



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

CASE NO: 12120/19

|                        |                                                 |
|------------------------|-------------------------------------------------|
| (1)                    | REPORTABLE: <del>YES</del> / NO                 |
| (2)                    | OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO |
| (3)                    | REVISED. Yes                                    |
| .....27 July 2020..... |                                                 |
| .....                  |                                                 |

In the matter between:

**ANTONY LOUIS MOSTERT**

First Applicant

**POWER PACK PENSION FUND  
(IN LIQUIDATION) (Represented by ANTONY LOUIS  
MOSTERT N.O.  
(in his capacity as liquidator of the Second Applicant)**

Second Applicant

and

**SIMON JOHN NASH**

First Respondent

**PAUL ROBERT O'SULLIVAN**

Second Respondent

**SARAH-JANE TRENT**

Third Respondent

**PAUL O'SULLIVAN & ASSOCIATES PROPRIETARY  
LIMITED  
(REGISTRATION NUMBER 2012/077700/07)**

Fourth Respondent

**OLD MUTUAL LIFE INSURANCE COMPANY (SOUTH  
AFRICA) LIMITED  
(REGISTRATION NUMBER 1999/004643/06)**

Fifth Respondent

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## JUDGMENT

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CRUTCHFIELD AJ:

[1] This application came before me by way of special motion. The papers spanned in excess of sixteen hundred (1 600) pages.

[2] The first applicant, Antony Louis Mostert, was the curator *ad litem* of the second applicant, Power Pack Pension Fund (in liquidation) (represented by Antony Louis Mostert *NO*) (in his capacity as liquidator of the second applicant). **I refer to the first and second applicants jointly as 'Mostert'.**

[3] The first respondent was Simon John Nash, a former trustee of various pension funds allegedly subjected to an 'asset-stripping' scheme executed by him and various others. I refer to the first respondent as 'Nash'.

[4] The second respondent, Paul Robert O'Sullivan, described himself as a 'professional forensic litigation expert'. Sarah-Jane Trent, the third respondent, was a legal consultant to the fourth respondent. The second and third respondents both co-authored the forensic report referred to hereunder.

[5] The fourth respondent, Paul O'Sullivan & Associates Proprietary Limited, was a corporate entity established by the second respondent for the purpose of conducting his forensic litigation business.

[6] No relief was sought against the fifth respondent, Old Mutual Life Insurance Company (South Africa) Limited, ('Old Mutual'). Old Mutual abided the decision of the Court and did not participate in the proceedings.

[7] Old Mutual was a recipient of the 'forensic report' referred to hereunder.

[8] I refer to the second to fourth respondents jointly as the 'O'Sullivan respondents.' Nash and the O'Sullivan respondents were represented separately at the hearing before me.

[9] Briefly stated, the applicants claimed:

1. An interim interdict that the first to fourth respondents, either themselves or through entities in which they hold an interest, be interdicted and restrained from:

- 9.1.1 Publishing or disseminating or causing either, whether in the media and/or on social media platforms or otherwise, any defamatory allegations in respect of the first and second applicants, their associates or persons engaged in assisting with the administration of the liquidation of the second applicant; and

- 9.1.2 Publishing the fourth respondent's 'forensic report' compiled by the second and third respondents dated 30 March 2019 or any variations, updates or amendments thereof and the contents of any correspondence between the second and fifth respondents.

2. That the interim interdict operate pending the final determination of action proceedings to be instituted against the first to fourth respondents for damages for defamation and a final interdict prohibiting the first to fourth respondents from continuing the publication of defamatory statements regarding the first applicant.
  
3. In respect of the action proceedings pending under case number 09/50684 in this Court ('the Power Pack action'), that the first to fourth respondents, either themselves or through entities in which they hold an interest, be interdicted and restrained from taking any actions (other than as a party to the Power Pack action in terms of the Uniform Rules of Court) including but not limited to directly corresponding and engaging with parties who may be required to give evidence in the action, including but not limited to the fifth respondent or any of its officers or employees, and one June Marx.

[10] Maier-Frawley AJ granted an urgent interim order in the matter during April 2019. The application before me was the next instalment in the proceedings.

[11] Nash sought the dismissal of the application together with costs of two counsel. The O'Sullivan respondents also claimed the dismissal of the application with costs to be paid by the first applicant in his personal capacity.

[12] Nash launched two striking out applications, both opposed by the applicants, in respect of which Nash required a judgment albeit not a discrete hearing. The applicants informed me at the outset that they would not refer to any of the impugned averments and they did not do so. Thus, the striking out applications were rendered moot eliminating any need for a judgment in respect of those applications.

[13] The applicants characterised the matter as a contest of rights – the first applicant's right to dignity together with the second applicant's right to efficient administration, particularly given the applicable context where the beneficiaries of the Power Pack Pension Fund ('the Fund'), were elderly pensioners, as opposed to the respondents' rights to freedom of expression, both to receive and impart information, including the public's interest in receiving information from the respondents, and Nash's right of access to justice.

[14] The defences raised by Nash in the matter before me, dovetailed with those raised by him in the matter determined by Matojane J, being that the order sought would violate his right to freedom of expression by limiting his right to impart information and ideas unjustifiably, and, unjustifiably limit the right of the general public to receive information regarding Mostert's unlawful conduct.<sup>1</sup>

[15] Furthermore, that Mostert was trying to 'gag' the respondents to prevent his alleged corrupt activities from coming to light, that the information that **he wishes to publish is true** and in the public interest.<sup>2</sup>

[16]

[17] The factual matrix to this application comprised various aspects:

1. Certain charges pending against Nash in the Specialised Commercial Crimes Court for fraud, theft and money laundering arising from the

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<sup>1</sup> Matojane J judgment [4].

<sup>2</sup> Matojane J judgment [5].

alleged unlawful removal of at least R160 million in capital from various pension funds, the alleged 'asset-stripping' scheme referred to earlier.

2. Long-running litigation referred to as the '**Power Pack action**', in which the second applicant is the plaintiff and Nash and various others the defendants, for the recovery of approximately R42 million allegedly extracted from the second applicant between June 1998 and September 1999. The Power Pack action was set down for trial on 31 July 2017.

[18] The applicants referred to an alleged defamatory smear campaign conducted by Nash inter alia against the first applicant and those involved in the administration of the second applicant. The alleged purpose of the smear campaign was to disrupt and delay the Power Pack action as a means of causing the demise of that litigation prior to its determination by the courts.

[19] The 'smear campaign' had succeeded in delaying the finalisation of the administration of the Nash funds, to the prejudice of the members and pensioners beneficially entitled thereto, together with the team administering those funds.

[20] The basis for the interdict claimed in respect of the Power Pack action was explained by the applicants thus: 'As the goal of that smear campaign is to stifle an action by the second applicant against Nash (the Power Pack action) and as Nash and the O'Sullivan respondents have been interfering with witnesses intended to be called in that action, the applicants seek an order interdicting the first to fourth respondents from taking any actions other than as a party to the Power Pack action in terms of the Rules of Court, including but not limited to directly corresponding and engaging with parties who may be required to give evidence in the action including but not limited to the fifth respondent or any of its officers or employees, and June Marx'.

[21] Nash denied that the alleged smear campaign was defamatory and contended that the applicants were attempting to 'gag' the respondents so as to prevent publication of the forensic report and public knowledge of the first applicant's alleged unlawful activities. Both Nash and the O'Sullivan respondents argued that they were acting in the public interest by making information regarding the first applicant known to the public. Furthermore, that the information was true.

[22] Nash denied that the applicants established the requirements for interdictory relief.

[23] As to Nash's right of access to justice, he alleged that an order in the terms sought by the applicants would significantly hamper his preparation of his defence and running of the trial in the Power Pack action. In effect, Nash's access to justice would be impeded. He *inter alia* would not be entitled to consult with his witnesses, not be entitled to call the O'Sullivan respondents, the FSB, Zondo or the Public Protector to furnish evidence in the trial and would be prevented from engaging with Old Mutual as regards the amounts claimed by the applicants in the Power Pack action having allegedly been discharged. Furthermore, Nash and each of the O'Sullivan respondents were alleged to have acted separately for a period some twelve years.

[24] The issues that I was required to determine comprised whether or not the conduct complained of by the applicants amounted to defamation of the first applicant and interference in the administration of the second applicant. If so, did the respondents acquit themselves of the onus resting upon them to furnish a defence that served to exclude wrongfulness or intention on the part of the respondents.

[25] In the event that the respondents did not do so, whether the applicants met the requirements of the interdictory relief sought by them.

[26] The parties have a long history through our courts, a plethora of judgments having been granted in respect of various of the parties in various forms. Two of those judgments were of particular relevance to these proceedings; being that of Matojane J<sup>3</sup> and Fisher J,<sup>4</sup> to which I refer hereunder.

[27] The Power Pack action incepted during 2009. The matter was set down for trial, by arrangement between the parties, on 31 July 2017. The hearing was postponed sine die as a result of Nash launching an application to stay the proceedings (the 'stay application') shortly prior to the date of the hearing.

[28] Matojane J interdicted Nash inter alia on 14 August 2018.

[29] During October 2018, Nash approached Old Mutual in an attempt to conclude an agreement premised on the termination of the Power Pack action. Old Mutual refused to conclude the proposed agreement.

[30] The stay application was heard by Fisher J on 19 November 2018 and dismissed on 4 February 2019.

[31] Before Matojane J, the first applicant was Mostert in his personal capacity, the second applicant was Mostert in his capacity as the curator of the Sable Industries Pension Fund (under curatorship), and liquidator of the Power Pack Pension Fund (in liquidation). The first respondent was Nash and the fourth respondent Midmacor

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<sup>3</sup> *Antony Louis Mostert and others v Simon John Nash and others* case no 34664/2017 ('Matojane J').

<sup>4</sup> *Simon John Nash and Midmacor Industries Limited v Director of Public Prosecutions and others* case number 22324/17.

Industries Limited, a company controlled by Nash. The remaining respondents are not relevant to the application before me.

[32] Matojane J, *inter alia*:

1. Interdicted Nash and the remaining respondents, either themselves or through entities in which they hold an interest, from disseminating, directly or indirectly, false and defamatory allegations pertaining to the first and second applicants and any of the first and second applicants' associates or persons engaged in assisting the second applicant in the administration of the curatorship of the third applicant (Sable Industries Pension Fund (under curatorship)), and in the liquidation of the fourth applicant (the Power Pack Pension Fund (in liquidation)); and
2. Ordered Nash and Midmacor Industries Limited (the fourth respondent) to obtain the leave of the Court first, as a prerequisite to instituting any further proceedings against the applicants; and
3. Ordered that Nash's website entitled 'pensionscam' be closed down.

[33] Nash unsuccessfully sought leave to appeal Matojane J's judgment. Nash's attempt to appeal Fisher J's judgment also failed.

[34] The applicants contended that the findings and orders of Matojane J as between the first applicant and Nash are binding on me. Furthermore, that the defences raised by the respondents were the same as those raised before Matojane J.

[35] It follows from the stay application and Nash's attempts to appeal the judgments of both Matojane J and Fisher J, that the Power Pack action has been delayed as a result thereof.

[36] Whilst the applicant argued that the majority of issues in this matter were *res iudicata* and limited issues remained for determination by me, the first respondent differentiated the matter before Matojane J and that before me. Matojane J interdicted the publication of matter that was false. That limitation did not appear from the notice of motion before me. Hence the respondents argued that the application should be dismissed as defamation per se is not wrongful and does not attract sanction. It must be false in order to attract an interdict.

[37] However, it was clearly apparent from a perusal of the applicants' founding affidavit that the alleged defamatory matter upon which the applicants relied for the order sought by them, was described as being false. In those circumstances, the absence of the limitation of false from the notice of motion was not, in and of itself, a reason to deny the interdict sought.

## DEFAMATION

[38] Turning to the applicants' claims of defamation, the applicants relied upon various allegedly defamatory statements made against the first applicant and others involved in the administration of the second applicant.

[39] The elements of defamation were reiterated by the Constitutional Court in *Le Roux v Dey*<sup>5</sup>, namely; the wrongful and intentional publication of a defamatory statement(s) of and concerning the plaintiff.

[40] Furthermore, at the outset, a complainant must prove only the publication of defamatory matter concerning the complainant. Thereafter, wrongfulness and intention on the part of the wrongdoer are presumed, and, it is for the wrongdoer, wishing to avoid liability, to raise a defence that excludes either wrongfulness or intention.

[41] It is settled law that it is the defendant who carries the onus to rebut either or both of the presumptions and that this onus is a full onus to be discharged on a balance of probabilities, not a duty to adduce evidence. A bare denial of the averments will not suffice. Facts must be pleaded and proved, sufficient to establish the defence/s raised by the wrongdoer.<sup>6</sup>

[42] A statement is defamatory of a plaintiff if that statement 'tends' to reduce the status, good name or reputation of the plaintiff.<sup>7</sup>

[43] The test is objective – the meaning the words conveyed to the reasonable reader of them.<sup>8</sup>

[44] The intention underlying Nash's alleged 'smear campaign' was evidenced, according to the applicants, from Nash's email correspondence dated 17 May 2011 to his

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<sup>5</sup> *Le Roux v Dey* 2011 (3) SA 274 (CC) ('Le Roux') para 84.

<sup>6</sup> *Id* para 85.

<sup>7</sup> *Le Roux v Dey* 2010 (4) SA 210 (SCA) para 8.

<sup>8</sup> *Id* para 15.

attorneys, the subject of which was 'Situation regarding the agreed approach to the attack on the Mostert Curatorship'.

[45] Nash referred therein to the trial *'being 'the one last fight that we have. It has to be the watershed fight .... (transforming) the legal as well as the public perception landscape. ... The Press will start to accuse Mostert and Tshidi (of the FSB) of corruption. The NPA will further lose heart. So I need a legal platform off which to highlight the whole sordid matter to the public. ... Our big news is the head of the FSB plotting with Mostert to put the CPF into Curatorship. ... this matter if properly brought to the foreground of the public awareness will turn the whole matter around'*

[46] The essence of the email was that the strategy, described by Nash as 'high risk' and 'high publicity', would result in public perception of Nash shifting favourably whilst that in respect of Mostert and the Financial Services Board ('FSB'), would reflect them as corrupt. That, in turn, would result in the prosecution authorities failing to prosecute the matter to finality.

[47] Matojane J referred<sup>9</sup> to Heaton-Nicolls JA's finding,<sup>10</sup> made with reference to Nash's email, that Nash engaged in a smear campaign against Mostert.

[48] Matojane J dealt<sup>11</sup> comprehensively with the rights to human dignity and freedom of expression as well as the defences comprising truth of the information and the public's interest in receiving the information, raised by the respondents before me. I refer to the judgment of Matojane J in that regard.

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<sup>9</sup> Note 1 above para 70.

<sup>10</sup> *Executive Office of the Financial Services Board v Cadac Pension Fund; In re: Executive Officer of the Financial Services Board v Cadac Pension Fund and Others* as referenced by Matojane J at para 70.

<sup>11</sup> Id paras 53 - 74.

[49] The applicants contended that Nash, having been interdicted by Matojane J from pursuing the alleged defamatory smear campaign, engaged the O'Sullivan respondents in order to circumvent Matojane J's order and continue the interdicted campaign, albeit not in Nash's name.

[50] Nash admitted appointing the fourth respondent to investigate various allegations of corruption and fraud *inter alia* against Mostert in his personal and official capacities, during July 2017. Nash extended the scope of the mandate during January 2019, to include certain items of correspondence between the second and fifth respondents in respect of the Old Mutual agreements. Those items of correspondence form part of the subject of the applicants claim for an interim interdict.

[51] The Old Mutual agreements, (the 'Old Mutual agreements') were concluded between Old Mutual and the Power Pack Pension Fund in settlement of issues arising out of the implementation of the asset-stripping scheme. Old Mutual made significant monetary payments to the Power Pack Fund in terms of the Old Mutual agreements, which form part of the issues in the Power Pack action.

[52] The applicants contended, and Nash denied, that the purpose of Nash's mandate to the O'Sullivan respondents was to disseminate false, factually incorrect and defamatory statements in respect of the first applicant to Old Mutual. Furthermore, to investigate the Old Mutual agreements as part of Nash's overall strategy to bring about the termination of the Power Pack action prior to it being determined by the courts.

[53] In my view, whether or not Nash engaged the O'Sullivan respondents with the purpose claimed by the applicants, in the event that the applicants meet the requirements of an interim interdict based on defamation by the O'Sullivan respondents, that will suffice to entitle the applicants to an appropriate order.

[54] The respondents contended that the defamatory allegations relied upon by the applicants were old, made previously and that the forensic report was already in the public domain.

[55] The applicants, however, pointed to new allegedly defamatory matter disseminated by the respondents in correspondence dated 29 March 2019. That correspondence, authored and signed by the second respondent, was sent on the fourth respondent's letterhead to an attorney at Wakefields, Old Mutual's attorneys, ('the addressee'), the third respondent and various of the attorneys engaged in these proceedings. The second respondent therein:

1. Referred to Nash as 'his client';
2. Threatened 'to expose the dark underbelly of crimes committed by Mostert and his accomplices over more than a decade';
3. Advised that he intended to update the forensic report in the event that he did not receive certain undertakings from the addressee and Mostert; and
4. Stated that Mostert 'belongs in prison', and. 'extorted' 'pay-outs' from various insurance companies including Old Mutual.

[56] Nash conceded having made statements of the nature reflected in the correspondence abovementioned, previously in respect of Mostert.

[57] The O'Sullivan respondents admitted having made certain statements of a defamatory nature regarding the first applicant. Those statements, of a limited nature, were already in the public domain all be it to a limited extent.

[58] The O'Sullivan respondents' statements that Mostert committed crimes, 'belongs in prison' and 'extorted' 'pay-outs' serve to undermine the first applicant's standing, his status and his good name and reputation in the ordinary sense of the words. The statements are prima facie maligning and defamatory of the first applicant.

[59] The O'Sullivan respondents argued that the first applicant was a public official, a liquidator and curator of the second applicant. As such, the first applicant was obliged to endure scrutiny and comment greater than the average individual. Whilst that is undeniably correct, there is a marked variance between reasonable and legitimate scrutiny and comment to which a public official is justifiably subject, and statements such as those made by the O'Sullivan respondents that the first applicant 'belongs in prison' and 'extorted' 'pay outs' to mention only two instances of unjustifiable commentary.

[60] The latter do not comprise reasonable scrutiny and comment but serve to degrade and reduce the first applicant in the eyes of those reasonable readers who come into contact with such statements.

[61] The statements relied upon by the first applicant are prima facie defamatory of him, both personally and also professionally as the liquidator of the second applicant given the context in which the statements were made by the O'Sullivan respondents.

#### The 'Forensic Report'

[62] Subsequent to the closure of the website ordered by Matojane J, and pursuant to Nash's mandate to the O'Sullivan respondents, the latter produced the first iteration of the forensic report, the 'draft report', and thereafter, a 'final report' dated 30 March 2019. The final report, together with all variations, updates or amendments thereof, was the subject of prayer 2.2 of the notice of motion.

[63] The O'Sullivan respondents distributed either or both of the draft and final report to various entities, including the Public Protector, the EFF and Old Mutual during February and March 2019.

[64] That publication, together with the withdrawal by the second respondent of the various undertakings made by him to refrain from disseminating the forensic report, resulted in the applicants launching this application on 2 April 2019.

[65] The forensic report referred *inter alia* to the first applicant's role in concluding the Old Mutual agreements with Old Mutual. The applicants contended that the forensic report contained false and factually incorrect matter defamatory of both Mostert and Old Mutual, that it comprised a restatement of averments made previously by Nash impugning the validity of the Old Mutual agreements.

[66] The forensic report alleged *inter alia* that the Old Mutual agreements were unauthorised, extortionate, criminal and invalid. The applicants argued that the intention underlying the forensic report and its publication to Old Mutual was to threaten, intimidate and extort Old Mutual in respect of the Old Mutual agreements.

[67] Old Mutual, however, rejected the allegations made by O'Sullivan, advising on 22 February 2019, that nothing in the forensic report justified an investigation by Old Mutual of the conduct of either Old Mutual or any of its employees, past or present.

[68] O'Sullivan's response dated 22 February 2019, to Old Mutual's rejection of O'Sullivan's allegations, framed as a commitment to accuracy, was to advise that it might 're-issue' the forensic report.

[69] Thereafter, correspondence from O'Sullivan to Old Mutual dated 25 February 2019, included statements of the nature made previously by Nash that were false, scandalous and defamatory of Mostert and Tshidi of the FSB:

1. Mostert '*... is raking in further millions in fees on what can best be described as 'double-dipping' since Mostert has already received the funds (and then some) from OM*';
2. '*... the conduct of Tshidi and Mostert over a period of many years, was nothing short of a double act, which led to the extorting of hundreds of millions, which resulted in Mostert paying himself more than R200 million. During the same period Tshidi bought lots of properties, which were all paid for in cash*'; and
3. '*We are also mandated to 'discuss a method of finally settling this matter, which would obviously be off the record and without prejudice. A settlement would obviously include confidentiality and the avoidance of potentially costly and time consuming litigation.'*

[70] Averments of fraud and corruption made previously by Nash regarding Mostert and Tshidi were dealt with by Matojane J, as being without any basis in fact and absent any proof thereof whatsoever. Notwithstanding Matojane J's orders, statements such as those made by O'Sullivan in the correspondence of 29 March and 25 February 2019, continue to be made, and, are notably similar to those made previously by Nash.

[71] O'Sullivan's statements are prima facie defamatory of both Mostert and Tshidi and serve to substantiate the applicants' argument that the O'Sullivan respondents were employed by Nash as a means of overcoming Matojane J's orders.

[72] It is axiomatic that the publication of the defamatory statements made by the respondents in respect of the applicants, the publication of the forensic report and the complaint laid by the EFF with the Public Protector as a result of information furnished to the EFF by the first respondent, all served to impede the first applicant in attending to his professional functions whilst simultaneously interrupting and delaying the winding up of the Fund, to the detriment of the beneficiaries of the Fund.

[73] The harm to the applicants as a result, is manifest.

[74] Moreover, whilst Nash denied that he instructed the second respondent or the O'Sullivan respondents to obtain a settlement from Old Mutual, O'Sullivan's correspondence of 25 February 2019 revealed the contrary.

[75] A clearly discernible link was drawn by O'Sullivan between Mostert's alleged unlawful conduct regarding the Old Mutual agreements and Old Mutual's involvement in the invalidity of those agreements on the one hand, and O'Sullivan's attempt to procure a settlement for Nash on the other.

[76] The correspondence of 25 February 2019 demonstrated that Nash and the O'Sullivan respondents were not acting in the 'public interest' as argued by them regarding the investigation into the Old Mutual agreements, or, in compiling the forensic report, but that they did so in order to obtain a settlement of the Power Pack action on behalf of Nash. The latter was motivated by his own self-interest and not the public good.

[77] In addition, turning to the forensic report *per se*, the purpose of the investigation mandated by the first respondent comprised an investigation of Mostert in relation to the Power Pack agreements, particularly whether those agreements amounted to a loan or a pay out by Old Mutual. Nowhere in the O'Sullivan respondents' description of the

purpose of the investigation, did they mention that investigation being in the interests of the public in general or that the investigation would further the public interest.

[78] In the circumstances, I find that the respondents were not acting in the public interest in investigating the Old Mutual agreements, or, in compiling or publishing the 'forensic report'.

[79] The applicants highlighted the absence of facts in the forensic report, and, the falsity of numerous allegations made therein, framed as 'findings' by the O'Sullivan respondents, to the effect that the first applicant breached the law in various respects. These included by drawing excessive curatorship / liquidator fees whilst the fees were advanced, in fact, to pay multiple co-curators involved in the curatorships and to cover various disbursements. Furthermore, the forensic report stated that the Old Mutual agreements were concluded as a loan for the purposes of unlawfully and intentionally enriching Mostert in his personal capacity. Such statements were shown by the first applicant to be false.

[80] The applicants pointed to the 'sting' in the 'forensic report', including the second respondent's 'finding' that the first applicant 'extorted' Old Mutual, suspicions that the first applicant was involved in possible corrupt activities including money-laundering and guilty of abuse of power, all of which were false.

[81] The respondents' statements to the effect that Mostert *inter alia* 'bullied' Old Mutual into paying over unjustified sums of money serve to degrade and reduce Mostert in his professional capacity as the Fund's liquidator. So too the allegations of possible money laundering and corruption by Mostert, given that they were alleged by the respondents in the context of the Old Mutual agreements. The same applies in respect

of the second respondent's 'finding' that Mostert 'extorted' Old Mutual and that Old Mutual was too embarrassed to admit it, hence Old Mutual 'joined forces' with the first applicant.

[82] The statements contained in the 'forensic report' are prima facie defamatory of the first applicant. Thus, the applicants' allegation that Nash engaged the O'Sullivan respondents with the purpose of continuing the defamatory 'smear campaign' against the first applicant were justified.

[83] The applicants admitted that the 'forensic report' had already been published to various limited parties. The applicants alleged that Mostert's reputation had already been damaged and further harm should be prevented by prohibiting the further publication of the 'forensic report'.

[84] In my view, the fact that the 'forensic report' had already had limited publication is not a reason to permit it to receive further or wider publication, assuming that the balance of the requirements of an interim interdict based on defamation are met. As and when Mostert's alleged criminal conduct in respect of the Old Mutual agreements is ventilated by Nash in open court in the Power Pack action, the alleged criminal activity will no doubt be referenced in the media. The truth of the issues will be made clear.

[85] Various of the statements made in the forensic report and in the correspondence highlighted by me herein referred to Tshidi of the then FSB. Hence, the applicants claimed that the interdictory relief apply in respect of associates involved in the administration of the winding-up of the second applicant.

#### The Freedom of Expression Defence

[86] The O'Sullivan respondents relied upon section 16 of the Constitution, being the guarantee of the right to freedom of expression, including press and media freedom, and, freedom to receive and impart information, both on the part of the respondents and the public.

[87] The freedom of expression defence was raised by Nash before Matojane J.

[88] The O'Sullivan respondents justified their claimed reliance on press and media freedom with reference to their alleged 'crime busting' work, allegedly tracking down and exposing alleged fraud, corruption and unlawful activities. Whether or not the O'Sullivan respondents are involved in activities of such a nature is not an issue to be determined by me.

[89] The O'Sullivan respondents, however, are not members of the press, and, as stated by Matojane J in respect of Nash,<sup>12</sup> are not under any duty to bring the allegations regarding Mostert or Tshidi to the attention of the public. More importantly, however, it follows from the fact that the O'Sullivan respondents (and Nash), are not members of the press or media, that they are not obliged to take steps to establish the truth or otherwise of an intended publication, prior to publication thereof.<sup>13</sup>

[90] Furthermore, I have already found that the O'Sullivan respondents are not acting in the public interest as regards the Old Mutual agreements (the issues in respect of which will be ventilated in the Power Pack action), or the 'forensic report', but are motivated by Nash's personal interests as they relate to the Power Pack action.

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<sup>12</sup> Matojane J note 3 above at para 63.

<sup>13</sup> Id.

[91] In these circumstances and in the light of the O'Sullivan respondents' willingness to publish statements such as those reflected in the correspondence highlighted herein, there is no basis to permit Nash or the O'Sullivan respondents to rely on press and media freedom.

### The Gagging Order

[92] The respondents argued that the interdictory relief, (other than the Power Pack action interdict sought in prayer 4 of the notice of motion), amounted to a gagging order, a restraint on free speech prior to publication,<sup>14</sup> and ought not to be granted.

[93] A restraint imposed prior to publication by the media serves to censor free speech. A strong presumption against constitutionality exists. Such restraints should only be granted where a failure to do so would result in a substantial risk of grave injustice.<sup>15</sup>

[94] The third respondent relied on the test in *Hix Networking Technologies v System Publishers (Pty) Ltd & Another*,<sup>16</sup> referred to in *Midi Television*,<sup>17</sup> to the effect that a party seeking such a restraint must show that the proposed ban is necessary, (meaning that the objective cannot be achieved by a reasonably available and effective alternate measure); that it is as limited in scope, time and content as possible; and, is proportional as between the salutary and deleterious effects of the ban.

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<sup>14</sup> Currie & De Waal *The Bill of Rights Handbook* 6 ed 374

<sup>15</sup> *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) ('*Midi Television*') at para 15; *Print Media South Africa v Minister of Home Affairs* 2012 (6) SA 443 (CC) at para [46].

<sup>16</sup> 1997 (1) SA 391 (A) at 402; *Midi Television id* at para 15.

<sup>17</sup> *Midi Television* note 14 above at para 15.

[95] The respondents argued that the relief claimed by the applicants failed all three grounds of that test.

[96] The cases relied upon by the respondents referred to prior restraints against the media. The applicants did not seek relief against the media, nor are the respondents part of the media or subject to a duty to ensure that a proposed publication is true and correct prior to its publication.<sup>18</sup>

[97] The restraint sought by the applicants regarding future versions of the forensic report turns on the test for defamation referred to in *Le Roux*,<sup>19</sup> together with the interests of justice as they relate to the beneficiaries of the Fund.

[98] Moreover, the forensic report does not contain facts and the averments that the forensic report does contain are substantially false. The respondents do not make out a case that the contents of any future version of the forensic report will be different or anything other than substantially untrue.

[99] The respondents' statements regarding the applicants reflect an absence of concern on the part of the respondents, not only with the truth or correctness of those statements but also with the language used to express them.

[100] I have already found, as Matojane J did in respect of Nash, that the O'Sullivan respondents are not under any duty to convey the 'forensic report' or any of the 'facts' alleged in it to the public or the shareholders or any other stakeholders in or concerning Old Mutual. The appropriate forum for the articulation and publication of such issues is the hearing of the Power Pack action. Thus, finalisation of that action, as soon as

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<sup>18</sup> Matojane J at para 63.

<sup>19</sup> *Le Roux* note 4 above at para 84.

possible, will serve to ensure that the truth regarding the alleged unlawful conduct in respect of the Old Mutual agreements is told, and that those responsible are brought to justice as allegedly sought by the respondents.

[101] The beneficiaries of the Fund are the parties most likely to suffer from any future delays in finalising the Power Pack action. It is likely, given the background and factual matrix to this matter, that any publication of a future version of the forensic report by the O'Sullivan respondents pending finalisation of the Power Pack action, will result in further litigation and consequential delays to that action. Any such delays will serve to prejudice the beneficiaries of the Fund, and, are inimical to the interests of those beneficiaries as well as to the administration of justice, and, ought not to be permitted.

[102] The further consumption of scarce judicial resources by litigation ancillary to the Power Pack action should not be permitted.

[103] The Old Mutual agreements are issues in the Power Pack action. They will be dealt with in those proceedings. In the light of the stated purpose of Nash's smear campaign, to influence the prosecution of the Power Pack action, publication of the forensic report or any future version thereof should not be permitted. Nor should publication of the correspondence between the second and fifth respondents be permitted.

[104] As to the O'Sullivan respondents' argument that no case was advanced by the applicants that the defamatory statements already made by the O'Sullivan respondents regarding the first applicant were likely to be repeated, the O'Sullivan respondents' case contained a marked inconsistency.

[105] The O'Sullivan respondents contended, on the one hand, that the applicants failed to make a case that the O'Sullivan respondents would republish the defamatory statements already made by them regarding the first applicant, whilst simultaneously insisting, on the other hand, that the alleged 'facts' gleaned from their alleged investigation into the Old Mutual agreements and the forensic report ought to be brought to the attention of the general public and the Old Mutual shareholders in particular.

[106] Hence, the O'Sullivan respondents themselves sought the publication of the forensic report. Additionally, the second respondent withdrew the undertakings made previously by him to refrain from disseminating the forensic report, and, the O'Sullivan respondents threatened to republish the forensic report. Old Mutual was informed on 22 February 2019, that they might 're-issue' the forensic report, and, they reiterated their intention to update the forensic report absent the second respondent receiving certain undertakings, on 29 March 2019.

[107] Maier-Frawley J's interim order operated to prevent any republication of the forensic report in the interim.

[108] In the circumstances, I reject the respondents' argument that there is no case that the O'Sullivan respondents will republish the defamatory statements already made by them regarding the applicants.

The Power Pack action interdict (Prayer 4 of the notice of motion).

[109] The applicants drew attention to the correspondence of Walkers Attorneys, dated 25 March 2019, in which Walkers stated *inter alia* that Old Mutual considered the two iterations of the forensic report to constitute harassment, intimidation and threats of Old Mutual and its employees, and, that the forensic report comprised an attempt to extort

Old Mutual or otherwise unlawfully obtain some advantage for the first respondent in respect of the Power Pack action.

[110] The applicants sought the interdict in prayer 4 in order to prevent the O'Sullivan respondents from intimidating potential witnesses who might be called to testify in the Power Pack action. The applicants referred to the extreme steps taken by O'Sullivan in an alleged attempt to intimidate one Ms June Marx ('Marx'), who switched alignment from the first respondent to the applicants.

[111] The applicants alleged that the first respondent failed to furnish any facts based upon which the relief claimed in prayer 4 of the notice of motion would impede the first respondent's preparation or defence in respect of the Power Pack action, or cause any prejudice to his legal team.

[112] The first respondent argued that the relief was not about defamation but about interdicting the first respondent from utilising the forensic report either in preparation of the Power Pack action or in the trial itself. The only 'carve out' according to the first respondent related to steps sanctioned by the Uniform Rules of Court and the Superior Courts Act 2013. The Uniform Rules of Court do not deal with how litigants' interview or communicate with witnesses. The Superior Courts Act does so in so far as it deals with subpoenas.

[113] Prayer 4 of the notice of motion, according to the first respondent, ignored how trials are prepared and attempted to limit the first respondent's right to call witnesses at the trial, including preventing the first respondent from utilising a forensic investigator.

[114] The first respondent argued that the relief claimed would result in the first respondent having to subpoena Old Mutual and any witnesses with whom it sought to communicate.

[115] In the light of the second respondent's correspondence to Old Mutual dated 25 February 2019 and Old Mutual's correspondence of 25 March 2019, the first respondent will have to subpoena Old Mutual and any employees, former employees, office bearers, directors or other witnesses of Old Mutual. Old Mutual is entitled to make that choice and the respondents are obliged to respect Old Mutual's choice accordingly.

[116] As regards the O'Sullivan respondents' interaction with Marx, the second respondent's email correspondence of 5 May 2018 to Marx, the subject of which was 'Fraud & corruption carried out by Mostert and others', stated inter alia:

'....our planned engagement with you was to help you... your mother would not be able to save you from being struck off as an attorney, or create alternative income streams after you have been sequestered. Or even do jail time for you, in the event that you were found guilty of the serious offences you are accused of.

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My suggestion: ... Meet with us together with the Public Protector and reverse the lies that have been spun to them by Mostert, .... Of course you don't have to come to us, we have no legal authority to demand that you do. But time is running out and you may find that by the time you do want to meet with us, we don't want to talk to you'.

[117] The second respondent detailed therein the alleged incriminating evidence to which the O'Sullivan respondents had access regarding Marx, the implication being only

too clear that the O'Sullivan respondents would utilise such information to achieve their purpose no matter the cost to Marx.

[118] The second respondent's email correspondence of 19 June 2018 to Marx, the subject of which was 'Fraud & Corruption carried out by Mostert and others', stated:

'Being labelled dishonest by the State, is surely something you would want to share with the Law Society June? If I was you, I would attempt to get my version of events in front of the Law Society before someone else does and accuses you of unbecoming conduct. Maybe now, you would consider coming clean at last?'

[119] The second respondent's email correspondence of 29 March 2019 to Marx, the subject of which was the forensic report of 8 February 2019, stated:

'Looks like the chickens are coming home to roost now. When Mostert gets fired, which he will, and a new curator is appointed, I will then push for you and him to be arrested and for you to pay the R17m you currently owe. The wheel turns June! The truth will out.'

[120] It is manifest that the second respondent's persistent threats were intended to intimidate Marx as regards the Power Pack action. The second respondent threatened Marx with a criminal record and incarceration, threatened her professional reputation and future financial livelihood inter alia by way of sequestration, and threatened to utilise such information as was available to the O'Sullivan respondents to achieve their own ends. Such ends being interference in the Power Pack action aimed at bringing about its termination prior to being determined by the courts, as was the purpose of the smear campaign.

[121] The applicants' potential witnesses are not obliged to endure pressure, intimidation, harassment and threatening conduct, all of which is unlawful, such as that directed by the second respondent against Marx.

[122] Nor are the applicants obliged to suffer the resultant interference with the applicants' potential witnesses in the trial of the Power Pack action, and, the consequent interference in the applicants' rights so a fair trial.

[123] In these circumstances, there is every reason to require that that the respondents not be permitted to deal with the applicants' potential witnesses in the Power Pack action other than as parties to the litigation as claimed by the applicants in prayer 4.

[124] Whilst Old Mutual and Marx are entitled to approach the court for the appropriate relief, the applicants are well within their rights to protect their interests in a fair trial, including preventing interference with their potential witnesses. Old Mutual employees and Marx are potential witnesses in the Power Pack action. Thus, the respondents are not entitled to attempt to engage with either of them or any other of the applicants' potential witnesses in the public arena, or, to attempt to threaten or intimidate them or any other of the applicants' potential witnesses.

[125] The respondents are obliged to respect the wishes of those potential witnesses who do not wish to communicate with the respondents. That includes Old Mutual, its employees and officers as evidenced by the letter of Walkers attorneys dated 25 March 2019, annexure 'FA9' to the founding affidavit.

[126] So too, the applicants cannot preclude the first respondent from using a forensic investigator, or prevent the forensic investigator from interviewing witnesses assuming that the potential witnesses are amenable to such interviews. Nothing compels a potential

witness to undergo an interview with the forensic investigator or any of the respondents in the event that that witness does not wish to do so.

[127] I did not understand prayer 4 of the notice of motion to prevent the respondents from utilising such documentary evidence as is relevant to the issues at hand in the trial of the Power Pack action, including the forensic report. In the event that the applicants object to a document to be used by the first respondent at the trial, the determination of that issue would be a matter for the trial court.

[128] The Old Mutual agreements form part of the issues for determination in the Power Pack action, and are obviously relevant to those proceedings. That, however, does not mean that the forensic report in and of itself is relevant to those proceedings. The first respondent ought to be in a position to furnish the relevant evidence regarding the alleged corruption and unlawful conduct in respect of the Old Mutual agreements himself, thus rendering the forensic report irrelevant.

[129] The false averments contained in the forensic report may result, however, in the use of the forensic report for purposes of the Power Pack action not serving the public interest. That, however, is not an issue to be determined by me.

[130] In my view, prayer 4 of the notice of motion does not prevent the first respondent from disclosing or using or referring to the forensic report in the Power Pack action. However, the respondents are not permitted to deal with the forensic report by publication thereof, or, in the public arena.

[131] The O'Sullivan respondents supported the arguments made on behalf of the first respondent regarding prayer 4 of the notice of motion.

[132] The Requirements of the interdictory relief

[133] As to the requirements of the interdictory relief, the first respondent argued that the effect of the interdictory relief sought by the applicants was final. Hence, the test to be applied was that in respect of final relief.

[134] In my view, the applicants met the requirements of the more stringent test utilised for final relief, as well as the lesser requirements of an interim interdict. In the light of the first respondent's contentions in this regard, I deal with the requirements of a final interdict.

[135] The applicants established a clear right not to be falsely defamed as was done by the respondents in the correspondence referred to herein, and, in terms of the forensic report. The applicants also have a clear right not to be impeded in finalising the winding up of the second respondent. This latter right is in addition to the rights of the beneficiaries that the winding up proceed to finality as expeditiously as possible.

[136] The first applicant has already suffered harm to his personal and professional reputation by virtue of the false defamatory statements already in the public domain. So too the associates involved in the winding up of the second respondent. The fact that a degree of harm has already been sustained, does not justify further or future publication of false defamatory material regarding the first applicant or others involved in the winding up of the second applicant.

[137] As stated by me afore, a reasonable apprehension that the respondents will continue with the publication of false defamatory statements against the applicants as well as continuing with the intimidation of the applicants potential witnesses in the Power Pack action with the intention of disrupting those proceedings, is more than sufficiently

evident from the respondents' own case and the correspondence authored by the O'Sullivan respondents.

[138] An award of damages will not suffice as an alternate remedy sufficient to protect the applicants' rights not to be falsely defamed and the second applicant's interest in finalisation of the liquidation of the Fund. There is no alternate remedy available to the applicants.

[139] The date of this judgment will be 28 July 2020.

[140] It is appropriate that the costs of this matter, including the costs of two counsel where so utilised by the applicants, follow the outcome on the merits. Additionally, given the contents of this judgment, those costs should be ordered on the scale as between attorney and client.

[141] The reserved costs of the interim application before Maier-Frawley J will be costs in the cause of this application.

[142] By virtue of the aforementioned, I grant the following order:

1. An interim interdict, interdicting and restraining the first, second, third and fourth respondents, ('the first to fourth respondents'), either themselves or through entities in which they hold an interest, from:

- 1.1. Publishing, causing to be published or in any other manner disseminating or causing to be disseminated to any person or to the public whether in the media and/or on social media platforms or otherwise, any false defamatory allegations pertaining to the

first and / or second applicants and of any of the first and / or second applicants' associates or persons engaged in assisting the second applicant with the administration of the liquidation of the second applicant; and

- 1.2. Publishing, causing to be published or in any other manner disseminating or causing to be disseminated to any person or to the public whether in the media and/or on social media platforms or otherwise, the fourth respondent's 'forensic report' compiled by the second and third respondents dated 30 March 2019 or any variations, updates or amendments thereof and the contents of any correspondence between the second and fifth respondents.
2. The interim interdict referred to in paragraph 1 above will operate pending the final determination of action proceedings to be instituted by the applicants, within one month of the date of this order, for damages for defamation against the first to fourth respondents together with final interdictory relief prohibiting the first to fourth respondents from continuing the publication of false defamatory statements of and concerning the first applicant.
3. Failure by the applicants to institute the action proceedings referred to in paragraph 2 above within the stipulated time period, will result in the automatic lapse of the interim interdict referred to in paragraph 1 of this order, and such interim interdict will be of no further force or effect.
4. Pending the final determination of the Power Pack action proceedings pending under case number 09/50684 in this Court (the Power Pack

action'), an interim interdict, interdicting and restraining the first to fourth respondents, either themselves or through entities in which they hold an interest, from taking any actions in respect of potential witnesses of the applicants in the Power Pack action (other than as a party to the Power Pack action in terms of the Uniform Rules of Court and Superior Courts Act 2013) including but not limited to directly corresponding and engaging with parties who may be required to give evidence in the action, including but not limited to the fifth respondent or any of its officers or employees, and one June Marx.

5. The reserved costs of the interim proceedings before Maier-Frawley J during April 2019, are costs in the cause of this application.
6. The costs of this application including the costs of two counsel where so utilised by the applicants are to be paid by the first to fourth respondents jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.



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**A A CRUTCHFIELD**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Counsel for the Applicants:

Mr JG Wasserman SC and  
Mr G Rome SC.

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|----------------------------------------------------------|---------------------------------------|
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| Instructed by:                                           | Darryl Furman & Associates Attorneys. |
| Date of the application:                                 | 30 July 2019.                         |
| Date of Judgment:                                        | 28 July 2020.                         |