

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2011/43945

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


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SIGNATURE

DATE: 10 December 2020

In the matter between:

MOSTERT, ANTONY LOUIS N.O.

Applicant

And

SABLE GROUP HOLDINGS (PTY) LTD

Respondent

JUDGMENT

SIWENDU J

Introduction

[1] The applicant, Antony Louis Mostert N.O. (Mr Mostert) is an attorney of this Honourable Court, with the place of business at The Braes, Ground Floor, 193

Bryanston Drive, Bryanston, Gauteng. He launched this application in his official capacity as curator and administrator of The Sable Industries Pension Fund (the Fund), a pension fund registered in terms of s 5 of the Pension Funds Act 24 of 1956 (the PFA).

[2] The Fund was placed in curatorship under the provisions of s 5(2)(a) of the Financial Institutions (Protection of Funds) Act 28 of 2001 in terms of the court order of 6 June 2006.¹ Mr Mostert also acts as the curator of at least nine other funds.²

[3] The respondent is Sable Group Holdings (Pty) Ltd (the Sable Group), a company incorporated under the company laws of the Republic of South Africa and having its registered address at Fairways Office Park, 52 Grosvenor Road, Bryanston, Sandton. It is a wholly-owned subsidiary of Sable Holdings Limited, a public company.

[4] The applicant sought to recover R21 806 241 (twenty-one million eight hundred and six thousand two hundred and forty-one Rand) with interest at 15.5% *a tempore morae*, alternatively from 31 September 2011 to date of payment, from the Sable Group. Mr Mostert launched the application in November 2011 (the main application) approximately five years and five months after his appointment.

[5] The reason for amplifying the date of the launch of the application is that in August 2019, the Sable Group filed a dismissal application, seeking to have the main application dismissed due to a delay in the prosecution of the legal proceedings (the dismissal application). This dismissal application was made in addition to an application to strike out specific averments made by Mr Mostert in the main application and his replying affidavit in terms of Rule 23(2). Mr Mostert opposed both the strike

¹ The order of 6 June 2006 by van der Merwe J, in terms of which Mr Mostert was authorised to inspect and investigate any irregularities committed by the Fund under the Inspection of Financial Institutions Act 80 of 1998; recover any assets lost; he was vested with the supervision and management of the business, 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 the order; and absolved from furnishing security.

² The Cadac Pension Fund; the Power Pack Pension Fund; the Mitchell Cotts Pension Fund; the Prestolite Pension Fund; the Lucas SA Pension Fund; the Picbel Pension Fund; the Cortech Pension Fund; and the Datakor Retirement Fund.

out and the dismissal applications. He also counter-applied to strike out certain paragraphs of the Sable Group's dismissal application.³

[6] The following applications are before this Court for consideration, namely:

- 6.1. The main application for the recovery of the sum claimed.
- 6.2. The Sable Group's application to strike out portions of Mr Mostert's founding affidavit and replying affidavit.
- 6.3. Mr Mostert's application to strike out specific averments made by the Sable Group in the dismissal application.⁴
- 6.4. The application to dismiss the main application.
- 6.5. Mr Mostert's request to have the case referred to trial and case management under the Commercial Court Practice Directive.

[7] For convenience, I will refer to the parties by name, being Mr Mostert and the Sable Group.

Background

[8] The Fund was provisionally registered on 19 February 1986, but finally registered on 12 February 1994. Subject to the order for curatorship, it remains under the jurisdiction and supervision of the executive officer of the Financial Services Board.

[9] Mr Mostert claims that the Fund is a victim of the notorious Ghavalas scheme,⁵ which directly caused his appointment and this application. Named after the infamous Mr Peter Ghavalas, the illegal and fraudulent scheme entailed stripping off numerous

³ Paragraphs 15, 16, 28, 28 to 45 and 51 of Sable Groups affidavit in the dismissal application.

⁴ Paragraphs 15, 16, 28, 38 to 45 and 51 of Sable Group's founding affidavit in the dismissal application.

⁵ In summary, the scheme involved a disguised or simulation of a transfer of fund membership, assets and liabilities to Lifecare Pension Fund pursuant to the sale of the shares in the principal employer company. A s 14 transfer certificate would be fraudulently obtained from the Registrar of Pension Funds, and a transaction different from that which was submitted to the Registrar. This facilitated the transfer of surplus assets of the various funds out to a Ghavalas company using Lifecare Pension Fund as a conduit. There would be a distribution to the original principal employer after Lifecare Pension Fund, Ghavalas and his company having taken a "commission" from the surplus.

pension funds' assets to the prejudice of pension holders in the 1990s. The reverberating effects of the scheme have been subject to multiple cases.

[10] Mr Mostert fingers the Sable Group for stripping and raiding the Fund assets, depriving fund members of Fund benefits. As of 30 June 1995, the value of Fund assets held in various policies with Sanlam, Liberty Life, and cash with RMB was approximately R91.4 million. From 1 November 1995, Fund assets had been reduced to about R61 million. On 5 February 1996, a sum of R25 149 454 was encashed from the assets previously invested in Sanlam and paid over by Wynne-Jones and Company (the then administrator of the Fund), and later to Old Mutual to purchase an Optiplus Category Level IV Policy (the Optiplus Policy) for the Fund.⁶

[11] The common cause facts are that:

- (a) Because the Fund was the holder of the Optiplus Policy, following Old Mutual's demutualisation, 387 200 Old Mutual shares ('the Fund shares') accrued to the Fund in August 2000. Old Mutual incorrectly reflected the Fund in its records as the 'Sable Pension Fund'. It issued the shares in the name of Sable/Sabre Pension Fund instead of Sable *Industries* Pension Fund.
- (b) There was thus a similarity between the names of Sable Group and the incorrect name on the policy. However, there is no dispute that the shares belonged to the Sable Industries Pension Fund.
- (c) On 15 August 2000, Mr Ian Kemp, a director at the Sable Group, signed a share transfer certificate (form CM42), transferring the allocated shares to Rice Rinaldi Stockbrokers, Nominee Company. The stockbrokers sold the Fund shares through an internal Nominee Company, Rinric Nominees. Correspondence from the stock brokerage's successor in title, Imara SP Reid (Pty) Ltd,⁷ confirms that the Fund shares were lodged and booked into client account number 141523 c/o Mr. Justin Nash, PO Box 786390, Sandton. It is

⁶ The policy was in the form of a life policy. Its object was to provide pension benefits to the Fund's pensioners and other beneficiaries. Benefits would be payable to the Fund. At the request of the Fund Old Mutual could pay benefits directly to pensioners or beneficiaries as if payments were by the Fund.

⁷ Letter from Isabel Rindel.

further common cause that the stockbroker account belongs to and is controlled by the Sable Group.

[12] The disagreement between Mr Mostert and the Sable Group concerns the transfer of the Fund shares and the proceeds from the sale of the shares in the amount of R6 377 617.53. Mr Mostert claims that on 21 August 2000, the stockbrokers paid the share sale proceeds into a Standard Bank account in the name of Sable Pension Fund/Momentum account, number 002322005, controlled by Sable Group, held in Braamfontein. He bases the claim on information reflected in a statement of account from Rice Rinaldi Securities (Pty) Ltd.

[13] Mr Mostert claims he subsequently established from the Financial Services Board that the 'Sable Pension Fund' was a non-existent pension fund. On 1 September 2011, he wrote to Mr Justin Nash seeking information about the Fund share sale proceeds, stating amongst others, that:

'It would also appear that shares were transferred from Sable Industries Pension Fund via the nominee company to Sable Group Holdings, ultimately to be sold on 15 August 2000 and the proceed of R6,377,617.53, was paid on 21 August 2000 into a Standard Bank account, Braamfontein reference, 002322005.'

[14] Mr Mostert alleges that 'Mr. J Nash' referred to in respect of the account is Mr Justin Nash. Mahons Attorneys, then representing Mr Justin Nash and the Sable Group, confirmed in a letter dated 19 September 2011 that the stock brokerage account 141523 and postal address, P.O. Box number 786390, Sandton 2146, belonged to the Sable Group. The attorneys disputed that Mr Justin Nash was a party to the transaction or received the Fund share sale proceeds. They undertook to investigate within Sable Group Holdings, which they did.

[15] In a subsequent letter dated 11 October 2011, Mahons Attorneys advised Mr Mostert that the Sable Group had established that:

- (a) the person who would have detailed knowledge of the transaction was Mr John Nash, the then Executive Chairman of Sable Group. He died in 2010.

- (b) It identified a share certificate (number 060890) in respect of Old Mutual PLC in the name of Sabre Pension Fund dated 12 July 1999, and an Old Mutual PLC share certificate (number 00254190) in the name of Sable Pension Fund dated 15 October 1999.
- (c) Unbeknown to the Sable Group, the shares were loaded onto its stockbroker account, number 141523, held with Rice Rinaldi. The shares were sold on 15 August 2000. Rice Rinaldi paid the proceeds into a Momentum Life, Absa Bank Account No. 2890000307.
- (d) The preliminary investigation showed that the Sable Group might have inadvertently received the proceeds from the shares in error. They would investigate how the error occurred, but required confirmation of ownership of the shares and that the proceeds indeed belonged to the Fund, given that the shares were not in the name of Sable Industries Pension Fund.

[16] Old Mutual confirmed the ownership of the shares. On 8 November 2011, Mr Mostert demanded payment of R21 806 241, alleging that the amount was the present-day value of the Fund shares. He based the quantum on a valuation certificate (as of 30 September 2011) from Fifth Quadrant Actuaries and Consultants (Pty) Ltd (Fifth Quadrant). Mahons Attorneys disputed the value attached and later Sable Group's liability, leading to the main application being launched.

Merits Dispute

[17] Mr Gavin Barry John Bowes, the Managing Director of the Sable Group, attacks Mr Mostert's claim on several fronts. He contends that it does not disclose an exact and complete cause of action. The Sable Group is left guessing what the basis for the claim is, to its prejudice. Given this, the Sable Group states it has assumed that the claim is premised on an unjustified enrichment.

[18] Mr Bowes contends that even though Mr Mostert refers to the Sable Group's indebtedness and a deposit of R6 377 617.53 into an account controlled by the Sable Group, a fact he disputes, Mr Mostert has not alleged the Sable Group was unjustly

enriched at the Fund's expense. He denies enrichment and, significantly, that the Sable Group received the share sale proceeds in its bank account.

[19] The Sable Group also protests that the claim is predicated on inadmissible hearsay evidence gathered from emails between Old Mutual and Imara SP Reid (Pty) Ltd as well as emails from Computershare.⁸ The emails are not confirmed on affidavit. It also disputes the emails assist in making out a cause of action against it.

[20] The Sable Group's version is that:

- (a) Rice Rinaldi paid R6 377 617.53 by cheque drawn in favour of Momentum and into an ABSA bank account held by Momentum Life. The Momentum Life bank account number was 2690000307,⁹ and not the Momentum Standard Bank account number 002322005 – as alleged by Mr Mostert.
- (b) A wholly-owned subsidiary of Sable Holdings Limited, Sabstra Financial Investments (Pty) Ltd (Sabstra),¹⁰ since deregistered in May 2011, held various financial investments from a series of transactions. In August 2000, Sabstra acquired three new endowment policies offshore through the Appleton International Hedge Fund (Appleton) to the value of R15 250 500.00.¹¹ Momentum Life facilitated the acquisition.
- (c) There were tranches of payments made for the acquisition. Sable Group paid R8 872 882.47; R6 377 617.53 was paid to Momentum by Rice Rinaldi from the realised share sale proceeds. The Sable Group also advanced an interest-free loan to Sabstra in the amount of R10 167 000, paid to Momentum, resulting in acquisition of R25 417 500 with Appleton.
- (d) Sabstra held the investment for approximately six years and liquidated it in December 2006. A realisation value of R33 558 861 accrued to Sabstra. Sabstra made a distribution, settling its loan account of R18 652 283.20 with

⁸ Email sent by Andre Van Wyk of Computershare to Henry Bosch of Old Mutual on 13 December 2010.

⁹ An ABSA bank deposit slip indicating that this payment was made by Rice Rinaldi to Momentum Life was included in the papers.

¹⁰ I understand Sabstra to be a sister company of Sable Group as both were wholly owned subsidiaries of Sable Holdings Limited

¹¹ Three endowment policies (numbers 98170327, 96170333 and 96170340)

the Sable Group, declared and paid a dividend to its parent company, Sable Holdings Limited, and retained R81 678. Sable Holdings Limited declared a dividend to its public shareholders. On the other hand, the Sable Group redeployed the capital from its loan repayment to other property investments.

[21] Faced with this version, Mr Mostert disclaimed reliance on the unjustified enrichment claim in his replying affidavit. He contended that the disposal was an act of theft and misappropriation by Sable Group and its directors. He also claimed that the Sable Group and its directors removed the Fund shares unlawfully through a wilful, wrongful, alternatively negligent conduct. They breached a duty of good faith to the Fund in contravention of s 5 of the PFA to the Fund's prejudice and its members. He reaffirmed the allegations of asset stripping and raiding of the Fund.

[22] Mr Mostert claimed that the payment into the Momentum account was on instruction from and an action of the Sable Group, its holding company Sable Holdings Limited, and its directors. He claimed Mr Kemp acted with their knowledge and contended that Sable Holdings Limited and the Sable Group were the recipients of the proceeds of the shares' illegal removal and sale.

[23] Mr Mostert dismissed the defences raised as spurious and of a technical nature, asserting there was an admission of a direct or indirect misappropriation.

Strike Out Application¹²

[24] It befits that I first deal with the strike out application. Sable Group seeks to strike out paragraphs 7, 9.3, 9.4, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 33 of the main application's founding affidavit. The assertions relate to the asset-stripping claims and the association with the Ghavalas methodology. Mr Mostert had stated elsewhere that:

'...the laundering of the proceeds of the Sable Fund shares is part of a grand scheme whereby Simon John Nash ("Simon Nash") raided pension funds over which he or his family members

¹² Rule 6(15) of the Uniform Rules of Court provides that a court strike out portions of an affidavit which contains averments that are scandalous, vexatious or irrelevant, the opposite party may apply for the striking out of the objectionable matter.

exercise control. The respondent is historically an entity associated with or controlled by the Nash family entities.’

[25] The Sable Group contends the allegations are scandalous, vexatious, and not connected with the pleaded case.

[26] As far as paragraph 33 is concerned, regarding the valuation certificate supporting the quantum claimed, the Sable Group asserts that this is an inadmissible opinion.

[27] In addition, it seeks an order striking out paragraphs 5, 7, 8, 9, 10, 11, 12, 14.1, 14.2, 14.3, 14.4, 14.5, 15, 16, 17, 17.1, 17.2, 17.3, 18, 19, 19.1, 19.2, 19.3, 19.4, 19.5, 20, 21, 22, 22.1, 22.2, 22.3, 23, 24.4, 24.5, 25, 26, 29, 30, 31, 32, 34, 37, 38, 39, 46, 55, 58, 61, and 64 of the replying affidavit. These paragraphs introduce the cause of action of theft, misappropriation referred to in paragraphs [21] to [23] above.

[28] In an about-turn, Mr Mostert’s practice note states that the averments were not material to the case, saying that, ‘*The applicant does not seek to rely on the substance of the relevant impugned paragraphs and will abide the decision of the court in regard to the strikeout.*’ In his answering affidavit to the dismissal application, Mr Mostert conceded an element of ‘aggrandisement’ in the founding affidavit. By parity of reasoning, the same view must apply to the allegations of theft, misappropriation, and wilful conduct and negligence – given the about-turn and resurrection of the unjustified enrichment claim, which I deal with later in the judgment.

[29] Given that Mr Rome SC (who appeared for Mr Mostert) came into the brief after much water had gone under the bridge, understandably also agreed during the argument that these averments were not an essential aspect of the case. They were made in the context of extraneous factors and atmosphere brought by the acrimonious litigation in matters not directly connected with the current applications.

[30] I have considered the offending paragraphs in the main founding affidavit. They do not have a bearing or connection with the transfer of the Fund shares to the stockbrokers. It was not claimed that the share transfer, the subsequent sale, and allocation towards a repurchase of the three Appleton policies were part of

implementing the Ghavalas scheme. Yet, an adverse portrait of the Sable Group's involvement or association with the notorious Ghavalas plan is conveyed.

[31] Mr Mostert persisted with the allegations that there was misappropriation, theft and wilful conduct, negligence, and breach of duty by the Sable Group. The joinder application judgment by my sister Dippenaar AJ (as she then was)¹³ makes it clear that it would be impermissible for Mr Mostert to discard a previous cause of action and raise a new one, or to raise new matter, in his replying affidavit unless there were exceptional circumstances.¹⁴

[32] Even though Mr Mostert filed his replying affidavit in July 2017, after receiving the judgment in respect of the joinder application, he did not take heed and correct these shortcomings or show extraordinary facts justifying the change.¹⁵ On the contrary, he persisted in the same vein in his affidavit opposing the dismissal of his application, which was launched in August 2019. Mr Mostert alleged that the Fund shares were laundered as part of the grand scheme of misappropriation by Simon Nash and his family. He claimed for the first time that the Sable Group is historically associated with the Nash family.

[33] There were no facts to support these allegations. The allegations remained an impermissible abandonment of the initial cause of action. In any event, they no longer tally with the resurrected cause of action of unjustified enrichment.

[34] I am satisfied that the Sable Group would be gravely prejudiced if these paragraphs are not struck out. In both instances, the company will be associated with improper and unethical conduct without a clearly established basis. The negative portrayal lingers because of the reiteration in the replying affidavit and later in the dismissal application. The Sable Group has been placed in an impossible position where they cannot effectively refute them. Accordingly, I find they fall to be struck off as scandalous, vexatious material.

¹³ The details of the joinder application brought by Mr Mostert are set out later in the judgment.

¹⁴ In a judgment delivered on 14 February 2017 under the case number 2011/43945.

¹⁵ See also *Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T)

[35] I deal with the request to strike out paragraph 33 in the section dealing with quantum, later in the judgment.

Dismissal application

[36] On 27 August 2019, the Sable Group launched a dismissal application because it claims an inordinate, inexcusable, and prejudicial delay by Mr Mostert in prosecuting the application. The Sable Group contends that Mr Mostert has abused the court process to its prejudice.

[37] The dispute involves a transaction that took place in August 2000, 19 years before the launch of the dismissal application. It is common cause that it took five to six years after Mr Mostert's appointment to launch the main application in November 2011. The Sable Group filed its opposing answering affidavit in February 2012. Mr Mostert filed his replying affidavit more than five years later, on 13 July 2017.

[38] Part of the period between February 2012 and July 2017 was consumed by the failed attempt to join other respondents, as already stated. However, even that proceeded at a glacial pace.

[39] Mr Mostert launched the joinder application because of the Sable Group's answering affidavit, but only did so in March 2013, a year after the answering affidavit was filed. The interlocutory application by the Sable Group, launched in terms of Rule 30(1), interrupted the period. However, this is of minimal consequence in the broader scheme of the litigation. The Sable Group launched the interlocutory application on 27 March 2013, and it was disposed of without much ado in a judgment by Ratshibvumo AJ on 13 June 2013.¹⁶

[40] It took three years to resolve the joinder application. There was a delay of two and a half years before the filing of heads of argument in February 2016. It was finally heard in November 2016. The judgment was delivered in February 2017. The court dismissed the application for leave to appeal in September 2017.

¹⁶ *Mostert NO v Sable Group Holdings (Pty) Ltd In re: Mostert NO v Sable Group Holdings (Pty) Ltd and Others* (2011/43945) [2013] ZAGPJHC 143 (13 June 2013).

[41] Cumulatively, it took approximately five and a half years before Mr Mostert filed a replying affidavit in the main application, which he did on 12 July 2017. Nine months elapsed before filing the heads of argument on 17 April 2018, and another year elapsed before the filing of Mr Mostert's supplementary heads of argument.

[42] On this score, the Sable Group claims its right to a fair trial is irrevocably compromised. It argues further that Mr Mostert may not have adequately secured the records of Sabstra. Additionally, Mr John Nash, its Executive Chairman, who had direct knowledge of the transaction, died in 2010. Mr Kemp is of advanced age and suffers from cancer and a heart condition. Witnesses will be called to recollect events that occurred 19 years ago.

[43] The Sable Group challenges that the litigation benefits the Fund or its members or that Mr Mostert acts in their interest, based on revelations indicating that he earned some R23.6 million as curator of the Fund. It alleges the continued litigation only benefits Mr Mostert, who has refused to disclose information about the Fund membership and beneficiaries. There are only four active members of the Fund. I do not deem it necessary to deal with these allegations. They are not central to the case.

[44] Mr Mostert considered the dismissal application as part of a calculated 'lawfare strategy' and a delaying tactic used by a Mr Simon Nash to avoid repayment, which frustrated and delayed completion of the recovery process. He countered that the Sable Group, too, was content to let the case linger. From this, I must infer that once the Sable Group received the applicant's supplementary heads, it recognised that finality was at hand and resorted to the same tactic used by Mr Simon Nash.

[45] Nevertheless, Mr Mostert conceded that finalisation took some time, but claims this was not due to inaction or of such a nature that warrants the dismissal of the main application. At worst, it can be attributed to ineptitude. He also agreed that the joinder application was ill-conceived and inadvertently led to delays. He blames his erstwhile lawyers for misadvising him. He claims that prejudice is absent because the Sable Group has not established that it is prejudiced. It is the recipient of millions of Rands to which it is not entitled, misappropriated from the pension fund members. He claims much of the recoveries were achieved in 2011, but for the funds controlled by

Mr Simon Nash. According to Mr Mostert, the case will most likely turn on documentary evidence rather than witness testimony.

[46] Numerous court decisions entrench the Court's inherent power to prevent an abuse of its process by frivolous and vexatious litigation.¹⁷ As correctly pointed out by Ms Cane (for Sable Group), there are no hard and fast rules defining the manner for the exercise of the Court's discretion. Nevertheless, the requirements are that the application must be vexatious or there must be an inexcusable delay, which seriously prejudices the other party.¹⁸

[47] On the authority in *Cassimjee*,¹⁹ I am required to take a close and careful examination of all relevant circumstances. As to the borders and nature of my discretion, there are two kinds – on the one hand, a discretion in the wide sense or a 'discretion loosely so-called', and 'a discretion in the strict sense' or 'true sense' on the other. Because the court's discretion is in the 'true sense' and it must be exercised judicially and not capriciously.²⁰

[48] I note the claim's genesis arose in August 2000, five years and four months before Mr Mostert's appointment. Even though it may be relevant when looking at the case overall, I do not bring this period to the reckoning or attribute it to Mr Mostert. It may well indicate the length of time it took to discover the malfeasance in the pension funds industry. The critical period informing the delay for which he must be accountable, is the five years it took from the date of his appointment to commence the proceedings. After that, the five and a half years delay before he filed his replying affidavit, as well as the subsequent two- year delay before the case was heard. As already noted, the joinder application played a part in the delay, taking approximately three years to resolve.

¹⁷ *Berrange N.O. and Others v Vorster and Others* (37718/2006) [2016] ZAGPPHC 1105 (3 November 2016) where Louw J, drawing from court decisions, ascribes the following meaning to 'vexatious' at paragraph 26: "obviously unsustainable" or "frivolous, improper, instituted without sufficient ground to serve solely as an annoyance to the defendant".

¹⁸ *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA).

¹⁹ *Ibid.*

²⁰ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another* 2015 (5) SA 245 (CC) para 85; *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A).

[49] The predominant explanation is that he became mired in an avalanche of litigation to recover monies for pension funds. When his work is viewed collectively, the Law reports are replete with cases involving him and the Nash Family on behalf of various pension funds. However, Ms Cane asserted that I should have regard to the decision *Berrange NO and Others v Vorster and Other*.²¹ She argued that the fact that he prioritised those cases over the current one is no excuse for the delay.

[50] I observe that in *Berrange*, the cause of action arose in 1999. Proceedings were instituted in 2006. The plaintiffs failed to act at all, for an excessive period of five and a half years after pleadings closed. They first litigated against other parties with the hope of recovering their claim. Had they been successful, they would not have resumed the litigation against the defendants. The court found the plaintiffs made a reasoned choice not to proceed with the action. They arbitrated proceedings based on probable outcomes of another case, and in my view, that would drive a court to conclude the conduct tantamount to an abuse of its process. I agree with Mr Rome and distinguish *Berrange* from the current facts because the inconsistent action did not evidence an abandonment and an abuse of court process.

[51] I have also considered the prejudice alleged. It centres on the deregistration of Sabstra, Mr Nash's death, and the Sable Group's submission that Mr Kemp is elderly and of ill health. As I understand it, Sabstra lay dormant from 2007 and got deregistered in 2011, a few months before the application. On the other hand, Mr Nash died in 2010, before the launch of the application.

[52] A dismissal application is draconian in its effect.²² It limits the right to have a dispute finally resolved by a court of law. In *Sanford v Haley NO*,²³ the court stated that:

'The Court will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action impacts seriously on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The Court will

²¹ *Berrange N.O. and Others v Vorster and Others* (37718/2006) [2016] ZAGPPHC 1105 (3 November 2016).

²² *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 ALL ER 543 (CA) at 556.

²³ *Sanford v Haley NO* 2004 (3) SA 296 (C) para 8.

exercise such power in circumstances where there has been a clear abuse of the process of court.'

[53] A decision to dismiss a case on the basis of delay is not one to be made lightly. Even though Mr Mostert's approach warrants strong criticism, I am minded that the Fund remains under the supervision of the FSB. The case involves a pension fund, and fund benefits which are long-term in nature. I am not persuaded that the Sable Group is prejudiced because the facts it relies on existed before the launch of the application and are not a consequence of the delay.

[54] The unresolved dispute on the merits will leave a lingering air of impropriety, which is not in the interest of all parties concerned. It is in the interests of justice and both parties to finally determine the merits of the dispute. Accordingly, I decline the application for dismissal.

[55] Given the dismissal, I do not deem it necessary to deal with Mr Mostert's application to strike out portions of Sable Group's founding affidavit in the dismissal application.

Prescription

[56] The Sable Group contends that the claim became extinguished by prescription before Mr Mostert's was appointment. Mr Mostert first made demand for payment some five-and-a-half years after his appointment.

[57] Mr Rome SC correctly argued that prescription would run from the time the Fund knew, or ought to have known, about the debt with the Sable Group and the facts giving rise to that debt. The requirements for the running of the prescription means that the Sable Group must show when the Fund knew, or ought to have reasonably known, of the existence of the debt.

[58] The defence has not been fully set out. Ms Cane SC (for the Sable Group) correctly did not labour the issue. It falls to be dismissed.

The Enrichment Claim²⁴

[59] Our law recognises the right to recover payment erroneously made to the another mistakenly without just cause by way of an unjustified enrichment claim.²⁵ A prerequisite is that there must have been an excusable error²⁶ for the payment, which caused the claimant's impoverishment and enrichment to the recipient.

[60] Accordingly, Mr Mostert had to show a payment or a benefit to the Sable Group, which resulted in the Fund's impoverishment and the Sable Group's enrichment.

[61] At first, the Fund's case seems to have been premised on the earlier letter that reveals that the stockbrokers credited a Sable Group controlled account upon the shares' transfer. Mr Mostert placed reliance on a preliminary investigation conveyed in the earlier letter from Mahons Attorneys, which intimated that Sable Group '*may have inadvertently received the proceeds from the shares in error*' and would investigate the matter. Mr Mostert also relies on the stockbroker's statement to assert that, by virtue of this statement and the credit allocation reflected therein, the Sable Group received the fund shares and was enriched.

[62] During argument, Mr Rome approached the resurrected enrichment claim from a number of portals, contending that the terms 'impoverishment' and 'enrichment' should not be edified above substance. He argued that the allocation of the Fund shares by the stockbrokers to the Sable Group's account leads to the enrichment conclusion. He contended further that the Sable Group 'seemingly accepted' that the payment of the shares accruing to the Fund was made into a bank account controlled by the Sable Group.

[63] The Sable Group's defence is that, even though the stockbrokers credited its broker account with the shares at the time of the transfer for sale, the Sable Group did not receive the share sale proceeds. The Sable Group injected funds through a loan to its sister company, Sabstra, to acquire and invest in the endowment policies.

²⁴ Before retracting, Mr Mostert also made a misappropriation claim which could be conceived as the *condictio furtiva*.

²⁵ See *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA).

²⁶ Although not in itself a hard and fast rule. See *Bowman, de Wet and Du Plessis NNO and others v Fidelity Bank Ltd* 1997 (2) SA 35 (A).

Similarly, Momentum received the payment of the Fund share sale proceeds from Rice Rinaldi and facilitated the acquisition of the Appleton endowment policies on behalf of Sabstra. It was not a direct beneficiary of the Fund Shares either, given that the Appleton acquisition was for the benefit of Sabstra.

[64] The disclosed document trail confirms the above. Information presented reveals that the proceeds were not paid in a Momentum Standard Bank account on 21 August 2000, as alleged by Mr Mostert. The payment was made to a Momentum Absa Bank Account. Mr Mostert did not present bank statements to bolster his claim but relied on the stockbroker's computerised printout of account (it seems akin to a ledger and or journal entry).²⁷ On the other hand, the Sable Group presented an Absa Bank deposit slip to show that ultimately, the funds did not flow directly to it.

[65] To counter these facts, Mr Rome contended that the claim is for the payment of value received pursuant the sale of the Fund shares. It does not matter that the Sable Group did not receive the proceeds of the sale. What matters is the common cause fact that the Fund shares were transferred to another entity as nominee for the first respondent, under circumstances where the unidentifiable 'consideration' – being the amount (in figures) – that had to be paid to the Fund for the securities. It is common cause that no amount was ever paid to the Fund in respect of the shares. He also faintly argued that the court can hold the Sable Group liable on account of the lost benefit and enrichment.

[66] These assertions do not on their own create or complete the cause of action of enrichment. Given the multiplicity of parties involved and the defence raised by Sable Groups, Mr Mostert had to allege facts to show that a benefit, even if indirect, accrued to Sable Group to support the enrichment claim.

[67] There are several short comings on the facts about the evidence of the receipt of the benefit. Mr Mostert incorrectly contended that the Sable Group allowed the proceeds to be transferred to one of its wholly-owned subsidiaries.²⁸ Sabstra was not

²⁷ The annexure shows a transfer of a cash amount of R6 377 617.63 from the respondent's account at Rice Rinaldi to Momentum Life. It not evidence of a deposit into Sable's bank account and or that it received the payment.

²⁸ Paragraph 10 to 35 and 12 of the answering affidavit.

a wholly-owned subsidiary of the Sable Group, but of Sable Holdings Limited. Mr Mostert considered that the Sable Group and its directors exercised control, such that the proceeds from the sale of the Fund shares did not find its way back to the Fund. He did not present facts to demonstrate how and through whom Sable Group exercised the control. I observe, that throughout, Mr Mostert appears to have conflated the Sable Group and its parent company Sable Holdings Limited.

[68] Mr Rome blames the Sable Group for an incomplete disclosure of how and why the *'monies came to be transferred out of its account.'* Circumstances pertaining to the transfer of the shares by Mr Kemp, and details of who gave instructions to the stockbrokers to deposit the proceeds to the Momentum for the acquisition of the Sabstra policy investment with Appleton, were not investigated or disclosed. The defence that after the disposal of the investment with Appleton, Sabstra, made a distribution to the Holding Company was not pursued at all. It seems to me that these issues fell squarely into Mr Mostert's wide investigative powers. He could have investigated these issues forensically in 2012 to get to the root of the flow of the share sale proceeds.

[69] Viewed in the context of the complex group of companies in which the Sable Group operated, Mr Mostert glossed over the material aspects of the Sable Group's factual assertions. More specifically, the Sable Group contended that it injected its funds through the loan account advanced to Sabstra, a sister company. At the time of the disposal, it received a repayment of its loan but no benefits. The ultimate beneficiaries, for a while, were Sabstra and Sable Holdings Limited. Mr Mostert did not jettison the evidence or show there was a direct or indirect benefit to Sable Group.

[70] Mr Mostert claimed, after consideration of the facts set out in the Sable Group's answering affidavit, that it became apparent that other individuals and entities, for and on behalf of, or under instruction or direction of the Sable Group, participated in the process of depriving the Fund of its shares. He unsuccessfully applied to join Sable

Holdings Limited, Mr Bowes, Paul Harwood Nash, and Ian Robert Kemp to these proceedings.²⁹

[71] Surprisingly, Mr Mostert narrowed the joinder application to the above parties and entities. The stockbrokers who would have acted on instructions and implemented the sale of the shares, as well as make the payment to Momentum Life, were not joined, nor was Momentum Life.

[72] I disagree with Mr Mostert's contention that Sable Group's denial of liability is vague or has failed to engage with the facts. I find there is on these facts a defence to the enrichment claim.

Dispute of Facts

[73] The contested merits lead to the complaint about the dispute of facts regarding the quantum claimed. Mr Mostert foresaw early on that a challenge was conceivable. First, he sought to recover the present value of the proceeds of the Fund shares of approximately R21 million, based on a report by Fifth Quadrant, authored by Mr Elrich Potgieter.

[74] The Sable Group sought to have the valuation certificate attached to support the quantum claimed struck off, because it was irregular and inadmissible. Mr Potgieter's expert qualifications were not disclosed and the valuation was not confirmed on oath.

[75] The Sable Group resisted the amount claimed on account that it is based on a present day value of loss of growth, underpinned by a likely investment strategy not properly articulated, as a matter of law and fact. It contends that this is unrealistic, unsubstantiated, and incorrect.

²⁹ In the joinder application it was set out that Mr Bowes, Mr Nash and Mr Kemp were the directors of both the Sable Group and Sable Holdings Limited at the relevant time.

[76] Faced with this, Mr Mostert made yet another about-turn. Now, he no longer claims the projected value of the growth, but the value realised at the time of the sale, R6 337 617.53, a flawed formulation of the enrichment claim

[77] In my view, even though Mr Mostert approached Sable Group's liability as a *fait accompli*, the application remained replete with disputed facts central to the Sable Group's defence from inception. In my view, the nature of the disputed of facts meet the requirements laid by the court in *Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd*.³⁰ The disputed facts were evident at inception from its letter, dated 14 November 2011, in response to the demand for payment, and after it filed its answering affidavit in February 2012. They are not resolvable on paper.

Referral to Trial

[78] The application for referral to trial and case management comes late in these proceedings, and I understand is a consequence of the change of Mr Mostert's attorneys. It is made out in the Supplementary Heads of Argument filed by Mr Rome. The Court is requested to exercise its discretion and order the parties to go to trial. The question is whether the dispute of facts was foreseeable and Mr Mostert's conduct reprehensible in resorting to the application procedure. The answer to the first question must be in the affirmative.

[79] At first, Mr Mostert maintained there could be no *bona fide* material dispute on any issue relating to the cause of action; and if disputed, such dispute would not be *bona fide*. Yet, the presentation of the case has been dogged by perplexing changes and inconsistencies on important aspects, the most fundamental of which is the exact cause of action on which Mr Mostert relies. I observe that the first intimation of an unjustified enrichment claim was by the Sable Group based on an *assumption* and its interpretation of the claim. Mr Mostert disavowed a reliance on unjust enrichment in his replying affidavit.

[80] Adding to the confusion, Mr Mostert persisted to introduce new grounds, alleging that the Sable Group played a part in a '*misappropriation*' of the funds.

³⁰ *Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

Inexplicably, he made an about-turn in opposition of the dismissal application and sought to revive the reliance on the rejected cause. He described the cause of action and ‘as an aegis of an unjust enrichment claim’. He stated that ‘...despite all the extraneous atmosphere, the founding affidavit in the main application established a claim for unjust enrichment.’

[81] In Mr Mostert’s opposition (answering affidavit) to the dismissal application, he maintained that the main application can be determined on the existing record and the only matter that inexorably requires a referral to trial is the quantum of the claim.

[82] As shown above, Mr Mostert later made another about-turn on the quantum for the first time in the supplementary heads of argument, now stating the claim is for the repayment of the value received.

[83] Significantly, Mr Mostert knew and ought to have foreseen by February 2012, on receipt of the answering affidavit of the respondent, that there would be a dispute of fact on the merits – but he proceeded regardless. Yet, again, the question of disputed facts formed part of the reasons for the dismissal of the joinder application by Dippenaar AJ.³¹ When he finally conceded the irresolvable dispute of fact, requesting a referral to trial, it was seven years after the Sable Group’s answering affidavit was filed.

[84] The SCA has held that:

‘An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the Court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail...’³²

[85] He persisted that only the quantum stands to the referred, and yet the supplementary heads of argument seem to indicate (without a clearly defined issue) that the even the merits could be referred based on the defences raised. I find this

³¹ Dippenaar J stated: ‘However, I cannot ignore the existence of the substantial factual disputes which already emerge from the papers in considering the issue of convenience, also of the court in due course seized with the main application.’ Mr Mostert claims he took heed of this judgment (despite also seeking to appeal it) and procured a referral to trial.

³² *Law Society, Northern Provinces v Mogami and others* 2010 (1) SA 186 (SCA) para 23.

wholly unsatisfactory. A referral to trial would be an abuse of the court process. The application for referral falls to be dismissed.

Conclusion

[86] I find nothing convoluted about the defence raised. Mr Mostert dealt with the case in a haphazard manner. He was granted wide powers and resources were placed at his disposal to forensically investigate the defence from start to end. The application falls to be dismissed on grounds stated above.

Costs

[87] The trite principle is that costs follow the result, but they are nevertheless at the discretion of the court. It follows that the costs of the striking off application must be borne by Mr Mostert because of the vexatious nature of the offending material. Mr Mostert is liable to pay the costs of one junior counsel. However, insofar as the dismissal application is concerned, I have exercised my discretion against an award of costs against the Sable Group. The dismissal application was not ill-founded. Its failure was solely due to the exercise of the discretion by the Court. As to the main application, the cost must follow the result. Mr Mostert is liable to pay the costs of two counsel, which include the costs senior counsel.

In the result, I make the following order:

1. Paragraphs 7, 9.3, 9.4, 14, 17 to 25 of the applicant's founding affidavit dated 15 November 2011 are struck off in terms of Rule 6 (15);
2. Paragraphs 5, 7, to 12, 14.1 to 14.5, 15 to 23, 24.4, 24.5, 25, 26, 29 to 32, 34, 37 to 39, 46, 55, 58, 59, 61 and 63 of the applicant's replying affidavit dated 10 July 2017 are struck off in terms of Rule 6 (5);
3. The applicant is ordered to pay the costs of one counsel in respect of the striking out application;
4. The dismissal application fails, and, there is no order as to costs;

5. The main application is dismissed; and
6. The applicant is ordered to pay the costs of two counsel which include the costs of senior counsel.

**T SIWENDU**

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 December 2020.

Date of hearing: 7-8 September 2020

Date of judgment: 10 December 2020

Appearances:

Counsel for the applicant: Adv. G Rome SC; M Cooke

Attorney for the applicant: Nicole Ross Attorneys

Counsel for the respondent: Adv. J Cane SC; G Cross

Attorney for the respondent: Eversheds Sutherland Attorneys