

SOUTH AFRICA / JUDGMENT

Nash and Others v Cadac Pension Fund (In Curatorship) (Registration Number: 12/8/0020425) and Others (545/2020) [2021] ZASCA 144 (11 October 2021)

[2021] ZASCA 144

COURT

Supreme Court of Appeal

BEFORE

Dambuza, Makgoka, Mbatha, Ledwaba, Unterhalter

CASE / FILE NUMBER

545/2020

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 545/2020

In the matter between:

SIMON JOHN NASH

FIRST APPELLANT

CADAC (PTY) LIMITED

SECOND APPELLANT

ANTOINETTE CRONJE

THIRD APPELLANT

IRIS ROSE SCHOEMAN

FOURTH APPELLANT

SAMANTHA MAYS

FIFTH APPELLANT

and

THE CADAC PENSION FUND (IN
CURATORSHIP) (REGISTRATION
NUMBER: 12/8/0020425) FIRST RESPONDENT

ANTONY LOUIS MOSTERT NO
SECOND RESPONDENT

JOHAN ESTERHUIZEN NO
THIRD RESPONDENT

KAREN KEEVY NO
FOURTH RESPONDENT

NMG ADMINISTRATORS (PTY) LIMITED
(REGISTRATION NUMBER: 1998/005937/07) FIFTH RESPONDENT

Neutral citation: Simon Nash and Others v The Cadac Pension Fund (In Curatorship)
(Registration Number: 12/8/0020425) and Others (545/2020)

[2021] ZASCA 144 (11 October 2021)

Coram: DAMBUZA, MAKGOKA and MBATHA JJA and LEDWABA and UNTERHALTER AJJA

Heard: 17 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 11 October 2021.

Summary: Application for interim interdict – whether requirements for interim order were met – whether the appellant should have brought a separate prior application to institute the application – leave had been sought – no requirement for separate prior application for leave – requirements for intervention by additional appellants were met - requirements for interim interdict met – appeal succeeds.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Francis J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the Gauteng Division of the High Court, Johannesburg is set aside and is substituted with the following order:

‘(1) The first applicant is granted leave to institute the interim relief application.

(2) The second applicant is granted leave to intervene and is joined in the main application.

(3) The third, fourth and fifth applicants are granted leave to intervene

and are joined in the interim application.

(4) Pending the finalisation of the main application instituted on 9 December 2019,

4.1 An interim interdict is granted against curators of the first respondent (second, third and fourth respondents) and the fifth respondent the administrator from:

4.1.1 refusing to accept further contributions from or on behalf of the second applicant and/or the members of the first respondent. 4.1.2 refunding any contributions from or on behalf of the second applicant and/or members of the first respondent.

(5) The respondents are jointly and severally ordered to pay the costs, including costs of employment of two counsel.'

Ledwaba AJA (Dambuza, Makgoka and Mbatha JJA and Unterhalter AJA concurring)

Introduction

[1] This is an appeal against an order granted by the Gauteng Division of the High Court, Johannesburg (the high court), per Francis J, on 14 May 2020, in terms of which two urgent interlocutory applications were dismissed. In the first application, the first appellant, Mr Simon Nash (Mr Nash) sought an interdict against the second to fourth respondents being the curators of the first respondent, the CADAC Pension Fund (in curatorship), together with the fifth respondent, NMG Administrators (Pty) Ltd (the Fund administrator). The interdict was sought as provisional relief, pending the determination of the main application brought by Mr Nash a few months earlier, on 19 December 2019, against the same respondents and the Fund. In the same urgent application CADAC (Pty) Ltd (CADAC) sought leave to intervene in the main application. In the second application the third to fifth appellants, Ms Antoinette Cronje, Ms Iris Schoeman, and Ms Samantha Mays (the intervenors) sought to intervene in the interlocutory application.

[2] The high court dismissed both applications – the interdict application was dismissed on the basis that Mr Nash had failed to obtain the leave of the court to institute the application as required in terms of two orders of the same court (per Claassen and Matojane JJ), and the intervention applications on the basis of the dismissal of the interdict application. This appeal, against the order of the high court, is brought with its leave.

Background

[3] The court order of 14 May 2020 had been preceded by a long history of civil and criminal litigation between Mr Nash and the curators of the Fund (Mr Anton Mostert, Mr Johan Esterhuizen and Ms Karen Keevy). The issues raised in those court proceedings concerned surplus funds that were withdrawn from eight pension funds, of which the CADAC Pension Fund was one. The withdrawals were effected through a scheme termed the 'Ghavalas scheme' and were unlawfully appropriated to

certain persons and entities, including Mr Nash and his erstwhile business associate, Mr Ghavalas. The scheme entailed that the funds were divested of most of their most active members who were transferred to another pension fund, leaving the first fund with a large surplus that would then be accessed by the principal employer and other parties.

[4] As a result, the pension funds were either placed under curatorship or were wound up. Mr Mostert was appointed a co-curator and/or liquidator of all of the funds. His extensive involvement in the liquidation and curatorship of the pension funds resulted in an acrimonious relationship between him and Mr Nash, culminating in numerous court battles between them.[1]

[5] Relevant to this appeal is that on 21 December 2010 the CADAC Pension Fund was placed under provisional curatorship in terms of an order of the high court (Claassen J). At the time Mr Nash was a member of the Fund, having been a member since 1995. He was the director and chairman of CADAC, the principal employer in relation to the Fund, with a casting vote. He was also the chairman and a trustee of the Fund. His wife, Mrs Elena Formo-Nash, was a director of CADAC and a trustee of the Fund.

[6] The relationship between Mr Mostert and Mr Nash was adversarial. In one instance, Mr Nash instituted court proceedings to set aside Mr Mostert's appointments as curator and liquidator and challenged his entitlement to fees in relation to the discharge of his duties.

[7] In another instance, Mr Mostert alleged that Mr Nash, through the Ghavalas scheme, had unlawfully transferred a surplus of R36 million from the Sable Pension Fund to 'his' company, Midmacor Industries Limited. He also alleged that Mr Nash had misappropriated R11 million from the CADAC Pension Fund with the intention of using it to finance his defence in a criminal trial. Mr Nash responded by accusing Mr Mostert of involvement in corrupt activities and exerting undue influence on the executive members of the Financial Services Board (FSB). These allegations resulted in Mr Mostert obtaining an interdict against Mr Nash in the high court on 14 August 2018, barring him from 'disseminating defamatory allegations' about Mr Mostert.

[8] After Mr Nash had turned 70, in November 2018, he gave notice to NMG of the withdrawal of his pension benefit of R36 525 806.31 from the Fund. The effective date of his withdrawal was stated as 31 May 2019. On 22 October 2019 he was advised that the fund's curators had instructed NMG to flag his benefit in terms of s 37D of the Pension Funds Act 24 of 1956 (the Act).[2] As a result, NMG did not process the requested withdrawal. It is in this context that on 6 December 2019 Mr Nash launched the main

application seeking the declaratory order that the instruction to flag his pension benefits be declared unlawful, that he was entitled

to withdraw the benefits, and that the respondents be directed to pay them to him.

[9] Whilst that application was pending, during April 2020 the curators notified Mr Nash (and other members) that from that time the Fund would be treated as a 'closed fund' and that no further contributions would be accepted from them. Instead, all of their past contributions would be refunded to them. This led to the urgent interlocutory application for an interdict which was dismissed by the high court.

[10] In his answering affidavit in the interlocutory application, Mr Mostert contended that the application was an abuse of court process and part of the 'lawfare' that had been conducted by Mr Nash against him since the commencement of the curatorship in December

2010. He maintained that Mr Nash had manipulated the Fund to his benefit by causing unsuspecting employees to deposit moneys into the Fund which had closed down and become paid up in March 2003. He highlighted that the transfer of the members of the Fund to the Optimum Pension Fund was approved by the Registrar of Pension Funds on 25 April 2005. However, in September 2004, Mr Nash attempted, impermissibly, to retrospectively (with effect from February 2003) transfer the employees and new members, including himself, back to the paid-up Fund, at a time when its rules had not been amended as required in terms of s 12 of the Act.

[11] Mr Mostert contended further that, to Mr Nash's knowledge, the Fund's evaluator had advised the curators that no benefit statements should be issued in respect of membership of the Fund until the question of the administration of the Fund has been resolved, including the fact that the Fund had become a paid-up fund from 01 March 2003. He contended that, in any event, Mr Nash had failed to obtain the prior approval of the court to launch proceedings against him, as required by the court orders granted by Claassen and Matojane JJ.

[12] As stated, the high court upheld Mr Mostert's contentions and dismissed the application for the interdict on the basis that Mr Nash had failed first to seek the leave of the court, before instituting the proceedings, having been declared to be a vexatious litigant in terms of the order of 14 August 2018 (Matojane J). On appeal, Mr Nash and the CADAC contended that none of the two court orders 'were an impediment' to their 'right of access to court'. It was also submitted on their behalf that a proper case was made out in the urgent application and

they were entitled to the interdictory relief that they sought.

The issues

[13] The issues that arise for determination in this appeal are: first, whether Mr Nash and CADAC required the leave of the court, when they launched the urgent application in April 2020. A related issue is whether Mr Nash and the other appellants should have brought a separate application for leave prior to launching the interdict application. If they did not have to do so, then a determination must be made as to whether a proper case was made out for the interim interdict that was sought. Furthermore, if Mr Nash did not require prior leave of the court, then the application for intervention must be determined, and lastly the question whether a proper case was made out for an interdict will be considered. I turn first to the issue of leave.

Leave to institute proceedings

[14] In the relevant part the order of 21 December 2010 (Claassen J) provided that:

‘All actions, proceedings, the execution of writs, summonses and other processes against the Fund, [shall] be stayed and be not instituted

(sic) or proceeded with without the leave of the Court.’

In the relevant part the order of 14 August 2018 (Matojane J) provided that:

‘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 applicant.’

In view of the conclusion we reach in respect of the issue whether Mr Nash required the leave of the court to institute the interdict proceedings, it is not necessary to interpret the court orders. This is all the more so because the respondents’ submissions on this issue migrated somewhat, from the appellants not having sought leave as required by the orders, to their having failed to seek leave separately, prior to launching the application for an interdict.

[15] It is necessary to highlight that the order of 14 August 2018 that requires Mr Nash first to obtain the leave of court before instituting proceedings against Mr Mostert and his co-respondents, was intended to curb the vexatious conduct of Mr Nash. Matojane J found Mr Nash to have been:

‘dishonest and motivated by ulterior motive 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 [litigation] against him and Midmacor.’

The intention therefore was that further proceedings brought by Mr Nash should be scrutinised by a court. Such assessment could only be made taking into account the basis for such further proceedings.

[16] Insofar as Mr Nash was required to seek leave to institute proceedings against Mr Mostert, he did seek leave. So did CADAC.[3] In para 2 of the application for interim interdict an order was sought:

‘2. Granting the First Applicant [Mr Nash], leave to institute this Application and to seek the relief set out hereafter, as contemplated

in terms of paragraph 4 of the order of the above court under case number: 2010/50596, granted on 21 December 2010 [the order of

provisional curatorship] and in paragraph 3 of the order of the above court under case number 64664/2017 dated 14 August 2018.

3. Granting the Second Applicant [Cadac], insofar as it is necessary, leave to intervene in the Application instituted by the First

Applicant under the above case number in terms of the notice of motion dated 9 December 2019 [the main application].’

[17] The contention by Mr Mostert that a separate prior application for leave was required is mere formalism. The facts on which the prior application would have been brought would have been exactly the same as those advanced in support of the application for an interdict. The court was entitled to consider the application for leave together with the application for the interim interdict, particularly in view of the cost implications that would result from the duplication entailed in the separate application for leave contended for by Mr Mostert. The order simply required that leave first be obtained. There is no reason why the application to obtain such leave should not have been contained in the same application that sought substantive relief. The high court was in a position first to determine whether leave should be granted to bring the proceedings, and if such leave was granted, then to proceed to hear the merits of the substantive application. Such an approach is practical and entirely consistent with the order made by Matojane J. The application for an interdict which he sought to bring was neither frivolous nor vexatious. Leave should have been granted.

The application for intervention

[18] The application(s) were dismissed by the high court based on the dismissal of the interim interdict application. The high court reasoned that the intervenors had only sought to support the unsustainable application brought by Mr Nash and that they brought nothing new to the proceedings. There was no finding, however, in the judgment of the high court that the intervenors had not demonstrated a legal interest as envisaged in Uniform Court Rule 12, which could be prejudicially affected in the subject matter of the proceedings. The rejected pension contributions had been made by CADAC as the employer. The members’ legal interest and the prejudice that they stood to suffer, individually, is apparent from the discussion on the interim interdict. The submission that they were Mr Nash’s alter ego is unsustainable. The parties should have been allowed to intervene and have their interests considered and, ultimately, protected.

Entitlement to an interim interdict

[19] Essentially, in the main application, Mr Nash, having been informed that his pension benefits had been flagged, sought a declarator that he was entitled to his full pension benefits and an order that such benefits be paid to him. Until March 2020 the appellants' pension contributions were accepted by the Fund. Indeed, the issues relating to the management or administration of the Fund during the period commencing March 2003 were to be decided in the main application. The decision by the curators to determine those issues by excluding the appellants from the Fund in March 2020 was taken abruptly, without consulting the appellants, at the start of the national lockdown declared in terms of the Disaster Management Act 57 of 2002. The decision to exclude them posed significant irreparable prejudice to them as they would be left without pension and related

benefits. The evidence was also that they would be liable for income tax on the refunded contribution.

[20] The appellants had therefore established a *prima facie* right which was under threat as a result of the conduct of the curators. Their request to the curators to maintain the status quo, which had prevailed for decades, pending the outcome of the main application was rejected. None of these facts were in dispute. The appellants had no option but to approach the court for relief. The balance of convenience favoured them. The requirements for a provisional interdict had been met.

[21] It was submitted on behalf of the respondents that the interim interdict would entitle Mr Nash to act as if he was a member of the Fund when he was, in fact, not. It is not clear that the interim interdict has any such entailment. It simply preserves the status quo until the issue of Mr Nash's membership can be determined in the main application. Should Mr Nash threaten to take any action that would subvert that determination, the respondents may approach the courts to preserve the status quo.

[22] The appellants sought an order that the respondents be directed to 'continue administering [the Fund] in terms of the Pension Funds Act, 1956 (as amended) and the Rules of the First Respondent'. This prayer is framed in impermissibly wide terms and cannot be granted for that reason. The appellants will be sufficiently protected in the interim if their contributions must continue to be accepted and not refunded. How those contributions should have been dealt with is a matter for the main application.

[23] Accordingly the appeal must succeed. The following order is granted:

(2) The second applicant is granted leave to intervene and is joined in the main application.

LEDWABA AJA

ACTING JUDGE OF APPEAL

Appearances:

For first and second appellants: Greg Wickins SC

Instructed by:

KWA Attorneys, Johannesburg

Hill, McHardy & Herbst Attorneys,

Bloemfontein

For third to fifth appellants: Sarah Pudifin-Jones

Instructed by:

Ian Levitt Attorneys, Sandton

Lovius Block Inc, Bloemfontein

For first to fourth respondents: J G Wasserman SC with S Quinn

Instructed by:

Assheton-Smith Inc, Cape Town

Michael Du Plessis Attorneys,

- [1] The Financial Services Board and the Registrar of Pension Funds also had to enter the fray. See for example, *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* [2013] ZAGPJHC 401; *Mostert and Others v Nash and Another* [2018] ZASCA 62; [2018] 3 All SA 1 (SCA); 2018 (5) SA 409 (SCA); and an unreported judgment in *Simon Nash and Another v The Executive Officer of the Financial Services Board* Case No 31650/12 (Gauteng Division of the High Court, Johannesburg).
- [2] In terms of s 37D an amount due by a member of a pension fund to his or her employer in certain specified circumstances may be deducted from the member's benefit on withdrawal of the member's benefits from the fund.
- [3] CADAC could only have been required to seek leave as per order of Claassen J.

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