REPORTABLE

CASE NO. I.1818/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GUDRUN OTTO **PLAINTIFF**

And

CHANNEL LIFE NAMIBIA LTD **FIRST DEFENDANT**

DAVID BRUNI N.O. **SECOND DEFENDANT**

Coram:	Shivute, JP
Heard on:	20 – 24/10/2003; 11 – 14/11/2003 and 26/11/2003
Delivered on:	28/05/2007

JUDGMENT

SHIVUTE, JP:

Introduction

[1] The plaintiff, a female aged 54 years old at the time of the hearing of this matter, instituted action against defendant for payment of N$500 000 plus interest at the rate of 20% per annum in respect of an insurance agreement for disability entered into between plaintiff and the defendant on or about 13 May 1999. It was common cause

or at any rate was not disputed that plaintiff trade qualified as a tour guide. She worked for tour companies on a freelance basis driving buses for tourists and taking tourists to places of interest in the country and where a vehicle she happened to drive could not reach, walking with them to those places and giving them information about the place.

[2] Defendant was originally cited as Fedsure Life Assurance of Namibia Ltd. Since the institution of the action, however, defendant underwent a name change and became known as Channel Life Namibia Limited. Amended particulars of claim were then filed to reflect this change and other matters that in the meantime came to light as will be discussed next.

[3] During the hearing of the matter it emerged that plaintiff was an unrehabilitated insolvent and the Court *mero moto* raised the question whether in those circumstances plaintiff had *locus standi* to issue summons and invited argument in this regard. Prior to hearing argument, however, counsel representing the respective parties agreed that plaintiff could continue with the action but on behalf of her insolvent estate and not in her personal capacity. The parties furthermore agreed that the trustee in her insolvent estate would have refused to sue had he been approached at the time of the institution of the action. Consequently, plaintiff would have been entitled to personally act on behalf of her insolvent estate. It was a further term of the agreement that in the event that plaintiff succeeded with her action, ‘any payments are to be made to her trustees, Messrs Investment trust’.

[4] Counsel for plaintiff also in the end obtained from the trustee confirmation in writing regarding the trustee's attitude towards the action. In a letter filed of record, the trustee who is now the second respondent, declined to institute action on behalf of the plaintiff and consented to and ratified, insofar as may be necessary, the institution of the action by plaintiff on behalf of her insolvent estate. He also waived his right to be party to the proceedings.

[5] Although counsel submitted extensive written heads of argument that were of immense benefit to the Court on the issue of *locus standi,* in the end they were *ad idem* regarding the legal position on the issue as reflected in the agreement. There can be little doubt that the agreement reflects the correct legal position.[1]

[6] The pleadings were subsequently amended, unopposed, *inter alios* joining the trustee as the second defendant. Accordingly, the second defendant is cited in his capacity as trustee in the insolvent estate of plaintiff and no relief was sought against him.

[7] In terms of the written agreement of insurance (the agreement) the defendant agreed to provide disability benefits to the plaintiff as follows:

> "Capital Sum Disability Benefit
> Benefit
> The benefit as specified in the schedule plus any benefit increase occasioned by FAIM shall be payable on the total and permanent disablement of the life insured."

[1]See, for example, De Polo and Another v Dreyer and Others 1991 (2) SA 164 (W) at 171G; Smith v Kwanonqubela Town Council 1999 (4) SA 947 (SCA); Voget and Others v Kleynhans 2003 (2) SA 148 (C) para. [22] and the cases cited therein.

[8] The acronym ‘FAIM’ stands for ‘Fedsure Life’s Inflation Master'. The schedule to the agreement gave the capital sum disability benefit as being N$500 000. It was on this basis that plaintiff claimed N$500 000 from the defendant.

[9] “Total and permanent disablement” is defined in the agreement as meaning:

> "total and permanent inability of the life insured due to sickness, injury, disease, illness or surgical operation to engage in own or similar occupation."

[10] It was also common ground between the parties that on 12 June 2001 plaintiff was diagnosed with a disc degeneration of levels L3-4 and L4-5 lumbar spine and extensive degeneration to spine. Medical opinion is also unanimous that plaintiff is incapacitated for the type of work she performed as a tour guide/bus driver such as walking and driving long distances.

[11] According to the amended particulars of claim,

> "As a direct consequence of the aforesaid injury the plaintiff was unable to continue in her occupation as a tour guide/bus driver for and on behalf of Springbok Atlas or any other company to that extend (*sic*) which disability and impairment is of such a permanent nature that she cannot continue in her present occupation or something similar to that extend (*sic*)[2]"

[12] In its amended plea defendant admitted the agreement but averred as follows:

> "3.2 At the time of entering into the agreement, the plaintiff was aware of the following facts, namely:

[2]Paragraph 6 thereof

3.2.1 that she suffered from depression and anxiety and had a history in this regard;

3.2.2 that she received prescribed anxiolytic therapy (Alzam) on a number of occasions prior to her application for the said insurance which forms the subject matter of the written agreement."

[13] Alternatively to paragraphs 3.2.1 and 3.2.2 above:

"3.2.3 that she fraudulently and/or dishonestly obtained prescribed medicine from Dr Nieuwoudt on various occasions for feigned symptoms of anxiety and/or sleeplessness."

"3.2 The plaintiff failed to inform the defendant of the aforesaid facts.

3.3 The said facts materially affected the risk in that with the knowledge of the said facts the defendant would not have accepted the risk, alternatively not have accepted the risk on the terms and conditions set out in the written agreement.

3.4 In the premises the defendant was entitled to avoid the written agreement which it did, alternatively, which it hereby does."

[14] The defendant also filed amended further particulars to its plea wherein it was alleged as follows:

"Plaintiff had [a] duty to disclose in view of the fact that the condition she suffered from was material to the risk she sought to insure.

Plaintiff was specifically appraised of the duty to disclose by virtue of clauses 13.06 (f), 13.07, 13.09 and 21 of the application form and clause 2.2 (g) and 2.4 (b) of the confidential report which she completed prior to the agreement being entered in … As is further evident from clause 21 above plaintiff warranted her answers.

Defendant avoids the contract because of plaintiff's non-disclosure referred to in the particulars of claim (*sic*) and her breaches of the warranty referred to above."

[15] In replication, plaintiff denied that she had had a history of depression and anxiety and pleaded that section 54(1) of the Long-term Insurance Act, 1998 (Act 5 of 1998) applied to the agreement and that by virtue of the provisions thereof the defendant could not as a matter of law avoid the agreement merely because of alleged non-disclosure. These and other issues that have crystallised between the parties will be dealt with in greater detail but first a summary of the evidence that has a bearing on those issues that call for decision.

Evidence on behalf of the Plaintiff

[16] Plaintiff testified and was cross-examined at length. In addition three witnesses testified on her behalf. Plaintiff's evidence may be summarised as follows: As previously discussed, plaintiff was aged 54 at the time of the hearing. She testified that she passed standard 10 and had lived and worked on a farm. She subsequently trained as a tour guide under the tutelage of a renowned tour guide for a period of six years. During the period of training already, she had started doing specialised guided tours, an activity she had engaged in for 24 years until her present disability put a stop to it. Her earnings fluctuated between N$10 000 and N$15 000.00 per month if gratuities or tips ranging between N$2 500.00 and N$4 000.00 depending on whether she did a specialised tour or not - with specialised tours generating more gratuities - are included. She had no level of computer literacy whatsoever and did not even know how to switch on a computer. As a result of her disability, she was unable to sit or stand for any lengthy period of time without taking strong medication. Her left leg would have to be operated on while her right leg had already been operated on. Upon

becoming disabled, she had initially stopped doing tours but circumstances had compelled her to do more tours subsequent to the institution of the action: She had foster children and their dependants as well as her own extended family to support and this forced her to do guided tours even though she had to do so under medication in order to suppress pain. On the question whether or not there was a job similar to a tour guide that she could possibly do in the light of her disability, plaintiff was adamant that there was no similar occupation that she could think of and that, in any event, she would not earn the money she had earned in her pre-disability occupation should she find alternative similar occupation.

[17] On the issue of the application form for insurance that she had signed, plaintiff testified that the Afrikaans version of the form that she signed was filled in on her behalf by one Marlene Erasmus, an insurance broker at the time working for Bank Windhoek and that plaintiff neither read nor completed the proposal form herself. Ms Erasmus filled in the form as they were chatting and because they knew each other very well she did not take the precaution of being attentive so as to be able to have a vivid recollection of the type of questions Ms Erasmus put to her during the process.

[18] According to plaintiff, her mother tongue was German and that although she understood Afrikaans relatively well; she could not at all say that she was fluent in the Afrikaans language.

[19] On the answers given to certain clauses in the proposal form and the confidential medical report which the defendant in its amended further particulars

alleged were wrongly answered, it will be recalled that the first clause complained of is clause 13.06 (f) which is to be found in its original version in tab C, page 8 of the bundle of documents and the translation thereof is to be found in tab C, page 95 of the bundle. The first question as translated was formulated as follows:

> "Do you, or have you ever, suffered from the following: any nervous or mental complaint, e.g. epilepsy, blackouts, paralysis, anxiety or depression?"

[20] It is common cause that plaintiff answered in the negative. In her evidence-in-chief she explained that she had neither suffered from nor had she been diagnosed with any of the above conditions and that as far as she was concerned she had answered the question correctly. She explained in cross-examination that she was also not advised that a document authored by her Windhoek-based medical Doctor Nieuwoudt and addressed to the insurer contained information that she was suffering from depression.

[21] The plaintiff offered the same explanation with regard to the question asked in clause 2.2 (g) of the confidential medical report that the defendant alleged was wrongly answered. The question in clause 2.2 (g) is essentially a replica of the question posed in clause 13.06 (f) above.

[22] The next question is to be found in clause 13.07, which was translated as reading:

> "In the last year, have you consulted a doctor or specialist or were you admitted to a hospital, or did you undergo a diagnostic investigation

> including electrocardiograms, X-rays, blood tests, other investigations or hospitalisation?"

[23] Plaintiff answered in the negative. She testified, however, that the correct answer should have been in the affirmative, for the simple reason that she had consulted a doctor as she had suffered from malaria during the period referred to in the proposal form. She says she had no intention to conceal the fact that she had seen a doctor during the period in question. Moreover, she had told Ms Erasmus that her usual doctor was Dr Nieuwoudt. She also happened to mention to Ms Erasmus that she, plaintiff, had on one occasion consulted an Outjo-based Dr Burger and that because the application form was filled in while she was in Outjo; and given the fact that the insurer also required a form to be completed by a doctor, Ms Erasmus inserted Dr Burger's name in the column requiring plaintiff to state her family doctor since it would be convenient for plaintiff to be examined by a local doctor instead of her having to travel all the way to Windhoek for that purpose.

[24] The next disputed answer given to a question in the application form is to be found in clause 13.09 thereof and it is translated as follows:

> "Are you currently taking or have you ever taken drugs, tranquilisers or other medicines?"

[25] Plaintiff's answer was an emphatic 'No'. She stated in evidence-in-chief that that was the correct answer. As far as her understanding of the above terms went, she had never taken drugs or tranquilisers. She added that though she did take Alzam after it was prescribed to her by Dr Nieuwoudt on 24 February 1997. Alzam,

also known as Xanor (misspelled in the record as ‘Sanor’), features prominently in this case. More about Alzam later. The Alzam was prescribed to enable her to sleep as she had difficulties sleeping owing to ‘certain worries’. She received the minimum dosage of 20 tablets and that although she was told to take three tablets a day she only took one tablet a night. She did not tell Dr Nieuwoudt that she had stress nor did Dr Nieuwoudt inform her that she had displayed stress-related symptoms. On the contrary she mentioned that she had a lot of worries related to a precarious situation at the farm and the people under her care. She has had a positive outlook towards her work and had not experienced any stress that she found to be too severe to manage. Plaintiff confirmed that Dr Nieuwoudt prescribed Alzam to her on a number of occasions but that she only took the tablets that were prescribed to her in February 1997 and the rest she gave to her brother. She explained that for the period between 1997 and 2001 she and her brother had problems concerning family crop farming businesses that were heavily indebted and adversely affected by the drought and by the sheer number of workers at those farms that stood to lose their jobs and the resultant loss of income. Her concerns were confirmed when the family farms were ultimately sold. And these worries that are not work-related had preoccupied her.

[26] After she had noticed the improvement the first prescription of Alzam brought about to her own situation, she decided to give the rest of the tablets subsequently prescribed to her by Dr Nieuwoudt to her brother since her brother too had experienced sleeping problems. Her brother was a type of person who would not readily seek medical attention and that explains why he did not go to the doctor to obtain his own prescription.

[27] As far as she was concerned, the Alzam tablets that she had received from Dr Nieuwoudt were sleeping tablets and that she did not use them on any repetitive basis. She did however concede during cross-examination that Dr Nieuwoudt told her that Alzam was, in effect, a tranquiliser and that in addition to Alzam, at least on one occasion, Dr Nieuwoudt prescribed her a proper sleeping tablet called Dormicum (misspelled in the transcribed record as ‘Dormicome’). The reasons she gave in cross-examination as to why she answered in the negative to the question enquiring whether or not she took medicine ranged from the explanation that she did not personally complete the application form to essentially blaming the person who filled in the form on her behalf for what she considered was a mistake and finally that she was not clear about the use of the word ‘drugs’ in the clause.

[28] According to plaintiff, she did not have any work-related stress. She had enjoyed her work and was very enthusiastic about it as she had considered it not only as a job but more of a hobby.

[29] In the question in clause 2.4 (b) of the confidential medical report, plaintiff was asked:

> "If not already stated, have you during the past 5 years:
> (b) Consulted any doctors or specialists, including regular general check-up?"

[30] Plaintiff’s answer was a ‘No’. In her testimony she acknowledged the answer was incorrect and that the correct answer should have been a ‘Yes’. She protested

that she could not have given such an answer since it was evident from the same document that she had been treated for malaria, a fact she had disclosed to the medical examiner who completed the confidential medical report. The explanation she offered for the wrong answer was that she did not complete the report personally.

[31] The next clause complained of by defendant was clause 21 on the application form which is in essence a declaration warranting *inter alios* the correctness of the information provided in the preceding clauses. It is quite a detailed clause. Its translated version spans closer to two pages. Plaintiff testified that the contents of clause 21 were neither drawn to her attention nor was she asked to read through the declaration before she signed the document.

[32] Giving evidence on events leading to defendant's repudiation of liability, plaintiff testified that after she had filed her claim supported as it was by the diagnosis confirming her disability, she first received a letter dated 10 September 2001 wherein she was advised that the claim had been unsuccessful due to alleged material non-disclosure at the time of the application. Reference was made in the letter to depression and anxiety states that had allegedly been of concern to underwriters. The paragraph conveying this information in the letter reads:

> "Depression and anxiety states have long been a major concern of underwriters, and if there is a history of depression, no disability benefits will be offered."

[33] Upon receipt of this letter plaintiff sought and obtained the assistance of Dr Estie Maritz who talked to a representative of the defendant with a view to persuading defendant to reconsider their position. Plaintiff had previously seen Dr Maritz as part of plaintiff's compulsory medical examination at the instance of a tour company that she had worked for. Suffice it to say that Dr Maritz's intervention did not yield the desired results. By a letter dated 05 October 2001 Dr Maritz was informed by defendant:

> "This claim was repudiated on the grounds that she no-disclosed a history of anxiety and depression…
>
> You mentioned to me that this was a short period of reactive depression and therefore of little consequence.
>
> The medical report, of which a copy is enclosed, indicates differently. The anxiety and depression lasted virtually the whole of 1997. This is material to the assessment of disability benefits. Had we been aware of this history we would not have considered acceptance of disablement benefits.
>
> The relevance of any material medical information is decided by the company underwriters, if a different decision would be offered on the full facts, then the information is material. The applicant for insurance must disclose all facts, and not only those they thought to be material (*sic*)."

[34] By a letter dated 6 December 2001, plaintiff was informed by the insurer*, inter alia*, as follows:

> "We regret to advise that after reconsideration of all the medical reports, that our previous decision to repudiate the claim was justified.
>
> The medical reports in our possession reaffirm that there was material no-disclosure.
>
> You received prescribed anxiolytic therapy (Alzam) on a number of occasions prior to the application for insurance in March 1999. The

> relevance of this information is important. We would not grant disability benefits under such circumstances."

[35] Plaintiff also testified that subsequent to the policy of disability insurance, she had successfully applied for a medical insurance policy styled ‘Ultramed’ with defendant in the year 2000. Plaintiff was required to fill in the application form and to have a confidential medical report completed by a medical practitioner. In the application form for the medical insurance plaintiff was asked questions similar to those she was asked in respect of the application for disability insurance. Such questions included whether she had or have ever had anxiety state or depression, to which she answered in the negative; whether she had suffered from illnesses such as malaria and to which she answered in the affirmative; and whether she was taking drugs, tranquilisers ‘or other medicines’; to which she answered in the affirmative.

[36] In respect of the confidential medical report that plaintiff said was completed by Dr Nieuwoudt, one of the questions asked was whether plaintiff had had anxiety state or depression and Dr Nieuwoudt ticked against the "Yes" column and under the column requiring details such as the nature of the complaint, Dr Nieuwoudt indicated that plaintiff had ‘stress-related anxiety’. Plaintiff contended that the doctor’s answer on this aspect was incorrect as she had not had anxiety state.

[37] Dr Nieuwoudt likewise ticked ‘Yes’ on the question whether or not plaintiff had taken any medicines and the doctor explained that plaintiff had taken Xanor "for stress-related anxiety in 1997, 1999". In any event the point was, so plaintiff stressed, defendant was in possession of this information and had accepted the proposal and

issued the policy for medical insurance without raising any query regarding plaintiff's insurability. As a matter of fact, so plaintiff added, plaintiff had successfully claimed under this policy.

[38] Plaintiff also testified about the clinical examination conducted on her by defendant's expert witness, Dr Pieter Coetzer, on 25 August 2003 and related that contrary to what was stated in Dr Coetzer's report, she had great difficulties undressing during the examination. Another aspect of Dr Coetzer's report that she considered incorrect was a statement in the report that she had taken one Voltaren (misspelled in the record as 'Vortarin') tablet whereas she had allegedly told Dr Coetzer that she had taken more than one Voltaren tablets.

[39] On the revelation that she had been declared insolvent after she had voluntarily surrendered her estate, plaintiff explained that she only informed counsel appearing on her behalf of this status during the hearing because she thought that her insolvency had no bearing on her disability. The other explanation given by plaintiff in this regard was that she thought she had been rehabilitated. Such belief was based on certain hearsay evidence, which even though not objected to, should not have formed part of the record. It will therefore be ignored. Plaintiff stated furthermore that she was not aware that she had to apply for rehabilitation.

[40] During cross-examination plaintiff was confronted with statements contained in paragraphs 6.1 and 6.2 of the declaration contained in the claim form for disability that she had personally completed and that read as follows:

> "6.1 I confirm that I am solvent and my estate has not been sequestrated.
>
> 6.2 I herby declare that the answers given by me in this form are in every respect true and complete and no material information has been withheld or omitted."

[41] It was common cause that plaintiff signed the declaration. Although she explained that she had not considered the issue of insolvency being relevant to her disability claim, she conceded that she had made a mistake on both scores.

[42] The next witness to be called on behalf of plaintiff was Ms Nadia Schlusche (misspelled in the record as ‘Fthlusche’). Ms Schlusche was the Managing Director of a tour company and her evidence related mainly to the inner workings of the tourism industry and to considerations of what levels of skill was required to becoming a successful tour operator or tour guide. Ms Schlusche also testified about the availability of occupations similar to a tour guide in the country and stated that the occupation closest to tour guiding would be nature conservation. To become a nature conservationist would, however, require a certain level of training, which plaintiff clearly lacks. According to Ms Schlusche, a tour operator is the entity that arranges tour excursions and it in turn employs tour processors, i.e. persons that process bookings and perform other administrative functions to ensure a successful tour. Tour operators then hire tour guides who then take out tourists to places of interest in the country. To operate in the tourism industry as a tour processor required a high degree of skill in administration and computer literacy would be a minimum requirement. At least three months extensive computer training was required to acquire the skills

necessary to operate as a tour processor. Ms Schlusche dismissed suggestions that one could be trained to use a computer in three days. The training and administrative skills required to become a tour operator are vastly different from the skills and training necessary to becoming a tour guide.

[43] Ms Shlusche was acquainted with plaintiff whom she described as the best tour guide one could possibly get and someone who was well known in the industry. As far as Ms Shlusche was concerned, owing to her lack of administrative skills and outdoor type of character, plaintiff would not easily fit in the office environment. She would therefore not employ her in an office environment. Ms Schlusche also testified about the salaries and other income earned by both tour guides as well as tour processors. Her evidence on the earnings of tour guides essentially tallies with plaintiff's evidence in this regard, save that in computing the monthly income of a freelance tour guide, Ms Schlusche added a rider to the effect that the overall pay was dependant on the number of days that the tour guide may work - which days were not guaranteed - as well as on the amount of tips that a tour guide may or may not get. Some clients do not tip at all and others tip well. Tour processors earn between N$5 500 and N$8 000 depending on experience and performance.

[44] Dr Nieuwoudt also testified on behalf of plaintiff, but not as an expert. It will be recalled that he is the general medical practitioner who had treated plaintiff from time to time. He stated that he obtained his MB ChB degree in 1977 and that he was in private practice. Relying on his clinical notes, Dr Nieuwoudt related that since 1996 he had seen plaintiff for a variety of causes. He had seen her on a good number of

occasions but I propose to summarise his evidence only in respect of the number of times he had seen her and she allegedly complained of stress and/or where Dr Nieuwoudt prescribed Alzam. These occasions total seven in number and are as follows:

[45] On 24 February 1997 he saw plaintiff who complained of stress and he prescribed Alzam of 0,25 milligrams (mg) per day. Alzam is used to treat stress but may also be used as a sleeping tablet. He considered 0,25mg per day to be a very low dosage and which had not much therapeutic value. At no stage did Dr Nieuwoudt make any formal diagnosis of stress and relied only on the *ipse dixit* of plaintiff in prescribing Alzam. He did not diagnose anxiety or depression either during the period that he had seen her. According to Dr Nieuwoudt, plaintiff had told him at the time that she was concerned about her horses she was doing trails with and which may not have a place to stay since the farm where they were kept was being sold. He could not recall plaintiff complaining about work-related stress.

[46] Six months later on 8 August 1997, he saw her again and she complained, among other things, of stress. He then prescribed a dosage of 0,25mg of Alzam to be taken twice a day. However, he again did not make any formal diagnosis of stress and relied on what he was told by plaintiff. Dr Nieuwoudt stated that it was a common practice for patients to give medicines prescribed to them to other people, a practice doctors do not condone.

[47] On 4 December 1997, a month and a day later, he saw plaintiff again and on this occasion Dr Nieuwoudt wrote in his clinical notes:

> "Stress/anxiety neurosis/Alzam is helping well, she is using 0,25mg per day. Alzam 0,25mg (30)."

[48] Dr Nieuwoudt explained that ‘anxiety neurosis’ is a mental disorder and that although he was not a psychologist; he could make a provisional diagnosis of anxiety and would then refer the patient to a psychiatrist or a psychologist for advice on the treatment. He, however, did not adopt this procedure in respect of plaintiff, because plaintiff did not present symptoms of ‘anxiety neurosis’, which incidentally is called anxiety disorder in modern terminology. He lamented the use of ‘anxiety neurosis’ in his notes not because it was an old fashioned expression but because, in his view, plaintiff did not have such a condition. At no stage was plaintiff booked off work because of any mental disorders.

[49] Dr Nieuwoudt was asked in cross-examination why he used the term ‘anxiety neurosis’ in his notes when, according to him, plaintiff did not present symptoms of anxiety disorder. He explained that the phrase was simply meant for his own guidance and that, in effect, it had no significance.

[50] When asked whether he was not concerned that other people who may read through his notes may be misled by the use of the phrase, Dr Nieuwoudt’s reaction was simply to state that he had no comment.

[51] On 11 May 1998, over five months after the last Alzam was prescribed, 30 tablets with a dosage of 0,25mg of Alzam were again prescribed for plaintiff. On account of the lack of details in his notes in respect of this prescription, Dr Nieuwoudt surmised that this prescription may have been requested over the telephone.

[52] On 24 June 1998, a little over a month since the last prescription of Alzam, thirty (30) tablets of 0,25mg of Alzam were again prescribed for plaintiff. This time, so Dr Nieuwoudt testified, the prescription was requested by telephone.

[53] On 18 November 1998 again thirty (30) tablets of 0,25mg Alzam were prescribed.

[54] The last time Dr Nieuwoudt prescribed Alzam was on 21 January 2000. The dosage was again 0,25mg but no indications on the notes of the number of the tablets prescribed.

[55] According to Dr Nieuwoudt, he had done many confidential medical reports for insurance companies and that from his experience doctors who compile these reports do not tell the insurers in detail the drugs that they had prescribed to their patients. On the contrary they use their discretion and disclose only the information that they considered to be relevant or useful to the company. In the case of plaintiff, Dr Nieuwoudt had to inform the insurer that he had prescribed Alzam because Alzam was written up in his notes over a period of time. Given the low dosage and the intermittent prescription of Alzam he did not, however, consider that plaintiff used

Alzam on any repetitive basis. He did not discuss with plaintiff any stress management programmes nor did he feel the need to refer her for psychotherapy.

[56] Dr Nieuwoudt indicated in cross-examination that he must have explained to plaintiff the consequences of using Alzam and that he must have made it known to her that Alzam was not merely a sleeping tablet. That explains why on 24 February 1997 he had prescribed Dormicum which is a sleeping tablet in addition to Alzam. Dr Nieuwoudt explained further that Alzam was meant to treat the stress while the Dormicum was meant to help plaintiff sleep at night. He conceded in cross-examination that he must have told plaintiff that he was treating her for stress for plaintiff had complained of stress. He furthermore, again in cross-examination, accepted that for him to have had prescribed Xanor in addition to what plaintiff told him about stress, he must have observed symptoms of stress and must have therefore made a diagnosis of stress. Dr Nieuwoudt made it clear in re-examination that he definitely made a diagnosis of stress, having excluded anxiety disorder and depression.

[57] Dr Nieuwoudt stressed in evidence-in-chief that during the period that he had seen her, plaintiff did not display a history of depression or anxiety. What she displayed, however, were occasional symptoms of stress.

[58] Dr Nieuwoudt confirmed that he had completed the confidential medical report in respect of plaintiff relating to the ‘Ultramed’ product and explained that he had ticked the ‘Yes’ column enquiring whether plaintiff had suffered from anxiety state or

depression, etc. for the reason that he thought plaintiff presented stress-related anxiety but added that he did not make any diagnosis of anxiety. He contended that if plaintiff were to be asked a similar question and were to answer in the negative and not having been advised that she had anxiety, she would ‘probably’ not be wrong in her answer. After he completed the confidential medical report he did not receive any query from the insurer.

[59] Dr Nieuwoudt also confirmed that he had written a letter to defendant essentially detailing the number of times that symptoms of stress were noted or Alzam was prescribed. Apart from recalling that the letter was requested in connection with depression, he could not recollect the circumstances in which the letter was written. The contents of the letter are important and played a central role in evidence. It therefore becomes necessary to quote it in full. The body of the letter reads as follows:

> "2 October 2001
>
> Re: Miss G. Otto
>
> She has been a patient of mine from 6/3/96.
> At that time she had Brucellosis.
>
> On the 24/2/97 I saw her with a left knee which was painful and she also mentioned that she had a lot of stress which was work-related.
> I treated her with Alzam.
>
> On the 8/8/97, I saw her again with stress-related symptoms. She was clinically healthy and I treated her again with Alzam 0,25mg bd (only 20) and Halcian 0,25mg (10).
>
> On 4/12/97, I saw her again with symptoms of anxiety neurosis and I prescribed Alzam 0,25mg bd (30) because it had helped her.

> On 11/5/98 she again received a prescription for Alzam 0,25mg (30) and on the 24/6/98 she received Alzam 0,25mg (30) again.
>
> On the 18/11/98 she received Alzam 0,25mg (30) and she was given Alzam (30) again on 21/1/01.
>
> A diagnosis of depression was never made. She never used large quantity of Alzam and not for long periods of time either.
>
> The stress symptoms she showed were as a result of business, financial and other reasons. She does not have a depressive personality and always came across as a positive person. It is possible that she sometimes, because of circumstances, had mild reactive depression, but she never needed anti-depressants according to my knowledge.
>
> Dr GJN Nieuwoudt
> BSc (Landbou) MB ChB (Stell)"

[60] Dr Nieuwoudt explained that reference to work-related stress in the letter was incorrect because, as already related, plaintiff never complained to him about work-related stress. He went on to say that the stress-related symptoms he observed on plaintiff included palpitations and insomnia. The Alzam tablets that were prescribed for plaintiff totalled some 200 tablets over a period of three years. With regard to the last sentence in the letter above, Dr Nieuwoudt stated that the opinion expressed therein regarding mild reactive depression amounted to speculation on his part since he had never seen plaintiff in a depressive state.

[61] The next witness to be called on behalf of plaintiff was an expert witness, Dr Estie Maritz who is in private practice. Dr Maritz testified that she obtained an MB ChB degree in 1989. She obtained a further diploma in aerospace medicine. She had 15 years experience as a medical doctor. In 1990 she was appointed as a psychiatric medical officer at the Mental Institute of the Sterkfontein Hospital (misspelled as

'Sterfontein' in the record) South Africa, where she continued to work until 1993. Since that year she had been acting as a medical consultant in the transport industry - airlines and tour operators - in the country. Her responsibilities as a consultant involved the medical examination and evaluation of possible risk criteria that may cause disability. The main risk factor she looks out for would be sudden incapacitation. In relation to persons that work for tour companies, she examines drivers mostly.

[62] With regard to her work in the psychiatric institution in South Africa, Dr Maritz relayed that she was exposed to working with cases of mental disorders as diagnosed by the DSM IV (Diagnostic and Statistical Manual IV), which is a manual used to diagnose psychiatric disorders. Although she was not a qualified psychiatrist therefore, she was conversant with the practice of psychiatry and the diagnoses of mental disorders. Additionally Dr Maritz had been exposed to the study of pharmacology, having done a course in pharmacology.

[63] Dr Maritz knew plaintiff personally, having examined her for the first time in 2000 on behalf of a tour company that had employed plaintiff. During such medical examination, plaintiff was found to have been medically fit to drive buses. Things changed dramatically in April 2001 when plaintiff was diagnosed with a severe degenerative disease of the lumbar spine. Needless to say that plaintiff subsequently became disabled to do her job as a tour guide/bus driver. Dr Maritz assisted plaintiff by completing a confidential specialist medical report in respect of plaintiff's disability claim and helped her manage her pain by the use of schedule 7 drugs. In spite of her

experiencing this pain and having lost her income as well having had her disability claim repudiated, Dr Maritz testified that plaintiff did not require any central nervous system drugs that are necessary for the support of stress symptoms, psychiatric illness or other mental disorders. She found plaintiff to function normally under these pressures.

[64] According to Dr Maritz, to diagnose someone for an anxiety disorder one had to consider a whole series of criteria as well as a scale of stressors, including psychosocial stressors that are employed to determine the nature and level of stress. Dr Maritz had talked to Dr Nieuwoudt about the treatment regime extended to the plaintiff and had seen the latter doctor's clinical notes on the plaintiff. Having regard to those notes and having observed plaintiff herself, Dr Maritz opined that plaintiff did not suffer from chronic stress that required to be managed by the use of drugs.

[65] Dr Maritz also testified about the use of Alzam by plaintiff. She stated that Alzam or Xanor belongs to a class of drugs that were widely used for sleep induction. The dosage and the frequency of the prescription of Xanor as recorded in Dr Nieuwoudt's notes were not indicative of stress management. Xanor comes in a variety of dosages, but 0,25mg is the weakest dosage on the market and if Xanor were to have had any therapeutic benefit on the treatment of symptoms of anxiety, it had to be used much more frequently than it had been prescribed to plaintiff. The dosage and frequency can also not amount to anxiolytic therapy.

[66] Dr Maritz revealed that plaintiff had admitted to her sometime after the disability claim had been declined that she had given some of the Xanor prescribed to her to her brother, a practice that was allegedly common among lay persons.

[67] Talking about the letter she had received from the defendant after she sought to persuade the defendant to reconsider the claim, Dr Maritz indicated that reference in the letter to her allegedly having indicated that plaintiff had a short period of reactive depression was quoted out of context. She stated that she did not tell the author that plaintiff had suffered from reactive depression. All she mentioned to the author of the letter was that most people would suffer, in their lifetime, a short spell of reactive depression and that such short period of reactive depression could not therefore be said to amount to a depressive disorder or anxiety disorder for that matter. In any event, so Dr Maritz concluded this aspect of her evidence, plaintiff had never been diagnosed with depressive disorder or anxiety.

[68] Dr Maritz agreed in cross-examination that Dr Nieuwoudt clearly conveyed the message in some of the passages in his letter of 2 October 2001 that he had treated plaintiff for stress, but that the level of such stress had not progressed to a disorder as understood in psychiatry. Insolvency or financial loss was one of the stressors that may trigger stress and scores five (5) on the scale used to determine stressors. She also commented on the treatment of plaintiff with Alzam and stated that the use of Alzam was appropriate for the management of the type of stress identified by Dr Nieuwoudt.

[69] Dr Maritz disclosed in cross-examination that she did not give all the information at her disposal regarding her treatment of plaintiff for pain management. She was concerned that further details of the treatment regime would be used against plaintiff by defendant. She had also declined to cooperate with defendant's expert witness as she had felt that the expert clinically examined plaintiff in the country without first having obtained the requisite local registration as a medical practitioner.

[70] Dr Maritz concluded her evidence under cross-examination with an unsolicited broadside aimed at defendant over what she perceived to have been an unfair characterisation of plaintiff by defendant during the trial. Her evidence concluded the case for plaintiff.

Evidence on behalf of the defendant

[71] Defendant commenced its case by calling its expert witness Dr Pieter Coetzer. Dr Coetzer has long and impressive curriculum vitae, which I will endeavour to summarise as practicable as possible. Having obtained his basic MB ChB degree from the University of Pretoria in 1977, Dr Coetzer served his houseman ship at a provincial hospital in South Africa for a year prior to taking up a position at the hospital as medical officer. In 1991 he obtained a BSc post-graduate degree in sports medicine from the University of Cape Town. Dr Coetzer is a Fellow of the American Academy of Disability Evaluating Physicians (AADEP) and is Board Certified as an Independent Medical Examiner by the American Board of Independent Medical Examiners (ABIME). At the time of his testimony, Dr Coetzer was the Chief Medical Advisor to Sanlam Life Insurance Company that he says is the second biggest insurer

in South Africa but that other than both being insurance companies, it had no relationship with the defendant. He had fifteen years experience in insurance medicine and his functions in Sanlam included the underwriting and claims assessment. As far as underwriting was concerned, he was a member of the insurance industry-wide Medical and Underwriting Committee of the Life Offices' Association (LOA); Chairman (*sic*) of the Independent Claims Assessment Panel; Fellow of the South African Institute of Life Underwriters; Member International Committee for Life, Disability and Health Insurance Medicine (ICLAM). Dr Coetzer had practised sports medicine and has published many learned articles and had co-authored policy documents on behalf of the insurance industry. He had acted as a resource person at workshops and seminars such as disability assessment workshops on psychiatric ground; post-traumatic stress disorder seminar; workshops on the assessment of disability due to low-back pain and made presentations to various re-insurers.

[72] Dr Coetzer's evidence and opinions may be summarised as follows:

[73] He was approached by defendant and given relevant documentation in respect of plaintiff's claim. He was then asked to give defendant an opinion on two matters. Firstly, the effect of non-disclosure of certain medical detail at the time of the application and secondly the merits of the disability claim.

[74] Dr Coetzer related that for an insurer to adequately assess the risk when considering an application for insurance, it must be in possession of all relevant medical facts relating to the risk to be covered.

[75] It is for that reason that questions are included in application forms for insurance. Such questions are designed to assist applicants to provide relevant information. Applicants, as a general proposition, are not at liberty to make value judgments of what medical facts are relevant and what not.

[76] In comparing the answers given by plaintiff to questions 13.06(f), 13.07 and 13.09 in her application form as well as the answers in questions 2.2(g) and 2.4(b) of the confidential medical report with the letter by Dr Nieuwoudt dated 2 October 2001 (Dr Nieuwoudt's letter) it appeared that such questions were not answered truthfully, because Dr Nieuwoudt in his letter stated that plaintiff had been treated for stress-related symptoms due to business, financial or other reasons on the dates detailed in his report and on which dates Alzam - a schedule 5 drug and anxiolytic - was prescribed.

[77] Even if plaintiff was not aware that her condition was an anxiety state or nervous complaint, she should still have mentioned in her application, which was only three months after the last consultation for stress on 18 November 1998, that she had consulted a doctor (question 13.07 and 2.4(b)) and that she was prescribed medications (question 13.09). Had these questions been answered in the affirmative, defendant would then have requested a report from Dr Nieuwoudt regarding the

consultations and medications prescribed. Dr Nieuwoudt's letter would have resulted in defendant or any other reasonable insurer declining disability benefits.

[78] It is not the dosage or frequency of the drug prescribed that is important but the repetitive pattern over a period in question and the cause of stress that would make the risk unacceptable.

[79] Claims experience had shown that work-related stress over a long period of time could transform into chronic anxiety and/or depressive episodes. Socio-economic factors could cause progression of the condition.

[80] Repeated prescriptions for a schedule 5 drug is indicative of stress too severe to manage through leave from work, stress management programmes or psychotherapy.

[81] Underwriting practice of most, if not all, insurers in South Africa and Namibia was to decline disability benefits where there was a history of work-related stress that (a) occurs repeatedly and was severe enough to warrant a doctor's consultation or (b) where it was treated with a schedule 5 drug within the two year period prior to application. Anxiety disorders were advanced stages of stress. Stress is a precursor to one of the anxiety disorders. Most if not all people suffer from stress. However, a person who suffers from stress and goes to see a doctor on more than one occasion and is given a schedule 5 drug meant that such person could not cope with stress and that is a substantial risk to an insurer.

[82] Dr Coetzer explained that although principles in medicine were universal, insurance medicine differed from clinical medicine in the sense that insurance medicine was all about risk rating. The insurer must consider the applicant's health condition almost as snapshot on the day of the application. Based on the information provided in the application form and the accompanying documentation, the insurer must decide on the applicant's mortality and mobility for the next 30 or 40 years. In contradistinction with clinical medicine, the clinical doctor has more time at his or her disposal to observe the patient's health condition and to take remedial action if and when required. The insurer could not.

[83] There were three categories of medical conditions that an insurer was cautious of insuring disability for. One of such categories is a pain-related condition where the severity of the disability is based upon the self-report of the patient. Pain cannot be rated in terms of medical number. It is not possible to predict how long a subjective condition like pain will take before it can lead to claim and therefore it is not possible to put a premium loading on such a condition.

[84] Dr Coetzer concluded his evidence on disability by stating that the disability benefits that plaintiff claimed would have been declined by defendant had plaintiff made full disclosure.

[85] It followed that the non-disclosure was material to the assessment of the risk.

[86] With regard to the clinical examination of plaintiff, Dr Coetzer explained that on 21 August 2003 and prior to the commencement of the trial he had consulted with plaintiff for an hour and ten minutes in Windhoek. Plaintiff arrived at the consulting rooms alone on two crutches. She informed Dr Coetzer that she had driven her own car to the rooms. Her complaints were: chronic pain and limitation of the movement of the left hip; chronic lower back pain and restriction of movement and slight pain in the right replaced hip.

[87] She indicated that she was taking Voltaren 50mg tablets 3 times a day, every day; Cortisone tablets one 3 times a day every day, name and dosage of which she did not know; Voltaren injections 2-3 times per week and various other painkillers, including Disprin, when necessary. She indicated that she took only one Voltaren tablet in the morning before she went for the examination.

[88] Other pertinent observations Dr Coetzer made during the course of the examination were that plaintiff did not put any weight on her left leg and that she managed to undress fairly easily. Although she could put on her socks and shoes herself with some discomfort, she could not tie her shoe laces.

[89] Dr Coetzer explained that the purpose of the clinical examination was to evaluate the whole person impairment of the plaintiff according to the American Medical Association's Guide to the Evaluation of Permanent Impairment, 5th edition (AMA Guides) with specific focus on impairment of the lumbosacral spine.

[90] According to Dr Coetzer, in assessing a disability claim one must first determine what the diagnosis was in order to verify whether the diagnosis was made correctly following international criteria. Secondly, given that most disability benefits were paid only where there had been permanent disability, one must determine whether adequate treatment had occurred. The next step would be to write the impairment. Impairment means the loss of function. The AMA Guides are the international benchmark for writing impairment in terms of medical numbers.

[91] That specific impairment and the organ or system in the body said to have been impaired is then correlated to the job description of the claimant. If the impairment precludes the claimant from performing his or her work a disability claim would be admitted. If not, of course it would be declined. In assessing disability one has to, as a last step, take into account the contractual requirements of the policy, whether it defines own occupation only or whether it refers to own or reasonable alternative or own or similar occupation.

[92] Having examined plaintiff, Dr Coetzer agreed that plaintiff had permanent impairment due to the following diagnoses:

(a) Total hip replacement.

(b) Advanced osteo-arthritis left hip, awaiting hip replacement.

(c) Disc degeneration and disc space narrowing of levels L3-4 and L4-5, without neurological sequelae.

[93] Dr Coetzer concluded that as plaintiff's claim rested on her complaint of pain which was not objectively quantifiable, it was essential to establish her sincerity and credibility. According to his assessment, plaintiff's version could not be accepted at face value for the following reasons:

(a) She had four out of five Waddel signs positive.

(b) Her ROM assessment of lumbosacral spine movement was invalidated by the SLR validity test, as the SLR exceeded the best true lumbar flexion by more that 15°.

(c) The X-rays of the left hip obtained after the examination did not fit the clinical picture presented during the examination, and hardly warranted urgent hip replacement.

(d) The pain questionnaire provided indicated that all activities made the pain worse. One would expect that certain activities would have no effect on back pain or even improve it, e.g. lying down, sleeping, etc.

(e) The utilisation of analgesics does not match the severity (80 out of 100) nor the frequency (90% of the time) of the pain as described by plaintiff. She used only anti-inflammatory and cortisone on an intermittent basis. Many analgesics that could control pain and improve quality of life were available.

[94] The facts mentioned in (a) to (e) above point to symptom exaggeration or psychosomatic overlay.

[95] Plaintiff was disabled as far as her previous occupation as a tour guide/bus driver was concerned , but she would be able to work in an occupation that was mainly sedentary in nature allowing for voluntary periodic standing and walking.

[96] As alternative employment it may be an option to work in a travel agency or to organise tours provided the remuneration was not significantly less than her previous earnings.

[97] Dr Coetzer conceded in cross-examination that although he had expressed the opinion contained in the paragraph [96] above, he did not profess to have expertise in the workings of the tourism industry in the country and that he expressed the opinion on the basis that he had the expertise to determine the function capabilities that plaintiff had and could apply to the job requirements of a category of certain occupations. He agreed though that he had no expertise to deal with the issues of plaintiff's skill level or skill transfer.

[98] Dr Coetzer was also asked in cross-examination to comment on why an insurer would have an exclusion clause in one policy and not in another. He explained that the risk in the two products would not be the same. In a disability policy, for example, people would be inclined to claim disability for psychiatric reasons, because they personally benefit from the lump sum payable should they succeed. In the case of a hospital or medical policy on the other hand, any monies paid out goes towards hospital expenses and so the patient gains nothing. There would be therefore no

motivation for people to want to abuse the system and only genuine cases would claim.

[99] According to Dr Coetzer, the use of a schedule 5 drug for psychological conditions over a period of more than a year would result in the declining of disability insurance. An exception would be an acute stress disorder which is attributable to an identifiable external force. In practice the doctor would volunteer information if Alzam was used for an acute stress disorder thereby obviating the need to seek more information.

[100] Dr Coetzer's report was based on the assumption that plaintiff had taken all the Alzam drugs prescribed to her by Dr Nieuwoudt. On the basis that that information was incorrect since plaintiff testified, as already noted, that she only took the tablets prescribed to her on the first occasion and that she gave the rest to her brother, Dr Coetzer's reaction was that the insurer would be concerned about the integrity and honesty of the claimant since she had proved that she was capable of deceiving her doctor. The insurer would, in assessing the risk, take into account the moral character of the applicant.

[101] His opinion on stress was based on the assumption that plaintiff suffered from work-related stress, because that was what was stated in Dr Nieuwoudt's letter. On the assumption that stress was not work-related, Dr Coetzer's reaction was that, the cause of stress was irrelevant. The fact that a person had sought medical attention meant that such person was a substantial risk in comparison to a person who could

cope with stress without medical intervention. All stress reactions would lead to the declining of disability benefits.

[102] On the questions contained in the health questionnaire, Dr Coetzer conceded that if plaintiff was not advised by her doctor that she had anxiety or one of the conditions listed in question 13.06 (f) then she was entitled to answer in the negative and that questions 13.06 (f) and 2.2 (g) were therefore answered correctly.

[103] Stress in itself may not be a problem for clinical medicine but it is for medical insurance. It is perceived as a precursor to the anxiety syndromes.

[104] The next witness called on behalf of defendant was Ms Gerda Ochse (misspelled in the record as 'Uschu'), Executive: Risk and Operations of defendant. She was in charge of the administration of policies, risk management as well as claims underwriting. She had been in the insurance industry since 1995. Prior to working for defendant, she was employed by Sanlam where she rose to the position of the company's Chief Underwriter and Manager of New Business Department. She was appointed by defendant in 2000 and became Manager: Underwriting and Claims. Her appointment meant that defendant's underwriting and claims assessment business that was hitherto done in South Africa was done locally. She also served as a Board member of the committee for underwriting and claims of the Life Association of Namibia.

[105] At the request of counsel for plaintiff Ms Ochse managed to get a policy that was subsequently cancelled by plaintiff. In the policy plaintiff's monthly income was indicated to have been R8000.00 (*sic*). In that policy document, plaintiff answered in the affirmative to question 13.07 asking whether she had seen a doctor in the last five years, giving details that she had seen the doctor for insurance HIV test. She had answered in the negative to question 13.09 enquiring whether she had taken drugs, tranquillisers or medicine. The company had issued the policy.

[106] As regards the repudiation of plaintiff's disability policy, Ms Ochse explained that the claim was declined and the policy repudiated on the ground that material information was not disclosed at the application stage. In terms of defendant's underwriting practice, no disability benefits should have been accorded to plaintiff had the information been disclosed at the time of the application.

[107] According to defendant's Underwriting Guidelines, if there were symptoms of any type of stress or anxiety within the period of three years before application, insurance will be declined. If the period was more than three years, then there would be a 100% loading of premium. If there was an indication of stress coupled with the use of anxiolytic within the period of three years before application then no disability insurance would be granted. Had defendant been aware of the medical treatment given to plaintiff by Dr Nieuwoudt at the time of the application, the application for disability benefits would have been declined.

[108] Ms Ochse confirmed that plaintiff had taken out the medical policy with defendant subsequent to the issuing of the policy for disability and explained that the application for the medical policy was not declined even though Dr Nieuwoudt had indicated in the confidential medical report that plaintiff had been treated for stress-related anxiety, because claims for mental illnesses and emotional disorders were specifically excluded in the medical policy.

[109] Ms Ochse confirmed in cross-examination that she personally dealt with the application for the medical insurance but that at the time she did not know that plaintiff had a disability policy.

[110] On the question why defendant did not use the information regarding stress-related treatment disclosed by Dr Nieuwoudt to determine whether such information was disclosed in the application for the disability policy, Ms Ochse explained that the two policies were on computer systems that were not linked. Moreover, in the absence of an indication in the medical policy that plaintiff had another policy with defendant, no attempt was made to search for the old policy. In any event, in effect it was trusted that plaintiff disclosed all material information.

[111] Ms Ochse was asked during cross-examination to comment on the fact that it appeared that prior to the receipt of Dr Nieuwoudt's letter defendant was in possession of information on the basis of which it decided to repudiate the claim. Ms Ochse in the end indicated that she did not know where such information could have originated. She indicated that the information could not have come from the

documents in respect of the medical insurance policy, because the documents in respect thereof were kept in Windhoek and the form wherein a recommendation to repudiate was made was written by a person or persons based in Johannesburg.

[112] Ms Ochse also agreed with the testimony of Dr Coetzer that as long as it had been disclosed that an applicant for disability insurance had been prescribed Alzam, irrespective of the reason therefor or the dosage, disability insurance would be declined. The insurer worked on the assumption that someone who takes Alzam or any other schedule 5 anxiolytic would have some form of stress or some condition that may progress. In that event the tendency was to decline the application. The applicant may however provide evidence rebutting the presumption for further consideration by the insurer.

[113] The third witness for the defendant was Mr Ricardo Patrick Jankowski. Mr Jankowski was a computer trainer employed by an employment agency called Jobs Unlimited. His short evidence was essentially to the effect that he ran a three day computer course that he stated was at intermediate level. The course introduced trainees to basic concepts on how to use a computer. At the end of the course trainees were expected not only to have the basic skills but also to apply those skills to working environments by way of doing general office work such as typing documents and working on a personal computer. The course cost N$450.00 at the time of the witness's testimony.

[114] Mr Jankowski also testified about a tailor-made computer course that he ran for employees of Namibia Wildlife Resorts who did reservations. He added though that the course had been discontinued.

[115] The next witness to be called on behalf of defendant was Ms Marlene Erasmus. It will be recalled that Ms Erasmus was the Bank Windhoek broker who was said to have completed the application form for disability insurance on behalf of plaintiff. Ms Erasmus confirmed that she had indeed completed the form in Afrikaans. She did not know plaintiff before and so did not know her personal history. Her evidence on this aspect was contrary to that of plaintiff who stated that she knew Ms Erasmus well, but this aspect of plaintiff's evidence was not canvassed with Ms Erasmus. Her evidence in this regard therefore remains undisputed. All the information relating to plaintiff was obtained from plaintiff. She read out the questions on the form and plaintiff gave her the answers which she ticked. At no stage during the completion of the report did plaintiff indicate that she did not understand Afrikaans.

[116] Plaintiff gave the name of her doctor as Dr Burger and Ms Erasmus vehemently denied that she had agreed with plaintiff to put Dr Burger's name on the form with full knowledge that plaintiff's family doctor was Dr Nieuwoudt. Ms Erasmus was adamant that she ticked the 'No' box after plaintiff indicated that she did not see a doctor in the last five years.

[117] When it came to the declaration on the form, Ms Erasmus said she had given the declaration to plaintiff and told plaintiff to read the declaration carefully since it formed the basis of the contract and that she should sign if she had agreed with its contents. Ms Erasmus entered her name and address as well as the plaintiff's particulars on the space reserved for that purpose on the report and thereafter sent the confidential medical report to the doctor for completion. Since it was confidential, the doctor was required to send the report directly to the insurer.

[118] The evidence of Mr Frederick Albertus Botha concluded the evidence on behalf of the defendant. Mr Botha was a tax partner at Price Waterhouse and Coopers whose evidence concerned the interpretation of plaintiff's tax returns for the years 1997 and 1998. The thrust of Mr Botha's evidence appears to be that no income was declared and no expenses were claimed in the returns during the periods under review.

[119] The issues that have crystallised from the pleadings and call for decision are:

(a) Whether defendant discharged its onus to prove on a balance of probabilities that plaintiff failed to disclose that she suffered from depression and anxiety and had a history of these conditions and

(b) Whether defendant discharged its onus to prove that plaintiff failed to disclose that had she received anxiolytic therapy on a number of occasions prior to her application for disability insurance.

Material non-disclosure

[120] An insured has duty to disclose when applying for insurance. Such applicant must answer questions put to him or her on a proposal from truthfully or accurately. He or she is obliged to volunteer knowledge material to the risk whether or not asked to do so.[3]

[121] As was stated in a South African case of *Munns and Another v Santam Ltd*[4]

> The general principle in our law is that it is the duty of a proposer for insurance to disclose any fact, exclusively within his knowledge, which it is material for the insurer to know. The information material for the insurer to know is information that may influence his opinion as to risk that he is incurring and consequently as to whether he will take it, or what premium he will charge if he does take it. The test of materiality is that of the reasonable man, whatever the insured's own assessment of the fact in question is, that is if a reasonable man would recognise that it is material to disclose the fact in question, disclosure is required. (Reference to authorities omitted)

[122] Furthermore,

> The insured must, therefore, disclose to the insurer, before the contract is concluded every material circumstance which he knows.[5]

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[3] Fine v The General Accident, Fire & Life Assurance Corporation 1915 AD 213; Beyers Estate v Southern Life Association 1938 CPD 8.

[4] 2000 (4) SA 359 (D&CLD) at 366 B – C. See also Wilke NO v Swabou Life Assurance Company Limited 2000 NR 23 at 44F - H

[5] Gordon & Getz: The South African Law of Insurance, 4th Edition, page 113

[123] A fact is material for the purposes of non-disclosure if it is one which would influence the opinion of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premium to stipulate; and/or whether to impose particular terms.[6]

[124] The Full Bench of this Court in *Wilke NO v Swabou Life (supra)* established that in determining whether undisclosed facts were material or not, the Court's function is to decide the issue objectively from the standpoint of a reasonable and prudent person.[7] The objective test has therefore been adopted by this Court.[8]

[125] It will be recalled that defendant alleged plaintiff should have disclosed that she had suffered from depression and anxiety states and that she had had a history in this regard. Disclosure of information with regard to depression or anxiety was required in terms of clause 13.06(f) of the proposal form.

[126] Defendant found itself in an untenable position during the trial as far as the allegation of non-disclosure of alleged anxiety was concerned. Having based its plea and undoubtedly the conclusions as well as opinions of its expert witness on the information supplied by Dr Nieuwoudt in his letter of 2 October 2001 in this regard, Dr Nieuwoudt in evidence essentially backtracked on the information supplied and then, contrary to the message he appeared to have conveyed in the letter, claimed that

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[6] Wilke NO v Swabou Life case (*supra*) at 45A
[7] At 45G
[8] See Joubert v ABSA Life Ltd 2001 (2) SA 322 (W) where the subjective test as propounded in Qilingele v South African Mutual Life Assurance Society 1993 (1) SA 69 (A) was preferred and Clifford v Commercial Union Insurance Co of SA 1998 (4) SA 150 (SCA) for apparently obiter dicta remarks in the judgment of Schutz JA criticizing the Qilingele approach. See also the incisive remarks of Nienaber JA at 161C-E in reaction to criticism leveled at the Qilingele approach.

reference in the letter to anxiety did not have any significant meaning, as he had used that term for his own records only. Significantly and perhaps fatally for defendant on this issue, Dr Nieuwoudt then maintained that he had in fact not diagnosed plaintiff as having, nor did he advise her of, symptoms of anxiety or depression. As if to add insult to injury, defendant came to learn for the first time in Court from plaintiff that plaintiff did not take all the Alzam tablets prescribed to her by Nieuwoudt.

[127] Faced with this, rather extraordinary change of heart, on the part of Dr Nieuwoudt, Dr. Coetzer conceded, as already relayed, that in the light of the evidence that plaintiff was not advised that she had suffered from these conditions, the answer in the negative was justified. Counsel for defendant also conceded that much. The issue of depression or anxiety as canvassed in clause 13.06(f) of the proposal form and clause 2.2(g) of the confidential medical report therefore falls away.

[128] Faced with plaintiff's evidence, defendant changed tact to counter the new evidence relating to the use of Alzam. As observed when presenting the summary of Dr Coetzer's evidence, emphasis changed from anxiety and depression to stress in view of Dr Nieuwoudt's concession in cross-examination that he must have had diagnosed stress for him to have had prescribed Alzam. The difficulty with this change of tact on the part of defendant was that the new direction does not accord with the pleadings as set out above. The issues are defined by pleadings.[9] Nowhere in the

[9]See, for example, Middleton v Carr 1949 (2) SA 374 (A) at 386 where Schreiner JA stated: "Generally speaking the issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or of avoiding a special order as to costs , on the court's readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated".
The difficulty for defendant, of course and as already noted, is that it based its pleadings on the information that turned out at the trial stage to be wrong.

pleadings is stress pleaded as a basis for the repudiation of the agreement.

[129] The clause to be considered next is clause 13.07 which asked the same question as asked in clause 2.4(b) of the confidential medical report. Plaintiff answered that she did not consult a doctor, which as plaintiff in evidence conceded, was an incorrect answer, because she had evidently consulted a doctor during the period. Plaintiff appears to blame Ms. Erasmus who completed the form on her behalf. Ms. Erasmus insisted that she had ticked the answers that she was given by plaintiff and I have no reason to doubt her evidence. She does not appear to me to have had a motive to tick an answer different from that given by plaintiff. Apart from an innuendo, if I understand it correctly, to the effect that being a broker she had a particular interest in the successful outcome of the application for insurance and would therefore not have an interest in ensuring that correct answers were given, no serious criticism was directed against her evidence. It was not suggested, nor was there a basis for a suggestion that Ms Erasmus, for example, intentionally ticked the wrong answer in order to implicate plaintiff or to ensure that the application succeeded.

[130] For the purposes of non-disclosure it is immaterial who completed the proposal form and the confidential medical report. In *Alpine Caterers Namibia (Pty) Ltd v Owen and Others*[10]*,* quoting Innes CJ in *Burger v Central South African Railways* 1903 TS 571, Frank J (as he then was) stated:

[10] 1991 NR 342

> "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature."

[131] The learned Judge further noted that Innes CJ's approach was confirmed in *George v Fairmead (Pty) Ltd*[11] where Fagan CJ observed:

> "When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature."

[132] "Man", "he" and/or "his" in the quotations in our context and in this day and age must surely be understood to include "woman", "she" or "hers" respectively.

[133] It is therefore of no assistance to plaintiff to say that she did not complete the forms personally. She signed both documents and warranted their correctness.

[134] It is indeed so that in the confidential medical report compiled in connection with the application for disability plaintiff disclosed that she had consulted doctors and gave their names and a list of ailments and investigations in respect of which she had consulted the doctors for. At the time of the consideration of her proposal for disability policy, therefore, defendant must have been aware that she had consulted certain doctors during the relevant period and this consideration may be crucial when evaluating the materiality of the non-disclosure.

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[11] 1958 (2) SA 465 at 472

[135] I am persuaded that defendant has discharged the onus of proving that plaintiff should have disclosed that she had seen a doctor.

[136] The next disputed question is to be found in clause 13.09. It will be recalled that plaintiff answered in the negative to the question enquiring whether she was, at the time of the application taking or had ever taken drugs, tranquilisers or other medicines.

[137] Plaintiff's explanation for what was clearly an incorrect answer amounted to this that she did not take drugs or tranquilisers; that she was not clear about the use of the word ‘drug’; that she did not consider tranquillisers to be drugs and that as rule Dr Nieuwoudt did not discuss with her what medicine he was going to prescribe. She regarded the Alzam she was given by Dr Nieuwoudt as a sleeping pill and not as a tranquiliser. As I understand Dr. Nieuwoudt’s evidence in this regard, Dr Nieuwoudt did not specifically say that he had actually explained to plaintiff that the Alzam she was prescribing was a tranquilliser. On the contrary, he believed that he must have explained to her that Alzam was not a mere sleeping pill. It would seem therefore that rather than stating a fact, Dr Nieuwoudt actually drew an inference. He may well have drawn the inference from the objective fact that on one occasion he prescribed both Alzam and a proper sleeping tablet, the combination of which was supposed to treat different complains. The view I take of the matter is that whether or not Dr Nieuwoudt explained to plaintiff that Alzam was a tranquilliser or not, plaintiff should have disclosed to the insurer that she had taken medicine. The question was not whether

she had taken Alzam but whether she had taken drugs, tranquillisers or ‘other medicine’. It is evident that in addition to Alzam, she had taken other medicine.

[138] According to Dr. Coetzer "ever" in question 13.09 meant 5 years, but Mr. Coleman, counsel for the plaintiff, makes a valid point that nowhere in the application form is the insured informed of this. The point does not, however, detract from the fact that plaintiff should have given a positive answer to the question.

[139] On the question why plaintiff answered in the negative to the question whether or not she had taken medicine, Dr. Nieuwoudt testified that plaintiff might have forgotten or that she did not think that Alzam was mentionable like headache tablets. Plaintiff herself did not testify to this and Dr Nieuwoudt’s testimony on this aspect at best amounts to speculation.

[140] In any event the net encompassing disclosure of material facts is cast rather wide and the omission to disclose a material fact cannot be excused on the basis of forgetfulness or mistake. In this regard, it was stated in *Beyers Estate v Southern Life Association* case (*supra*) as follows:

> It is well-established law that it is immaterial whether the omission to communicate a material fact arises from intention or indifference or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known … His duty is carefully and diligently to review all the facts known to himself bearing on the risk proposed to the insurers, and to state every circumstance which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract.[12]

[12] At 20

[141] Gordon & Getz *op. cit.* on pages 123-124 make a similar point:

> A proposer who makes a reckless statement cannot be said to believe in its truth. If he 'does not attempt to tax his memory, or really try to think about the matter, and apply his mind to it; if he was casual and negligent in the answers he gave', then he does not fulfil his obligations to disclose everything material to the insurer.

Anxiolytic therapy?

[142] The next enquiry is whether defendant discharged the duty of proving that plaintiff received anxiolytic therapy as alleged in the amended plea. It was common cause that Alzam or Xanor was an anxiolytic.

[143] Dr Nieuwoudt testified in evidence-in-chief that he prescribed Alzam on a low dosage and intermittently and when requested by plaintiff. He did not diagnose plaintiff with any disorder so as to place her on therapy. In cross-examination, however, he conceded that he must have diagnosed stress; otherwise he would not have prescribed Alzam.

[144] As already observed, plaintiff stated that she only took the Alzam tablets from the batch that was prescribed to her on the first occasion. The rest she gave to her brother. However difficult it may be to believe given the sheer number of tablets that was allegedly given to plaintiff's brother in contrast to those she says she took, there is no evidence gainsaying plaintiff's evidence in this regard and given the evidence of

both Doctors Maritz and Nieuwoudt that lay people often share prescribed medicine contrary to medical advice, plaintiff's evidence has to be accepted.

[145] Dr Maritz's evidence was to the effect that the dosage and frequency of the prescription of Alzam had no therapeutic value and that the way the drug was prescribed was consistent with "other" uses of the drug.

[146] The Concise Oxford Dictionary, 10th edition, defines "therapy" as "treatment intended to relieve or heal a disorder; the treatment of mental or psychological disorders by psychological means".

[147] "Disorder" in the context of medicine is defined in the same dictionary as "a disruption of normal physical and or mental functions". Given that it has been conceded on behalf of plaintiff that plaintiff had not been diagnosed of symptoms of a mental disorder as understood in psychiatry, it seems to me that it has not been proven on a balance of probabilities that the Alzam plaintiff received was part of a therapy according to the grammatical meaning of that word.

Alternative plea

[148] It remains to consider the alternative to paragraph 3.2.2 of defendant's amended plea. To recapitulate, in the alternative to paragraph 3.2.2 defendant averred that plaintiff had obtained prescribed medicine from Dr Nieuwoudt in effect by false pretences and that she should have informed defendant of this.

[149] It is undoubtedly so that on her own evidence, plaintiff obtained Alzam from Dr Nieuwoudt in circumstances that could properly be described as false. She pretended to the doctor that she needed Alzam when she instead and having obtained the prescription she passed on the tablets to her brother. If Dr Nieuwoudt's entry in his clinical notes is anything to go by, it seems that on 4 December 1997, plaintiff must have represented to Dr Nieuwoudt that Alzam was helping well while knowing that the last time she had taken the tablets was about nine months previously. Defendant's alternative averment is therefore borne out by evidence. The issue of the of failure to disclose, as it were, her questionable conduct is germane to what has been referred to in the law of insurance as the "moral hazard", an issue I shall advert to in due course since this issue is in turn relevant to the consideration of the materiality of the undisclosed fact. I would first turn to consider the issue of warranty in view of the finding that plaintiff should have disclosed that she had received medicines and in view of the finding regarding plaintiff's moral integrity.

Warranty

[150] Plaintiff pleaded that the agreement between the parties was subject to section 54(1) of the Long-term Insurance Act, 1998 (Act No.5 of 1998) (the Act). Section 54(1) of the Act is a successor to Section 63(3) of the Insurance Act, No.27 of 1943, which latter section was considered by this Court in the *Wilke NO's* case (*supra*). Section 54 (1) of the Act virtually mimics section 63(3) of Act 27, 1943 and the new section reads as follows:

> "Notwithstanding anything to the contrary contained in any domestic policy or any document relating to such policy, any such policy issued before or

> after the commencement of this Act shall not be invalidated, and the obligation of a registered insurer or reinsurer thereunder shall not be excluded or limited, and the obligations of the owner thereof shall not be increased, on account of any representation made to the registered insurer or reinsurer which is not true, whether or not such representation has been warranted to be true, unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under such policy at the time of its issue or of any reinstatement or renewal thereof."

[151] The object of the enactment was set out in *Qilingele v South African Mutual Life Assurance* (*supra)* as follows*:*

> "The object of the enactment is manifest, namely to protect claimants under insurance contracts against repudiations based on inconsequential inaccuracies or trivial misstatements in insurance proposals. An insurer's right to repudiate liability on the basis of the untruth of a representation made to it, whether elevated to a warranty or not, was curtailed. This was done by, first, providing generally that liability could not be avoided on account of any misrepresentation, warranted or not, and then adding a qualification. By structuring the provision in that way the draftsman ensured that the onus to prove the requisite elements of the qualification – and hence of the right to avoid liability – would rest on the insurer."[13]
> (Emphasis added)

[152] As previously observed, this court held in *Wilke NO* case (*supra*) that the test for determining whether the incorrectness of representation materially affected the assessment of the risk is objective. Insofar as Mr Frank, counsel for defendant, relied on the *Qilingele* (*supra*) decision for the proposition that,

> "In the field of warranties the test is not that of a reasonable man, but whether the particular insurer regarded the information material,"

[13] At 74B-C

I must point out that I am bound by the *Wilke NO* case (*supra*); being a decision of the full Court.

[153] In an attempt to discharge the onus to prove that the undisclosed facts materially affected the risk, defendant led the evidence of its expert witness, Dr Coetzer as well as its underwriter, Ms Ochse. It will be recalled that Dr Coetzer's evidence on the aspect on failure to disclose that plaintiff had received medicine and had consulted a doctor during the period referred to in the proposal form was that had these facts been disclose, defendant would have asked for a report from Dr Nieuwoudt regarding the consultations and the medicines prescribed. If Dr Nieuwoudt had written a letter similar to his letter of 2 October 2001, defendant or any other reasonable insurer would have declined to grant disability benefits. Dr Coetzer also added that it was not the dosage or frequency of the drug that the insurer was concerned about. What was of concern was the repetitive pattern of the drug used and the cause for the condition being treated. Socio-economic factors can cause the progression of work-related stress.

[154] It will also be recalled that Ms Ochse also agreed with the view expressed by Dr Coetzer to the effect that so long as it had been disclosed that an applicant for disability insurance had been prescribed Alzam, disability insurance would be declined irrespective of the reason for the prescription or the dosage.

[155] It cannot be emphasised too strongly that the above evidence must be evaluated objectively from the stand point of a reasonable man and prudent person

and not from the stand point of a reasonable insurer. Mr Coleman argued and I agree with him that a reasonable person would not regard it to be reasonable to simply decline the application on the mere mention of Alzam without enquiring the reason for use and the dosage. This would be particularly so because as it has been demonstrated in this case, apart from being an anxiolytic, Alzam also had other uses as testified about by Dr Maritz who testified that it could also be used as sleep induction and as mentioned in the Internet extract handed up by Mr Coleman and to which no objection was raised showed. To summarily decline the proposal without first making enquiries so as to satisfy one of the circumstances that led to the taking of the drug would, in my view, not satisfy the test of a reasonable or prudent person.

[156] Moreover, defendant had received information contained in the confidential medical report in respect of the medical policy to the effect that plaintiff had seen a doctor and had been treated for work-related stress, but this information was not used to assess the subsequent proposal for disability cover. By neglecting to collate relevant and intertwined information in order to assess the risk in the proposal for disability insurance and/or to ensure that its computer systems were linked so as to be able to facilitate the collation of such information defendant acted to its own detriment.

[157] Returning now to the materiality or otherwise of the failure to disclose that plaintiff had seen a doctor, Mr Frank argued that even if plaintiff did not take the medication prescribed to her by Dr. Nieuwoudt, she should have disclosed the fact that she had obtained medicine from Dr Nieuwoudt under false pretences as that would have had affected the moral hazard of doing business with her. Mr Frank

submitted further that the doctor/patient relationship as well as the fact that insurers rely on the information provided by doctors in the assessment of risks were principles at stake in this case. If a person could abuse the doctor/patient trust to feign a condition, so Mr Frank asked, what will prevent the person from abusing that trust to facilitate an insurance claim, especially in cases such as the present where the nature of the complaint, namely lower back pain, could not be objectively assessed? This is essentially a 'moral hazard' argument and it is to this principle that I propose to turn next.

[158] In *Munns and Another v Santam Ltd* (*supra*) Tshabalala AJP stated as follows in relation to the so-called moral hazard:

> "It is elementary that one of the matters to be considered by an insurance company in entering into contractual relations with a proposed assured is the question of the moral integrity of the proposer – what has been called 'the moral hazard'".[14]

[159] The following examples of moral hazard could be distilled from reported cases: failure to disclose facts relating to financial and business integrity;[15] failure to disclose the quality of management;[16] previous financial difficulties;[17] that the premises covered by a fire insurance contract housed a brothel;[18] that a previous loss occurred as a

[14]At 367J

[15]Steyn v AA Onderlinge Assuransie Assosiasie Bpk 1985 (4) SA 7 (T); Munns and Another v Santam Ltd (supra)
[16]Fransba Vervoer (Edm) Bpk v Incorporated General Insurances Ltd 1976 (4) SA 970 (W)
[17]Fouche v The Corporation of London Assurance 1931 WLD 145
[18]Richards v Guardian Assurance Co 1907 TH 24

result of carelessness by the insured;[19] failure to disclose a previous conviction of robbery.[20]

[160] There is, however, authority for the proposition that the "moral hazard" principle is not as important to long-term insurance contracts such as life insurance (and I would add, disability insurance) as is to cases of short-term insurance. In *AA Mutual Life Assurance Association Ltd v Cronje*[21], Eloff DJP stated the following in relation to the failure to disclose previous insolvency in a proposal for life insurance and I respectfully endorse the *dictum*:

> "The reasonable man postulated by cases, would not, in my opinion, consider the moral hazard as important in the context of an application for life insurance, as would be the case with, e.g. fire insurance. With life insurance the risk under consideration relates to the state of health of the person concerned, and to factors which may endanger his life. It is to my mind far-fetched to suggest as counsel for the appellant did, that disclosure of the insolvency of the deceased might have prompted the appellant to investigate the circumstances of the moral sequestration to find out if they reveal something adverse to the moral integrity of the deceased, or which could bear on the risk or the possible loading of the premium."[22]

[161] I conclude then that although I found that plaintiff should have disclosed that she had taken medicine and that she had consulted a doctor, a reasonable man in possession of the relevant facts would not conclude that the undisclosed information was of such a nature as to likely to have materially affected the assessment of the risk. Defendant was accordingly not entitled to repudiate the agreement.

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[19] Israel Bros. v Northern Assurance Co and the Union Assurance Co (1892) 4 SAR 175
[20] Munns and Another v Santam Ltd (supra)
[21] 1990 (3) SA 966
[22] At 968E-G

Disability

[162] The issue of disability remains to be considered next.

[163] According to the minutes of the second Rule 37 conference to be found in tab "A", page 103, of the bundle of documents, the parties agreed in paragraph 1.2 as follows:

> "Plaintiff bears the onus to prove her disability but the parties agree that according to the experts of both sides she is disabled for her own occupation as tour guide/bus driver. The only issue remaining in this context is whether she is able to work in a similar occupation as defined in the policy."

[164] I could not find the definition of “similar occupation” in the policy. So I take it that it must have its ordinary meaning, which according to the Concise Oxford Dictionary, 10th edition, page 1337, is defined as “of the same kind in appearance, character or quantity, without being identical”. In the context of the present matter, I would accept that a similar occupation should be understood to mean an occupation of the same kind in character as a tour guide to which plaintiff could reasonably be expected to apply her knowledge, qualification and experience, provided that the remuneration is not significantly less than her previous earnings.

[165] In an attempt to prove the remaining issue, as previously noted, plaintiff testified and called Ms Schlusche. The evidence of both the plaintiff and Ms Schlusche has been presented in the summary of evidence. At the pain of being repetitive, it essentially amounted to this that given plaintiff’s disability; the pain that she

experiences; her lack of administrative as well as computer skills; her outdoor outlook, there was virtually no occupation similar to tour guide/bus driver that she could do.

[166] Defendant led the evidence of Dr Coetzer who in the end and fairly conceded that he did not possess the expertise to testify about skills necessary for alternative occupation for plaintiff as well as Mr Jankowski.

[167] Apart form establishing that an average person may be able to acquire computer skills in three days, Mr Jankowski's evidence did not contribute much to the enquiry.

[168] Defendant also gave the summary of expert opinion by one Dinette Venter who was supposed to have testified on this aspect of the case but this person in the end was not called and no explanation was given in this regard.

[169] It will be recollected that the evidence with regard to plaintiff's income was that plaintiff earned between N$10000 and N$15000 a month depending on whether she did what she referred to as a specialised tour or not. Her estimate of the income was in essence corroborated by the evidence of Ms Schlusche who appears to me to have had intimate knowledge of the tourism industry in this country. Counsel for defendant submitted that plaintiff's income had not been established. Counsel referred to tax returns for the relevant period as well as to plaintiff's bank statement, which did not reflect income that plaintiff claimed to have earned. While I agree that the tax returns and other instances detailed by Mr Frank clearly cast a shadow on plaintiff's credibility

- which may explain why an attempt appeared to have been made to withhold the tax returns from the court by stating, *inter alios*, that plaintiff did not render tax returns during the relevant period - I am nevertheless persuaded that Ms Schluche's evidence puts beyond doubt the level of income plaintiff commanded before disability. Ms Schlusche appeared to me to be a fairly independent witness who did not appear to have taken personal interest in the predicament that plaintiff found herself in when compared, for example, to Dr Maritz, who at some point appeared to have lost sight of objectivity and in effect became a character witness for plaintiff as exemplified by a rather dramatic statement she made just shortly after counsel for defendant had finished cross-examining her. I do not understand Mr Frank to level any criticism at Ms Schlusche as witness.

[170] Now Ms Shlusche's further evidence on the aspect of 'similar occupation' and in recapitulation, was that the occupation that came closest to a tour guide would be a nature conservationist. For plaintiff to become a nature conservationist she would require training. Ms Schlusche did not testify about salary structures of nature conservationists. As previously mentioned, plaintiff does not possess the skills of tour processors who on the evidence of Ms Schlusche, appear to be highly trained individuals who command between N$5000 and N$8000 a month. Even if she had such skills, it would be apparent from Ms Schlusche's evidence that plaintiff would have had to undergo a substantial fall in her income. It would be artificial to argue that plaintiff could be taken up in an administrative position in a tour operator or travel agency in the face of what I consider to be objective evidence of Ms Schlusche pointing to the lack of administrative and computer skills on the part of plaintiff. Given

her age and outdoor outlook as well as her disability it cannot reasonably be expected of plaintiff to acquire the requisite administrative skills so as to be able to look for an administrative position in a tour operator's office or travel agency.

[171] For all those reasons I find that plaintiff has discharged the onus on a balance of probabilities that she is totally and permanently unable to engage in an occupation similar to a tour guide/bus driver.

[172] Mr Frank raised other points of criticism, including specific instances that he argues point to the lack of credibility on the part of plaintiff. Likewise Mr Coleman raised a number of specific points. I mean no disrespect to counsel if I do not deal with those points individually. I must point out though that in coming to the conclusions I have arrived at in this case, I considered all of them. The need to avoid prolixity and to curtail the already overburdened judgment necessitated that not every conceivable point raised, be it factual or legal, be dealt with individually.

Conclusion and costs

[173] In the result I have found that defendant did not discharge the onus of proving on the balance of probabilities that the allegations that plaintiff failed to disclose materially affected the risk seen from a point of view of a reasonable man and prudent person so as to be entitled to reject the claim and repudiate the agreement. Plaintiff, on the other hand, discharged the onus on a balance of probabilities of proving that she was disabled for a similar occupation and that it was entitled to the judgment in the sum agreed upon in the agreement entered into between the parties.

[174] Mr Coleman submitted, based on the evidence when defendant would have paid plaintiff had the claim been admitted that should plaintiff be successful, interest should run from a period about ten days from the date defendant addressed the first letter to plaintiff advising her of the repudiation of liability. This is justified.

[175] Mr Coleman furthermore urged for a special costs order on the basis of the argument, if I understand it correctly, that the way defendant presented its case by shifting the goal posts as the evidence emerged amounted to an abuse of the court process. Moreover, so the argument ran and again if I understand it correctly, defendant should in effect be penalised for failing to call its expert witness that it had announced it would call. I do not consider that such an order would be justified in the circumstances of this case. There has been a shifting of positions on both sides and while an inference may be drawn from the failure to call the expert witness, that in itself is hardly a ground for a punitive costs order. I would accordingly decline to make such an order.

Order

[176] In the result I make the following order:

1. Judgment is entered in favour of the plaintiff in the amount of N$500 000,00 plus interest on the aforesaid amount at the rate of 20% per annum calculated from 11 September 2001.

2. Defendant is directed to pay plaintiff's costs.

3. In view of plaintiff’s insolvency and in terms of the agreement entered into between counsel representing the respective parties payments are to be made to plaintiff’s trustees, Messrs Investment Trust.

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SHIVUTE, JP

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COUNSEL FOR THE DEFENDANT: MR. T.J. FRANK
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