IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 43195/2013

In the matter between:

SIMON JOHN NASH	First Applicant
MIDMACOR INDUSTRIES LIMITED	Second Applicant

and

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

05/04/17
DATE

SIGNATURE

ANTONY LOUIS MOSTERT	First Respondent
ANTON LOUIS MOSTERT NO	Second Respondent
SABLE INDUSTRIES PENSION FUND	Third Respondent
AL MOSTERT & CO INCORPORATED	Fourth Respondent
EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD	Sixth Respondent
REGISTRAR OF PENSION FUNDS	Seventh Respondent

JUDGMENT

Tuchten J:

1 This case has at its heart a dispute between the first applicant (Mr Nash) and the first respondent (Mr Mostert) about the meaning of a single phrase in an order of court and a single sentence in the recordal of a contractual arrangement between the second respondent, ie Mr Mostert in his representative capacity (the curator) as curator of the third respondent (the Sable Fund), and the sixth respondent (the FSB) made for the benefit of the Sable Fund.

2 In short, the dispute is about the lawfulness of the agreement concluded between the curator and the FSB about the curator's remuneration (the remuneration agreement) for the performance of the duties of his office as such. The applicants say the remuneration agreement is void *ab initio*. The respondents other than the Sable Fund say the remuneration agreement is valid. The Sable Fund is neutral in this regard.

3 But the principal parties are at each other's throats and have drawn the other parties into the dispute. What ought to have been a dispute about the meaning of these provisions, seen in the context of the largely admitted relevant facts and the applicable legislation has mushroomed into a record before me of several thousand pages. On the first day of the hearing, I received even more paper contributing to the factual material before me. The case took three days to argue.

All the parties were represented by two counsel. The applicants were represented by one set of counsel, as were Mr Mostert and the fourth respondent (ALM Inc)[1], the FSB and the sixth and seventh respondents and the Sable Fund respectively. I shall generally describe positions or submissions as having been taken or made by or on behalf of the respondents without identifying the specific respondent.

4 The background to the dispute is that a large amount of money was stolen from the Sable Fund in 1995. At that time, Mr Nash was able to influence the financial transactions of and concerning the Sable Fund. He claims to have been a member of the Sable Fund in 1995. The second applicant (Midmacor) is a company controlled by Mr Nash. Midmacor was the Sable Fund's principal employer, as that term is used in the relevant legislation.

5 Mr Mostert asserts that Mr Nash stole R36 million, in round figures, from the Sable Fund. Mr Nash denies any wrongdoing. Mr Nash is an accused person in a criminal trial in relation to this allegation. The trial has gone on for a number of years and is presently part heard. I do

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1 ALM Inc is a firm of attorneys, notaries and conveyancers. In the list of its directors on its correspondence under its letterhead, Mr Mostert's name appears first. It is thus a fair inference that Mr Mostert's position vis-a -vis ALM Inc corresponds to that of a senior partner in an unincorporated firm of attorneys.

not make any findings as to Mr Nash's guilt or innocence. But because this is an application for final relief and Mr Mostert as a respondent has asserted Mr Nash's guilt on this charge, I must accept in accordance with the procedural rule in *Plascon-Evans* and purely for the purposes of this case that Mr Nash is indeed guilty of this crime. This judgment should not be read as pronouncing on Mr Nash's guilt or innocence.

6 The effect of the theft was that the Sable Fund was left without any assets under its control. The FSB is vested by law with certain powers to act to remedy this situation. It is necessary to quote the whole of s 5 of the Financial Institutions (Protection of Funds) Act,[2] (FIA) as it read prior to its amendment by the Financial Services Laws General Amendment Act.[3] Before its amendment, s 5 provided:

> (1) The registrar may, on good cause shown, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.
>
> (2) Upon an application in terms of subsection (1) the court may-

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2 28 of 2001

3 45 of 2013. Counsel referred during argument to the FIA as it read *after* its amendment with effect from 2014.

(a) provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit; and

(b) simultaneously grant a rule *nisi* calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.

(3) On application by the institution the court may anticipate the return day if not less than 48 hours' notice of such application has been given to the registrar.

(4) If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator.

(5) The court may make an order with regard to-

(a) the suspension of legal proceedings against the institution for the duration of the curatorship;

(b) the powers and duties of the curator;

(c) the remuneration of the curator appointed provisionally under subsection 2(a) or finally under subsection (4).;

(d) the costs relating to any application made by the registrar under subsection (1);

(e) the costs incurred by the registrar in respect of an inspection of the affairs of the institution concerned in terms of the Inspection of Financial Institutions Act, 1998 (Act 80 of 1998);

(f) any other matter which the court deems necessary.

(6) The curator acts under the control of the registrar who made the application under subsection (1), and may apply to that registrar for instructions with regard to any matter arising out of, or in connection with, the

control and management of the business of the institution.

(7) The curator must furnish the registrar of the institution concerned with such information concerning the affairs of the institution as the registrar may require.

(8)

(a) Any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the registrar with regard to any matter arising out of, or in connection with, the control and management of the business of an institution which has been placed under curatorship.

(b) A person who makes application contemplated in paragraph (a) must give notice of not less than 48 hours of such application to the registrar or the curator, as the case may be, and the registrar or curator is entitled to be heard at such application.

(9) The court may, on good cause shown, cancel the appointment of the curator at any time.

7 The sixth respondent was a registrar and the Sable Fund was an institution for the purposes of s 5 of the FIA.

8 The FSB brought an application to this court under case no.10545/2006 pursuant to s 5 of the FIA as it then read for orders with immediate effect placing the whole of the business of the Sable Fund provisionally under curatorship and appointing Mr Mostert as the curator of the business of the Sable Fund. The matter came before

Poswa J and an order, which I shall call the Poswa order, was made on 20 April 2006. The Poswa order provided comprehensively for the scope of the curator's authorities, powers and duties. For example: subject to the supervision of the FSB, the curator was authorised to take immediate control of the business to the exclusion of anyone else; directed to give consideration to the best interests of the members and to recover the assets illegally removed and amounts owed to the Sable Fund; authorised to incur reasonable expenses and costs as might be necessary or expedient for purposes of the curatorship; and authorised to pay them from the assets of the Sable Fund. The curator was expressly authorised by the Poswa order to employ the services of lawyers and other professional persons and to institute, prosecute or defend proceedings on behalf of the Sable Fund. Duties to report were imposed on the curator A rule *nisi* was directed to issue, with directions for service, calling upon the Sable Fund and all other interested persons to show cause why the appointment of the curator with powers and duties set out in the Poswa order should not be confirmed.

9 Paragraph 9 of the Poswa order is central to this case. It was framed to operate immediately and reads as follows:

> The curator shall be entitled to periodical remuneration **in accordance with the norms of the attorneys profession,**[4] as agreed with the [FSB], such remuneration to be paid from the assets owned administered or held by or on behalf of the [Sable] Fund, on a preferential basis, after consultation with the [FSB].

10 On the return day of the rule *nisi*, 6 June 2006, Van der Merwe J confirmed the rule. In addition Van der Merwe J extended the powers of the curator to apply for the dissolution of the Sable Fund and to act as its liquidator. In fact, the Sable Fund was never dissolved and the curator was never appointed its liquidator.

11 On 15 August 2007, Prinsloo J granted an order supplementing the order of 6 June 2006. The supplementing order authorised the curator to conduct investigations with a view to locating assets and taking proceedings against any person whom the curator believed had unlawfully acquired or diverted any asset of the Sable Fund.

12 Some of the documents relevant to the agreement ultimately reached between the curator and the FSB relative to the curator's remuneration are before me. It is necessary to go through them to establish the context in which the remuneration agreement was concluded. In fact, in the applicants' founding affidavit the case is

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4 My emphasis.

made that the contractual material making up the remuneration agreement is constituted by or recorded in some of these documents.

13 By letter dated 17 July 2006, Mr Mostert wrote on the letterhead of ALM Inc to the FSB in regard to the Sable Fund. Mr Mostert reported that in about October 1995, the Sable Fund had fallen prey to a bogus amalgamation with another pension fund, as a result of which the Sable Fund was stripped of all its assets. Mr Mostert reported:[5]

> Other than contingent damages claims, that the [Sable] Fund has against the protagonists and participants of the scheme, there are no other assets in the Fund ... and has no cash resources. This state of affairs presents a problem for me as curator as there are no accessible funds available to finance the curatorship.
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> ...
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> It would be most unfortunate, if due to the lack of finance the curatorship, and particularly the legal proceedings that will inevitably have to be undertaken, could not continue. This would obviously be prejudicial to the Fund Members.
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> In the circumstances I am in my capacity as curator of the Fund, and as a directors [*sic*] of [ALM Inc], prepared to continue the curatorship and undertake any legal proceedings at risk, and at my expense (including disbursements) on the basis of a contingency arrangement in terms of which my remuneration will only become payable against recoveries on behalf of the Fund.

5 Paragraph numbers omitted.

> I am agreeable to finance the disbursements, including counsel's fees in respect of the litigation, on the basis that should there be recovery by the Fund, these disbursements would be a first charge there against, to be refunded to [ALM Inc], and that the proposed remuneration be one third of the amount recovered thereafter.

14 By letter dated 25 July 2006, Mr Mostert, again writing on an ALM Inc letterhead, reported that the surplus transferred out of the Sable Fund amounted to some R36 million, which he would attempt to recover plus interest although he could not speculate on the prospect of a successful recovery of the full amount.

15 The FSB wrote a letter dated 10 August 2006 to the curator. The letter is headed **SABLE INDUSTRIES PENSION FUND 12/8/20317/1: CONTINGENCY FEE** and is annexure SJN11 to the applicants' main founding affidavit. The letter reads:

> With reference to your facsimile dated 7 August 2006, I wish to confirm that, for the work done by the curator and [ALM Inc] relating to the Sable [Fund], since the date upon which the fund was placed under curatorship, which includes the exercise of the duties of the curator as well as any legal work undertaken by [ALM Inc], the curator and [ALM Inc] shall be jointly entitled to 33.33% (i.e. 16.66 per cent each) of all amounts recovered for the benefit of the [Sable Fund], upon the further undertaking that all disbursements of the curator and [ALM Inc], shall be paid by [ALM Inc] and or the curator

> out of any recovery made on behalf of the [Sable Fund], failing which shall be paid by [ALM Inc] and/or the curator out of own funds.

16 The three letters to which I have just referred were not handed over to Mr Nash voluntarily. The were produced at Mr Nash's criminal trial during and pursuant to the cross-examination of an official, Mr Tshidi, from the FSB.

17 The final document in this regard is a memorandum of understanding (the MOU) headed **MEMORANDUM OF UNDERSTANDING OF THE PARTIES MENTIONED HEREAFTER**. It records agreements concluded between the FSB, Mr Mostert, ALM Inc, and another attorney, Mr Wandrag and Mr Wandrag's firm. Mr Mostert and Mr Wandrag were the appointed curators or liquidators of a number of pension funds with under curatorship or liquidation. The MOU reflects Mr Mostert and the FSB as having signed on 16 October 2008 and Mr Wandrag on 17 October 2008. During argument, counsel for the applicants recorded a contention that the MOU may not have been signed on the dates there recorded. This was not raised in the founding affidavit and for present purposes I accept that the MOU was signed on the dates reflected in the document.

18 The copy of the MOU provided to Mr Nash was redacted to omit the contents of paragraphs 1, 2 and 3. At my request, counsel for the FSB supplied a copy with those paragraphs reinstated. The MOU as a whole deals with the remuneration to be paid to the several curators and liquidators pursuant to their offices.

19 The attack mounted by counsel for the applicants in regard to the MOU relates only to clause 6 of that document, which reads:

> It is recorded that the curator of the Sable ... Fund has applied for the fund to be placed in liquidation. Formal notification from the FSB with regard to the fund being so placed in liquidation has not been received. **In the circumstances recovery of assets made prior to the fund being placed in liquidation shall be subject to the curators' remuneration of 16,33% (exclusive of VAT) of such assets recovered.**[6]

20 On the strength of the material I have described, which the applicant alleged constituted the remuneration agreement, the applicants brought the present proceedings by notice of motion dated 11 July 2013. The first prayer sought is one for leave to bring the present application, in so far as it may be necessary. The necessity was said

6 My emphasis

possibly to arise from paragraph 4 of the Poswa order, which provides:

> All actions, proceedings, the execution of all writs, summonses and other processes against the Fund, be stayed and be not instituted or proceeded with without the leave of the Court.

21 Manifestly, this paragraph was designed to stay and restrict proceedings arising from the conduct of the business of the Sable Fund before its business was placed under curatorship and not to restrict proceedings arising from the conduct of the curatorship. This is reinforced by the provisions of s 5(8)(a) of the FIA which, as I shall show, empowers anyone to bring proceedings, without further leave of the court, to set aside or alter any decision made or any action taken by the curator or the registrar with regard to any matter arising out of, or in connection with, the control or management of the business of a fund under curatorship.

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

23 Prayer 2 of the notice of motion was for an extension of the period of 180 days provided for in s 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). The applicants' case is that PAJA is not applicable to the relief they seek and the prayer for the extension of the period contemplated in s 7(1) is sought if the court finds that the applicants' cause of action is one which in fact must be brought under PAJA.

24 Prayer 3 was for a declaration that the agreements contained in the letters with which I dealt above are null and void and set aside. The applicants encountered a difficulty in this regard when it was pointed out that the MOU is in fact a recordal of several agreements and parties represented by attorney Wandrag are not before the court.

25 To meet this concern, the applicants proposed in a draft order to limit the relief they seek in this regard to the final sentence of clause 6 of the MOU. Counsel for the respondents countered that this would result in an impermissible severing of clause 6 from the other contractual material in the MOU constituting the remuneration agreement. I shall deal with this issue below.

26 In prayer 4, the applicants ask that Mr Mostert, the curator and ALM Inc be ordered to repay to the Sable Fund all money received pursuant to any of the agreements identified in prayer 3. Prayer 5 is a claim for a statement of account by the same respondents of all money received by or on behalf of the Sable Fund from April 2006 to the present date. Prayer 6 is for an order directing Mr Mostert, the curator, the Sable Fund, ALM Inc, the FSB and the seventh respondent to comply with paragraph 9 of the Poswa order whenever professional and curator's fees are to be incurred.

27 In prayer 7, costs are sought only against those respondents who oppose the application.

28 The only basis for the relief advanced before me by counsel for the applicants is the following: they submit that on a proper interpretation of the phrase *in accordance with the norms of the attorneys profession, as agreed with the [FSB]*, the curator and the FSB were limited in their capacity to contract for curator's remuneration to be paid out of the assets of the Sable Fund to a reasonable remuneration calculated on the same basis as members of the attorneys' profession are entitled to charge fees. The fee arrangement of a percentage, as recorded in clause 6 of the MOU, thus counsel for the applicants, constitutes a contingency agreement. All contingency agreements

between attorneys and their clients, counsel submit, are prohibited at common law. This rule, counsel submit, is a norm of the attorneys' profession. The only exception to this rule, argue counsel, is an agreement which falls within the parameters created by ss 2 and 3 of the Contingency Fees Act[7] (CFA). An agreement between attorney and client consistent with the CFA, counsel submit, would result in a fee agreement between attorney and client consistent with the norms of the attorneys' profession.

29 But, say counsel for the applicant, there is no suggestion in the present case of an agreement whose form and terms would constitute compliance with the provisions of the CFA as applied as a norm under paragraph 9 of the Poswa order. So the remuneration agreement, counsel submit, cannot pass the threshold test imposed by the Poswa order.

30 Before I set out the position of the respondents on this, the central issue, I must deal with the special defences which the respondents have advanced. The first of these is that the applicants should be refused a hearing because of the application of what they call the doctrine of clean hands.

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[7] 66 of 1997

31 Perhaps a good starting point in this regard is *Mulligan v Mulligan*,[8] where it was held that a fugitive from justice, or a person who has deliberately placed himself beyond the jurisdiction of the court, had no standing to litigate. A fugitive, it was held, did not have "clean hands". By this is meant that such a person would

> ... be in a much more advantageous position than an ordinary applicant or even peregrines, who is obliged to give security. He would have all the advantages and be liable to none of the disadvantages of an ordinary litigant, because, if unsuccessful in his suit, his successful opponent would be unable to attach either his property, supposing he had any, or his person, in satisfaction for his claim for costs. Moreover, it is totally inconsistent with the whole spirit of our judicial system to take cognisance of matters conducted in secrecy. It is true the applicant is entitled to present his petition through a solicitor, but, nonetheless, while disclosing his whereabouts to his solicitor, he withholds that information from the court and from his opponent. As a fugitive from justice, he is not only not amenable to the ordinary criminal and civil processes of the court, but as far as this Court is concerned, it cannot call upon him to appear in person to give evidence on oath; it cannot order his arrest in case the facts testified to in his affidavit are proved to be false, whereas on the other hand he would be able to incept criminal proceedings for perjury to have been committed by his opponent. And, in this case, he would be able to involve the authority of the court to arrest his opponent if she were suspected of flight with the property sought to be interdicted.

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8 1925 WLD 164

> Such a litigant might, moreover, conceivably be the cause of the courts being unable to arrive at any decision on the facts sought by him to be determined, if, during the hearing of the application, the court were to find that justice could not be done unless he was called to give evidence on oath before it. Were the court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets law and order in defiance.

32 This extreme position has not stood the test of time in its principled rigidity. In the case of a fugitive, it has recently been held that the fact that an applicant is a fugitive is no more than a factor which a court may take into account in considering whether the fugitive applicant should be heard.[9]

33 Another situation in which the concept of clean hands has been considered is in relation to an application for the winding-up of a company on the grounds that such an order is just and equitable because those who control it are deadlocked. In some of the cases, relief has been denied on the grounds that the applicant contributed to the deadlock and thus did not have clean hands. But the modern approach there too is that absence of clean hands is no more than a

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9 *Harris and Others v Rees and Others* 2011 2 SA 294 GSJ 301

factor to be taken into account in arriving at the value judgment prescribed by the statute.[10]

34 In a number of cases, the clean hands doctrine has been raised in the context of applications for discretionary remedies, such as interdicts. The uncleanliness is said in these cases to relate to the motive of the applicant in bringing the proceedings or some other morally opprobrious or criminal act committed by the applicant which has a connection to the proceedings. In this category of cases, the thrust of modern judicial reasoning is that the conduct complained of is no more than a factor to be weighed in the exercise of the judicial discretion.[11]

35 Yet another category of cases in which the clean hands concept has been considered is that of the litigant who seeks the return of performance under an illegal transaction. As was pointed out in *Klokow v Sullivan*,[12] the principle that such a party must show an absence of any knowingly unlawful conduct in relation to the illegality as a prerequisite to an entitlement to recover has been relaxed since

10 See eg *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 5 SA 1 SCA paras 27-28

11 For some of the most recent cases, see eg *Treatment Action Campaign v Rath and Others* 2007 4 SA 563 C; *Mgoqi v City of Cape Town and Another; City of Cape Town v Mgoqi and Another* 2006 4 SA 355 C

12 2006 1 SA 259 SCA paras 17-18

the celebrated case of *Jajbhay v Cassim*[13] in 1939. One such ground for relaxation is the overriding consideration of public policy.

36 In the present case, the respondents complain of an improper motive on the part of Mr Nash. It is not suggested that this motive extends to Midmacor or that Midmacor is the *alter ego* of Mr Nash. The motive is that Mr Nash hopes through success in this case to frustrate the curator's right to compensation and thereby stultify the curator's efforts to bring Mr Nash, as it were, to justice and to recover money for the benefit of the Sable Fund.[14]

37 I accept that Mr Nash has the motive imputed to him. The investigations which might lead to the recovery of money, however, are at an advanced stage, if not completed, and money has been recovered which is available for payment to members when due processes have been completed. They might decide to use this money to pursue further investigations. As far as bringing Mr Nash to justice is concerned, his criminal trial is at an advanced stage at the instance of the national prosecuting authorities. I cannot see that any

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13 1939 AD 537

14 In this regard, counsel for the respondents referred to an email dated 14 August 2013 in which Mr Nash gloated that the present application would be a "dagger at their commercial heart!" But Mr Nash also said he believed he had a good case.

further investigation by the curator is needed or that money need be expended by the Sable Fund in that connection.

38 But to my mind the most important factor of all at this level is that the applicants are complaining in relation to the remuneration of an office bearer who is exercising public power. It is in the highest degree in the public interest that such complaints should be ventilated and that appropriate relief should issue if such a complaint is well founded. To suppress such an investigation on the ground that the applicant hopes that the ultimate order of court will discomfort the *ex hypothesi* offending office bearer or will disable the functions the office bearer is to perform will seldom if ever weigh against the need to uphold the rule of law in this regard. Moreover, I do not think that this is a case of abuse of legal process. The applicants are not trying to use court procedure for a purpose other than that for which it was primarily intended.[15]

39 And of course, Mr Nash has a further motive for bringing this case. He thinks that the curator is charging too much for his services and that an order of court in his favour will mean that there may be more money for the Sable Fund. It is unnecessary at this level to find that

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15 Compare *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 SCA para 50.

Mr Nash is being altruistic: the more money in the Sable Fund, the smaller the loss that can be attributed to the actions of Mr Nash.

40 In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others (No 1)*,[16] the applicants sought to review certain disciplinary proceedings taken against them pursuant to which they were dismissed. The question of the cleanliness of their metaphorical hands was considered. The court had this to say:[17]

> [81] [The applicants] have succeeded in this application, not because they have clean hands, but because the Constitution is supreme and its fundamental rights protect everyone, even the basest of individuals, from the abuse of governmental power.
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> [82] The respondents, however, are far from blameless. They acted with no regard for the disciplinary code and procedure that they were bound to apply. In so doing they acted cynically and in bad faith: they, as senior administrators in the department, must have known that what they were doing was not permitted, yet they proceeded, not even attempting to comply with their clear duties. The respondents are public officials, clothed with statutory powers that they hold in trust on behalf of the public, and subject to statutory and constitutional duties. For them to have approached this matter as they did was not only unconstitutional but also unacceptable from the

16 2008 3 SA 91 E

17 Footnotes omitted.

> perspective of political morality: the State and, self-evidently, the officers through which it exercises its powers and performs its functions, are meant to serve as role-models for the populace.
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> [83] But for the fact that the respondents displayed a cynical disregard for the Constitution and the law similar to that displayed by the applicants, a disregard that cannot be tolerated in a constitutional State, I would have considered withholding any remedy to which the applicants would otherwise have been entitled. The applicants and the respondents all have dirty hands. On the one hand, I consider it necessary in order to vindicate the Constitution to grant the bulk of the relief sought by the applicants.

41 I respectfully subscribe broadly to the approach of the learned judge. The facts in that case are of course far removed from the present but the principle underlying the exercise by the learned judge of his discretion in favour of the applicants is that vindicating the Constitution is a value to which the courts must give very great weight. The exercise of public power is always a constitutional matter. I decline to allow any improper motive on the part of Mr Nash in bringing this case to obstruct the proper ventilation of the issues which the case raises.

42 The next attack of the respondents with which I shall deal is that upon the standing of the applicants. The applicants claim to have standing on two bases. The first is that Mr Nash was throughout a member of

the Sable Fund and that Midmacor was at a stage its principal employer. The respondents do not suggest that as member and principal employer respectively the applicants will not have standing. The challenge is that the applicants were not *bona fide*, because they formed their relationships with the Sable Fund in order to plunder it.

43 In a report dated 22 May 2006, the curator in fact asserted that the applicants bore the relationships to the Sable Fund in question and, in the same report[18] observed that a participating employer has been held by the courts to be the controlling mind of the fund in question. The curator reported in the same report[19] that the past management of the Sable Fund required further investigation and scrutiny.

44 Yet when the applicants sought to use the curator's own findings as a basis for standing, the curator changed his stance somewhat to suggest that the conduct of the applicants which the curator believed required further investigation and scrutiny somehow rendered them something less than member and principal employer respectively and disabled them from bringing the curator's own conduct before the court for scrutiny. I reject this proposition as incorrect. Even if the applicants are guilty of the conduct suggested and even if they formed

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18 Paragraph 13

19 Paragraph 30

the relationships with the Sable Fund to facilitate their plundering of it, those facts do not somehow cancel their relationships. They remain member and the principal employer respectively, vested with the rights and obligations which those relationships bring.

45 Moreover, on the facts, the alleged connection between the conduct imputed to the applicants and the plundering of the Sable Fund cannot be made. Counsel for the respondents could not suggest why it would be necessary or even useful for the applicants to form these relationships with the Sable Fund for the purpose of plundering it. And finally, it is established on the papers that their relationships *preceded* the connection with the person who is said to have devised the scheme whereby the plundering took place.

46 I therefore conclude that the applicants have established standing as member and principal employer respectively.

47 The second basis upon which standing is asserted is that provided by s 5(8)(a) of the FIA.[20] Counsel for the respondents submitted that this provision did not provide standing in respect of action on the part of a curator which is the subject of this case. I disagree. The conclusion of the remuneration agreement is a matter arising out of, or in

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20 I quoted this subsection in paragraph 6 above.

connection with, the control and management of the business of the Sable Fund.

48 I therefore find that the applicants are vested with standing by the provisions of s 5(8)(a) of the FIA.

49 The final matter with which I must deal before proceeding to a consideration of the interpretation of paragraph 9 of the Poswa order and its application to the remuneration agreement is whether or not, as was argued on behalf of the respondents, the applicants are required to invoke the provisions of PAJA as a ground for relief. If this is so, then before the application of PAJA itself can be considered, I would have to decide whether the applicants' failure (by some 18 months to two years) to bring proceedings under PAJA within the period prescribed by s 7(1) should be extended under s 9.

50 Although the applicants rely on PAJA in the alternative, in their main cause of action reliance on PAJA is expressly disavowed. The respondents, on the other hand, contend that the applicants' only permissible route to the relief they seek is through PAJA. The respondents rely in this regard on the well known *dicta* to the effect that where PAJA is available, it is impermissible to circumvent PAJA and rely directly on s 33 of the Constitution. Furthermore, in *State*

Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd,[21] it was held that

> ... if the unlawful administrative action falls within PAJA's remit there is no alternative pathway to review through the common law.

51 I think that there are two answers to the respondents' contention. The first is that s 5(8)(a) of the FIA confers a general right on *any person* to apply to court to set aside or alter *on good cause shown* any decision of the curator or the FSB in regard to a matter I have already found to lie within the reach of s 5(8)(a). This is a cause of action quite independent of PAJA or indeed of s 33 of the Constitution. It confers a broad discretionary power on the court to intervene even in situations in which the aggrieved applicant could not succeed under PAJA. It would be absurd to suggest that under s 5(8)(a) a grievance which could find redress under PAJA would be subject to the constraints of PAJA while a grievance not subject to PAJA would not be subject to such restraints.

[21] 2017 2 SA 63 SCA para 33

52 The second answer to the respondents' contention is that the applicants are not seeking to review a decision but to set aside a contract. PAJA applies only to *decisions*.[22] A decision is the action of deciding (a contest, question etc), the making up of one's mind; to decide is to determine (a question, controversy or cause) by giving the victory to one side or the other, to settle or to resolve. A contract is a mutual agreement that something shall be done or forborne to be done.[23] Applying the test applicable to the interpretation of documents, with which I shall deal below, the construction contended for by the respondents does violence to the clear language of the measure.

53 Section 6 of PAJA is concerned with the *review* of administrative actions. But the applicants' attack is not directed at the decision of the parties to the remuneration agreement to enter into that agreement. Whether the applicants could have attacked the decision to enter into the remuneration agreement is to my mind of no moment. The product of those decisions was the remuneration agreement. The remuneration agreement is a legal fact (*regsfeit*) which exists as a consequence, but independently, of the decisions to enter into it which preceded its conclusion.

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22 In s 1 of PAJA, administrative action is defined as "any *decision* taken, or any failure to take a *decision* ...".

23 Shorter Oxford English Dictionary

54 In the situations in which contracts concluded by persons exercising public power are usually attacked (the most obvious example being that of a contested tender), the contract falls as a consequence of the invalidity of the decision of the person taking administrative action. But that is not the only route by which a contract can be assailed.

55 In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others,*[24] it was held that the act by an organ of state of cancelling a commercial contract did not constitute administrative action but was the exercise of a right flowing from the contract itself. I do not overlook that there were differences between the facts of that contract and the remuneration agreement. In entering into the contract in *Metro Inspection Services*, the organ of state was acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution.[25] In the present case, the organ of state was acting pursuant to and constrained by paragraph 9 of the Poswa order.

56 Looking at the contract in *Metro Inspection Services* from the perspective of the supplier of services to the organ of state, I believe that on the logic of the decision of the SCA, the supplier would have

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24 2001 3 SA 1013 SCA

25 Paragraph 18. Nor do I overlook that PAJA was not in operation when *Metro Inspection Services* was decided.

been entitled in contract to invoke the provisions of the contract itself to avoid that contract, even if the ground upon which the supplier hypothetically sought to avoid the contract constituted administrative action on the part of the organ of state.[26] If that is correct, it follows that the supplier could have avoided the contract without recourse to the principles of administrative action if the same contract had been *contra bonos mores*.

57 I have found that their status as member and principal employer of the Sable Fund s 5(8)(a) of the FIA confer standing on the applicants to seek to impugn the remuneration agreement on the ground that it is *contra bonos mores*. As I see it, that puts them in the same position, at the level under discussion, as a non-state party seeking to avoid a contract it has concluded with an organ of state. And from that, in my view, it follows that they need not invoke the provisions of PAJA.

58 I therefore find that the applicants are not subject to the constraints of PAJA in advancing their cause of action in this case. I need therefore not reach the question of delay.

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26 For example, fraud on the part of the organ of state anterior to the conclusion of the contract.

59 The way is finally open to me to consider those matters which I think are at the heart of the dispute between the parties, ie the interpretation of paragraph 9 of the Poswa order and the consequence for the remuneration agreement. I set out the case for the applicants above so that I could deal with and decide the other issues raised by the respondents.

60 The first question raised by the respondents relates to the interpretation of paragraph 9 of the Poswa order. The modern approach to the interpretation of documents has been authoritatively set out in a number of cases decided in the Supreme Court of Appeal. In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,[27] the court held in relation to the interpretation of a provision in a contract:

> Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away.

[27] 2014 2 SA 494 SCA para 12; footnotes omitted.

> Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'.

61 In *Commissioner, South African Revenue Service v Bosch and Another*[28], the court held in relation to the interpretation of a provision in an income tax statute:

> The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material. There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions ... .

62 Specifically in regard to the interpretation of court orders:

> The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules ... . (A)s in the case of a

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28 2015 2 SA 174 SCA para 9; footnotes omitted.

> document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it.
>
> This approach has been endorsed by this court. Kriegler J in *Ex parte Women's Legal Centre* added that the interpretation of a court order 'entails determining the legal context in which the words in the order were used.[29]

63 Counsel for the respondents suggested that the critical phrase "according to the norms of the attorneys profession" in paragraph 9 of the Poswa order should be held to govern the periodicity of the remuneration rather than the character of the remuneration agreement itself. In my view, this interpretation is strained. If what the court intended was no more than that the curator, as mandatory, would be entitled to periodical payments rather than one payment to be made only after the mandate had been completed, that would render the entire critical phrase superfluous. On the other hand, treating both the periodicity and the character of the remuneration as being subject to the norms which govern attorneys in relation to remuneration would ensure that the remuneration agreement ultimately concluded would, for the benefit of the members and others

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29 *Electoral Commission v Mhlope and Others* 2016 5 SA 1 CC para 33. Footnotes omitted

interested in the Sable Pension Fund and for the promotion of good governance, be constrained by norms designed to ensure that the curator was paid a reasonable rate for his services. The functions of a curator and of an attorney undertaking a mandate for a client, while not identical, have much in common; in particular, both have fiduciary duties towards those whose interests they serve.

64 I therefore conclude that the character of the curator's remuneration was required by paragraph 9 of the Poswa order to be agreed in accordance with the norms of the attorneys' profession.

65 Counsel for the respondents argued that the remuneration agreement itself did not constitute a commission agreement for work done. Counsel drew a distinction between the work to be done by the curator himself and the litigious work to be done by ALM Inc. Paragraphs 5 and 8 of the Poswa order describe the curator's powers and duties. These include taking control of, administering and investigating the business of the Sable Fund, recovering its assets, paying out benefits to members, administering the business, drawing statements of account reflecting the financial position of the Sable Fund and reporting on a variety of matters of interest to the court and the FSB.

66 The context in which the order was made and the remuneration agreement was concluded show that the only assets that it was contemplated could be recovered for the benefit of the Sable Fund constituted money owed to it by third parties. So the main activity of the curator was to be to frame demands upon those believed to be liable to the Sable Fund and to prosecute legal proceedings if those demands were not met. For this purpose, amongst others, paragraph 5.9 of the Poswa order empowered the curator to obtain legal assistance and paragraph 5.10 authorised the curator to institute, prosecute and defend legal proceedings on behalf of the Sable Fund.

67 Clearly, the order contemplated that the curator would engage attorneys and counsel to prosecute these claims and possibly also make demands for payment. The argument, accordingly, was that when the curator gave instructions to attorneys to take action on behalf of the Sable Fund to recover money due to it, the curator was acting champertously. But, so ran the argument, the curator was not himself performing work in return for a commission. The attorneys instructed by the curator were to perform that work and the applicants' attack was not directed at the fee arrangement between the curator and the attorneys he engaged for this purpose. So the argument, reduced to its essentials, is that the curator performed the non-litigious work for no remuneration and was no more than the funder in relation

to the litigious work, in respect of which the curator, and not the FSB or the Sable Fund, was obliged to pay the lawyers their fees and disbursements.

68 Of course it was contemplated that the curator would engage the services of ALM Inc, a firm in which Mr Mostert had an interest, but counsel pointed out, correctly, that it was not suggested that ALM Inc was the *alter ego* of Mr Mostert or of the curator so that this fact was irrelevant to the analysis.

69 The legal foundation underlying counsel's submission is to be found in the judgments in *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*[30] (*PWC*), *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*[31] (*SAAPIL*) and *Ronald Bobroff and Partners Inc v De La Guerre*[32] (*Bobroff*). These cases are authority for the proposition that at common law, agreements between a legal practitioner and his client that the legal practitioner will receive his remuneration out of the proceeds that the client recovers in litigation (including cases before quasi-judicial tribunals such as licensing authorities) or that the legal

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[30] 2004 6 SA 66 SCA

[31] 2013 2 SA 583 GSJ

[32] 2014 3 SA 134 CC

practitioner's right to recover will depend on the outcome of the litigation, in a phrase contingency fee agreements between legal practitioner and client, are contrary to public policy, unenforceable and unlawful.[33]

70 I make two observations. Firstly, although there are general statements in these judgments that *all* contingency fee arrangements between legal practitioners and their clients were proscribed by the common law, I think counsel for the respondents are correct when they argue that the courts concerned had in mind contingency fee agreements in litigious matters. This is not surprising because the cases considered were litigious matters and the courts all had to consider the impact of the CFA.

71 But counsel for the respondents went further: they submitted that these cases, and particularly *PWC* were authority for the proposition that in non-litigious matters, legal practitioners *were* under the common law entitled to enter into contingency fee agreements with their clients. I do not read the cases to say this. To my mind the position is rather that the question whether contingency fee agreements between legal practitioner and client in non-litigious matters were permitted at common law has not yet been expressly

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33 *PWC* para 41; *SAAPIL* para 7 approved in *Bobroff* para 5.

decided. Counsel were not able to refer me to any such reported decision and I could not find any through my own researches.

72 So to my mind, the question must be decided according to first principles. *PWC* established that the origin of the prohibition is twofold: in Roman and Roman-Dutch law, agreements to provide a litigant with funds to enable a litigant to prosecute its case (*pacta de quota litis*) were looked upon disfavour because they encouraged speculative litigation. In English law, the provision of assistance to a litigant in which the person providing assistance has no legitimate interest (*maintenance*) and its aggravated form where a person maintains a suit in return for a share in the proceeds (*champerty*) were illegal when found to be contrary to public policy.[34]

73 The principle that such agreements were in our law contrary to public policy was subject to one exception: where a person in good faith gave financial assistance to a poor litigant and thereby helped him to prosecute litigation in return for a reasonable recompense or interest in the litigation, the agreement would not be unlawful or void.[35]

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34 *PWC* para 25

35 *PWC* para 27

74 But this exception did not extend to contingency fee agreements between legal practitioners and their clients. The only legal route for such legal practitioners to conclude lawful contingency fee agreements is through the CFA.[36]

75 The purposes of the prohibition were also twofold: the first was a concern held by the English common law for the integrity of the judicial system; the fear that champertous agreements could give rise to abuses such as the inflation of damages, the suppressing of evidence and the suborning of witnesses. But that concern has diminished, if not entirely disappeared, both in the United Kingdom and in the Republic.[37]

76 What remains, however is the second purpose of the prohibition: the concern that the conduct of practitioners in undertaking speculative actions for their clients could give rise to conflicts of interest between the duty and the interests of legal practitioners.[38]

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36 *PWC* para 41

37 *PWC* paras 29, 32 and 39

38 *PWC* para 42

77 *SAAPIL* makes the same points:[39]

> Contingency fee agreements are a species of *pacta de quota litis*, which were looked upon with disfavour at common law because they were considered to encourage speculative litigation and consequently amounted to an abuse of the legal process. Contingency fee agreements were singled out for particular censure because they are a form of *pacta de quota litis* between a lawyer and his client, which has additional undesirable features. The first is that they compromise the lawyer's relationship with his client by introducing conflicts of interest, and have a high risk of abuse. Contingency fee agreements vest the legal practitioner with a financial interest in the outcome of the case, which may adversely affect a legal practitioner's ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that a contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation, and an overriding desire to secure a successful outcome may tempt him or her into practices which may compromise his or her duties to the court, such as coaching witnesses, misleading the court, falsifying evidence, etc.

78 Christie[40] is of the same view. The learned author's opinion is that any system of payment by results than payment for work done is equally bad.

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[39] Footnote 5 to para 7

[40] *The Law of Contract in South Africa*, 7th ed (2015) 411-413

79 To my mind, the thread that runs through the judgments and commentary is that making a legal practitioner a partner in his client's enterprise tends to subvert the interests of justice. To decide whether an agreement is against public policy, a court must look to the tendency of the proposed transaction, not its actually proved result.[41]

80 With all this in mind, there can be no justification for allowing legal practitioners to conclude contingency fee agreements in relation to non-litigious work. An agreement to charge fees for doing the work required for, say, a stock exchange listing contingent on the listed vehicle's achieving a certain market capitalisation or for drafting an agreement which the client hopes to conclude with an with an organ of state, whether under a tender or otherwise, contingent on the award of the contract or tender to the client has a tendency to subvert the interests of justice as serious as a contingency fee agreement in relation to litigious work. I find that contingency fee agreements in relation to non-litigious work are against public policy for broadly the same reasons that such agreements are contrary to public policy in relation to litigious work.

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41 *PWC* para 24

81 A further submission made on behalf of the respondents is that the critical clause in paragraph 9 of the Poswa order refers to norms and not legal prescriptions. By reference to dictionary definitions, counsel submitted that "norms" and "laws" fall into two rigidly separated categories. A norm is something which is usual, typical or standard. Once it is held that the prohibition against contingency fee arrangements is of general legally binding rather than morally, ethically or societally persuasive application to legal practitioners, so runs the argument, it follows that the prohibition is not covered by the critical clause which refers to norms and not to laws.

82 I think this is a case in which the recourse to dictionary definitions without due regard to the purpose of the provision and its context would lead to an incorrect result. As I see it, the purpose of the inclusion of the critical phrase in the Poswa order in the context of remuneration was to ensure that the remuneration regime was constrained by the well known ethical norms applicable to legal practitioners.

83 Moreover, to my mind, norms and law are not separate categories hermetically sealed from one another. A norm given the force of law remains a norm because the force of law reinforces the character of a norm as something usual, typical or standard. That the respondents'

argument is incorrect can be demonstrated by reference to two reported cases in which separate faith based claims were made for exemptions from the law of the land of general application. In *Prince v President, Cape Law Society, and Others*,[42] the applicant sought to free the norm of his faith based grouping from the strictures of the law relating to the ingestion of a certain prohibited substance; in *Christian Education South Africa v Minister of Education*,[43] the applicant sought to escape the strictures of the law relating to the imposition of corporal punishment at schools under their control.

84 In both cases, the applicants were unsuccessful. But that is not the point. In both cases the applicants pointed to a practice which was the norm in their respective communities and sought to harmonise those norms with the law of the land. In both cases the norm existed independent of the legal prohibition and, if not abandoned in the light of the judgments, continued to exist as norms. And had the respective applicants been successful and had their practices achieved the status of being sanctioned by law, the character of those practices would not have stopped being norms in the communities concerned.

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[42] 2002 2 SA 794 CC

[43] 2000 4 SA 757 CC

85 Counsel for the respondents submitted that the fact that the CFA does not apply to curators in their capacities as such meant that its provisions could not be applied in the present case. I think that this is not the correct way to approach the interpretational problem. The critical clause, as I have found, constrains the FSB and the curator in their choices in relation to remuneration agreements. They may only conclude a remuneration agreement which accords with the norms of the attorneys' profession. The applicable norm is a general prohibition against contingency fee agreements. If the CFA is not available to mitigate the position of curators, that will not entitle those parties to conclude such an agreement.

86 But I think that the basis of the argument is incorrect. If the CFA creates a norm of the attorneys' profession, there is no reason why those parties should not have legitimately concluded a remuneration agreement that complied in substance with the CFA and thus brought themselves within that norm.

87 I was provided by counsel for the applicants, without objection, with an extract from a set of rules of the attorneys' profession which sets out the profession's rules relating to professional fees, tariffs and allowances. The rules govern the manner in which the council constituted by the organised profession or a committee appointed by

the council will assess the fees and disbursements which one of its members may recover, particularly in relation to non-litigious work.[44]

88 Rule 28.3 identifies the considerations of which the council will take cognisance in the exercise of this function "[w]ith a view to affording the member concerned reasonable and adequate remuneration for the services rendered by that member." The council must in every assessment "allow such fees and disbursements as appear to it to have been reasonable for the performance of the work concerned." In so doing, the council is required to take cognisance of a number of factors listed in rule 28.3. These are the amount and importance of the work done; the complexity of the matter or the difficulty or novelty of the work or the questions raised; the skill, labour, specialised knowledge and responsibility on the part of the member; the number and importance of the documents prepared or perused, without necessarily having regard to length; the place where and the circumstances in which the services or any part thereof were rendered; the time expended by the member; where money or property is involved, its amount or value; the importance of the matter to the client; the quality of the work done; the experience or seniority of the member; and whether the fees and disbursements have been

44 Compare rule 28.1.3 which provides that the Council will *not* assess fees or disbursements in litigious matters unless the parties agree that it may do so.

incurred or increased though over-caution, negligence or mistake on the part of the member.

89 Rule 28.9 provides that fees and disbursements determined pursuant to the scheme of these Rules will be "deemed to be reasonable fees and disbursements payable to the member for the services rendered."

90 It is striking that in this compilation, there is no suggestion that the organised attorneys' profession contemplates a contingency fee or (subject to one exception with which I shall shortly deal) a fee in the form of a commission.

91 The exception in these rules relates to collection commission in respect of claims "handed over for collection". In such a case, an attorney may, under rule 29, charge "reasonable attorney and client charges and reasonable collection commission". This provision appears to have its origin in item 13 of Part II to Table A to the Magistrates' Courts Rules of Court which provides that as between party and party, when a judgment debt is payable in instalments in terms of a judgment or agreement, a fee of 10% subject to a specified maximum per instalment may be recovered from the debtor but that no additional fee may be charged for any attendance in connection with the receipt or payment of any instalment.

92 I did not hear full argument on the collection commission rule and I express no opinion on its validity or otherwise. For present purposes, it suffices to say that the limited exception in relation to collection commission cannot constitute a general norm applicable to non-litigious work.

93 For these reasons, I conclude that the remuneration agreement concluded between the FSB and the curator is against public policy because it amounts to an unlawful contingency fee agreement, is thus not in accordance with the norms of the attorneys' profession and is thus invalid. The conclusion of the remuneration agreement constituted the exercise of public power, which is always a constitutional matter. Under s 171(1)(a) of the Constitution, I must declare the remuneration agreement to be unlawful and invalid.

94 An issue arose during argument as to the extent of the declaration which was required. The issue arose because the arrangement recorded in the letter dated 10 August 2006 (SJN11) was said by the respondents to have fallen away, never to have been implemented and to have been superceded by the provisions of the MOU. On this basis it was argued by the respondents that there was no need to declare the agreement recorded in SJN11 invalid or to set it aside.

95 The foundation of my finding is that paragraph 9 of the Poswa order did not permit the conclusion of a contingency fee agreement. I do not want there to be any room for a suggestion later that this judgment dealt only with the remuneration agreement recorded in the MOU and did not deal with the remuneration agreement in SJN11. It would be highly undesirable, to say the least, if one or other of the respondents resisted compliance with the thrust of this judgment on that basis. There can in the light of the position advanced by the respondents be no prejudice to them if the orders I propose to make include a reference to SJN11.

96 A further issue arose from the fact that the MOU records several agreements. Some of the contracting parties under the MOU are not parties to this action. It would of course be quite inappropriate to make orders affecting the rights of those other contracting parties and not merely the remuneration agreement. To meet this difficulty, counsel for the applicants put up a draft order in which they sought to restrict the order of invalidity in relation to the MOU to clause 6. Counsel for the respondents countered that this would amount to an impermissible severing and result in the court's impermissibly making a contract for the parties.

97 In my view this is a matter of form rather than substance. The thrust of the applicants' case is directed at the remuneration agreement. The draft put up by counsel for the applicants was an attempt to achieve, if the applicants were successful, a declaration that the remuneration agreement, and only the remuneration agreement, was void. The difficulty suggested by counsel for the respondents will be met if my order makes it clear that the MOU is only set aside to the extent that it constitutes the remuneration agreement or part of the remuneration agreement between the curator and the FSB and that all other agreements recorded in the MOU remain unaffected by any order made in this case.

98 With this in mind, I intend not to restrict the order of invalidity in relation to the MOU to its clause 6 but to make it clear that only the remuneration agreement is to be declared invalid and that the rights and relationships of parties other than those created by the remuneration agreement are not affected by the orders I propose making.

99 I turn to remedy which on any basis must be just and equitable. As a first step, I shall set the remuneration agreement aside. Counsel for the respondents submitted that I should leave the remuneration agreement intact, for two reasons: firstly, the hardship this would

cause to members of the Sable Fund, whose entitlements would now have to be recalculated in accordance with this judgment; secondly, the hardship this would cause to the curator who suggests that he did not keep records which would enable him to calculate a reasonable remuneration.

100 I think that both these grounds are overstated: the time required to recalculate the amounts due to members should not be very long once the curator's remuneration has been agreed in accordance with paragraph 9 of the Poswa order and properly assessed; and the curator will have reports, correspondence and file notes from which his entitlement in accordance with what I have found to be the law can be calculated.

101 But whatever hardship may be caused by my orders, these considerations must in my judgment yield to the necessity that remuneration agreements under which those exercising public power enjoy remuneration from the funds of others be concluded according to law. That is, in a fiscal sense, the foundation of our democracy and the essence of the rule of law.

102 In the second instance regarding remedy, I shall order the curator to provide the applicants with a statement of account of money received or debited by him as fees during the period of the office held by the curator. This form of the accounting required of the curator was proposed in the draft order handed up by the applicants during their argument in reply and is more restricted than that in the prayer in the notice of motion. The duty to account arises from the fiduciary relationship between the curator and the Sable Fund. I shall afford the curator three months to comply with this order.

103 The next question is as to the content of the court imposed remedy which ought to follow the production of the account. The applicants ask that the curator be ordered immediately to repay to the Sable Fund all that he has received by way of remuneration. But I do not think that would be appropriate at this stage. It is open to the FSB and the curator to conclude a remuneration agreement in accordance with paragraph 9 of the Poswa order. I express no opinion on whether or not any such new remuneration agreement might lawfully be of retrospective operation. For this reason, I think that an order simply providing for debatement of the account may be insufficient. I shall therefore provide in the order for any party within a reasonable period after the production of an account to apply to court for further relief arising from the terms of the order.

104 As to costs: although the applicants sought in the notice of motion as originally framed an account from Mr Mostert, the curator and ALM Inc, counsel for the applicants conceded that the duty to account was on these papers restricted to the curator only. On that issue, therefore, Mr Mostert and ALM Inc were successful. But the key issue in the case, on which all the respondents except the Sable Fund joined issue with the applicants, related to the question whether the remuneration agreement could survive scrutiny. On that issue the applicants were successful and thus substantially successful in the case. The applicants sought no relief against the Sable Fund. On this basis, I shall order the respondents other than the Sable Fund to pay the applicants' costs. All the parties used the services of two counsel and the papers and the issues involved certainly justified their employment.

105 Certain condonation applications were brought in relation to the late delivery of affidavits. Condonation was conceded but I am told that the costs were reserved for the consideration of this court. It is appropriate that the costs of those applications be born by the applicants in each case for condonation.

106 The applicants also ask for a special costs order relating to material introduced by Mr Mostert and ALM Inc bearing upon the character of Mr Nash. In view of my conclusions, no special such order need be made but I must state that the character attacks began in the founding affidavit. The attacks made by Mr Mostert were in any event relevant to the defence, which I found to be ill-founded, of unclean hands.

107 I make the following order:

1 To the extent necessary, the applicants are granted leave to institute these proceedings pursuant to paragraph 4 of the order of this court granted on 20 April 2006 under case no. 10545/2006, forming annexure SJN1 to the main founding affidavit of the applicants (the Poswa order).

2 The remuneration agreements between the fifth and/or sixth respondents and the second respondent (the curator) recorded in annexures SJN11 and SJN13 to the main founding affidavit of the applicants are hereby declared null and void *ab initio* and are set aside.

3 Nothing in this order contained shall affect the rights of any party to any agreement reflected in SJN13 or the validity of any agreement recorded in SJN13 other than as provided in 2 above.

4 The curator is directed to render, within three months of the date on which this order is made, an account supported by vouchers of all curator's fees debited or received on behalf of the third respondent from the date upon which the curator was appointed under the Poswa order to the date upon which the account is produced.

5 Any party may, within a reasonable time after the curator has provided the account contemplated in paragraph 4, apply to court on notice to all the other parties for further relief including, but not limited to, an order that the curator must repay to the third respondent money received by him as his fee under any remuneration agreement set aside by this order.

6 The applicants for condonation in applications where costs were reserved for the consideration of this court must pay the costs of the applicants in the main application in relation to such condonation applications on the unopposed scale.

7 The first, second, fourth, fifth, sixth and seventh respondents must pay the applicants' costs of suit in relation to this application, including the costs consequent upon the employment of both senior and junior counsel.

NB Tuchten
Judge of the High Court
5 April 2017

For the applicants:
Adv A Subel SC and Adv W de Bruyn
Instructed by Cowan-Harper Attorneys
Johannesburg

For the first and fourth respondents:
Adv CDA Loxton SC and Adv A Milovanovic
Instructed by Assheton-Smith Inc
Cape Town

For the second and third respondents:
Adv J Dreyer SC and Adv J Bleazard
Instructed by Polson & Ross Attorneys
Johannesburg

For the fifth, sixth and seventh respondents:
Adv Q Pelser SC and Adv EL Theron SC
Instructed by Rooth and Wessels
Pretoria

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