

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2022-036777

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

DATE

SIGNATURE

In the matter between:

GLACIER FINANCIAL SOLUTIONS (PTY) LTD

Applicant

and

NONHLANHLA MOTANYANE

First Claimant

PALESA MOTANYANE

Second Claimant

PHETEHO MOTANYANE

Third Claimant

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 23 October 2024.

DE OLIVEIRA, AJ

Introduction

[1] The applicant, Glacier Financial Solutions (Pty) Ltd, has delivered an interpleader notice under the following circumstances:

- (a) The applicant is part of the Sanlam Life Insurance Limited (“Sanlam”) group of companies. It administers a Living Annuity policy, purchased by Nthofela Albert Motanyane (“the deceased”) on 25 November 2011 (“the policy”), on behalf of Sanlam.
- (b) The estimated death benefits (i.e., proceeds) under the policy amount to approximately R2.7 million.
- (c) On 6 March 2021, the deceased passed away.
- (d) A dispute has arisen between the first claimant, on the one hand, and the second and third claimants, on the other, about which of the claimants are entitled to the benefits of the policy. In view of the fact that all three of them share the same surname, and with due respect to them, I intend to refer to each of the claimants by their first name.
- (e) The applicant contends that it is under liability in respect of which it was, or expected to be, sued by the claimants making adverse claims. As a result, and on 13 October 2022, the applicant instituted interpleader proceedings calling on the claimants to deliver particulars of their respective claims and requesting the Court to make a decision in regard to the applicant’s liability to the claimants and/or the validity of their competing claims in terms of rule 58(6) of the Uniform Rules of Court.

[2] The parties’ respective positions, and the relief sought by each of them, is set out in a joint practice note dated 3 October 2024.¹ Their respective positions may be summarised as follows:

¹ I digress to briefly mention that a joint practice note is, in my view – and notwithstanding that it is expressly required in all opposed motion matters by virtue of paragraph 25.17 of the Revised Consolidated Practice Directive 1 of 2024 – an indispensable requirement for the effective adjudication of opposed motions. It provides the necessary framework for courts to efficiently navigate opposed motions, incorporates important matters agreed to between the parties and highlights the issues to be determined by the court. Parties are therefore urged to attend pre-hearing conferences, and to prepare joint practice notes, with

- (a) The applicant seeks directions from the Court in relation to its liability, if any, to one or more of the claimants in terms of rule 58, together with an order that its taxed or agreed costs occasioned by the interpleader proceedings may be deducted from the amounts paid out to a party with a valid claim.
- (b) Nonhlanhla seeks an order in terms of rule 58(6) that the competing claims be adjudicated here and now (i.e., in these interpleader proceedings), that Nonhlanhla's claim be accepted and that the proceeds of the policy be paid out in accordance with the below-defined third nomination, namely:
 - i. to Nonhlanhla as to 34%;
 - ii. to Palesa as to 33%; and
 - iii. to Pheteho as to 33%.
- (c) Palesa and Pheteho, on the other hand, seek an order that Nonhlanhla's claim be rejected and directing that the proceeds of the policy be paid out in accordance with the below-defined second nomination, namely to Palesa and Pheteho in equal shares. In the heads of argument filed on their behalf, however, as well as in argument advanced before me, Palesa and Pheteho seek an order that the issue of the validity of the third nomination, as well as Palesa and Pheteho's allegations of fraud committed by Nonhlanhla in respect thereof, be referred in terms of rule 58(6)(c) for the hearing of oral evidence.

The Relevant Factual Background

[3] The following facts are common cause:²

the necessary care and diligence, for courts will not lightly permit parties to deviate from their agreements and other matters contained in a joint practice note (see for example, albeit in the context of pre-trial conferences, *Filta-Matix (Pty) Ltd v Freudenberg and Others* 1998 (1) SA 606 (SCA) and *National Union of Metalworkers of South Africa and Others v Driveline* 2000 (4) SA 645 (LAC) at [16] and [82]). In the matter before me, the parties' legal representatives did precisely as they were supposed to do. The joint practice note was of much assistance to this Court, for which it expresses its gratitude.

² Joint Practice Note 3 October 2024, para 9 at 04-4 – 5.

- (a) Nonhlanhla is not, and Palesa and Pheteho are, the biological children of the deceased.
- (b) On 22 May 1996, the deceased married Nonhlanhla's mother ("Carol") when Nonhlanhla was 2 years old.
- (c) In September 2010, the deceased had a stroke, which resulted in a speech impediment. He ceased working and commenced therapy for his disability.
- (d) On 25 November 2011, the deceased, on the advice of his broker, one Frik Grobler ("Grobler") (who at the time of his death had assisted the deceased with his financial portfolio for a period in excess of 20 years), facilitated his purchasing the policy from Sanlam, and administered by the applicant, with proceeds from his retirement fund, and in respect of which the estimated death benefits are R2 706 684.95.
- (e) In terms of the policy, the deceased was entitled to nominate a beneficiary who would receive the specified death benefits in the event of his passing. In addition, the deceased was entitled to revoke or replace the nomination of a beneficiary unilaterally. Any nomination or replacement was valid only if it was:
 - i. in writing;
 - ii. signed by the deceased; and
 - iii. received by the applicant prior to his death.
- (f) Over the years the deceased nominated beneficiaries.
- (g) On 2 November 2011, the deceased nominated Carol as a beneficiary to the policy ("the first nomination").
- (h) The deceased and Carol were divorced in the Regional Court, on 18 April 2018, having signed a settlement agreement dated 19 February 2018.
- (i) On 6 April 2017, the deceased removed Carol, his then ex-wife, and nominated Palesa and Pheteho as beneficiaries in equal shares ("the

second nomination"). The second nomination was accompanied by an affidavit by the deceased which confirmed that the deceased had suffered a stroke which left his ability to communicate (verbally and in writing) impaired. The deceased signed the second nomination by way of affixing his thumb print to each page in front of the Commissioner of Oaths.

(j) On 5 July 2020, Nonhlanhla was also nominated as a beneficiary together with Palesa and Pheteho, with Nonhlanhla to receive 34%, Palesa 33% and Pheteho 33% of the death benefits ("the third nomination"). The third nomination was signed electronically, in accordance with the applicant's internal processes and the Electronic Communications and Transactions Act 25 of 2002, and accepted by Sanlam and the applicant.

(k) On 6 March 2021, the deceased died.

[4] The relationship between Nonhlanhla, on the one hand, and Palesa and Pheteho, on the other, is unfortunately very acrimonious. Whilst Nonhlanhla contends that the third nomination is valid and binding – having been accepted by the applicant as such – Palesa and Pheteho accuse Nonhlanhla of having fraudulently procured an amendment to the policy by way of the third nomination, to the extent that they have proffered criminal charges against her.

[5] As a result of the competing claims, and the applicant's inability³ or hesitation to make payment of the death benefits in accordance with the third nomination, Nonhlanhla on 10 June 2022 instituted an application in this Court, under case number 2022-20040, against Palesa, Pheteho and the applicant in which she seeks an order, *inter alia*, compelling Palesa and Pheteho to complete and submit the necessary documents to the applicant and that the applicant then distribute the death benefits to the parties in accordance with the third nomination ("main application").

[6] Palesa and Pheteho opposed the main application and filed an answering affidavit therein. They also sought, by way of a counter-application, an interdict

³ At some stage, Palesa and Pheteho hampered payment of the death benefits in accordance with the third nomination by failing to furnish, *inter alia*, copies of their identity documents to the applicant.

against the applicant prohibiting it from making payment of the death benefits in accordance with the third nomination until such time as it had investigated and reported on the validity of the third nomination.

- [7] The parties have incorporated their respective affidavits in the main application, by way of their particulars in these interpleader proceedings. This is an important issue to which I will return later.
- [8] According to Nonhlanhla, it was only in March 2021 that she learned for the first time of the fact that she is not the biological daughter of the deceased. She says that this revelation came as a great shock to her (which comes as no surprise), in particular because the deceased had regarded Nonhlanhla as his daughter and raised her as such. She further bears the deceased's surname and her birth certificate reflects her as being the deceased's daughter.
- [9] After the deceased took up residence in a retirement village in or around 2018, Nonhlanhla says that she often cared for him, to the extent that she cooked for him and ran errands for him. According to her, she was his primary caregiver. Pheteho admits that Nonhlanhla ran errands for the deceased from time to time, but says that he too cooked for the deceased and delivered food to him during the lockdown period.
- [10] Despite suffering a stroke and a consequent speech impediment, the deceased remained in control of his faculties and otherwise functioned normally. Not only is this confirmed by Nonhlanhla, but a medical doctor, who examined the deceased shortly after his stroke for purposes of the deceased submitting a disability claim with Discovery, did *not* conclude that the deceased was incapable of managing his own affairs. Notably, Palesa and Pheteho only baldly deny that the deceased remained in control of his faculties and functioned normally other than his speech impediment.⁴
- [11] According to Nonhlanhla, in and during June 2020, the deceased asked her to make contact with Grobler to ask for a change of beneficiary document for one of his policies, which she duly did, having spoken to Grobler's assistant for this

⁴ Main Application, AA para 24.1 at 01-132.

purpose, and whose confirmatory affidavit is attached to Nonhlanhla's particulars in terms of rule 58. The circumstances surrounding this request are that the deceased spoke to Grobler, who was a trusted confidante of the deceased, and his broker and financial advisor since 2001, and informed him that he wished to make certain amendments to the policy. Like his assistant did, Grobler also deposed to confirmatory affidavits in support of Nonhlanhla's version, and did so in both the main application and in the interpleader proceedings.

[12] The third nomination was subsequently executed in and during July 2020 and accepted by the applicant as such. In regard thereto, Palesa and Pheteho accuse Nonhlanhla of "...having unduly influenced [the deceased] and changed the beneficiaries to the living annuity policy..."⁵ (The words in square brackets are mine) Little more is said than this. At the most, they say that:

- (a) Nonhlanhla and Grobler "colluded" against Palesa and Pheteho.⁶ Why or how they would do so is not said.
- (b) Because Nonhlanhla had access to the deceased's laptop and cellphone, that "...leaves doubt as to who actually completed and signed the third nomination form."⁷
- (c) Palesa was appointed by the deceased in terms of a Power of Attorney to do one thing or another. For the third nomination to be valid, it ought to have been signed by Palesa on the deceased's behalf.⁸
- (d) They have acted to protect their late father's wishes.

[13] Despite Palesa and Pheteho's subsequently appointed attorneys contending, in and during March 2021, that the deceased "...lacked the physical capacity to sign any documents since he suffered the stroke..."⁹, Palesa herself applied to be

⁵ Id at para 15.2. See also Interpleader, 2nd and 3rd Claimants' Affidavit, para 8.1 at 01-91.

⁶ Id at para 26.

⁷ Interpleader, 2nd and 3rd Claimants' Affidavit, para 8.1 at 01-91.

⁸ I pause to point out, however, that as a consequence of my findings herein, Palesa was not required to participate in the execution of the third nomination because the deceased had allegedly executed a power of attorney in her favour. Nor could someone armed with a power of attorney amend beneficiaries in terms of the applicable terms and conditions of the policy.

⁹ Correspondence 30 March 2021, para 2.1 at 01-251.

substituted as the executrix in the deceased's estate based on a will purportedly executed by the deceased in and during 2016 – if the deceased allegedly lacked physical capacity to effect the third nomination in July 2020, why did he not lack such capacity when executing a will in 2016? Furthermore, and having regard to Palesa and Pheteho's erstwhile attorneys' correspondence dated 30 March 2021, their real gripe appears to be the last will and testament purportedly executed by the deceased in 2019; they contend that that will is invalid and that Nonhlanhla forged the deceased's signature thereon. By way of example, they demanded an undertaking from Nonhlanhla that:¹⁰

“...we request that you confirm and provide us with a written undertaking that no payments of the deceased Glacier Investment Policy or Living Annuity or any other investment or policy which is beneficiary nominated shall be distributed to any beneficiary or heir *until such time as the validity of the Last Will and Testament has been confirmed by an expert and a Court with competent jurisdiction.*” (Emphasis added)

[14] It is the 2019 will that is effectively in dispute; not the third nomination as defined herein. Palesa and Pheteho appear to rely on the alleged forging of the 2019 will as circumstantial evidence proving that Nonhlanhla, “...Mr Grobler and Marie Victor [Grobler's assistant] colluded to fraudulently submit documents which does not reflect the last wishes of [the deceased].”¹¹ (The words in square brackets are mine) Notably, despite indicating that a handwriting expert's report would be procured to show that the deceased's alleged signature on the 2019 will was forged, no such report has been produced by Palesa and Pheteho.

[15] Despite Palesa and Pheteho threatening in July 2021 that they would institute an urgent application to prohibit Nonhlanhla from attempting to obtain her 34% share of the death benefits, no such application was ever instituted. Nor did they approach the court or the Financial Services Board as threatened in July 2021.

[16] What followed was a relatively prolonged exchange of correspondence between the parties' respective attorneys – Palesa and Pheteho accusing Nonhlanhla of

¹⁰ Id at para 3.

¹¹ Main Application, AA para 35.3 at 01-138.

having fraudulently procured her nomination as a beneficiary under the policy, and Nonhlanhla disputing same.

- [17] It is with the above background in mind that I turn to analyse the competing claims of the claimants in light of rule 58. I should however point out, first, that whilst Palesa and Pheteho raised two material non-joinder points by way of points *in limine* in the main application, they did not persist with such points *vis-à-vis* the applicant in the interpleader proceedings.

Analysis of Competing Claims

- [18] The crisp issue for determination, as I see it, is whether Palesa and Pheteho *bona fide* and genuinely dispute the validity of the third nomination, or differently put, whether their allegations of fraud against Nonhlanhla are such as to raise a real, genuine and *bona fide* dispute of fact disentitling Nonhlanhla to the relief sought or justifying a referral of the matter to oral evidence in terms of rule 6(5)(g) read with rule 58(6), which is what Ms Bekker, who appeared before me on behalf of Palesa and Pheteho, submitted is the appropriate order to be made.
- [19] I should however say something first about Ms Bekker's submissions to the effect that this is not an ordinary motion matter in view of the fact that Rule 58 envisages the delivery of "particulars" only, which are not required to be clothed in the form of an affidavit and which do not need to set out the claimants' competing claims with the same precision as a pleading.¹² I understood Ms Bekker to disavow the relief explicitly claimed by Palesa and Pheteho in the interpleader proceedings, namely that the Court should make an order, in terms of Rule 58(6)(a), that they were, to the exclusion of Nonhlanhla, entitled to the death benefits of the policy. Ms Bekker sought to persuade me that Palesa and Pheteho have not completely and fully advanced their case in these or in the main proceedings and that they should be permitted to supplement it, either by way of discovery (in the event of the matter being referred to oral evidence) or by way of a supplementary affidavit.

¹² *Corlett Drive Estates v Boland Bank Bpk* 1979 (1) SA 863 (C) at 867G, approved in *Kamfer v Redhot Haulage (Pty) Ltd* 1979 (3) SA 1149 (W) at 1153–4.

[20] The problem with the above submissions, as I see it, is that the parties, including Palesa and Pheteho, elected to advance their claims in these proceedings by way of affidavit, in which case the normal rules applicable to affidavits should apply. They also incorporated their respective affidavits from the main application into their affidavits in the interpleader proceedings. In other words, the parties have advanced their evidence in respect of the subject matter of these proceedings *in toto*, whether by way of the affidavits in the main application or the affidavits in the interpleader proceedings, or both. Indeed, included in the record before me is a founding affidavit by Nonhlanhla in the main application, an answering affidavit by Palesa and Pheteho therein, and a replying affidavit to Palesa and Pheteho's answering affidavit, which Nonhlanhla incorporated into her affidavit filed in the interpleader proceedings. I thus have before me the three affidavits that would otherwise have formed part of the record in the main application. For all intents and purposes, this is an opposed motion by a different name. I can think of no better a situation wherein a court can "...there and then adjudicate upon such claim..." as contemplated in rule 58(6)(a). Why else would rule 58(6)(a) exist?

[21] Despite reference being made in Ms Bekker's heads of argument to the "fact" that Palesa and Pheteho intend to cross-examine some or other witness, or that they are possessed of documents which provide "...clear and unequivocal evidence of Nonhlanhla's fraud...",¹³ I do not see any factual basis for these submissions, and I respectfully disagree with Ms Bekker's submissions that Palesa and Pheteho's affidavits, properly construed, reserve their right to supplement, or disclaim that the contents thereof are not exhaustive of their evidence in the matter.

[22] I accordingly find that I can determine the matter "here and now" as contemplated in Rule 58(6)(a); all of the relevant evidence is before me.

[23] Returning to the issue at the heart of the matter, namely whether Palesa and Pheteho have raised a real, genuine and *bona fide* dispute of fact, it is appropriate to restate certain trite principles of our law pertaining to disputes of fact in motion

¹³ Ms Bekker's heads of argument, para 3 at 03-9.

proceedings (the parties having elected to place their respective particulars under rule 58 before court by way of affidavit).¹⁴

- [24] The general rule when dealing with disputes of fact in motion proceedings is as set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹⁵ where the court referred to *Stellenbosch Farmers' Winery Ltd (Pty) Ltd v Stellenvale Winery (Pty) Ltd*¹⁶ and held as follows:

"... Where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order...In certain instances the denial by the Respondent of a fact alleged by the Applicant may not be such as to raise a real, genuine or bona fide dispute of fact (Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at pp 1163-5). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under rule 6 (5)(g) of the uniform rules of court and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which it seeks.... Moreover, there may be exceptions to this general rule, as for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

- [25] In *Soffiantini v Mould*,¹⁷ the court held as follows in relation to the determination of disputes of fact:

"In the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 T at 1165 Murray, then AJP, said:

'A bare denial of the applicant's material averments cannot be regarded as sufficient to defeat the applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary examination... and to ascertain whether denials are not fictitious intended merely to delay the hearing.'

¹⁴ Both Nonhlanhla, on the one hand, and Palesa and Pheteho, on the other (at least in their affidavit filed in the interpleader proceedings), seek to have their respective claims to the death benefits of the policy adjudicated in their favour. They both seek final relief (though in Ms Bekker's heads of argument, Palesa and Pheteho seek an order that the matter be referred to oral evidence).

¹⁵ 1984 (3) SA 623 (A).

¹⁶ 1957 (4) SA 234 (C) at 235E-G.

¹⁷ 1956 (4) SA 150 (E) at 154E-H.

See also the case of *Prinsloo v Shaw*, 1938 AD 570.

If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device.

It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

[26] There is another general principle that weighs heavily with me in the present matter and it is this: the more serious the allegation or its consequences, the stronger must be the evidence before a court will find the allegation established.¹⁸ In view of this fact, and having regard to the further fact that a party wishing to rely on fraud must not only plead it, but also prove it clearly and distinctly,¹⁹ Palesa and Pheteho are required to clearly and distinctly plead not only the necessary *facta probanda*, but also the relevant *facta probantia* in order to (i) sustain their claim to the death benefits to the exclusion of Nonhlanhla (ii) alternatively to raise a genuine and *bona fide* dispute of fact in relation to Nonhlanhla’s case.²⁰ It is apposite to recall that fraud is not easily inferred.²¹

[27] In *Mouton v Park 2000 Development 11 (Pty) Ltd*,²² it was held that:

“At the same time, it is equally well established that where a dispute of fact is not a ‘real, genuine or *bona fide*’ one the Court will be justified in ignoring it and may proceed to find on the applicant’s version thereof. So too, where the respondent’s version is clearly or palpably far-fetched or untenable, the Court may take a robust approach and decide the matter on the basis of the applicant’s version. As always, in evaluating the contents of the affidavits *the Court must have due regard for the treatment which the respondent has given*

¹⁸ *Gates v Gates* 1939 AD 150 at 155; see also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [27].

¹⁹ *Courtney-Clarke v Bassingthwaighe* 1991 (1) SA 684 (Nm) at 689F–G.

²⁰ It is trite to state that, in motion proceedings, affidavits serve the dual function of pleadings and evidence – see in this regard and for example *ABSA Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) at [23].

²¹ *Gilbey Distillers and Vintners (Pty) Ltd v Morris NO* 1992 (2) SA 217 (SE) at 226A; *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) at 822G–H.

²² 2019 (6) SA 105 (WCC) at 85.

to the averments under reply. In this respect a respondent has a duty to engage with the facts which are put up by the applicant, and to deal with them fully and comprehensively. Any 'skimpiness' and improbabilities in his version may thus count against him." (Emphasis added)

- [28] Not only do Palesa and Pheteho bear the onus to prove fraud in order to succeed with their claim; insofar as they seek a referral of the matter to oral evidence, they are required to show that their allegations of fraud are such as to raise a real, genuine and *bona fide* dispute of fact. In this regard, I am particularly interested in the "...treatment which [they have] given to the averments under reply."²³ (The words in square brackets are mine) The averments under reply are Nonhlanhla's allegations pertaining to her relationship with the deceased, his mental faculties at the time of executing the third nomination and the execution thereof itself.
- [29] In my view, Palesa and Pheteho have not adequately engaged with or disputed Nonhlanhla's case. I agree with Ms Ternent that Palesa and Pheteho's allegations are wholly speculative and unsubstantiated, or as she put it in oral argument, that they merely rely on "....random facts built into a conspiracy." If I were to permit such allegations to achieve a further delay of the matter, either by way of a referral to oral evidence or otherwise, "...the effective functioning of the court...", in the words of Price JP, "...can be hamstrung and circumvented by the most simple and blatant stratagem."²⁴ I thus intend on adopting a "...robust, common-sense approach..."²⁵ to the matter.
- [30] It is noteworthy that Palesa and Pheteho do not genuinely or *bona fide* dispute that the deceased was perfectly capable of managing his own affairs. There is no evidence on the papers before me to the effect that the deceased could not himself have submitted the third nomination electronically, as was done and which was accepted by the applicant. There is thus the submission made, not in an affidavit, but in counsel's heads of argument, that the deceased's laptop was not in complete working condition since 2019, so "...the deceased would not have been able to change the beneficiaries to the policy of his own accord working

²³ Ibid.

²⁴ *Soffiantini* (note 17 above) at 154E-H.

²⁵ Ibid.

from his own laptop, and required assistance, likely from Nonhlanhla or from Mr. Grobler.”²⁶ This, I regret to say, is inappropriate both from the point of view that it is not supported by evidence under oath, but also because it is speculative.²⁷ The repeated refrain of our courts on this subject is well known; it comes to us from *Caswell v Powell Duffryn Associated Colliers Ltd*,²⁸ where Lord Wright remarked as follows:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

- [31] There are no positive proved facts from which an inference can be made that Nonhlanhla somehow masterminded the execution of the third nomination by taking control of the deceased’s laptop and email account. This is no more than pure speculation and suspicion on the part of Palesa and Pheteho, i.e., “...random facts built into a conspiracy.”
- [32] It has thus been held that, if the court is satisfied as to the inherent credibility of the applicant’s factual averments, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief sought.²⁹
- [33] Whilst I am mindful of the fact that motion proceedings are not designed to determine probabilities,³⁰ there are certain facts and factors that further militate

²⁶ Ms Bekker’s heads of argument, para 21 at 03-9.

²⁷ A good rule of thumb is for every recordal of fact or factual submission contained in counsel’s heads of argument to appropriately cross-reference the source. In the case of motion proceedings, the source would be an affidavit or annexure. In trial matters, the oral evidence on record or some or other document proved and admitted into evidence would constitute the relevant source. This way, a reader can readily interrogate and verify a recordal of fact or factual submission contained in heads of argument.

²⁸ [1939] 3 ALL ER 722 (HL) 733E-F.

²⁹ See for example D E van Loggerenberg *Erasmus: Superior Court Practice* (Jutastat E-Publication) at RS23, 2024, D1 Rule 6-34 and the authorities referred to in footnote 225 therein.

³⁰ See for example *Zuma* (note 18 above) at [26].

against finding that the relatively bare denials of Palesa and Pheteho create real, genuine and *bona fide* disputes of fact. To name only a few:

- (a) Nonhlanhla's version is corroborated by both Grobler and his assistant. There is no indication that such persons are being untruthful or that they have reason to be. On the contrary, and by all accounts, Grobler was a trusted confidante of, and advisor to, the deceased.
- (b) Notwithstanding that Palesa and Pheteho proffered criminal charges against Nonhlanhla (for theft and fraud), there is no indication that the SAPS have further investigated the matter or that the NPA have decided to formally charge Nonhlanhla with a criminal offence in relation to the execution of the third nomination, and this despite the passage of three years.
- (c) Despite their continuous threats to bring the matter to a head by instituting litigation or by reporting the matter to some or other regulator, Palesa and Pheteho have failed to do either.
- (d) The applicant's "audit trail" confirms that the documents were emailed to the deceased's email address and processed therefrom, resulting in the applicant accepting the third nomination as being valid.
- (e) Despite asserting that the 2019 will was forged and that a handwriting expert will verify such forgery (to the extent of foreshadowing a report as far back as July 2021), no report has been produced, nor have Palesa and Pheteho identified an expert.
- (f) Whilst reference is made to the fact that Palesa and Pheteho employed the services of a computer technician to obtain access to the deceased's laptop after his passing, and for purposes of extracting relevant information and documentation, they have not furnished any such information or documentation despite obtaining access to the laptop since August 2022.
- (g) The deceased was able to and apparently did continue to sign documents, even in manuscript, such as in respect of the lease at the retirement village.

(h) According to Nonhlanhla, she only learned of her nomination as a beneficiary under the policy in March 2021, when she and Palesa and Pheteho attended a meeting at Grobler's offices.

[34] As far as a referral to oral evidence in terms of rule 6(5)(g) is concerned, such an order is not simply there for the taking. By way of example, if a respondent makes averments which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit containing allegations which *prima facie* establish that defence (I pause to mention that Palesa and Pheteho do not allege this to be the case, namely that they cannot *prima facie* establish the fraud by way of affidavit), the respondent is entitled to invoke subrule 6(5)(g),³¹ *albeit that*:³²

"It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. *Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established.* Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one."

[35] Palesa and Pheteho have not satisfied this Court "...that there are reasonable grounds for believing that [their allegations of fraud will] be established." (The words in square brackets are mine)

[36] In all, and having regard to the fact that all of the evidence by all of the claimants is before me, I am of the view that Nonhlanhla's claim stands to be accepted and that the claims of Palesa and Pheteho fall to be rejected. The order I intend to make appears at the end of this judgment.

³¹ See for example *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at 204E..

³² *Id* at 205A-B.

[37] Insofar as costs are concerned, Nonhlanhla seeks that Palesa and Pheteho pay costs on an attorney and client scale. Her case in this regard is that there is no evidence of fraud or unlawfulness on the part of Nonhlanhla whatsoever. Palesa and Pheteho's allegations, unsubstantiated as they are, have the effect of defaming and maligning Nonhlanhla. She further contends that Palesa and Pheteho's opposition to the main application, and their participation in the interpleader proceedings, is vexatious and obstructive. I agree with these submissions.

[38] On 12 September 2022, and upon receipt of Palesa and Pheteho's answering affidavit, Nonhlanhla's attorneys addressed correspondence to their counterparts inviting Palesa and Pheteho to withdraw their opposition (the letter is dated 22 August 2022), which they elected not to do.

[39] In *Abrahams v RK Komputer SDNBHD and Others*,³³ the Court remarked as follows:

"The first applicant has repeatedly alleged in her affidavits dishonesty on the part of the third respondent. Thus she alleges that his approach entailed 'not a bona fide mistake, but rather a deliberate attempt to obfuscate and avoid the issue at hand'; she describes his reasoning as entailing 'disingenuously linking' matters, 'contrived and disingenuous . . . he certainly could not have had an honest belief in his said findings'; and, in reply, she reiterates that he 'is not being entirely frank with this court'; she strives to infer (through, as indicated above, the most gossamer speculation) that the third respondent and first respondent's counsel may have discussed the merits of the matter'; and she alleges that he 'deliberately ignored' a particular matter. As I have indicated, her counsel (in her presence) continued to press these conclusions in oral argument on her behalf to the very end.

I believe that the court in these circumstances is required to mark its particular disfavour towards an approach which impugns in this way the personal and professional integrity of..."

[40] These remarks are particularly apposite *in casu*. Accusing Nonhlanhla of having deliberately and fraudulently committed a crime, with no evidence other than dubious circumstantial evidence and "gossamer speculation", is deserving of this

³³ 2009 (4) SA 201 (C) at 211-212.

Court's censure. Litigants cannot hide behind affidavits when accusing others of serious criminal impropriety.

- [41] In any event, at the absolute worst for Nonhlanhla, and at best for Palesa and Pheteho, they have put Nonhlanhla to the unnecessary trouble and expense of having to institute the main application and to participate in the interpleader proceedings on an opposed basis, which expense she should not have to bear.³⁴ I would have ordered them to pay costs on an attorney and client scale on this basis in any event.

The Applicant's Costs

- [42] It remains to deal with the issue of the applicant's costs. It seeks an order that its costs occasioned by the interpleader proceedings, as may be taxed or agreed, be deducted from the proceeds of the death benefits under the policy after the competing claims have been determined.
- [43] Mr Mathiba, who appeared before me on behalf of the applicant,³⁵ submitted, with reference to *African Life Assurance Society Ltd v van der Nest and Another*,³⁶ that an applicant who was entitled to adopt the procedure under rule 58 is *prima facie* entitled to its costs. It is normal practice in such circumstances to release the applicant from the proceedings and to allow it to deduct its costs from the proceeds of the disputed property.³⁷
- [44] Whilst there is some merit in the claimants' criticism of the applicant's institution of the interpleader proceedings, for it could quite simply have abided the court's decision in the main application and thereby avoided the additional costs (to all concerned) occasioned by the interpleader proceedings, I am satisfied that the applicant was entitled to institute the interpleader proceedings (it being faced with adverse claims), and that as a result it ought to be entitled to its costs occasioned by the interpleader proceedings on Scale A as contemplated in rule 67(3)(A) read

³⁴ See in this regard *In re Alluvial Creek Ltd* 1929 CPD 532 at 535.

³⁵ The heads of argument having been drawn on behalf of the applicant by Ms L Liebenberg.

³⁶ 1971 (3) SA 672 (C) at 675(E).

³⁷ *Ibid.*

with rule 69. I am also satisfied that the applicant is entitled to deduct such costs, as may be taxed or agreed, from the proceeds of the policy prior to the distribution thereof to the claimants.

[45] Whilst Ms Ternent implored me to order that the applicant's costs be deducted from Palesa and Pheteho's portion of the death benefits, I am disinclined to make such an order on the basis that Palesa and Pheteho are not to blame for the applicant's election to institute interpleader proceedings, and notwithstanding that they are the losing parties herein. I accordingly direct that, whilst the applicant's costs, on Scale A, may be deducted from the proceeds of the death benefits, they are to be deducted from such benefits prior to the distribution thereof in the below-mentioned proportions to the claimants.

Order

[46] In the circumstances, I make the following order:

- (a) The first claimant's claim is accepted.
- (b) The second and third claimants' claim is rejected.
- (c) The second and third claimants are ordered, within 7 (seven) days of the date of service of this order on them, to complete and submit to the applicant the death claim forms together with certified copies of their identity documents and proof of their banking details in order for the applicant to distribute the proceeds of the Glacier Living Annuity policy, no.: 3419942 ("the policy"), of the late Nothofela Albert Motanyane to the claimants.
- (d) The second and third claimants are further ordered to comply with any request by the applicant, within 7 (seven) days of such request being made, for additional information and documentation in order to give effect to (c) above and (e) below.
- (e) Upon compliance with (c) and (d) above, and after deducting its costs per (g) below, the applicant is ordered to distribute the proceeds of the policy to the claimants in the following proportions:

- i. the first claimant – 34%;
 - ii. the second claimant – 33%; and
 - iii. the third claimant – 33%.
- (f) The second and third claimants shall pay the first claimant's costs on an attorney and client scale.
- (g) The applicant's costs occasioned by the interpleader proceedings, on Scale A as contemplated in rule 67A(3) read with rule 69, may be deducted from the proceeds of the policy prior to the distribution in terms of (e) above.



DE OLIVEIRA AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Counsel for the Applicant:	S Mathiba (heads of argument by L Liebenberg)
Intstructed by:	Werksmans Attorneys
Counsel for the First Claimant:	P V Terner
Instructed by:	Kim Meikle Attorneys
Counsel for the Second and Third Claimants:	C Bekker
Instructed by:	Du Toit Attorneys

