

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. 2010/50596

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1. REPORTABLE: YES/NO	
2. OF INTEREST TO OTHER JUDGES: YES/NO	
3. REVISED.	
.....	
DATE	SIGNATURE

In the application of:-

**EXECUTIVE OFFICER OF THE FINANCIAL
SERVICES BOARD (“the FSB”)**

Applicant

And

THE CADAC PENSION FUND

Respondent

And

In the urgent counter-application of:-

EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD

Applicant

And

CADAC PENSION FUND	First Respondent
ANTONY LOUIS MOSTERT N.O. (“the curator”)	Second Respondent
IZAK VAN ROOIJEN	Third Respondent
PAUL HARMSE	Fourth Respondent
PETER GILBERT	Fifth Respondent
SHAUNINE BEKKER	Sixth Respondent
SIMON JOHN NASH	Seventh Respondent
ELENA FORNO-NASH	Eighth Respondent
CHRISTO ENGELBRECHT	Nine Respondent
KERRY PROCTOR	Tenth Respondent

JUDGMENT

NICHOLLS, J

Introduction

1. On 21 December 2010 pursuant to an ex parte application brought by the Financial Services Board (“FSB”), the Cadac Pension Fund (“CPF”) was placed under provisional curatorship. In terms of the provisional order Anthony Louis Mostert (“Mostert”) was appointed as the provisional curator.
2. The applicant, the FSB, seeks final confirmation of the appointment of Mostert as curator. The first respondent is the CPF, purportedly represented herein by new trustees who were appointed after the fund was placed under provisional curatorship and after the original trustees resigned. The second respondent is Mostert in his capacity as

provisional curator. The sixth to eighth respondents were trustees of CPF at the time CPF was placed under provisional curatorship. They subsequently resigned. The third to fifth and ninth to tenth respondents were trustees of CPF at various times after the fund was placed under provisional curatorship and were deponents to various affidavits on behalf of CPF.

3. The need for curatorship has been conceded and the real issue in dispute is the suitability of Mostert as curator. The CPF has brought a counter application in which it seeks a variation of the provisional order, the appointment of alternative curators, and an order that the costs incurred in opposing the appointment of Mostert be paid by the CPF and ultimately the FSB. In addition I am called upon to decide various interlocutory applications, namely an application for the joinder of Mostert in his personal capacity; an application by Mostert as provisional curator to strike out certain portions of the counter application and an application by one Machin for the removal of Mostert as curator. The latter application was withdrawn at the eleventh hour and all that remains is the question of costs in respect of that application. I am further called upon to decide the reserved costs of an urgent application on 15 February 2011 brought by Mostert as provisional liquidator.

4. On the face of it, this is a relatively simple application which hardly warrants the 7000 – 8000 page record and the days spent in acrimonious argument. However the full import of the matter must be viewed in context of the intense animosity between the two protagonists, Simon Nash (“Nash”) and Mostert. Nash, the seventh respondent, was the chairman and director of the principal employer, Cadac Pty Ltd (“Cadac”) and a trustee and chairperson of CPF with a casting vote at the time it was placed under curatorship. His wife, Elena Forno-Nash, is the eighth respondent and was a director of Cadac and a trustee of CPF at the time.

5. This matter concerns the last of seven pension funds placed under curatorship pursuant to the so-called “Ghavalas transactions”, an alleged pension fund surplus stripping scheme devised by Peter Ghavalas. In essence this was a scheme whereby a pension fund would be divested of most of its active members in favour of another pension fund, thereby leaving a specific fund with large surplus to be accessed by the principal employer and other third parties who were not entitled thereto. This scheme was described by Nash in a radio interview in 2011 as “*a mechanism where the pension fund surplus was accessible to a company on a quick basis rather than a slow basis...*”, the slow basis being the pension fund contribution holidays.

6. In all of the other six pension funds Mostert has been appointed as curator and has achieved, so we are told by the applicant, a considerable measure of success. His competence is disputed by the respondents. What cannot be disputed is Mostert’s tenacity in delving into the Ghavalas transactions. This has led to Nash accusing Mostert of having a personal vendetta against him and acting in cahoots with the FSB to destroy him. The relationship between Nash and Mostert goes back several years and is inextricably bound to the fate of several other pension funds.

Background and Chronology

7. The Sable Pension Fund (“Sable”) is one of the seven pension funds implicated in the Ghavalas transactions. Mostert is also the curator of Sable. Nash was a trustee of Sable until it was placed under curatorship. The fundamental opposition to Mostert’s appointment is “an irresolvable conflict” between the interests of Sable and those of CPF. The objection is that Nash stands conflicted as a result of an alleged claim that Sable has against CPF. Mostert and the FSB aver that the issue of a claim by Sable is merely a red herring.

8. Since 1994 various transfers in terms of section 14 of the Pensions Fund Act 24 of 1956 ("PF Act"), have taken place between the implicated funds. Section 14 governs amalgamations and transfers between funds and other entities, and regulates the transfer of assets and liabilities. To be of any force and effect, any transfer must be approved by the FSB. This is evidenced by a certificate issued in terms of section 14. The transactions most relevant to this matter are the following:

8.1.1 On 1 July 1994 Sable transferred 212 members to the Sukhulu Pension Fund. A section 14 certificate was issued in respect of the transfer on 13 April 1995.

8.1.2 Another transfer of 158 members from Sable to CPF took place on 1 April 1995. On 10 November 1995 a certificate was issued approving a transfer in the amount of R20 804 708 retrospectively from 1 April 1995. The transferring members' liability was valued at R10 763 842.

8.1.3 A further transfer of 4 members and 146 pensioners were transferred from Sable to the Lifecare Group Pension Fund together with assets of approximately R61 million. The members and pensioners were not ultimately transferred although a section 14 certificate was issued on 31 October 1995.

8.1.4 Only R36 million was paid over to Lifecare and approximately R25 million was paid to Old Mutual to outsource the pensions. The amount in respect of the 4 members was retained in Sable. The pensioners did not receive any portion of the R36 million surplus.

8.1.5 The 4 members subsequently joined CPF together with the other 148 members. There was no section 14 transfer submitted when these members changed funds.

9. At the time of the section 14 Sable/CPF transfer Nash was the principal employer of both funds and acted as trustee of both funds. Nash became a member of Sable shortly before the transfers took place and ended up a member of CPF without a section 14 transfer having been completed. Pursuant to the approved transfer, the amount of R28 332 740 was transferred from Sable to CPF.
10. The FSB and Mostert maintain that the transfers from Sable to CPF were fraudulently devised as part of a scheme to strip Sable of its surplus and that the section 14 certificates were procured under false pretences. There are two cases pending in this division to set aside the section 14 certificates in other pension funds which were part of the Ghavalas transactions.
11. Nash and his company Midmacor Industries Limited ("Midmacor") have been criminally accused for their alleged involvement in the fraudulent surplus scheme, as have approximately 25 other individuals. Six have pleaded guilty, including Ghavalas. Nash's trial is currently underway and Ghavalas is a state witness.
12. Another of the key role players in the unfolding saga is June Marks ("Marks"), the erstwhile attorney of Simon Nash and CPF until she withdrew as attorney of record for both on 3 October 2010. She was instrumental in many of the earlier transactions and submitted fees in excess of R12 million to CPF for the period from October 2005 to September 2010.
13. Mostert, as provisional curator of CPF, has successfully obtained judgment against Marks for these fees which were paid to her on the authority of Nash for his criminal and civil litigation. Marks has unsuccessfully appealed the judgment on her fees as far as the Constitutional Court. Marks changed 'sides' whenever it suited her interests to do so. One of the few issues not in dispute in this matter is the unreliability of Marks.
14. Vivian Cohen ("Cohen"), is the actuary who was appointed by the CPF in May 2006. He stated in a report dated 17 April 2011 that he previously

provided an actuarial valuation for CPF in February 2003 wherein, at the request of Marks, provision was made for a legal claim against the surplus of CPF. He provided nil surplus scheme documentation on the assumption that the surplus in CPF would not be in the fund as a result of the legal claim, following the advice of Marks. However, during investigations which he conducted in April and May 2007, documents became available to him for the first time showing that other transfers from Sable had taken place just before and just after the Sable transfer to CPF in 1995 for no apparent reason other than to enable the removal of some R36 million surplus assets from Sable.

15. According to Cohen, on the information now available to him, the purpose and effect of these transfers was to separate the members and pensioners from a large portion of the surplus that was identified by the 1995 valuation report. Having considered the various transfers from an actuarial perspective he concluded that they were not isolated transfers but part of a scheme devised to remove all members and pensioners from Sable with the ultimate objective to remove the surplus.
16. On 22 September 2010 criminal investigations commenced into Nash's activities. Thereafter events moved rapidly.
 - 16.1 On the same day a resolution was passed by three of the four trustees of CPF to make payment of R2 million into the trust account of Werksmans Attorneys ("Werksmans") as a "retainer fee" to oppose the FSB's inspection into the affairs of CPF.
 - 16.2 On 19 October 2010 an inspector appointed by the FSB commenced his investigations into the R10 -12 million legal fees paid to Marks by CPF.
 - 16.3 On 29 October 2010 a mandate was given to Werksmans by the CPF board (which at that time included Nash and his wife) to obstruct the FSB's investigation into the CPF.

18.4 On 5 November 2010 a resolution was taken by CPF to transfer an amount R2.5 million to Leonard Cowan of Cowan Harper Attorneys, who represents Nash in his criminal trial.

18.5 As from 29 November 2010 Werksmans represented Nash and the trustees of CPF.

17. On 15 December 2010 Marks had a change of heart (one of several) and approached the FSB accompanied by Advocate Louw purportedly to make a full and frank disclosure with regard to the fraud taking place at CPF. This appears to have been motivated by a belief that by providing the FSB with information, she could avoid prosecution in respect of her R12 million fees. When it became apparent in April 2011 that the FSB inspectorate was continuing with their investigation and issuing subpoenas, she had another change of heart and told Nash that her co-operation with the FSB was a set-up to expose the FSB to the advantage of Nash.
18. After consultations with Marks in December 2010, the FSB launched the present application on an ex parte basis in terms of section 5(1) of Financial Institutions (Protection of Funds) Act 28 of 2001 ("FI Act"). It was brought by Dube Phineas Tshidi, ("Tshidi") in his capacity as the executive officer of the FSB and Registrar of Pensions. The following day, 21 December 2010, the provisional order ("the order") was granted by this court.
19. In late December 2010 Nash brought an urgent application in the name of Cadac Pty Ltd but failed to pursue it. Approximately a month later on 21 January 2011 Nash and his wife resigned as trustees and new trustees of CPF were elected. Simultaneously Werksmans received a mandate to act for the new trustees in opposition of the curatorship.

20. After the application was launched the following occurred:

22.1 On 8 February 2011 Mostert as provisional curator brought an urgent application against the former and current trustees claiming return of the monies held in trust by Werksmans on behalf of the CPF and seeking to interdict them from acting in breach of the provisional order. On 15 February 2011 the respondents consented to the relief which was made an order of court by agreement.

22.2 On 15 February 2011, the same day, the answering affidavit was filed and an “urgent” counter-application was launched by the new trustees of CPF against the FSB.

22.3 Thereafter, and until the end of 2011, the parties filed various supplementary affidavits without applying for condonation. These included lengthy affidavits by Mostert and an affidavit by Nash in support of the CPF. At the commencement of this hearing there was consensus that all parties were equally ‘guilty’ and no opposition to the filing of any of the affidavits was raised.

22.4 On 2 November 2011 CPF resolved to launch an application to join Mostert in his personal capacity. The resolution also ratified all actions taken by Werksmans in respect of the counter application and the urgent application. On 22 December 2011 the CPF, as counter applicants launched the joinder application. This was opposed.

22.5 The return day of the main application was extended on various occasions until it was set down for the week of 12 August 2013.

22.6 A few days before the hearing, Mostert brought an application for the admission of new matter. This was pursuant to another change of heart by Marks who had delivered an affidavit to the FSB offices to which were annexed various emails allegedly detailing the fraud that Nash had committed on CPF. Prior to dealing with the main application and the opposition thereto, it is necessary to dispense with this application.

Application for the admission of additional information

- 23 On 29 July 2013 an affidavit was delivered by Marks to the FSB, a couple of weeks before the hearing. In the affidavit Marks purportedly tells the truth to expose the manner in which Nash abused, and continues to abuse, the CPF for his own personal interest. Attached to the affidavit are various emails, including some authored by Nash, to verify her statement.
- 24 Pursuant to the delivery of the affidavit, Mostert brought an application for the admission of the additional documentation on 6 August 2013. The additional documents are comprised of Mark's affidavit as well as a further affidavit and a provisional curator's report by Mostert. The CPF oppose this application on the grounds that Marks is not a party to the proceedings and therefore has no entitlement to place evidence before court by way of affidavit. There is no opposition to the admission of the curator's report. It should be noted that when the admissibility of these documents was raised in a meeting with the acting Deputy Judge President van der Merwe shortly before the hearing, the legal representatives of CPF indicated that they would not file opposing papers and did not require further time to respond thereto.
- 25 In determining whether additional documents should be admitted, a court must consider whether there was any male fide or remissness on the part of the party seeking their admission¹. In this matter there is no suggestion of

¹ *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W); *Rhooode v De Kock and Another* 2013 (3) SA 123 (SCA)

male fides by Mostert and the FSB in producing them only at this late stage. The delay was because the documents were only recently disclosed to them. Marks, as an officer of the court, deemed it necessary to put the information before court.

- 26 The authenticity of the emails is not challenged. The reason being, according to Mr Watt-Pringle for CPF, is that they are irrelevant and it is on this basis that their admission is opposed. I cannot agree with this proposition. The importance of the new matter cannot be under-estimated. On the face of it the emails provide support for Mostert's theory that Nash fraudulently concocted a claim on behalf of Sable in the books of CPF. They also lend credence to the view that the trustees of CPF were unduly influenced by Nash.
- 27 In considering whether to admit the additional documentation, a court should take into consideration that the FSB is not an ordinary commercial litigant but a statutory body whose role it is to protect pension fund members from abuse.² No prejudice is suffered by the CPF as a result of the late submission of the documents - all the emails fall within the knowledge of the trustees or the knowledge of Nash on whom they have chosen to rely. The issue of privilege was not pursued by CPF. Any privilege which would attach to these documents, is in any event, that of the fund under curatorship and not the fund as represented by the new trustees.
- 28 Mark's affidavit satisfies the criteria set out by our courts for the admission of new material and should accordingly be admitted into evidence. While scant reliance can be placed on the evidence of Marks, the emails attached to her affidavit constitute credible documentary evidence.
- 29 Before dealing with the main application and the opposition thereto, it is necessary to set out the legislative framework applicable to the application.

² *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA)

LEGISLATIVE FRAMEWORK

30. Pension funds are creatures of statute governed by, inter alia, the provisions of the Pensions Fund Act 24 of 1956, the Financial Services Board Act 97 of 1990 ("FSB Act"), Financial Institutions (Protection of Funds) Act 28 of 2001 ("FI Act") and the Inspection of Financial Institutions Act 80 of 1998.

31. The Financial Services Board is established in terms the FSB Act. Pension funds approved and registered by the FSB in terms of the applicable legislation are required to comply with all relevant statutory provisions to ensure that such entities conduct their business in such a manner that the assets of members entrusted to them are protected. Section 13 of the FSB Act provides for the appointment of an executive officer. In terms of section 3 of the PF Act the executive officer also serves as the Registrar of pension funds. The Registrar has a right to apply to court for the appointment of a curator to take control of and manage the business of a pension fund.

32. The appointment of a curator is brought in terms of section 5(1) of the FI Act which provides that the Registrar may, on good cause shown, apply to court for the appointment of a provisional curator to take control of, and to manage the whole or any part of, the business of an institution. A court may also simultaneously grant a rule nisi calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.

33. Section 5(6) provides that the curator acts under the control of the Registrar, and may apply to the Registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution. Section 5(8) provides that any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the Registrar with regard to any matter arising out of, or in connection with, the control and management of the business of an institution which has been placed under

curatorship. Section 5(9) provides that the court may, on good cause shown, cancel the appointment of the curator at any time.

34. The test for “good cause” in terms of section 5(1) was held by the Supreme Court of Appeal in *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd*³ to be whether the circumstances provided legitimate concern on the part of the Registrar, such as the existence of an adverse inspection report, notwithstanding a possible dispute of fact arising from the findings of the inspectors. The court commented that one of the reasons why the legislature has seen fit to grant extensive powers of supervision and control to the Registrar is that the members of pension funds often do not have the knowledge, skill or resources to take adequate steps to protect themselves. The Registrar fulfils an important function as the guardian of the interests of the members of pension funds.⁴
35. Reference has already been made to section 14 of the PF Act Section 14 governing amalgamations and transfers between funds, and the transfer of assets and liabilities. This is a regulatory provision wherein the Registrar, acting in the public interest, or in the interests of the fund or its members, can approve or refuse a scheme. The Registrar may approve a scheme in the interests of the members of a fund or refuse the transaction if the scheme is not reasonable or equitable and does not comply with certain conditions.

The Main Application

36. The main application was launched in terms of section 5(1) of the FI Act. The basis of the curatorship as set out in the founding affidavit of Tshidi is that the CPF, under the control of Nash and his wife, has been the victim of the Ghavalas surplus stripping transactions in that it received assets in

³ [2012] 1 All SA 135 (SCA)

⁴*Executive Officer of the Financial Services Board v Dynamic Wealth Ltd* [2012] 1 All SA 135 (SCA) Page 176

excess of R8 million, to which it was not entitled, from Sable. At the time Nash was the chairman of the principal employer of CPF, Cadac (Pty) Ltd, and the chairman of CPF with the casting vote. He was also a trustee of Sable until it was placed under curatorship.

37. The other allegations are that Nash used the resources of CPF for his direct and indirect benefit, namely defending criminal charges against him. For several years payments were made to Marks in relation to the criminal charges against Nash and Midmacor amounting in excess of R10 million, and thereafter to Harper Cowan attorneys. In September 2010 CPF made a payment of R2 million to Werksmans to oppose the FSB inspection into the affairs of CPF. Nash also caused two mortgage bonds to be registered over property co-owned by CPF and by Cadac, thereby further encumbering CPF.
38. An order was granted on 21 December 2010 by Claassen J. The order provided that Mostert be appointed as provisional curator and that CPF be placed under provisional curatorship and management, subject to the supervision of the FSB. In terms of the order the trustees of the CPF were provisionally divested of the management of the business. All actions, proceedings and other processes against the CPF were stayed, and, in terms of the order, were not to be instituted or proceeded with without the leave of the Court.
39. The order, inter alia, stated that Mostert was:
 - “5.1 authorised to take immediate control of the Fund, manage and investigate, the affairs, business and operations of and concerning the Fund, together with all assets and interests relating to the business, such authority to be exercised under the control of the applicant;*
 - 5.2 vested with all powers of control and management which would ordinarily be vested in, and exercised by, the board of management or trustees of the Fund, whether by law or in terms of the rules of the*

Fund, and the present board of management, trustees, administrators or principal officers of the Fund shall be divested of all such powers;

- 5.3 *directed to give consideration to the best interests of the respective members (including the pensioners) of the Fund;*
 - 5.8 *directed to investigate any irregularities committed by the Fund, its board of management, principal officers, consultants, actuaries, auditors, participating employer or any other party presently or previously involved in the affairs of the Fund, and for that purpose authorised to have access to any inspection report...or to any other documentation or records, wheresoever kept, in connection with the Fund;*
 - 5.9 *permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as he may reasonably deem necessary for the performance of his duties in terms of this order, and to defray reasonable charges and expenses thus incurred from the assets owned, administered or held by or on behalf of the Fund, including but not limited to the appointment of AL Mostert and Company Incorporated by virtue of its in depth prior involvement with investigations relating to the affairs of the Fund;*
 - 5.10 *authorised to institute or prosecute any legal proceedings on behalf of the Fund and to defend any action against the Fund.”*
40. A rule nisi was issued in terms of which the fund, and any interested parties, were to show cause why the appointment of Mostert should not be confirmed, and why the trustees should not pay the costs in their personal capacities. The curator was further called upon to file a progress report.

41. In response thereto the CPF anticipated the return day by filing an opposing affidavit and launching a counter application for the setting aside of the appointment of Mostert and appointing Norman Klein and Gavin Gainsford as provisional curators. Further orders were sought in the counter application to direct CPF to pay Weksmans' fees for the opposition to the appointment of Mostert; the urgent application of Mostert of 8 February which had been granted by consent; and two invoices dated 25 November 2010 and 20 January 2011 for R299 824.44 and R98 948.58 respectively. During the course of argument the claim for payment of these two invoices was abandoned. It seems difficult to refute that these were in respect of Nash's criminal charges, and unrelated to CPF.
42. The counter application was brought by three new trustees elected on 21 January 2011. They stated at the outset that in view of their short involvement with affairs of CPF, they had no personal knowledge of the serious allegations of mismanagement and unlawful conduct and had to rely extensively on the advices received from the former trustees, in particular Nash. Mostert and the FSB have branded the trustees as puppets of Nash.
43. The counter application elicited an answering affidavit from the FSB as well as a 146 page affidavit from Mostert which together with annexures runs to well over 1000 pages. Further affidavits were filed by Tshidi on behalf of the FSB. Nash himself filed an affidavit.
44. It is appropriate to deal with the joinder application before dealing with the opposition of the CPF to Mostert's appointment.

Application to join Mostert in his personal capacity

45. An application to join Mostert in his personal capacity was launched by the new trustees of CPF on 22 December 2011, a year after the granting of the provisional order placing the fund under curatorship. The purpose of the

application was for Mostert to reimburse the CPF for all legal costs incurred in the course of this matter. It was conceded that such an application was unnecessary as such a costs order can be made irrespective of whether Mostert had been joined in his personal capacity. The authority of the applicants to launch such proceeding was raised as a point in limine.

46. Mr Luderitz on behalf of Mostert submitted that the new trustees had no authority to launch the joinder application. He pointed out that Paragraph 7 of the provisional order specifically makes provision for “*the fund or any other interested party*” to anticipate the return day. On the other hand paragraph 5 of the order divests the CPF of the control and management of the fund which is placed in the hands of the provisional curator. In terms of paragraph 5.10 it is the provisional curator who is “*authorised to institute or prosecute any legal proceedings on behalf of the Fund and to defend any action against the Fund*”.
47. It was argued that the trustees, if they wished to launch any legal proceedings, should have approached a court to authorise such proceedings. Alternatively they could have applied to vary the court order. The resolution taken by the trustees on 2 November 2011 for Werksmans to launch the joinder application is insufficient. A resolution does not provide CPF with the necessary locus standi who, unless authorised by a court to do so, have no authority to launch any legal proceedings.
48. On the question of authority generally, Mr van Nieuwenhuizen for the FSB averred that it was for the members to anticipate the return day, not the trustees of CPF, as the fund was already placed in the hands of the provisional curator. The new trustees were not exercising their duties in terms of section 7D of the PF Act and certainly not for the objectives set out in section 7C of the Act. They do not constitute a board of management and any resolutions taken by them are ultra vires and invalid

49. Mr Watt Pringle on behalf of the CPF responded that it was inconceivable that the provisional curator could be the interested party as contemplated by the FI Act and the rule nisi. Clearly “the fund” referred to in the rule nisi was CPF as represented by its board of trustees. Although the trustees were divested of their authority in terms of the order, the fund through its trustees is the only possible candidate who could possibly oppose the final appointment.
50. It is correct that the fund, as represented by its trustees, is an interested party, as contemplated by the rule nisi. However, although the fund as represented by its trustees, clearly has the authority to oppose the final appointment of a Mostert as curator, this authority does not extend to launching any other applications. A resolution to institute legal proceedings cannot clothe CPF with the necessary authority to launch the joinder application. In my view, this authority is limited to opposing the appointment of the curator and the institution of any other legal proceedings remains the preserve of the provisional curator in terms of the order.
51. The authority that the CPF derives to anticipate the return day and oppose the appointment is derived from the express terms of the court order, not from the resolution of 2 November 2011. The court order specifically divests the trustees of the authority to institute any other legal proceedings on behalf of the fund which vests in the provisional curator from that day forward. The trustees were entitled to challenge the appointment of Mostert but not entitled to bring a new application unless authorised by a court
52. The consequence of my findings is that the CPF, as represented by its trustees, has no locus standi to launch any legal proceedings. This means that the application for the joinder of Mostert in his personal capacity falls to be dismissed as a result of lack of locus standi. As it was, in any event, launched out of an “abundance of caution” Mostert should not be out of pocket as a result thereof and I intend to award costs on the attorney and client scale.

53. The counter application falls to be dismissed on the same grounds. It is unnecessary to deal with the striking out application. Insofar as the trustees oppose the appointment of Mostert this is dealt with hereunder.

Opposition to Mostert

54. In essence the main grounds of opposition to the appointment of Mostert as curator are the following. Firstly, Mostert as curator of Sable is faced with an irresolvable conflict between the interests of Sable and the interests of the CPF in view of the claim Sable has against CPF. The conflict is exacerbated by the fact that Mostert has negotiated a contingency fee agreement with the FSB for all monies recovered on behalf of Sable. This renders him totally unsuitable and unable to protect the interests of CPF. Although it was submitted that the contingency fee was 33%, it is common cause that this was reduced by the FSB in 2008 to 16.6% which is 6.6% above the statutory fee of 10%.
- .
55. Secondly, Mostert has a conflict of interest between the interests of CPF and his own interests as an attorney of the firm AL Mostert and Company Incorporated ("AL Mostert") who are the attorneys of record for the fund. The firm also, until earlier this year, acted for Mostert in the application to join him in his personal capacity. This, it is argued, is a further indication of his conflicted position as both a litigant and an attorney in the firm AL Mostert. It is alleged that Mostert has used the funds of the CPF as a war chest to fund the opposition to the challenge to his appointment. While funding his own firm on a lavish basis he has starved the new trustees of necessary funds to oppose his appointment.
56. For the above reasons it is stated that the trustees and members of CPF have no reasonable prospect of independent, unbiased or scrupulous treatment at the hands of Mostert. He has branded the trustees as puppets of Nash and made it very near impossible for them to obtain funding to oppose his opposition.

Conflict between Sable and CPF

57. I now deal with the main issue in this matter, namely the allegation that Mostert is placed in an untenable position as a result of the claim Sable has against CPF which renders him totally unsuitable to act as curator for both these funds. It is alleged that both Mostert and Tshidi should have known about these claims and should have drawn same to the attention of the court when they brought the ex parte application. The failure to do so is a further indication of Mostert's unethical and unprofessional conduct.
58. From the outset the FSB and Mostert have consistently denied the existence of a conflict. They have stressed that the issue is not that Sable has a claim against CPF but rather that both Sable and CPF have been victims of a fraud perpetrated by Nash. If there is an "overpayment" then this will be reversed by an administrative decision rather than constituting a claim that the one fund has against the other.
59. The CPF's version on the papers is that Cohen's actuarial report makes mention of a possible claim of R10 million that Sable may have against CPF plus legal costs in the sum of R3 million. On 9 July 2007 the FSB pending the 2003 actuarial report and the nil surplus scheme until the Sable claim had been resolved. In July 2008 Mostert informed the FSB that R28.8 million was transferred from Sable to CPF in April 1995 when the actuarial value placed in the members transferred was approximately R10.6 million. This means, according to the CPF, that at that time Mostert had formed the view that there was an overpayment of R18 million. Tshidi also admits that in later affidavits that there is a possibility of a conflict if Mostert were to institute action against the CPF. All the above, it is stated, illustrate the extent of Mostert's conflict.

60. What the above argument does not take into consideration is that Cohen has since concluded that there were no genuine claims and any claims were part of a scheme devised to remove surplus assets from Sable. Further, Mostert has categorically stated that as curator of Sable he has no intention of pursuing the claim and that the only claims against CPF are those applicable to the “statutory regime”. This is a reference to the setting aside of the section 14 transfers.

61. Importantly, irrefutable evidence is provided by the emails that there is no claim and never was one. Instead Nash has fabricated a claim in order to deceive the FSB and to avoid an investigation into the affairs of CPF. This appears from various emails Nash sent to Marks during May 2011. In an email dated 15 May 2011 he states:

“If I believed that Sable genuinely had a claim against the CPF, I would certainly not have been so stupid as to start a PF surplus distribution exercise. ”

62. Later the same day on 15 May 2011 he sent Marks an email advising her that she was wrong in what she had related to Darren Williams of Werksmans and that:

“ We effectively reverse calculated the R13 million as this was the surplus calculated at that (sic) time and we had to return a nil surplus to prevent any legal action being taken by FSB against the Fund to appoint a “tribunal” to distribute the surplus.... They could possibly have done this if there was a surplus and we needed to get thru the next 3 years to the next valuation. (little did we know the saga ahead!!) So, we had to get them to accept a “nil surplus”. So, we had to have “liabilities” against the fund of R13 million. So, we had the figure of R3m and the R10m for contingent liabilities as this was necessary to get the Nil Surplus situation.”

63. In an email on 9 May 2011 Nash explained to Marks:

“Yes, but I think the calculation was maybe a “reverse calculation” in that we knew we had to submit a nil surplus and therefore needed at least R13m of contingent liabilities”.

64. In relation to Cohen’s actuarial report, Nash’s true intention is revealed in the email he sent stating:

“I see that he does not confirm that we transferred out with the Minimum Benefits. This may or may not increase the benefit to those transferring out.

I see he actually refers to a “surplus” in the comparative table of R3m. I hope the FSB do not latch onto this and say we need to do a distribution”

65. These emails are indicative that Nash over a period of years fraudulently devised a strategy whereby the business of CPF could be transferred with a nil surplus valuation. Any claim that existed was fictitious and concocted for this purpose. Nash obviously feared that the submission of a surplus distribution scheme would have exposed his involvement in the affairs of various funds in which he acted as trustee. The newly introduced surplus legislation obliged him to distribute the surplus, in effect excluding him, together with all active members, from participation in the surplus distribution of the surplus.⁵ It is now well established that pension fund monies are sacrosanct and generally cannot be used for the benefit of the employer⁶. Nash clearly used the resources of the CPF to fund his defence to any possible criminal charges he may face and to ward off an investigation into CPF which may expose his history of abuse of CPF monies to bolster the cash flow of CADAC.

66. Mr Watt-Pringle for the CPF was constrained to argue that the real point regarding the conflict is that as long as the possibility exists that the section

⁵ Section 15B of the Pension Funds Act no 24 of 1956 (as amended). See also CPF’s former actuary’s report dated 1 March 2005 confirming the exclusion of Nash from distribution.

⁶ *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA)

14 transfer of members from Sable to CPF could be set aside, with the consequence that funds will also have to be repatriated to Sable, Mostert remains in a position of irresolvable conflict. Because of his 16% contingency fee arrangement in respect of Sable, he has no incentive to resist the transfer. Nor will he have any incentive to ensure that the actuarial adjustments are made to the best possible benefit of the members of CPF. Even if the transfer is found to constitute a fraud, there are insufficient facts to anticipate the possible consequences for the CPF, who must receive independent advice in this regard.

67. It is correct that both Mostert and Tshidi are of the view that the section 14 transfer from Sable to CPF falls to be set aside, as is being done in the cases of the other section 14 certificates arising out of the Ghavalas transactions. However, this claim in terms of the 'statutory regime' is the only claim Sable could possibly have against CPF. This is not a claim in the true sense but rather the reversal of an administrative decision and any entitlement that Sable may have will be subject to the administrative decisions of the FSB being set aside. Both Mostert and Tshidi state that should the section 14 transfer from Sable to CPF be set aside, it will be rectified in accordance with the recommendations of independent actuaries, irrespective of who is appointed as curator. Mostert will be entitled to no fee in terms of his contingency fee arrangement in respect of Sable. The rectification may consist of a transfer of assets or even transfer of members. It has also been suggested that to allay any fears that members may have, this court make an order that the members of CPF receive independent legal advice from a senior counsel of their choice when, and if, an application to set aside the section 14 transfer is launched.
68. It is apparent that there has been a complex and confusing web of transactions involving various corporate entities over a period of many years. It is not this court's role to attempt to unravel these complexities. These are primarily the domain of the criminal court. Reduced to its simplest terms it appears that Nash wanted access to the considerable

surplus funds in Sable. To do this he needed another co-operative pension fund to accept the active members from Sable. CPF was a small fund with a dormant principal employer and provided Nash with the opportunity to set his scheme into motion over a period of many years. To prevent any FSB involvement it was necessary to submit a nil surplus valuation. Hence a fictitious claim had to be created.

69. As Mostert delved deeper into the Ghavalas transactions the extent of Nash's dishonesty became apparent. Nash's counter strategy was to claim a corrupt relationship between Mostert and Tshidi. In an email to Darren Williams of Werksmans he suggests how public perception about him will be transformed and *"the press will start to accuse Mostert and the FSB of corruption"*. This will result in the NPA *"loosing heart"*, presumably a reference to the criminal charges Nash is facing. In relation to the present matter he warns that this trial is *"high risk and high publicity"*. It has to be the *"one large fight we have. It has to be the watershed fight."*

70. Mention must be made of the callous disregard that Nash displayed towards the pensioners. He viewed them as an impediment to his plans. On 29 April 2009 he wrote to Marks that *'pensioners have entirely different motives to current members so they must not be given the right to a Trustee. I also frankly want a situation where there are 4 trustees and the chairman has a casting vote in the situation of deadlock-----otherwise control passes to an adjudicator (fsb/Mostert!!).'*

Over a year later on 1 August 2010 he wrote to Marks: *"If we settle with the State / FSB on the basis of a distribution of the (sic) Pension Fund Surplus and we say 80% goes to company and 20% as a "perk to employees/members ??? Would the pensioners be part of this I wonder?? This is why it may be relevant to outsource them now. ?? nThen (sic) the complication is gone."*

71. I am satisfied that on a conspectus of all the evidence that the issue of a claim that Sable may have against CPF is indeed “a red herring” and does not constitute an irresolvable conflict for Mostert. Nash’s emails make that abundantly clear. Insofar as there may be an application for the setting aside of a section 14 certificate resulting in any form of restitution to any of the other pension funds involved in the Ghavalas transactions, then this will be determined, not by Mostert, but by a board of 3 independent actuaries. This is an administrative decision.⁷ Should the members of CPF still feel uneasy then they have an option of obtaining independent legal advice from the senior counsel of their choice.

The bias of Mostert

72. It is alleged that the trustees believe that Mostert is incapable of treating them in an independent and unbiased manner. Firstly, they say Mostert acted in an unethical manner in bringing the ex parte application. It is trite that an applicant when bringing an ex parte application must make full disclosure and display the utmost good faith.⁸ The basis for this submission is that at the time the ex parte application was brought, Nash anticipated a claim by Sable. Even if this was later found to be a fictitious claim, it was improper to bring the application believing that there was such a possibility. Therefore he is rendered completely suitable to be appointed as curator.

73. This allegation is unfounded. Tshidi referred to the relationship between CPF and the Sable fund in his founding affidavit and maintained that there was no genuine Sable claim against the CPF. Subsequent revelations have proven him correct.

74. What is more disturbing is Mostert’s use of his own law firm, AL Mostert, to litigate on his behalf. Although this in itself is not prejudicial or necessarily

⁷ *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 39 (SCA)

⁸ *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma v National Director of Public Prosecutions* 2009 91) SA 1 CC para 102

results in a conflict, there is no escaping the inference that this may create an incentive to litigate unnecessarily. Moreover, this litigation which has been described as lavish, is at the expense of CPF. Undoubtedly the actions of Nash, in thwarting Mostert's attempt to obtain information, were a major contributing factor to the legal costs. However, Mostert's affidavits in response to the counter application were excessive. The affidavit of 144 pages with approximately 1000 pages of annexures was unnecessary and unwarranted. The perception of being motivated by self-interest is aggravated. The application was that of the FSB and it was for the FSB to put up whatever evidence they saw fit, including an affidavit from Mostert if required. It was not for Mostert to enter the fray using the resources of CPF to do so. The question remains whether this renders him unsuitable to be curator of CPF.

75. Mr Watt Pringle referred to several cases which he said supported the removal of Mostert, who is in an analogous position to the liquidators in these cases.
76. In *Ma-Afrika Groepbelange (Pty) Ltd & Another v Millman Powell NNO and Another* ⁹ the court commented that good cause for the removal of a liquidator was held to have been shown where the liquidator was not independent. The court in *Ma-Afrika* quoted from English case law¹⁰ that unless the liquidator was wholly independent, it was in the interests of everyone concerned to remove him. Even the appearance of being one-sided was sufficient grounds for his removal.¹¹ It was argued that in this application not only is there an appearance of bias, but Mostert has used the assets of CPF as a war chest to fund his opposition to the counterclaim, from which he has benefitted personally.
77. This argument does not take into account that the court in *Ma-Afrika* case went on to say that the removal of a liquidator was a radical step which

⁹ 1997 (1) SA 547 (C)

¹⁰ *Re London Flats Ltd* [1969] 2 All ER 744 (Ch) at 752 ; *In re Contract Corporation: Gooch's case* (1872) 7 Ch App 207 at 211

¹¹ *James v Magistrate, Wynberg and Others* 1995 (1) SA 1 (C)

could not be granted unless a proper case was made out therefor. It is not sufficient merely to show that there is an apprehension or perception of bias, partiality, lack of independence or fairness on the part of the liquidator. Nor does it suffice to establish, even *prima facie*, that the liquidator had not performed satisfactorily, had made questionable decisions or committed errors of judgment.¹² This does not constitute 'good cause'. The conduct of the liquidator must be assessed in its full context and of cardinal importance is whether the removal of the liquidator is to the general advantage and benefit of all persons concerned. The court held that a relevant factor in determining whether it is to the general advantage to remove the liquidator is the expense and inconvenience caused by the appointment of a new liquidator for the purpose of completing the work already done by his predecessor. Accordingly a court should be far less inclined to remove a liquidator at a late stage of the winding-up process than to replace him at an early stage.¹³

78. In *Hudson and Others NNO v Wilkins NO and Others*¹⁴ it was held that a court will exercise its discretion to remove a liquidator if it appears that he or she, through some relationship, direct or indirect with the company or its management or any particular person concerned in its affairs, is in a position of conflict. However, a mere suspicion does not lend credence to an allegation that there was a conspiracy or collusion. This case also does not provide support for the removal of Mostert. There is no evidence of anything more than a suspicion of bias. The collusion alleged is with the FSB which has no financial interest in the curatorship.
79. In *Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others v Jeeva and Others*¹⁵ the SCA found that in an inquiry in terms of section 417 and 418 of the Companies Act no 61 of 1973, bias or perceived bias on the part of the liquidator does not infringe any rights of persons

¹² *Ma-Afrika Groepbelange (Pty) Ltd & Another v Millman Powell NNO and Another* 1997 (1) SA 547 (C) at p 566

¹³ *Ma-Afrika Groepbelange (Pty) Ltd & Another v Millman Powell NNO and Another* 1997 (1) SA 547 (C) at p566

¹⁴ 2003 (6) SA 234 (T)

¹⁵ 1996 (2) SA 573 (A)

summoned for such inquiry. Therefore relief against such bias is not competent.¹⁶

80. *Standard bank of South Africa v the Master of the High Court and Others*¹⁷ dealt with the situation where Nel was liquidator of both Macmad and its subsidiary, Intramed, although his co-liquidators were not common to both. The liquidators were removed for not disputing a R325 million claim by Macmad and using estate funds to fund their private litigation which was aimed at reducing their fees. Navsa JA found that it was “*distressing that Nel did not appreciate the conflict situation that he found himself in. As liquidator of Macmed he was, in seeking to prove a contentious claim in Intramed, motivated by the interests of a creditor. As a liquidator of Intramed, together with de Villiers, he was obliged to consider the interests of the debtor*”¹⁸. It was further held that opposition to an application for the removal of a liquidator on the basis of his conduct was self-evidently a personal one and should be borne by the liquidator in his personal capacity.¹⁹
81. It should be noted that Nel and his co-liquidator had previously been ordered to pay costs personally by the Grahamstown High Court. Despite this they continued to use Intramed funds to pay for their legal costs, including their costs of appeal to the Supreme Court of Appeal. To the contrary, in the present application, the provisional order specifically gives Mostert the right to use the services of his own firm, AL Mostert. The fact that there is no genuine Sable claim further distinguishes this case from the *Standard bank* case.
82. In my view the above cases do not provide unqualified support for the removal of Mostert as curator. More specifically, it is difficult to see how the

¹⁶ *Receiver of Revenue, Port Elizabeth v Jeeva and Others; Klerck and Others v Jeeva and Others* 1996 (2) SA 573 (A)

¹⁷ 2010 (4) SA 405 (SCA)

¹⁸ 2010 (4) SA 405 SCA para 101

¹⁹ 2010 (4) SA 405 SCA para 73

removal of Mostert will be to the general advantage of persons who have a legitimate interest in the surplus of the CPF, this being the test set out in the *Ma-Afrika* case.

Role of the FSB

83. The FSB has an oversight function over the curator who, in terms of section 5(6) of the FI Act, acts under the control of the Registrar. The curator may apply for instructions from the Registrar in respect of any matter related to and arising from the business and control of the fund. In terms of section 5(8)(a) any person may make application to the court to set aside any decision made, or action taken, in connection with the business of the fund, by the curator or .
84. The Registrar has wide powers both as to placing a fund under curatorship and whom it appoints as curator. The remedy of curatorship is primarily for the benefit and protection of members of a financial institution and the Registrar has been described as ‘the guardian of the interests of members of pension funds’.²⁰
85. Given the onerous duties that the Registrar discharges, a court should not easily deviate from whom the Registrar has recommended.²¹ The suitability of such a person has been informed by background knowledge of the fund, the skills needed to manage the fund as well as the Registrar’s knowledge and confidence in the person recommended. The appointment of a curator often results in the previous trustees losing control of the fund and sometimes in their conduct being investigated. For this reason it is common that the Registrar will encounter resistance in applications for the appointment of curators.²²

²⁰ *Financial Services Board v De Wet and Others* 2002 (3) SA 525 (C); *Executive Officer, Financial Services Board v Ovation Global Investment Services (Pty) Ltd and Another* 2008 (3) SA 60 (C)

²¹ *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd* [2012] 1 All SA 135 (SCA)

²² *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd* [2012] 1 All SA 135 (SCA)

86. The FSB avers that because of the number of large and powerful reputable institutions involved, they need a strong character like Mostert to act as their “bloodhound” to follow the money trail. He and his legal team have the tenacity and ability to trace and expose the dishonesty of the high profile individuals who dominate the administration of pension funds. Mostert has, they say, more than fulfilled their expectations by recovering hundreds of millions to date. They further claim that no individual would be prepared to unravel the Ghavalas transactions for the normal fee. In any event in this matter no contingency fee is applicable and Mostert will only earn the normal attorney’s fees.
87. The CPF is a relatively small fund with an asset value of R63 million as at 30 June 2013. According to the FSB it cannot afford the expense of a new curator at this stage. In February 2011 Tshidi stated in an affidavit that the FSB were not married to Mostert as curator. However, some two and half years later the expense of appointing a new curator who will have to acquaint him or herself with the issues and facts that have occupied Mostert for years, is prohibitive.

Conclusion

88. I agree that this matter is too far advanced for the appointment of a new curator. Even a co-curator cannot make any meaningful contribution at this stage. It will merely mean an added and unnecessary expense to a fund that already has been over burdened with legal costs. Mostert may not be the ideal candidate in view of the suspicion and controversy surrounding his appointment. Under normal circumstances a totally neutral curator would be preferable. But this is no ordinary matter. It involves a history of highly complex financial transactions. Mostert has been instrumental in unravelling some of these transactions which, on the face of it, are unlawful. It is in the interests of justice that this matter be finalised as soon as possible. In my view it is to the general advantage and benefit of all persons concerned, particularly the pensioners, that Mostert’s appointment be confirmed. He is

the choice of the regulator and they are empowered, and indeed are enjoined, to oversee his functions. The FSB have indicated that in this matter there is no contingency fee applicable and they will ensure that Mostert will be paid normal attorney's fees as curator.

89. It is disturbing that Mostert litigated in what was described as a lavish scale, using the services of his own law firm, AL Mostert Inc at the expense of CPF. I am mindful that paragraph 5.9 of the court order permitted him to do so on the basis of the firm's depth of knowledge of the Ghavalas transactions. While I accept Mostert is the repository of invaluable information regarding the CPF and should therefore not be removed as curator at this late stage, I do not accept that only his law firm can litigate on his behalf. Mostert must be capable of transferring his wealth of knowledge to another law firm in which he has no financial interest. That his legal firm is best placed to deal with Ghavalas transactions notwithstanding, the appointment of a law firm in which a curator has a direct interest, creates the perception that the curator is benefitting twice, both a curator and as lawyer. This practice should be frowned upon. Accordingly the rule should not be confirmed with regard to the use of the services of AL Mostert Inc.

Costs

90. The costs follow the result and the trustees should be liable to pay the costs of this application, including the counter application. Nevertheless, I am of the view that Mostert's lengthy affidavit, termed an answering affidavit to the counter application, was unjustifiable. It amounts to a defence of his appointment which was the role of the FSB. It was not for Mostert to defend his own appointment. The costs of the drafting of this affidavit must be specifically disallowed. No party to these proceedings should be burdened by these costs which Mostert should pay personally.
91. Counsel for Nash argued that he came before this court purely as a witness for the new trustees who requested his assistance in the form of an

affidavit. It is trite that a court cannot award costs against a party who is not before it, unless the circumstances are exceptional and an award is made *bonis propriis*.²³ It is argued, because no substantive relief is sought against Nash, no costs can be awarded against him and that in respect of Mrs Nash there are no allegations of wrong doing against her; her inclusion is indicative of the extent of the malicious vendetta being conducted by Mostert. An order is sought by Nash that the FSB and Mostert pay the costs of Mr and Mrs Nash on a punitive scale.

92. What seems to have been overlooked is that there was a joinder application in respect of Nash and his wife. They are therefore not only witnesses but have been joined as parties to this action. The order provides that the trustees, which include Nash and his wife, should show cause why they should not be liable for costs on a scale as between attorney and client. Nash and his wife resigned approximately a month after the grant of the provisional order. Nash has been in *de facto* control of the CPF since 1995. It was his actions, together with that of the previous trustees, that necessitated the appointment of a curator. The application to place the fund under curatorship is not opposed which amounts to an admission of mismanagement on the part of the previous trustees. It is clear that Nash was the driving force behind the opposition to Mostert and the counter application. As the ultimate decision maker, Nash should be liable for the costs of this application on a punitive scale together with the previous trustees.

93. In respect of the new trustees it is extremely difficult to ascertain exactly what independent knowledge they had at any given time, but it is apparent that they have been influenced by Nash. At a time when the new trustees were ostensibly acting totally independent of Nash, there are emails from Nash instructing Werksmans, acting on behalf of the trustees, what strategy to adopt towards this case. It could not have been put more plainly than Nash's own words in his email of 17 May 2011 to Darren Williams of

²³*Dowjee Co Ltd v Waja* 1929 TPD 66; *Revielo Leppa Trust v Kritzing* [2007] 4 All SA 749 (SE)

Werksmans: *“So, it is apparent that the current trustees are now operating the Fund more or less on behalf of me the main beneficiary as well as on behalf of the beneficiaries of the Surplus (of which the company is one as well).”*

94. The new trustees were the deponents of the affidavits in the counter application and there is no compelling reason why they should not be made to pay the costs of this application in their personal capacities jointly and severally with Nash and the previous trustees. However, there is no concrete evidence of any wrong-doing on their part, other than to be unduly influenced by Nash. I do not deem it appropriate that they should pay costs on a punitive scale.

Costs of urgent application

95. The launching of the urgent application by Nash as provisional curator in February 2011 to get Nash and the new trustees CPF to comply with the court order, was solely as a result of their non-co-operation. The respondents deliberately ignored the provisional order fully aware of their obligations in terms thereof. The fact that they capitulated and agreed to an order by consent is confirmation thereof. Whether they even had the locus standi to oppose the application is questionable. On whatever basis, it is entirely appropriate that the respondents cited in that application pay the costs of the urgent application on a punitive scale.

Machin application

96. Machin's conduct was nothing short of extraordinary. He instituted his action, presumably in consultation with Nash, at a time when the matter was about to be heard. This resulted in a postponement. His action for the removal of Mostert was premised on an alleged cession of Marks' claims for legal fees. This claim was obviously unsustainable in light of judgment against Marks in respect of her fees and the Supreme court of Appeal and

the Constitutional Court's refusal of leave to appeal. Machin withdrew his application on the eve of the hearing without tendering costs. This amounts to nothing more than an abuse of the court and he should be obliged to pay costs on the attorney and client scale.

In the result I make the following order:

In the curatorship application (case no 50596/2010)

1. The provisional order granted by Claassens J on 21 December 2010, attached marked A, is confirmed and made final in respect of paragraphs 1 to 4, 5.1 to 5.8 and 5.10 to 5.16, 6.3, 8.1 to 8.5 and 9 thereof.
2. Paragraph 5.9 of the provisional order is confirmed in the following terms:
“permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as he may reasonably deem necessary for the performance of his duties in terms of this order, and to defray reasonable charges and expenses this incurred from the assets owned, administered or held by or on behalf of the Fund, with the exclusion of the services of AL Mostert and Company Incorporated.
3. Paragraph 6.2 of the provisional order is confirmed, in the following terms:
“the costs of these proceedings and the opposition thereof, as between attorney and client, as well as the costs of the curator and the cost of the inspection conducted into the affairs of the Fund in terms of the Inspection of Financial Institutions Act no 80 of 1998, shall be paid by the trustees of the Fund, in their personal capacity, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client, including the costs of two counsel. In this paragraph “the trustees” shall mean the sixth, seventh and eighth respondent.

4. The curator shall under the control of the Registrar of Pension Funds (Registrar) furnish the with progress reports on the curatorship on a six-month basis.
5. The curator shall file a further report to this court by no later than 28 February 2014 advising on the status of the curatorship as at 31 December 2013.
6. On receipt of the curator's report, the shall re-enrol the matter for consideration of the report.
7. Should the members so require, a counsel of their own choice, including senior counsel, shall be appointed at the expense of the fund, in the event of an application for the setting aside of any section 14 transfers in terms of the Pension Funds Act.

In the counter application (also case number 50596/2010)

8. The counter application issued on 15 February 2011, purportedly in the name of the Cadac Pension Fund (but which was itself cited therein as the first respondent), is dismissed.
9. The third to tenth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the applicant's costs of the counter application on the scale as between party and party, including the costs of two counsel.
10. The costs of the second respondent (cited in the counter-application) are disallowed and the second respondent is not entitled to recover these costs from any party to these proceedings.

Reserved costs of the urgent application brought by the provisional curator on 15 February 2011

11. The first, second, fifth, sixth and seventh respondents cited in the court order attached marked B, are ordered to pay the costs of the urgent application jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client, including the costs of two counsel.

In the application issued by Paul Matthew Machin on 10 August 2012 under the same case number (for the removal of the provisional curator and to declare all litigation declared by him to be a “nullity”)

12. Paul Matthew Machin is ordered to pay to the Registrar and the Fund (represented by the curator) costs of suit on the scale between attorney and client, including in each instance the costs of two counsel.

In the application to join Mostert in his personal capacity (also case number 50596/2010)

13. The application is dismissed.

14. The costs of this application, including the costs of two counsel, shall be paid by the third to tenth respondents jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client, including the costs of two counsel.

This order shall lie for inspection by any member of the Fund at the office of the Fund, being 193 Bryanston Drive, Cnr William Nicol and Bryanston Drive, The braes Office park, Ground Floor, Stemcor House, until 31 January 2014, and thereafter at the Woodlands Office park, Building 14, First Floor, Woodlands Drive, Woodmead.

**C.HEATON NICHOLLS
JUDGE OF THE
SOUTHGAUTENG HIGH COURT**

Appearances

Counsel of the applicant : ADV. VAN NIEUWENHUIZEN SC
ADV. MANCHU

Counsel for the 1st respondent: ADV. WATT-PRINGLE SC
ADV. T.D. PRINSLOO

Counsel for the 2nd respondent: ADV. GAUNTLETT SC
ADV. L. VAN TONDER

Counsel for the 7th & 8th respondents: ADV. W. DE BRUYM

Date of hearing : 12 – 16 AUGUST 2013

Date of judgement : 13TH DECEMBER 2013

