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

Case Numbers: A2024-041968 & A2024-042123

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In the matter between:

THE CADAC PENSION FUND	First Appellant
ANTONY LOUIS MOSTERT	Second Appellant
and	
EXECUTIVE OFFICER OF FINANCIAL SERVICE BOARD	First Respondent
IZAK VAN ROOIJEN	Second Respondent
PAUL HARMSE	Third Respondent
PETER GILBERT	Fourth Respondent
SHAUNINE BEKKER	Fifth Respondent
SIMON JOHN NASH	Sixth Respondent
ELENA FORNO-NASH	Seventh Respondent

CHRISTO ENGELBRECHT Eighth Respondent

KERRY PROCTOR Ninth Respondent

and in the matter between:

SIMON JOHN NASH First Appellant

ELENA FORNO-NASH Second Appellant

and

EXECUTIVE OFFICER OF FINANCIAL SERVICE BOARD First Respondent

CADAC PENSION FUND Second Respondent

ANTONY LOUIS MOSTERT N.O. Third Respondent

IZAK VAN ROOIJEN Fourth Respondent

PAUL HARMSE Fifth Respondent

PETER GILBERT Sixth Respondent

SHAUNINE BEKKER Seventh Respondent

CHRISTO ENGELBRECHT Eighth Respondent

KERRY PROCTOR Ninth Respondent

Coram: Yacoob, Wanless et Mahosi JJ

Heard: 30 April 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the relevant electronic platform. The date and time for hand-down is deemed to be 10h00 on 12 of FEBRUARY 2026.

Summary: Appeal against judgment determining costs in litigation relevant to curatorship of Fund – where affidavit from curator required and relied on by court – less important whether filed by curator *qua* curator or in

personal capacity – context does not support order that curator pay costs in personal capacity.

Appeal – where Supreme Court of Appeal explicitly set aside all costs orders and refers to High Court to consider – High Court must consider all costs orders afresh, including those referred to in other parts of the order.

Costs – seldom interfered with on appeal - court to take into account all relevant circumstances.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg (Vally J sitting as Court of First Instance)

In case number A2024-041968 (the first appeal):

1. The appeal is upheld.
2. Paragraphs 10 and 10.1 of the orders of Vally J made on 19 May 2023 are set aside.
3. The order of Vally J in paragraph 9 of the order of 19 May 2023 is deemed to include those costs originally dealt with in paragraphs 10 and 10.1.
4. References to paragraphs 10 and 10.1 in the remainder of the order of Vally J are to be considered *pro non scripto*.

In case number A2024-042123 (the second appeal):

5. The appeal is dismissed with costs on scale C.

JUDGMENT

THE COURT:

Introduction

- [1] This judgment deals with two separate appeals brought against a single order and judgment of Vally J. In the first appeal (A2024-041968) the Cadac Pension Fund (“the Fund”) as the First Appellant and Anthony Louis Mostert N.O. (“Mostert”) as the Second Appellant, seek to overturn para 10 of Vally J’s order in terms of which, *inter alia*, the Court disallowed Mostert’s costs in opposing a counter-application brought for his removal as provisional curator of the Fund and precluded him from recovering his costs from any party in the proceedings. The first appeal is not opposed by any respondent, despite the necessary consequence of its success being that the erstwhile trustees become liable for those costs.
- [2] In the second appeal (A2024-042123) Simon John Nash (“Nash”) and Elena Forno-Nash (“Forno-Nash”), seek to overturn paras 3, 3.1, 3.2 and 4 of Vally J’s order in terms of which they, together with their former co-trustee of the Fund, Ms Shaunine Bekker (“Bekker”), were held personally liable for litigation and curatorship costs. Both appeals are with the leave of the Court *a quo*.

Background

- [3] The original application was heard in this Court over thirteen years ago and the record in this appeal spans almost 2 500 pages. Thus, we do not provide a comprehensive overview of the entire matter. Instead, we set out a summary of the judgments that are relevant to the issues before this Court.
- [4] The Fund was administered by Bekker, Nash and Forno-Nash, as trustees. On 21 December 2010, the Executive Officer of the Financial Services Board (“the

FSB”)¹ brought an urgent *ex parte* application to place the Fund under provisional curatorship. The matter was heard by Claasen J who granted the order on that date and appointed Mostert as the provisional curator. Of particular significance for purposes of this appeal, the order made by Claasen J included a *rule nisi* calling upon interested parties to show cause why:

...6.2 the costs of these proceedings, as between attorney and client, as well as the costs of the curator and the costs of the inspection conducted in to the affairs of the Fund in terms of the Inspection of Financial Institutions Act, No. 80 of 1998, should not be payable by the trustees of the Fund in their personal capacity, alternatively from the assets owned, administered or held by or under control of the Fund; (our emphasis)

- [5] Between 2010 and 2013 the parties engaged in various interlocutory disputes and various interlocutory orders were granted, which are not relevant to the appeals. On 15 February 2011 the Fund, represented by new trustees acting on Nash’s “advice”, brought a counter-application seeking to remove Mostert as the Fund’s provisional curator and seeking to appoint Norman Klein (“Klein”) and Gavin Gainsford (“Gainsford”) as the new provisional curators. During the course of 2011 the Fund also brought an application to join Mostert to the main application in his personal capacity. Various affidavits were filed, including by Nash in support of the Fund, although he was no longer a trustee. Mostert opposed the Fund’s (counter-) applications and, shortly before the final return day of the matter, sought condonation for and delivered a comprehensive affidavit which dealt with the merits of the counter-application and the main application. In particular, he included information he had uncovered whilst acting as provisional curator of the Fund.
- [6] On 13 December 2013, Heaton-Nicholls J (as she then was) handed down judgment (“the Nicholls judgment”),² confirming Claasen J’s provisional order; placing the Fund under final curatorship and retaining Mostert as its final

¹ The FSB has been superseded by the Financial Sector Conduct Authority (the FSCA) but in order to be consistent with the papers and the numerous earlier judgments, we refer to the body as the FSB.

² Heaton-Nicholls J, now Nicholls JA, stopped using the hyphenated form of her name after the judgment referred to. Since the SCA in its order refers to her as Nicholls J, and for clarity, we shall do the same.

curator. We do not set out the original order in full, as it was later varied and the varied order repeats those parts of the order that survived.

- [7] In her judgment, Nicholls J found that it was not for Mostert to defend his appointment. It is for this reason that the Court concluded that the costs of drafting his affidavit must be specifically disallowed, that no party should be burdened by those costs, and that Mostert should pay them personally. The order made was in accordance with that ruling.
- [8] On 8 April 2014, Nicholls J issued “the Varied Order”, which included a *caveat* to her original order. This order was accompanied by a judgment setting out the reasons for variation, and explaining that the FSB had brought an application to deal with alleged ambiguities. The varied order reads:

In the curatorship application (case no 50596/2010)

1. *The provisional order granted by Claassens J on 21 December 2010, attached marked A, is confirmed and made final in respect of paragraphs 1 to 4, 5.1 to 5.8 and 5.10 to 5.16, 6.3, 8.1 to 8.5 and 9 thereof.*
2. *Paragraph 5.9 of the provisional order is confirmed in the following terms:*
"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 made confirming paragraph 5.9 of the provisional order, nothing therein detracts from the applicant and curator's obligations to ensure payment of all fees and disbursements of AL Mostert and Company Incorporated from the business of the Cadac Pension 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. *Paragraph 6.2 of the provisional order is confirmed, in the following terms:*

"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 respondent.

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 the 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.

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.

- 4. The curator shall under the control of the Registrar of Pension Funds (Registrar) furnish the Registrar with progress reports on the curatorship on a six-month basis.*
- 5. The curator shall file a further report to this court by no later than 28 February 2014 advising on the status of the curatorship as at 31 December 2013.*
- 6. On receipt of the curator's report, the Registrar shall re-enrol the matter for consideration of the report.*
- 7. Should the members so require, a counsel of their own choice, including senior counsel, shall be appointed at the expense of the fund, in the event of an application for the setting aside of any section 14 transfers in terms of the Pension Funds Act.*

In the counter application (also case number 50596/2010)

- 8. The counter application issued on 15 February 2011, purportedly in the name of the Cadac Pension Fund (but which was itself cited therein as the first respondent), is dismissed.*

9. *The third to tenth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the applicant's 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) 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 counsel's fees) paid to AL Mostert and Company Inc. and the curator's remuneration only in relation to the preparation of the counter-application.*

Reserved costs of the urgent application brought by the provisional curator on 15 February 2011

11. *The first, second, fifth, sixth and seventh respondents cited in the court order attached marked B, 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.*

In the application issued by Paul Matthew Machin on 10 August 2012 under the same case number (for the removal of the provisional curator and to declare all litigation declared by him to be a "nullity")

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.*

In the application to join Mostert in his personal capacity (also case number 50596/2010)

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 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.*

This order shall lie for inspection by any member of the Fund at the office of the Fund, being 1[...] B[...] Drive, Cnr W[...] N[...] and B[...] Drive, The B[...] O[...] p[...], Ground Floor, S[...] H[...], until 31 January 2014, and thereafter at the W[...] O[...] p[...], Building 1[...], First Floor, W[...] D[...], W[...].

[9] All parties appealed Nicholls J's orders and on 29 February 2016 the Supreme Court of Appeal ("SCA") granted an order by consent ("the SCA order") in the following terms:

1. *The provisional order granted by Claasen J on 21 December 2010 is confirmed and made final in respect of paragraphs 1, 3, 4, 5.1 to 5.8 and 5.10 to 5.16.*
2. *Anthony Louis Mostert ("Mostert") be appointed the curator of the Fund together with Johan Esterhuizen and Norman Klein and they are absolved from furnishing security.*
3. *The curators will take all decisions on a majority basis.*
4. *The curators shall be entitled to periodic remuneration in accordance with the norms of their respective professions, as agreed with the Registrar.*
5. *Paragraphs 2, 2.1 and 2.2 of the order of Nicholls J granted on 8 April 2014 are confirmed.*
6. *All cost orders granted by Nicholls J on 13 December 2013 as read with the clarification order granted on 8 April 2014 are set aside and reserved for later determination by the Court on consideration of the curators' final report.*
7. *The curators shall under the control of the Registrar of Pension Funds finish the Registrar with progress reports on the curatorship on a six monthly basis.*
8. *The curators shall prepare a final report (including any minority report) and submit it to the court by 31 August 2016 or such other date as the court may determine for a final determination on all outstanding issues, including costs orders.*
9. *The costs of the appeal are reserved for determination by the court on consideration of the curator's final report.*

[10] Mr Klein declining appointment as a curator, the SCA made another order by agreement on 17 November 2017, varying the previous order to allow the

Chairman of the Johannesburg Bar Council to appoint an additional curator, and setting a new date for the submission of the final report. Subsequent to the parties seeking clarification of the above order the SCA issued a letter on 12 April 2022 (“the SCA letter”) stating that:

‘The court’ clearly was meant as the High Court, which would be required to deal with the matter after consideration of the Curators’ final report, including dealing with liability for the costs of appeal.

In addition, the SCA confirmed that:

[t]here is no contradiction as alluded to by you. Para 2.1 of the order of Nicholls J of 8 April 2014 dealt very specifically with fees and disbursements of AL Mostert and Company, with certain exclusions. That order was not set aside. The costs orders, however, in paragraph 6 of the order of this court, as agreed by the parties, were all set aside.

[11] In light of the SCA order and the SCA letter the matter was set down to determine costs and issues arising from Nicholls J's judgment. On 8 February 2023, Vally J heard the matter and issued a judgment on 19 May 2023 with the following order (“the Vally 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 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 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.*

[12] The principal issues for determination by this Court (on appeal) are:

- a. whether Mostert should be allowed the costs of opposing the counter-application brought for his removal as provisional curator (the first appeal), and

- b. whether the “Nash parties” (as Nash and Forno-Nash style themselves) should be liable for the costs of the litigation and curatorship (the second appeal).

[13] At the outset, we consider it appropriate to note that it is well-established that a court will interfere with a costs order only in very limited circumstances. A costs order (particularly for costs of litigation) is an exercise of judicial discretion which would only be interfered with if it is demonstrated that the court exercised its power capriciously or upon a wrong principle, was somehow biased, or had no substantial reason for its decision.

The first appeal

[14] At the heart of the Fund’s and Mostert’s (for convenience, we refer to these appellants collectively as “the first Appellants”, to distinguish them from the appellants in the second appeal) appeal, is para 10 of the Vally order (and also of the Nicholls orders), which disallowed Mostert’s costs in opposing a counter-application brought for his removal as provisional curator of the Fund and precluded Mostert from recovering his costs from any party to the proceedings. It was submitted, on behalf of the first Appellants, that the Vally order is in essence a *de bonis propriis* costs order against Mostert (as was the Nicholls order). It was also submitted that Vally J erred in not considering that part of the order afresh.

[15] It was further submitted that such costs order was inappropriate, given that, *inter alia*, Mostert had, at all times, acted in his capacity as curator of the Fund and, more importantly, the evidence he adduced in his answering affidavit to the counter-application had been integral in assisting the court in unravelling the unlawful conduct of the erstwhile trustees of the Fund.

The factual background relevant to the first appeal and submissions by the first Appellants based thereon

- [16] When dealing with the factual background relevant to the first appeal and submissions by the first Appellants based thereon, this judgment will deal only briefly with the judgments and orders already referred to earlier herein. However, unnecessary repetition will be avoided.
- [17] On 15 February 2011 the “Fund” (but, it was submitted on behalf of the first Appellants, the true actors were Van Rooijen, Harmse and Gilbert,³ the trustees at the time, under the control and directions of Nash) instituted a counter-application seeking to remove Mostert as the Fund’s provisional curator and to appoint Klein and Gainsford as the new provisional curators.
- [18] As set out earlier in this judgment, Mostert opposed this counter-application and delivered a comprehensive answering affidavit, which dealt with the merits of the counter-application, as well as with issues relating to the main application (including information he had uncovered whilst acting as provisional curator of the Fund). Nicholls J found that Mostert ought not to have opposed the application on his own behalf, and disallowed his costs in the counter-application.
- [19] The SCA then set aside all the costs orders granted by Nicholls J and reserved them, to be determined after considering the final report of the curators, while confirming paras 2, 2.1 and 2.2 of her order.
- [20] It is here that the issue arises. Vally J considered that, by confirming paras 2, 2.1 and 2.2 of the Nicholls order, the SCA also by necessary inference confirmed paras 10 and 10.1 of that order. He did not, therefore, reconsider those costs.
- [21] On behalf of the first Appellants, it was submitted that, regard being had to the text, context and purpose of the SCA order, it is clear that, on a proper interpretation, this Court is (as indeed Vally J was) entitled and obliged to

³ These are the second to fourth respondents in the first appeal and the fourth to sixth respondents in the second appeal.

reconsider the costs order set out in paras 10.1 and 10.2 of the Varied Order of Nicholls J. This submission is also accepted by this Court.

- [22] It was further submitted that para 6 of the SCA order makes it clear that all costs orders, without exception, were set aside. This was confirmed by the SCA in the SCA Letter. Accordingly, the text makes it clear that the costs orders set out in paras 10 and 10.1 were set aside and Vally J was required to reconsider those orders. In the opinion of this Court this submission cannot be disputed. Both the text and purpose of the SCA order support the conclusion that paras 10 and 10.1 of Nicholls J's order have been set aside by the SCA.
- [23] In this regard, a core issue in the application before Nicholls J was the allegation that Mostert was biased and had an ulterior motive and agenda. The SCA appointed two independent curators to consider Mostert's conduct prior to their appointment and to conduct their own investigations independent of Mostert. Paragraph 6 of the SCA order thereafter states that the issue of costs would only be determined by the Court "*on consideration of the curators' final report*".
- [24] In the premises, it was submitted, on behalf of the first Appellants, that the investigation by the independent curators into Mostert's conduct, together with their progress and final reports, was something the SCA considered essential to a determination on the issue of costs. In this regard, the reports of Esterhuizen and Keevy and investigations of Mostert's conduct would (and do) inform the court as to whether Mostert was justified in opposing the counter-application (for his removal) and delivering his answering affidavit.
- [25] Counsel for the first Appellants submitted before this Court that the *context* in which para 6 of the SCA order was granted was that it was inappropriate for Nicholls J to have granted any costs orders in the absence of reports from the independent curators and the purpose of para 6 of the SCA order was to provide the court (that is, Vally J) with an independent view (from independent curators) regarding who should ultimately be liable for the various costs incurred during the course of the relevant litigation.
- [26] Arising from the foregoing, it was submitted that the text, context and purpose of para 6 of the SCA order supported Mostert's interpretation, namely

that paras 10 and 10.1 of the Nicholls J order were set aside, despite the contents of para 2.1 of the Nicholls order having been confirmed by the SCA.

[27] It was argued, on behalf of the first Appellants, that the Nash parties latched onto the *caveat* in the Nicholls order, excluding costs in paras 10 and 10.1 from being recovered by Mostert's firm, to argue that the SCA order confirmed Nicholls J's order insofar as it excluded Mostert's ability to recover his costs for opposition to the counter-application. In this regard, it was submitted that this is an unsustainable interpretation of the SCA order in that it reads para 5 of the SCA order narrowly and in isolation, without having regard to the context of the SCA order as a whole. It is also at odds with the confirmation by the SCA in the SCA letter. It must be noted that the Nash Parties did not pursue that argument in this court.

[28] Further, it was submitted that para 6 of the SCA order is clear and unequivocal. It sets aside all costs orders and does not "*carve out*" the costs orders contemplated in paras 10 and 10.1 of the order emanating from the Nicholls judgment. Moreover, it was submitted that when para 5 of the SCA order is read conjunctively with para 6 of the SCA order the confirmation of paras 2, 2.1 and 2.2 related only to confirmation that:

- a. Mostert was permitted to engage the assistance of professional service providers to assist him in the curatorship of the Fund;
- b. the costs of these service providers would be defrayed from the assets owned, administered or held by or on behalf of the Fund;
- c. Mostert would be entitled to pay all fees and disbursements of AL Mostert and Company Incorporated up and until 13 December 2013 from the business of the Fund, and
- d. the exclusion of 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 was instructed to act as the attorneys for the curator or the fund in legal proceedings.

[29] It was further pointed out by Counsel for the first Appellants that para 2.1 of Nicholls J's order dealt very specifically with Mostert's right to pay all of the "fees and disbursements of AL Mostert and Company Incorporated from the

business of the Cadac Pension Fund under curatorship up and until 13 December 2013". This much was confirmed in the SCA letter.

- [30] The portion of para 2.1 dealing with the "exclusion of all the fees, disbursements and costs referred to in paragraphs 10 and 10.1 of this order" was, it was also submitted, clearly not confirmed by the SCA when regard is had to the text, context, and purpose of the SCA order and, specifically, para 6 thereof. Once again, the foregoing is confirmed in the SCA letter.
- [31] Accordingly, it was submitted that this Court is enjoined (and indeed obliged) to consider the issue of whether Mostert was entitled to recover his costs in opposing the counter-application. Following thereon, it was submitted that, contrary to what was held by Vally J, this Court should consider afresh the issue of Mostert's costs of the counter-application.
- [32] This Court accepts as sound the bulk of the submissions made on behalf of the first Appellants. It is clear that the SCA did confirm para 2.1 of the Nicholls order. However, in doing so, there was obviously no intention to also confirm paras 10 and 10.1. Those paragraphs, as all paragraphs dealing with costs, were set aside. In the premises, it is necessary for this Court to consider afresh the issue of Mostert's costs of the counter-application.

Is Mostert entitled to the costs of the counter-application?

- [33] At the outset, it is important to note that the SCA did not disturb any of Nicholls J's findings on the merits. Accordingly, this Court must accept the factual findings by Nicholls J and determine the incidence of costs in the exercise of its discretion as if this Court had made those factual findings. The only change to those findings would be any findings made by Vally J on the basis of the reports to which he was enjoined by the SCA to refer.
- [34] In order to address the issue of Mostert's costs, it is apposite to briefly set out certain of Nicholl J's findings. They are as follows:
- a. with the need for curatorship having been conceded by the trustees (both previous and current), Nicholls J distilled "the real issue in dispute" to be "the suitability of Mostert as curator";

- b. the information contained in the supplementary affidavit deposed to by June Marks ("Marks"), which Mostert applied to have admitted as new matter, "provides support for Mostert's theory that Nash fraudulently concocted a claim on behalf of Sable in the books of CPF"; "lends credence to the view that the trustees of CPF were unduly influenced by Nash" and its importance "cannot be underestimated";
- c. the Fund, as represented by its trustees, had no *locus standi* to launch any legal proceedings. That is, the trustees had no *locus standi* to launch the counter-application seeking to remove Mostert as provisional trustee;
- d. Vivian Cohen ("Cohen"), the statutory actuary of the Fund, concluded that there were no genuine claims and such claims as there were, were part of a scheme devised to remove surplus assets from the Sable Fund;
- e. Nash:
 - i. had "fabricated a claim in order to deceive the FSB and to avoid an investigation into the affairs of CPF";
 - ii. had "over a period of years fraudulently devised a strategy whereby the business of CPF could be transferred with a nil surplus valuation";
 - iii. had submitted "fictitious and concocted" claims for this purpose;
 - iv. had "clearly used the resources of the CPF to fund his defence to any possible criminal charges he may face and to ward off an investigation into CPF which may expose his history of abuse of CPF monies to bolster the cash flow of CADAC";
 - v. "set his scheme into motion over a period of many years" creating a nil surplus valuation "[t]o prevent any FSB involvement";
 - vi. Nash's counter to the claims against him was to allege a corrupt relationship between Mostert and Dube Tshidi (the former Chief Executive Officer of the FSB);
- f. Nash (who was a trustee of the Fund and whose very task it was to protect the interests of pensioners) viewed the pensioners as "an impediment to his plans";

- g. on a conspectus of all the evidence the issue of the claim that the Sable Fund may have against the Fund was indeed “a red herring” and did not constitute an irresolvable conflict for Mostert;
- h. the actions of Nash (in *de facto* control of the Fund since 1995) and the previous trustees “had necessitated the appointment of a curator”;
- i. Nash had been the driving force “behind the opposition to Mostert and the counter-application”;
- j. it was apparent that the new trustees (who had launched the counter-application) had been influenced by Nash at a time when the new trustees were ostensibly acting totally independently of Nash. There are emails from Nash instructing Werksmans Attorneys, acting on behalf of the new trustees, as to what strategy to adopt towards this case. Nicholls J made specific reference to an email from Nash to the new trustees’ attorney, Darren Willans of Werksmans Attorneys, where Nash said:

“... the current trustees are now operating the Fund more or less on behalf of me ... I am also the ... guarantor of the Werksmans costs.”;
- k. it was Mostert’s investigations that had revealed “the extent of Nash’s dishonesty”;
- l. a “strong character like Mostert” was necessary to “follow the money trail” and “expose the dishonesty of the high profile individuals who dominate the administration of pension funds”;
- m. Mostert had “been instrumental in unravelling some of these transactions which, on the face of it, are unlawful”, and
- n. Mostert “is the repository of invaluable information regarding the CPF”.

[35] It was submitted, on behalf of the first Appellants, that it is in the context of these findings regarding Nash and the previous trustees’ conduct, together with Mostert’s assistance to the court, that Mostert’s opposition to the counter-application must be viewed.

- [36] The counter-application was brought in the name of the second to fourth respondents (as newly-appointed trustees of the Fund) at Nash's behest, seeking to oust Mostert as curator and promoting the appointment of two new curators (with little pension fund experience). It was premised on Mostert having an "*irresoluble conflict*" and on the alleged existence of a sinister and corrupt relationship between Mostert and Tshidi of the FSB. What was also sought was that the legal costs incurred by the second to fourth respondents in bringing the counter-application be paid by the Fund.
- [37] The second to fourth respondents, however, lacked the necessary *locus standi* to bring the counter-application as they had been divested of control of the Fund when Mostert was appointed as provisional curator.
- [38] The Court authorised Mostert to file an answering affidavit in terms of para 3 of the order of 6 March 2011 by Claasen J and Mostert's affidavit was filed on this basis. The FSB expected Mostert to file an answering affidavit (to deal with matters within his knowledge) and Mostert obliged the FSB's requests.
- [39] The order of Claasen J authorised and obliged Mostert to defend all legal proceedings against the Fund and on 15 February 2011 the court granted an order that Mostert be entitled to obtain information to investigate the affairs of the Fund, which he subsequently did.
- [40] Mostert reported the results of his investigations to the court in the answering affidavit and in subsequent affidavits filed by him in the proceedings. This evidence was extensively referred to and relied upon by Nicholls J in her judgment. Nicholls J also allowed an application for the admission of additional information by Mostert. In so doing, Nicholls J concluded that "*the importance of the new matter cannot be underestimated*".
- [41] It was submitted by counsel for the first Appellants that, given that Mostert was not only invited to file an answering affidavit in the counter-application but was obliged to do so by the order of Claasen J, Nicholls J's criticism of Mostert for filing his affidavit and "*defending his own appointment*", thereby disallowing him his costs, was unjustified.

[42] It was further submitted that his affidavit contained critical evidence upon which the court relied in finding that there was no genuine claim by the Sable Fund against the Fund and that the claims made were part of a scheme devised to remove surplus assets from the Sable Fund. It was held that these claims were fabricated by Nash to deceive the FSB and to avoid an investigation into the Fund's affairs.

[43] It was the evidence Mostert adduced upon which the court based its finding that the counter-application had been premised on a falsity. The facts and evidence presented to the court by Mostert in his answering affidavit included:

- a. the report of the actuary to the Fund, Cohen, which was made available to the court in his answering affidavit. This report is specifically referred to in the Nicholls judgment;
- b. documentation obtained by Mostert from Marks regarding the activities of Nash; the affairs of the Fund and the inter-related affairs of the Power Pack Fund and the Sable Fund, together with her activities in concealing the manipulation of the affairs of the Fund by Nash. Although Marks provided Mostert with a great deal of the information pertaining to Nash's involvement in the transactions, Mostert was able to show that Marks had attempted to downplay her own involvement. This Mostert did by relying on draft statements prepared by Marks and comparing those to the final, signed affidavit. As a result, the court found that little reliance could be placed on the evidence of Marks;
- c. emails obtained by Mostert established that the Sable Fund had never had a claim against the Fund and that Nash had fabricated a claim in order to deceive the FSB so as to avoid an investigation into the affairs of the Fund. This evidence was apparent from emails sent by Nash to Marks dated 9 and 15 May 2011. In addition, the emails indicated that Nash had, over a period of years, devised a strategy whereby the business of the Fund could be transferred with a nil surplus valuation. These emails were disclosed to the court in Mostert's supplementary affidavit and in the supplementary provisional curator's report of July 2013;

- d. evidence adduced by Mostert in the answering affidavit showed that Nash had used the Fund's resources to pay for his defence of criminal charges he anticipated facing and to ward off an investigation into the Fund that would expose his history of the abuse of the Fund monies to bolster the cashflow of Cadac;
- e. Mostert was also able to put up evidence to show that the newly appointed trustees were not acting independently but rather at the behest of Nash.

[44] In the premises, we agree with the first Appellants that the answering affidavit in the counter-application was essential to a determination of the main application and the counter-application.

[45] The documents disclosed to the court in the answering affidavit included actuarial reports; minutes of meetings; documents relating to the Sable Fund; curators' reports and a vast volume of emails, all of which made it apparent that there had been a complex and confusing web of transactions involving various corporate entities over many years.

[46] Critical is the fact that by the time the applications were finally argued the trustees abandoned substantial portions of the original relief sought in the counter-application. This was largely due to the evidence that Mostert had put up in his answering affidavit and included the controversial email referred to earlier in this judgment from Nash to Werksmans attorneys. It was in this email that Nash confirmed that the second to fourth respondents were acting on his instructions and that he was the guarantor of Werksmans' fees. Importantly, it was the revelation of this email that caused the second to fourth respondents to abandon their claim for Werksmans' fees to be recouped from the Fund.

[47] Given that the counter-application was dismissed for lack of *locus standi*, it is appropriate that costs should follow the result. Those persons who brought the counter-application, namely the second to ninth respondents, should pay these costs. This was the order made by Nicholls J, which the first Appellants submit was correct.

- [48] Nicholls J effectively ordered Mostert to pay the costs of drafting his answering affidavit *de bonis propriis*. It was submitted that the court made the order in the absence of good reasons for such an order, such as improper or unreasonable conduct or a lack of *bona fides*.⁴
- [49] There must be a material departure from responsibility of office to justify an order of the nature made.⁵ It was submitted, on behalf of the Appellants, that the court also made this order in circumstances where Mostert was cited as a party in the counter-application in his capacity as provisional curator representing the Fund and where relief patently adverse to the Fund was sought without a proper basis (as the court itself held).
- [50] The general principle is that the appointment of a curator by the court will afford *prima facie* protection to that curator against an order for *costs de bonis propriis*.⁶ Counsel for the first Appellants also submitted that such an order was not (and could not be) anticipated by Mostert at the hearing since the application to join him personally, in order to seek that he pay the costs in his personal capacity, was dismissed. The disallowance of the costs of the answering affidavit was thus made without Mostert making representations to the court in relation thereto. This order, it is submitted, was not justified.
- [51] The first Appellants also relied upon the fact that the order was based on a mischaracterisation of the purpose and content of the answering affidavit, together with the nature of Mostert's opposition of the counter-application in his *nomino officio* capacity on behalf of the Fund. According to the first Appellants, Nicholls J's real complaint appears to have been with the breadth of Mostert's answering affidavit (which spanned 143 pages and over 1 000 pages with annexures).
- [52] In respect of this criticism the Appellants submitted that: -
- a) although the relief sought in the counter-application related to the removal of Mostert as the curator of the Fund and the payment of the

⁴ *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 725.

⁵ *Blou v Lampert & Chipkin* 1973 (1) SA 1 (A) at 14.

⁶ *Taylor v Lucas* 1937 TPD 405 at 408; *Ex Parte Donaldson* 1947 (3) SA 170 (T); *Martin v Road Accident Fund* 2000 (2) SA 1023 (W) at 1039.

costs of the counter-application by the Fund, the contents of the counter-application went far further;

- b) it was a thinly-veiled attempt to impugn Mostert's character and vindicate the trustees' (both current and previous) conduct;
- c) the counter-application was, as correctly identified by the court, driven by Nash and the trustees were "*unduly influenced by Nash*" in bringing the counter-application;
- d) the counter-application was a ruse by Nash to delay the final hearing of the matter and to remove Mostert as curator. Had Mostert not opposed the counter-application, there was every possibility that Nash would have been able to actuate this ruse and mulct the Fund (*the very pension fund he had used to conduct his scheme*) with the costs of the counter-application and avoid being held accountable for his and the former trustees' conduct in mismanaging and misusing the Fund;
- e) the founding affidavit in the counter-application contained scurrilous and defamatory allegations levelled against Mostert, which impugned his character. Where unbridled attacks are made on a person in litigation, that person is entitled to file an affidavit to refute those allegations and is "*entitled to defend [his] honour*";⁷
- f) Mostert had been the Fund's curator for some time. He, rather than the FSB, had knowledge of the facts necessary to oppose the application. Also, Mostert, rather than the FSB, had the fiduciary obligation to protect the Fund's interests. It was Mostert, rather than the FSB, who was authorised by the court to investigate and to report his findings to the court, thereby assisting the Court, which he did;
- g) however, most fundamentally, Nicholls J used the content of the answering affidavit in determining that the counter-application was ill-founded and amounted to an abuse. Nicholls J expressly held that Mostert "*is the repository of invaluable information regarding the CPF*";

⁷ *Vinassa v Sunset Point Properties 106 (Pty) Ltd* 2012 JDR 1339 (GNP) at para [11]

- h) it was only with the benefit of Mostert's answering affidavit that Nicholls J was able to find "*on a conspectus of all the evidence that the issue of a claim that Sable may have against CPF is indeed "a red herring" and does not constitute an irresolvable conflict for Mostert*";⁸
- i) finally, it was submitted that the fact that Mostert was justified in opposing the counter-application is supported by the various reports filed by Esterhuizen and Kevvy.

[53] In the circumstances, given Mostert's fiduciary obligation to file an answering affidavit; Mostert's entitlement to file an answering affidavit to address the attacks on his character and the fact that the court relied on the evidence contained in the answering affidavit for its decision, it was submitted that Nicholls J ought not to have disallowed Mostert's costs of the answering affidavit and ought to have made an order in terms similar to that made for the benefit of the FSB, in favour of the Fund.

[54] Counsel for the first Appellants also submitted that an appropriate costs order was not to re-instate paras 10 and 10.1 of Nicholls J's order but to order that the second to ninth respondents pay the costs of Mostert and the Fund in opposing the counter-application on the scale as between party and party, including the costs of two counsel.

Conclusion on the first appeal

[55] We agree with all of the material submissions made on behalf of the first Appellants and as set out in this judgment. In particular, Mostert's affidavit was both necessary and useful to the court. Whether he did so on his "own" behalf, to protect his position, or under the auspices of the FSB or in his capacity as the true representative of the Fund, makes no real difference. That he may not have been well-advised to oppose the counter-application on his own behalf does not detract from this.

[55] In the premises, this Court must set aside paras 10 and 10.1 of the Vally Order and make an appropriate costs order. There is no need for this Court to set

⁸ *Emphasis added.*

aside the corresponding paras of the Nicholls order, as it has already been set aside by the SCA.

- [56] As to what an appropriate order in respect of costs arising from the first appeal should be, the relevant paragraph of the first Appellants' Notice of Appeal reads as follows:

4. The Court a quo accordingly erred in failing to determine the incidence of costs of the second respondent (Mostert) in the counter application and to order the affected orders be deleted and substituted with an order in the following terms:

"The third to tenth respondents⁹ are ordered, jointly and severally, the one paying the other to be absolved, to pay the first and second respondents' costs of the counter application, including the costs of two counsel.

- [57] This is identical to the existing costs order in para 9 of the Vally Order which deals with all the other costs of the counter-application, and there is no reason why that paragraph should not be deemed to apply for the costs initially dealt with in the impugned paragraphs. It would also be appropriate, for clarity, to declare that references in the remainder of the order to those paragraphs be considered to be *pro non scripto*.

- [58] As for the costs of this appeal, as set out earlier, none of the respondents opposed the appeal to this Court. In the premises, it would be just and equitable if not order is made in respect of the costs of the first appeal.

The second appeal

- [59] The second appeal, also against the Vally order of 19 May 2023, is brought by the Nash parties. The Nash parties were the seventh and eighth respondents before Vally J, and are the sixth and seventh respondents in the first appeal.

- [60] As set out in detail earlier in this judgment, Vally J found that it was appropriate that the Nash parties, together with the person who had been their

⁹ These are the third to tenth respondents in the court a quo.

co-trustee when the Fund was placed into curatorship, Bekker,¹⁰ bear the costs of the curatorship application and the opposition to that application,¹¹ as well as the costs of the curatorship and of the Inspection into the affairs of the Fund.

- [61] Vally J also ordered that the third to tenth respondents before him, who are the Nash parties as well as the fourth to ninth respondents in the second appeal,¹² pay the costs of the counter-application, save for those costs which were the subject of the first appeal. These respondents, with the Nash parties, also bear the costs of various other applications as set out above.
- [62] The Nash parties now appeal against the costs orders, specifically paragraphs 3, 3.1 and 4 of the Vally order. The remaining respondents do not appeal the orders, nor do the Nash parties seek to appeal the remaining costs orders. The FSB's submission in their Heads of Argument that the Nash parties seek to have all costs orders against them vacated is therefore inaccurate.
- [63] In their notice of appeal, the Nash parties seek an order setting aside paragraphs 3, 3.1 and 4, and substituting in their stead an order that the costs of the application and the costs of the inspection be borne by the Fund, save that the respondents should bear their own costs. The relief set out in the Nash parties' draft order, however, seeks an order in which it is declared that the curatorship is not complete, the relevant paragraphs are set aside, and those costs are deferred for determination when the curatorship is in fact complete.
- [64] The second appeal is opposed only by the FSB. The first Appellants (which, it will be remembered, includes the Fund) were at pains to note that the second appeal is only between the Nash parties and the FSB, and that they do not make any submissions regarding the second appeal. This despite the fact that it is the Fund who would bear the consequences should the appeal be upheld.

¹⁰ The sixth respondent before Vally J, the fifth respondent in the first appeal and the seventh respondent in the second appeal.

¹¹ Paragraphs 3 and 3.1 of the Vally order.

¹² Collectively the second to ninth respondents in the first appeal.

[65] The grounds on which the Nash parties seek to set aside the relevant orders are, broadly, that:

- a. the FSB could not seek an order that the Nash parties pay, *inter alia* the “costs of the curatorship” as this relief was not sought in its notice of motion, but was sought belatedly in its heads of argument, and an order for “costs of curatorship” is impermissible;
- b. the FSB had no *locus standi* to seek “costs of curatorship” which was essentially recovery of costs already paid by the Fund, and which only the Fund could claim;
- c. the first Appellants were respondents in the court *a quo* and ought not have been allowed to make common cause with the applicant (the FSB);
- d. an order for “costs of curatorship” is, in any event, premature, and
- e. the court impermissibly relied on reports which were not evidence.

[66] We do not deal with the grounds relied on by the Nash parties in the manner in which they articulate them. In our view that would perpetuate the false narrative created by the notice of appeal and the heads of argument.

[67] It will be noted, by reference to paragraph [11] of this judgment, that the phrase “costs of curatorship” does not appear in the paragraphs of the Vally order under appeal. We deal with this aspect below.

Costs of Curatorship

[68] The real gripe that the Nash parties raise in this first ground is that “costs of curatorship” is not an established/ known concept, and that there is no provision in the Act for an order for such a thing. They ascribe a particular meaning to the phrase, and go on to argue at length about why no such relief could have been sought or granted.

[69] The FSB brought the application in terms of s 5(1) of the Financial Institutions (Protection of Funds) Act (“the Act”).¹³ The Nash parties contend that the orders a court may make in such an application are only those provided for by that section.

[70] Section 5(5) of the Act, before it was amended in 2013, and as it was at the time the application was instituted, provided that:

- (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 a curator ...;*
 - (d) the costs relating to any 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 No.80 of 1998); or*
 - (f) any other matter which the court deems necessary.*

[71] It seems to us that the first issue to be examined is the meaning of the phrase “costs of curatorship” in the Vally order. In order to do so, one must look at how the order came to be made in those terms.

[72] In its notice of motion, the FSB sought, *inter alia*, a *rule nisi* calling upon interested parties to show cause why the following order should not be granted:

that the costs of these proceedings, as between attorney and client, as well as the costs of the curator and the costs of the inspection conducted into the affairs of the Fund in terms of the Inspection of Financial Institutions Act, No. 80 of 1998, should not be payable by the trustees of the Fund in their personal capacity, alternatively from the assets owned, administered or held by or under control of the Fund[.]

[73] Claasen J’s order in December 2010 included a rule in those terms, and the Nash parties do not quibble with this. They refer to the relief sought in the

¹³ Act 28 of 2001.

notice of motion (and granted by Claasen J) as “costs in the usual sense”. It is clear that the FSB was seeking relief that would hold the trustees personally liable for certain costs, and that the trustees had proper notice of this.

- [74] The Nash parties seem to accept that an order in those terms for what they refer to as “costs in the usual sense” could have been made. This is despite the fact that section 5(5) does not include in the list of possible inclusions in an order “costs of the curator”. It does however include “remuneration” of the curator. This stance by the Nash parties is at odds with their contention that the subsection only provides for two kinds of costs, that is, costs of the application and costs of the inspection. It also, of course, fails to take into account that s 5(5)(e) allows the court to make an order about any other matter the court deems necessary.
- [75] The order made by Nicholls J in December 2013 was cast in the same terms as the notice of motion and Claasen J’s order, and provided that the Nash parties and Bekker would pay those “costs in the usual sense” in their personal capacity. The order as originally made by Nicholls J was then sought in the original notice of motion and the Nash parties had had an opportunity to respond to it.
- [76] The phrase “costs of curatorship” arises for the first time in the judgments in this matter in para 12 of the clarification judgment of Nicholls J, which accompanied the Varied Order, in April 2014. In their heads of argument, the Nash parties contend that the phrase arises for the first time in paragraph 3.3 of the Varied Order. However, it appears, and gains meaning from, the body of the judgment, in particular, paragraph 12:

Similarly, the phrase “costs of curator” is allegedly uncertain because it is unclear whether this term refers only to the curator’s remuneration or to the curator’s costs of curatorship. My intention was to include all costs. The respondents agree that clarity can be achieved by making specific reference to the not only the curator’s remuneration but also to all fees and disbursements of AL Mostert up until the 13 December 2013 with the exclusion of the costs referred to paragraph 10 of the final order. (sic)

[77] Reference to the Varied Order, set out in para [8] of this judgment, shows that while “costs of curatorship” is given a specific meaning in para 3.3 of the Varied Order, there is no order made regarding who should pay the “costs of curatorship”. The Varied Order, like the original order by Nicholls J, and the Claasen J *rule nisi*, only allocates liability for the “costs of the curator”, costs of the inspection, and costs of the application, which the Nash parties themselves characterise as “costs in the usual sense”.

[78] At para 3.2 of the Varied Order, Nicholls J clarifies what is meant by “costs of the curator”, because that is one of the clarifications in response to which the clarification judgment was written and the Varied Order was made. Here it is specified that:

[t]he 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 the 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.

[79] Paragraph 3.3 of the Varied Order simply states that “costs of curatorship” would have a similar meaning for the future implementation of the order. However, there has been no order regarding costs of curatorship.

[80] As already mentioned, the SCA set aside all the costs orders made in the Varied Order, determining that the High Court must deal with costs once the curators have issued their final report.

[81] The High Court, in the person of Vally J, then made the order now under appeal. However, it is significant that nowhere in the order, nor in the actual paragraphs being appealed, does the phrase “costs of curatorship” appear. Instead, paras 3 and 3.1, which are appealed against refer to the same costs as did the orders of Claasen J and Nicholls J. Paragraph 3.2 of the Vally

Order, also appealed against, is cast in identical terms to para 3.2 of the Varied Order.

- [82] Paragraph 4 of the Vally Order limits the costs in para 3 to costs incurred up to 19 December 2020, and reserves costs incurred after that date to be determined in other pending litigation (case number 43585/2019).
- [83] Nowhere in the Vally Order does the phrase complained of, “costs of curatorship” appear. The phrase occurs in one paragraph of the judgment of Vally J, para [25], in which Vally J notes that the appointment of two additional curators by the SCA increased the costs of curatorship. This does not add any weight to the Nash parties’ contentions.
- [84] Since the phrase “costs of curatorship” does not appear in the orders under appeal, it seems to us that all of the argument which deals with that concept is a red herring and need not be considered. To the extent that there is a complaint about the “costs of the curator”, the Nash parties themselves characterise those as part of “costs in the usual sense” and cannot then complain about them.
- [85] There is then obviously no merit in the contention that these “costs of curatorship” were sought for the first time in heads of argument ten years after the fact. The order that was granted was in exactly the terms sought in the original notice of motion. The Nash parties, as did all other respondents, had an opportunity to respond to that relief. There was no ambush and no lack of *audi*.
- [86] In any event, the Vally Order limits what is meant by those costs simply to the remuneration of the curators and the legal costs incurred by them. It is obvious that those must be the reasonable, taxed costs. So any complaint about luxurious litigation is dealt with in that manner.

Remaining Issues

- [87] The contention that the FSB has no *locus standi* to claim on behalf of the Fund the costs that have already been defrayed by the Fund, whilst attractive, also falls apart on closer analysis. The orders made by the various courts, consistently, were that the curator was empowered to defray the necessary costs from Fund assets, and that cause ought to be shown why those costs should not be borne by the trustees at the time in the ordinary course. The claim is therefore not a new one, as the order even in its original form was clearly intended to provide for an interim way of allowing the curatorship to proceed, while the issue of who should be ultimately responsible for the costs incurred is still pending. There is no unliquidated claim for damages. It is an order for costs for specific functions, where the costs are limited by law. This is only unliquidated in the same sense as any costs order may be considered to be unliquidated. The protections lie in the various safeguards such as regulated tariffs and taxation.
- [88] Whether the first Appellants were respondents or not, a court is not only entitled but required to take into account the totality of what is before it when making costs orders. The contention that it was not open to the first Appellants to support the FSB's position before the court does not assist the Nash parties.
- [89] Regarding the contention that the curatorship is not yet finalised and therefore that the Vally Order was premature, Vally J found that the administrative part of the curatorship was complete, and that only the litigation which the Nash parties had instituted kept the curatorship notionally alive. There is nothing in the papers to disturb that conclusion. This contention by the Nash parties also has no merit.
- [90] The contention by the Nash parties that it was not open to Vally J to make the order that the trustees bear the costs in their personal capacities because the *rule nisi* had not been extended by the SCA and therefore had lapsed is also

without merit. A costs order is not a consequential order of the sort which would need to be revived to be made final. It was within the discretion of the court to make the order whether it was sought as an ordinary prayer or as a *rule nisi* and nothing turns on the form of the original order.

[91] Finally, we agree with the findings of Vally J regarding the evidentiary value of the reports. The Nash parties were given an opportunity to respond, so cannot complain of a lack of *audi*, and the fact that their attempt to raise disputes was unsuccessful does not invalidate the findings. Our view is that the evidentiary matter before the court was correctly evaluated and determined.

[92] It follows that the second appeal must be dismissed with costs, on scale C as requested.

Order

[93] For the reasons set out above we make the following order:

In case number A2024-041968 (the first appeal):

1. The appeal is upheld.
2. Paragraphs 10 and 10.1 of the orders of Vally J made on 19 May 2023 are set aside.
3. The order of Vally J in paragraph 9 of the order of 19 May 2023 is deemed to include those costs originally dealt with in paragraphs 10 and 10.1.
4. References to paragraphs 10 and 10.1 in the remainder of the order of Vally J are to be considered *pro non scripto*.

In case number A2024-042123 (the second appeal):

5. The appeal is dismissed with costs on Scale C.

S YACOOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

BC WANLESS
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

D MAHOSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES

For the first appellants:	AR Sholto-Douglas SC
Instructed by:	Assheton-Smith Ginsberg Incorporated
For the Nash parties:	GD Wickins SC, M Tsele
Instructed by:	KWA Attorneys
For the FSB:	EL Theron SC
Instructed by:	Rooth and Wessels Inc