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Enhancing Judicial Excellence

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TRIBUTE TO AKHO NTANJANA

Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton and continue on your well-defined route.

Thank you for being our guiding light.

CONTENTS

ARTICLES

CASE NOTES

Enhancing Judicial Excellence

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The *South African Judicial Education Journal* is published by the South African Judicial Education Institute (SAJEI), Office of the Chief Justice. The mandate of SAJEI is to provide judicial education to aspiring and serving Judicial Officers in order to enhance judicial accountability and transformation of the Judiciary.

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THE DEFERMENT OF PAYMENT OF BENEFICIARY CLAIM PENDING THE OUTCOME THIRD PARTY INVESTIGATIVE PROCESSES: A REVIEW OF *NCUBE v LIBERTY LIFE* [2024] 2 ALL SA 861 (GJ) AND *BASDEO v DISCOVERY LIFE LTD* [2024] ZAGPPHC 884 (10 SEPTEMBER 2024)

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I INTRODUCTION

N took a life insurance policy over the life of M commencing on 1 August 2013. In terms of the policy the insurer undertook to provide death benefits cover of R11 million after the anniversary date on 1 August 2017. On M'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 estate where applicable. M died on 31 August 2017, being a date after the anniversary date, while the policy was still in force. On 27 September 2017, N submitted a claim with his insurer for payment of death benefits. It refused to honour the claim on the basis that a murder investigation was underway and ongoing. The insurer aptly pointed out that the South African Police Services ('SAPS') had not cleared N as a person of interest in its ongoing investigations surrounding M's murder. In this regard, it referred to a letter from the SAPS dated 18 May 2021.

Faced with resistance from his insurer, on 14 May 2021 N instituted an action in the High Court seeking payment of death benefits in the sum of R11 million. The insurer countered the claim by seeking a stay of proceedings pending the outcome of criminal investigations or inquest or criminal trial. It maintained that it was 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. Despite a cloud hanging over N, the court granted summary judgment in favour of the policyholder for payment of death benefits plus interest, calculated from the date of lodgement of the

claim on 27 September 2017, to the date of final payment. It also mulcted the insurer with a punitive costs order.

This is not, as the reader may suppose, the plot of a well-rehearsed Netflix documentary series clip or a murky tale of killings for insurance pay-out capturing the public imagination, but the facts of *Ncube v Liberty Life* [2024] 2 ALL SA 861 (GJ). (Recent examples include those of R Ndlovu, A Setshwantsho & A Bella Dosantos who have all been arrested and charged in connection with killing loved ones for insurance pay-outs. M Netshisaula 'Unveiling the dark reality behind women who kill for insurance payouts' *IOL* 13 April 2024 https://www.iol.co.za/news/crime-and-courts/unveiling-the-dark-reality-behind-women-who-kill-for-insurance-payouts-4e98d29e-e625-4d03-beb0-c2c52453970d). Likewise, the recent case of *Basdeo v Discovery Life Ltd* [2024] ZAGPPHC 884 (10 September 2024) to a large extent replicates the issues that arose in *Ncube* (see also *Hoare v S* [2005] JOL 15646 (T)). These consequential decisions pose fascinating questions about the dilution of the settled common-law unworthiness principle. Put simply, the general rule of unworthiness stipulates that no person may be enriched by their unlawful conduct, or benefit from any conduct that is punishable (A Malherbe *Dilution by the Courts of the General Unworthiness Principle* (LLM mini-dissertation, UP 2016). The first and threshold question is for how long can the insurer faced with an otherwise proper claim by a dodgy beneficiary refuse to either repudiate or honour the policies until the completion of unrelated third-party investigative processes? The second question is what limitations and requirements does the law impose in such a situation? The third question is whether the insurer can rely on a stay of proceedings to withhold payment of the beneficiary claim? Given that deferment of payment of a claim pending the outcome of investigative processes does not constitute a defence except under exceptional circumstances, how can a court balance various factors, namely prejudice, delay and fairness to both parties when considering whether deferment is justified? This commentary grapples with intricate issues embedded in *Ncube* and *Basdeo*.

II OPPORTUNISM IN THE INSURANCE INDUSTRY

Before addressing vexed issues emanating from *Ncube* and *Basdeo*, in particular, the nature of the dilemma confronting an insurer faced with an otherwise perfectly valid claim from an ostensibly dodgy beneficiary, a few words about the deep-seated and even escalating opportunism in the insurance industry are appropriate (A Kilroy & KA Smith 'Fraud statistics 2024' *Forbes Advisor* available at https://www.forbes.com/advisor/insurance/fraud-statistics/; Note 'Financial crime in the insurance industry' *PWC Global* available at https://www.pwc.com/gx/en/industries/financial-services/publications/financial-

crime-in-the-insurance-industry.html; 'The digital deception: The rise of AI insurance fraud threatens the industry and consumers' *Momentum Life* 26 June 2024 available at https://www.fanews.co.za/article/short-term-insurance/15/general/1217/the-digital-deception-the-rise-of-ai-insurance-fraud-threatens-the-industry-and-consumers/3). It cannot be denied that the insurance field remains a veritable site of fraudulent activities (D Millard '*P K Harikasun v New National Assurance Company Ltd* (190/2008) [2013] ZAKZDHC 67 (12 December 2013)' (2016) *De Jure* at 155). Manifold deceptive practices in life insurance include false death claims, beneficiary fraud and fabricated policies ('Life cover fraud – reality in South Africa – here's what you need to know to protect yourself' *Hollard Life Solutions* 11 April 2024 available at https://www.fanews.co.za/article/life-insurance/9/general/1202/life-cover-fraud-2a-reality-in-south-africa-here-s-what-you-need-to-know-to-protect-yourself/39186). Sight however must never be lost about the asperities of insurer opportunism. On occasions insurers have sought to escape liability to indemnify the insured by relying on some inconsequential inaccuracies or trivial misstatements some of which are not materially connected to the risk or assessment of the claim (*Qilingele v SA Mutual Life Assurance Society* 1993(1) SA 69(A) 74B; *Molefe v Miway Insurance Co Ltd* [2023] ZAGPPHC 489 (20 June 2023); *Strydom v Certain Underwriting Members* 2000 (2) SA 482 (W)). The pressing issue is fairness in insurance contracts. Hence, the intrusion in the field of insurance of 'Treating Customers Fairly' ('TCF') concept (https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Treating-customers-fairly.aspx; Commentators are sceptical about the efficacy of TCF in the insurance filed: D Millard 'Through the looking glass: Fairness in insurance contracts – A caucus race?' (2014) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 547–566; D Millard & CJ Maholo 'Treating customers fairly: A new name for existing principles?' (2016) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 594).

III COMMON-LAW UNWORTHINESS PRINCIPLE

It is useful to review, in brief compass, the common unworthiness principle. It is trite as Corbett and others helpfully explained:

> *The basis of the grounds of unworthiness mentioned by the authorities is that to allow the beneficiaries to take the benefit would offend against public … and the general principle that no one should be permitted to benefit from his or her own wrongful act or derive from conduct which is punishable (M Corbett, G Hofmeyr & E Kahn The South African Law of Succession (2001) 2ed at 79).*

In a nutshell, this longstanding common-law rule otherwise known by the aphorism '*de bloedige hand neemt geen erffenis*' – 'the bloody hand does not

inherit' stipulates that no person who intentionally and unlawfully causes the death of the deceased is disqualified from receiving any benefit from the deceased estate (C Van der Walt & JC Sonnekus 'Die nalatige bloedige hand-neem "erffenis"' (1981) *Tydskrift van Suid Afrikaanse Reg* at 30; HR Hahlo 'Die bloedige hand eft niet' (1952) *South African Law Journal* at 136 and 'Forfeiture by murder' (1953) *South African Law Journal* at 1; *Smit v Master of High Court, Western Cape* [2022] ZAWCHC 56 (26 April 2022); *Daniels NO v De Wet* [2008] 4 All SA 549 (C). See also MC Wood-Bodley 'Forfeiture by a beneficiary who conspires to assault with intent to do grievous bodily harm: *Daniels NO v De Wet* 2009 (6) SA 42 (C)' (201) *South African Law Journal* at 30; C Triggs 'Against policy: Homicide and succession to property' (2005) *Saskatchewan Law Review* at 117) or in terms of the interstate succession (A Skeen 'Unworthiness through negligence' (1993) *South African Law Journal* at 446; HR Hahlo 'Murder rewarded' (1976) *South African Law Journal* at 376; JS McLennan 'Unworthiness to inherit, the "*bloedige hand*" rule and euthanasia, what to say in your will' 1996 *South African Law Journal* at 143. The application of the common-law disqualification is broadly premised on public policy considerations. The headnote to the judgment in *Casey v The Master* 1992 (4) SA 505 reads:

> *Principle and public policy require that the maxim 'de bloedige hand neemt geen erfenis' still applies to a person who negligently caused the death of another.*

(PW Thirion 'De bloedige hand neemt geen erffenis revisited' *Advocate* August 2013 at 45; RRM Paisley & MJ de Waal 'Forfeiture of bequests to witnesses in South Africa and Scotland' (2002) *Stellenbosch Law Review* at 197). Another important consideration is to prevent fraud and falsity. Where there is no basis to suspect any fraudulent conduct, the disqualification does not apply (A Yuda & M David '"*Die Bloedige hand*" principle in s 37C pension fund distributions' https://www.financialinstitutionslegalsnapshot.com/2020/09/22/de-bloedige-hand-principle-and-its-application-in-s37c-pension-fund-distributions/; J van der Walt-Nieuwoudt 'Winding up the bloody estate' *Legal* 13 November 2023 https://legalhero.co.za/2023/11/13/winding-up-the-bloody-estate/). A survey of leading authorities reveals that the common-law disqualification rule is applied explicitly and implicitly in insurance law (DM Davis *Gordon & Getz The South African Law of Insurance* 4ed (1993) at 356–358). It has been stated that our courts will not recognise a benefit accruing to a criminal from their crime. The most obvious illustration is where the life assured has been murdered, no benefit under the policy shall accrue to the murderer or anyone claiming through him (DM Davis (1993) at 356–358; *Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602; *Gray v Barr, Prudential Insurance Co Ltd* [1971] 2 QB 554. See also SWJ van der Merwe 'The helping hand' (1968) 1 *Comparative and International Law Journal*

of Southern Africa 447 at 456. *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 (CA) Unreported Case No 46154/2013 and 46155/2013 ZAGPHC 191 dated 18 August 2014.

IV THE DEFERMENT OF PAYMENT DEFENCE

The issue of deferment of payment connected to unrelated third-party investigation was considered in *Alexander v Discovery Life Ltd* Unreported Case No 46154/2013 and 46155/2013 ZAGPHC 191 dated 18 August 2014. In that case the insurer argued that it was not prudent to pay out any claims in terms of the policies until the police investigation in terms of the deceased's death was completed. The court found that the insurer failed to conduct any investigation into the alleged illegal activities of the insured nor did the insurer make any reasonable inquiries into the status of the investigation by the SAPS at the time prior to the commencement of the judicial proceedings. It was in this case that the reasonableness of the delay in the assessment of the claim was highlighted as an important aspect (*Basdeo* para 37).

Nkobe v Liberty Group Unreported Case Nr. 2021/23807 Gauteng Local Division, Johannesburg, is the next case in which the insurer had deferred its decision until independent third-party processes have been concluded. In this instance, the insurer invoked a specific exclusion clause (clause 7) that stipulated that no benefits would be paid if a claim arose directly or indirectly from the life assured or the policyholder's wilful and material violation of any criminal law. The court reaffirmed the essential proposition that deferring payment pending the outcome of investigative processes was no defence at all. Furthermore, it noted that clause 7 was not pleaded in the papers as a defence.

Adopting the approach signalled in *Alexander* and *Nkobe*, Southwood AJ in *Ncube* dismissed the insurer's reliance on the pending investigation by SAPS as a ground for justification for the non-payment of the claim as per the insurance policy (*Ncube* para 36.2). In the case at bar, after almost seven years, the insurer failed to plead a defence to the claim.

Basdeo is the most recent addition to the deferment of payment jurisprudence. In the case at hand, the applicants were the nominated beneficiaries in respect of their father's death benefit policy (Discovery Life Plan ('the CLP')). Following the murder of their father on 29 November 2020, the sons proceeded with their claims. The value of the policy was R400 000. Hence each beneficiary was entitled to receive R200 000 together with interest and costs (*Basdeo* para 2).

On 10 December 2020, Discovery was informed by the SAPS to 'STOP ALL INSURANCE PAYMENTS' relating to the deceased (*Basdeo* para 3.3). Three years later on 5 June 2023, the applicants issued summons against

Discovery because no payment was forthcoming. On 14 July 2023, the second applicant's claim was fully paid together with the interest and costs.

In opposing summary judgment application, Discovery essentially contended that that the first applicant's claim was premature as a result of the SAPS investigation. The insurer further insisted that it was contractually bound in terms of clause 12.4 of the policy and thus had to wait for the outcome of the police investigation. Clause 12.4 of the policy reads:

> *Discovery Life reserves the right to investigate claims or await the outcome of third-party investigations (such as police investigations) or the outcome of tribunals (such as judicial inquests) or tests (such as toxicology tests) and may defer its decision to refuse or admit a claim until such investigation, tribunals or tests are completed.*

Counsel for Discovery pointed out that its defence stood on a different footing to *Nkobe* and *Alexander* wherein the insurers were not reliant on express terms contained in their policies. In the case under consideration, it was explicitly stipulated that an insurer had to await the outcome of the police investigation or a third-party investigation and furthermore reliance on clause 12.4 was its defence at all relevant times (*Basdeo* para 40). In short, Discovery maintained that its defence was *bona fide* and its conduct consistent with the terms of the policy (*Basdeo* para 30).

In the absence of a confirmatory affidavit from the author of the SAPS's letter, the applicants contested the authenticity and the reliability of the said letter. They further argued that the letter in question did not hold evidentiary weight (*Basdeo* para 31). Be that as it may, Discovery suffered a similar setback as Liberty. Kooverjie J held that Discovery's defence premised on clause 12.4 was neither *bona fide* nor good in law (*Basdeo* para 45). Consequently, the applicant was justified in pursuing the summary judgment proceedings and was therefore entitled to the interest and costs. The key takeaway from the *Basdeo* judgement is the importance of finalising and paying out a claim within a reasonable period of time. Reasonableness in this instance was not limited to the investigation but also the finalisation of the claim by the insurer.

VI STAY OF PROCEEDINGS

One of the interesting contentions raised by the insurers in *Ncube* and *Basdeo* in challenging High Court action to enforce beneficiary claims concerned the stay of proceeding defence. The insurers' focal submissions were that civil proceedings ought to be postponed until third-party investigative processes have been disposed of. It was emphasised that the High Court is vested with inherent power to regulate its proceedings. Additionally, in terms of section 173 of the Constitution proceedings may be stayed on grounds dictated by the interests of justice. In *Ncube*, Liberty buttressed its submission by relying

on the Constitutional Court's pronouncements in *Mokone v Tassos Property CC* 2017 (5) SA 456 (CC) paras 66–67. In that case, the Constitutional Court confirmed the principle that the overall interests of justice will be the final determinative feature.

It must be kept in mind that a stay of proceedings is normally only granted in exceptional circumstances and the nature of the power vested in the court to grant a stay is circumscribed (*Adbdullhay M Mayet Group (Pty) Ltd v Renasa Insurance Co Ltd* 1999 (4) SA 1039 (T) 1048H). A stay may only be ordered in the clearest of cases and there is a formidable onus on the party seeking a stay to establish that the interests of justice favour a stay. Indeed, there is no rule of law which stays proceedings where a criminal prosecution is pending (*Du Toit v Van Rensburg* 1967 (4) SA 433 (C) 435H; *Irvin & Johnson v Basson* 1977 (3) SA 1067 (T) 1072H–1073B; *Kamfer v Millman & Stein NNO* 1993 (1) SA 122 (C) 125E–126D; *Davis v Tip No and Others* 1996 (1) SA 1152 (W) 1157B-E). Rather, the practice is that a stay will only be granted where there is an element of state compulsion impacting on the accused's right to silence (*Law Society of the Cape of Good Hope v Randell* 2013 (3) SA 437 (SCA) paras 11–32). Notably, in *Ncube* and *Basdeo* a stay of proceedings could not be sustained as the defence was not properly pleaded. Noteworthy in *Ncube:*

> *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 investigation. (Ncube para 36.2; Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd [2022] 4 All SA 827 (GJ) paras 23–24.)*

V WHAT CONSTITUTES EXCEPTIONAL CIRCUMSTANCES TO JUSTIFY DEFERMENT OF PAYMENT AND FOR PURPOSES OF STAY OF PROCEEDINGS?

The insidious effect of apparent opportunism illustrated in the *Alexander/Nkobe/Ncube/Basdeo* cases is that an insurer presented with valid claim from a dubious claimant is handcuffed. The crisp question is: Does established jurisprudence provide useful guidance as to what constitutes 'exceptional circumstance' to warrant deferment of payment and/or stay of proceedings? It should be noted that, the meaning of the phrase 'exceptional circumstances' remains an elusive proposition. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule (*S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC); *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) paras 46– 47. R Cachalia 'Clarifying the exceptional circumstances test in *Trencon*:

an opportunity missed' (2018) *Constitutional Court Review* 6; *Liesching and Others v S* 2019 (4) SA 219 (CC) paras 38–42; *Premier, Gauteng and Others v Democratic Alliance and Others* 2022 (1) SA 16 CC) paras 56–58; *Mnquma Local Municipality v Premier Eastern* Cape [2012] JOL 28311 (ECB) para 76. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as 'ordinary' in one case may be treated as 'exceptional' in another (*MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas* 2002 (6) SA 150 (C) 156E-F; *S v Mohammed* 1999 (2) SACR 507 (C) 513J-514B; *Norwich Union Life Insurance Society v Dobbs* 1912 AD 395, 399F-H). On this point, the court in *S v Petersen* 2008 (2) SACR 355 (C) paras 55–56, noted that:

> *On the meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11)(a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.*

A survey of case law regarding the deferment of payment pending the finalisation of unrelated third-party investigative processes provides hints as to what factors would constitute 'exceptional circumstance'. The existence of ongoing independent investigation implicating the claimant as a 'person of interest' alone does not constitute exceptional circumstances to warrant the withholding of payment. A beneficiary can expect a claim to be paid in the event of third-party investigation proving fruitless or not being finalised within a reasonable period of time (*Basdeo* para 38). In the *Nkobe* matter the court highlighted the unreasonableness of the period of time that had lapsed since the inception of the investigation process with no end in sight (*Basdeo* para 44). The investigation in the *Nkobe* case commenced in 2021 and was still not finalised in 2024. Importantly, a private investigation conducted by the insurer carries less weight than an investigation by the SAPS when assessing a defence by the insurer supporting non-payment of a claim (*Basdeo* para 40). Deferment of payment will be justified in instances where the beneficiary has been charged.

As already indicated a high threshold is set for the granting of a stay of civil proceedings pending criminal trial. The envisaged fact-based enquiry must

establish 'exceptional circumstances' of the specific case. Such exceptional circumstances would be evident where the claimant is on trial connected with the death of the life assured. Most notably where the claimant orchestrated the contract killing of the deceased. It is submitted that where the claimant has been charged or is on trial and/or convicted, the interest of justice will favour a stay of civil proceedings. This brings into the equation the engaging contrast to *Alexander/Nkobe/Ncube/Basdeo* provided by the Sabadia saga (J Du Plooy-Gildenhuys & M Blackbeard 'The sabadia conspiracy' (1999) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 148. The case involved a Pretoria-based psychiatrist who conspired to kidnap and murder his wife. Dr Sabadia sought the help of his then-patient to enlist the services of contract killers to murder his wife. The murder was disguised as a hijacking. Sabadia and his co-conspirators were found guilty and sentenced by the court in that instance. Of interest to us, is that there was a life insurance policy on the life of the deceased in favour of Sabadia. The policy covered the life of the deceased wife for an amount exceeding R3m in total. Sabadia was also found to be in debt at the time of the death of his wife due to his medical practice declining and him owing money to several people. The court found that the failure by the Sabadia in enquiring from the insurer on how to claim the benefits from the life insurance policy on his wife's life demonstrated suspicion. Had Dr Sabadia really been innocent in respect of the death of his wife, he would have claimed the benefits from the life policy. Unlike in the previous cases discussed, Dr Sabadia was considered to be a suspicious beneficiary due to the fact that he did not institute a claim against the life policy in that instance.

V STRIKING A BALANCE OF FAIRNESS TO BOTH THE INSURER AND THE INSURED

The limitations and requirements imposed by law where the insurer refuses to honour an otherwise perfectly valid claim until sufficient information becomes available from certain unrelated third-party investigative processes at some indeterminate point in time entail a balancing act. When considering whether deferment is justified, a court is required to balance a range of factors, namely prejudice, delay and fairness to both parties when deciding whether deferment is justified. It has been held that the principle of the balance of fairness favours the insured in circumstances where it is not in the interest of justice to have deferred the payment (*Nkobe* para 53).

In *Alexander*, the factors embodied in the proportionality exercise were framed 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 time;*

> *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 defer;*
>
> *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 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. (Alexander paras 19–20)*

Southwood AJ in *Ncube* explicitly endorsed the reasoning in *Alexander* in support of the conclusion that the balance of fairness favours the insured after almost seven years had lapsed and the insurer failed to plead a defence to the claim (*Ncube* para 53). Significantly, Liberty had deferred its decision until independent third-party processes have been finalised. Similarly, in *Nkobe* the claim was lodged in 2017, the action was instituted in 2021 and in 2024 Liberty had still not paid. It was plain that the delay was unfair and caused prejudice to the insured party.

To return to *Basdeo*, Discovery withheld his benefit payout without following up on the investigation status. Evidently, the insurer appeared to have only made enquiries after the institution of a summary judgment application. This led the court to conclude that Discovery's conduct was unreasonable in the circumstances. In fact, litigation as well as the continuation thereof could have been avoided if Discovery dealt with the claims timeously (*Basdeo* para 51).

VII CONCLUSION

Against the backdrop of pervasive opportunism in the insurance industry, *Ncube* and *Basdeo* bring into sharp relief the perennial migraine confronting insurers. Presented with a valid death benefits claim from a claimant who is a person of interest in an uncompleted murder investigation, an insurer is caught between the proverbial rock and a hard place. On the one hand, if the insurer intends to repudiate the claim, it must do so within a reasonable time. Otherwise, the claim must be honoured. However, placing heavy reliance on the outcome of ongoing independent third-party investigative processes, the likelihood of unduly prejudicing a beneficiary is magnified. A clear statement from the authorities is that the insurer does not have an unrestricted period within which it can avoid liability on account of its inability to assess the merits of claim. Deferment of payment pending the conclusion of third-party investigation is unlikely to be countenanced. Consequently, the prospects

of a stay of proceedings defence are really daunting. Central to *Ncube* and *Basdeo* is the court's expressed disapprobation of the excessive delay caused by the insurers' conduct. Accordingly, a disgruntled claimant would be justified in pursuing summary judgment and prejudgment interest, coupled with a punitive costs order.

It would seem that deferment of payment would be justified and a stay of proceedings defence sustained only if exceptional circumstances are found to exist such as confession, charging and prosecution of the claimant for involvement in the demise of the life assured. In sum, the court would, in weighing all relevant considerations find that the balance of fairness favours the insurer. It follows that in such circumstances it would be in the interests of justice to have proceedings instituted by the claimant to enforce payment of benefits barred.