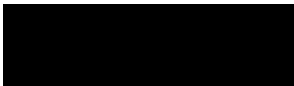


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
25 March 2024	
DATE	SIGNATURE

Case No.: **2021/23807**

In the matter between:

NKOSILATHI NCUBE

Plaintiff

and

LIBERTY GROUP LIMITED

Defendant

JUDGMENT

Summary: Action for specific performance under a life insurance policy. Insured event in 2017. Claim lodged in 2017. Action instituted in 2021. All material allegations in the particulars of claim admitted. No special defence pleaded. Defendant seeking stay pending outcome of criminal investigation or inquest or criminal proceedings.

Stay constitutes exercise of discretion which must be used sparingly and in exceptional circumstances. Test: interests of justice. In these circumstances not in interests of justice to stay action.

Costs: conduct of defendant vexatious in extended meaning of the term. Plaintiff was put to unnecessary expense in instituting action and prosecuting action after application for summary judgment was dismissed. Yet no defence to claim. Costs on the scale as between attorney and client justified.

Costs in terms of Rule 32(9)(b): Relief granted substantially as prayed. Defendant did not disclose *bona fide* defence in summary judgment application. Summary judgment should have been granted had the defendant not raised an unreasonable defence. Costs on the scale as between attorney and client justified for this reason as well.

SOUTHWOOD AJ:

1. This is a claim for specific performance in terms of a life insurance policy. I refer to the plaintiff as Mr Ncube, and to the defendant as Liberty.

The Claim

2. On 14 May 2021, Mr Ncube caused summons to be issued out of this court for payment in terms of a life insurance policy. Mr Ncube is the policyholder of the insurance policy concluded with Liberty over the life of Mr Vusumuzi Mhlanzi, identity number 740304 5486 080 ('**Mr Mhlanzi**').
3. On 27 May 2022, the Particulars of Claim were amended.

4. The particulars of the parties are not in issue.
5. The following material allegations are admitted by Liberty:
 - 5.1. On or about 24 July 2013, Liberty and Mr Ncube concluded a written agreement of insurance under policy number 59885431600 commencing on 1 August 2013. I refer to this agreement as the Policy.
 - 5.2. The Policy consists of the documents attached to the Particulars of Claim as Annexures 'A' to 'E.'
 - 5.3. The following express, alternatively tacit, alternatively implied terms are the relevant terms of the Policy:
 - 5.3.1. Liberty undertook to provide death benefit cover of R11 245 725.00 after the anniversary subject to a premium contribution of R2 034.24 in respect of the life assured, being Mr Mhlanzi.
 - 5.3.2. The policy anniversary date was 1 August 2017, in terms of which the premium amount would increase as per the agreement between the parties.
 - 5.3.3. Liberty undertook to provide disability benefit for a maximum amount of R11 245 725.00 after the anniversary if Mr Mhlanzi became permanently disabled, or impaired, as defined in the Capital Disability (ODD) (65), depending on the level of impairment.

- 5.3.4. All benefits due would be paid to the Policyholder, except where otherwise stated.
- 5.3.5. On Mr Mhlanzi's death, the death benefits would be paid to any nominated beneficiary who survived him. If no Beneficiaries were nominated, the death benefits due would be paid to the Policyholder or his or her estate where applicable.
- 5.3.6. Mr Ncube is the Policyholder.
- 5.3.7. The Benefit, being the Life Cover, would pay out on the date of the death of Mhlanzi.
- 5.4. In concluding the Policy, Mr Ncube represented himself and Liberty was represented by its duly authorised agent and broker, Mr Hercules Van Heerden.
- 5.5. Mr Ncube has complied with his contractual obligations which includes payment of the policy premiums which are up to date.
- 5.6. Mr Mhlanzi died on 31 August 2017, being a date after the anniversary date, in terms of which the premium was increased and duly paid.
- 5.7. At the time of Mr Mhlanzi's death, the Policy was still in force and effect between the parties.

- 5.8. As Mr Mhlanzi died on 31 August 2017, the Policyholder is entitled to claim payment of the Benefit being the Life Cover.
- 5.9. No exceptions apply.
- 5.10. Mr Ncube lodged a claim with Liberty through its authorised agent on or about 27 September 2017.
- 5.11. Liberty has failed, alternatively refused, alternatively neglected to make payment of the claim.
- 6. Liberty placed the following in dispute:
 - 6.1. Mr Ncube is entitled to seek payment from Liberty at the time of Mr Mhlanzi's death in terms of the Policy.
 - 6.2. Pursuant to the Policy, on the death of Mr Mhlanzi, Mr Ncube was entitled to the payment of the death benefits in terms of the Policy.
 - 6.3. Liberty is obliged in terms of the Policy, specifically clause 5, to pay all benefits due to the Policyholder, Mr Ncube.
- 7. In support of its denial, Liberty pleaded that Mr Ncube is only entitled to payment if he is not a person of interest in ongoing police investigations surrounding Mr Mhlanzi's murder. Liberty further pleaded that the South African Police Service ('**SAPS**') had not cleared Mr Ncube as a person of interest in its ongoing investigations. This was indicated in a letter from the SAPS dated 18 May 2021.

8. Liberty also denied that it is obliged to make payment on the policy whilst investigations are pending regarding the death of the deceased.
9. No terms of the Policy were pleaded in support of these contentions. On the face of it, the plea did not disclose a defence to the claim.
10. Mr Ncube sought payment of the sum of R11 245 725.41, interest on the aforesaid sum of R11 245 725.41 at the rate of 10.25% *per annum a tempore morae*, '*calculated from the date of lodgement of the claim to the date of final payment*' and costs on the scale as between attorney and own client.
11. The relief sought in Liberty's plea was that the claim be stayed, alternatively be dismissed with costs
12. Prior to the trial, Mr Ncube brought an application for summary judgment which was dismissed with costs of senior counsel. I deal with this later in relation to the question of costs.
13. At the commencement of this hearing, I had to determine Liberty's application to stay the action. Argument was completed on the first day of the hearing and I reserved judgment until court commenced on the following day. I dismissed the application with costs and indicated that reasons would be furnished in my final judgment.
14. This was followed by an application for postponement from the bar by Liberty's counsel. *Mr Smith SC*. During the course of argument, *Mr Smith*

conceded that what had been pleaded in the plea was intended to support a stay but did not constitute a defence to the claim.

15. I gave an *ex tempore* judgment in which the postponement application was dismissed with costs.
16. Thereafter, the parties closed their cases and delivered their closing arguments.

The application for a stay

17. In its plea, Liberty sought a stay of proceedings pending the final determination by the SAPS. It is unclear what this means.
18. In the Notice of Motion, the stay was sought pending the finalisation of the investigation conducted by the SAPS under case number Bramley CAS 01/01/2017.
19. However, in Liberty's heads of argument, Liberty sought a stay pending the finalisation of the inquest into the death of Mr Mhlanzi and, thereafter, the decision of the Director of Public Prosecutions as to whether to charge Mr Ncube and, if charged with the murder of Mr Mhlanzi, pending the finalisation of the criminal trial.
20. Liberty also sought costs on an attorney and own client scale.
21. The basis of the stay in the founding affidavit is the following:

- 21.1. The wording of the Policy is clear. No payment can be made in terms of the Policy where there is a violation of criminal law. So much is clear from the provisions of clause 5 of Annexure C to the Particulars of Claim.
- 21.2. A murder investigation is underway and ongoing, and Mr Ncube remains a person of interest in the murder of Mr Mhlanzi. For so long as Mr Ncube is a person of interest in the murder of Mr Mhlanzi, he is not entitled to obtain payment of the benefit in terms of the Policy. It is against the terms of the Policy as well as the *boni mores* for a person to obtain payment from an insurance policy if such person was the cause of death of the Life Assured over which the policy was held;
- 21.3. certain *dicta* from the summary judgment:
- 21.3.1. the terms of the exclusion have not yet been rendered irrelevant as Mr Ncube has not been excluded as a person of interest in the murder of the deceased;
- 21.3.2. the provisions of the exclusion clause together with the ongoing criminal investigation by SAPS into the death of the deceased, in respect of which Mr Ncube is a person of interest, constitutes a defence to Mr Ncube's claim;

21.3.3. Mr Ncube should be pressurising the SAPS to complete its five-year investigation into the death of the deceased, pending which Liberty's hands are tied pursuant to the terms of the life policy;

21.3.4. the exclusion clause refers to a violation of the criminal law. The only entity entitled to investigate conclusively a violation of the criminal law is the SAPS.

22. In Liberty's heads of argument and in oral argument but, pertinently, not in the papers, Liberty contended that this Court cannot hear any evidence as to the cause of Mr Mhlanzi's death nor any exculpatory evidence from Mr Ncube that he had no involvement in the death of Mr Mhlanzi nor hear evidence from any members of the SAPS or the prosecutor as to Mr Ncube's possible involvement or not in the death of Mr Mhlanzi because this is a function reserved for the magistrate appointed in terms of the Inquests Act, 58 of 1959 (**'the Inquests Act'**). Accordingly, Liberty contended, this Court cannot usurp that function. In Liberty's heads of argument, it relied for this submission on section 17A of the Inquests Act. In oral argument, *Mr Smith* relied on section 16 of the Inquests Act.

23. The existence of the inquest appears for the first time in Liberty's replying affidavit. This fact now forms the basis of the relief sought in Liberty's heads of argument.

24. After the replying affidavit had been delivered, Mr Ncube delivered a supplementary answering affidavit. However, at the hearing, *Mr Cowley*, who appeared for Mr Ncube, withdrew the affidavit. Accordingly, although appearing on Caselines, this affidavit has not been admitted as part of the record of the stay application.

Principles for a stay

25. Liberty contends that in terms of the High Court's inherent power in terms of section 173 of the Constitution, proceedings may be stayed on grounds dictated by the interests of justice. Liberty relies for this submission on the judgment in *Mokone*.¹ This is the basis on which Liberty contends that this Court should grant a stay in these proceedings. I am bound by *Mokone*.
26. A stay of proceedings is normally only granted in exceptional cases and the power is exercised sparingly.²
27. There is no rule of law which stays civil proceedings where a criminal prosecution is pending. Instead, a stay will only be granted where there is an element of state compulsion impacting on the accused's right to silence.³

1 *Mokone v Tassos Property CC & Another* 2017 (5) SA 456 (CC) at [66]-[67].

2 *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Co Ltd and another* 1999 (4) SA 1039 (T) at 1048H

3 *Law Society of the Cape of Good Hope v Randell* 2013 (3) SA 437 (SCA) at [23]-[31]

Is it in the interests of justice to grant a stay?

28. In this application, Liberty refers to clause 5 of Annexure C to the Particulars of Claim as the basis for contending that “*No payment can be made in terms [of the Policy] where there is a violation of criminal law*”.

29. Clause 5 of Annexure C to the Particulars of Claim provides as follows:

‘All benefits due will be paid to the Policyholder, except where otherwise stated below

Where the Life Assured dies, the death benefits will be paid to any nominated Beneficiaries who survive the Life Assured. If no Beneficiaries have been nominated, the death benefits due will be paid to the Policyholder or his/her estate where applicable.

Where a cession has been recorded, the nomination of any Beneficiaries prior to the cession will be of no force and effect. All benefits due will be payable to the cessionary including where the Life Assured dies. Further, the cessionary may elect to nominate in writing one or more Beneficiaries in which case, all benefits due when the Life Assured dies will be payable to these nominated Beneficiaries.

The Policyholder may at any time appoint, change, or remove one or more Beneficiaries, unless a cession has been recorded. The Policyholder may appoint different beneficiaries for each Life Assured under the policy.

No cession, appointment, change or removal of a Beneficiary will be binding on Liberty Life unless it is given to Liberty Life in writing, and unless Liberty Life has recorded such cession or Beneficiary appointment, change or removal. Liberty Life is not responsible for the validity of any cession or Beneficiary nomination.

Subject to any cession, the Policyholder may exercise all rights under this policy without the consent of any Life Assured or Beneficiary.

Where the policy has more than one Policyholder, all the Policyholders must jointly exercise all their rights."

30. Clause 5 does not support Liberty's contention.
31. However, what Liberty may be referring to is clause 7 of Annexure C to the Particulars of Claim which provides as follows:

'In addition to any Specific Exclusions set out in the applicable benefit terms and conditions, no benefits will be paid if a claim arose directly or indirectly from the Life Assured or Policyholder's:

- *Wilful and material violation of any criminal law.'*

32. I assume, as did Mr Cowley, that Liberty is relying on clause 7 (**'the exclusion'**) and not clause 5.
33. Essentially, what this application is designed to achieve is a stay so that either a SAPS investigation, per the Notice of Motion, or an inquest and any subsequent proceedings, per the heads of argument, can establish whether Mr Ncube wilfully caused the death of Mr Mhlanzi, which might constitute a defence in terms of the Policy and/or the common law.
34. However, Liberty has failed to plead any provisions of the Policy, including clause 7, referred to above, and/or or any provisions of the common law,

and any relevant material facts which could serve as a defence to the claim.

35. As indicated above, Liberty's counsel conceded that the plea does not disclose a defence to the claim.

36. Insofar as the summary judgment found that the provisions of the exclusion and the criminal investigation by the SAPS, in respect of which Mr Ncube is a person of interest, constitutes a defence to the claim, this is clearly wrong for the following reasons:

36.1. the provisions of the exclusion and facts which indicate that the exclusion applies have not been pleaded;

36.2. no provision in the Policy or any principle in the common law has been pleaded which supports the allegation that Liberty is not obliged to pay in the face of an ongoing SAPS investigation in which the Policyholder is a person of interest in the investigation⁴;

36.3. the defence indicated in Liberty's affidavit resisting summary judgment is not a defence to the claim;

36.4. in the premises, no defence and no facts which disclose a *bona fide* defence are contained in Liberty's affidavit resisting summary judgment.

⁴ See in this regard *Nedbank Limited v Uphuhliso Investments and Projects (Pty) Ltd and others* [2022] 4 All SA 827 (GJ) at [23]- [31]

37. In my view, it is not in the interests of justice to stay proceedings in order to give the defendant an opportunity to establish a defence which has not been pleaded and/or where the prospects of establishing a defence are speculative at best.⁵
38. In relation to the contention that this Court cannot determine this matter because the matters to be determined by this Court fall within the exclusive jurisdiction of the magistrate seized with the inquest, this is a basis for relief which arises for the first time in argument.
39. Simply on this basis, the application cannot be granted.
40. Even if this Court should take a more robust approach and consider this argument on the basis of the facts in the replying affidavit, the application must fail.
41. As indicated above, I was referred to sections 16 and 17A of the Inquests Act as the basis for the contention. I was not referred to any other authority in support of this contention.
42. Section 16 of the Inquests Act provides as follows:

5 In addition, insofar as the relief based on the inquest is concerned, as sought in Liberty's heads of argument, given the fact that this case was only made out in the replying affidavit, this would constitute a basis for refusing the relief sought in the heads of argument. It is trite law that an applicant has to make out a case in its founding papers: *Democratic Alliance v Koufax Municipality and others* [2014] 1 All SA 281 (SCA) at [18], approving of the *dictum* in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at [29].

'16. Finding.—

- (1) *If in the case of an inquest where the body of the person concerned is alleged to have been destroyed or where no body has been found or recovered, the evidence proves beyond a reasonable doubt that a death has occurred, the judicial officer holding such inquest shall record a finding accordingly, and thereupon the provisions of [subsection \(2\)](#) shall apply.*
- (2) *The judicial officer holding an inquest shall record a finding upon the inquest—*
 - (a) *as to the identity of the deceased person;*
 - (b) *as to the cause or likely cause of death;*
 - (c) *as to the date of death;*
 - (d) *as to whether the death was brought about by any act or omission prima facie involving or amounting to an offence on the part of any person.*
- (3) *If the judicial officer is unable to record any such finding, he shall record that fact.'*

43. As indicated above, the factual issue which remained to be determined prior to Liberty's concession that what was pleaded did not constitute a defence to the claim, is whether Mr Ncube is a person of interest in the SAPS' investigation into the murder of Mr Mhlanzi. This is not a finding which the magistrate must determine in the inquest. No issue which arises from the plea is identical to any question which the magistrate must determine.

44. In any event, nothing in section 16 indicates that this Court does not have jurisdiction to determine this contractual claim.

45. Section 17A of the Inquests Act provides as follows:

'17A. Re-opening of inquest.—

- (1) *The Minister may, on the recommendation of the attorney-general concerned, at any time after the determination of an inquest and if he deems it necessary in the interest of justice, request a judge president of a provincial division of the Supreme Court to designate any judge of the Supreme Court of South Africa to re-open that inquest, whereupon the judge thus designated shall re-open such inquest.*
- (2) *An inquest referred to in [subsection \(1\)](#) shall, subject to the provisions of this Act, as far as possible be continued and disposed of by the judge so designated on the existing record of the proceedings, and the provisions of section 17 (2) shall, in so far as they are not contrary to the provisions of this section, apply mutatis mutandis to such an inquest.*
- (3) *A judge holding an inquest that has been re-opened in terms of this section—*
 - (a) *may cause any person who has already given evidence at the inquest to be subpoenaed to give further evidence;*
 - (b) *shall record any finding that differs from a finding referred to in section 16 (2), as well as the respect in which it differs; and*
 - (c) *shall cause the record of the proceedings to be submitted to the attorney-general concerned.'*

46. What I have stated above in relation to section 16 applies with equal force to section 17A.

47. For these reasons, as well, the application for a stay cannot be sustained.

48. Finally, what is also relevant is the prejudice to be suffered by the parties if the stay is granted or not granted.

49. The claim was lodged in 2017. This action was instituted in 2021. It is now 2024 and Liberty is still not in a position to defend the claim.

50. No authority was furnished in support of a stay of an action to enable a defendant an opportunity to establish if a defence exists after completion of a police investigation, an inquest or a criminal trial.

51. In contrast, in *Klencovljec*⁶, a judgment referred to by *Mr Cowley*, where the Court had to determine whether an insurer faced with otherwise perfectly valid claims can refuse to repudiate or honour the policies until sufficient information becomes available from certain unrelated third-party investigative processes at some indeterminate point in time, the Court held as follows:

51.1. if an insurer is entitled to a reasonable time to assess a claim, it would seem to follow that if such insurer wishes to avoid liability to make payment in terms of the policy, it is bound to repudiate the policy within a reasonable time⁷;

51.2. in failing to assess the claims and in waiting for the outcome of third-party processes, the insurer has rendered time and the adequacy thereof irrelevant. Time has played no part in the insurer's deliberations and its decision to defer⁸;

51.3. *'In the end it might simply be a balance of fairness to both insurer and insured in the prevailing circumstances of the matter, which*

6 *Klencovljec v Discovery Life Limited* [2015] JOL 33202 (GJ); 2014 JDR 1768 (GP); 2014 JDR 2151 (GJ)

7 at [19]

8 at [20]

would determine the time which the law would reasonably afford the insurer to exercise its election. It is unlikely that an [insurer] would have an unlimited timeframe within which it can seek to escape liability due to its inability (perceived or genuine) to assess a claim. Litigants are on a daily basis faced with all manner of limitations and obstacles in gathering the necessary evidence and information relevant to their cases. At some point however, time is up and the clock must (and does) stop.’⁹

52. I align myself with the reasoning in this judgment.
53. After almost seven years, Liberty has failed to plead a defence to the claim. This failure occurs in circumstances where it appears that Liberty has deferred its decision until independent third-party processes have been concluded. In my view, after almost seven years, where no defence to the claim is raised, the balance of fairness favours the insured.
54. In all the circumstances, it is not in the interests of justice to grant a stay.

The Action

55. Mr Ncube bore the onus of alleging and proving the facts necessary to bring him within the terms of the Policy. Liberty bore the onus of alleging and proving facts necessary to support an exception to general liability.¹⁰

⁹ at [22]

¹⁰ *Eagle Star Insurance Co Ltd v Willey* [1956] 1 All SA 31956 (1) SA 330 (A) at 334A-335F

56. As indicated above, the material allegations in the claim have been admitted and Liberty has conceded, correctly, that the plea does not disclose a defence. Accordingly, no evidence was lead.
57. The parties' respective arguments dealt with the date from which interest should run, the applicable rate, and the question of whether costs should be granted on an attorney and client scale.
58. I invited the parties to make further written submissions on these topics including the provisions of Rule 32(9)(b).¹¹
59. Both parties made further submissions which I have considered.
60. *Mr Cowley* contended that *mora* interest begins to run from the date on which *mora* arises. *Mr Cowley* relied for his submissions on *Mokala*¹² and *Crookes Brothers*¹³.
61. *Mr Smith* contended the following:

11 The court may at the hearing of such application make such order as to costs as to it may seem just: Provided that if— ...

(b) in any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially as prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiff's costs of the action to be taxed as between attorney and client.

12 *Mokala Beleggings v Minister of Rural Development and Land Reform* 2012 (4) SA 22 (SCA) at 25D-E

13 *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and others* 2013 (2) SA 259 (SCA) at 269E-F

- 61.1. Liberty does not have enough information regarding the death of Mr Mhlanzi;
- 61.2. Liberty could not establish that Mr Ncube was not a person of interest in the criminal investigation;
- 61.3. Liberty cannot be penalised in a situation where it cannot investigate; only SAPS can investigate;
- 61.4. as at 18 May 2021, Mr Ncube was described by the SAPS as a person of interest in the criminal investigation and had indicated that the claim should not be paid. These circumstances prevailed up to the point that the matter was referred to the inquest;
- 61.5. Liberty accepts that at that point, no criminal charges could be laid;
- 61.6. the referral occurred in 2022 and so, at best for Mr Ncube, interest should only run from 1 January 2022.
- 62. Essentially, the argument appears to be that on an equitable basis, interest should only run from 1 January 2022.
- 63. However, in its written submissions, Liberty indicated that the obligation to pay only arose on 6 April 2022 when the investigation was referred to a magistrate for an inquest.
- 64. As such, Liberty now also contends that interest runs from the date on which *mora* arises.

65. This is correct given the SCA judgments, *Mokala* and *Crookes Brothers*.
66. Both parties, however, made submissions as to when *mora* arose. This was not open to them as the date on which *mora* arose is not an issue which I have to determine.
67. As indicated above, it is common cause that as per the Policy Summary, the Benefit, being the Life Cover, would pay out on the death of Mr Mhlanzi. Mr Mhlanzi died on 31 August 2017 and Mr Ncube is entitled to claim payment of the Benefit being Life Cover.
68. No other terms of the Policy were pleaded which placed these allegations in issue or indicated that *mora* arose on some other date or in some other way.
69. On the face of it, the Policy indicates when performance is due i.e. on the date of the death of the deceased, *in casu*, 31 August 2017. This is referred to as *mora ex re* and no demand is necessary to place the debtor in *mora*.¹⁴
70. This would usually result in an order directing payment of interest on the capital sum from the date on which *mora* arose, namely 31 August 2017.
71. In this case, however, the Particulars of Claim, pray for interest '*a tempore morae; calculated from the date of lodgement of the claim*'

14 *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and others* 2013 (2) SA 259 (SCA) at [17]

72. When I raised this discrepancy with *Mr Cowley*, he informed me that Mr Ncube would claim interest from the date of lodgement of the claim, which is later than the date of Mr Mhlanzi's death, the date on which *mora* arose.

73. Insofar as the rate of interest is concerned, in contrast to the position taken in oral argument, the parties, in their written submissions, contend that the prescribed rate applicable at the time when *mora* arose is the applicable rate and remains constant.

74. The parties referred to *Dave hill*¹⁵ which in turn refers to section 1(1) of the Prescribed Rate of Interest Act¹⁶.

75. Section 1(1) of the Prescribed Rate of Interest Act provides as follows:

'If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate contemplated in [subsection \(2\) \(a\)](#) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise'.

76. The Benefit owed in terms of the Policy is a monetary obligation which bears interest from the date on which *mora* arises.¹⁷ I was not referred to any provision of the Policy which governed the rate at which interest is to

15 *Davehill (Pty) Ltd v Community Development* 1988 (1) SA 290 (A) at 300G-301I

16 55 of 1975

17 *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga and Others* 2013 (2) SA 259 (SCA) at [14]

be calculated. Accordingly, section 1(1) of the Prescribed Rate of Interest Act applies.

77. No special circumstances have been established by either party justifying a departure from the default position prescribed by section 1(1).
78. Accordingly, what must be determined is the prescribed rate of interest as at the date on which *mora* arose, namely 31 August 2017.
79. The prescribed rate of interest from 1 May 2016 was 10.5% per annum.¹⁸
80. The prescribed rate of interest from 1 September 2017 was 10.25% *per annum*.¹⁹
81. Accordingly, the prescribed rate of interest on the date on which *mora* arose is 10.5% per annum.
82. However, the rate of interest sought in the prayers of the Particulars of Claim is a rate of 10.25% *per annum*. Accordingly, this is the rate which will be ordered.

18 GN 461 of 2016; GG39943 dated 4 March 2016; GN 924 in GG 41082 of 1 September 2017

19 GN 924 of 2017; GG 41082 of 1 September 2017; GN 435 in GG41581 of 20 April 2018

Costs

83. In essence, Mr Ncube seeks costs on an attorney and client scale on the basis that Liberty's conduct in defending the matter has been vexatious in the extended meaning of the term²⁰, namely that, as *Mr Cowley* contented, Mr Ncube has been put to the expense of bringing and prosecuting this action in the absence of any defence.

84. The following common cause facts arising from the pleadings are relevant:

84.1. the claim was lodged on 27 September 2017;

84.2. the combined summons was issued on 14 May 2021;

84.3. in its plea dated 19 July 2022, Liberty admitted, in paragraph 7, that '*The Plaintiff is entitled to claim*' but pleaded that Mr Ncube is only entitled to payment if he is not a person of interest to ongoing police investigations surrounding Mr Mhlanzi's murder and that the SAPS has not cleared Mr Ncube as a person of interest in its investigations. At the hearing of the action, *Mr Smith* conceded, correctly, that this did not constitute a defence to the claim;

20 *Lemore v African Mutual Credit Association and Another* 1961 (1) SA 195 (C) at 199 G-H approving *In re Alluvial Creek Ltd* 1929 CPD 352 at 535, itself approved in *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and another* 1997 (1) SA 157 (A) at 177D-F

- 84.4. subsequent thereto, Mr Ncube brought an application for summary judgment. Liberty successfully opposed Mr Ncube's application for summary judgment without a valid defence being disclosed in the plea;
- 84.5. as a result, Mr Ncube was forced to set the matter down for trial and to prepare for the trial.
85. *Mr Smith* contends that it was not reprehensible to defend a claim in these circumstances i.e. that SAPS had identified Mr Ncube as a person of interest in its investigations and instructed Liberty not to pay the claim.
86. However, it is clear that at every step, Liberty was aware that it had no defence to the claim. Yet Mr Ncube, in order to obtain what he was contractually entitled to was forced to take a number of steps which were in my view, unnecessary, given that Liberty had no defence to the claim.
87. I find that Liberty's conduct was vexatious, in the extended meaning of the term, and justifies a special order for costs.
88. Insofar as Rule 32(9)(b) is concerned, the Rule does not permit the trial court to interfere with the costs order given in the summary judgment proceedings, as contended by *Mr Cowley*.

89. The Rule does, however, provide the trial court with a basis for justifying a special costs order. This is where the trial court grants an order substantially as prayed for and is of the view that summary judgment should have been granted had the defendant not raised a defence which was unreasonable.
90. The plea was delivered on 20 July 2022.
91. The application for summary judgment was delivered on 10 August 2022, within 15 days of delivery of the plea, in accordance with Rule 32(2)(a).
92. The application is based on a liquidated amount in money as contemplated by Rule 32(1)(b).
93. Mr Ncube verified the cause of action and the amount claimed and identified the facts on which the claim was based and why the defence as pleaded did not raise any issue for trial, in accordance with Rule 32(2)(b).
94. In terms of Rule 32(3), the defendant may satisfy the court by affidavit by any person who can swear positively to the fact that the defendant has a *bona fide* defence to the action and which affidavit discloses fully the nature and grounds of the defence and the material facts relied upon.
95. In this case, a Senior Legal Specialist in Liberty's Distribution Support and Dispute Resolution Department deposed to the affidavit in which she

confirmed that '*the Defendant has a bona fide defence to the Plaintiff's claim.*' As is clear, this contention was incorrect if not reckless.

96. The affidavit refers, incorrectly, to clause 5 of Annexure C to the Particulars of Claim as providing that '*no benefit will be paid if a claim arose directly or indirectly from the Life Assured or Policyholder's wilful and material violation of any criminal law*'.
97. This provision of the Policy is not pleaded.
98. The affidavit goes on to state that '*the Defendant is only entitled to make payment of the claim once the fragmentary (sic) of investigations against the Plaintiff are concluded and the Plaintiff is cleared and is no longer a person of interest.*'
99. As was correctly conceded at the trial, this did not constitute a defence to the claim.
100. *Mr Smith* contended that Liberty raised, both in its plea, and in the summary judgment what was known to Liberty at the time. At the trial, *Mr Smith* clarified that what had been pleaded did not constitute a defence to the claim but was intended to establish the stay as sought by Liberty.
101. However, *Mr Smith's* contention does not explain why this was raised as an ostensible defence when Liberty must have been aware that this did

not constitute a defence. As such, the presentation of facts in the summary judgment as a defence when these facts were solely intended to support the stay of the action was unreasonable.

102. In the premises, Mr Ncube should have been granted summary judgment had it not been for Liberty's unreasonable defence. Furthermore, I intend to give judgment for Mr Ncube substantially as prayed.

103. For these reasons, too, Mr Ncube is entitled to costs on the scale as between attorney and client.

Order

104. In the result, judgment is granted in favour of the plaintiff for:

- (a) payment in the sum of R11 245 725.00;
- (b) interest on the sum of R11 245 725.00 at the rate of 10.25% *per annum*, calculated from the date of lodgement of the claim, 27 September 2017, to the date of final payment;
- (c) costs of suit on the scale as between attorney and client.



F SOUTHWOOD

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CaseLines. The date of delivery of the judgment is deemed to be 25 March 2024.

APPEARANCES

Date of hearing: 11 and 12 March 2024

Date of judgment: 25 March 2024

Counsel for the Plaintiff: HH Cowley

Instructed by: Matojane Malungana Inc

Counsel for the Respondent: HJ Smith SC

Instructed by: Rams Attorneys