REPORTABLE

CASE NO. SA 22/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHANNEL LIFE NAMIBIA (PTY) LTD **APPELLANT**

And

GUDRUN OTTO **RESPONDENT**

CORAM: Maritz, JA, Strydom, AJA *et* Chomba, AJA.

Heard on: 26/03/2008

Delivered on: 15/08/2008

APPEAL JUDGMENT

STRYDOM, AJA: [1] The appellant is a long term insurance company which, on the 13th May 1999, concluded an insurance contract with the respondent in terms of which life cover was granted to the respondent as well as a disability benefit, payable in a capital sum, on the total and permanent disablement of the life insured. For the sake of convenience I will refer herein to the parties as they appeared in the Court *a quo.*

[2] On the 12th June 2001 the plaintiff, who earned her keep as a freelance tour guide, was diagnosed with a disk degeneration of parts of her lumbar spine and extensive degeneration to her spine as a result of which she was incapacitated to continue with her work as a tour guide.

[3] In terms of her contract of insurance with the defendant, plaintiff submitted a claim for payment of the capital disability benefit in the amount of N$500,000.00. This claim was submitted on 20 August 2001. By letter dated 10 September 2001, the defendant informed the plaintiff that her claim was not successful. She was further informed that medical reports in the possession of the defendant indicated that there was material non-disclosure by her at the time of application for the life insurance. The letter continued to state that depression and anxiety have long been a major concern of underwriters, and if there had been a history of depression, no disability benefits would have been offered.

[4] Attempts were made by plaintiff to bring about a change of attitude by the insurer and further medical reports were submitted. However, by letter dated 6 December 2001, the defendant re-affirmed its previous decision to repudiate the claim as a result of material non-disclosures by the respondent at the time when application was made for insurance. A further reason was added to that previously stated namely, that the plaintiff received anxiolitic therapy (Alzam) on a number of occasions prior to the application for insurance and, had the defendant been informed of this, it would not have granted disability benefits.

[5] Having reached a stalemate in the negotiations, the plaintiff issued summons for payment of the amount of N$500,000.00 plus interest and costs.

[6] After a lengthy trial where both parties called expert witnesses in regard to various issues, the Court *a quo* found for the plaintiff in the amount claimed in the summons as well as interest and costs.

[7] The defendant's appeal is against the whole judgment of the Court *a quo* and the order of costs granted by the Court. In this Court Mr. Heathcote now appeared on behalf of the defendant whereas Mr. Coleman, who also appeared on behalf of the plaintiff in the Court *a quo*, again represented the plaintiff.

[8] Before dealing with the merits of the appeal there are three preliminary issues which must be addressed. The first is an application by the defendant to amend its plea. The second and the third issues are applications for condonation by the defendant.

[9] In regard to the first issue the Court, after deliberation, dismissed the application with costs and intimated that it would provide its reasons when delivering its judgment. In regard to the second and third issues the Court allowed counsel to address argument together with their arguments on the merits of the appeal. Having heard full argument on these issues I am of the opinion that it would be appropriate for me to now also deal with the applications for condonation, more particularly also because Mr. Coleman argued that, giving the provisions of Rule 6(5) of the Supreme Court Rules, the failure of an appellant to

file its record timeously has the effect that the appeal is deemed to be withdrawn which meant that no condonation could be granted by the Court. If Mr. Coleman is correct it follows that that would be the end of this appeal.

[10] Further to the application to amend its plea the Court, after hearing argument, dismissed the application and issued the following order:

> "1. That the appellant's application to amend paragraph 3.2.1 of its amended plea by the insertion of the words 'and stress' immediately after the word 'anxiety' is refused with costs.
>
> 2. That for purposes of taxation it is noted that argument in the application took up 45 minutes of the Court's time."

[11] The application for an amendment, as set out above, was mooted by Mr. Heathcote in the penultimate paragraph of his Heads of Argument, a somewhat extraordinary way of dealing with such an application. Nevertheless counsel was allowed to move his application which was mainly based on the submission that the issue of stress was fully canvassed at the trial and would therefore cause the plaintiff no prejudice if allowed.

[12] Mr. Coleman objected strenuously to the application. He denied that the issue of "stress" was fully canvassed at the trial and counsel further pointed out that other additional evidence would have been led by plaintiff had the amendment been timeously moved during the trial.

[13] This Court agrees with Mr. Coleman. It is trite that a party can apply for an amendment of his or her pleadings, even at the late stage when the matter is on appeal. In *de Villiers v de Villiers,* 1947 (1) SA 264 (CPD), Ogilvie Thompson, AJ, (as he then was) stated the rule as follows on p 264-265:

> "Although somewhat unusual, amendments of pleadings can certainly be made on appeal, and there is a good deal of authority to support such amendments; but the Court will only grant an amendment on appeal if it be satisfied that the amendment will not occasion prejudice to the other side; and in the ordinary course such prejudice will obtain if the subject-matter now sought to be introduced by the amendment was not canvassed in the court below."

[14] The amendment sought in the above case concerned an alternative cause of action to be introduced by the appellant. The Court refused the application and, referring to the intended amendment, stated that it would involve further investigation of a number of matters. (See further *British Diesel Ltd v Jeram & Son,* 1958 (3) SA 605 (N) and *Desai v NBS Bank Ltd,* 1998 (3) SA 245 (N).)

[15] Mr. Heathcote submitted that the issue of stress was common cause between the parties at the trial and was fully canvassed. He submitted that in the circumstances the amendment could not cause the plaintiff any prejudice.

[16] I agree with Mr. Heathcote that the issue of stress was mainly the illness for which the respondent was treated, and as such was common cause. For example, Dr. Maritz, the expert witness called by the plaintiff, stated that stress was something which is common to all people and most people experienced

stress at some or other time during their lifetime. It seems that she was of the opinion that stress by itself was not something which should cause undue alarm.

[17] Dr. Coetzer, the expert called by the defendant, had much to say about stress and during cross-examination he expressed the opinion that stress would be serious if the person suffering from it cannot cope by him- or herself and needed medical treatment to rid him- or herself thereof.

[18] The amendment now sought by Mr. Heathcote is not a formal amendment of some or other allegation contained in the plea of the defendant. The purpose of the amendment is to augment the defendant's defence to the extent that stress would now also feature, first of all as a condition which should have been disclosed by the plaintiff when she made application for the insurance and, secondly, that this non-disclosure would be a further basis on which the appellant could now disclaim payment of the insurance policy.

[19] None of the plaintiff's witnesses dealt with stress in this context. They dealt with stress in general terms as something which has a common occurrence and to which most people succumb at some or other time in their lives. The conclusion, rather belatedly came to by Dr. Coetzer, that stress combined with Alzam would also lead to a decline of insurance, was not even put to the expert witness called by the plaintiff and I agree with Mr. Coleman that, had the plaintiff been alerted to the stance now taken by the appellant on appeal, it would have led further evidence in that regard and would have dealt with the issue on that basis. Consequently the subject-matter of the amendment now sought by the defendant

was not fully canvassed in the Court *a quo* and to allow the amendment at this stage would prejudice the plaintiff.

[20] The two applications for condonation arose in the following way. In regard to the record containing the evidence given at the trial, the legal practitioner of the defendant explained that notice of appeal was filed on 26th June 2007. On the 13th July the legal practitioner handed the office file to his erstwhile secretary with written instructions for it to be given to a clerk under attachment to do the necessary to obtain copies of the record for filing with the Registrar of the Court.

[21] After informing himself of the relevant Rules of this Court the practitioner made a note in his diary that the record was to be filed not later than 26th September 2007. An extract from the diary was attached which contained such note. The practitioner further stated that it now appeared that he had misinterpreted the relevant rule as it obliged the appellant to file copies of the record within three months of the handing down of the judgment of the Court and not three months after lodging of the appeal as he read the Rule.

[22] This was not the end of the practitioner's woes. It turned out that the secretary, to whom he had handed the instructions for the articled clerk, never passed those instructions on before she left the firm. All this came to light when the legal practitioner for the plaintiff started to implement steps to execute on the judgment which had been handed down on 28th May 2007.

[23] In his affidavit the legal practitioner dealt extensively with the merits of the appeal and submitted that the appeal had a reasonable prospect to succeed.

[24] The second application for condonation also dealt with the record of appeal. When counsel for the appellant started to prepare heads of argument he realised that the exhibits which had been handed in at the trial did not form part of the record filed with the Registrar. The documents were then obtained from the plaintiff's legal practitioner, and after copies had been made, the documents were bound in four volumes and filed with the Registrar. From the Registrar's stamp this seems to have been the 22nd February 2008, just about five weeks before the appeal was due to be heard.

[25] The plaintiff opposed both applications. In regard to the first application it was contended that the Rule of Court was clear and that there was no room for a misinterpretation, especially not where the legal practitioner of the defendant was a senior attorney with many years of experience. In regard to the second application respondent's legal practitioner expressed doubt as to the veracity of the explanation given.

[26] Apart from the question whether, in the circumstances, the Court should come to the relief of the defendant and grant condonation, a point *in limine* was raised by Mr. Coleman in terms whereof counsel submitted that an appeal which was deemed to have been withdrawn according to Rule 5(6)(b) could not be condoned by the Court.

[27] The Rules of the Court relevant to Mr. Colman's argument are Rules 5(5)(b) and (c) and 5(6)(a) and (b), These Rules provide as follows:

"5(5) After an appeal has been noted in a civil case the appellant shall, subject to any special directions issued by the Chief Justice-

(a) …..

(b) in all other cases within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required within three months after an order granting such leave;

(c) within such further period as may be agreed to in writing by the respondent,

lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be necessary: Provided that –

(The proviso is not relevant to the issue.)

5(6)(a) If an appellant who has withdrawn his or her appeal or has failed to lodge the record of the proceedings in the court appealed from, or, if an appellant is in terms of paragraph (b) deemed to have withdrawn his or her appeal, a respondent who has noted a cross-appeal may, within 21 days of the date of receipt by the respondent or his or her attorney of notice of withdrawal by the appellant or of the date upon which the appellant is so deemed to have withdrawn his or her appeal, as the case may be, notify the registrar in writing that he or she desires to prosecute the cross-appeal, and such respondent shall thereupon for the purposes of sub-rule (5) be deemed to be the appellant, and the periods prescribed in paragraphs (a) and (b) thereof shall be calculated as from the date on which the appellant withdrew his or her appeal or on which the appeal is so deemed to have been withdrawn.

(b) If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his or her attorney for consent to an extension thereof and given notice to the registrar that he or she has so applied, he or she shall be deemed to have withdrawn his or her appeal."

[28] If I understood the argument of Mr. Coleman correctly, he submitted that the provisions of Rule 5(6)(b) are not only applicable to instances where there is a cross-appeal but that it also apply to those instances where an appellant, in terms of Rule 5(5)(b), failed to file the record of appeal within the 3 months required by the rule, or such further extension allowed by a respondent. Such failure would then, so it was argued, result that the appeal is deemed to be withdrawn and once it is withdrawn the matter would be out of the hands of the Court.

[29] At this stage it is appropriate to state that prior to Independence the Supreme Court of South West Africa was a division of the Supreme Court of South Africa and as such it applied, with the other Provincial divisions of the Supreme Court, the Uniform Rules. After Independence new rules were promulgated for the High Court of Namibia but, with few exceptions, those Rules were similar to those applied before Independence.

[30] As far as the Supreme Court of Namibia was concerned that Court was only established on Independence as prior to that appeals from the Supreme or High Court of South West Africa either went to the Supreme Court of South Africa (Appellate Division) or was heard by the Full Bench of the Supreme or High Court of South West Africa. After Independence appeals to the Full Bench continued for some time but was then done away with and, in regard to appeals from the High Court, the Supreme Court was then the only Court of Appeal. Therefore, although Rules for the Supreme Court of Namibia were only drafted and promulgated after Independence, these rules were again very similar to that of the Appellate Division of the Supreme Court of South Africa.

[31] This short history of the Rules of our Courts is necessary to show that when the then Chief Justice of Namibia promulgated the Rules of the Supreme Court of Namibia by Government Notice No. 56 of 8th October 1990, and modelled those Rules on that of the Appellate Division of the Supreme Court of South Africa, it can be accepted that he was well aware of how those Rules were applied and interpreted by that Court. In fact until the new rules were promulgated on 8th October 1990 the rules of the Appellate Division of South Africa were also the rules of the Supreme Court of Namibia. (See Article 138(3)(e) of the Constitution of Namibia).

[32] As our Rule 5(6)(a) and (b) is almost identical to Rule 5(4)(bis)(a) and (b) of the Rules of the Appellate Division of the Supreme Court of South Africa, it would, for the reasons set out above, be most instructive to see how that Court interpreted that rule, which was promulgated during 1969.

[33] Before the amendment, which brought about Rule 5(4)(bis(a) and (b), cases such as *Vivier v Winter; Bowkett v Winter,* 1942 AD 25 and *Bezuidenhout v Dippenaar,* 1943 AD 190 show that failure to file an appeal record on time, or to give security within the time laid down by the Rules, had the effect that the appeal lapsed, even though there was no specific rule to that effect. It did not mean the end of the appeal and it could again be reinstated after application for condonation was made by the appellant and granted by the Court.

[34] The interpretation of sub-rule (4)(bis)(a) and (b) was specifically dealt with in the case of *Santam Versekeringsmaatskappy Bpk v Pietersen,* 1970 (4) SA 215 (A.A.). In this matter counsel for the defendant/respondent submitted, in his heads of argument, that the matter could not be heard by the Court due to the provisions of the sub-rule and it was there similarly argued that rule 13 could not be applied. (Rule 13 was the equivalent of our Rule 18 whereby the Court could condone non-compliance of the rules on good cause shown). However, during argument counsel conceded that the point was not a good one. The Court nevertheless dealt with the issue and stated as follows on page 217 C-G:

> "Dit is baie duidelik dat subreël (4)(bis) ingevoeg is in Reel 5 om 'n respondent wat 'n teenappel aangeteken het, 'n geleentheid te gee om, indien hy dit verlang, die aanhoor van die teenappèl te bespoedig in twee gevalle (1) waar die appellant die appél daadwerklik teruggetrek het en nie die stukke ingedien het nie en (2) waar dit geag word uit hoofde van die bepalings van subreel (4)(bis)(b) dat hy dit teruggetrek het. Die verweerder moet dan binne 21 dae vanaf ontvangs deur hom of sy prokureur van kennisgewing van daadwerklike terugtrekking deur appellant of vanaf die datum wanneer dit geag word dat hy (appellant) dit gedoen het, die Griffier van hierdie Hof in kennis stel dat hy die teenappèl wil voortsit. Daarna word hy geag vir die doeleindes van subreel (4) die appellant te wees en moet hy die stukke inhandig binne die periodes genoem in subreel (4)(a) en (b) bereken vanaf die datum waarop die appèl daadwerklik teruggetrek is of geag word teruggetrek te wees. Subreel (4)(bis)(b) is slegs ingevoeg om in 'n geval waar die appél nie daadwerklik teruggetrek is nie, die datum te bepaal waarvandaan die periode van 21 dae en die periodes genoem in subreel (4)(a) en (b) bereken moet word. Dit was nooit bedoel om in 'n geval soos die onderhawige van toepassing te wees nie. In so 'n geval, d.w.s. in 'n geval waar 'n appellant nie betyds die stukke ingehandig het nie, loop hy wel die gevaar dat die appèl van die rol geskrap kan word maar hy is altyd geregtig om vir genoegsame redes aansoek om kondonasie van sy versuim te doen in terme van die bepalings van Reel 13.
>
> (It is quite clear that sub-rule (4)(bis) was inserted in Rule 5 to give a respondent who had noted a cross-appeal, an opportunity, if he so wishes, to expedite the hearing of the cross-appeal in two instances (1) where the appellant has actually withdrawn the appeal and did not file the record and (2) where it is deemed in terms of the provisions of sub-rule 4(bis)(b)

> that he has withdrawn it. The defendant must then within 21 days from receipt by him or his attorney of a notice of actual withdrawal by the appellant or from the date from which it is deemed that he (appellant) has done so, give notice to the Registrar of this Court that he desires to prosecute the cross-appeal. Thereafter he is deemed for the purposes of sub-rule (4) to be the appellant and he must file the documents within the periods stated in sub-rules (4)(a) and (b) calculated from the date upon which the appeal was actually withdrawn or was deemed to have been withdrawn. Sub-rule (4)(bis)(b) was only inserted to cover the instance where an appeal was not actually withdrawn, to determine the date from which the periode of 21 days and the periods stated in sub-rule (4)(a) and (b) should be calculated from. It was never intended to apply to an instance such as the present case. In such an instance, that is where an appellant failed to file his documents timeously, he may run the risk that the appeal may be struck from the roll but he is always entitled to apply, for good cause shown, that his failure be condoned in terms of the provisions of Rule 13.)" (My free translation.)

[35] As far as I could determine this interpretation of the Rule was constantly followed by the Appeal Court of South Africa. (See in this regard *Moraliswani v Mamili,* 1989 (4) SA 1 (AD), *Court v Standard Bank of SA Ltd; Court v Bester NO and Others,* 1996 ((3) SA 123 (AD); *Mamabolo v Rustenburg Regional Local Council,* 2001 (1) SA 135 (SCA) and *Uitenhage Transitional Local Council v South African Revenue Service,* 2004 (1) SA 292 (SCA)).

[36] It is so that in the case of *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd,* 1981 (1) SA 1040 (AD), Wessels, JA, expressed the opinion that at an appropriate time the Court might well reconsider the circumstances in which the provisions of Rule 5(4)(bis)(b) should apply. This was said with reference to the interpretation of the Rule in the *Santam v Pietersen*- case, *supra.* However, the cases mentioned by me in the preceding paragraph, with the exception of the *Santam*-case, were all delivered subsequent to the *Waikiwi*-case and they all confirmed the interpretation set out in the *Santam v Pietersen*-case.

[37] I respectfully agree with the interpretation of the Rule by the Appellate Division of South Africa and, seeing that our Rule 5(6)(a) and (b) is almost identical to that of the Appellate Division of South Africa, I am not persuaded that our Rule is amenable to the interpretation contended for by Mr. Coleman. More so as our Rule was clearly modelled on the South African Rule and at the time the interpretation given to that Rule was clear.

[38] If Mr. Coleman's interpretation of the Rule is accepted it would mean that an appellant may be non-suited without him having been amiss in any way and solely because of the neglect or inadvertence of his legal practitioner, and no matter how deserving his case may be, the Court would stand by helplessly to come to his relief. In my opinion it could never have been the intention to close the doors of the Court on an appellant under circumstances over which the Court has no control. To do so would amount to an abdication of the Court's powers to regulate its own affairs and would further also amount to the Court divesting itself of its own jurisdiction, something which, in my opinion, the Court cannot do.

[39] I have therefore come to the conclusion that the point taken by Mr. Coleman cannot succeed. As far as our Rule 5(6)(a) and (b) is concerned I find that sub-rule (b) apply to regulate the period within which a cross-appeal is to be prosecuted and that it does not apply to the present instance where an appellant failed to deliver the record of appeal timeously as provided for by Rule 5(5). In such an instance the appeal is deemed to have lapsed and may be struck from the roll. However, an application for condonation may be brought in terms of Rule 18

and, on good cause shown, the failure to comply with the Rules may be condoned and the appeal be re-instated.

[40] Because of my conclusion above it becomes necessary to consider the two applications for condonation and re-instatement of the appeal. In regard to the initial delay of the record I must agree with Mr. Coleman that the provisions of Rule 5(5) are clear and that it leaves no room for the mistaken interpretation of the legal practitioner for the defendant.

[41] In the present instance sub-rule (5)(b) is the rule applicable to the lodging of the record in this instance. A reading of sub-rule (5)(a) makes it also clear that an appeal must be lodged within a certain period after **judgment** or **order** was granted or after the date upon which an **order** for leave to appeal was granted. Nowhere in the Sub-Rule is there any reference to the date upon which an appeal was lodged and consequently the explanation by the legal practitioner as to how it came that he diarized the date of 26 September 2007 seems to me to be evidence of neglect on his part to apply himself properly to the provisions of the Rule. However I accept that the legal practitioner acted *bona fide* and that he was in fact under the impression that the D-date for filing the record was the 26th of September.

[42] Thereafter the above mistake was followed by the neglect of the secretary who failed to pass on the instructions of the legal practitioner to the articled clerk who was not involved in the trial action. I think that one can normally accept that a secretary would comply with instructions. However, in this instance there was

present a circumstance which took the matter out of the ordinary which should have caused a prudent practitioner to make sure that his or her instructions were carried out, and that was that the secretary left the employ of the firm of legal practitioners shortly after the instructions had been given. Although the failure to find out whether the instructions were passed on to the articled clerk was perhaps not so important, something else happened which I think is blameworthy of the legal practitioner's conduct. That is that although the date of the 26th September came and went the practitioner did nothing to find out whether the record had been lodged. He was only alerted to the failure to lodge the record when the legal practitioners of the plaintiff started to take steps to implement the judgment which they had in favour of their client.

[43] After the record was lodged, and about five weeks before the appeal was due to be heard, it was discovered that the record, which was previously filed, was not complete. None of the documentary exhibits, handed in during the trial, formed part of the record. The result was that at this late stage the record was swollen with four more volumes of documents. The explanation given for this was that the office file did not contain these documents and, seemingly, because the person who attended to the filing of the record was not involved in the matter, she did not realise that these documents, or for that matter any documents, were handed in at the trial and were now missing from the record. Again a little diligence would have discovered that the record was not complete and that steps should have been taken, at a much earlier stage, to locate the documents and to file them as part of the record.

[44] Although I have found that in regard to both applications to apply for condonation there was a failure on the part of the legal practitioners of the defendant to apply due diligence in dealing with the matters in hand and that this caused a delay in the hearing of this appeal, it cannot be said that that delay was inordinate. Even if everything was done in terms of the time frames, provided by the Rules, it is unlikely that the matter would have been ripe for hearing before it was actually heard by this Court during the March/April term for the hearing of appeals. It can therefore not be said that the delay caused by the non-compliance with the rules was inordinate and that the plaintiff was unduly prejudiced in that regard.

[45] In *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie,* 1969 (3) SA 360 (A) at 362 F-G, Holmes, JA, stated that the factors which a Court would consider in deciding whether to grant condonation are the importance of the case, prospects of success, the respondent’s interest in the finality of the case, the convenience of the Court and the avoidance of unnecessary delay.

[46] I have already dealt with the issue of delay and have come to the conclusion that there was not an inordinate delay in this instance. The finality of the judgment is of course of great importance to the parties but the weight given to this factor, so it seems to me, would also to some extent be determined by the length or shortness of the delay. There is also no doubt in my mind that this case is of importance to both parties. The amount involved in this matter is substantial. Regarding the prospects of success I must point out that the matter was not clear

cut and that the principles involved, although not novel in all respects, were intricate and not easy to decide. All in all I am of the opinion that this is a matter where the Court should grant condonation and then proceed with the merits and decide that separately.

[47] Before doing so I must point out that at each session of the Supreme Court there are various applications for condonation because of non-compliance with some or other of the Rules of the Court. Many of these applications could have been avoided through the application of diligence and by giving the process a little more attention. Practitioners should inform themselves of the provisions of the Rules of the Supreme Court and cannot accept that those Rules are the same as that of the High Court. It further seems that it has become the practice of legal practitioners to leave the compilation of the record entirely in the hands of the recording company. That, however, does not relieve an appellant, who is responsible for the preparing of the appeal record, from ensuring that the record is complete and complying with the Rules of this Court.

[48] The past session again saw five to six records which were not complete. This is an inconvenience to Judges who must prepare for the coming session and further places a burden on the staff of the Court to get practitioners to rectify the failures. All this add to the costs of appeal and the time is fast approaching where the Court will have to either refuse to hear such matters or order the legal practitioner responsible to pay the unnecessary costs occasioned by his or her failure.

[49] In regard to the record of appeal, practitioners must check the record to ensure –

(i) that there are no pages missing from the record;

(ii) that all the relevant documentary exhibits are before the Court;

(iii) that there are no unnecessary documents included in the record, such as heads of argument used in the Court *a quo* and arguments raised in that Court, unless such heads of argument are relevant to some or other aspect of the appeal, e.g. to show a concession made by the opposite party;

(iv) that the record complies in every respect with the provisions of Rule 5(8). (9), (10), (11), (12), (13) and (14) of the Rules of the Supreme Court.

(v) Where a litigant in an appeal brings an application before this Court, e.g. an application for condonation, and that application is opposed, the party bringing the application is responsible to bind the documents relevant to the application and to provide a proper index.

[50] I now turn to the merits of the appeal.

[51] The contract of insurance on which the plaintiff’s claim is based also covered her in the event of permanent disablement to continue her present occupation or an occupation similar to that. The policy defined "total and permanent disablement" as follows:

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

[52] In her particulars of claim the plaintiff stated that on the 12th June 2001 she was diagnosed with a disc degeneration of the L3/4 and L4/5 of the lumbar spine and extensive degeneration to the spine. As a result thereof the impairment of the plaintiff was of a permanent nature in that she was no longer able to continue with her work as a tour guide/bus driver. She stated further that she had at all relevant times complied with her obligations in terms of the written contract of insurance and more particularly that she regularly paid the premiums as required by the policy. As a result of her being diagnosed with a permanent disablement, she gave notice of her claim to the defendant. However this claim was rejected by the defendant.

[53] Further Particulars were requested by the defendant as a result of which plaintiff provided the defendant with copies of the letters written by the defendant's employee in which he repudiated the plaintiff's claim. The relevant parts of these letters read as follows:

"10 September, 2001

Dear Miss Otto,

Policy Number: ZU490731

Reference is made to your claim for disability on the above policy.

The medical reports in our possession indicate that there was material non-disclosure at the time of application for life insurance.

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.

We will amend the policy accordingly."

"06 December, 2001

Dear Miss Otto,

Policy Number: ZU490731

Reference is made to your claim for disability benefits on the above policy and the additional medical reports submitted.

We regret to advise that after reconsideration of all the medical reports, that our previous decision to repudiate the claim is justified.

The medical reports in our possession reaffirm that there was material non-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."

[54] In its plea the defendant admitted the agreement between the parties and then, in paragraphs 3.2 to 3.5, set out its defence to the plaintiff's claim. These paragraphs read as follows:

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

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.

3.3. The plaintiff failed to inform the defendant of the aforesaid facts.

3.4. The said facts materially affected the risk in that with 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.

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

[55] In an application for further particulars to defendant's plea the plaintiff requested, *inter alia*, the following information, namely:

"1.7 On what basis in terms of the written agreement and/or otherwise is the allegation made that the Plaintiff's alleged suffering from depression and anxiety forms the subject matter of the written agreement? Full particulars are required.

1.8 On what basis in law and/or otherwise does the Defendant rely for the allegation that the Plaintiff had a duty to inform the Defendant of the alleged facts relating to depression and anxiety.

1.9 Without derogating from the generality of the aforesaid request the Defendant is requested to specify the following:

(a) In terms of which clause of the agreement concluded between the parties did the Plaintiff have a duty to inform the Defendant in the event that she may have suffered from depression and anxiety?

(b) In respect of which clause of the agreement did the Plaintiff have a duty to inform the Defendant in the event that she received prescribed anxiolytic therapy?

(c) When did the Defendant represent to the plaintiff that the latter had a duty as set out hereinbefore?

(d) Where was such representation made?"

[56] The defendant replied as follows to the above request:

"1.7 Plaintiff had a duty to disclose the said condition prior to the conclusion of the agreement entered into between the parties.

1.8 See 1.7 above. Plaintiff had this duty to disclose in view of the fact that the conditions she suffered from was material to the risk she sought to insure.

1.9 Plaintiff was specifically apprised of the duty to disclose by virtue of clauses 13.06(f), 13.07, 13.09 and 21 of the application form which she completed prior to the agreement being entered in. Copies of the relevant portion of the proposal form is annexed hereto marked annexures "D1, 2 and 3". As is further evident from clause 21 above plaintiff warranted her answers.

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

[57] The plaintiff, thereupon, filed a replication in which she replied as follows to paragraph 3 of the defendant's plea:

"1. The Plaintiff denies that she had a history of depression and anxiety and puts the defendant to the proof thereof.

2. In any event, the Plaintiff pleads that Section 54(1) of the Long-term Insurance Act, l998 (Act 5 of 1998) applies to her agreement of insurance and that by virtue of the provisions thereof the Defendant cannot avoid the agreement merely because of the alleged non-disclosure.

3. In particular the Plaintiff denies that the failure to inform the Defendant of the alleged depression and use of anxiolyptic (sic) therapy was of such a nature as to be likely to have materially affected the assessment of the risk under the management of insurance and puts the Plaintiff to the proof thereof.

4. In the alternative to paragraph 3, and only in the event that the Court holds that the alleged non-disclosure to have materially affected the assessment of the risk under the agreement of insurance, the Plaintiff asserts that it could only affect the determination of the premium payable for the insurance and tenders that the difference be set-off against her claim."

[58] During the trial, and after the plaintiff gave evidence, the defendant applied for, and was granted permission, to amend paragraph 3 of its plea. The following paragraph was then added to the defendant's plea, namely:

"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 Niewoudt on various occasions for feigned symptoms of anxiety and/or stress and/or sleeplessness."

[59] This addition to the plea of the defendant necessitated the plaintiff to amend her replication and she pleaded as follows to the new paragraph 3.2.3, namely:

"2.1. Plaintiff denies that she had the intent to be fraudulent, or dishonest in obtaining the prescriptions involved. She simply intended to assist her brother.

Plaintiff replicates that the information that she did not use all the prescriptions of Alzam obtained from Dr. Niewoudt reflects favourably on her insurability and defendant's defence falls away as a result thereof.

2.3 Furthermore, this information had no bearing on assessing the risk herein. Defendant is put to the proof that the said information would have affected the assessment of this particular risk adversely.

2.4 Reliance on these facts herein as a defence is vexatious and indicative of defendant's intention to avoid paying plaintiff's claim at all costs.

> 2.5 Persistence with the defence herein in light of these facts is equally vexatious."

[60] There was yet another amendment, this time to paragraph 1.9 of the defendant's Further Particulars where, after the word "form" in the paragraph, the following words were inserted, namely;

> "and clauses 2(g) and 2.4(b) of the confidential medical report"

[61] The issues which have crystalised from the pleadings were therefore as follows:

(a) The defendant admitted the agreement of insurance between the parties and therefore also its validity;

(b) The *onus* was therefore on the plaintiff to prove on a balance of probabilities her entitlement to claim and in order to succeed she had to bring her claim within the four corners of the agreement.

(c) If the plaintiff succeeds the *onus* would shift to the defendant to prove on a balance of probabilities its entitlement to repudiate the claim.

(See *Qilingele v South African Mutual Life Assurance Society,* 1993 (1) SA 69(A) at 74C; *Clifford v Commercial Union Insurance Co of SA Ltd,* 1998 (4) SA 150 (SCA)

at 155 E and *Liberty Life Association of Africa Ltd v De Waal en 'n Ander,* 1999 (4) SA 1177 (HHA) at 1182C).

[62] The Court *a quo* found that the plaintiff did indeed acquit herself of the *onus.* I see no reason to differ from this finding. The learned Judge *a quo* properly and fairly summed up the evidence of all the witnesses and I will therefore only refer to the evidence where necessary.

[63] During the trial it became clear that the experts on both sides were of the opinion that the plaintiff's disability was permanent and that it disabled her from following her present occupation as a tour guide/bus driver. They only differed as to the extent of that disability and as to whether the plaintiff would be able to take up different but similar work to what she was doing before.

[64] In regard to the plaintiff's ability to do other but similar work, the evidence led by the plaintiff dealt with various possible options such as working in the office of a tour operator, or with nature conservation or in a travel agency, and it was attempted to show that she either was not suited for this type of work, or that she would not be able to do the work as a result of her disability. Moreover it was attempted to show that such work was not similar to what she had been doing.

[65] The evidence showed that the work of a tour operator was an office job which required administrative skills and reasonable skills to operate a computer. In contrast to that, the work of a tour guide was to accompany the tourists on their travels and being able to inform them about the *fauna* and *flora* of Namibia

and to be knowledgeable about the Country, its people and its history. The work of a tour guide can be described as an outside job and the success or otherwise of a tour is very much in the hands of the tour guide. Plaintiff said that she was good at her work and enjoyed it.

[66] In this regard the plaintiff was corroborated by Mrs. Schlusche, who, since 1988 was involved in the tourist business as a tour operator. Mrs. Schlusche further testified that the work of a travel agency was quite different from that of a tour guide and substantiated her evidence with examples of what such work entailed. She also testified that there was no similarity between the work done at Nature Conservation and that of a tour guide and said that the former was no more than a booking office. The witness was able to compare the earnings of a clerk in the tour operator's office and that of a touring guide. According to her the plaintiff would at best earn a monthly salary of N$6000.00 as a tour operator, whereas she, as a touring guide, and depending on the tips she got, would earn between N$10,000.00 and N$15,000.00 per month. In regard to this discrepancy between what she earned as a tour guide and what she would earn as a clerk in the office of a tour operator, Dr. Coetzer, very candidly, testified that such a discrepancy would be a factor to determine whether such work could be described as similar.

[67] The Court *a quo* accepted the evidence of Mrs. Schlusche. She is obviously a person with wide experience of the various components of the tourist business who gave her evidence objectively and without a motive to particularly benefit the plaintiff. That, so it seems to me, was also accepted by Mr. Heathcote who did not offer any criticism of her evidence.

[68] In regard to her income as a tour guide the plaintiff testified that she had a turnover of N$15,000.00 or more per month. This included tips given to her. This evidence came in for severe criticism by Mr. Heathcote who pointed out that this income was substantially more than what was stated by the plaintiff in her income tax returns. There is no doubt that Mr. Heathcoat's criticism was justified. However, to her credit the plaintiff testified that her aunt completed her returns and, once she was aware of this situation, she went to see an accountant as well as a person at the revenue office.

[69] As far as plaintiff's income was concerned, the Court *a quo* found support for that evidence in the evidence of Mrs. Schlusche. Although Mrs. Schlusche could not give direct evidence of the income of the plaintiff it is clear from her evidence that the plaintiff was an exceptional tour guide who was highly in demand and whose evidence of her income fell within the range testified to by Mrs. Schlusche.

[70] In regard to the physical evidence of the plaintiff, she testified that because of her back she could not sit for long periods; that she must take regular pain killers and also injections when the pain became unbearable. It is also common cause that the disability from which the plaintiff is suffering is one which progresses with time. In this regard Dr. Maritz, the expert who testified for the plaintiff, stated that the last six months, presumably before the case started, the plaintiff's pain was such that it was necessary to give her at times schedule 7 drugs which have many side effects.

[71] Dr. Coetzer, who examined the plaintiff, some time before the court case started, was of the opinion that the plaintiff exaggerated the intensity of her pain. He was also of the opinion that the diagnosis that she should undergo a hip replacement was premature.

[72] Dr. Coetzer's opinion was based on measurements and tests applied by him, one such test was the Waddle test. Four of the five factors of the test proved positive which caused him to come to the conclusion that the plaintiff was exaggerating the intensity of her pain. However, as was also testified by the doctor, pain is not quantifiable. It was inevitable that much of the evidence given by Dr. Coetzer was to a certain extent speculative. It is common knowledge that some people have a higher pain threshold than others. Others are much more susceptible to pain. Similarly Dr. Coetzer held it against the plaintiff that she consulted a doctor when she was stressed and did not do something herself to relieve the situation. That, he said, was evidence that she could not cope by herself which, so it seems, was another way of saying that her stress condition was serious. But again it is well known that some people would consult a doctor for any ailment whereas others would only do so when the situation became serious, as was testified by Dr. Maritz. According to Dr. Coetzer the only reason why he agreed that the plaintiff was permanently disabled to continue her work as a tour guide was as a result of the hip replacement as that would preclude her from walking long distances.

[73] Dr. Coetzer's evidence is in contrast with the evidence of Dr. Maritz and the plaintiff. Dr. Maritz has seen the plaintiff over a long period and was able to testify

more particularly about the way the illness progressed from the first time she diagnosed it, an opportunity which Dr. Coetzer did not have. Dr. Maritz was initially under the impression that operative treatment would enable the plaintiff to continue in some occupation. This, namely operative treatment, later proved not to be a possibility.

[74] The plaintiff testified about her own illness. It was as a result of pain that the illness was diagnosed. Notwithstanding this she tried to continue her work in order to generate an income for herself. This also proved to be impossible. This is not the picture one has of a person that has no, or very little pain, or was exaggerating pain in order to cash in on a disability policy. The impression one has of her evidence is that she, for the past three or four years was not able to work and, as a result thereof, had no, or very little, income. Because of this situation she testified that she was dependent on the charity of other people. She walks with crutches and testified that she could not sit for any long period of time.

[75] The Court *a quo* accepted the evidence of the plaintiff and Dr. Maritz and came to the conclusion that the plaintiff was permanently disabled from working. A factor which the learned Judge *a quo* also took into consideration was the discrepancy of what the plaintiff was able to earn and what she would now be able to generate, if she was able to work, and concluded that she was also disabled to do similar work.

[76] I agree with the learned Judge. Judged on probabilities it seems to me to be highly improbable that a person, who was independent and was earning a high

income and who enjoyed her work interacting with other people, would feign pain and have to receive medical treatment and have to depend, as it were, on the charity of other people, if there was any possibility open to her to avoid such a situation.

[77] I am therefore satisfied that the Court *a quo* correctly concluded that the plaintiff had acquitted herself of the onus and had proven that she had been permanently disabled to do the work of a tour guide or work of a similar nature.

[78] According to the defendant's further particulars the defendant relied on non-disclosure by the plaintiff as set out in paragraph 3 of its plea and on the breach of the warranty given by the plaintiff when she completed the application form. (See paragraph 1.10 of the further particulars supplied by the defendant to its plea).

[79] As far as non-disclosure is concerned the defendant relied on the issues set out in paragraph 3 of its plea. These were:

1. That the plaintiff did not disclose at the time that she suffered from, or had a history, of anxiety and depression; and

2. That she received anxiolytic therapy (Alzam) on a number of occasions prior to her application for insurance.

[80] In the alternative to the above paragraphs the defendant raised the defence of "moral hazard" based on the plaintiff's evidence that she only used for herself

the prescribed Alzam on the first occasion and thereafter gave the pills to her brother.

[81] As previously stated, the plaintiff filed a replication to the plea of the defendant in which she invoked the provisions of section 54(1) of the Long-term Insurance Act, Act 5 of 1998 (the Act) and she denied that she had a history of depression and anxiety. In the alternative plaintiff stated that the non-disclosure, if accepted by the Court, only affected the determination of the premium payable for the insurance and she tendered that the difference be set off against her claim.

[82] Section 54(1) of the Act provides 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."

[83] Section 54(1) was obviously modelled on section 63(3) of the Insurance Act, Act 27 of 1943 of South Africa and, as was found by the Court *a quo*, section 54(1) virtually echoes the provisions of sec. 63(3) of Act 27 of 1943. Decisions based on the latter section and its interpretation would therefore be most relevant to the issues to be decided in this case.

[84] In the case of *Qilingele v South African Mutual Life Insurance Society,* 1993 SA (1) 69 (AD), the object of the enactment, in that instance section 63(3), was stated 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."

[85] Previous to the enactment a contract concluded on the basis of the truth of the information given in the application form was regarded as a warranty (See *Labuschagne v Fedgen Insurance Ltd,* 1994 (2) SA 228 (WLD) at 236D – 237D and *Clifford v Commercial Union Insurance Co of SA, supra, at 156I- 157D)* with the result that all answers given by an insured were material and even a trivial misstatement could give rise to a repudiation of the insurance contract. That result is no longer possible because of section 54(1) of our Insurance Act and section 63(3) of the Insurance Act of South Africa, Act 27 of 1943, and, whether warranted or not, only those answers which are likely to have materially affected the assessment of the insurance risk at the time of the policy's issue or renewal affect the validity thereof.

[86] It was common cause that paragraph 21 of the application form, completed by the plaintiff, contained a warranty as to the correctness and truth of the

information given by the plaintiff. It was specifically stated that such answers and information formed the basis on which the contract was concluded.

[87] The test of when particular information was material regularly formed the subject of discussion in cases over the years. In the leading case of *Mutual and Federal Insurance v Oudtshoorn Municipality,* 1985 (1) SA 419 (AD), Joubert, JA, after discussion of the relevant English decisions and various decisions of Courts in South Africa, formulated the test as follows at 435F to I:

> "What is the position in Roman-Dutch law? I am unable to find any support in the Roman-Dutch law for either the prudent or reasonable insurer test or the prudent or reasonable insured test. It is implicit in the Roman-Dutch authorities and also in accordance with the general principles of our law that the Court applies the *reasonable man* test by deciding upon a consideration of the relevant facts of the particular case whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums. If the answer is in the affirmative, the undisclosed information or facts are material. The Court personifies the hypothetical *diligens paterfamilias* i.e. the reasonable man or the average prudent person. (*Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA381 (A) at 410H – 411D). The Court does not in applying this test judge the issue of materiality from the point of view of a reasonable insurer. Nor is it judged from the point of view of a reasonable insured. The Court judges it objectively from the point of view of the average prudent person or reasonable man. This reasonable man test is fair and just to both insurer and insured inasmuch as it does not give preference to one of them over the other. Both of them are treated on a par."

[88] This test was since applied in the various divisions of the Supreme Court in South Africa and also on occasion in Namibia. (See the cases collected in the *Potocnik v Mutual and Federal Insurance Co Ltd,* 2003 (6) SA 559 (SECD) at 566E - F and *Wilke NO v Swabou Life Assurance Company* 2000 NR 23 at 45J - 46B).

[89] However, in the case of *Qilingele v South Africa Mutual Life Assurance Society*, *supra,* Kriegler, AJA, (as he then was), discussed the effect of section 63(3) and concluded that the situation was not akin to that discussed in the *Oudtshoorn Municipality* case. He further stated that, in applying the section, there was no room for the reasonable man test with its valued judgment. The distinction between the two tests were found to be that the *Oudtshoorn Municipality* case was concerned with common law non-disclosure whereas the test applied in *Qilingele* has to do with positive misstatement. The learned Judge formulated the test to be applied as follows:

> "……What the Court has to determine is whether the falsehood of the misrepresentation in suit is such as probably to have affected the assessment of the risk undertaken by the particular insurer when he extended the insurance cover under which the contested claim is being brought.
>
> That exercise is essentially a simple comparison between two assessments of the risk undertaken. The first is done on the basis of the facts as distorted by the misrepresentation. Then one ascertains what the assessment would have been on the facts truly stated. A significant disparity between the two meets the requirement of materiality contained in s 63(3) of the Act. And a disparity will be found to be significant if the insurer, had he known the truth, would probably have declined outright to undertake the particular risk, or would probably only have undertaken it on different terms."

[90] Five years later, in the *Clifford*-case, *supra*, criticism was expressed by Schutz, JA, of the test applied in the *Qilingele* case, *inter alia*, that the test applied has a subjective element which would favour the insurer, Schutz, JA, was of the opinion that the common law reasonable man test of materiality as exposed by

Didcott, J. in *Pillay v South African National Life Assurance Co Ltd,* l991 (1) SA 363 (D) was correct. The issue was however not decided by the Court.

[91] In a later case, namely *Liberty Life Association of Africa Ltd v De Waal en ‘n Ander,* 1999 (4) SA 1177 (HHA) van Heerden, AHR, approached the issue as follows, page 1182F - H:

> “Die kernvraag is immers of die onjuiste inligting die *beraming* van die risiko na die oordeel van ‘n redelike persoon sou beinvloed het, byvoorbeeld deurdat die appellant eers verdere inligting sou ingewin het voordat hy sou besluit het om die risiko al of nie te aanvaar (vgl *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1980 (1) SA 208(A) op 216D-F). Met ander woorde, die vraag is nie net of die onjuiste inligting die risiko sou beinvloed het nie, maar ook of dit ‘n uitwerking sou gehad het op die appellant se beoordeling van die risiko. (Vergelyk *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A) op 75D-F)."
>
> (The crucial enquiry was whether, in the opinion of a reasonable person, the inaccurate information furnished would have influenced the assessment of the risk, for example, because the appellant would first have sought further information before deciding to accept the risk or not. In other words, the question was not only whether the false information would have influenced the risk, but also whether it would have had an effect on the appellant's assessment of the risk.)

[92] On p 1183B the learned Judge stated that it did not really matter whether, in the circumstances of the case, one follows the approach of Kriegler, AJA, in the *Qilingele* case or the approach of Schutz, JA, in the *Clifford* case.

[93] It is in my opinion clear that, in regard to the South African Courts, the last word has not yet been spoken. It seems however that more recent cases tend to gravitate towards applying the test of the prudent or reasonable insurer. Although

the question, as to which test to apply, was also argued before us and counsel held opposite views, the issue was not discussed in depth. My impression was that both counsel favoured the test which they thought would best suit their purpose. I do therefore not think that this is the opportunity to break new ground. In my opinion the reasonable man test as applied in the *Oudtshoorn Municipality* case is an objective test and would be fair to both parties as it does not favour either the insurer or the insured. It is furthermore a concept with which our Courts are familiar. There is in my opinion nothing in sec 63(3) or sec. 54 (1) of our Act which would render the application of the reasonable man test invalid in determining whether the incorrectness of a representation is such as to be likely to have materially affected the assessment of the risk. That is then the test which should apply.

[94] Before dealing with the plea of the defendant I wish to refer to the two expert medical witnesses called by the parties. The plaintiff called Dr. Estie Maritz who obtained her medical degree in 1989. She also obtained qualifications in Trauma and Aerospace medicine. She was in general practice for 15 years. During this period she held a permanent appointment at Sterkfontein hospital, a major Psychiatric Institution, as a Psychiatric Medical Officer. She also studied for an honours degree in Pharmacology but could not sit for the final examination due to the birth of her second son.

[95] The defendant called Dr. Pieter Coetzer. Dr. Coetzer obtained his medical degree in 1977 and he is currently the Chief Medical Adviser to Sanlam. As such his work entailed underwriting, claims, office management etc. He is a member of

the Medical & Underwriting Standing Committee of Life Office's Association, Chairman of the Independent Claims Assessment Panel and a member of various other Associations and Committees both nationally and internationally. There is no doubt that the witness is well qualified, through his years of experience in insurance and as a member of various Boards and Committees, to be able to express in general, opinions in regard to underwriting etc.

[96] Both witnesses were in my opinion well qualified to testify on the subjects for which they were called and their expertise was not challenged in any way.

[97] Returning now to the plea of the defendant, the first complaint was that the plaintiff did not disclose in her application form that she was or had suffered from anxiety and depression. The relevant question posed in the application form reads as follows:

> "13.06 Do you or have you ever, suffered from the following:
>
> (f) Any nervous or mental complaint, e.g. epilepsy, blackouts, paralysis, anxiety or depression?"

[98] The plaintiff's answer to this question was "No" and she thereby indicated that she did not have a history of anxiety and depression nor was she suffering therefrom. The first letter written by the defendant in which liability to pay was disclaimed stated that the claim was denied on the grounds of non-disclosure of the above mental conditions. During the trial it was not clear how the defendant came by this information. At this stage I must mention that the plaintiff,

subsequent to the disability and life policy, also applied for medical insurance in which it was disclosed that she had used Alzam and in which Dr. Niewoudt gave a confidential report. Ms. Ochse, who testified on behalf of the defendant, stated that this information, set out in the medical policy, was not available to Mr. Feben, the person who, on behalf of the defendant, repudiated plaintiff's claim, as that took place from the office in Johannesburg and the medical policy, which was accepted, was processed and kept in Windhoek.

[99] However, the plaintiff denied that she had suffered from anxiety or had a history of depression. She said that she informed Dr. Niewoudt that she had "worries" about the possibility of losing their family farm and did not know how to continue to care for two workers on the farm. She was also never informed by the doctor of a diagnosis to that effect. She further denied that her problems were work related, as stated by Dr. Niewoudt, and said that she at all times enjoyed her work.

[100] Dr. Maritz, the expert called by the plaintiff, confirmed that the plaintiff did not suffer from any anxiety disorder or depression. According to the witness the plaintiff is a very positive person who enjoyed what she was doing. Dr. Maritz, although not a psychologist, gained experience in this field when she was attached to the Sterkfontein hospital which is a psychiatric institution which cared for people with mental disorders.

[101] The reference to anxiety originated in notes, made by Dr. Niewoudt during consultations with the plaintiff, although he referred to her being stressed he also

on one occasion noted anxiety neurosis. When he gave evidence the doctor stated that the notes were personal and for his own edification. He further said that he never made a diagnosis of anxiety and depression and did not observe such symptoms. He also did not inform the plaintiff of his "findings".

[102] Faced with this evidence and the fact that Dr. Niewoudt had backtracked on his earlier reports and notes, Mr. Heathcote argued that the Court should, on a balance of probabilities, hold him to his original "findings". That is easier said than done. It seems to me that the doctor, for want of a better description, used the words anxiety and depression, as he said, to inform himself rather than to indicate thereby that he had diagnosed a certain psychological condition. In the light of the evidence of Dr. Maritz and the plaintiff herself, this seems to me a plausible explanation.

[103] The Court *a quo* also accepted this explanation. Although probabilities play a role in the evaluation of a witness's evidence many other factors such as the demeanour of a witness, the impression he or she made etc. are all factors which the trial Judge would have had the opportunity to observe and to consider in his evaluation of the witness. It is trite that a Court of Appeal, only dealing with the record, is at a disadvantage and when it comes to the findings of credibility of witnesses, would only interfere with the findings of the trial Judge on certain well defined grounds, which were, in my opinion, not present in this instance.

[104] However, even looking at the probabilities it seems to me that those favour the plaintiff and not the defendant. All the evidence suggests that anxiety and

depression are serious conditions which, if left unattended, could develop into serious mental disorders. In the present instance no follow-up appointments with the doctor were seemingly scheduled and it was left to the plaintiff to decide whether to come back for further treatment or not. The dosage and quantity of Alzam pills were the minimum which could be prescribed. The doctor never saw the need to book the plaintiff off from work or advise her to take off some time from her work. As a general practitioner he seemingly never thought that her condition was such that she needed the assistance of a psychologist or psychiatrist. He also testified that he would have treated her differently and would have referred her for psychiatric treatment if she was suffering from anxiety.

[105] The onus is on the defendant to prove non-disclosure of material facts by the plaintiff. For this reason Mr. Heathcote could not ask the Court to reject *in toto* the evidence by Dr. Niewoudt, placed before the Court by means of his verbal testimony and the reports and notes given by him to the defendant, as the defendant had to rely on part of this evidence to prove its case.

[106] Dr. Coetzer readily conceded that if the plaintiff did not know what the doctor wrote down in his notes and was not informed of any diagnosis that her answer to the above question cannot be faulted. This is so because an applicant for insurance can only give information which he or she had knowledge of. On the evidence put before the Court *a quo* and on the probabilities I am satisfied that the defendant did not acquit it of its onus in regard to this part of its defence set out in paragraph 3 of its plea.

[107] The second ground of non-disclosure, relied on by the defendant in paragraph 3 of its plea, was that the plaintiff received prescribed anxiolytic therapy (Alzam) on a number of occasions prior to her application for the insurance which formed the subject matter of the written agreement.

[108] This was also the ground relied upon by the defendant in its letter dated 6 December 2001. It related to question 13.09 of the application form which reads as follows:

> "Are you currently taking or have you ever taken drugs, tranquilisers or any other medicines?" The answer was "No".

(The form completed by the plaintiff was the Afrikaans version and the word "drugs" was there indicated as "dwelmmiddels".)

[109] The form in which this ground is couched is important. It refers to anxiolytic therapy received by plaintiff on a number of occasions. As I have indicated above these were also the words used by the defendant when it repudiated the plaintiff's claim and was therefore not some formula thought out by the pleader when he drafted the plea.

[110] The plaintiff testified that she only used the Alzam pills on the first occasion they were prescribed by Dr. Niewoudt. On the other occasions when she was given Alzam pills she handed them to her brother who was also experiencing problems as a result of the financial situation which, eventually, culminated in them

losing the family farm. Dr. Maritz as well as Dr. Niewoudt testified that medics are aware of this practice which occurs frequently and, although they did not condone it, there was not much that they could do about it. The Court *a quo* accepted this evidence.

[111] Plaintiff stated that she did not receive any therapy and that she took the Alsam as a sleep induction. She denied that she was suffering from any mental or nervous condition and stated that although she was stressed she did not need therapy to get over it.

[112] Both Dr. Maritz and Dr. Niewoudt denied that she was given any therapy. Dr. Niewoudt stated that the dosage and the frequency of its use were too low and too intermediate to constitute a therapy. He further stated that if she was actually suffering from an anxiety neurosis, he would have referred her to a psychiatrist. He said that his use of the words anxiety neurosis, in his notes, was wrong. Some of the instances, when he prescribed Alzam, he did not see the plaintiff as she only had phoned him. He prescribed Alzam as a tranquiliser and sleep inducement, which, he thought, must have been discussed by them. The doctor, in cross-examination, said that he had seen symptoms of stress and that he had told the plaintiff that Alzam had also been prescribed for that and he told her that it was a Schedule 5 medicine.

[113] Dr. Maritz testified that the plaintiff never needed drugs for the central nervous system in respect of stress, psychiatric illness or other mental disorder. In order to diagnose these disorders one uses a scale and DSM4 and that there is a

whole list of criteria before one can come up with a diagnosis of anxiety. The doctor also explained her reference to reactive depression and denied that she ever, in her report, stated that the plaintiff was suffering from that ailment. According to the criterium for stress the plaintiff was suffering from two number 5 stressors and was coping. To be of any therapeutic value the dosages of Alzam had to be such, and had to be repeated so often, that the drug remained in the system of the patient. This, according to Dr. Maritz, was crucial.

[114] Dr. Coetzer, on the other hand, stated that the dosage of the drug was not important. What was important was the fact that it was repeated over a period of two years. Where there is information that a schedule 5 drug was used within two years before application for insurance containing disability benefits the insurer would decline. The witness testified that anxiety was a more advanced stage of stress and as stress may lead to anxiety, and because of the subjective nature of the latter, insurers would not be willing to take the risk. If the drug was taken to induce sleep, insurers would still be wary as insomnia might point to stress. However, if Alzam was used for insomnia and such use had been earlier than two years before the application for insurance was made, an insurer would accept the risk.

[115] In regard to the answering of the questions in the application form, Dr. Coetzer said that the plaintiff should have stated that she had seen a doctor on various occasions. It is not expected of an applicant for insurance to tell what, in each instance, the diagnosis was. When the insurer knew that a doctor was consulted on various occasions the onus would then be on the insurer to obtain

more information as to why a doctor was consulted. According to Dr. Coetzer the approach of insurers to the use of Alzam is pretty standard. What differs is that some would need further information to substantiate their decision and others would decline right away. In this context the doctor said that it would be irrelevant whether the plaintiff was diagnosed with anxiety or depression. All that was relevant was that she used Alzam over a period of 18 months.

[116] Miss Gerda Ochse, who was employed by the defendant, and who was responsible, *inter alia*, for the administration of policies, which also included claims underwriting, agreed that the simple fact of the use of Alzam would have the effect that the policy, as far as disability benefits were concerned, would be declined. The witness however agreed that the plaintiff was never diagnosed with severe stress or post-traumatic stress. According to this witness the dosage of the medicine is not relevant. However the insurer will look at the reasons for its use, so if the client can come up “with some sort of reason” that reason, so I understood this evidence, would be considered by the insurer before coming to a firm decision. She further stated that where stress did not develop into one of these acute forms or depression that she “could live with that”.

[117] It is clear that Dr. Coetzer, when he gave evidence, elevated stress, where Alzam was prescribed, as a ground which would have entitled the insurer to repudiate the claim on non-disclosure thereof. And in this regard Miss Ochse also seems to be of the same opinion. However the problem for the defendant is that it nowhere in its pleadings relied on stress, or the non-disclosure thereof, as a ground which would have entitled it to repudiate. That was the reason why Mr.

Heathcote applied for an amendment of the defendant's plea to also include stress. This application was refused for the reasons stated earlier. The plaintiff relied in its plea on anxiety *per se* and secondly on the treatment thereof with Alzam and the non-disclosure thereof by the plaintiff.

[118] The only evidence concerning anxiety and depression were contained in the report made by Dr. Niewoudt to the defendant based on the notes he made during consultations. However, that was retracted by the witness when he testified that he never diagnosed anxiety or depression and that the only symptoms he observed were stress related. He also testified that he did not treat the plaintiff for anxiety and depression.

[119] Although the learned Judge *a quo* was of the opinion that the plaintiff should have revealed the fact that she, during the relevant period, was prescribed medicine, and not only Alzam, the Court came to the conclusion that the Alzam plaintiff received was not part of a therapy "according to the grammatical meaning of that word".

[120] In this regard the Court *a quo* was relying on the evidence of Dr. Maritz and the dictionary meaning of the word "therapy", which, according to the Concise Oxford Dictionary, is defined as "treatment intended to relieve or heal a disorder; the treatment of mental or psychological disorders by psychological means".

[121] However, the enquiry into the plaintiff's failure to disclose does not end there. A reasonable construction of par. 3.2.2 of the defendant's plea does not only

contemplate therapy in the strictly medical sense of a systematic and consistent prescription of medication (Alzam in this case) to maintain a level of the drug in the system of the patient in the treatment of a condition or disorder (anxiety) over a period of time as Dr. Maritz suggested, but in its ordinary sense may also simply include any treatment intended to relieve or heal a disease or disorder by some remedial, rehabilitating, or curative process– such as a course of medication given to relieve feelings of anxiety. In fact, a reading of par. 3.2.2 suggests that the latter is what the pleader had in mind: "she received prescribed anxiolytic therapy (Alzam) <u>on a number of occasions prior to the application</u> for the said insurance which forms the subject matter of the written agreement". Therefore, it is a reasonable construction of the plea that the defendant sought to deny liability because the plaintiff had failed to disclose the number of occasions on which a course of Alzam had been prescribed as treatment for her mental condition.

[122] The ordinary meaning of the word therapy is much wider than what was stated by Dr. Maritz, and which evidence led the Court *a quo* to the finding set out herein above. In *Longman: Dictionary of Contemporary English*: *New Edition*, the word is defined as "the treatment of illnesses of the mind and body, esp. without drugs or operations". Various dictionaries on the Internet support the above definition and do not limit therapy to treatment of a mental disorder only. See also the following: *American Heritage Dictionary*: therapy: Treatment of illness or disability.

Kernerman: English Multilingual Dictionary: therapy: the (methods of) treatment of disease, disorders of the body etc.

American Heritage New Dictionary of Cultural Literacy, 3rd Ed: therapy: Treatment intended to cure or alleviate an illness or injury, whether physical or mental.

Merrian-Mekster's Medical Dictionary: therapy: therapeutic treatment: as a: remedial treatment of mental or bodily disorder.

Finally: *Dictionary.com Unabridged*: therapy: the treatment of disease or disorders, as by some remedial rehabilitating, or durative process.

[123] There is in my mind no doubt that the issue of the prescription and use of Alzam (or Xanor, as it was also called) on the latter basis was fully covered during the trial. It is common cause that the prescription and use of Alzam was not disclosed by the plaintiff when she completed the application form. The focus of both parties was from the beginning of the trial on the use and disclosure or non-disclosure of the drug. The plaintiff and her witnesses explained why such use was not material to the issue whereas the defendant’s witnesses, fully concentrated on this issue and the effect of its non-disclosure. In my opinion this issue was fully canvassed in the Court *a quo*, both parties willingly participated and led evidence in this regard. Also on appeal before us this aspect was fully argued by both counsel (See in this regard *Vos v Cronje and Duminy,* 1947 (4) SA 873 (CPD) at 880; *Collen v Rietfontein Engineering Works,* 1948 (1) SA 413 (AD) at 433; *Minister van Justisie v Jaffer,* 1995 (1) SA 273 (AA) at 281B-I and *Mastlite (Pty) Ltd v Stavracopoulos,* 1978 (3) SA 296 (TPD) at 299 A-E.)

[124] I have hereinbefore fully dealt with the evidence in this regard and I do not intend to repeat it except in so far as it may be necessary to motivate my conclusion. However, because this issue was fully dealt with by both parties, it is

clear from a reading of the above quoted cases that the Court cannot ignore that evidence but will have to deal with it.

[125] The first issue is what must be disclosed by a person completing an application form for insurance? In *Mutual and Federal Ins. v Oudtshoorn Municipality, supra,* p442 F – H, which dealt with the position before the advent of section 63(3), Miller, JA, stated the following:

> "It is part of our law that a person making a proposal for insurance is under a duty to disclose to the insurer material facts of which he has knowledge – material, that is, to the question of "estimating the risk", which in turn would involve the question of acceptance or refusal of the proposed insurance and, in the case of acceptance, the question of the premium to be charged. That there is such a duty of disclosure was at no stage in dispute between the parties to this litigation, nor was its existence in any way challenged, which is not surprising………"

[126] The purpose and effect of sec. 63(3) (our sec 54(1)), "……was simply to detoxify the warranty by removing its potential for abuse, without outlawing its legitimate use. In other words, materiality would regain its true meaning and that meaning would be protected from being stifled by contract. On the other hand, the warranty would not be deprived of all value. Where a misstatement was indeed material the deeming effect of the contract ('the proposal form shall form the basis of the contract') would relieve the insurer of having to prove inducement." (per Schutz, JA, in the *Clifford v Commercial Union Insurance Co of South Africa Ltd (supra),* p157 D-E).

[127] The question whether a fact is material or not is something which is not left to the judgment of the proponent for insurance. (See *Fransba Vervoer (Edms) Bpk v Incorporated General Insurance Ltd,* 1976 (4) SA 970 (W) at 975H-976B and *Potocnik v Mutual and Federal Insurance Co Ltd, supra, at p566 A - D*). It is further immaterial whether a non-disclosure or misstatement resulted from fraud, inadvertence or other non-fraudulent motive. (See *Beyers Estate v Southern Life Association,* 1938 CPD 8 and Gordon & Getz*: South African Law of Insurance,* 2nd Ed., p 111).

[128] The question is therefore whether a reasonable or prudent man would have considered that the prescribed Alzam, which was not disclosed, was likely to affect the assessment of the risk to be undertaken by the insurer, either to accept or decline the proposed insurance, and if accepted, at what premium or whether to further investigate and then decide. Section 54(1) of the Act is clear that the time to which the Court must refer is when the policy was issued or renewed. In this regard the Court *a quo* was in my opinion wrong to apply the test *ex post facto* with hindsight and then to conclude what the reasonable man would do. This was also the basis of Mr. Coleman's argument.

[129] Mr. Coleman further argued that because the use of Alzam was disclosed in the medical policy which was taken out more than a year later, the defendant could not now rely on non-disclosure. It seemed that Mr. Coleman relied on waiver by the defendant. The onus in that regard would have been on the plaintiff and it would have to show that the defendant waived its rights with full knowledge thereof. (See *Collen v Rietfontein Engineering Works, supra,* at page 436). The

evidence concerning the medical policy does not go further than to mention the fact. To suggest, as the Court *a quo* did, that the mere existence of the information in relation to another policy casts a duty on the defendant to investigate and to act thereon is not justified. The duty remains that of the proponent for insurance to answer questions correctly and truthfully and to disclose all material information. Ms. Ochse in any event testified that the two policies were on different systems, the one in Namibia and the other in South Africa and that they locally were not aware of the other policy. This evidence stands uncontroverted. This evidence is also relevant if the plaintiff relied on the second policy as a disclosure of the fact that she was treated with Alzam.

[130] In the light of all the evidence it seems to me that the reasonable man would have concluded that it was material to disclose that Alzam or Xanor was prescribed. The undisputed evidence of Dr. Coetzer was that it was standard for the insurance industry to decline insurance for disability benefits wherever a Schedule 5 drug, such as Alzam or Xanor, was concerned. The only difference was that some Insurers would investigate further in order to substantiate their decision to decline. In the present instance the disclosure of Alzam would at least have caused the defendant to further investigate the situation. The non-disclosure "cost the defendant, I thus conclude, the opportunity it would otherwise have taken to investigate, measure and assess the true magnitude of the risk assumed by it" (per Didcott, J. stated in *Pillay v South Africa National Life Assurance Co Ltd,* 1991 (1) SA 363 (D&CLD) at 367H. See further *Clifford v Commercial Union Insurance Co of SA Ltd, supra,* at 155E; *Liberty Life Association of Africa Ltd v De Waal en ‘n Ander,* at 1182F – 1183B).

[131] Because of my conclusion it is not strictly necessary to deal with the defendant's argument regarding misstatements by the plaintiff which may have been a breach of the warranty. This defence was pleaded by the defendant by answers given in its reply to a request for further particulars to its plea. One of the issues mentioned there concerns question No. 13.07 of the proposed application for insurance which reads as follows:

> "In the last year, have you consulted a doctor or a specialist………." Plaintiff's answer was "No".

[132] This answer was given notwithstanding the fact that the plaintiff saw Dr. Niewoudt at least 10 times during the previous year. It is impossible that plaintiff could not have been aware of the significance of this information to her application for disability insurance. The answer of "No" to this question is a misstatement and, as previously pointed out, whether it was given fraudulently or inadvertently, it constituted a breach of the warranty given by her. The notes of Dr. Niewoudt show that these were not insignificant ailments, such like colds or headaches, which could be ignored. There is to my mind little doubt that the reasonable man would have concluded that such information was likely to have affected the assessment of the defendant's risk and was therefore material. The negative answer given by the plaintiff further deprived the defendant of an opportunity to investigate, which investigation would certainly have led the defendant to the fact that Alzam had been prescribed.

[133] I have therefore come to the conclusion that the defendant proved on a balance of probability a material non-disclosure which entitled it to repudiate the claim by the plaintiff. The breach of the warranty would be to the same effect.

[134] May I point out that the non-disclosure by the plaintiff had nothing to do with the disability which was subsequently diagnosed, and as was also testified by defendant's expert Dr. Coetzer. I mention this for consideration by the defnendant.

[135] In the result I would allow the appeal with costs (such costs to include the costs of one instructing and one instructed counsel) and order that the judgment of the Court *a quo* be set aside and substituted with the following order:

The plaintiff's claim is dismissed with costs.

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STRYDOM, A.J.A.

I agree.

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MARITZ, J.A.

I agree.

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CHOMBA, A.J.A.

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