THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case No: 1005/13

In the matter between:

RUTH CHRISTINE VISSER **APPELLANT**

and

1 LIFE DIRECT INSURANCE LIMITED **RESPONDENT**

Neutral citation: *Visser v 1 Life Direct Insurance Limited* (1005/13) [2014] ZASCA 193 (28 November 2014).

Coram: Cachalia, Willis, Swain JJA and Fourie AJA
Heard: **21 November 2014**
Delivered: **28 November 2014**

Summary: Life insurance policy – repudiation by insurer – alleged misrepresentation and non-disclosure by deceased of pre-existing medical condition – insurer failing to discharge onus.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mabesele J, sitting as court of first instance):

1 The appeal is upheld with costs.
2 The judgment of the High Court is set aside and replaced with the following order:
‘(a) Judgment is granted in favour of the plaintiff for payment of the sum of R3 200 000.
(b) The defendant is to pay interest on the aforesaid sum at the rate of 15,5 per cent per annum from 3 December 2010 to date of payment.
(c) Costs of suit.’

JUDGMENT

Swain JA (Cachalia J and Fourie AJA concurring):

[1] The appellant, Ruth Christine Visser (Visser) is a 80 per cent beneficiary in terms of a life insurance policy issued by the respondent, 1 Life Direct Insurance Limited (1 Life) in favour of the late Sibongile Ntobongwana (the deceased).

[2] The claim of Visser for payment of 80 per cent of the insured sum of R4 million, on the death of the deceased, was repudiated by 1 Life on the ground that the deceased had misrepresented and failed to disclose to 1 Life, certain details of her pre-existing medical condition, which materially affected the assessment of the risk under the policy by 1 Life.

[3] As a result Visser instituted action against 1 Life in the South Gauteng High Court, Johannesburg (Mabesele J), for payment of the sum of R3 200 000. The claim was dismissed on the ground that 1 Life justifiably repudiated the claim because the deceased had provided ‘false information’ to it in respect of her pre-

existing medical condition which had precluded 1 Life from properly assessing the risk. Leave to appeal having been refused, the present appeal is with the leave of this court.

[4] In terms of s 59(1)(*a*) of the Long Term Insurance Act 52 of 1998 (the Act) 1 Life was entitled to repudiate the life policy if a misrepresentation was made to it by the deceased, which was not true, or which amounted to a failure to disclose information, if the representation or non-disclosure was likely to have materially affected the assessment of the risk under the policy concerned.

[5] 1 Life bore the onus of proving that the deceased had misrepresented to 1 Life that she had never had any episodes of anxiety or stress. It also had to prove that the deceased had failed to disclose that she had received medical advice or treatment for fainting in 2005 and chest pains in 2006.

[6] 1 Life relied upon two sources of evidence to discharge this onus. Firstly, the transcript of a telephone conversation held on 28 November 2007 between the deceased and a representative of 1 Life, during which the deceased was asked and answered questions relating to her state of health. The answers furnished formed the basis upon which the life insurance policy was issued. Secondly, records of Groote Schuur Hospital of visits ostensibly paid by the deceased to the emergency unit at the hospital on 15 August 2005 and 11 July 2006. The records ostensibly contain details of the medical complaints of the deceased, medical tests carried out on her, as well as the observations of the attending doctor.

[7] Because scant regard was paid in the court a quo to the admissibility of this evidence, as well as proof of the evidence contained in this documentation, the parties were requested to make submissions on the following issues:

(a) The admissibility and reliability of the hospital records.

(b) The admissibility, reliability and completeness of the telephonic transcript.

As a result, the parties filed supplementary heads of argument.

[8] The admissibility of the record of the telephonic conversation and the hospital records must be distinguished from the evidential status of their contents. I accept

that the records were admissible without further proof. The parties agreed at the rule 37 conference that the records would serve as evidence of what they purport to be 'without admission of the truth of the contents'. In addition, on 22 February 2012 1 Life delivered a notice in terms of rule 35(9) of the Uniform Rules of Court calling upon Visser to admit that the hospital records and the telephonic transcript were properly executed and were what they purported to be. On 6 March 2012 Visser made this admission.

[9] Before us, there was no issue that the telephonic transcript was admissible, reliable and complete and I therefore turn to the evidential status of the contents of the hospital records. The doctor who conducted the interviews with the deceased should have been called to prove the truth of their contents. This was not done. No explanation appears on the record for this. No application was made in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988 for the hearsay evidence contained in the hospital records to be admitted. Again, no explanation appears on the record for this.

[10] The hospital records were introduced into evidence before the court a quo by counsel for Visser. He put to a witness, Dr Steyn, that she had been presented with 'certain documents related to the visit or the supposed visit of the deceased to Groote Schuur Hospital'. Dr Steyn, on behalf of Visser, and Dr Kayle, on behalf of 1 Life, expressed their views on the nature and seriousness of the deceased's medical condition, based upon the contents of the hospital records.

[11] Counsel for 1 Life (not the same counsel who appeared in the court a quo) submitted that the trial was conducted by the parties on the basis that the contents of the hospital records were not in dispute. However, an examination of the evidence reveals that there was no clear understanding between them as to the evidential status of the contents of the hospital records. It is, however, clear that the parties did not agree that the contents of the hospital records were correct.

[12] It appears the learned judge in the court a quo was uncertain of the status of the evidence contained in the hospital records. At one stage he asked 'is their dispute about the report or what' but no answer was forthcoming from counsel.

When Dr Steyn expressed her opinion on the contents of the medical reports, the learned judge stated the issue was not whether the deceased was sick, but whether the deceased failed to disclose that to 1 Life. He added that the issue was 'not whether or not we believe the contents' of the hospital records. When Dr Steyn stated that an entry in the hospital records was incorrect, he intervened and said the correctness of the contents could not be challenged, because the doctor who wrote the notes was not present. He added that was not the enquiry, which was whether the deceased failed to disclose the medical conditions contained in the notes. He stated that whether or not the information was correct, or accurate was accordingly irrelevant. He accordingly did not appreciate that the contents of the hospital records were relied upon to prove the pre-existing medical condition of the deceased. Only when that issue was proved could the further issues of misrepresentation or non-disclosure by the deceased arise.

[13] The court a quo also laboured under the misconception that the contents of the hospital records were not in issue between the parties. He stated that if the parties were agreed that the deceased suffered from certain medical conditions, then the cause of those conditions was immaterial. This statement provoked no response from counsel.

[14] The inadequacy and lack of clarity of the hospital records was referred to repeatedly in the evidence. Dr Steyn agreed that the hospital records were incomplete and contained far less information than they should have. Assumptions therefore had to be made and one had to speculate concerning the causes of the symptoms, in the hospital records. Dr Kayle, who gave evidence for 1 Life, said he could not fully assess the correctness of the recorded symptoms and diagnosis of the deceased's medical condition, because the investigation was incomplete. The evidence of Dr Steyn and Dr Kayle makes it clear that the parties never agreed that the contents of the hospital records were true and accurate.

[15] The absence of any agreement between the parties that the medical condition of the deceased was recorded correctly in the hospital records, appears from the record. Counsel for 1 Life put the following to Dr Steyn:

‘So all the doctors, with respect, are in a very difficult position. You had scanned notes and you may correctly interpret it and you may incorrectly interpret it – Correct.

That should be the approach in this case. You cannot swear by the correctness or the incorrectness of any of the notes, you can simply see what you see. – True.

Understanding that it is unfortunately incomplete in the sense that it contains far less information than it should have done. – True.

Would that be a fair summary in my approach to the case? – Yes.’

[16] The submission of counsel for 1 Life that the parties conducted the trial on the basis that the relevant contents of the hospital records were not in dispute is accordingly incorrect. It is also incorrect that Visser acquiesced in the use of the hospital records to establish the primary facts. Because 1 Life’s counsel did not regard the hospital records as proof of ‘the primary facts’ Visser could never have acquiesced in their use for this purpose. The court a quo accordingly erred in concluding that ‘it is not in dispute that the illnesses are noted, correctly, in the hospital records’.

[17] Counsel for 1 Life submitted however, that Visser had admitted the truth of the contents of the hospital records in an answering affidavit filed by her in opposition to an application for the rescission of a judgment obtained by Visser against 1 Life. 1 Life alleged in its founding affidavit that the deceased had failed to disclose that ‘she had been hospitalised for fainting spells during 2005 and that she had suffered from stress anxiety during July 2006’. It was also alleged that the deceased ‘specifically confirmed that she had never had any episodes of depression, anxiety or stress’.

[18] Visser replied to these allegations in her affidavit as follows:

‘The nature of episodes related to the insured’s anxiety, depression or stress, I suggest cannot be adduced from a Groote Schuur Hospital report dated 12 July 2006 and attached hereto marked “POA2”. . . . Alternatively – there is certainly no clarity on the medical correlation substantiated by the applicant [1 Life] between panic and anxiety, within the papers filed of record. What is further evident is that the insured in accordance (with) the visit to hospital on 12 July 2006, (POA2 refers) presented with abdominal pains and not because of episodes of depression, anxiety or stress. I further fail to see how this aspect could be viewed as a material non-disclosure, alternatively how such condition (under the

circumstances) even presented to the applicant, would have affected the risk assessment of the insured and lead to the rejection of any claim.'

[19] The only statement of Visser which relates to the contents of the hospital records is that the deceased 'presented with abdominal pains and not because of episodes of depression, anxiety or stress'. The statement simply reflects what appears on the hospital records, and does not refer to any of the other entries. There was no admission of the truth and correctness of all of the facts contained in the hospital records. Even if construed as an admission, Visser never intended to formally admit the contents of the hospital records. The admission was accordingly informal and she would have been entitled to lead evidence to contradict or explain the admission.[1] At no stage before or during the proceedings before the court a quo, did 1 Life contend that Visser had made the admission now contended for on appeal. Visser was never given the opportunity to lead any evidence to deal with the so-called admission. There is no basis for the submission made.

[20] 1 Life therefore failed to discharge the onus of proving the truth and accuracy of the contents of the hospital records. It consequently failed to prove that the deceased had experienced episodes of anxiety or stress, had received medical advice or treatment for fainting in 2005 and chest pains in 2006. The issue of whether the deceased made a misrepresentation during the telephone conversation as well as the materiality of any alleged misrepresentation or non-disclosure, does not arise in the absence of proof of the deceased's pre-existing medical condition. In my opinion Willis JA in his separate but concurring judgment has attempted to deal with issues relating to misrepresentation and their materiality that need not even be considered.

[21] During the later stages of argument in this appeal a member of the court, Mathopo AJA unfortunately became ill. With the consent of both parties argument was concluded in his absence. This judgment is the decision of a majority of the remaining judges who are in agreement and constitute a majority of the judges

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[1] P J Schwikkard & S E van der Merwe, *Principles of Evidence,* 3rd ed (2009) para 26 2 1.

before whom the hearing was commenced, in accordance with s 13(3)(*a*) of the Superior Court Act 10 of 2013.

[22] I make the following order:

1 The appeal is upheld with costs.

2 The judgment of the High Court is set aside and replaced with the following order:

'(a) Judgment is granted in favour of the plaintiff for payment of the sum of R3 200 000.

(b) The defendant is to pay interest on the aforesaid sum at the rate of 15,5 per cent per annum from 3 December 2010 to date of payment.

(c) Costs of suit.'[2]

K G B SWAIN
JUDGE OF APPEAL

Willis JA:

[23] I have read the judgment of Swain JA. I agree with the order that he has proposed and much of his reasoning. I consider that what is often loosely called 'the materiality of the non-disclosure' must, however, unavoidably be dealt with. For this reason I have written a separate judgment.

[24] The appellant appeals, with the leave of this court, against the judgment of the South Gauteng High Court, Johannesburg (Mabesele J), which dismissed her claim with costs.

[2] The date from which *mora* interest is to run, being 3 December 2010 is the date upon which 1 Life became aware of the judgment obtained by Visser and thereby acquired knowledge of Visser's claim.

[25] The appellant, Ms Ruth Christine Visser, as the beneficiary of 80% of the proceeds of a life insurance policy, instituted action against the respondent (the insurance company). The deceased's husband, Mr Luwasi Ntyeku, was the beneficiary of the other 20%. The insured was Sibongile Ntobongwana (the deceased). The benefit to accrue to the plaintiff was R3.32 million.

[26] The plaintiff was a school teacher. She was also an officer in the Salvation Army (the Army), a Christian organization that promotes good works. The deceased was a youth leader in the Army and it was through the Army that the plaintiff and the deceased first met each other during the middle of 2007. The plaintiff's husband was a pastor in the army. The plaintiff and the deceased struck up a warm relationship. The plaintiff recognised the deceased's talent and that the deceased wanted to improve herself by starting a business in the dealership of arts and curios. The plaintiff and her husband assisted the deceased in starting up a business selling arts and curios. The three of them entered into a partnership agreement. They lent her money and gave her administrative support and strategic advice. The business was a resounding financial success. The deceased was able to buy a flat of her own in Parow shortly after the business had been established.

[27] The deceased took out the insurance policy with the insurance company with effect from 1 December 2007. The insurance policy was issued as a result of a telephonic application by the deceased to the insurance company. The deceased died on 29 January 2009. It appears from the record that she died from unnatural causes.

[28] The insurance company has sought to avoid payment on the basis that the deceased, when taking out the policy in question, had not disclosed that she had received medical advice and treatment in 2005 and 2006. The non-disclosure allegedly relates to chest pains, fainting spells and episodes of anxiety during this period. By reason of the manner in which this case was conducted in the high court and the manner in which the argument was presented in this appeal, I think it better to consider a few cardinal principles of the relevant law before a more detailed examination of the facts. This may be unusual but an overview of the relevant legal principles may assist in understanding the facts as set out hereunder. *Qilingele v*

South African Mutual Life Assurance Society,[3] despite controversies in cases which followed it,[4] made it clear that an insurer seeking to avoid liability on the basis of the untruth of a representation made to it, bears the onus of proving the requisite elements that would justify its repudiation of liability in terms of s 19(3) of the Insurance Act 27 of 1943 (the Insurance Act).[5]

[29] Two questions have loomed large in this case. They are simply stated but more difficultly answered: (a) what are the facta probanda (the facts which need to be proven) and (b) what are the proven facts? In relation to the case which the insurance company has made out, the answers to the first question are to be found by reference to the substantive law of insurance and to the second by reference to the law of evidence.

[30] The issue of whether an insurer has succeeded in establishing the requisite elements in order to avoid liability in terms of an insurance policy by reason of the non-disclosure of facts by the insured has vexed the courts for some time. It has been instructive to read the cases that we were requested by counsel to consider.[6] These authorities have imparted an overall perspective of the issues that are relevant when an insurer seeks to avoid liability on the ground of the insured's non-closure of facts. The cases in question have dealt, more specifically, with the requirement in terms of which the insurer must prove, in terms of s 19(3) of the Insurance Act 27 of 1943, that 'the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue …thereof.'[7] I have also profited from reading Peter Havenga's article 'Materiality in Insurance Law: The Confusion Persists.'[8]

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[3] *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A).
[4] See, for example, the cases below in respect of which I acknowledge counsel's exhortations to peruse.
[5] *Qilingele v South African Mutual Life Assurance Society* (supra) at 74A-C. Repealed and replaced by the Long-Term Insurance Act 52 of 1998 (see s 59 of new Act).
[6] The following, in particular, were helpful: *Commercial Union Insurance Co of SA Ltd v Lotter* 1999 (2) SA 147 (SCA); *Clifford v Commercial Union Insurance Co of SA Ltd* 1998 (4) SA 150 (SCA); *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A); *Qilingele v South African Mutual Life Assurance Society* fn 1; *President Versekeringsmaatskapy Bpk v Trust Bank van Afrika Bpk & 'n ander* 1989 (1) SA 208 (A); *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A); *Mahadeo v Dial Direct Insurance Ltd* 2008 (4) SA 80 (W).
[7] Ibid. See also s 19(3) of the Insurance Act 27 of 1943. *Qilingele v South African Mutual Life Assurance Society* (supra) at 74A.
[8] P Havenga 'Materiality in Insurance Law: The Confusion Persists' 1996 (59) THRHR at 339.

[31] Necessarily, and self-evidently, first among these elements, preceding the question of materiality, would be (a) that a representation was made and (b) that it was untrue. Both Mr Symon, who appeared for the insurance company in the appeal and the insurance company's counsel in the trial itself, fairly and correctly conceded that this was indeed the correct legal position. This is implicit in Kriegler JA's reasoning in *Qilingele*.[9] It is more explicit in *Fransba Vervoer Bpk v Incorporated General Insurances Ltd*.[10] That the onus on the insurer is extensive is set free from doubt in the English case of *Joel v Law Union And Crown Insurance Company*.[11] *Joel*'s case was followed in *Fransba*.[12] *Fransba* makes it clear that there is a further element which the insurer must prove. This further element Mr Symon would not concede, despite my having tested this with him with some insistence during the course of argument. It is that the fact or facts in question must have been known to the insured at the time when she gave her answers to the questions posed to her by the insurer.[13]

[32] Conceptually, there is a difference between, on the one hand, the materiality of a non-closure 'in the wider sense' of the term (which includes the elements of (a) the fact of non-disclosure; (b) the awareness by the insured of the facts which she may have been required to disclose and (c) a consideration of the materiality of that non-disclosure) and, on the other, materiality 'in 'the narrower sense' (which separates materiality per se from both the non-disclosure itself of relevant facts and the concomitant state of mind of the insured). Conflating the wider into the narrower sense is easily done but can lead to confusion. The failure to distinguish the wider from the narrower sense may explain the difficulties which the litigants, as well as the trial court, experienced during the action. When it comes to a consideration of the entitlement of an insurer to avoid liability on the ground of non-disclosure by the insured, the facta probanda are those which relate to the two elements of (i) the non-disclosure itself and (ii) the consciousness or awareness of the insured of the facts

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[9] At 74C and 76G.
[10] *Fransba Vervoer (Edms) Bpk v Incorporated General Insurances Ltd* 1976 (4) SA 970 (W) at 977. This case was referred to with approval by this court in *Mutual and Federal v Oudtshoorn* (supra) at 435E.
[11] *Joel v Law Union and Crown Insurance Company* (1908) 2 KB 863 at 880.
[12] At 977B-D
[13] Ibid.

which she would have been required to disclose. The materiality of the non-disclosure is a question of law.

[33] For reasons that I hope will become manifest later in this judgment, the question of the materiality (in the narrow sense) of the alleged non-disclosure does not even arise in this case because, even if one accepts that the representations were made, the insurance company has failed to establish that they were (a) untrue and (b) were known to have been untrue by the deceased, at the time when she made them. Put differently, the insurer must discharge the onus of proving that the deceased would, in her understanding of the questions, have known that she was telling an untruth in response thereto.[14]

[34] In the nature of things, the state of mind of the insured, her awareness of what she would have been required to disclose, will ordinarily be a matter of inferential reasoning. The evaluation embraces both subjective and objective elements: what is relevant is not merely what she thought and understood at the time but also what facts she, in the context of the questions and her particular situation, there and then, could reasonably have been expected to disclose. Relevant to the issue of the facts an insured could reasonably have been expected to disclose would obviously be whether, as mentioned previously, 'the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue …thereof.'[15]

[35] There will therefore, unavoidably, be an osmotic relationship between the questions of law and fact.[16] This process of osmosis may explain the murkiness that has clouded so much thinking on the overall question of the materiality of a non-disclosure by an insured: the permeability between the questions of law and fact is indeed gaping. Questions of law and fact do not necessarily separate conveniently into hermetically sealed compartments.[17]Nevertheless, if correct decisions are to be

[14] The nexus between knowledge and understanding is usefully made apparent in, for example, *The Oxford Dictionary* 2006.
[15] Ibid. See also s 19(3) of the Insurance Act 27 of 1943.
[16] The German word *Durchdrungen* expresses the process well.
[17] See *Secretary for Inland Revenue v Trust Bank of Africa Ltd* 1975 (2) SA 652 (A) at 666E; which was followed in *S v Petro Louise Enterprises & others* 1978 (1) SA 271 (T) at 280A-B. In *Magmoed v Janse Van Rensburg & others* 1993 (1) SA 777; 1993 (1) SACR 67 (A) Corbett CJ, delivering the

made concerning the issue of the materiality non-disclosure in contracts of insurance, there must be alertness to the distinction between the two separate questions.

[36] By reason of the fact that this case falls to be decided according to the law of evidence, my remarks concerning the requisite elements for an insurer to avoid liability on the grounds of no-disclosure should be understood as being strictly obiter. In no way should they be understood as the final word on the matter. They are presented by way of background. The reason is that, if a litigant loses a case 'for want of evidence' it is entitled, in my opinion, to have some sense, in the reasons for judgment, of what it might have been expected to prove. In any event, the evidence, or lack thereof, which may have been put before any court, cannot be considered in abstracto or in vacuo from the facta probanda.

[37] On 16 November 2010, the plaintiff sought and obtained judgment by default against the insurance company in the South Gauteng High Court in the sum of R3.2 million together with interest and costs. The insurance company thereafter made application for rescission of this judgment. In its founding affidavit in support of the application for rescission, Mr Anton De Souza, the chief executive officer of the insurance company said the following:

'[20] An investigation of the claim [by the plaintiff] then took place by the applicant's forensic division. The results of the investigation, which was conducted by Henk Uys of Telesure Group Services (Pty) Ltd, whose confirmatory affidavit is attached hereto marked "AS8", are set out below. It emerged in the course thereof that the applicant had failed to make at least two material disclosures and had also made a misrepresentation which were relevant to the granting of the insurance cover concerned.

[21] The non-disclosures concerned were the failure of the insured to disclose that she had been hospitalised for fainting spells during 2005 and that she had suffered from stress anxiety during July 2006. A copy of the transcript of the telephone consultation conducted at the sales stage is attached hereto marked 'AS9.'

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unanimous judgment of this court said, at 809A, that he was 'in full and respectful agreement' with what Botha J had said in *Petro Louise Enterprises*. In *S v Basson* 2005 (1) SA 171 (CC) para 48 the Constitutional Court said that it found Corbett CJ's analysis in *Magmoed* of the distinction between questions of fact and law to be 'helpful'.

The alleged misrepresentation related to the deceased's income. This ground of objection was later abandoned by the insurance company.

[38] Further on in the affidavit, the insurance company relied on the following:

'[21.4] the insured [the deceased] stated that she had not suffered chest pains at any stage (page 7 of the transcript);

[21.5] the insured specifically confirmed that she had never had any episodes of depression, anxiety or stress (page 7 of the transcript);

[21.6] the insured stated that she was never hospitalised (page 7 of the transcript).'

In the answering affidavit the plaintiff denied that there had been two material non-disclosures and any misrepresentation. She then pertinently responded as follows:

'AD PARAGRAPH 21.4

I deny that from page 7 of the transcript "AS9" (page 50), that it can be inferred as alleged by the Applicant, that the insured stated that she had not suffered chest pains at any stage. The question at page 7 clearly relates to disorders of the heart and not chest pains in general. This I submit does not constitute any non-disclosure or misrepresentation.

AD PARAGRAPH 21.5

This is admitted, as the insured never presented with "episodes" of depression, anxiety or stress. "Episodes" clearly depict the plural and a series of events. The nature of episodes related to the insured's anxiety, depression or stress, I suggest, cannot be adduced from a Groote Schuur Hospital report dated 12/07/2006 and attached hereto marked "POA2".

Alternatively – the interpretation of such question by any person other than the insured would be purely speculative.

Alternatively – there is certainly no clarity on the medical correlation substantiated by the Applicant between panic and anxiety, within the papers filed of record. What is further evident is that the insured in accordance the visit to hospital on 12/07/2006, (POA2 refers) presented with abdominal pains and not because of depression, anxiety or stress. I further fail to see how this aspect could be viewed as a material non-disclosure, alternatively how such condition (under the circumstances) even presented to the applicant, would have affected the risk assessment of the insured and lead to the rejection of any claim.

AD PARAGRAPH 21.6

. . . She [the deceased] was clearly never 'hospitalized" due to referral by a doctor or taken up in hospital due to a particular illness. Again the interpretation of the question and answer

thereto will remain speculative in absence of the insured and I submit it is not being a non-disclosure under the circumstances . . . .'

During argument before us, Mr Symon placed great reliance on these responses by the plaintiff. In particular, he contended that there was no dispute between the parties as to the questions which the insurance company had put to the deceased, the deceased's answers thereto and what appeared in the hospital records. He contended also that these answers contained 'admissions against interest'. I shall, in due course, deal more directly with these issues.

[39] The plaintiff, at no stage, admitted the truthfulness of the contents of the hospital records. It is trite that the production in evidence of documents in terms of R35 (10) of the Uniform Rules of Court, after these have been admitted in terms of R35 (9), as happened in this case does not extend to the truthfulness of the contents thereof.[18] The documents are not evidence that the content thereof is true.[19] The contents, unless admitted as being true remain hearsay evidence and therefore inadmissible unless they qualify for admission under one of the recognised exceptions to the hearsay rule.[20]

[40] The common law rules regarding the admission of hearsay evidence were rendered more flexible by the coming into operation of The Law of Evidence Amendment Act 45 of 1988 (The Law of Evidence Amendment Act).

The relevant portions thereof read as follows:

'3(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to -

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[18] See *Absa Bank Bpk v Ons Beleggings BK* 2000 (4) SA 27 (SCA) para 6 and the authorities therein cited.
[19] Ibid.
[20] See *Knouwds v Administrateur Kaap* 1981 (1) SA 544 (C) at 551H-552B. Referred to with approval in *Absa Bank Bpk v Ons Beleggings BK* (supra).

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)*(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.

(4) For the purposes of this section -

"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

"party" means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

No application was made at any stage during the trial for the contents of either the transcript or the hospital records to have been admitted in terms of s 3 of The Law of Evidence Amendment Act. Had such an application been brought, the outcome may have been different. As *McDonald's Corporation v Joburgers Drive Inn Restaurant (Pty) Ltd & another; McDonald's Corporation v Dax Prop CC & another; McDonald's Corporation v Joburgers Drive Inn Restaurant (Pty) Ltd and Dax Prop CC*[21] *and Makhatini v Road Accident Fund*[22] make clear, the admission of the evidence is no mere formality; the admission of the evidence is not to be had, merely for the asking.

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[21] *McDonald's Corporation v Joburgers Drive Inn Restaurant (Pty) Ltd & another; McDonald's Corporation Dax Prop CC & another; McDonald's Corporation v Joburgers Drive Inn Restaurant (Pty) Ltd and Corporation Dax Prop CC* 1997 (1) SA 1 (A) at 27D-H.

[22] *Makhatini v Road Accident Fund* 2002 (1) SA 511(SCA) paras 26 to 35.

The court must carefully consider all the factors listed in s 3(1)*(c)* of the Law of Evidence Amendment Act. It was only once this court, in preparation for the hearing of the appeal, invited the parties to make submissions in regard to the whole question of the admissibility of the transcript and the hospital records that they did so. Apart from the evidence of the plaintiff and her husband, both parties lead evidence in an attempt to address the materiality of the non-disclosures.

[41] The trial court said:

'[44] The evidence is that the defendant relied upon false information provided to it by the deceased and concluded a policy contract with her. Had the deceased disclosed her health status the defendant would have been able to weigh its options to either load the premium, reject the application or referring the deceased to a medical doctor for medical examination and a report which would enable them to take an informed decision on the application of the deceased'.

The judge added that:

'[45] For these reasons, I do not hesitate to come to a conclusion that the defendant was justified to repudiate the contract. The result is that the plaintiff's claim must fail.'

The trial court was clearly wrong. The trial court failed to make a proper distinction between the production of a document in terms of Rule 35 (10) and the admissibility of its contents as evidence. A perusal of the record indicates that the transcripts of the questions and the answers given by the deceased were, by necessary implication, agreed to have been truly and correctly recorded. It certainly was not the position with regard to the hospital records. Accordingly, the insurance company failed to discharge the onus of proving that the answers were untrue and, furthermore, that the deceased would, in her understanding of the questions, have known that she was telling an untruth in response thereto. The insurance company's defence to the plaintiff's claim must fail.

[42] In view of the fact that the parties conducted the trial as if the materiality of the non-disclosures rather than the admissibility of evidence were the real issue, I should not want the insurance company to think that the plaintiff has succeeded on purely technical grounds. The evidential deficiencies in the insurance company's case go further than technicalities.

[43] The insurance company relied on the fact that it appeared to be common cause that, at the time her telephonic application for insurance was made, the deceased was asked the following two questions, to which she answered 'No':

(1) 'Do you have or have you ever had any episodes of depression, anxiety or stress?' and

(2) 'Have you ever had any illness or any medical or surgical advice or treatment other than already stated, e.g. operations, accidents, hospitalisations?'

The hospital records show that in 2005, she had been visited the hospital and complained the she had had, 'fainting spells', an argument with her boyfriend that she had been robbed as a result of which she may have had panic attacks and that she was adjusting to her new role as mother of a baby then aged three months old. The hospital record of the 2006 indicates that she had a 'stabbing pain over her lower ribs' that afternoon. The deceased had been treated as an outpatient. These are the facts upon which the insurance company has relied to seeking to avoid liability under the insurance policy.

[44] The person who conducted the interview on behalf of the insurance company did not testify. The doctors with whom the deceased may have consulted also did not testify. The evidence of these records is obviously hearsay. No application was made by the insurance company for this evidence to be admitted in terms of s 3 of the Law of Evidence Amendment Act.

[45] Both Dr Elmin Steyn, who was called by the plaintiff and Dr Allan Kayle, who was called by the defendant agreed that the records showed that the deceased was not hospitalized (in the sense of being admitted to a ward as a patient, that the diagnosis, if any, was incomplete, inconclusive and certainly not serious). They both agreed that the records showed that the doctors who may have examined the deceased did not find any condition that required immediate medical care. Interestingly, the record of the second visit indicates that the deceased had no past medical history. Dr Steyn said that the visit after an argument with her boyfriend was typical of abused women and could be construed as a cry for help. Both visits took place late at night.

[46] The insurance company's counsel himself, when cross-examining Dr Steyn put it to her as follows:

'Q: That should be the approach in this case. You cannot swear by the correctness or the incorrectness of the notes, you simply see what you see?

A: Yes.

Q: Understanding that it is unfortunately incomplete in the sense that it contains far less information than it should have done?

A: True

Q: Would that be a fair summary in my approach to the case?

A: Yes'

Even if the sketchy hospital records are to be considered as admissible evidence very little, if any, weight can be attached to them in all the circumstances of this case.[23] There exists real uncertainty as to the accuracy and truth of (a) what the deceased said and complained of when she went to the hospital and (b) the truth and accuracy of such diagnosis as may have been made. Such weight as could be attached to the hospital records, read together with the transcript, would not, when viewed in context, discharge the onus that rest on the insurance company.

[47] There was much debate before us concerning the law of 'admissions against interest' by reason of the 'privity of interest' that existed between the deceased and the plaintiff. Mr Symon argued that, because of the plaintiff's responses in her affidavit resisting summary judgment, she had made informal admissions. Moreover, if I understood the argument correctly, this resulted in there being vicarious admissions of the truthfulness of what was recorded in the hospital records as having been said by the deceased to those who attended upon her at the hospital. These, he argued, were admissions against interest by the deceased. By reason of of the 'privity of interest' between the deceased and the plaintiff, these admissions could be held against the defendant, because she referred to them in her affidavit opposing the application for rescission of the default judgment. As Watermeyer CJ said in *R v Leibbrandt & others,*[24] there is a 'danger of arguing in a circle' when considering the issue of whether one person's statement can or should be held

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[23] See, for example, *Narotam v Madhav & anothe*r 1965 (4) SA 85 (W) at 88A-89A and *S v Ostilly & others* 1977 (2) SA 104 (D)

[24] *R v Leibbrandt & others* 1944 AD 253 at 276.

admissible to the extent of being an admission against another (sometimes described as a vicarious admission).

[48] Sight must not be lost of the importance of not confusing the distinction between the admissibility of hearsay evidence, on the one hand, and an admission, on the other. There can be no doubt whatsoever that there were no admissions of fact either by the deceased or the plaintiff that, in themselves, were dispositive of the issues in the trial. Everything has depended upon the permissible inferences that one may draw, on a balance of probabilities, from the facts – whether these facts were in issue or admitted. Ultimately, as Zeffertt and Paizes point out in their *The South African Law of Evidence*, all questions of admissibility of evidence relate to relevance, reliability and the constitutional right[25] of all persons to a fair trial.[26] The 'admissions against interest' point raised by the insurance is too tenuous too succeed in all the circumstances of this particular case: it would result in the admission of unreliable evidence, denying the plaintiff a fair trial. As the insurance company has failed to avoid its liability in terms of the insurance policy, the plaintiff must succeed.

N P WILLIS
JUDGE OF APPEAL

[25] See s 34 of our Constitution, 1996.
[26] DT Zeffertt and AP Paizes AP *The South African Law of Evidence*, 2nd ed, at 481-516.

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