judge said that Whiting's evidence that arrangements for the payment of the premiums were made before the date upon which the proposal form was signed ie 26 February 1985 and that he did not open an account afterwards did not ring true. In the first place Whiting did not say that arrangements for the payment of the premiums had already been made. He merely said that the insured gave him a card containing details of a bank account with the S A Perm. This information was then used to complete the authority for the payment of premiums by way of stop orders. Furthermore, there is no evidence to suggest that the bank account, details of which Whiting said appeared on the card which the insured handed to him on 26

February 1985, did not then exist. There was therefore insufficient reason not to accept Whiting's explicit evidence in this regard.

Finally, the learned trial Judge found Whiting's evidence that he used colloquial language to explain the questions in the proposal form either not true or an indication that Whiting was not dealing

with the normal or average person. These findings are, in my

view, totally unjustified. Why Whiting would lie in saying that

he used simple language is not clear. I find it quite natural and realized that he was dealing with someone from a sub-economic area. And the mere fact that a proposal form is explained in simple language is no indication, in my view, that the client is not a person of average, normal intelligence.

I proceed to deal with the expert evidence relating to the insured's mental capacity. In his evidence in chief Fenster first expressed the view that the insured's IQ of 51 placed him in the category of severely mentally retarded, but he soon qualified that by saying that the insured was severely mentally retarded "within the range of mild". In cross-examination he conceded that his original assessment was based on an out-dated classification which was no longer accepted and that according to the current classification by the DSM III (which he appeared to accept as correct) a person with an IQ of between 50 and 70 was classified as mildly mentally retarded. It is not clear why he used an outdated classification in the first place.

According to the DSM III mild mental retardation is defined

as "strongly equivalent to the education category 'educable'". Dr Fenster, however, expressed the firm opinion that the insured was ineducable. He further stated categorically that the insured was permanently and totally unfit for employment on the open labour market; that he had no doubt whatsoever that his mental retardation was such that any observant layman would have noticed it and that it was "scientific and definite" that he did not have contractual capacity. Other firmly expressed views were, infer alia, that Williams's evidence that the insured could read a newspaper was "impossible"; that when he left school he was "unable to read Afrikaans"; and that he would not have been able to pay the premiums on time.

It is quite clear from Dr Fenster's evidence that the basic

premise for all these views was that the insured had at the age of 17-18 years not progressed beyond the level of Sub B at school, and that it was therefore impossible for him to have improved afterwards. This was repeatedly stated by him under cross-examination, and he then readily conceded that if this fundamental premise was wrong his opinions would be wrong too.

Dr Fenster's basic premise turned out to be incorrect. When the insured left Lotus River Primary School at the end of 1976 at the age of fifteen years he had, as I have already indicated, reached the level of Std 2 in certain subjects while in others he was still at Std 1 or Sub B levels. So, for example, Holmes testified that the insured's reading level was "between say late Std 1 and the beginning of Std 2". Nothing is known about his

progress during 1977 and 1978 and Dr Fenster was not entitled to assume that he made no further progress during that time. In the circumstances his view that the insured was ineducable can carry little weight. It will further be recalled that Schilder said that the insured was not ineducable and that her view is supported by the DSM III manual. For these reasons the respondent, on whom the onus rests, has not shown that the insured was ineducable.

Dr Fenster was also probably wrong when he said that the

insured was unable to obtain work on the open market. As I have

earlier shown, it is likely that the insured in fact obtained such

employment after leaving school and that he was so employed at the

time of his death. Dr Fenster's sweeping statement that any

perceptive observer would have noticed his mental retardation is

contradicted by Richter, Williams and Whiting who all met the insured. His statement that the insured would not have been able to meet the payments under the policy was shown to be wrong. So was his statement that the insured could not read Afrikaans when he left school. In view of Holmes's evidence as to the insured's reading ability it would seem that Dr Fenster was wrong also when he said that the insured could not read a newspaper.

The emphatic manner in which Dr Fenster expressed his opinions apparently impressed the learned trial Judge, who, in accepting his evidence, said in his judgment: "The opinion of Dr Fenster was emphatic: it was scientific and definite that the insured could not have had the contractual ability to conclude the agreement." For the reasons I have given the learned Judge erred

in accepting Dr Fenster's evidence. As for his opinion concerning the insured's lack of contractual capacity being "scientific", Dr Fenster's original "scientific" labelling of the insured was indeed wrong in that the insured was not severely mentally retarded. Furthermore, adopting an inaccurate factual basis for views so dogmatically expressed, can hardly be described as "scientific".

Loebenstein, a clinical psychologist, expressed the view that the insured was only mildly mentally retarded. He based this view on the insured's IQ of 51 which followed an earlier test result of 61; the fact that the insured was placed in an adaptation class at school where he made progress and was not ineducable in the view of his teachers; and the fact that in later life he was self-supporting

and lived independently, having obviously acquired sufficient skills to be employed on the open market. Loebenstein said that the insured came from a greatly deprived socio-economic background and was materially and socially disadvantaged in his early life. He was placed in the care of foster parents at a young age and his relationship with them was very poor. His deprived background and home environment had a deleterious effect on his progress at school and on his IQ tests but his performance would have improved once he was placed in a more stimulating environment. Loebenstein emphasised that "mild mental retardation must always be examined in a particular context at a particular time" in order to determine the degree to which a person has improved. In the case of the insured there was no information available as to the

"intervening factors and circumstances" in his life from the time he left school until the beginning of 1985. In the absence of such data it was not possible to assess his intellectual functioning at the time he took out the insurance policy. The trial Judge did not reject Loebenstein's evidence but attached little weight to it on the ground that there was no intervening factor. He said in this regard:

> "There is no evidence to indicate any intervening factor that contributed substantially to his mental development. I am bound to accept that there was a measure of improvement, even if this is limited to his ability to write his name, but I do not accept that any material advancement of intellect occurred between the age of 18 and 24."

The trial Judge concluded by assessing the insured's mental capacity at the time he entered into the contract of insurance on the same basis as Dr Fenster had done ie as that of someone who had

at the age of 17-18 years not progressed beyond Sub B. For the reasons I have given the learned Judge erred in doing so. Moreover, in saying that he does not accept that the insured's intellectual level improved materially since he left school because there was no evidence to that effect, the learned Judge would seem to have wrongly placed the onus of proving contractual capacity on the plaintiff. It was common cause that the onus of proving that the insured lacked the required contractual capacity at the relevant time rested throughout on the respondent, so that it was for the respondent to prove that at the time of contracting the insured's intellect had not improved from that described by his school teachers. For all we know his mental state may well have improved since then. (Cf Mitchell v Mitchell and Others 1930

AD 217 at 224.) Indeed, the evidence of the school teachers and Loebenstein was that that was to be expected.

There are other passages in the trial Court's judgment from which it would appear that the onus was wrongly applied. The trial Court found that the policy held out no benefit at all for the insured. That finding, as I have indicated, was not justified. It further pointed out that no evidence whatsoever was led as to why the plaintiff was named as the beneficiary, as if it was for the appellant to give a reason for the policy, and concluded that the insured had been "manoeuvred" into taking out the policy. This finding was totally unjustified. The trial Court then proceeded as follows :

"[T]he most compelling reason for rejecting an understanding

> on an appropriate level on the part of the insured, is that there seems to be no reason whatsoever for him to have concluded the agreement."

What the learned Judge is saying in effect is that the appellant bore the onus of giving a reason for the policy and that in the absence of such explanation an inference of lack of contractual capacity arises.

In the present case the onus is, in my view, all-important. An enquiry into the state of a man's mind is, from the nature of things, a very difficult and delicate one, as was pointed out by Innes CJ in Pheasant v Warne 1922 AD 481 at 489 and by Tindall JA in Lange v Lange 1945 AD 332 at 344.

In the present case it is particularly so because, firstly, nothing is known about the insured during the crucial period of his life just

before the contract in question was concluded, and secondly, the evidence adduced at the trial was so contradictory.

The test for contractual capacity which is of application in the present case is that which has been laid down in cases such as Prinsloo's Curators Bonis v Crafford and Prinsloo 1905 TS 669 and the two cases referred to in the preceding paragraph. In Prinsloo's case, supra, Solomon J stated at p 673 that the test was whether the person concerned

> "was of sufficiently sound mind and understanding to realise the nature of the obligation into which he was entering, and to appreciate the duties and responsibilities created by that contract."

In Pheasant v Warne, supra, Innes CJ stated at p 488 :

> "And a court of law called upon to decide a question of contractual liability depending upon mental capacity must

> determine whether the person concerned was or was not at the time capable of managing the particular affair in question - that is to say whether his mind was such that he could understand and appreciate the transaction into which he purported to enter."

See also Lange v Lange, supra, at 341 - 342.

In my view the contract of insurance in question was a fairly simple one and it did not require a high degree of intelligence to understand the nature of the contract and the nature of the obligations created thereby. It was not in issue that by the time of the insured's death no premiums were outstanding and in view further of Richter's evidence it must be accepted that the insured at least understood his responsibility for paying the premiums.

I have already referred in some detail to the conflicting evidence relating to the insured's mental state at the relevant time.

There is an irreconcilable difference between the lay evidence of Adams, on the one hand, and that of Williams, Richter and Whiting on the other. I have pointed out that the trial Court did not reject the evidence of Williams and Richter and merely criticised certain aspects of their evidence. That criticism, as I have indicated, was not justified. I have also pointed out that the trial Court's rejection of Whiting's evidence was unwarranted.

As for the expert witnesses Fenster's evidence was, as I have indicated, fundamentally flawed and can carry very little weight. Loebenstein, on the other hand, emphasised the insured's potential for mental improvement resulting from a changed environment after leaving school. On a proper assessment of all the evidence and on a correct application of the onus the trial Court should have held

that the respondent had not proved that the insured lacked the required mental capacity to conclude the contract in question.

I proceed to deal with the defence that the proposal form contained the following misrepresentations which grounded repudiation of liability.

"1. There were no circumstances not disclosed in the proposal form relating to the insured's health which may affect the risk of assurance on his life;

2. He was self-employed and was in receipt of earnings exceeding R650-00 per month;

3. He had attained a Std 8 qualification;

4. He had one brother who was in good health."

It was alleged in the pleadings that these statements were false in that, firstly, there were circumstances relating to his health which may affect the risk namely that he was severely mentally

retarded; secondly, he was unemployed and not in receipt of earnings exceeding R650-00 per month; thirdly, he had not attained a Std 8 qualification; and fourthly, his brother, although in good health, was also mentally retarded. Section Q of the proposal form contains a warranty, over the insured's signature, of the truth of the statements in the proposal form and his agreement that they form the basis of the insurance contract.

An insurer's contractual right to repudiate liability on the ground of misrepresentation made to it, whether elevated to a warranty or not, was curtailed by sec 63 (3) of the Insurance Act 27 of 1943, which, insofar as here relevant, provides as follows:

> "Notwithstanding anything to the contrary contained in any ... document relating to (a domestic) policy, any such policy ... shall not be invalidated and the obligation of an insurer

> thereunder shall not be excluded ... on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be 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 issue ... thereof."

This sub-section was fully considered in a recent decision of this Court in Qilingele v South African Mutual Life Assurance Society 1993 (1) SA 69 (A). In delivering the judgment of the Court Kriegler AJA distinguished between the test for materiality in cases where the ground for repudiation is a failure of the common law duty to disclose material facts, and the test in those cases where the insured expressly vouched for the truth of his representations founding the contract of insurance and moreover did so by way of warranty (at 73 A-F and 74 F-G),

The learned Judge stated the test in the latter type of case as

follows, irrespective of whether the misrepresentations have been

warranted to be true or not (at 75 B-E).

> "The enquiry as to the materiality of the misrepresentation is consequently not conducted in abstracto but is focused on the particular assessment. From that it follows that the evidence of the underwriter who attended to the assessment is not only relevant but may prove crucial. So, too, evidence that the insurer had a particular approach to risks of the kind in question would be relevant and could be cogent. Obviously general considerations affecting the assessment of the kind of risk in issue will bear on the probabilities and will be taken into account. But, and this serves to be emphasised, the enquiry is aimed at determining whether the specific assessment was probably materially affected by the specific misrepresentation in contention."

The learned Judge went on to say (at 75 G-H) that applying this

test involved a simple comparison between two assessments of the

risk undertaken. The first is done on the basis of the facts as

misrepresented by the insured. The second determines what the assessment would have been on the facts truly stated. If there is a significant disparity between the two, then the materiality requirement in sec 63 (3) is satisfied.

Returning to the misrepresentations alleged in the present case, it was common cause that the first misrepresentation alleged on the pleadings was not proved as the insured was not severely mentally retarded. Counsel for the respondent contended in the alternative that the statement was false in that the insured had attended a special class at school. This was clearly an afterthought and was never canvassed at the trial. It is not possible to say what effect this might have had on the assessment of the risk.

The second and fourth statements have not been shown to be false. Apart from Williams's evidence that she had formed the impression that the insured worked for himself, there was no other admissible evidence of what the insured did or what he earned. With regard to the insured's brother, there was no evidence that he was mentally retarded at the time the proposal form was signed. The evidence of Mr Heugh, the foreman at Atomic Steel where he had been employed on the open market for more than six years, whose evidence was not contested, was to the effect that he is a normal, average person and that there is nothing the matter with his mental ability.

That leaves the statement that the insured had passed Std 8 at school which the parties agreed was false. Richter, the

respondent's branch manager, was the man who assessed the risk under the policy on behalf of the respondent. His evidence was to the effect that even had the insured indicated that he had only passed Std 2 or that he had had no schooling at all, it would not have affected the assessment of the risk. Richter's evidence was that, on the respondent's approach to this type of insurance, a person's academic qualifications were not regarded as material. There was no other evidence on this issue and the respondent has, in my view, clearly failed to discharge the onus of proving that this specific misrepresentation materially affected the assessment of the risk. For these reasons the respondent has failed to show that it was entitled to repudiate the contract on the ground of misrepresentation.

I deal finally with the defence based on the failure of the duty to disclose material facts. The respondent's allegation on the pleadings was that the insured had failed to disclose that he was severely mentally retarded. I have already said that the insured was not proved to be severely mentally retarded. As in the case of the first of the alleged misrepresentations, counsel for the respondent contended in the alternative that the insured should have disclosed that he had been placed in a special class at school. In President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk en 'n Ander 1989 (1) SA 208 at 216 D-G this Court held that the test of whether information should be disclosed was whether the reasonable man (not the reasonable insurer or insured) would appreciate that the information should be conveyed

to the prospective insurer so that the insurer itself could decide whether to accept the risk or to charge a higher premium than usual.

> On the facts of the present case I am unable to find that the reasonable man would have considered that he should inform the insurer of the fact that he had been placed in a special class at school. In my view the reasonable man would have considered the information entirely irrelevant. In his mind the information could not have influenced the risk in any way or his ability to comply with his obligations under the policy. I cannot therefore find that the insured ought to have disclosed the fact that he had attended a special class at school to the respondent.

> For these reasons the defences raised by the respondent failed and the Court a quo erred in granting judgment with costs in its

favour. As far as the costs of counsel are concerned Mr Laubscher appeared alone for the appellant at the hearing of the appeal although he had appeared with a senior at the trial. He asked for the trial costs of two counsel. I am satisfied that, having regard to the amount involved in the action and the nature of the issues in dispite between the parties, the matter warranted the employment of two counsel and that the costs of two counsel should be allowed to the extent to which two counsel have in fact been employed.

In the result the appeal succeeds with costs and the following orders are made:

1. Condonation is granted. The appellant is ordered to pay the costs of the application for condonation.

2. The order of the Court a quo is set aside and it is replaced by the following order:

(a) Judgment is granted for the plaintiff in the amount of R200 000-00 with interest a tempore morae from 25 July 1988 to date of payment.

(b) Defendant is further ordered to pay interest at the rate of 12% per annum on the plaintiffs taxed bill of costs from a date 15 days after the allocatur of the Taxing Master.

(c) Defendant is ordered to pay the costs of the action, such costs to include the costs of two counsel.

3. The respondent is ordered to pay the costs of the appeal, including the costs of the application for leave to appeal but excluding the costs of counsel for the appellant's supplementary heads of argument.

W. VIVIER JA.

HEFER JA) concurred.