

Ninth Respondent

KERRY PROCTOR

Tenth Respondent

Neutral Citation: *Executive Officer of the Financial Services Board v Cadac Pension Fund and 9 others* (Case No: 50596/2010) [2023] ZAGPJHC 524 (19 May 2023)

JUDGMENT

Vally J

Background

[1] This matter is only concerned with the issue of costs and as such one would have thought it would be a simple and straightforward issue that ought to be finalised relatively quickly. But this was not to be. This is so because it has a long history - it originates way back in 2010 – and the key protagonists have been, and still remain, virulently opposed to each other. They found it impossible to agree on anything. It thus became necessary to probe the entire history of the matter, which in turn involved reading a substantial part of a voluminous record.

[2] On 22 December 2010 this court, per Classen J, issued an interim order placing the first respondent, the Cadac Pension Fund (the Fund), under provisional curatorship in terms of s 5(1) of the Financial Institutions (Protection of Funds) Act, 28 of 2001. The second respondent, Mr Louis Mostert (Mr Mostert) was appointed the provisional curator. In the same order the court issued a *rule nisi* calling all the respondents to say why the order should not be made final. The Fund launched an urgent counter-application on 15 February 2011 seeking the removal of Mr Mostert as the provisional curator and replacing him with two other persons, but then failed to pursue the application to finality. Heaton-Nicholls J

found that the application was actually brought by the seventh respondent, Mr Simon Nash (Mr Nash) in the name of the Fund. The trustees of the Fund, however, recorded that they opposed the confirmation of the *rule nisi*. They filed their answering affidavit on 15 February 2011 – by which time some of the trustees were replaced - and at the same time filed another counter application. The counter application placed the focus on Mr Mostert. This became a common theme throughout the litigation that followed the order of Claassen J. Mr Mostert on the other hand, responded by placing the focus on Mr Nash. In fact, almost all of the disputes that arose subsequent to the order of Claassen J placed him and Mr Nash at the centre of those disputes.

[3] A number of applications were brought in the meantime which were dealt with at the hearing of the two applications - the application to confirm the *rule nisi* and the counter application. These were:

- a. an application to strike-off certain material from the affidavits;
- b. an application to introduce new material;
- c. an urgent application, brought by Mr Mostert on 15 February 2011, seeking to recover monies of the Fund paid over by Mr Nash and/or the then trustees to pay for the legal expenses incurred by Mr Nash in his prosecution for, amongst others, allegedly perpetrating a fraud on the Fund, and to compel them to comply with the order of Claassen J. The trustees were: Mr Nash (Mr Nash-1st respondent), Mrs Elena Forno-Nash (Mrs Forno-Nash - 2nd respondent), Ms Shaunine Bekker (Ms Bekker - 3rd

respondent), Mr Christo Hechter (Mr Hechter - 4th respondent), Mr Peter Gilbert (Mr. Gilbert - 5th respondent), Mr Izak van Rooijen (Mr van Rooijen - 6th respondent), Mr Paul Harmse (Mr. Harmse - 7th respondent) and Ms Annette Cronje (Ms Cronje – 8th respondent);

d. an application brought by a Mr Paul Matthew Machin (Mr Machin) who sought to remove Mr Mostert as a provisional curator, and have declared all litigation brought by Mr Mostert to be a 'nullity'; and,

e. an application to join Mr Mostert to the proceedings in his personal capacity, which was brought by the third to tenth respondents cited in this matter.

[4] The opposition to the confirmation of the *rule nisi*, the counter application and the various other applications brought spawned a voluminous bundle of paper totalling some 8 000 pages.

The judgment and order of Heaton-Nicholls J

[5] Between 12 – 18 August 2013 Heaton-Nicholls J (as she then was) heard the applications and, on 13 December 2013, delivered a well-reasoned, comprehensive judgment dealing with every material dispute between the applicant and the respondents, and between Mr Mostert and the respondents. The judgment concluded with a set of orders. The applicant sought clarification of some of her orders and on 8 April 2014 she clarified them. The costs orders issued by her are, we will soon see, of particular relevance in this matter.

[6] The relevant parts of the orders made by Heaton-Nicholls are:

a. In the application to confirm the *rule nisi* – also referred to as the curatorship application:

- ‘2. The second respondent [i.e. Mr Mostert] is permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as he may reasonably deem necessary for the performance of his duties, in terms of this order, and to defray reasonable charges and expenses thus incurred from the assets owned, administered or held by or on behalf of the Fund, with the exclusion of the services of AL Mostert and Company Incorporated.
- 2.1 Notwithstanding the [above order – in para 2] nothing therein detracts from the applicant [i.e. FSB’s] and the curator’s obligations to ensure payment of all fees and disbursements of AL Mostert and Company Incorporated from the business of the [Fund] under curatorship up and until 13 December 2013 with the exclusion of all the fees, disbursements and costs referred to in paragraphs 10 and 10.1 of this order’.
- 2.2 The exclusion of the services of AL Mostert and Company Incorporated effective from 13 December 2013 relates only to such services of a litigious nature where the said company is instructed to act as attorney for the curator of the Fund in legal proceedings.
3. The costs of these proceedings and the opposition thereof, as between attorney and client, as well as the costs of the curator and the cost of the inspection conducted into the affairs of the Fund in terms of the inspection of the Inspection of Financial Institutions Act no 80 of 1998, shall be paid by the trustees of the Fund, in their personal capacity, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client, including the costs of two counsel. In this paragraph “the trustees” shall mean the sixth, seventh and eighth respondent.
- 3.1 The phrase “and the opposition thereof” includes the costs of the applicant.
- 3.2 The phrase “costs of curator” will include not only the remuneration of the curator but also the legal costs incurred by the curator including the payment of the fees earned and

disbursements of AL Mostert and Partners Inc. with the exclusion of all the fees and disbursements and costs referred to in paragraph 10 and 10.1 of this order.

- 3.3 The phrase “costs of curatorship” will bear a similar meaning in the future implementation of this order, save for that period post 13 December 2013, the attorney will be the attorney acting at such time for the Cadac Pension Fund.

...

b. In the counter application to remove Mr Mostert and replace him with two persons chosen by the Fund

- ‘8. The counter application issued on 15 February 2011, purportedly in the name of the Cadac Pension Fund (but which was itself cited therein), is dismissed.
9. The third to tenth respondents, [i.e. Mr Van Rooijen, Mr Paul Harmse, Mr Peter Gilbert, Ms Bekker, Mr Nash, Mrs Forno-Nash, Mr Engelbrecht and Mr Proctor] are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the counter application on the scale as between party and party, including the costs of two counsel.
10. The costs of the second respondent (cited in the counter-application) [i.e. Mr Mostert] are disallowed and the second respondent is not entitled to recover these costs from any party to these proceedings.
- 10.1 The costs of the second respondent shall include all the costs, fees and disbursements (including counsels’ fees) paid to AL Mostert and Company Inc. and the curator’s remuneration only in relation to the preparation of the counter-application.’

c. In the urgent application brought by Mr Mostert

- ‘11. The first, second, fifth, sixth and seventh respondents [i.e. Mr Nash, Mrs Forno-Nash, Mr Gilbert, Mr van Rooijen and Mr Harmse] are ordered to pay the costs of the urgent application jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client, including the costs of two counsel.’

d. In the application brought by Mr Machin

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

e. In the application to join Mr Mostert in his personal capacity

- '13. The application is dismissed
14. The costs of this application, including the costs of two counsel, shall be paid by the third to tenth respondents [i.e. Mr Van Rooijen, Mr Paul Harmse, Mr Peter Gilbert, Ms Bekker, Mr Nash, Mrs Forno-Nash, Mr Engelbrecht and Mr Proctor] jointly and severally, the one paying the other to be absolved, on a scale as between attorney and client, including the costs of two counsel.'

[7] For various practical reasons the curatorship could not, and did not, end with the judgment and orders of Heaton-Nicholls J. Heaton-Nicholls J was alert to this eventuality and catered for it in sub-paragraphs 3.2 and 3.3 of the order. Bearing this in mind she held that the costs of the curator and the costs of the curatorship would be borne by the sixth, seventh and eighth respondents. (Ms Bekker, Mr Nash and Mrs Forno-Nash), the reason being that they were the trustees of the Fund at the time when many improprieties were committed against the Fund. Had they complied with their fiduciary duties to the Fund, the curator would not have been appointed and the Fund would not have been burdened with the costs arising therefrom. This was anticipated in paragraph 6.2 of the *rule nisi*, which Heaton-Nicholls J confirmed. Heaton-Nicholls J took the firm view that, as they were responsible for the Fund being placed in curatorship, they and not the Fund – which ultimately means the members – should bear the costs of the curatorship. In her clarification order Heaton-Nicholls J clarified what is meant by 'costs of curator' and 'costs of curatorship'.

[8] Heaton-Nicholls J made findings which, no doubt, were central to her decision to make the orders referred to above. These are captured in the various pronouncements in the judgment.

a. With regard to Mr Nash's role and conduct she found:

'These emails are indicative that Nash over a period of years fraudulently devised a strategy whereby the business of [the Fund] could be transferred with a nil surplus valuation. Any claim that existed was fictitious and concocted for this purpose. Nash obviously feared that the submission of a surplus distribution scheme would have exposed his involvement in the affairs of various funds in which he acted as trustee. The newly introduced surplus legislation obliged him to distribute the surplus, in effect excluding him together with all active members, from participation in the surplus distribution of the surplus. It is now well established that pension fund monies are sacrosanct and generally cannot be used for the benefit of the employee. Nash clearly used the resources of the [Fund] to fund his defence to any possible criminal charges he may face and to ward off an investigation into [the Fund] which may expose his history of abuse of [the Fund] monies to bolster the cash flow of Cadac [the Company].'¹

And:

'It is apparent that there has been a complex and confusing web of transactions involving various corporate entities over a period of many years. It is not this court's role to attempt to unravel these complexities. These are primarily the domain of the criminal court. Reduced to its simplest terms it appears that Nash wanted access to the considerable surplus funds in Sable. To do this he needed another co-operative pension fund to accept the active members from Sable. [The Fund] was a small fund with a dominant principal employer and provided Nash with the opportunity to set his scheme into motion over a period of many years. To prevent any FSB involvement it was necessary to submit a nil surplus valuation. Hence a fictitious claim had to be created.

As Mostert delved deeper into the Ghavalas transactions the extent of Nash's dishonesty became apparent. Nash's counter strategy was to claim a corrupt relationship between Mostert and

¹ At para 65 of the judgment

Tshidi [the Executive officer of the FSB]. In an email to Darren Williams of Werksmans he suggests how public perception about him will be transformed and *"the press will start to accuse Mostert and the FSB of corruption"*. This will result in the NPA 'loosing heart', presumably a reference to the criminal charges Nash is facing. In relation to the present matter he warns that this trial is *"high risk and high publicity"*. It has to be the *"one large fight we have. It has to be a watershed fight."*

Mention must be made of the callous disregard that Nash displayed towards the pensioners. He viewed them as an impediment to his plans. On 29 April 2009 he wrote to Marks [Ms June Marks an attorney for Cadac and for the Fund prior to the order of Claassen J] that "pensioners have entirely different motives to current members so they must not be given the right to a Trustee. I also frankly want a situation where there are 4 Trustees and the chairman has a casting vote in the situation of deadlock - --- otherwise control passes to an adjudicator (fsb/Mostert)"

Over a year later on 1 August 2010 he wrote to Marks: *"If we settle with the State/FSB on the basis of a distribution of the (sic) Pension Fund Surplus and we say 80% goes to company and 20% as a "perk to employees/members ??? Would the pensioners be part of this I wonder?? This is why it may be relevant to outsource them now. ?? Then (sic) the complication is gone."*²

And:

'It is argued, because no substantive relief is sought against Nash, no costs can be awarded against him and that in respect of Mrs Nash, there are no allegations of wrong doing against her; her inclusion is indicative of the extent of the malicious vendetta being conducted by Mostert. An order is sought by Nash that the FSB and Mostert pay the costs of Mr and Mrs Nash on a punitive scale.

What seems to have been overlooked ... is that Nash and his wife have been joined as parties to this action. The order [*rule nisi*] provides that the trustees, which include Nash and his wife, should show cause why they should not be liable for costs on a scale as between attorney and client. Nash and his wife resigned approximately a month after the grant of the provisional order [*rule nisi* which included an interim order]. Nash has been in *de facto* control of the [Fund] since 1995. It was his actions together with that of the previous trustees, that necessitated the appointment of a curator. The application to place the fund under curatorship is

² At paras 68 – 70 of the judgment

not opposed which amounts to an admission of mismanagement on the part of the previous trustees. It is clear that Nash was the driving force behind the opposition to Mostert and the counter application. As the ultimate decision maker, Nash should be liable for the costs of this application on a punitive scale together with the previous trustees.

In respect of the new trustees it is extremely difficult to ascertain exactly what independent knowledge they had at any given time, but it is apparent that they have been influenced by Nash. At a time when the new trustees were ostensibly acting totally independent of Nash, there are emails from Nash instructing Werksmans, acting on behalf of the trustees, what strategy to adopt towards the case. It could not have been put more plainly than Nash's own words in his email of 17 May 2011 to Darren Williams of Werksmans: *"So, it is apparent that the current trustees are now operating the Fund more or less on behalf of me the main beneficiary as well as on behalf of the beneficiaries of the Surplus (of which the company is one as well)"*

The new trustees were the deponents of the affidavits in the counter application and there is no compelling reason why they should not be made to pay the costs of this application in their personal capacities jointly and severally with Nash and the previous trustees. However, as there is no concrete evidence of any wrong-doing on their part, other than to be unduly influenced by Nash, I do not deem it appropriate that they should pay the costs on a punitive scale.³

b. With regard to Mr Mostert's conduct, she found:

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

³ At paras 91 – 94 of the judgment

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

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

'... I am of the view that Mostert's lengthy affidavit, termed an answering affidavit to the counter application was unjustifiable. It amounts to a defence of his appointment which was the role of the FSB. It was not for Mostert to defend his own appointment. The costs of the drafting of this affidavit must specifically be disallowed. No party to these proceedings should be burdened by these costs which Mostert should pay personally.'⁴

[9] The cost orders, thus, are based on the following findings:

- a. Mr Nash was not just an ordinary trustee of the Fund, but was '*de facto* in control of it since 1995';
- b. The Fund had been mismanaged – this was admitted by dint of the fact that the confirmation of the *rule nisi* was not opposed;

⁴ At paras 89 - 90 of the judgment

- c. Mr Nash has perpetrated a fraud (or frauds) on the Fund;
- d. Mr Nash has been dishonest in his dealings with the Fund;
- e. Mr Nash and Cadac have benefitted as a result of the decisions and actions of Mr Nash;
- f. The trustees of the Fund were unduly influenced by Mr Nash;
- g. Mr Mostert has been central in uncovering the dishonest and fraudulent conduct of Mr Nash, which fraud was the fundamental, though not only, reason for the Fund to be placed in curatorship. In this regard the following findings by Heaton- Nicholls J were crucial:
 - i. One Mr Peter Ghavalas (Mr Ghavalas), orchestrated a scheme to defraud various pension funds – five of them, two of which are the Sable Pension Fund (Sable) and the Fund. The fraudulent scheme basically involved asset-stripping the funds. Mr Nash was a party to the fraudulent scheme of Mr Ghavalas. In 1994 Sable transferred members and a sum of R20 804 708.00 to the Fund. The transfer was to have taken place in terms of s 14 of the Pension Fund Act, 24 of 1956 (Pension Fund Act). Mr Nash had become a member of Sable just before the transfer was to take place. The transfer, however, was not completed;

- ii. An erstwhile attorney for Mr Nash and the Fund, Ms June Marks (Ms Marks), was instrumental in many of the transactions that formed part of the fraudulent activities of Mr Ghavalas. She had charged the Fund R12m for the period 2005 to 2010, but since the Fund was placed under curatorship, Mostert was successful in obtaining judgment against Ms Marks for these fees;
- iii. Another firm of attorneys, Werksmans, received monies from the Fund as payment for services provided by Werksmans towards obstructing the investigation of the Financial Services Board (FSB) into the affairs of the Fund;
- iv. A Mr Leonard Cowan (Mr Cowan) of Cowan Harper Attorneys received R2.5m from the Fund as payment for services to be provided in defending Mr Nash during his criminal trial;
- h. Mr Nash had a callous disregard for the pensioners and perceived them to be an impediment to his plans;
- i. The FSB has selected Mr Mostert as curator because of his knowledge of the fraudulent activities of Mr Ghavalas; and,
- j. There is a conflict of interest between Mr Mostert as curator of the Fund and AL Mostert Inc as legal representative of the Fund.

[10] The findings above have to be seen in the context of the following common cause facts: (i) Mr Nash was a trustee of both funds –Sable and the Fund where he held a casting vote, as well as the executive chairman of Cadac which was the employer of the members of the Fund; (ii) Mr Nash controlled Cadac; and (iii) Mrs Forno-Nash was a trustees of the Fund and a director of Cadac.

[11] The third to tenth respondents succeeded in obtaining leave to appeal to the Supreme Court of Appeal (SCA) against the order of Heaton-Nicholls J. While their appeal was pending, Mr Mostert's appointment as provisional curator, in terms of the Classen J order, continued.

The order of the Supreme Court of Appeal

[12] On 29 February 2016 the SCA, without hearing argument from the parties and without rendering a judgment, made an order:

- a. Confirming the most material aspects of the *rule nisi* – i.e. order of Classen J;
- b. Confirming the appointment of Mr Mostert as curator and appointing two other curators, namely, Mr Johan Esterhuizen and Mr Norman Klein;
- c. Allowing for the curators to take all decisions on a majority basis;
- d. Confirming paragraphs 2, 2.1 and 2.2 of the order of Heaton-Nicholls J;

- e. Setting aside all costs orders of Heaton-Nicholls J which were to be determined by this court 'on consideration of the curators' final report.';
- f. Compelling the curators to file progress reports with the Registrar of Pension Funds on a six-monthly basis and to prepare a final report by 31 August 2016 and submit it to this court;
- g. Reserving the issue of costs of the appeal for determination by this court on consideration of the curator's final report.

[13] Mr Esterhuizen accepted his appointment as co-curator but Mr Klein did not. The SCA varied its order by requesting that the Chairperson of the Johannesburg Bar Council appoint a replacement for him. The Chairperson appointed a Ms Karen Keivy (Ms Keivy) on 10 December 2017.

[14] While the SCA remitted the matter to this court to determine the issue of costs only, and directed that this court should determine the issue by considering the curators' 'final report', it has, at the same time, confirmed orders 2, 2.1 and 2.2 of Heaton-Nicholls J's orders. Those orders, of course, are to be read with 10 and 10.1 of her orders. In those orders Heaton-Nicholls J deprived Mr Mostert of certain costs incurred by him in the counter application, despite him being successful in the matter. My reading of the order of the SCA is that those orders are not a matter for this court. Their confirmation by the SCA precludes any interference thereto by this court. Thus, the order this court issues herein will simply restate those orders.

[15] Prior to the judgment and orders of Heaton-Nicholls J there was an application brought by Mr Mostert on behalf of the Fund to recover monies paid to Ms Marks.⁵ The application was successful. The judgment in that matter was issued by Mayat J. Subsequent to the judgment there were numerous other applications, all of which impacted upon the curatorship. They have been dealt with by other judges of this court. They, together with the appeal to the SCA, have contributed significantly to the costs of the curatorship and the delay in terminating the curatorship. The judges that have dealt with these applications are, Bruinders AJ,⁶ Victor J,⁷ Matojane J⁸ and Fisher J.⁹

[16] All those judgments contain findings adverse to Mr Nash as well as critical comments – some devastating ones - about Mr Nash and his conduct.¹⁰ They also contain adverse findings regarding the honesty of Mr Nash.

The reports of the curators

[17] Two of the curators, Mr Esterhuizen and Ms Keevy issued a report on 30 May 2018. They informed that they had undertaken a scrupulous exercise in examining the affairs of the Fund during the curatorship and had found that

⁵ *Anthony Mostert N.O. v June Marks Incorporated and June Marks*, Case No.: 2011/31374 (9 January 2012) There were other cases between these parties that were dealt with in the single judgment.

⁶ *A Mostert N.O v Cadac*, Case No.: 2011/24793 (24 March 2015)

⁷ *The Financial Services Board and Another v The Sable Industries Pension Fund and Others*, Case No.: 2009/35016 (6 March 2017)

⁸ *Anthony Louis Mostert and Others v Simon Nash and Others*, Case No 34664/2017 (14 Aug 2018)

⁹ *Simon Nash and Midmacor Industries Limited v Director of Public Prosecutions and Others*, Case No.: 22324/17

¹⁰ The judgment of Mayat J (see n 5) shows that monies of the Fund were used, at the instance of Mr Nash, to pay for Mr Nash's private legal fees. See also para [15] of Bruinders AJ's judgment, n 6; paras [7], [15], [20], [23] and [26] of Victor J's judgment, n 7; paras [35], [74], [77] and [83] of Matojane J's judgment, n 8; paras [4], [42] and [43] of Fisher J's judgment, n 9

actions taken by Mr Mostert were necessary to protect the interest of the Fund. They found that the previous trustees engaged in extensive obstructive conduct to prevent Mr Mostert from performing his court-imposed duties. They examined all the litigation Mr Mostert was forced to engage in and noted that most were finalised to the benefit of the Fund. They record two concerns: (i) the current liabilities exceed the current assets; and (ii) the Fund became a paid-up fund from 1 March 2003 by virtue of an approved rule amendment. However, after this period, the trustees accepted new members without first re-amending the rules, as a result of which these new members could not have been lawfully accepted as members. On the whole, their primary recommendation was that the curatorship be brought to a close, as the costs of the continued curatorship result in an unnecessary depletion of the Fund's assets to the detriment of the pensioner members. They also made a recommendation regarding the new members. That recommendation, however, is in issue in subsequent litigation, which is presently being case-managed by myself.

[18] Mr Mostert filed a report on 26 March 2019. The report outlines an encounter Mr Esterhuizen and Ms Keevy had in a meeting, on 23 October 2018, with some of the members and Mr Keith Braatvedt (Mr Braatvedt), the erstwhile attorney of the members. Mr Esterhuizen and Ms Keevy were, it is reported, told by the members that Mr Nash was driving the entire process and was intimidating them to join him in the controversies between himself and the curators, the FSB (in its dealings with Sable and the Lifecare Group Holdings Pension Fund) and the Director of Public Prosecutions (with regard to his criminal prosecution and the prosecution of his company, Midmacor). The intimidation took the form of the

threat of dismissal from the employ of Cadac if they failed to support him in his endeavours. They indicated further that Mr Braatvedt does not represent them, that he only took instructions from Mr Nash, and that they wished to disassociate themselves from all Mr Nash's actions and withdraw from the Fund. The report points out further that two of the respondents, Mr Hechter and Ms Cronje, have each furnished Mr Mostert with an affidavit containing allegations that they have been intimidated and threatened by Mr Nash. Ms Cronje, it bears noting, was the principal officer of the Fund as well as an employee of Cadac.

[19] A report was filed by the curators on 13 May 2021. They call it the 'final report'. However, on 19 December 2019, they and the Fund were drawn into further litigation by Mr Nash concerning the alleged pension pay-out he claims is due to him. The papers in that application were finalised in February 2020, thus making the matter ripe for hearing. Then on or about 18 – 25 March 2020 the curators took a decision regarding the membership of some of the employees (now ex-employees) of Cadac. Thereafter, on 11 October 2021 Cadac was authorised by the SCA to join in Mr Nash's application. Cadac then brought its application on 17 December 2021. It sought to review and set aside the decision of the curators taken during or about March 2020. The curators filed their answering affidavit to Cadac's application on 17 January 2022. In the meantime, the business of Cadac was sold as a going-concern, which resulted in the curators challenging the legal standing of Cadac to bring its application – albeit as part of the one instituted by Mr Nash. Thereafter, thirty-four applicants brought an application to intervene in Mr Nash's and Cadac's application. That application has yet to be finalised.

[20] That litigation notwithstanding the curators' final report stands, as the administrative aspect of their curatorship has been concluded and they have resolved to liquidate the Fund. However, it is of significant note that in that litigation the curators have been placed at risk of having personal costs orders being made against them.

[21] In their final report they state that Nash was 'the driving force and in control' of the Fund, Sable and Cadac, that it was his conduct that caused the Fund to be placed in curatorship, and that he should be ordered to pay all the costs of the curatorship. They point out that subsequent to the order of Claasen J, Nash did everything possible to frustrate the curatorship and delay its finalisation. The report quotes extensively from some of the judgments referred to above, especially the judgment of Matojane J. They examined the conduct of Mr Mostert, especially with regard to the litigation he was required to either initiate or forced to engage in to defend the interests of the Fund, and found that the Fund benefitted from his conduct. They also shared Matojane J's view that all the litigation initiated against the Fund, brought by the ex-trustees and by some members, was driven by Mr Nash. No doubt, their experience when meeting some of these litigants or members had an impact on their conclusion. Their report manifestly demonstrates that they did not simply adopt a supine attitude towards the affairs of the Fund: they engaged actively and independently of Mr Mostert in its affairs. But, their involvement did not alter the fact that the curatorship was necessary and has produced significant benefit to the Fund. Mr Esterhuizen and Ms Keevy do raise a point with regard to paragraphs 2, 2.1 and

2.2 of Heaton-Nicholls J's order. It is their view that Mr Mostert should not have been deprived of his costs. I have already indicated that this issue was dealt with by the SCA.

The costs orders

[22] All the costs orders issued by Heaton-Nicholls J were set aside save for the confirmation of orders 2, 2.1 and 2.2 (which have to be read together with orders 10 and 10.1). In my view, the costs orders issued by Heaton-Nicholls J in the urgent application brought by Mr Mostert, the application brought by Mr Machin and the application to join Mr Mostert in his personal capacity should not be disturbed. The orders made on the merits in those applications remain intact, and they formed the basis upon which the accompanying costs orders were made. There is, therefore, no basis in law or in logic to disturb the orders. Thus, orders 11, 12 and 13 of Heaton-Nicholls J will simply be repeated here. Orders, 2, 2.1, 2.2, 10 and 10.1 too will be repeated herein as they have been confirmed by the SCA. This leaves the issue of the costs orders contained in paragraphs 3, (costs order in the confirmation of the *rule nisi*) and paragraphs 9 and 10 (costs orders in the counter-application).

[23] The costs order made in paragraph 3 of Heaton-Nicholls J's order must be seen in the context of the orders made with respect to the appointment of Mr Mostert, and the powers that were conferred upon him as a curator. These powers are extremely wide. They are designed to ensure that the curatorship is effectively managed, taking into account the fundamental finding that the Fund was, until then, mismanaged and a victim of fraud(s). The powers allowed for Mr

Mostert to do everything necessary to beget proper management of the Fund, and to recover all monies that were unlawfully removed from the Fund. By confirming those paragraphs of the *rule nisi* that granted Mr Mostert the necessary powers, Heaton-Nicholls J recognised that a weighty task was invoked upon him. The SCA joined Mr Esterhuizen and Ms Keevy as his co-curators. As joint curators they were given the same powers and carried the same responsibilities as Mr Mostert. The SCA, like Heaton-Nicholls J, was aware that costs would be incurred by them as curators in carrying out the court-imposed duty to beget the Fund to proper management.

[24] The question that immediately follows is: who should bear these costs? It can only be either the Fund or the trustees that were in charge at the time the Fund was mismanaged and a victim of the fraud(s). Heaton-Nicholls J came to the conclusion that it should be the trustees. I can see no reason at all to disagree with her.

[25] In the curators' final report, which I am enjoined by the SCA to take into consideration when making a costs order, the curators strongly emphasise that Mr Nash should be ordered to pay the costs personally, as he was the principal protagonist in all the actions and activities that were designed to frustrate and undermine the work of the curatorship, and which resulted in prolonging the existence of the curatorship at a huge expense. There is some merit in their contention, which is borne out by the many related litigations that have taken place since the *rule nisi* was granted by Claasen J. The *rule nisi* it will be remembered incorporated an interim order, which remained in place until the SCA

pronounced on the matter on 29 February 2016. The trustees were party to the appeal. The SCA decided to appoint two more curators. Their appointment made no material changes to the curatorship. Costs of the curatorship increased though. They were appointed to attend to the alleged bias of Mr Mostert, especially against Mr Nash. They found no substance to the claim of bias. On the contrary, they found that his conduct focused on the interests of the Fund and that it benefitted the Fund. The FSB, which has been required to oversee the conduct of Mr Mostert, has not found any conduct on his part that was inconsistent with his fiduciary duty towards the Fund. As the trustees were party to the appeal, they should bear the costs that followed the order of Heaton-Nicholls J, since in my view the order of the SCA made no difference, save for increasing the costs, in the curatorship.

[26] The respondents were given an opportunity by myself to respond to the reports, even though the SCA did not accord them this privilege. The SCA simply asked this court to determine the issue of costs by having regard to the curators' final report.

[27] Mr Nash and Mrs Forno-Nash complained that the reports, and especially the final report, were not presented in the form of an affidavit, and contend further that the statements and recommendations contained therein should carry no weight. It does not constitute evidence, they say. There is no merit in this contention. In this case, the SCA enjoined this court to have regard to the final report of the curators. The SCA did not ask or order the curators to file an affidavit with this court. There is good reason for that. Reports by court appointed curators

of a pension fund are hardly ever presented in the form of an affidavit. This is true for court appointed curators of any legal personality who are required to report their findings to the court for further deliberation. Their reports certainly carry evidential value. In this case it is evidence the SCA has implicitly asked for by requiring this court to only make its determination on the issue of costs after having regard thereto. Requiring them to present their reports in the form of affidavits is simply asking of them to change the format of their reports. The factual material contained therein remains the same whether presented in the form of an affidavit or in the form of a report. Demanding that they be in the form of an affidavit before it is accepted as evidence is elevating form over substance. It is important to bear in mind, too, that curators of pension funds bear a fiduciary duty to the funds under their curatorship. Their conduct is subject to supervision by the FSB. Their reports are basically a record of their conduct and their findings. They will be held accountable for what is or is not in their reports regardless of whether they swear by – or affirm – the contents therein.

[28] Mr Nash and Mrs Forno-Nash complain that Mr Mostert has litigated luxuriously and at the same time earned handsomely from the curatorship. With regard to the former they draw attention to various judgments in related matters, where the High Courts and the SCA have admonished him for doing so. This was a problem for Heaton-Nicholls J too, and she has attended to it in orders 2, 2.1, and 2.2, 10 and 10.1 of her orders. The SCA has confirmed these orders. Thus, their complaint has been adequately addressed. As for their second complaint, the fees earned by Mr Mostert are subject to the control of the FSB. They should

not be excessive. And in any event, anyone ordered to pay those as part of the costs order is still entitled to challenge the reasonableness of the fee(s) charged.

[29] In response to the reports of the curators, Mr van Rooijen revealed that himself, Mr Gilbert, Mr Harmse, Mr Engelbrecht and Mr Proctor were indemnified by Cadac for all the costs they may become liable for as a result of the litigation between them and the Fund. The indemnity agreement was signed by Mr Nash on behalf of Cadac, the indemnitor. This explains why they, and especially Mr van Rooijen, continued to do battle with the curators. At the time of placing the Fund under curatorship they made common cause with Mr Nash and Mrs Forno-Nash by complaining of bias on the part of Mr Mostert. Their concern was addressed by the SCA, but they did not let up in their battle with the curators. This is particularly true of Mr Nash, Mrs Forno-Nash and Mr van Rooijen. However, whether the three of them alone, or all the trustees at the time, are ordered to pay the costs is of no moment as the costs will be carried by Cadac.¹¹

The impact of Mr Nash's and Cadac's litigation

[30] Mr and Mrs Forno-Nash contend that as the Fund is still engaged in litigation it is not sensible to regard the report as the 'final' one as the curators would have to continue with the curatorship until the litigation is finalised. I disagree. The administrative work of the curators has been concluded. The curators, however, need to remain on board to finalise this pending litigation. The outcome of the litigation should not, I hold, impact on the costs order issued here.

¹¹ Presumably the sale of Cadac as a going-concern does not affect the indemnity granted to them by Cadac

The costs incurred prior to the decision taken regarding the membership status of certain ex-employees of Cadac can be finalised here and the costs incurred, including the costs of the curatorship, can be determined in that litigation.

Costs of the appeal in the SCA

[31] The SCA left the issue of the costs of the appeal for determination by this court. The order granted in the SCA was by agreement between the parties. Neither party was fully successful in the appeal. In the circumstances, it is fair, just and equitable that no order as to costs be made in regard to the appeal.

Order

[32] The order made below reproduces the numbering of Heaton-Nicholls J for convenience, and to avoid any confusion or uncertainty. The following order is made:

a. In the application to confirm the *rule nisi* – also referred to as the curatorship application:

2. The second respondent is permitted to engage such assistance of a legal, accounting, actuarial, administrative or other professional nature, as he may reasonably deem necessary for the performance of his duties in terms of this order, and to defray reasonable charges and expenses thus incurred from the assets owned, administered or held by or on behalf of the Fund, with the exclusion of the services of AL Mostert and Company Incorporated.

- 2.1 Notwithstanding the order in para 2 above nothing therein detracts from the applicant's and the second respondent's obligations to ensure payment of all fees and disbursements of AL Mostert and Company Incorporated from the business of the [Fund] under curatorship up and until 13 December 2013 with the exclusion of all the fees, disbursements and costs referred to in paragraphs 10 and 10.1 of this order.
- 2.2 The exclusion of the services of AL Mostert and Company Incorporated effective from 13 December 2013 relates only to such services of a litigious nature where the said company is instructed to act as attorney for the curator or the Fund in legal proceedings.
3. The costs of these proceedings and the opposition thereof, as between attorney and client, as well as the costs of the curator and the cost of the Inspection conducted into the affairs of the Fund in terms of the Inspection of Financial Institutions Act no 80 of 1998, shall be paid by the trustees of the Fund in their personal capacity, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client, including the costs of two counsel. In this paragraph "the trustees" shall mean the sixth, seventh and eighth respondents.

- 3.1 The phrase “and the opposition thereof” includes the costs of the applicant.
- 3.2 The phrase “costs of the curator” will include not only the remuneration of the curator but also the legal costs incurred by the curator including the payment of the fees earned and disbursements of AL Mostert and Partners Inc. with the exclusion of all the fees, disbursements and costs referred to in paragraph 10 and 10.1 of this order.
4. The costs referred to in paragraph 3 above shall only include costs incurred up to 19 December 2020. The costs incurred thereafter shall be reserved for determination in the case brought by Mr Nash and Cadac under case number 43585/2019.
- b. In the counter application to remove Mr Mostert and replace him with two persons chosen by the Fund
8. The counter application issued on 15 February 2011, purportedly in the name of the Cadac Pension Fund (but which was itself cited therein), is dismissed.
9. The third to tenth respondents are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the counter-application on the scale between a party and party, including the costs of two counsel.

10. The costs of the second respondent (cited in the counter-application) are disallowed and the second respondent is not entitled to recover these costs from any party to these proceedings.

10.1 The costs of the second respondent shall include all the costs, fees and disbursements (including counsels' fees) paid to AL Mosterts and Company Inc. and the curator's remuneration only in relation to the preparation of the counter-application.

c. In the urgent application brought by Mr Mostert

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

d. In the application brought by Mr Machin

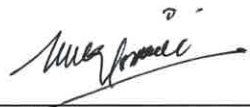
12. Paul Matthew Machin is ordered to pay to the Registrar and the Fund (represented by the curator) costs of suit on the scale between attorney and client, including in each instance the costs of two counsel.

e. In the application to join Mr Mostert in his personal capacity

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

f. Costs of the appeal to the SCA

- i. Each party to pay its own costs


 PP B VALLY
 JUDGE OF THE HIGH COURT
 JOHANNESBURG

For the applicant:

For the 1st respondent:

For the 3rd respondent:

For the 7th – 8th respondents:

E Theron SC Instructed by Rooth & Wessels Inc.

Sholto-Douglas SC Instructed by Craig Assheton-Smith

D Vetten Instructed by Darryl Furman & Associates

G D Wickins SC with M Tsele Instructed by KWA Attorneys

Date of Hearing: 08 February 2023

Date of Judgment: 19 May 2023