CASE NO. 42496

In the matter between:

VALERIE ELSIE CORNWELL PURR

APPELLANT

AND

ABSA BANK LTD FIRST RESPONDENT

MYLES STUART SECOND RESPONDENT

BEFORE: SMALBERGER, NIENABER, MARAIS,

SCHUTZ JJA and STREICHER AJA

HEARD: 2 MAY 1997

DELIVERED: 20 MAY 1997

SCHUTZ JA

J U D G M E N T

SCHUTZ JA:

Hindsight is not vouchsafed the common man as he picks his course through life. This must be kept constantly in mind in a case like this one, where all is so obvious now. It is a case in which members of a family took investment advice from a bank's investment advisor. That advice has proved to be lamentably bad. Almost all that was invested was lost. The bank and the person in its employ who gave the advice have been sued. The broad issue is negligence. There is no question that the bank offered investment advice, that the advice was accepted and

acted upon, that it was bad advice, and that it caused loss. There is no imputation of dishonesty. The particular aspect of negligence that is in contention is the degree of skill and care to have been expected of the respondents. They accept that they had to act with skill and care. The question is, with how much skill and care? The claim pleaded relied upon contract, alternatively delict, but as the case was presented as one in delict, and as nothing turns upon the precise cause of action, I shall treat it as such. How the Purrs saw things

At 65 Mrs Durr decided that attending to her investments herself was becoming burdensome. A friend suggested she approach Mr Myles Stuart of the United Building Society for assistance. She did so in 1985,

and out of this flowed the various investments by herself and members of her family which gave rise to this case. I shall refer to the family collectively, if somewhat inaccurately, as the Durrs. They were her husband Mr Durr, her daughter Mrs Stanley and her granddaughter Miss Ashburner. All of these people gave evidence and all have suffered loss. The only plaintiff is Mrs Durr. She has taken cession of the other claims. Having lost before van Zyl J in the Cape Provincial Division, she is the appellant.

In 1985 Stuart was the regional manager of the United Building Society's broking division in Cape Town. He was to become the second defendant, and the second respondent on appeal. In time the building society metamorphosed into United Bank. Later it was absorbed as a

division in the first respondent, Absa Bank Limited, which was the first defendant in the trial.

Pursuant to her approach Stuart visited Mrs Durr at her home and this became the scene for intermittent business during succeeding years, until 1992. She was in no need of the highest return available and was looking for secure investments. This she told Stuart. On his advice she invested on fixed deposit at United Building Society and in an annuity with Old Mutual. She found him charming and polite and he gained her confidence - so much so that at a later stage she appointed him her executor.

In 1989 a company called Supreme was mentioned by Stuart for the first time. This was a very good company, he told her. She asked

him if it was safe for investment. He gave the answer, which according to her was repeated on later occasions, that his own and his mother's money was invested with Supreme. (In his evidence Stuart stated that his mother's money was so invested on his recommendation and that he told the Durrs as much. But he disputed that he had said that any of his own money was invested in Supreme. Nor was that the fact. The other members of the family supported Mrs Durr. No finding was made by the Court below. Hot though the dispute was on this point, I do not think that it is of much moment, as I would expect that for a son to vaunt a company by saying that he has persuaded his mother to invest in it is at least as strong as saying that he had done so himself.) Other expressions attributed to Stuart are that Supreme was a very solid company and that

he strongly recommended investment in it. That such was the tenor of his commendation is not in dispute. In fact this was what Stuart believed. The first investment in Supreme, of R30 000, was in the form of secured debentures. That was in November 1989. These had been offered by him as an alternative to fixed deposits. In February 1990 another R10 000 followed. The debentures were redeemable after 12 months, but were re-invested on maturity. It is unnecessary to detail all her investments and re-investments in debentures, all of which were recommended by Stuart with re-affirmation of his original indorsement.

In 1990 he proposed a new form of investment, preference shares in Supreme, redeemable within three years. Again Mrs Durr sought assurance as to risk and was given it. By now Mr Durr had become

interested, due to his wife's persuasions. He received the same assurance from Stuart as she had received. After discussion with him, Stuart worked out how an available one and a half million rands should be invested. At the top of the list was R300 000 for Supreme preference shares. Mr Durr accepted all the recommendations. At the same time, November 1990, Mrs Durr committed R100 000 of hers to the same shares.

Next, it was Mrs Stanley's turn. In November 1991 she invested R20 000 in preference shares. She had met Stuart at her mother's home. He made an appointment to visit her. During the visit he told her that she would do better if she withdrew money invested with Syfrets and placed it in Supreme. He told her also that it would be a very secure

investment. She consulted her husband, who was not happy with the proposal. However, he phoned Stuart, and upon receiving assurance from him, suggested that she proceed if that was her wish. That is what she did.

For her 21st birthday Mr and Mrs Durr gave their granddaughter, Miss Ashburner, R10 000. She also met Stuart at their home. He advised her what to do with the money. In February 1992 she invested it in Supreme debentures.

Mrs Durr's last investment was on 5 November 1992, thirteen days before the two Supreme companies that were the ones that mattered (as it later turned out), were provisionally liquidated. This last investment was R80 000 in secured debentures. Of this Rl 000 was for an elderly

gardener. Once again assurance as to risk was sought and given. When the music stopped Mrs Durr was owed R115 000 on secured debentures and R150 000 on preference shares: Mr Durr was owed R300 000 on preference shares: Mrs Stanley was owed R20 000 on the same: and Miss Ashburner R10 000 on secured debentures - a total of R595 000.

What were the Durrs' expectations and beliefs? Mrs Durr said that she would never have thought of approaching Stuart had he not been connected with a bank or building society. The picture that she had in her mind was that in a big company like United or Absa there would be financial experts who would examine prospective investments - "men who were really in the know." It is clear that she has no clear idea of what a preference share is other than that it confers some sort of priority.

She seems to think that it ranks prior to a debenture (which it does not), a belief which Stuart also appeared at that time to hold. Mr Durr does not know what a preference share is. But Stuart assured him that Supreme preference shares were an entirely safe investment. Nor does Mr Durr know what a debenture is. Miss Ashburner was not asked, but there is no reason to suppose that her state of knowledge on these matters exceeded that of her elders, or that her expectations were any different. As to Mrs Stanley, she also does not know what preference shares are and, referring to United, her comment was "a big company like that you take - those are the people that you take the advice from."

Her husband, it will be recalled, took the trouble to phone Stuart. According to him Stuart said that "our people" (ie at Absa - I use this

name to include United in its two manifestations) had thoroughly investigated the operation, Supreme, and that he was confident that it was a sound investment. Stanley was emphatic about this. Stuart disputed any reference to "our people". His version is "That was never contained, conveyed to him, what I recall probably having said to him was that I had investigated Supreme and that I had satisfied myself that Supreme was in order". The Court below made no finding on this important dispute. The truth about "Supreme"

Just about everything that Stuart told the Durrs about Supreme was wrong, not that he knew it, but because he had allowed himself to be misled, as many others also had been, by a series of deceits.

In order to sort out the tangle it is necessary to establish some corporate identities. The two companies which had issued "secured debentures" and "preference shares" were, at the time of liquidation, Supreme Holdings Ltd and Supreme Investment Holdings (Pty) Ltd. I shall refer to them respectively as "Holdings" and "Investment". Holdings had been formed in 1986. By 1990 it was insolvent. When registered in 1986 it was named Supremebond Trust (Pty) Ltd. (There was a purpose in this name, with its inclusion of the word "bond".) In 1988 it was converted to a public company and the name became Supremebond Trust Ltd. In May 1990 its name was changed to Supreme Holdings Ltd, the appellation under which, being unable to pay its debts, it was liquidated in November 1992. Investment was formed in 1989.

It was insolvent from its inception. Its fortunes never improved. The original name was Supremebond Investment Holdings (Pty) Ltd. (Notice again the "bond".) Later in the year it was converted to a public company and the name became Supremebond Investment Holdings Ltd. In 1991 it became Supreme Investment Holdings Ltd, and after some months it reverted to being a private company with the name Supreme Investment Holdings (Pty) Ltd. It was provisionally liquidated together with Holdings, similarly unable to pay its debts.

The affairs of Holdings and Investment were inextricably interwoven. Neither was a listed company. The moving spirits behind them were one Ronbeck, an attorney, and one Hafner, an accountant. In 1985, that is before either of the companies so far mentioned was

registered, Supreme Bond (Ply) Ltd had been formed. This was a participation bond company, which survived the collapse in November 1992. It did not form part of the "Supreme Group" at all. The shares in it were held by Ronbeck. I shall refer to it as "the participation bond company." There were numerous further companies which did form part of the group. Some of them will be mentioned later.

Between them Holdings and Investment (to which I shall refer collectively as "the two companies") raised large sums of money from the public. At the time of liquidation they owed debenture holders some R280 million (on what was described in the debenture certificates as secured debentures, but which were in fact not secured). So-called preference shareholders were owed another R40 million. Two of the

means employed in raising money were to pay brokers commission some three times more than the going rate for comparable investments and to offer a return on debentures some one and a half to two per cent above the fixed deposit rate. The higher rate of return was not only attractive to investors but would encourage brokers wishing to remain competitive to offer the "product" as one of the commodities in their stock in trade.

What was held out to the world was that "Supreme" had a sound financial base in a selection of manufacturing and trading companies, with particular emphasis placed upon three that were listed on the Johannesburg Stock Exchange (which last was one of the true statements.) The listed companies were Supreme Industrial Holdings,

Protea Furnishers and Supreme Manufacturing Holdings. What was lacking in respect of the two companies (which were the ones that mattered as they were issuing the debentures and preference shares), was any clear statement as to their relationship with the other companies; and any audited financial documents of the kind that the law requires, which, if they had been available, would have allowed some assessment of the activities, profitability and soundness of the two companies. No financial statements were filed with the Registrar of Companies by Holdings which, as a public company was required to do so. No financial statements were made available to any broker by either company. ("Supreme" marketed through brokers.) None were sent to debenture holders or preference shareholders, as was by law required.

Even for internal consumption they were late. For instance, the statements for the year ended 31 December 1990 were not signed by the auditors until May 1992. There was a reason for that. During the course of the 1990 audit the auditors realised that Investment was insolvent at the end of 1990. In order to prevent this being reported, an increase of capital of R19 950 000 in December 1990 was fabricated retrospectively. That amount was supposed to have been paid by Holdings to Investment for new shares, but it never was.

After January 1989 not a single prospectus was issued, although money was being raised from the public wholesale. S 145 of the Companies Act 61 of 1973 ("the Companies Act") requires an offer to the public for subscription for shares to be accompanied by a prospectus.

A prospectus may be used for only three months after its registration (s 156). It must contain a fair presentation of the state of affairs of the company (s 148); and many informative details, including an auditor's report, are required to be included. For purposes of a public subscription debentures are equated to shares (definition of "share" in s 1). The reason advanced for not issuing prospectuses was supposed to be, relying on s 144, that because shares and debentures were made available to a limited class consisting of brokers, the offer was not calculated to become available to other persons. This contention was advanced despite the fact that brokers were issued with wads of application forms!

The "secured debentures" were in fact unsecured, for a variety of reasons that need not be set out.

Again deceit was involved, but mainly

of a kind that only a detailed investigation would reveal. What was apparent to the outsider, however, was that the debenture certificates, although calling themselves secured debentures, said nothing about how and to what extent the security had been effected. Also, for the enquirer with longer vision, the publicly available documents of the three listed companies in the group, upon which much emphasis was placed, would have shown that they had not issued debentures or preference shares.

For reasons that need also not be stated the "preference shares" were irregularly allotted and the claims of those who subscribed for them are those of concurrent creditors.

Rather than documents in a form which past experience has embedded in the statutes as a requirement, brokers were edified with

glossy brochures, dossiers containing laudatory but largely irrelevant press cuttings, and they were exhorted to invest at marketing conferences.

The two companies' names were played down. Rather the "Supreme Group" was put forward as disposing over the operational companies and their assets, and particularly the three quoted companies. Completely spuriously, the "Supreme Group" was dated back to 1923, whereas Holdings had been formed in 1986 and Investment in 1989. The actual facts concerning the two companies themselves were suppressed. What was also suppressed was where the major investments were being made by the "Supreme Group": not in the operational companies, but in a trio called Insulated Structures (Pty) Ltd ("Insulated"), Sandton Finance (Pty) Ltd ("Sandton") and Pier Investments (Pty) Ltd ("Pier"). Insulated was

an intermediary financing company which was having problems with the Financial Services Board. Sandton was involved in what the witness Goldhawk called the "loan-sharking business", lending small amounts to the man in the street at high rates, a business, according to him "which involves unusual collection tactics whereby letters are not necessarily used but large people knocking on the door go to collect money very often." Pier bought repossessed properties from the participation bond company, properties that did not generate income, and put them together in property portfolios.

The broad substance was that the two companies were running an illegal bank, taking deposits from the public, and through their intermediaries, lending to other members of the public at a rate higher

than that paid to the depositors. Of course, they had no license to conduct a bank, so that they could not openly solicit deposits from the public. Becoming a bank would have entailed rigorous regulation. Openly raising capital by offering shares or debentures would have required a prospectus with no room to quibble. That would have entailed a scrutiny which they could not bear. So it was also no good. The expedient that was devised was to use the participation bond company as a stalking horse. It was a registered financial institution and was entitled to solicit funds. What was done, as explained by Goldhawk, was to advertise participation bonds and then to add that, by the way, secured debentures and preference shares were also on offer. That no doubt explains the "bond" in the earlier names of the two companies, and the

suggestion contained in a widely distributed brochure, to wit:

> "The Supreme Investment.
>
> By law, all investments in Supreme Bond are placed in Participation Mortgage Bonds or Secured Debentures. Supreme Bond grants mortgages only over income producing immovable property and investors participate in the high returns that result. Each Participation Bond is secured by the property on which it is granted, making this one of the safest possible investment avenues.
>
> In order to accommodate investors with different periods of investment, Supreme Bond offers you Participation Bonds for 60 months with a floating rate and a 'floor rate' guaranteed for this period.
>
> In addition, Supreme Bond offers investment opportunities in 'Secured Debentures' for 6, 12, 18, 24 and 36 months respectively with fixed interest rates of interest guaranteed for these periods."

Had the Durrs heard only a fraction of the preceding recital they would not have invested in Supreme.

I would add that those who are stigmatised in my judgment for

dishonesty are not parties to the litigation. The three persons who are parties are content that the facts are broadly as I describe them, and they dictate what facts are presented to the Court. What Stuart did

Stuart, of course, did not know nor suspect these things at the time. He first heard of Supreme in 1989 from colleagues and associates and decided to investigate. He telephoned Mannheim, the director of Supreme's Cape Town branch. Upon enquiry as to how Supreme managed to offer such high rates Mannheim told him that money was saved by not advertising, marketing being confined to brokers and accountants, and by minimising administration costs. After this conversation he received marketing material through the post from time

to time, including the brochure already mentioned. Stuart read the brochure, and having regard to its contents, what Mannheim had told him, and discussions with other brokers, he concluded that he could offer Supreme as an investment with confidence. Neither at this time nor at any other time did he ask for financial statements or a prospectus. At no stage before liquidation did he hear or see anything negative about "Supreme", whether in newspapers or elsewhere.

He decided that he wished to meet Mannheim personally, so he went to see him, in order to assess the man and his environment. The man he found credible, plausible and confident, the premises professional but not opulent. He took the opportunity to ask Mannheim how Supreme invested the money it collected. Participation bonds and secured

debentures were mentioned. The latter were said to be secured through assets in the company, assets such as fixed property. Returns were said to be obtained from investments in retailing, property and manufacturing companies. Two of the names mentioned were well known to him, Protea Furnishers, and Mewa, a manufacturer of steel products. Mannheim told him that Ronbeck had been a director of Johannesburg Building Society, later Allied Building Society and he said that Supreme had been in existence since 1923. Stuart came away with total confidence in Supreme. There had been no mention of loan sharking. Stuart had worked for Allied before and considered that if Ronbeck had been a director he would have the skill and integrity to run a profitable business.

Stuart twice evaded a question whether he had asked Mannheim squarely what the security behind the debentures was. When he was pressed on this subject in cross-examination he appealed again to the generalities expressed by Mannheim, but was forced to concede that he did not know what the precise nature of the security was, or whether it was adequate. According to him the fact that the certificate said "secured" was enough.

Consistently with his version that he had not said to Mr Stanley that "our people" had investigated Supreme, he claimed that when he spoke to Mrs Durr he told her that he (the emphasis was he personally) had done investigations and that the result was that the company was sound, with a "risk profile (that) was not excessive."

When he took the final R80 000 to Mannheim in November 1992 (days before the collapse) "once again (he) gave me assurances … that all was in order." This message, thus curiously phrased, reconfirmed his confidence. His evidence proceeded:

> "And my understanding from that conversation was, if Supreme had gone into negotiations with United and were going to raise capital and United was going to lend them capital [this is a reference back to a part of the conversation he had already described] obviously they [meaning United] would have had their own set of risk assessment criteria before they would even consider lending any organisation funds."

This is a strange remark. It sounds very much like what Mrs Durr thought. It also reflects that Stuart drew solace from a second or third hand account of investigations which his employer might make. Yet his evidence was that although that same employer had skilled people who

could investigate Supreme, and they were available to him on a direct approach, he never once sought any information or advice from them.

After the crash he went to see Mannheim again. Mannheim assured him that there was nothing much to worry about. There had been an adverse article in Finansies en Tegniek, there had been a "little bit of a scare" and a "run on funds", but things would stabilise. This sanguine view seems to have made some impression on Stuart, particularly as he said that it was confirmed by the managers of some of the subsidiaries. Mr Durr deposed that on hearing of the liquidation he had phoned Stuart, whose response was "Don't worry, it is not another Masterbond." (So he was alive to the travails of Masterbond.) Miss Ashburner also phoned him and she also was told not to worry. Mrs

Durr, in her turn, was given assurance, but on a different if equally erroneous basis, that preference shares offer greater security than secured debentures.

What did the law expect of Stuart and Absa?

Imperitia culpae adnumeratur,says D 50.17.132 - lack of skill is regarded as culpable. That much is accepted by the respondents. But how much skill, they say. We have shown all the skill that an "ordinary" or "average"broker, or a bank employing such a one, need show. What more can be asked of us?

Two questions arise in this case. 1. In general, what is the level of skill and knowledge required? 2. Is the standard required in judging that level that of the ordinary or average broker at large, or is it that of

the regional manager of the broking division of a bank professing investment skills and offering expert investment advice?

The answer to the first question is found in the judgment of Innes C J in van Wyk v Lewis 1924 A D 438 at 444 with reference, as it happens, to medical practitioners:

> "It was pointed out by this Court, in Mitchell v Dixon (1914 A D at 525) that 'a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care'. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that level" (own emphasis).
>
> "But (at 448) the decision of what is reasonable under the circumstances is for the Court; it will pay high regard to

the views of the profession, but it is not bound to adopt them."

For the purposes of this case I do not think that anything need be added to this statement. (Scott L J in Mahon v Osborne [1939] 1 All E R 535 (CA) at 549 D-E was to say of Innes C J's judgment that it was one "of which I should like humbly to express my admiration".)

However, the second question is less easy - whether the standard is set by the broking community at large or by a much smaller group of which Stuart is a representative. The Court below opted for the wider and therefore less strict test, accepting a submission that "[Stuart] was at all relevant times a member of the broking profession and as such his conduct should be evaluated on the basis of the general level of care, skill and diligence which might reasonably be expected of a typical,

ordinary or average broker,"

This conclusion was reached notwithstanding that the respondents had made the following statements in their plea:

> "[Absa and Stuart] offered expert financial planning and investment advice to the public."
>
> "[Absa] invited the public to make use of such services."
>
> "The investors made use of the services offered by [Absa] and asked for and received investment advice from [Stuart]."
>
> "[Stuart] gave the investors expert financial planning and investment advice."
>
> "[Absa and Stuart] would exercise the degree of skill and care which is required of a reasonably competent and careful investment advisor when giving advice to clients."

In his evidence Stuart affirmed that he was content that his conduct be measured against the standard of an expert financial and investment advisor.

The respondents' case was not, therefore, that they be measured by the standards of any old broker, but that of an expert of the kind stated.

However, the evidence was rather differently presented, and the Court below acted on that evidence. The only expert witness that the respondents called was one Wessels, the executive director of the Life Offices Association of South Africa ("LOA"), a trade association of all the major life insurance companies. He was called to give evidence of the knowledge and skills of the "average or typical broker", of which there are some 27000 in South Africa, of whom 16000 or 17000 are linked to insurance companies. The definition of a broker that he used in establishing the number of 27000 was one that had been proposed for the purposes of his own evidence by Goldhawk, an expert witness for

Mrs Durr, namely "... any person, (whatever his designation or job description might be) who offers information and advice on financial planning and/or investments or solicits or procures investments, for reward by way of commission or otherwise". These 27000 brokers, and I say it in a non-pejorative sense, must be a motley lot.

Wessels expressed the view that Goldhawk's expectations of them were too high. Wessels's "typical broker" is a man of modest accomplishment. He would not ask for financial statements, and if provided with them would not be able to read them; he would not know that a prospectus is required for a public offer, or how a prospectus differs from glossy marketing material; he would take a "secured debenture" certificate at face value; he would be misled by misleading

brochures and advertisements such as were issued by Supreme; and,

critically for this case, he would not have the skills to analyse or assess

"institutional risk". This expression is used to denote the soundness or

creditworthiness of a prospective debtor. It is used by Wessels in

contrast to "product risk". A "product" is part of a broker's stock in

trade, like an endowment policy or a fixed deposit. That falls within the

"typical broker's" sphere of competence. But institutional risk is quite

beyond him. This means, in plain English, that if he is advising a client

to lend money to a new debtor, he lacks the skill to assess the debtor's

creditworthiness. That provokes the immediate question whether be

should recommend the debtor, without warning his client of his own

incapacity.

A reading of Stuart's evidence delineates him as one of Wessels's | typical brokers. The list of things relevant to this case of which he is ignorant is a long one. He seems to have an imprecise understanding of separate corporate personality, of the possible natures of a "group", and of possible relationships within a group. He does not understand the character of the security offered by either preference shares or debentures, of the range of varieties of either, or of the order of ranking of preference shares and debentures. He does not know what a prospectus is, what its purpose is, or what may be learned from one. He is unfamiliar with the Companies Act. He does not know what financial statements comprise, nor would he know how to interpret them if given to him. Even less does he know that a public company must file them

with the Registrar of Companies, after which they are matter of public record. Nor does he know that deposits may not be solicited from the public indiscriminately except by registered banking institutions. (I put this last matter loosely.) I do not say these things in disparagement of Stuart. It is not negligent not to be a lawyer. But those who undertake to advise clients on matters including an important legal component do so at their peril if they have not informed themselves sufficiently on the law.

Not only did the Judge below adopt the "typical broker" test, but he held that Mrs Durr tendered no evidence as to the duties and functions of bankers under circumstances such as exist in this case. That is not entirely correct. Mr Goldhawk had said:

> "If a person holds himself out as an expert and there is support, such as a financial institution confirming that he's an expert, then any person dealing with him should be entitled to expert advice. There's the analogy of if you get into a taxi and the taxi driver is a bad driver, does that remove any negligence claim you may have against him?"

Mr Goldhawk is a chartered accountant and a specialist investigating accountant. He was appointed as such by the liquidators of "Supreme" and gained a deep insight into the group and its penumbra.

Mr Nieuwoudt was also called as an expert by Mrs Durr. He is a Fellow and current Vice-President of The Institute of Life and Pension Advisors ("ILPA") and chairman of that body's professional standards institute. Its members are drawn from the cream of the life and pensions industry. This was made a ground of criticism of his evidence. His standards were impossibly high, it was said.

Nieuwoudt joined issue with Wessels on the question of "institutional risk". The main basis of his opinion that the respondents had acted negligently was that they were concerned with recommending forms of investment less well used by financial institutions, namely unlisted preference shares and unlisted debentures. (Stuart does not seem to have encountered these phenomena before.) Both amounted to debt financing and it was imperative to make at least a preliminary investigation of the solvency of the debtor. Among other things, he would at least expect that the broker find out who exactly the debtor is to be, what the security offered is, and seek to obtain financial information by asking for a prospectus and audited financial statements. Of course, everything would depend upon the particular circumstances.

But, he added, "the important issue is that even if the advisor himself does not have the personal competence to make the enquiries, I believe it's incumbent upon him to harness whatever resources are available to i him, or if necessary to ask for professional, legal or accounting opinion before committing his client's funds to such an investment."

These opinions of Messrs Goldhawk and Nieuwoudt are of assistance, but the case remains one where the Court will, in the end, have to form its own opinion, having regard to the reasoning advanced by the experts.

By contrast the respondents called no expert evidence from the banking sector to explain what they contended was meant or was to be understood by Absa's public professions of skill, or what Stuart would

have been told if he had asked for help. It would have been interesting to hear whether indeed they contended that the "average or typical broker" of Wessels's description met their public claim to expertise. It may be added that when an attempt was made to cross-examine Wessels as to what he thought was to be expected of Absa, he, not surprisingly, shied away from the subject.

In dealing with the question whose standard is the relevant one, I have dealt with the opinions of the experts and some of the facts at some length. That is because in real life negligence is not a mere legal abstraction, but must be related to particular facts. However, as a matter of law set in the present factual context, I am of the opinion that the relevant standard is not that of the "average or typical broker" as he has

been defined. To accept that standard would be to allow a definition chosen by a witness for his own purposes to dictate the result, making the enquiry as to what is required of a particular kind of broker pointless. What is actually needed is first to determine what skills the particular kind of broker needs to exhibit, which must depend in large part on what skills he is held out to possess. If this were not so then the reasoning advanced by the respondents would justify the neurosurgeon being judged by the standards of the general practitioner. That would be contrary to the reference by Innes CJ in van Wyk v Lewis (above) at 444 to "the branch of the profession to which the practitioner belongs".

I conclude that the appropriate standard is that of the regional manager of the broking division of a bank professing investment skills

and offering expert investment advice.

Before dealing with the issue of negligence it is necessary to underline the manner in which the respondents have chosen to present their case. Goldhawk directed his attention to a wide group of brokers but focused more specifically upon those who offered information or advice for investment purposes or who solicited or procured investments. The members of that class of broker would then have to exhibit the particular skill that they professed. The respondents have simply ignored this vital qualification, chosen to use Goldhawk's broad group as the source of the relevant benchmark of skill, and proceeded to establish that most of that group do not in fact have all the skills needed to give comprehensive investment advice. Therefore they cannot be expected

to exhibit the necessary expertise, it is sought to be argued. This is a complete perversion of Goldhawk's classification. He did not select a group without the requisite skills. Once the correct categorisation has been made it is apparent that Wessels's evidence concerns a type of broker who is irrelevant to the setting of standards in this case. There is no other expert evidence on the respondents' side. So Stuart enters the arena all on his own. Were Stuart and Absa negligent?

It remains to enquire whether Stuart and Absa have been negligent. It should be mentioned that Absa has been sought to be held liable in delict on one or other of two bases: as vicariously liable for Stuart's conduct, or as negligent in its own right for exposing the public

to Stuart without supervising or training him properly. To my mind it is clear that if Stuart was negligent, that negligence is vicariously attributable to Absa, and it was so conceded in argument. Accordingly, if Stuart was negligent the alternative need not be explored.

In dealing with what standard is to be applied to Stuart I have already given some preliminary indications of what I think was expectecd of him. I shall now examine this question more closely.

On his own evidence Stuart's real skills lie in advising clients on different kinds of products. Thus he can advise them to plan their affairs having regard to the incidence of income tax and estate duty, to returns, capital growth, liquidity, duration of investment, various forms of investment such as endowments, retirement annuities, unit trusts, fixed

deposits, life insurances, and a variety of other matters. This is in itself a valuable service and on the evidence Stuart was able to provide it.

But whether he was qualified to advise investments in preference shares and debentures in "Supreme" is a more questionable matter. That his advice was bad is now clear. But, as I said at the outset of this judgment, one must be careful not to use hindsight to impute foresight to him. And it must be remembered that many other brokers, institutions and various regulating authorities were fooled as well.

It is now clear that a little persistence in just a few enquiries would have led to the Durrs investing their money elsewhere. Were there warning signs visible to Stuart which should have led him to make at least some of those enquiries? Goldhawk says that there were. Now I

think I should make it clear that Goldhawk, although speaking out of much experience and deep insight into the affairs of "Supreme", tried to be fair, and not expect of others his own standards and skills. So that there were many things that would have alerted him, had he been in Stuart's position, that he thought it unlikely would have alerted a competent broker in a bank's investment division. There were others that he was doubtful about. Perhaps they should have alerted that broker, perhaps not. He was not dogmatic about those. But there was a residue which, taken collectively, should have alerted the broker. That was his opinion.

The first warning signs according to Goldhawk were the high returns and high commissions offered by "Supreme". Whilst placing less

emphasis on these two factors, Nieuwoudt agreed on their relevance. As far as high commission is concerned (about an extra one per cent for debentures in this case) it imposes an additional burden upon profit margins. If the return is also higher than normal, that burden is further increased. In order to cover these burdens there is pressure to lend at higher rates than normal, possibly to persons who cannot obtain lower rates from banks. And so the vicious circle may be created.

High commission also creates temptation. It may influence the broker to promote something that is not, objectively speaking, best for his client. A broker with any knowledge of the world must know that that is sometimes the very object. And even if he is beyond temptation he might well ask himself whether the person offering the high

commission does not anticipate that some other brokers might be less upright. As far as high returns are concerned, Nieuwoudt put it succinctly: the basic rule of investment is that there is an inverse relationship between risk and return. This is no hard and fast rule, of course, but it is a rule nonetheless. Over the centuries people, sometimes almost whole peoples, have ignored it, usually with the same result. Stuart was mindful of the rule, because he asked Mannheim how the unusually high returns were achieved. The explanation about saving advertising and other costs should, 1 think, have been taken with a grain of salt, particularly when he was invited to marketing conferences (which he attended). Marketing conferences cost money. High returns and high commissions should not be overemphasized, but they were, to my mind,

reasons for some caution at the very threshold, particularly when both were present in a marked degree.

Nieuwoudt's main emphasis was not on these two factors but on a failure to make preliminary enquiries into the would-be debtor. I have set out his views above. Goldhawk, also, was of the view that whatever allowance one makes for a broker in Stuart's position, he should have obtained better information, more particularly by calling for a prospectus and/or financial statements. I must say that I find it astonishing that when the legislature and the administration has gone to trouble to allow people to protect themselves and their clients, to allow them to have easy access to audited figures, as in the case of Holdings, that these facilities should be ignored, in favour of glossy pamphlets and press cuttings

selected by the debtor. And if it be complained that the standard I postulate is too high, then I would suggest that banks and similar institutions refrain from claiming an expertise that they do not have. If a prospectus had been sought it would soon have become apparent that there was none. And if the reason for its absence was given as being that there was no offer to the public, common sense should have raised a query, whatever some lawyer was supposed to have said. Similarly, if financial statements had been asked for, they would not have been given. That alone should have been enough. And had the excuse been offered that they were late, that should have led to further enquiry. If, on the other hand, they had been provided, even an unskilled person might have asked, but how is it that in such a well managed company there is a loss?

The answer raised to all this is - but Stuart was so unskilled that he did not even know that he ought to ask. One of the first requirements of a professional is to know when he may be getting out of his depth, so that I do not think that that is a sufficient excuse. I am not able to say exactly what Stuart should have done. But I would suggest that there was a point at which he should have walked down the passage or across the street, or lifted the telephone, or activated the fax, and said to a lawyer, or accountant, or banker (none of which he was) in the employ of Absa, something like this. "Look, I have been introduced to some attractive debentures (preference shares) in a group called Supreme. Would you please tell me quite what debentures (preference shares) are, and how secure they are. And also, please tell me how I find out who

and what Supreme is and what risk attaches to investing in it."

When questioned about his failure to seek advice Stuart justified himself by saying that a certain responsibility was placed on his own shoulders as a broker and that it was simply not practical to ask for an investigation of "every single investment opportunity or insurance opportunity or business opportunity." This despite the fact that he had not marketed debentures or preference shares before and despite the fact (as he acknowledged in the light of retrospect) that he had not verified a single fact about the two companies. He sought to explain his conduct by saying that he looked to the Registrar of Financial Institutions to keep a watch on companies. Wessels also had said that the "average or typical broker" would largely rely on the official regulators rather than

make his own investigations.

Similarly, he drew solace from the fact that "Supreme" was listed. In fact the two companies were not listed. The same question may be asked. In this case it would have been quite easy to And out, simply by looking at the daily stock exchange lists published in the press. But that would have required knowledge of the names of the two companies, knowledge that Stuart did not have at once to hand. Should he not have had? One sees the victim of an insidious and well thought out fraud ready to be ensnared because of his own ignorance and too ready trust in his fellows. Frauds play upon these qualities. To have a trusting nature is not in itself to be negligent. But to be naive may be. Stuart, in my opinion, was naive. To have gone to Mannheim in the first

instance as an intitial step was reasonable, but to go to him again after news of the collapse and be talked into a sense of some security, seems to me to lack that edge of suspicion and alertness to possible evil that an investment advisor should have as part of his weaponry.

I would say something about reliance on the various regulatory bodies and officials. They do perform valuable functions in protecting the public against fraud. But for an investment advisor to assume that they have shot out all the predators is ingenuous. New ones always creep in under the wire. Those responsible for lending other people's money must be ever alert to this, and, sometimes helped by the regulatory powers, make their own investigations to the extent reasonably necessary. These powers are not there, after all, to give individual and

daily attention to particular lenders, and the grindings of their mills are sometimes slow. Individual attention falls to be given by individual advisors. And then, there are also other aids to the investor and his advisor which the State has made available. To what extent did Stuart avail himself of them?

When asked why he had not sought audited financial statements Stuart's answer was "Because I didn't believe it was appropriate. When I started to market Supreme through secured debentures, the document that I read indicated that the investment was secured, and I believed that to be the case at the time and nothing was ever conveyed to me to challenge that "(own emphasis). He was cross-examined about the analogy of a bank manager (which the Judge below did not consider to

be an analogy at all - "bank managers are terrible people … they trust nobody" - said in jest). It was put to him that if a representative of company A wishing to borrow money was asked by the hypothetical bank manager to produce financial statements and he produced those of company B, he would not be taken seriously. He conceded that B company's statements would not advance the application. Upon being asked if the analogy was unfair, he answered "Except that the name Supreme' was always prevalent and that was what gave the impression that what you were looking at was the same as what was being offered to clients." As an example it was pointed out to him that whereas certain results that were put forward in a published profit announcement related to Supreme Industrial Holdings Limited, a debenture certificate was

issued in the name of Holdings. He was asked whether it was not apparent that different companies were involved. His answer was "No, because I see the same - the name 'Supreme' appearing on both documents . . .. My understanding was that by investing in Supreme one is investing in a group of companies . . .." This is tantamount to lending to a nebula. Stuart was asked whether if the hypothetical bank manager had been told by the supplicant that financial statements (presumably of the correct company this time) were not needed, and that a brochure was quite good enough to establish that debentures being proffered as security were in fact secured, the bank manager was likely to accept that proposition. He agreed that it was unlikely that he would.

When pressed as to why the Durrs should be expected to receive less

protection than the bank, Stuart answered "Because of the research that I had done myself, and the Durrs obviously trusted my evaluation". It is difficult to know what to make of this answer, when one has regard to the fact that Stuart's researches had consisted of asking Mannheim a few superficial questions, casting his eye over the marketing hand-outs, and attuning his ear to the gossip of the market. Later he was asked again "Is there any reason why you think its reasonable to expose pensioners to greater risks than the bank would be prepared to expose its money to?" and he answered "No."

Stuart fared no better on the question why he did not ask for a prospectus. "Because I didn't believe it was appropriate or necessary," was the answer. He had addressed his mind to the question of a

prospectus. He had come across prospectuses before. But, he concluded, a prospectus was needed only for a "new placing". There was no doubt in his mind that a prospectus was not needed. This conclusion was reached without his being informed on the subject, without reference to the Companies Act and without seeking any help or advice. In hindsight he conceded, he was now much wiser. He made a similar reluctant concession with regard to taking "secured debentures" at face value.

I do not think that Stuart can be blamed for not having realized that the two companies were running an illegal bank. Goldhawk said that as an outsider he could not be expected to have guessed what was going on inside. Nor should he have realized how the participation bond company was being misused. Goldhawk furthermore conceded that he

did not think a broker would read anything sinister into the advertising material standing alone, which a more skilled person probably would have done.

I come towards my conclusion on the subject of negligence. The basic rule is stated by LAWSA First Reissue Vol 8 para 94, as follows:

> "The reasonable person has no special skills and lack of skill or knowledge is not per se negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity."

The respondents accept that an investment advisor requires special skill and that in a case such as the present he would be under a duty to make enquiries concerning "Supreme". But, argued Mr Joubert for the respondents, they were not under a duty to investigate "institutional risk",

that is the creditworthiness of "Supreme". This cannot be. They held themselves out as expert investment advisors, without qualification. Even more to the point is what Stuart said to the Durrs, after he had chosen to bring "Supreme" to their attention. He used expressions concerning it such as "safe", "very solid", "very secure" and "very sound". He said that he had investigated it and strongly recommended it for investment. The Durrs accepted his advice and relied on it. He knew that. It was what he had intended should happen. This, to my mind, defined his duty to the Durrs. He had advised them to embark upon what was in effect moneylending. Lending money is a potentially dangerous activity. He had investigated the debtor and found it sound, he said. Mrs Durr was entitled to see him as a man skilled to advise her

on such matters and as one backed by a major bank: not as one devoid of skill in assessing creditworthiness and unready to seek help. The duty is established.

Was that duty performed? I have set out what Stuart did. What it amounts to is that he went to the subject of the investigation, instead of performing an independent investigation (save for some conversations with colleagues and reading some of the journals). Mr Joubert has argued that he was under no duty to go further unless there was something to alert him, and there was nothing. I have difficulty with this submission too. He had told his clients that he had investigated Supreme, but was driven to concede that he had not established a single fact about the two companies, the borrowers. To my mind he had no

right to make the recommendation until he had satisfied himself by sufficient means that the investments in those particular companies were safe.

This is an even stronger case than that decided by Thirion J in Nathan and Other v Absa Bank Ltd and Another(unreported D & CLD 30.11.1995). There the second defendant, a financial advisor employed by the first, had recommended investment in secured debentures in "Supreme". The learned Judge said (at 35):

> "[The recommendation] carried the further implication that Allied had reason to believe, based on its knowledge of the business affairs of Supreme or reliable information about its affairs, that an investment in Supreme secured debentures would be reasonably safe, . . . and that plaintiffs would in the ordinary course of the business of Supreme and barring unforeseen events be repaid the amount of their investment

What was implied in that case was express in this one.

Returning to Stuart's conduct, there were in my opinion warning signs if not flashing lights. First, there is the matter of the high commissions and high interest rates, which I have discussed already. Second, there is the fact that "Supreme" did not have a well established track record when he made his first recommendation to the Durrs in 1990. Holdings had been issuing debentures since 1986 and Investment was formed only in 1989. The first preference shares were issued in 1990. To my mind it is idle to equate these forms of investment in this sort of institution with placing a fixed deposit with an established bank. No doubt Stuart was right in saying that he did not have to seek assistance each time he was to recommend a deposit in such a bank. But

in doing so he was really evading the question as to why he did not make more pertinent enquiries about "Supreme". Also, I think he should have wondered whether Mannheim's explanations as to the rediscovery of the cornucopia were not possibly too good to be true. All of these things taken collectively did, I think, constitute warning signals.

Given the rule of law concerning the undertaking of activity requiring skill, Stuart was in a constant dilemma. Either he had to forewarn the Durrs where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have recommended Supreme. What he was not entitled to do was to venture into a Geld in which he professed skills which he did not have and to give them assurances about the soundness of the investments

which he was not properly qualified to give. Before he recommended Supreme he should first have sought help, which was readily available to him. Given the limits of the enquiries he had made himself he was under a duty to do so. I do not suggest that the professionals at Absa would at once have brought down the house of cards, but a few pertinent requests for the likes of audited statements and prospectuses should have led to more questions or simply a loss of interest in "Supreme".

Accordingly 1 am of the view that on the facts of this case Stuart did not perform his duty and was consequently negligent. Absa's negligence follows, as it is accepted that it is vicariously liable for his actions.

I have constantly kept in mind my own warning about the dangers

of hindsight, but in the end I am persuaded that there should have been more foresight. I have also borne in mind that an investment advisor is not as such the guarantor of what he recommends and nothing that I have said should be read as indicating the contrary.

The parties have reached agreement on amounts and interest rates

should the appeal succeed.

In the result the appeal is upheld with costs. Paragraph 1 of the order made below is set aside and replaced with the following:

"1. (a) The defendants are ordered, jointly and severally, to pay the plaintiff:

(i) The sum of R 772 845,50;

(ii) Interest thereon at the rate of 14 per cent per annum from 1 November 1995 to date of payment;

(iii) The costs of suit

(b) Messrs Goldhawk and Nieuwoudt are declared necessary witnesses."

W P SCHUTZ JUDGE OF APPEAL SMALBERGER JA) NIENABER JA) MARAIS JA) CONCUR STREICHER AJA)