

SOUTH AFRICA / JUDGMENT

CADAC Pension Fund and Others v Nash and Others (43585/2019) [2025] ZAGPJHC 386 (16 April 2025)

[2025] ZAGPJHC 386

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

43585/2019

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IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, JOHANNESBURG)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

16 April 2025

Case No. 43585/2019

In the matter between:

THE
CADAC PENSION FUND First
Applicant
ANTONY
LOUIS MOSTERT NO Second
Applicant
JOHANNES
ESTERHUIZEN NO Third
Applicant
KAREN
KEEVY NO Fourth
Applicant
and
SIMON

JOHN NASH First Respondent
CADAC
(PTY) LTD Second
Respondent
ANTOINETTE
CRONJE Third Respondent
IRIS
SCHOEMAN Fourth
Respondent
SAMANTHA
MAYS Fifth
Respondent
NMG
ADMINISTRATORS (PTY) LTD
Sixth Respondent
INTEGRITY RETIREMENT
FUND
ADMINISTRATORS
(PTY) LTD Seventh
Respondent

JUDGMENT

WILSON J:

1 The question in this case concerns the circumstances under which an interim interdict granted to maintain the status quo pending the outcome of an application for final relief may be discharged. I find that such an interdict will rarely be capable of discharge unless there is no longer a live issue between the parties in the application for final relief. In my view, there remains a live issue between the parties in this case, and the interim interdict sought to be discharged must remain in place. The litigation in this case has taken on a high degree of procedural complexity. Accordingly, before explaining my reasons for the conclusion I have reached, I must first set out some of this complexity.

The Fund and its operations

2 The first applicant, the Fund, is a pension fund in curatorship. The second, third and fourth applicants are its curators. The second respondent, CADAC, is a company, which, until 2022, employed all of the Fund's members. CADAC's business has since been sold to another company, Hudaco, which now employs those who worked for CADAC at the time of its sale. In October 2022, after Hudaco's purchase of CADAC's business, CADAC apparently changed its name to EFN Investments (Pty) Ltd. However, following the convention adopted by the parties to this litigation, and by the other Judges of this division who have been seized with litigation involving the Fund since 2022, I shall continue to refer to the second respondent as "CADAC".

3 On 1 March 2003, the Fund formally closed to new members and became paid up. However, for reasons that are not necessary to set out, the Fund's erstwhile trustees continued to operate the Fund as if it had not been closed. The Fund accepted new members, and purported to accord them the pension benefits defined in its rules. At least some of this was done with the approval of the Registrar of Pension Funds.

4 In 2010, the Fund was placed in curatorship, but it continued to accept contributions from members who had joined the Fund after 1 March 2003. In November 2018, the first respondent, Mr. Nash, applied to withdraw his pension benefits from the Fund. In addition to being a putative member of the Fund, Mr. Nash is a director of CADAC and was a trustee of the Fund before it was placed under curatorship. The Fund believes Mr. Nash to be responsible for substantial wrongdoing in this role, including the misappropriation of surpluses the Fund accumulated while it was under his control.

5 The Fund refused to pay the benefits Mr. Nash claimed. It apparently took the view, based on the wrongdoing it imputed to him, that Mr. Nash may be liable for deductions to his pension fund benefits allowed under section 37D of the Pension Funds Act 24 of

1956. On 6 December 2019, Mr. Nash instituted proceedings seeking a declaration that he is entitled to his full pension fund benefits,

and that the decision to withhold his benefits until his liability under section 37D had been determined was unlawful.

6 The curators of the Fund then took the view that the Fund had been allowed to operate irregularly for a lengthy period; that individuals who had been permitted to join the Fund since 1 March 2003, and who had been treated as members of the Fund despite joining after that date, including Mr. Nash, should not have been so treated; that those individuals should be refunded the contributions they had made plus interest; and that the Fund should cease to accept any further payments from CADAC or its employees. For this reason, too, the curators resisted Mr. Nash's application for declaratory relief.

7 The curators communicated their decision to the Fund's putative members in a letter dated 25 March 2020. The effect of the

decision was that a large number of people, including Mr. Nash, who had thought they were members of a pension fund, and entitled to all the benefits associated with such membership, were suddenly told that they were not, after all, members of the Fund and were not entitled to such benefits. They were instead, so the curators decided, entitled only to the reimbursement of their contributions plus interest.

Mr. Nash's interdict application

8 Mr. Nash then brought an application in this court to restrain the Fund from giving effect to the curators' decision pending

the outcome of his application for declaratory relief. The third, fourth and fifth respondents, Ms. Cronje, Ms. Schoeman and Ms. Mays, all of whom were, or until 25 March 2020 thought they were, members of the Fund, applied for leave to intervene in Mr. Nash's application.

9 The papers disclose a long history of acrimony between Mr. Nash and the curators, particularly Mr. Mostert. In one of the skirmishes arising from this acrimony, Mr. Nash was placed under restraint from instituting further litigation against the Fund and its curators without the leave of the court. It followed that, in his application to restrain the implementation of the 25 March 2020 decision, Mr. Nash also had to seek leave to institute that application.

10 On 14 May 2020, Francis J dismissed the application for an interdict and the applications for leave to intervene. He did so primarily on the basis that Mr. Nash ought to have sought and obtained leave to bring his interdict application before instituting it. In other words, Mr. Nash was not entitled, so Francis J held, to seek permission to sue for the interdict in the same notice of motion as the one in which Mr. Nash prayed for the interdict itself. It appears that Francis J took the view that the interdict application was not properly before him for that reason, and that the intervention applications had to fail as a result.

11 However, on 17 May 2021, the Supreme Court of Appeal reversed Francis J's decision. It granted Mr. Nash leave to bring his

interdict application. The Supreme Court of Appeal also granted Ms. Cronje, Ms. Schoeman and Ms. Mays leave to intervene in it. The Supreme Court of Appeal furthermore granted an interim interdict restraining the Fund from refusing to accept further contributions

from CADAC or the Fund's putative members, and it restrained the Fund from refunding any of the contributions it had already

received (see *Nash v Cadac Pension Fund* [2021] ZASCA 144 (11 October 2021) ("Nash")).

The second intervention application

12 Since the Supreme Court of Appeal granted the interim interdict, several more putative members of the Fund have applied for leave to intervene in Mr. Nash's application. They also seek to broaden the relief sought in that application. In essence, they seek to review and set aside the curators' decision to treat the Fund as paid up, and to force a change in the Fund's rules which would retroactively condone the irregular operation of the Fund for several years. In other words, they seek to restore their status as members of a pension fund, rather than as individuals with a right to be reimbursed their contributions, which is how the curators currently wish to treat them. All but one of them was unsuccessful in seeking leave to intervene at first instance, but this court upheld their appeal against that decision in *Cronje v CADAC Pension Fund* (case no. A2023-125604, 14 April 2025). The review relief will now be pursued in tandem with the declaratory order Mr. Nash seeks in the main application.

The application to discharge the interim interdict

13 The Fund now seeks to discharge part of the interim interdict the Supreme Court of Appeal granted. The Fund says that circumstances

have so altered since the interim interdict was granted that it no longer serves any real purpose. In particular, the Fund seeks the discharge of the restraint on it refunding any of its putative members' contributions in line with the curators' 25 March 2020 decision. The Fund says that most if not all of its putative members have tired of the litigation about the status and benefits associated with their contributions. They want to take whatever money they can, and get out of the fight. In at least a few cases, the Fund's putative members are of fairly advanced age, and are, the Fund says, in urgent need of their money. The Fund says it seeks no more than the right to give these members a choice: wait until the status of the Fund is resolved, or take the curators' 25 March 2020 offer. In restraining the Fund from "refunding any contributions from or on behalf" of those putative members (see Nash, paragraph 23), the Supreme Court of Appeal has ruled out that possibility until Mr. Nash's application for declaratory relief is finally determined.

14 CADAC opposes the application to discharge the interdict. I have no doubt that Mr. Nash, and his long-running animus toward the curators, lurks behind that opposition. However, the question before me has little to do with the motive for which Mr. Nash, or anyone else, might oppose the application. It is rather concerned with whether, objectively, there is a basis in fact and in law to discharge the interdict.

Jurisdiction

15 It was initially argued that I have no jurisdiction to interfere with the interdict, because it was granted by the Supreme Court of Appeal. However, at the outset of oral argument, Mr. Tsele, who appeared for CADAC, abandoned that contention. The concession was a wise one. Unless a court of appeal specifically elects to retain jurisdiction over a matter – for example by granting and administering a structural or a supervisory order – an order granted on appeal becomes the order of the court of first instance (see in this respect *General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey* NO 1988 (4) SA 353 (A) at 358H and *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* 2012 (9) BCLR 951 (CC) at paragraphs 7 to 9).

16 It follows that, where a court of appeal substitutes the order of a lower court with an interim interdict, the interim interdict

becomes the order of the lower court. The execution, variation or discharge of that order is a matter for the lower court, not for the court of appeal. In other words, only this court has the jurisdiction to vary or discharge the interim interdict the Supreme Court of Appeal granted in this case. The Supreme Court of Appeal released the matter from its jurisdiction when it substituted Francis J's order with the interim interdict.

No case for discharge made out

17 The question is accordingly whether, on the ordinary principles applicable, I should discharge the interim interdict. It is uncontentious that a court has the power to vary or discharge its own interim order (see *Bell v Bell* 1908 TS 887), but the test for doing so is an exacting one (see *Meyer v Meyer* 1948 (1) SA 484 (T) at 490). Generally speaking, there must be a material change in the circumstances that necessitated the interim order which

deprives the order of its original purpose.

18 The purpose of the interim interdict granted on appeal in this case was to preserve the status quo until Mr. Nash's application for final relief is determined. It seems to me that a court will rarely revisit such an interdict unless the facts have so altered as to render the application for final relief moot. While the primary purpose of an interdict pendente lite is to protect the parties' rights, it also preserves the effectiveness of the court's jurisdiction to finally determine the dispute in due course. It is hard to think of circumstances under which a court would set aside an interdict pendent lite, so long as the parties still wish the court to resolve a dispute by making an order that would have some practical effect.

19 In this matter, Mr. Nash's application for final relief seems very much alive. At the centre of that case is the issue of whether Mr. Nash, and the other putative members, are entitled to the full range of pension benefits afforded to members of the Fund under the Fund's rules, or merely to the return of their contributions plus interest. On the face of things, the resolution of this dispute would plainly have practical effect. It would first determine what the putative members of the Fund are really entitled to – a range of pension fund benefits, or merely the refund of their contributions plus interest. Second, the resolution of the main case would entail a final pronouncement on whether the 25 March 2020 decision was open to the curators as a matter of law.

20 The Fund says that there is no material difference between the value of the contributions it intends to return plus interest and the payouts that the putative members would be entitled to as members of the Fund. However, I do not think that has been established. The tax implications of the Fund's refund proposals are far from clear. The Fund points to a non-binding private opinion issued by the South African Revenue Service (SARS) under section 75 of the Tax Administration Act 28 of 2011 which states that those who accept the refunds the curators propose will be "deemed to be members of the Fund for income tax purposes". But the problem with the directive is precisely that it is not binding (see, in this respect, the legal position spelt out in section 88 of the Tax Administration Act). However remote the likelihood that SARS would resile from a non-binding private opinion, the fact remains that, legally speaking, the putative members who accept refunds are exposed to the risk of tax liability that person receiving a pension fund benefit properly so-called is not.

21 However, even if there was no difference between the value of the reimbursement the curators propose and the value of the pension

benefits the putative members could expect to receive if they or Mr. Nash are successful in the application for final relief, there would still, in my view, be a live controversy between the parties. This is because there is an underlying point of legality at stake in the application for final relief. Mr. Wasserman conceded in argument that the curators' refund scheme would not be permissible if the Fund could not lawfully be treated as closed and paid up since 1 March 2003. It follows that if Mr. Nash ultimately defeats the Fund's contention that he is not entitled to his pension benefits because he was never a member of the Fund, or if the putative members ultimately succeed in reversing the curators' decision to treat the Fund as fully paid up and closed, then there would be no semblance of legality to the curators' 25 March 2020 decision.

22 It was clear in argument that the Fund considers the possibility of this outcome to be very remote, but it seems to me that Mr. Nash's prospects of success in the main application have become no better or worse since the interim interdict was granted. There is, accordingly, no change in the strength of the case to be argued in the main application that might justify the discharge

of the interim interdict.

23 In sum, it seems to me that, insofar as the interim interdict was intended "to preserve the status quo" (see Nash, paragraph 21), it has retained its purpose in the years since it was granted.

The putative members who wish to be reimbursed of their contributions

24 The real difficulty in this case is that the interdict binds parties that were not before the Supreme Court of Appeal when it was

granted. It was not just the parties to the appeal who could not be refunded. It was any putative member of the Fund who had not accepted a refund at the time the Supreme Court of Appeal made its order. The restraint on refunding contributions to putative members of the Fund was granted without hearing from those who, the Fund says, now wish to accept their refunds. Those individuals must sit on the side-lines while Mr. Nash's application is brought to finality, together with the review application brought by the putative members joined to the case on 14 April 2025.

25 Mr. Wasserman, who appeared for the Fund, argued that Mr. Nash and a few other putative members may still be interested in the application for final relief, but the circumstances are now that most putative members of the Fund are no longer interested. However, none of the putative members who wish to accept the refunds are before me. The Fund did not join them to its application, and I have precious little admissible evidence of what their attitude really is. Accepting for a moment the Fund's case at its highest, it seems to me that what the Fund really asks me to do is pave the way to make the putative members an offer they can no longer refuse, because this litigation has stretched out for so long that they are now desperate to get whatever they can. To permit the Fund to offer such a "choice" in these circumstances would seem to me to negate the very purpose for which the interim interdict was granted.

26 I am sympathetic to those who may feel that they have been tangled up in litigation over which they have no control, and who wish to walk away from it. I am also open to the possibility that the Fund will prevail in the main case, and the refund scheme embodied in the 25 March 2020 decision will ultimately be implemented. But neither of these misgivings entitles me to discharge the interim

interdict. The only question before me is whether, on the facts, the interim interdict serves the purpose that for which it was originally granted: to preserve the status quo pending the application for final relief. For the reasons I have given, the interim interdict clearly retains the purpose for which it was granted, and must accordingly be left in place.

27 The surest way to resolve the problem for all concerned is to bring the main application to a hearing as soon as possible. It seems

to me that none of the parties has done what they should to achieve that outcome. The record in this case is littered with interlocutory

skirmishes (which have necessitated at least two appeals), proposals to accelerate or settle the litigation which have been stymied by excessive formalism and point-taking, and a large measure of delay. That must stop. The Fund can best serve the interests of those it says it sought to help in this application by bringing the main case to a prompt conclusion.

Costs

28 Mr. Wasserman accepted that, if the application to discharge the interim order failed, the costs of the application should follow

the outcome of the main case. I heard no real argument to the contrary from Mr. Tsele.

Order

29 Accordingly, the application is dismissed, with costs to be costs in the cause.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 16 April 2025.

HEARD ON: 26 March 2025

DECIDED ON: 16 April 2025

For the Applicants JG Wasserman SC

Instructed by Assheton Smith Ginsburg Inc

For the Second Respondent: M Tsele

(Heds of argument drawn by GD Wickins SC and M Tsele)

Instructed by KWA Attorneys

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