

SOUTH AFRICA / JUDGMENT

Southern Life Association Ltd. v Beyleveld NO (266/87) [1988] ZASCA 104; [1989] 1 All SA 390 (A) (22 September 1988)

[1988] ZASCA 104

COURT

Supreme Court of Appeal

BEFORE

Rabie, Joubert, Smalberger, Milne, Eksteen

CASE / FILE NUMBER

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CASE NO: 266/87

SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the appeal of:

THE SOUTHERN LIFE ASSOCIATION LIMITED Appellant
and

LODEWYK CHRISTOFFEL VAN DEVENTERBEYLEVELD N.O. Respondent

CORAM: RABIE ACJ, JOUBERT, SMALBERGER, MILNE et EKSTEEN JJA

DATE OF HEARING: 23 August 1988 DATE OF JUDGMENT: 22 September 1988

JUDGMENT

MILNE JA/ 2 MILNE JA: The appellant is an insurance company. It employed one Alfred van Zyl in its Cape Town branch. The respondent is the executor of the estate of the late Adeline Maud Easterbrook, to whom I shall refer as Mrs Easterbrook. Mrs Easterbrook's son, Lionel Easterbrook (whom I shall call Easterbrook), is the sole heir in the estate. The respondent sued the appellant and Van Zyl, jointly and severally, the one paying the other to be absolved, for damages in the sum of R69,450. The claim was based on transactions alleged to have occurred between Easterbrook, representing Mrs Easterbrook, and Van Zyl, acting in the course and scope of his employment as a financial adviser with the appellant. It was based upon an alleged breach of warranty or representation by Van Zyl that a particular investment by Mrs Easterbrook would be "secured"; alternatively, on a breach of an undertaking to ensure that the investment would be secured.

3Van Zyl did not defend the action, and the respondent took judgment by default against him. It seems that Van Zyl did not pay any part of the judgment debt. The appellant defended the action against it. The trial Court awarded damages against the appellant in the sum of R63,000 with interest, the amount of damages having been agreed in that sum. The judgment is reported in 1987(4) SA 238 (C). Leave to appeal was granted by the trial Court. The factual background is, to a large extent, common cause. Where it is not, I shall indicate. Mrs Easterbrook was a widow who had lived for many years in Johannesburg. Her sister and her son lived in Cape Town. In 1983 Mrs Easterbrook, who was then 82 years old, sold her house in Johannesburg and moved to Cape Town in order to be near her son and her sister. Her house appears to have been her sole asset, apart from "a small war pension". The sale of this house realised a nett sum of R60,000 which she put into a bank savings account. In order to increase

4her income, she asked Easterbrook to try to find a secure investment for the R60,000 with a rate of return that would give her "a reasonably good living". In about November 1983, Easterbrook approached Van Zyl, whom he knew previously, and asked him to find the best investment of this kind that he could for Mrs Easterbrook. At this time, Van Zyl was employed by the appellant company and working at its premises in Cape Town, and this approach by Easterbrook took the form of a telephone call to Van Zyl at the appellant's premises. Van Zyl said that after Easterbrook's approach to him, he had been approached by one Hambridge who had "an undisclosed client" who wanted to borrow a sum of money in the vicinity of R60,000, and who would secure the loan by way of a first mortgage bond registered over a property valued at R70,000. Van Zyl, so he says, told Hambridge that "...if he could submit the first mortgage bond and title deeds, which is normal practice, I can discuss the investment with Mr5 Easterbrook." While Van Zyl was, in many respects, a patently unreliable witness, there is no reason to doubt this particular piece of evidence, since there is a letter from Hambridge dated 1 February 1984 which confirms what Van Zyl said in this regard. It is not clear exactly when Hambridge approached Van Zyl but, about six weeks after Easterbrook spoke to Van Zyl about his mother's investment, the latter telephoned Easterbrook and told him that he had the ideal investment for Mrs Easterbrook (referring to the proposed loan to Hambridge's client). The money would, so Van Zyl said, be invested for one year at an interest rate of 21%, tax free, payable three monthly in advance. Easterbrook said in evidence that he assumed that the money was to be invested with the appellant company (this is in dispute). After discussion with his mother, Easterbrook told Van Zyl that, providing the investment was adequately secured, his mother would make the investment which Van Zyl had recommended. On 1 March 1984 Van Zyl picked up Mrs6 Easterbrook from her residential hotel in Cape Town, and took her to the bank where she withdrew the R60,000 from her savings account in the form of a cheque payable to Hambridge which she handed to Van Zyl. On that same day she received a cheque drawn by Hambridge for R3,151 being interest for the first quarter. Mrs Easterbrook's cheque for R60,000 was given by Van Zyl to Hambridge, who lent it to one Du Plessis who was, apparently, Hambridge's "undisclosed client". Easterbrook learnt, shortly afterwards, that his mother's cheque had been paid to Hambridge. He said in evidence that he was not worried at all about the fact that the cheque was in favour of Hambridge and not the appellant company because "...as far as I was concerned it

was an investment in the Southern Life". (This is in dispute). Although it is quite apparent that both Van Zyl and Easterbrook intended the loan to be against the security of a first mortgage bond, Van Zyl had, unbeknown

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to Easterbrook (or Mrs Easterbrook), yielded to pressure from Hambridge, and agreed to obtain the R60,000 loan from the Easterbrooks without a bond being registered, upon the faith of a (valueless) assurance from Hambridge that "the documents would be on my desk the next day", and that Hambridge would be personally responsible for anything "that might go wrong".

Easterbrook thereafter asked for "confirmation"

of the security of the investment and, in response, Van Zyl gave Easterbrook a copy of a letter dated 1 March 1984. This letter is written on the appellant company's

letterhead and it is signed by Van Zyl who subscribes himself as "financial adviser". The letter is addressed to Hambridge and is headed "Mrs A M Easterbrook: Investment". The body of the letter reads as follows:

"Mrs A M Easterbrook has now invested R60 000,00 with you at 21% taxfree interest for one year payable quarterly in advance. The Capital is to be repaid on 1st March 1985.

As Mrs Easterbrook has received her first interest cheque in cash, I would appreciate it if further interest could be paid into her savings account number 02.31242.029.8 R at the Trust Bank, Sea Point.8 Please confirm with me or Mr L A Easterbrook at telephone number 25-

1900. Address all correspondence to me and I will ensure that Mr Easterbrook receives copies.

For your reference Mr Easterbrook's address is 29 Firmount Road, Sea Point.

Please ensure that copies of documentation reaches my office soonest and that interest payments are made promptly."

Easterbrook said, although this was in dispute, that here regarded this as confirmation of the transaction, but nevertheless pressed Van Zyl for the "actual authority". This pressure resulted in a further letter being given to Easterbrook. This is a letter dated 10 May 1984. It was written on the appellant's letterhead and signed by Van Zyl who on this occasion subscribed himself as "Senior Financial Adviser". It is addressed to Easterbrook and headed "Investment Mrs A Easterbrook". The body of the

letter reads as follows:

"Attached please find copy of fitle (sic) deed number T3214/1981.

The investment of R60 000,00 was in the above property deal of which the original fitle (sic) deed is with the firm of attorneys as reflected. The repayment of capital will take place on 1 March 1985 and during this period interest of R3 150,00 is payable quarterly in advance.

If for any reaosn (sic) mom does not receive the above interest on

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time I will expect an urgent call from you.

I will personally hand her the capital cheque at the end of this periodi

Hoping you find everything to your satisfaction."

Enclosed with that letter were the title deeds of certain property and, according to Easterbrook, a power of attorney by Petrus Jacobus du Plessis to pass a bond to Adeline Maud Easterbrook in an amount of R60 000 for monies lent and advanced. Easterbrook said that he believed as a result of having received this letter and the documents, that his mother's investment was secured. In fact, leaving aside the typing errors, the letter contains a prime example of pure gibberish. It says "The investment of R60 000,00 was in the above property deal of which the original title deed is with the firm of attorneys as reflected." When the letter was written the writer, namely Van Zyl, knew perfectly well that the investment was not, in any way, secured but he intended Easterbrook to believe, as he did, that it was secured. It is a thoroughly disingenuous if not actually

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fraudulent letter. . In actual fact, as already mentioned, the investment was totally unsecured and, furthermore, it was not an investment with the appellant company, nor even with Hambridge. The money had, in fact, been invested with one Du Plessis. It is equally clear that it was a term of the contract made between Easterbrook, acting on behalf of his mother, and Van Zyl that Mrs Easterbrook's investment was to be secured. Van Zyl, who was called by the appellant company at the trial as a witness, said in evidence that the investment was to be secured by a first mortgage bond, and that he told Mrs Easterbrook that it was a safe investment and that it was "secure". Van Zyl also admitted in cross-examination, that he knew that the loan was totally unsecured and knew that Easterbrook and Mrs Easterbrook believed the loan to have been adequately

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secured (and that they did not even know of the existence of Du Plessis). Du Plessis's estate was provisionally sequestrated on 15 November 1984 and finally sequestrated on 16 January 1985, (and the estate of Hambridge had, apparently, also been sequestrated by the time of the trial). Apart from the initial payment of interest of R3,151, Mrs Easterbrook was never paid any interest nor was she repaid any of her capital. A claim was, however, made in the insolvent estate of Du Plessis, and it is, presumably, on the basis of the receipt of a dividend in the amount of R6,300, that the quantum of the claim in the action was reduced to the agreed figure of R63,000. As it was part of the contract between Mrs Easterbrook (represented by Easterbrook), and Van Zyl that the

loan was to be secured, and it was never secured (nor could Van Zyl at any time have believed it to be secured), it is clear that Van Zyl acted, at the very

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least, negligently in representing to Easterbrook and Mrs Easterbrook that the repayment of the loan had been adequately secured. This aspect of the case has never seriously been in dispute. What is very much in dispute is, however, whether in all the circumstances, the appellant company is liable for the loss suffered as a result of Van Zyl's conduct. On the pleadings, the crucial issues were, firstly, whether Van Zyl in his dealings with regard to this investment was acting in the course and scope of his employment with the appellant company, and secondly, if he was not, whether the appellant company is estopped by its conduct from denying that he was.

The trial Judge said "It is essentially on the issue of first defendant's alleged estoppel that the trial proceeded." It appears to me that some effort was made at the trial to establish that Van Zyl had actual authority to represent the appellant in his transactions with

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Easterbrook, but on a proper reading of Van Zyl's letter of appointment (which was the standard letter of appointment issued to all employees falling within Van Zyl's category), Van Zyl had, in fact, no authority other than to sell insurance policies on behalf of the appellant. Clause 8E of the Conditions of Employment states specifically that "your authority to act for the Southern is confined to the terms and provisions of this letter of appointment. It is understood that the Southern shall not in any way hold itself responsible for, or be bound by, any act done by you in excess of the authority conveyed hereunder." It seems to me to be a necessary implication from the matters that are referred to in the letter, that Van Zyl's job was to sell life insurance policies on behalf of the appellant and nothing else. The learned trial Judge was, therefore, correct in approaching the case on the basis that the crucial question was whether or not the estoppel pleaded had been established by the respondent.

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The replication raised the estoppel in the following terms:

"1.2 At all times material hereto the First Defendant permitted the Second Defendant:

1.2.1 to conduct business as a financial adviser; 1.2.2 to conduct such business from premises openly identified as belonging to the First Defendant; 1.2.3 to use stationery and business cards of the First Defendant;

1.2.4 to describe himself as a 'financial adviser' and/or

'senior financial adviser' on such stationery and business cards;

1.2.5 to conduct business with the deceased and her agent, LIONEL EASTERBROOK, from the aforesaid premises, in the aforesaid capacity and with the use of such stationery.

1.3 A true copy of the Second Defendant's 'Southern' business card describing him as a 'financial adviser' is annexed marked 'PRI' and a true copy of a letter dated 10th May 1984 addressed to the deceased's agent, LIONEL EASTERBROOK, on the First Defendant's letterhead describing the Second Defendant as a 'senior financial adviser' is annexed marked 'PR2'. 1.4 In permitting the Second Defendant to act as aforesaid, the First Defendant, by its conduct, represented that the Second Defendant was a financial adviser or senior financial adviser in its employ and that the Second Defendant acted in the course and scope of such employment when transacting business as he did with the deceased and/or her agent as aforesaid.

In the alternative to paragraph 1.4 above:

1.5 In permitting the Second Defendant to act as aforesaid, the First Defendant, by its conduct, enabled the Second Defendant to represent to the deceased and/or the said LIONEL EASTERBROOK that at all material times he was acting within the course and scope of his employment with the First Defendant, and the Second Defendant in fact represented to the deceased and/or the said LIONEL EASTERBROOK that he was acting within the course

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and scope of his employment with the First Defendant at all material times.

In the further alternative to paragraphs 1.4 and 1.5 above:

1.6 In permitting the Second Defendant to act as aforesaid, the First Defendant thereby ostensibly authorised the Second Defendant to give financial advice in the course and scope of his employment with the First Defendant. 1.7 The deceased and the said EASTERBROOK in fact believed that the Second Defendant was acting in the course and scope of his employment with the First Defendant at all material times, which belief was induced by the factors described in paragraphs 1.2.1 to 1.2.5 above. 1.8 Had the deceased and/or the said EASTERBROOK not held the aforesaid belief, neither of them would have conferred the mandate described in paragraph 5 of the Particulars of the Plaintiff's Claim on the Second Defendant nor would they have invested the funds as advised by the Second Defendant and as set forth in paragraph 7 of the Particulars of the Plaintiff's Claim. 1.9 In the premises the First Defendant is estopped from denying that at all material times hereto the Second Defendant acted in the course and scope of his employment with the First Defendant."

At the pre-trial conference, it was admitted by the appellant that Van Zyl was empowered by it to use a business card bearing the name, address and logo of the appellant describing him as "financial adviser", and that the appellant permitted Van Zyl to use the title "financial adviser" in his business dealings on the appellant's behalf

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with members of the public. It is unnecessary to deal more fully with the evidence on this issue, firstly, because the reported judgment of the trial Court (referred to above), clearly sets out the effect of the evidence and secondly, because the appellant's counsel conceded, at the outset, that

the appellant had, by its conduct in permitting him to use the card, held out that Van Zyl was qualified to give financial advice on behalf of the appellant, and was employed by the appellant as a financial adviser. In my view this concession was wisely made, and I entirely agree with the following remarks of the trial Judge on p247B-E:

"Van Zyl was designated a 'financial adviser' by first defendant and allowed to hold himself out as such. Whatever the private limitation on Van Zyl's actual authority may or may not have been, a principal in the position of first defendant can hardly in my view, be heard to complain if one of its employees who, although the purpose of his employment is to effect policies of insurance, is styled and held out to the public as a financial adviser, gives financial advice. What otherwise is the point of holding out an employee as a financial adviser? One appreciates that in the world of commerce there is a measure of hyperbole in the titles and designations given to employees, but there is a risk inherent in this that a member of the public with whom the employer deals may reasonably take the style or designation at its face value and assume that, when the employee acts in a manner which is consistent therewith, he is doing so as an employee and in the course and scope of his employment."

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While persons accustomed to dealing with insurance companies would, probably, infer no more from the words "financial adviser" on the business card than that the holder of the card was entitled to give financial advice on insurance matters, it by no means follows that this would be so in the case of the financially unsophisticated or ignorant layman. Indeed, it is clear that many life insurance companies hold themselves out as employing "...life insurance advisers (who) are able to offer a comprehensive financial advisory service...". Some of the evidence of Smorenberg, who was employed as agency manager of the branch where Van Zyl was employed, amounts to an admission that the insurance industry, including the appellant, holds its representatives out as offering a rather wider package than simply selling life insurance, and offers the service of advice not only with regard to the right insurance policy, but in more general terms with regard to clients' finances.

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That is, however, by no means conclusive of the matter. It was submitted by appellant's counsel that (a) the term "financial adviser" is too vague to found an estoppel; alternatively (b) the conduct of Van Zyl relied upon did not constitute the giving of financial advice (and therefore, did not even fall within Van Zyl's ostensible authority); in any event, (c) the respondent had not established that it was upon the faith of any holding out by the appellant that Easterbrook or Mrs Easterbrook invested the R60.000, and further alternatively

- (d) that in any event, even if the holding out by appellant was an inducing causê of the money having been lent, the respondent had to prove that it was the sole cause, and that it had failed to do so.

There is considerable substance in the appellant's first point. For a representation to

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constitute an estoppel it must be unambiguous. *Hartogh v National Bank* 1907 TS 1092 at 1104. The words "financial" and "adviser" and the phrase "financial adviser", are words of wide meaning. If a man is employed as a financial adviser by an insurance company, what would that normally embrace? The answer would seem to be that it must, at least, include the giving of financial advice; but that phrase is not as unambiguous as one might think at first sight. Does it mean advice as to the financial planning of the "estate" of the client of an insurance company - how to minimize the liability of the estate for death duties and other matters of that nature - or does it embrace advice on what would be sound investments not merely in the life insurance world but generally? Could it be said, for example, to embrace advice on the share market? - and if so, would it extend to the giving of advice as to whether or not a particular class of shares or even a particular share would be a sound investment? Would

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such advice have to be confined to shares quoted on the stock exchange? It is by no means clear to me that when an insurance company holds out its employee as a financial adviser it is saying, in effect, "If my employee gives you negligent advice about the stock market I will be liable if, as a result of your taking such advice, you suffer loss." Quite apart from this question, the problem that arises pertinently in this case, is whether it can be said that acting as a financial adviser would also embrace conduct which amounts to the implementation of such advice. I suppose that it is conceivable that circumstances might arise where the actual arranging of a loan in the sense of drawing up and considering the relevant documents, could constitute acting as a financial adviser, although I am strongly inclined to think that, in the ordinary course of events, it would not. If I am correct in this view, then the appellant must succeed on the second point, namely that the conduct of Van Zyl which is relied upon does not fall

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within his ostensible authority. It has not been proved that at the time when he advised Easterbrook that the investment he had found for Mrs Easterbrook would be "secured", he did not intend that it would be secured by means of a first mortgage bond over the borrower's property. If it is correct, that the implementation of his advice was not something which fell within Van Zyl's ostensible authority, then his conduct in not ensuring the passing of the bond after the money had been paid over does not fall within the ostensible authority alleged. It is conceivable that a case could have been made on the following lines:

- (a) that by the time Mrs Easterbrook paid over the R60,000 Van Zyl knew that his representation that the investment would be secured (in the sense of being secured before or simultaneously with the advance of the money), was no longer true;
- (b) that Van Zyl's letters of 1 March and 10 May

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1988, referred to above, lulled the Easterbrooks into a false sense of security and induced them to abstain from enquiring fully into the question of whether or not the investment was, in fact, secured; and

(c) both such letters having been written on the

appellant's letterhead and signed by Van Zyl as financial adviser, a material cause of the Easterbrooks' failure to enquire as aforesaid, was the fact that the appellant held Van Zyl out as a financial adviser employed by the appellant. Cf *S v Harper & Another* 1981(2) SA 638(D) at 653B-655H. That was, however, not the case pleaded by the

respondent, which was that had the deceased and Easterbrook not held the belief that Van Zyl was acting in the course and scope of his employment with the appellant, "...neither of them would have conferred the mandated described in paragraph 5 of the particulars of claim on the

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second defendant nor would they have invested the funds as advised by the second defendant ...". Quite apart from these problems, however, I am driven to the conclusion that the respondent failed to prove, on a balance of probabilities, that it was the appellant's holding out that induced Easterbrook to advise his mother to make the investment, or Mrs Easterbrook to make the investment. It was the appellant's case that Easterbrook accepted Van Zyl's advice and assurances, not because of any holding out by the appellant, but because of a previous association between the Easterbrooks and Van Zyl, in the course of which the latter had given the Easterbrooks advice, including advice of a financial nature. The trial Court rejected this argument. The grounds upon which it did so, appear in the reported judgment at p246E-J and 249D-G. In a nutshell, the trial Judge's reasoning was that although the evidence established a pre-existing

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association between Easterbrook and Van Zyl, that was merely the reason why he chose Van Zyl (and not some other person fulfilling the same role), when he sought Van Zyl's advice as to his mother's investment. The trial Judge accepted Easterbrook's evidence that he would not have consulted Van Zyl about his mother's investment but for the fact that he believed that Van Zyl was employed as a financial adviser by the appellant, and said that Easterbrook "...impressed me as an honest man...". The trial Judge had the advantage of seeing and hearing the witnesses, and this Court will not lightly come to a different conclusion on findings of credibility. Counsel for the appellant, however, advanced a formidable array of criticisms of Easterbrook's evidence. Many of them are well-founded, and taking their cumulative effect into account, I am of the view that the learned Judge a quo should have held that the respondent had not discharged the onus of proving that it was on the faith of the appellant's

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holding out that Easterbrook or Mrs Easterbrook acted as they did. In the first place, there is no doubt that Easterbrook, and, to a much lesser extent, Mrs Easterbrook, did, over a period of years, consult Van Zyl on a variety of matters. Easterbrook and Van Zyl met each other during 1977 when Easterbrook was a director at Indo Jet Travel and Van Zyl was an insurance consultant at Indo Atlantic Insurance Brokers. Indo Jet Travel was a wholly owned subsidiary of Indo Atlantic Insurance Brokers. Easterbrook suggested in his evidence that while he was quite happy to consult Van Zyl on "insurance matters", he would only have consulted him on "investment matters" on the faith of the appellant's representation that he was employed by the appellant as a financial adviser. It is quite clear, however, that several of the matters upon which Easterbrook consulted Van Zyl, when Van Zyl was still employed by Indo Atlantic, did not relate

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solely to insurance. The letters of 11 June and 14 December 1982 contain advice relating to the position of Easterbrook's "estate". Van Zyl also drew a will for Mrs Easterbrook and she asked him to do something in relation to the purchase of a house for her in Cape Town. Easterbrook further conceded that "I went to Mr Van Zyl because I knew him from past proceedings"; that as far as he was concerned Van Zyl had very well-rounded experience in financial matters generally; that both he and his mother had the "utmost trust" in Van Zyl; and that Van Zyl was his financial confidante. A potent weapon was put into the hands of the appellant when (in order to rebut a suggestion of recent fabrication), the statement prepared by his attorney was put in, and Easterbrook confirmed that the statement correctly reflected "what happened at the consultation" between himself and his attorney. This is a fairly lengthy document and there are certainly indications in it that Easterbrook intended to hold the appellant

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liable. In fact, it contains the statement by Easterbrook that "as far as I was concerned this investment fell under

the umbrella and financial backing of the Southern Life Association for whom Mr Van Zyl was the agent and financial adviser." It also contains, however, several passages that strongly bear out the appellant's contention that it was Easterbrook's previous association with Van Zyl that prompted him to consult Van Zyl and to take his advice.

Paragraph 5 reads as follows:

"I decided to consult with Mr Alfie van Zyl whom I first met when I was working for Indo Jet Travel which was a wholly owned subsidiary of Indo Atlantic Insurance Company where Mr Van Zyl worked. I had previously consulted Mr Van Zyl about my personal insurance arrangements and the execution of my will and I at all times regarded him as my financial advisor. I had always had the utmost faith in Mr Van Zyl's discretion and knowledge of financial business and it is for this reason that I trusted his advice in where my mother should invest her life savings. Mr Van Zyl advised me that he would research the 'investment market' and that he would get back to me."

(My underlining)The following passage is also significant: "I was confident that Mr Van Zyl would procure sufficient security for the loan as I had always been impressed by his business acumen and competence as evidenced by the various

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plaques and awards which decorated his office and recorded his various achievements as financial advisor". What is significant is that there is no reference to the business card and, indeed, it is suggested that it was the various plaques and awards decorating Van Zyl's office and recording his achievements as a financial adviser, that gave Easterbrook his confidence in Van Zyl. There is no evidence that any of the "various plaques and awards" contained any reference to the appellant or had been provided by the appellant. There is a further aspect of the matter which casts doubt on Easterbrook's credibility. He persisted throughout his evidence in saying that at all times he thought his mother was investing with the appellant company. There are a number of factors which make it difficult to accept that he could possibly have thought this. When Easterbrook approached Van Zyl about the investment for Mrs Easterbrook, Van Zyl said that he would "look around the investment market" and would come

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back to Easterbrook; and, in fact, Van Zyl did not come back to him until approximately six weeks' later. One would have thought that if Mrs Easterbrook had been investing with the appellant there would be no question of "looking around" nor any reason for a delay of six weeks. The cheque for R60,000 was made out to Hambridge and not the appellant, and it was Hambridge's personal cheque that was received by Mrs Easterbrook as her first interest payment. This directly contradicts Easterbrook's evidence that he thought that the appellant would pay the interest. Easterbrook was told by Van Zyl that he, Van Zyl, would receive an amount of R300 as commission from Hambridge: this is not capable of any reasonable construction other than that Van Zyl was acting on behalf of Hambridge and not the appellant. The letter dated 1 March 1984 from Van Zyl to Hambridge, of which a copy was sent to Easterbrook, makes it plain that the investment was directly with Hambridge. Although it is plain that Easterbrook had

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discovered by July 1984 that the money had not been lent to Hambridge but to Du Plessis (who had nothing whatever to do with the appellant), and Easterbrook knew by November 1984 that Du Plessis had been sequestered, he made no complaint to, or claim against, the appellant until 9 January 1985. Furthermore, when the attorneys acting for Mrs Easterbrook wrote to the appellant making the claim, their letter recorded that Van Zyl had recommended to Easterbrook as Mrs Easterbrook's agent "...that she place her funds with a Mr H C Hambridge...". The letter written on the same date to Hambridge by Mrs Easterbrook's attorneys refers to the money having been "loaned and advanced to you". After the death of the deceased, the attorneys acting for the respondent lodged a claim against the insolvent estate of Du Plessis. All this indicates that Easterbrook knew that he had a private deal with Van Zyl, and suggests that the claim against the appellant was something of an afterthought. Easterbrook's attempted explanation of these

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matters is not convincing. The extent to which he had faith in Van Zyl is demonstrated by the fact that in February 1985, when it was quite apparent that the loan had not been secured and in fact the money had been lent to DuPlessis who had gone insolvent, Easterbrook still continued to consult Van Zyl about amendments to his will.

The learned trial Judge faced this problem

squarely and dealt with it as follows (at p246I-J):

"Whatever terminology may or may not have been used in his statements by Easterbrook to his attorney, in letters written on his behalf and in his evidence, it is clear to me that Easterbrook assumed that he was making an investment which carried the imprimatur of first defendant which he knew to be a respected and financially sound institution".

He later referred to Easterbrook's belief that the investment was being made "under the aegis" of the appellant.

If Easterbrook had said that he believed that the

investment was being made under the protection of the appellant he might have been cross-examined as to what this

somewhat vague belief really meant, but his evidence might

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have been more credible. That is not, however, what he said. He said, quite unequivocally, in evidence, that he believed that his mother had invested the money with the appellant, that the appellant would repay her the money and that the appellant would pay the interest. For the reasons set out above he could not have believed this to be the position, and the criticisms of his credibility cannot be brushed aside. It was submitted on behalf of the appellant that in order to found an estoppel in our law "...it is not sufficient to prove that the representation in question was an inducing cause of the representee acting to his detriment, and that the respondent must indeed show that it was the inducing cause." For the respondent it was submitted that it is sufficient if the representation in question is a material cause of the representee acting to his detriment. In this regard see the incisive comments of Prof J C de Wet in his thesis "ESTOPPEL BY REPRESENTATION"

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IN DIE SUID-AFRIKAANSE REG at p31 and the article by Prof Kerr entitled CAUSATION IN ESTOPPEL BY MISREPRESENTATION 1977 SALJ 270. Compare also the position in English Law as set out in SPENCER BOWER & TURNER: ESTOPPEL BY REPRESENTATION (3rd ed) pp104-110, in particular the quotation of the remarks of DIXON J in the Australian case of *Grundt v The Great Boulder (Pty) Gold Mines Ltd* [1937] HCA 58; (1938) 59 C.L.R. 641 (H.Ct. of Aust.) at p674-5 as to the meaning of "detriment". The conclusions I have come to, however, render it unnecessary to

consider these interesting questions.

The appeal is allowed with costs including the

costs of two counsel, and the order of the Court a quo is altered to read as follows:

"Absolution from the instance with costs including the costs of two counsel".

A J MILNE Judge of Appeal

RABIE ACJ] EKSTEEN JA]

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