



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

CASE NO: 43585/2019

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

14 May 2020

EJ Francis

In the interlocutory application between:

SIMON JOHN NASH

First Applicant

CADAC (PTY) LTD

Second Applicant

and

THE CADAC PENSION FUND (IN CURATORSHIP)
(REGISTRATION NUMBER: 12/8/0020425)

First Respondent

ANTON LOUIS MOSTERT N.O.

Second Respondent

JOHAN ESTERHUIZEN N.O.

Third Respondent

KAREN KEEVY N.O.

Fourth Respondent

NMG ADMINISTRATION (PTY) LTD
(REGISTRATION NUMBER: 1998/005937/07)

Fifth Respondent

In re the main application between:

SIMON JOHN NASH

Applicant

and

THE CADAC PENSION FUND (IN CURATORSHIP)
(REGISTRATION NUMBER: 12/8/0020425)

First Respondent

ANTON LOUIS MOSTERT N.O.

Second Respondent

2.

JOHAN ESTERHUIZEN N.O. Third Respondent

KAREN KEEVY N.O. Fourth Respondent

NMG ADMINISTRATION (PTY) LTD
(REGISTRATION NUMBER: 1998/005937/07) Fifth Respondent

In the application for intervention between:

ANTOINETTE CRONJE First Applicant for Intervention

IRIS ROSE SCHOEMAN Second Applicant for Intervention

SAMANTHA MAYS Third Applicant for Intervention

SIMON JOHN NASH First Applicant

CADAC (PTY) LTD Second Applicant

and

THE CADAC PENSION FUND (IN CURATORSHIP)
(REGISTRATION NUMBER: 12/8/0020425) First Respondent

ANTON LOUIS MOSTERT N.O. Second Respondent

JOHAN ESTERHUIZEN N.O. Third Respondent

KAREN KEEVY N.O. Fourth Respondent

NMG ADMINISTRATION (PTY) LTD
(REGISTRATION NUMBER: 1998/005937/07) Fifth Respondent

JUDGMENT

FRANCIS J

1. There are two applications that were enrolled for a hearing in the urgent court during the lockdown period. The first application is referred to as the interlocutory application and the second as the intervention application.

2. The applicants, Simon John Nash (first applicant) and Cadac (Pty) Ltd (the

second applicant) brought an urgent interlocutory application on Tuesday 5 May 2020 for the following order:

- “1. *The usual forms and services provided for in the rules be dispensed with and this matter be disposed of at such time and place and in such manner and in accordance with such procedure as the court deems fit.*
2. *Granting the First Applicant leave to institute this Application and to seek the relief set out hereinafter, as contemplated in terms of paragraph 4 of the order of the above court under case number: 2010/50596, granted on 21 December 2010 and in paragraph 3 of the order of the above court under case number: 34664/2017 dated 14 August 2018.*
3. *Granting the Second Applicant, insofar as it is necessary, leave to intervene in the Application instituted by the First Applicant under the above case number in terms of the notice of motion dated 9 December 2019.*
4. *Pending the outcome of the relief sought in the aforesaid notice of motion:*
 - 4.1 *interdicting the curators of the First Respondent (being the Second, Third and Fourth Respondents) and/or the administrators of the First Respondent (being the Fifth Respondent) from:*
 - 4.1.1 *from refusing to accept further contributions from or on behalf of the Second Applicant and/or the members of the First Respondent;*
 - 4.1.2 *refunding any contributions from or on behalf of the second applicant and/or the members of the first respondent;*
 - 4.2 *directing the Respondents to continue administering the First Respondent in terms of the Pension Funds Act, 1956 (as amended) and the rules of the First Respondent.*
5. *The costs of the application shall be paid by the Respondent, in their personal capacities, on the attorney and client scale, jointly and severally, the one paying the other to be absolved.*
6. *Further and alternative relief.”*

4.

curatorship). The second respondent is Anton Louis Mostert in his capacity as the curator of the first respondent. The third respondent is Johan Esterhuizen also a curator of the first respondent. The fourth respondent is Karen Keevy a curator of the first respondent. The fifth respondent is NMG Administrators (Pty) Ltd which is the administrator of the first respondent.

4. The interlocutory application was instituted on 20 April 2020 and it required the respondents to file their answering affidavits by 27 April 2020 and its replying affidavit by 30 April 2020.

5. The interlocutory application was opposed by the first to fourth respondents (the respondents) on several grounds including that of urgency. The respondents had *inter alia* stated in their answering affidavits that Cadac has no *locus standi* itself and on behalf of members of the Fund for the relief that it is seeking who are employees of Cadac. It stated that the first applicant had failed to provide any mandate to do so and the employees of Cadac were not parties to the main application or the present application. Insofar as the relief was sought by the first applicant he likewise has no *locus standi* to seek such relief on behalf of the employees of Cadac. The issue of the first applicant's entitlement to withdraw pension benefits and that the respondents pay such pension benefits to him formed part of the subject matter of the main application which is pending before this court.

6. The intervention application dated 29 April 2020 was instituted on an urgent

basis and was enrolled for a hearing on 5 May 2020. The intervention applicants sought the following relief:

- “1. *Directing that the First to Third Applicants for intervention be joined as the Third to Fifth Applicant in the Interlocutory Application set down for 5 May 2020 under the above case number;*
2. *In the event this application for intervention alternatively the urgent application is not determined on 5 May 2020, granting the relief sought in paragraph 4 (paragraphs 4.1, 4.1.1, 4.1.2 and 4.2 inclusive) of the applicants’ notice of motion, pending the determination of the urgent interlocutory application.*
3. *Costs in the event of opposition;*
4. *Further and/ or alternative relief.”*

7. The first to third applicants in the intervention application are Antoinette Cronje, Iris Rose Schoeman and Samantha Mays respectively. The respondents remain the same respondents as cited in the interlocutory application. The first applicant remains Simon John Nash and the second applicant Cadac (Pty) Ltd.
8. Both applications were opposed by the respondents on the issue of urgency or lack thereof and on the merits. The interlocutory application was also opposed on the grounds that that the first applicant first had to obtain leave from this court to institute the present application in terms of orders granted by Claassen J in 2010 and Matojane J in 2018. The first applicant sought such leave in the main and interlocutory application.
9. It is common cause that on 10 December 2019 the first applicant, Simon John Nash (Nash), brought an application which for ease of reference is called the

main application. The relief sought in the main application is for an order granting Nash leave to institute the application in terms of paragraph 4 of the order granted on 21 December 2010; directing that the decision of the curators of the Cadac Pension Fund (the CPF) - the second to fourth respondents to instruct the fifth respondent to flag the pension benefits of Nash in terms of section 37D of the Pension Funds Act, to be unlawful; directing the respondents to pay to Nash such benefits which he might be entitled to in terms of the Pension Funds Act and the rules of the CPF and costs of the application.

10. It is further common cause that the main application is opposed by the respondents. All that remains in the main application is for the parties to file heads of arguments and to obtain a date of hearing. The answering affidavit in the main application was served and filed on 14 February 2020. The replying affidavit was served on 28 February 2020 and filed on 3 March 2020.
11. The first issue that arises for determination in the interlocutory application is whether Nash is required to first seek leave of this court in a separate application to issue this application or whether he is required to seek leave at all. It is clear from the main application and the interlocutory application that he sought leave to institute the application and is also seeking the relief set out in his application in one application and has referred to the orders granted by Claassen J and Matojane J respectively. The respondents contended that Nash requires the Court's permission to litigate in his own name.

12. It was contended on behalf of the applicants in the interlocutory application that Nash does not have to seek leave to institute the application since the parties are different to those in the Matojane J order. However, if it was found that he must seek leave to institute the application, he can do so in one application and there is no need for him to bring two different applications. Nash sought leave in terms of prayer 2 of the notice of motion to institute this application. The possible need to do so arises out of two orders of this court namely that of Claassen J and Matojane J.

13. It was further contended that upon a proper reading of the Claassen J order, and having regard to the provisions of the Financial Institutions (Protection of Funds) Act 28 of 2001 and in particular section 5(8)(a) thereof, no leave to institute this application is required. Section 5(8)(a) of the Act pertains to pension funds under curatorship and read as follows:

“5(8)(a) 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 had been placed under curatorship.”

14. Reliance was also made to the matter under case number 43195/2013 where Mostert was a party in his personal capacity as a curator of the Sable Industries Pension Fund, where Tuchten J, interpreted an identical order dealing with the Sable Industries Pension Fund as follows:

“21. Manifestly, this paragraph was designed to stay and restrict proceedings from the conduct of the business of the Sable Fund before its business was placed under curatorship and not to restrict proceedings arising from the conduct of the curatorship. This is reinforced by the provisions of section 5(8)(a) of the FIA Act which, as

I shall show, empowers anyone to bring proceedings, without further leave of 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 or management of the business of a fund under curatorship.

22. *As I shall show, the applicants have raised matters of considerable substance in that regard and to the extent necessary leave ought to be, and is, given."*

15. It was further contended that insofar as the order of Matojane J is concerned, leave was not necessary in terms thereof, either Mostert was a party to that matter in his personal capacity and in his capacity as a curator of the Sable Industries Pension Fund and not the CPF. Nash is not seeking relief against Mostert in his personal capacity (save for the costs order, which is an ancillary issue not a self-standing one). Nor does he seek relief against Mostert N.O. in his capacity as the curator of the Sable Industries Pension Fund. Leave is not required for those proceedings to be instituted against Mostert N.O. as a curator of the CPF.

16. It was further contended that in any event and *ex abundante cautela* that a proper case was made out for leave, inasmuch as it may be required, for these proceedings to have been instituted and to continue therewith in the light of the fact that the first applicant has raised matters of considerable substance in regard to the curatorship of the CPF. Inasmuch as leave is necessary that he is entitled to seek leave in this application it is not required to institute a prior separate application to do so. This so it was contended was in line with the court's approach to leave being sought as a prerequisite for proceedings against companies in business rescue. In terms of section 133(1)(b) of the

Companies Act 71 of 2008, no legal proceedings may be commenced or proceeded with against a company after business rescue has commenced without the consent of the business rescue practitioner or leave of the court.

17. It was further contended that in *Chetty t/a Nationwide Electrical v Hart and Another* NNO 2015 (6) SA 424 SCA, it was held that the provision of section 133 was merely procedural limitation and not an absolute bar to the institution of legal proceedings. Inasmuch as it limits, or intrudes upon the constitutional right of access to court which a litigant may ordinarily enjoy, it must be interpreted in a manner which is least restrictive of such rights. A generous construction should be adopted over a merely textual or legalistic one in order to afford affected parties the fullest possible protection of such rights of access to court. It was submitted that to require the first applicant in this matter to seek leave of the court in a separate application, would constitute too great an infringement of his right of access to the court. In addition, given the urgency of the matter, and in the absence of any undertaking from the respondents, a separate application could render the relief sought herein nugatory.

18. It is common cause that the CPF was placed in provisional curatorship in terms of an order granted by Claassen J on 21 December 2010 under case number 2010/50596 where the first respondent Anton Louis Mostert N.O. was appointed as a provisional curator of the CPF. Paragraph 4 of that order provides that all actions, proceedings, execution of all writs, summonses and

processes against the Fund be stalled and be not instituted for or proceeded without the leave of the court. Paragraph 5 of that order provides that the curator is authorised to pay pensions or other benefits to those members of the fund who are legitimately entitled thereto, having regard to the rules of the fund and their financial position, after consultation with the fund's valuator. Paragraphs 1 to 4, 5.1 to 5.8 and 5.10 to 5.16, 6.3, 8.1 to 8.5 and 9 of the provisional order was confirmed by Heaton Nicholls J on 13 December 2013. The provisional order was confirmed and made final by the Supreme Court of Appeal on 29 February 2016 and was later varied by the same court on 31 May 2018.

19. I have considered the arguments raised on behalf of Nash. The arguments are persuasive but misses an essential point namely that there are two court orders granted in this court that requires Nash to obtain the leave of the court before instituting any action. Section 5(8)(a) of the Financial Institutions (Protection of Funds) requires him to bring such an application. The aforesaid section is not applicable in the present matter since there is a court order that requires him to seek leave. The provisions of the Companies Act does not assist Nash since that deals with a different issue. The context is also different. In terms of the Companies Act there is nothing that prevents a party from seeking both relief in one application. That position does not apply to Nash who has been severely criticised by various courts.

20. This matter has a rather unfortunate history between Simon John Nash and

Anton Louis Mostert in his official capacity. Simon John Nash who is an applicant in both applications is required in terms of two court orders to seek leave of the court before he can institute any application. He has in essence been declared a vexatious litigant. He has made the courts his play ground and battle fields. The only parties who are benefitting in his litigation are the lawyers that he has been paying to represent him in those matters. There are various judgments of our courts including the Constitutional court that has been scathing about how he has litigated and the stratagem that he has used. Our courts are not here to be used and abused by persons who have a propensity to litigate.

21. This brings me to the judgment and order of Matojane J on 14 August 2018 under case number 34664/2017 where he stated the following at paragraphs 92 and 93:

"In my view, the fact that Nash succeed in his application to have the contingency fee agreement between Mostert and the FSB declared invalid ("the Tuchten judgment) is not the reason why Nash and Midmacor should not be compelled first seek leave of this court prior to instituting any further legal proceedings against the applicants. Nash is dishonest and is motivated by ulterior motives to disrupt the progression of the administration of the Sable Fund the Power Pack Fund and the Cadac Fund by bringing a series of applications aimed at delaying and derailing civil and criminal[sic] against him and Midmacor.

The Ghavalas scheme has caused severe financial distress to some pension funds, and an immediate intervention by the court is called for in the public interest to ensure that frivolous applications do not delay the conclusion of civil and criminal proceedings that have already been instituted. The relief sought does not constitute a bar to Nash's access to the courts. Instead, it imposes a judicial oversight as the first step in any further proceedings that are to be instituted by Nash."

22. Matojane J then made and order that the first and fourth respondents (who

were cited as Simon John Nash and Midmacor Industries Limited Cadac Pension Fund (under curatorship) were ordered first to obtain the leave of the Court as a prerequisite to instituting any further proceedings against the applicants. The applicants in that case were Antony Louis Mostert (first applicant) and Antony Mostert N.O. the second applicant in his official capacity as curator of the Sable Industries Pension Fund under curatorship (the third applicant) and Power Pack Pension Fund (in liquidation) as the third applicant.

23. The order granted by Matojane J is similar to an order that is contemplated in section 2(b) of the Vexatious Proceedings Act 3 of 1956. The section provides as follows:

(b) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against or different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings.

24. It is trite that an order granted in terms of the provisions of the Vexatious Proceedings Act is not unconstitutional and does not infringe a person's right to access the courts. Similarly the order granted by Matojane J does not infringe Nash's right to access the courts. In this regard see *Beinash and*

Another v Ernst & Young and Others 1999 (2) SA 116 (CC). Such a party will have to show the court that he has a *prima facie* case and the application or action is not an abuse of court.

25. It is clear that in all the matters that served before the courts that the common denominator was Nash. Reference is made in the Matojane J judgment to the Cadac Pension Fund which has been placed under curatorship. It is a co-respondent in these applications before me. Anton Louis Mostert was the first applicant in the matter before Matojane J. He was the second applicant in his official capacity. There were two other respondents in that matter namely the Sable Industries Pension Fund (under curatorship) and the Power Pack Pension Fund (in liquidation). The first respondent in that matter was Nash. In the Claassen J order Nash was also a party as well as the CPF.
26. It is clear from the order made by Matojane J that Nash must first obtain the leave of the Court as a prerequisite before instituting further proceedings against Mostert N.O. and in his personal capacity. Matojane J was mindful of the Tuchten J judgment and ruled that Nash still had to obtain the leave of the court as a prerequisite to instituting any further proceedings against the applicants in that case. He said that that is where the judicial oversight as referred to him would take place. In other words he must first bring an application seeking such leave. He will have to convince that court that the proceedings are not an abuse of the process of the court and that there is a *prima facie* ground for the proceedings. I share the views and approach

adopted by Matojane J.

27. The provisions of section 133(1)(b) of the Companies Act is not applicable in the present matter. There are two court orders issued in this court against the first applicant that requires him to obtain an order first before he can institute legal proceedings. None of those orders were set aside and are still binding on the parties.
28. Taking into account the history of the matter and what the various courts have said about Nash he is required to first bring an application separately for leave to institute the interlocutory application. That is where the judicial oversight must take place before he is granted or refused permission to institute the proceedings. The bar that was imposed by both Claassen J and Matojane J still exist. It follows therefore that since Nash has failed to bring an application separately for leave to institute the interlocutory application, the interlocutory application stands to be dismissed.
29. It follows that the intervention application stands to be dismissed since that application is in support of the interlocutory application that was brought by Nash and the second applicant for the relief that was being sought. The intervention applicants had sought to be joined as the third to fifth applicants in the interlocutory application. The intervention application is premised on an interlocutory application that is dismissed for the reasons stated above.

30. It becomes unnecessary to deal with the remainder of the issues.
31. There is no reason why costs should not follow the result. I do not believe that this is a matter where a punitive cost order should be granted.
32. In the circumstances I make the following order:
 - 32.1 The interlocutory application is dismissed.
 - 32.2 The costs of the interlocutory application are to be borne by the first and second applicants jointly and severally the one paying the other to be absolved.
 - 32.3 The intervention application is dismissed.
 - 32.4 The costs of the intervention application are to be borne by the first to third intervention applicants jointly and severally, the one paying the other to be absolved.

Francis J
 FRANCIS J
 HIGH COURT JUDGE
 GUATENG LOCAL DIVISION

FOR INTERLOCUTORY
 APPLICANTS : GD WICKENS SC INSTRUCTED BY KWA
 ATTORNEYS

FOR INTERVENTION
 APPLICANTS : P STAIS SC WITH S PUDIFIN-JONES
 INSTRUCTED BY IAN LEVITT
 ATTORNEYS

FOR 1 - 4 RESPONDENTS : JG WASSERMAN SC INSTRUCTED BY
 ASSHETON-SMITH INCORPORATED

FOR FIFTH RESPONDENT : NO APPEARANCE

DATE OF HEARING : 5 & 6 MAY 2020

DATE OF JUDGMENT : 14 MAY 2020