

SOUTH AFRICA / JUDGMENT

Mostert and Others v Nash and Others (34664/2017) [2018] ZAGPJHC 511; [2018] 4 All SA 267 (GJ) (14 August 2018) [2018] ZAGPJHC 511

COURT

South Gauteng High Court, Johannesburg

BEFORE

Matojane

CASE / FILE NUMBER

34664/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE:

NO: 34664/2017

In

the matter between:

ANTONY

LOUIS

MOSTERT First

Applicant

ANTONY

LOUIS MOSTERT N.O.

(in

his capacity as curator of
the Third Applicant:

In
his capacity as liquidator of the Fourth
Applicant) Second
Applicant
SABLE
INDUSTRIES PENSION FUND
(UNDER
CURATORSHIP) Third
Applicant
POWER
PACK PENSION FUND
(IN
LIQUIDATION) Fourth
Applicant
and
SIMON
JOHN
NASH First
Respondent
ELENA
FORNO-NASH Second
Respondent
ANCE
ROTHSCHILD Third
Respondent
MIDMACOR
INDUSTRIES
LIMITED Fourth
Respondent
CADAC
PENSION FUND
(UNDER
CURATORSHIP) Fifth
Respondent
JOHAN
ESTERHUIZEN NO
(in
his capacity as joint curator of the Fifth
Respondent) Sixth
Respondent
ANTONY
LOUIS MOSTERT NO
(in
his capacity as joint curator of the Fifth
Respondent) Seventh
Respondent
FINANCIAL
SERVICES
BOARD Eighth
Respondent

JUDGMENT

Matojane J

Introduction

[1] The dispute between the parties in this matter opposes fundamental rights, freedom of expression and the right to be protected against defamatory remarks. Courts are guardians of the constitutional values which include not only the freedom of expression but also the respect for the inherent dignity owed to 'all human beings. Based on the facts of this case, I find that the latter right should prevail.

[2] The applicants (collectively referred to as "Mostert") seek an order against the first to fourth respondents prohibiting them from disseminating, directly or indirectly, false and defamatory allegations about Mostert. They also seek an additional relief

directing the respondents to close down certain websites and ordering that the respondents may not institute proceedings against Mostert without first having obtained leave of the court.

[3] The second, third and fourth respondents did not depose to confirmatory affidavits and the allegations by Mostert is accordingly

not disputed by them.

[4] The first respondent ("Nash") dispute the nature of the defamatory claims alleged. He asserts that the order sought would constitute a severe violation of his right to freedom of expression, in that, firstly it seeks to limit his right to impart information and ideas unjustifiably; and secondly, it unjustifiably limits the public's right to receive the information about Mostert's unlawful conduct.

[5] Nash asserts that Mostert is trying to "gag" the respondents in order to prevent his corrupt activities from being

exposed. He states further that the information which Mostert seeks to withhold from the public is true, and its dissemination is in the public interest, in that the public has right to know the extent of the misconduct of Mostert and the Financial Services Board ("FSB"), as public officials, and to make an informed judgement.

Overview

[6] The third applicant and fourth applicants are both pension funds of which first applicant ("Mostert") is the appointed curator and liquidator respectively. Mostert is cited in his personal capacity and as a curator and as a liquidator of the pension funds respectively.

[7] Mostert alleges that the first respondent ("Nash"), utilising the Ghavalas Scheme[1] unlawfully removed and transferred the surplus of the Sable Pension Fund in an amount of R36 million to Midmacor Industries Limited

("Midmacor"). Nash was at the time a trustee of the Sable Pension Fund and was in control of the principal employer of the Sable Pension Fund. He avers that as part of the unlawful removal of the surplus from the Sable Fund, fraudulent applications in terms of section 14 of the Pension fund Act were made[2] and the Registrar of Pension Funds issued section 14 certificates, under it, transferring the business of the Sable Fund to the Lifecare Fund.

[8] Mostert further alleges that Nash was a party to the fraud, theft and simulated transactions which were concluded with the object of unlawfully removing an amount of R42 million from the Power Pack Fund. A substantial portion of these funds remains to be recovered from Nash and Midmacor.

[9] Nash and the other trustees of the Cadac Pension Fund, have according to Mostert, misappropriated the amount of some R11 million from the Cadac Fund in order to finance Nash's defence in respect of anticipated criminal charges of fraud and theft perpetrated by him in these funds.

[10] Nash and his company, Midmacor currently faces charges in the Specialist Commercial Crimes Court for fraud, theft and money laundering relating to the removal of pension fund monies from the Sable Pension Fund and the Power Pack Pension Fund. Nash's trial is currently underway, and Ghavalas is a state witness.

[11] The second respondent is Elena Forno-Nash. She is married to Nash and has served as the trustee of Cadac Pension Fund. Together with Nash, she is also a director and shareholder of the principal employer of Cadac Pension Fund, Cadac (Pty) Ltd.

[12] The third respondent is Lance Rothschild, a part-time journalist. Mostert alleges that Nash and Forno-Nash engaged him in order to facilitate and advance an orchestrated smear campaign against him.

[13] Ms June Marks, an erstwhile attorney of the Sable Fund, Power Pack Fund and the Cadac Pension Fund is a witness in Nash's criminal trial and has deposed to some affidavits as to the manner in which Nash has deceived her. She confessed that she had conspired with Nash in an orchestrated smear campaign, and during 2012, and at the instigation of Nash, proffered criminal charges against Nash, which she subsequently withdrew. Marks explains that Nash influenced her into believing that Mostert was guilty of wrongdoing which she subsequently established to be false.

Urgency

[14] The Nash dispute the urgency of the application. He contends that Mostert establishes no basis for the belief that any further

publication of defamatory material anticipated such that the application must be determined urgently. Nash asserts that the publication in question has been in the public domain for many years and Mostert has taken no steps to enforce his rights against the respondents in respect thereof.

[15] It is trite that when courts are enjoined by rule 6(12) to deal with urgent applications in accordance with procedures that follow the rules as far as possible, this involves the exercise of judicial discretion by a court 'concerning which deviations it will tolerate in a specific case'. In *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* Corbett JA held that:

"Naturally, it is for the Court to decide whether the matter is really one of urgency and whether the circumstances warrant a departure from the normal procedures. To hold otherwise would, in my view, make the Court the captive of the Rules. I prefer the view that the Rules exist for the Court, rather than the Court for the Rules."

[16] It would appear from the applicant's founding affidavit that the launching of the urgent application was brought about as a result of Nash repeating the old defamatory material about Mostert. On 16 July 2017 City Press and Fin24 advised Mostert that they were about to publish the substance of criminal charges which Nash had laid at the Randburg Court and the complaint to the Public Protector by the EFF which had been orchestrated by Nash.

[17] On 14 March 2018, Nash addressed a letter to the Deputy Director General, National Treasury, the letter was copied to Lord Hein of the House of Lords and Abel Sithole, Chairman of the Board of the FSB wherein Nash stated in paragraph 2 of the letter that:

"The cancer of Mostert within the FSB has not gone away. All of the consequences flowing from his direct influencing/instruction of the Executive of the FSB that I predicted would escalate if ignored have indeed escalated"

[18] In the same letter Nash makes unsubstantiated allegations regarding the falsification of inspection reports and the commission of perjury and further falsely claims that the Supreme Court of Appeal "in a damning indictment of FSB I Mostert association" ordered that two curators be appointed when in fact those additional curators were appointed by agreement between the parties.

[19] In his supplementary affidavit, Nash repeats the defamatory statements that Mostert has unlawfully conducted himself and that he is involved in corrupt activities and conduct without any facts to support such statements. This in my view, establishes a basis for the belief that further publication of defamatory material is anticipated such that the application must be determined urgently.

[20] In these circumstances, I am of the view that the matter was of sufficient urgency to justify Mostert approaching the court on the notice provided for in the notice of motion. The allegations against Mostert involves an alleged ongoing unlawful conduct and Nash was not taken by surprise by the allegations contained in the founding affidavit. Consequently, the challenge to the urgency of the application must fail having regard to the above factors including the interest of justice.

The relief sought

[21] In summary, the applicants (referred collectively as "Mostert") sought and obtained an order ex parte on urgent basis preventing the respondents from publishing the present application papers in Part A of the application. In Part B of the application Mostert seeks and order that:

21.1 First to third respondents be interdicted from disseminating, directly or indirectly, false and defamatory allegations about the first and first and second applicants;

21.2 that respondents be directed to cause the website <http://pensionscam.co.za> or any other website established by them which refer the Mostert be closed down within 24 hours of being ordered to do so, failing which the Sheriff shall be authorised to do so.

21.3 Ordering that the respondents shall first obtain the leave of the Court as a prerequisite to instituting any further proceedings against the applicant

Failure to comply with the requirement of ex parte applications

[22] Nash assert that there are highly relevant and material facts about Mostert's misconduct which Mostert has hidden from the Court and on this basis he argues the entire application should be dismissed and the order granted in Part A should should et aside. The following are examples of the alleged instances of non-disclosure.

[23] Nash avers that Mostert has been appointed a curator to 11 Pension Funds and has concealed an extraordinary commission agreement signed between himself and the CEO of the Financial Services Board ("FSB"), Mr Dube Tshidi. This agreement entitled Mostert to receive a percentage of fees averaging 25% of "collections". In concluding the contingency agreement, Nash alleges that Mostert and Tshidi acted unlawfully and committed fraud as the agreement has been declared unconstitutional in a judgment of Tuchten J.

[24] The judgment of Tuchten J was in fact disclosed in the founding affidavit including the fact that the said judgment was on appeal before the Supreme Court of Appeal. Tuchten J in the judgment reported as Nash and Another v Mostert and others[3] held that contingency fee agreements in respect of non-litigious matters were against public policy. He found that the remuneration between Mostert and the FSB was not in accordance with the norms of the attorney's profession and thus invalid[4].

[25] Tuchten J did not make a finding that Mostert and Tshidi have committed fraud as alleged by Nash. Accordingly, Mostert could not have been obliged to disclose a fraud that does not exist.

Payment of FSB expenses

[26] Nash alleges that Mostert has contracted back with the FSB to pay FSB their "expenses" which the FSB incurs in respect of funds which Mostert manages. He explains that "having entered into a highly beneficial contract with the FSB, Mostert then assures that the FSB reaps its share of the spoils. There are no facts to substantiate these bald allegations.

Refund of states costs

[27] Nash alleges that the FSB refunded the state's costs to prosecute him criminally. He alleges that he is aware that the State has spent over R30 million on the various FSB trials. He states further that "the FSB is a regulator and not authorised to act as pseudo-prosecutor, yet refuses to disclose the level of support for the NPA".

[28] This allegation is preposterous and is not supported by any facts. The NPA is prosecuting Nash, and his company, Midmacor, for their alleged criminal conduct in removing pension fund monies from the Sable Fund and Power Pack Funds and the FSB is the complainant.

The use by Mostert of his law firm

[29] Nash assert that Mostert, acting as a curator, routinely appoints his law firm as attorneys to advise himself as curator and has charged excessively high fees to himself as curator. He states that Mostert continues this by using his daughter and partner to set up their firms and reap further financial benefits.

[30] Nash does not mention that the order of Classen J dated 21 December 2010 expressly permitted Mostert to appoint his law firm because of its peculiar knowledge of the pension funds in question.

[31] Heaton-Nicholls J considered this issue in *Executive Officer of the Financial Services Board (the FSB) v Cadac Pension Fund; In Re: Executive Officer of the Financial Services Board v Cadac Pension Fund and Others*[5] where the court said:

"It is disturbing that Mostert litigated in what was described as a lavish scale, using the services of his law firm, AL Mostert Inc at the expense of CPF. I am mindful that paragraph 5.9 of the court order permitted him to do so on the basis of the firm's depth of knowledge of the Ghavalas transactions. While I accept Mostert is the repository of invaluable information regarding the CPF and should therefore not be removed as curator at this late stage, I do not accept that only his law firm can litigate on his behalf. Mostert must be capable of transferring his wealth of knowledge to another law firm in which he has no financial interest.

That his legal firm is best placed to deal with Ghavalas transactions notwithstanding, the appointment of a law firm in which a curator has a direct interest creates the perception that the curator is benefitting twice, both a curator and as a lawyer. This practice should be frowned upon. Accordingly, the rule should not be confirmed with regard to the use of the services of AL Mostert Inc.

[32] In my view, the non-disclosure of a court-mandated law firm does not constitute suppression of a material fact and would not influence a court in the determination of the relief sought in Part A.

Prior findings in other matters

[33] The Nash contends that the present application is Mostert *modus operandi* as it was not the first time that Mostert has litigated in this manner. He argues that the application should be dismissed on the basis that Mostert failed to disclose that in 2007, he brought an *ex parte* application, in his capacity as a curator of various funds and the judge dismissed the application because the evidence relied upon was hearsay. He refers to another judgment by Joffe J where the judge was critical of the evidence of Mostert as being of no evidential value at all.

[34] The two cases referred to are irrelevant in the determination of the relief sought in Part A of the application. It is not clear on what basis Mostert was obliged to disclose such findings.

[35] Nash's conduct in this application is typical of his *modus operandi*, which involves making unsubstantiated malicious allegations without any proof. In an application brought by Nash against the FSB in which Nash sought, amongst others an order that his criminal trial be held in camera ("the secrecy application") Wright J had this, to say about Nash's conduct[6] at para 28:

"The founding affidavit contains irrelevant and harsh allegations against some of the respondents which have not been proved.. The first group of respondents are said to be "aided and abetted" by the "Mostert team". Mr Mostert is the 12th respondent and the curator or liquidator of the relevant pension funds. This is an allegation of wrongfulness,

particularly to commit a crime. See the Concise Oxford English dictionary, 11th edition, revised." Mr Mostert will personally and financially benefit from the outcome of the criminal proceedings and any monies paid to the state". How this will occur is not explained. The barb is that Mr Mostert will benefit unlawfully from doing what he is said to be doing. Mr Mostert is accused of being "disingenuous", that is insincere. There is an allegation that Ms Marks contributed to inspection reports which form the basis of the criminal prosecution and that she wrote certain paragraphs for the state in the charge sheet. These allegations are roundly refuted. The FSB and Mostert teams are said to consist in a cabal which operates against applicants. This allegation too is denied in detail but in a restrained manner. Apart from this observation, the tone of the founding affidavit is strident and provocative, and it and its annexes are far too long."

Discussion

[36] It is trite law that in an ex parte application for interim relief, failure to reveal material facts and information in an application where such facts might have influenced the court in arriving at a decision to grant relief would .in itself be sufficient to warrant a dismissal and setting aside of the order complained of. See *Schlesinger v Schlesinger*[7].

[37] In *National Director of Public Prosecutions v Basson*[8] Nugent JA said at 489 H-J:

"Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E-349B)."

[38] Margo J in *Cometal-Mometal S A R L v Corlana Enterprises (Pty) Ltd*[9] referred to certain factors that could be taken into account by a court in the exercise of its discretion not to rescind the order as follows:

"It seems to me that, among the factors which the court will take into account in the exercise of its discretion to grant or deny relief to a litigant who has breached the uberrima fides rule, are the extent to which the rule has been breached, the reasons for the non-disclosure, the extent to which the court might have been influenced by proper disclosure in the ex parte application, the consequences, from the point of doing justice between the parties, of denying relief to the applicant on the ex parte order, and the interests of innocent third parties, such as minor children, for whom protection was sought in the ex parte application."

The enquiry falls into two parts, namely whether material facts were undisclosed and, secondly, whether a court should exercise its discretion in a particular case to set aside the order granted, one must take into account what was said in *Schlesinger v Schlesinger* (supra) at 3508-C, namely:

It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex-parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."

[39] In my view, the alleged instances of non-disclosure are not material and would not have influenced the outcome of Part A. The relief granted in Part A ordered that the matter be heard as one of urgency, in camera.

Antony Louis Mostert's situation

[40] Mostert asserts that the following conduct by Nash has had the effect of delaying the progression and administration of Pension Funds and ultimately to prejudice the former members thereof, all of whom are of advanced age and may be deceased before the surplus apportionments are completed:

40.1.1 Disrupting the progression of the administration of the Sable Fund, the Power Pack Fund and the Cadac Fund by bringing the series of applications aimed at delaying and derailing civil claims against him and his company, Midmacor. These include;

40.2 Attempts to delay the adjudication of the application brought to set aside the section 14 certificate transferring the business of the Stable Fund to the Lifecare Fund;

40.3 Seeking to set aside the fees payable to Mostert and declaring that those fees were not in accordance with the wording of the original order placing the Sable Funds under curatorship - Tuchten judgement;

40.4 Seeking a permanent stay of the civil and criminal proceedings about the fraud, theft and simulated transactions in respect of the Power Pack Fund.

40.5 Seeking to remove Mostert as the provisional curator of the Cadac Fund, opposing Mostert final appointment and raising disputes as to the appointment of the third curator; this action has resulted in the curatorship of Cadac having been effectively sterilised for seven years

40.6 A smear campaign using social media, website and the media as a platform, to damages Mostert's good name and reputation which has amounted to defamation.

Nash's conduct and its repercussions

[41] On 22 July 2017 Nash filed an affidavit in a criminal complaint where he said:

"I act on behalf of myself and a number of clients who have been witness to the corruption of officials of the Financial Services Board ("FSB") and it's self-appointed curators who are operating a state-sanctioned crime syndicate specialising in racketeering and fear.

..... We have recordings of the head of the FSB, Tshidi and his inspectors and alleged legal advisor, Ms Stander breaching the legislation and committing crimes by falsifying FSB reports to use to take over pension funds and then taking the money and intimidating the officers · into submission with attorney AL Mostert.

In 2005 Attorney Mostert was broke and heavily in debt, but he made a deal with Tshidi head of the FSB that as curator of pension funds he could extort millions from innocent victims and invest it for himself. ..."

[42] Despite the appointment of Mostert as a liquidator being confirmed by the Supreme Court of Appeal after Heaton-Nicholls J, in a damning judgment, had dismissed Nash application seeking to remove. Mostert as a curator of the Cadac Pension Fund, Nash states in his supplementary replying affidavit that Mostert has actively participated in collusive conduct and was the main conspirator in having himself (Mostert) appointed as a curator of the Cadac Pension Fund.

[43] Nash alleged that Mostert and his team falsified inspection Reports and committed perjury in filling what they knew to be false

affidavits to plot the curatorship of Cadac Fund.

[44] Nash concludes his letter of 14 March 2018, addressed to the Deputy Director General of National Treasury and copied to Lord Hein of the House of Lords and Abel Sithole, Chairman of the Board of the FSB by stating:

"I urge that you, as Board members, now intervene and get the cancer of the "Mostert factor" out of the FSB as clearly it has lead the FSB organization corrupt conduct. As previously I tender all evidence (that is not privileged) that would be required by any truly independent audit person to verify the above"

[45] Nash without any facts to support his allegations, states that Mostert has done many secret deals with different witnesses and that Mostert has a reputation of presenting false and incorrect facts to suit his position.

[46] Despite the appointment of two additional curators to the Cadac Pension Fund by the Supreme Court of Appeal being by agreement, Nash falsely claims in the said letter that the Supreme Court of Appeal "in a damning indictment of FSB I Mostert association" ordered that two curators be appointed.

[47] In paragraph 52 of his answering affidavit Nash alleges that Mostert is guilty of:

"Corruption in that on or between 15 March 2005 and 20 July 2017, Mostert and Tshidi were unlawfully and intentionally engaged in a generally corrupt relationship in terms of which Tshidi used his position as CEO or Executive Manager of the FSB to ensure that Mostert would be appointed as the provisional curator and or final curator of various specified pension funds....."

[48] Nash interacted with the EFF, a political party and provided it with information that it used to lodge a complaint with the Public Protector. Nash continues publication of the latest website www.pensionscam.co.za which claims:

This website serves to lay bare a highly evolved, cynical, mercenary, yet simple scheme operated by a curator (Attorney Antony Louis Mostert) acting in conjunction and co-operation with senior members of the Financial Services Board (FSB) with the ultimate objective of earning the curator "nauseating" amounts of money in the form of "Contingency Fees". These illegal contingency fees are a self-devised incentive scheme and feed the desire for persecuting various targeted individuals/companies on the basis of transactions undertaken in the 1990's.

[49] The respondents with Nash as the controlling mind has attacked Mostert's moral character by suggesting that he is a "drug

user", frequents "brothels" and engages in prostitution and bribed the FSB officials.

Nash' defence

[50] Nash contends that the order sought would constitute a serious violation of his right to freedom of expression, in at least two ways: firstly, it seeks to limit his freedom to impart information and ideas unjustifiably; and secondly, it unjustifiably limits the public's right to receive the information pertaining to Mostert's unlawful conduct.

The

issues

[51] To decide the dispute, the court must answer the following questions:

- a. Has Nash undermined the right of Mostert to the safeguard of his dignity and reputation or fama which personality right is protected by the law of defamation;
- b. Does freedom of expression exonerate Nash from all liability for his untruthful statements about Mostert;
- c. Is the order sought justified?

[52] The law of defamation is designed to protect the reputation of people, in doing so, it limits the right to freedom of expression. Such limitation can be consistent with the Constitution only if it can be said that 'an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other. See *Hoho v The State*.^[10]

Right to human dignity

[53] Human dignity is stated in s 1 of the Constitution to be a foundational value of our democratic state. Section 10 of the Constitution protects the right of every person to dignity: this right includes "inherent dignity and the right to have their dignity respected and protected". In *Dawood and Another v Minister of Home Affairs and Others*,^[11] the Constitutional Court explained that:

"The value of dignity in our Constitutional framework cannot ... be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity, therefore, informs constitutional adjudication and interpretation at a range of levels."

[54] All rights are interpreted generously and purposively having regard to the underlying values of the Constitution. In *Khumalo and Others v Holomisa*^[12] O'Regan J stated that although freedom of expression is fundamental to our democratic society, it is not of paramount value.

It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.

Freedom of expression

[55] Section 16 of the Constitution provides as follows:

"(1) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm."

[56] The Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority*[13] explained that Section 16 is in two parts. Subsection (1) is concerned with the expression that is protected under the Constitution. Any limitation of this category of expression must satisfy the requirements of section 36[14] to be constitutionally valid. Subsection (2) deals with an expression that is specifically excluded from the protection of the right.

[57] It follows that it must first be determined whether the expression is one specifically protected under section 16(1) or specifically

excluded under section 16(2); secondly, if the expression is one which is protected by section 16(1) and not excluded by section 16 (2), the court must then determine whether the purported limitation complies with the requirements of the general limitation clause under the section 36 limitation clause.

[58] What is required by section 36 of the Constitution was explained by Nugent A in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*[15] thus:

"The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective

alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.'

[59] The importance of the right to freedom of expression has often been stressed by our courts. O'Regan J in *South African National Defence Union v Minister of Defence and Another*[16] held:

"... freedom of expression is one of a "web of mutually supporting rights" in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 11). These rights are taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even

where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by the society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views."

[60] Mokgoro J in *Case and another v Minister of Safety and Security & Others*[17] explained the right to receive information as follows:

"But my freedom of expression is impoverished indeed if it does not also embrace my right to receive, hold and consume expressions transmitted by others. Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of-expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression. Thus, a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally protected freedoms both of the speaker and of the would-be recipients."

[61] Mokgoro J emphasized that the right to freedom of expression not be to be understood in isolation;

". .. but as part of a web of mutually supporting rights enumerated in the Constitution, including the right to "freedom of conscience, religion, thought, belief and opinion", the right to privacy, and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value.

[62] Freedom of expression does not trump the right to dignity. In *S v Mamabolo*[18] the following was said by the Constitutional Court regarding the relationship between the rights to dignity and freedom of expression:

"With us, the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law."

[63] It is important to bear in mind that Mostert does not seek an interdict against the media. Nash is not part of the media and has no legal duty or obligation to bring to the attention of the public the type of allegations he makes about Mostert without first establishing whether they are indeed true and correct. The cases dealing with freedom of expression are distinguishable in that respect.

[64] The order sought in the notice of motion is to prevent the first to fourth respondents from continuing to publish false and defamatory statements, which statements the respondents seek to repeat by among other things, disseminating such information on the website www.pensionscam.co.za and well as repeating such statements to the media.

[65] The Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi*[19] held that:

".. the publication in the press of false, defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way a at the particular time.

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion (*Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956

(4) SA 310 (W) at 318 C-E), and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information? Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before the defamatory matter is published in a newspaper." (at 1212G - 1213A)".

[66] It follows in my view, that in defamation cases the truth of what is said and the public interest are relevant factors. Also relevant are the context in which the statements were made, their reasonableness, the tone used, the identity of the person who made the statements and the identity of the victim. These criteria are also useful, in my view, when determining whether freedom of expression justifies the violations of a person's right to dignity.

[67] Nash submits in his heads of argument and court that Mostert has failed to prove the publication of material that is defamatory of him and has failed to meet the basic threshold for proving "publication" of defamatory statements. "Publication" means the communication or making known to at least one person other than the plaintiff. It may take many forms. Apart from the obvious forms of speech or print, the injurious information can also be published through photographs, sketches, cartoons or caricatures[20]

[68] The elements of the delict of defamation were restated by the Constitutional Court in *Le Roux v Dey*[21] thus - (a) the wrongful and

(b) intentional (c) publication of (d) a defamatory statement(s) concerning the plaintiff. At paragraph 85 the court said:

"Yet the plaintiff does not have to establish every one of these elements in order to succeed. All the plaintiff has to prove at the outset is the publication of defamatory matter concerning himself or herself. Once the plaintiff has accomplished this, it is presumed that the statement was both wrongful and intentional. A defendant wishing to avoid liability for defamation must then raise a defence which excludes either wrongfulness or intent. Until recently there was doubt as to the exact nature of the onus. However, it is now settled that the onus on the defendant to rebut one or the other presumption is not only a duty to adduce evidence, but a full onus, that is, it must be discharged on a preponderance of probabilities. A bare denial by the defendant will therefore not be enough. Facts must be pleaded and proved that will be sufficient to establish the defence."

[69] Once a plaintiff establishes that a defendant has published a defamatory statement concerning the plaintiff, it is presumed that the publication was both unlawful and intentional[22] A defendant wishing to avoid liability for defamation must then raise a defence which rebuts unlawfulness or intention. The defences raised by Mostert to rebut unlawfulness are that the publication was true and in the public benefit.

[70] In the counter application brought by Nash opposing Mostert's final appointment as a curator Judge Heaton-Nicholls states at para 69 of her judgment[23] that Nash had embarked on a smear campaign against Mostert, she found that:

"As Mostert delved deeper into the Ghavalas transactions the extent of Nash's dishonesty became apparent. Nash's counter strategy was to claim a corrupt relationship between Mostert and Tshidi. In an email to Darren Williams of Werksmans, he suggests how public perception about him will be transformed and "the press will start to accuse Mostert and the FSB of corruption". This will result in the NPA "losing heart", presumably a reference to the criminal charges Nash is

facing. In relation to the present matter, he warns that this trial is "high risk and high publicity". It has to be the "one large fight we have. It has to be the watershed fight."

[71] Despite the above critical findings by the court, Nash continues with his vilification campaign against Mostert. He provides no proof that the facts on which his statements are based are true. Nash makes repeated allegations that Mostert is guilty of corruption

and fraud without any basis and in flagrant disregard of consequences. The allegations cannot be regarded as "in the public interest" as they are based on falsehood and distorted facts. The imputation lowers Mostert in the estimation of ordinary people straddling all sectors of our society and is outrageously defamatory.

[72] Nash's impugned statements were made publicly, in newspaper articles, website publications as well as through the launch of spurious court actions and a carefully plotted smear campaign as found by Heaton-Nichols J. There is no merit in the submission that Mostert has failed to prove the publication of the defamatory statements by Nash.

[73] Nash states in general terms that the statements are fair comment and in the public interest. A fair comment made honestly and in good faith on matters of public interest can constitute a defence to defamation unless they are made maliciously. The statement must be one of comment, not fact, and in order to be fair, it must be an honest expression of an opinion on facts which are true and known to the person to whom the comment is made. The comment must relate to matters of public interest. See *Crawford v Albu*[24].

[74] The defamatory statements by Nash are not made honestly and in good faith and are not supported by any evidence. They are retaliation

against Mostert for uncovering Nash's fraud and corruption as highlighted by the findings of Heaton-Nichols J. He imputes base and corrupt motives in the circumstances where such imputations are not warranted by the facts. An ordinary unprejudiced reader would not take the statements to be a comment based on facts. Nash's defence based on a fair comment cannot succeed.

Final relief

[75] The relief prayed for by the applicants is final in effect. The applicants must, therefore, establish (a) a clear right, (b) that injury is reasonably apprehended; and

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(c) that no other suitable form of relief is available[25].

A clear right on the part of the applicant

[76] The respondents asserts that this court is obliged to consider against Mostert's rights, the fact that the information in question is true and for the public benefit. Also the fact that Mostert's rights must be weighed against respondent's right to freely express information that is true and in the public interest, and the public's right to receive such information. This sentiment is reflected by the Supreme Court of Appeal In *Modiri v Minister of Safety and Security and Others*[26] as follows:

"As explained by the Constitutional Court in *Le Roux v Dey* 2011 (3) SA 274 (CC) para 122, common law grounds of justification play a pivotal role within the framework of our Constitution. The reason is that it is primarily in the province of justification that the common law allows the courts to strike a proper balance between the often conflicting fundamental rights of freedom of expression, including freedom of the press, on the one hand, and the rights to freedom of privacy and dignity, including reputation, on the other. Under the rubric of truth and public benefit, the balancing act turns mainly on the element of public interest or benefit. If a defamatory statement is found to be substantially untrue, the law does not regard its publication as justified. Publication of defamatory matter which is untrue or only partly true can never be in the public interest, end of story. But, the converse does not necessarily hold true. Our law does not regard the publication of a defamatory statement as justified merely because it is true, precisely because the court may, in its performance of the balancing act, find that in the particular circumstances of the case, the freedom of expression is outweighed by the victim's right to privacy or dignity".

[77] It is clear that there cannot be a justification for the publication of untruths. The defamatory statements published by Nash are substantially untrue. Despite the judgment of Heaton-Nichols J which traversed all facts relating to Mostert's curatorship, and Nash's unsuccessful appeal against it, Nash has repeated the false and defamatory allegations in the supplementary affidavit. He states that Mostert has approached the court with "unclean hands" to cover up his corrupt activities in failing to pursue Marks for repayment of monies stolen from the Cadac Fund without any facts to support such statements.

[78] The respondents argue that the defamatory material about which applicants complain has already been disseminated and is within the public domain and the information that applicants seek to interdict will not have any further effect on his dignity. I disagree. The fact that the defamatory material is within the public domain does not entitle Nash to continue disseminating such material unabated in flagrant disregard of Mostert's rights.

[79] Mostert in my view has established a clear right not to have the defamatory statements which have already been disseminated not to be publicized again.

Reasonably apprehended injury

[80] The fact that Nash continues to defame Mostert in the answering affidavit, in the media and through the website www.pensionscam.co.za with abandon establishes a well-grounded likelihood that Nash will continue to defame Mostert in the future unless he is stopped from doing so.

No alternative remedy

[81] In *Doctors for Life International v Speaker of the National Assembly & Others*[27]

[2006] ZACC 11; 2006 (6) SA 416 (CC) at 446 C-E, the Constitutional Court said:

"Where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief."

[82] I find in this case that there is no other suitable remedy available to the applicant other than an interdict. The respondents have employed a stratagem on an ongoing basis to malign Mostert. As long as the respondents continue in their vilification campaign against Mostert, there will be a continuing violation of his rights which is ongoing and persistent. It is difficult to see how this campaign can be topped in the future except through an interdict. The court must intervene to prevent the violation of Mostert and his associate's constitutional right to dignity.

The declaratory order that leave of the court be obtained before the first or fourth respondents institute litigation

[83] Nash and Midmacor have successfully delayed the progression of criminal proceedings brought against them arising out of, the

unlawful surplus removal of the Sable and Power Pack Pension Funds for some seven years. through delaying tactics. They have instigated

a "trial within a trial" in their criminal trial alleging breach of legal privilege.

[84] In August 2012 Nash and Midmacor brought an application under case no 31650/12 ("the secrecy application") they complained of alleged breaches of privilege by Ms Marks. They sought an order that Ms Marks be ordered to furnish " masses of privileged information" which were alleged to have been provided by Marks to the FSB inspectors and persons engaged in assisting and advising Mostert in the investigation of the affairs of the Sable Fund, Power Pack and the Cadac Fund.

[85] They argued that Marks betrayed their confidence and collaborated with the state, the FSB and Mostert as the curator and liquidator of the pension funds. They claimed to require all the documents sought to enable a meaningful defence to be made in their criminal trial in the magistrate's court.

- [86] Wright J dismissed the secrecy application with punitive costs holding that the trial magistrate is best placed, particularly during a trial within a trial to decide the necessary questions of fact from facts found to be proved. Applications for leave to appeal and petitions for leave to appeal were instituted and subsequently refused. This is indicative of delaying tactics by spurious litigation.
- [87] Despite the outcome of the judgment of Wright J, Nash and Midmacor have brought an application to permanently stay the civil and criminal proceedings pending against them and for the "trial within a trial" to be set aside ("the stay application"). The application for the stay of civil proceedings is premised on the same unidentified alleged breaches of privilege that Wright J refused to adjudicate on.
- [88] They also seek to set aside the criminal proceedings on the allegation that the finding of the magistrate in the criminal proceedings in the "trial within a trial" will be against them and is a foregone conclusion. Nash has proceeded to take part in his criminal trial despite the permanent stay application pending. The ulterior motive of seeking to delay and derail the progression of these proceedings has succeeded in that the stay application has resulted in the trial in the civil proceedings which was set down for hearing for four weeks commencing on 31 July 2017 not commencing and being postponed sine die.
- [89] The FSB brought an application to set aside the section 14 certificates issued for the Sable Fund. Victor J granted the application on 25 May 2017, Nash brought an application for leave to appeal the judgment and as a delaying tactic, failed to timely prosecute the appeal because he knew that the existence of the section 14 certificates is a bar to the Sable Funds taking steps to recover the surplus assets unlawfully removed.
- [90] Using the "new trustees" appointed by him despite the Cadac Fund being under provisional curatorship, Nash sought an order by way of urgency to remove Mostert as provisional curator and opposed his final appointment. The application was dismissed by Heaton-Nicholls J as did the appeal to the Supreme Court of Appeal.
- [91] Nash after that raised a dispute as to the appointment of a third curator and in doing so frustrated the appointment of the replacement third curator after the resignation of Mr Norman Klein. It took five years for Mostert's provisional appointment to be finalized. As a result, the curatorship of Cadac has been sterilized for seven years.
- [92] In my view, the fact that Nash succeeded in his application to have the contingency fee agreement between Mostert and the FSB declared invalid ("the Tuchten judgment") is not the reason why Nash and Midmacor should not be compelled first seek leave of this court prior to instituting any further legal proceedings against the applicants. Nash is dishonest and is motivated by ulterior motives to disrupt the progression of the administration of the Sable Fund, the Power pack Fund and the Cadac Fund by bringing a series of applications aimed at delaying and derailing civil and criminal against him and Midmacor.

[93] The Ghavalas scheme has caused severe financial distress to some pension funds, and an immediate intervention by the court is called for in the public interest to ensure that frivolous applications do not delay the conclusion of civil and criminal proceedings that have already been instituted. The relief sought does not constitute a bar to Nash's access to the courts. Instead, it imposes a judicial oversight as the first step in any further proceedings that are to be instituted by Nash.

[94] In the result the following order shall issue:

1. First to third respondents, either themselves or through entities in which they hold interest, are interdicted from disseminating, directly or indirectly, false and defamatory allegations pertaining to the first and second applicants and any of the first and second applicants associates or persons engaged in assisting the second applicant in the administration of the curatorship of the third applicant and in the liquidation of the fourth applicant;
2. The respondents are directed to cause the website <http://pensionscam.co.za> or any other website established by them which refer to Mostert or his associates be closed down within 24 hours of being ordered to do so, failing which the Sheriff shall be authorised to do so.
3. The first and fourth respondents are ordered to first obtain the leave of the Court as a prerequisite to instituting any further proceedings against the applicants.
4. The costs of this application are to be borne by the First to Third respondents jointly and severally.

K E MATOJANE J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

For the Applicant: Adv Wasserman SC with Adv Quinn

Instructed by: ASSHETON-SMITH INCORPORATED

For the defendant: Adv Subel SC with Adv Pudfin-Jones

Instructed by: IAN LEVITT ATTORNEYS

Date of hearing: 19 April 2018

Date of judgment: 14 August 2018

[1] During 1993, Peter Ghavalas ("Ghavalas") devised a fraudulent scheme to remove surplus funds from pension funds. The

scheme was marketed to principal employers with control of pension funds. Pension fund monies were illegally released to the

controlling company of each pension fund. A commission of 30% of the surplus was paid to Ghavalas and the balance of the surplus was illegally channeled to employers who participated in the fraudulent scheme. (" the Ghavalas scheme")

[2] Since 1994 various transfers in terms of section 14 of the Pensions Fund Act 24 of 1956 ("PF Act"), have taken place between the implicated funds. Section 14 governs amalgamations and transfers between funds and other entities, and regulates the transfer of assets and liabilities. The transfer must be approved by the FSB.

[3] 2017 (4) SA

[4] Paragraphs [72] to [80]

[5] (2010/50596) (2013] ZAGPJHC 401 (13 December 2013) at para 89

[6] Simon Nash and another v The Executive Officer of the Financial Services Board Case no. 31650/12 South Gauteng unreported

[7] 1979 (4) SA 342 (W) 348C-350C

[8] 2002 (1) SA 419 (SCA) at 489 H-J

[9] 1981 (2) SA 412 (W) at 414E-414H

[10] (493/05) [2008] ZASCA 98 (17 September 2008)

[11]

[2000] ZACC 8; 2000 (3) SA 936 at para 35

[12] (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002)

[13] 2002 (4) SA 294

[14] Section 36(1) provides as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

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- (a) the nature of the right;
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- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

[15] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* (100/06) [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA) (18 May 2007)

[16]

[1999] ZACC 7; 1999 (4) SA 469 (CC) para 8

[17]

[1996] ZACC 7; 1996 (3) SA 617 (CC) para 25

[18] 2001 (3) SA 407 (CC) para 41

[19] 1998 (4) SA 1196 (SCA)

[20] *Le Roux v Dey* para 86 *supra*

[21] 2011 (3) SA 274 at para 84

[22] *Khumalo and Others v Holomisa* 2005 (5) SA 401 (CC)

[23] *Executive Officer of the Financial Services Board (the FSB) v Cadac Pension Fund; In Re: Executive Officer of the Financial Services*

Board v Cadac Pension Fund and Others.

[24] 1917 AD 102 at page 114

[25] *Setlogelo v Setlogelo* 1914 AD 221 at 227

[26] 2011 (6) SA 370 (SCA); [2012] 1 All SA 154 (SCA)

[27]

[2006] ZACC 11; 2006 (6) SA 416 (CC) at 446 C-E

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