REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**

04/02/2019
DATE

SIGNATURE

Case Number: **22324/17**

In the matter between:

SIMON JOHN NASH	First Applicant
MIDMACOR INDUSTRIES LIMITED	Second Applicant

and

DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
MAGISTRATE FOR THE REGION OF JOHANNESBURG	Second Respondent
POWERPACK PENSION FUND (IN LIQUIDATION)	Third Respondent

JUNE STACEY MARKS	Fourth Respondent
ANTONY LOUIS MOSTERT N.O.	Fifth Respondent
ANTONY LOUIS MOSTERT	Sixth Respondent
A L MOSTERT & COMPANY INC	Seventh Respondent
CULLINAN HOLDINGS LIMITED	Eighth Respondent
QUENTIN ALFRED SOUTHEY	Ninth Respondent
AUBREY HENLEY WYNNE-JONES	Tenth Respondent
WYNNE-JONES & COMPANY EMPLOYEE BENEFITS CONSULTANTS	Eleventh Respondent
MTM INDUSTRIES LIMITED	Twelfth Respondent
KARRIMOR AFRICA (PTY) LIMITED	Thirteenth Respondent
OUTDOOR-LIFESTYLE HOLDINGS LIMITED	Fourteenth Respondent
PAUL RONALD ANTHONY FERGUSON	Fifteenth Respondent
NEIL OSCAR DAVIES	Sixteenth Respondent
DEREK NORTH CARSTENS	Seventeenth Respondent
ANTHONY ALEXANDER THOMPSON	Eighteenth Respondent
PETER GHAVALAS	Nineteenth Respondent
FINANCIAL SERVICES BOARD	Twentieth Respondent
JOHAN ESTERHUIZEN	Twenty First Respondent

JUDGMENT

FISHER J.

[1] This matter has, at its heart, the criminal and civil culpability and liability of the first Applicant, Mr Simon John Nash. The second applicant, Midmacor of which Mr Nash is the director and guiding mind, are the first and second accused in criminal proceedings pending before the Specialized Commercial Crime Court, Johannesburg. These criminal proceedings have been running for in excess of 9 years. Mr Nash and Midmacor are also defendants and third parties in civil proceedings in this court which are being conducted under case number 09/50684. These civil proceedings have also been protracted – summons having been instituted some 10 years ago.

[2] In the criminal proceedings Mr Nash and Midmacor are accused of, inter alia, fraud, theft, and various statutory contraventions. The financial services Board (FSB) the 20th respondent in this matter, is the complainant in the criminal proceedings. Mr Nash and Midmacor have pleaded in the criminal proceedings that they are not guilty in respect of all charges and the proceedings are underway. A trial within a trial in that matter as to the admissibility of certain evidence in currently being dealt with by the Magistrate in these proceedings. The admissibility of evidence is also at the heart of these proceedings.

[3] The civil proceedings are based essentially on the same factual complex as this application. These proceedings relate to a claim by the liquidators of the 3rd respondent the PowerPack Pension Fund (in liquidation) which is founded upon the removal of PowerPack's assets through theft and/or fraud and/or breach of fiduciary duties between the period 1998 to 1999.

[4] This application is the latest foray of Mr Nash with this court as battleground. The application started life as an urgent application which was brought on the eve of the civil trial which was specially allocated by the DJP for 4 weeks. The parties thereto ,including Mr Nash, had all agreed to the date set with junior and senior counsel reserved and employed in preparation.

[5] The relief sought was essentially the following:

a. A stay of the impending hearing of the civil trial;
b. A stay of the criminal trial which was underway and at a stage where an interlocutory issue had been brought to the high court;

c. An order that certain information and documents relating to the fees charged by Mr Mostert and his firm be disclosed;
d. A declaration that the proceedings were contrary to the Constitution.

[6] The application for the stay of the criminal proceedings was sought to be withdrawn on the eve of this hearing. It was explained that Mr Nash had decided that he would no longer pursue the stay of the criminal proceedings in this court but would condescend to wait for the verdict of the Magistrate on the issue. The more jaded view and that espoused by the respondents is that there remains further grist for the delay mill in this approach.

[7] The relief against Mr Mostert in relation to his financial disclosures had been abandoned earlier in the process and during the case management of the matter by the DJP. It bears mention that, at this stage, the validity of the charges by Mr Mostert and his firm were before the SCA for adjudication.

[8] Mr Katz SC for the applicants thus stated that he would persist with only the declaratory relief and the stay of the civil proceedings.

[9] The stay of the civil proceedings was sought initially on the basis that there was a profound and fundamental breach of the legal professional privilege of the applicants. It was, however, conceded by the applicants before the hearing that the matter of legal professional privilege could not be decided on the papers alone. It was sought that the court allow evidence, limited to the issue of whether Ms Marks had acted for Mr Nash in his personal capacity as well as for the companies and pension funds which she represented. The argument is that, once this is established there must be a finding of breach of priviledge and thus a finding that there should be the requested stay. The respondents countered by agreeing that the matter could be dealt with on the hypothetical basis that Ms Marks did act for Mr Nash, although this is denied.

BACKGROUND AND RELATED LITIGATION

[10] The transactions involved in these criminal and civil proceedings relate to what has been regarded by some courts (including the SCA)[1] as being a fraudulent scheme. The scheme, known eponymously as the "Ghavalas Option."[2] Involved some 8 pension funds[3]. It is alleged that this scheme entailed the stripping of pension fund surpluses from these funds and the unlawful appropriation thereof by various protagonists. Mr Nash is charged with being such a person, as is Midmacor. The alleged fraud resulted in these pension funds being placed under curatorship or winding-up or both. Part of the losses sustained formed the subject matter of delictual claims by the various funds (duly represented by their curators or liquidators as the case may be).

[11] Mr Ghavalas is apparently to testify in the criminal proceedings against Mr Nash. Mr Ghavalas has pleaded guilty in relation to his part in the scheme. By all accounts he is expected to implicate Mr Nash and Midmacor in relation to the fraud and other unlawful conduct which is relied on in the criminal and civil proceedings in issue.

[12] The case against Mr Nash is to the effect that he was one of the orchestrators of the scheme and deeply involved in transactions which resulted in the losses sustained.

[13] Mr Anthony Louis Mostert is a key figure in this and other related matters which have been brought before this and other courts. He features here and in the related proceedings in his capacities as joint liquidator or joint curator of the affected pension funds. He is also called by the applicants to give account, in his personal capacity. The firm, Mostert & Associates, of which he is a director, is also joined in the

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[1] See inter alia Picbel Groep Voorsorgfonds v Somerville (405/12) [2013] ZASCA 24 (22 March 2013)

[2] The scheme was infamously devised by Peter Ghavalas who has been convicted of offences related thereto and who is to testify at the criminal trial of Mr Nash.

[3] Picbel Groep Voorsorgfonds (in liquidation), Sable Industries Pension Fund (under curatorship), Mitchell Cotts Pension Fund (in liquidation), Lucas South Africa Pension Fund (in liquidation), Datakor Pension Fund (under curatorship), Datakor Retirement Fund (under curatorship) and Cortech Pension Fund (under curatorship) Cadac Pension Fund (under curatorship).

proceedings. This firm has been used to provide legal services to Mr Mostert in his capacity as curator and liquidator of the pension funds in issue.

[14] Mr Mostert has held something akin to a monopoly in relation to these official positions in that he has been appointed in a representative capacity to administer each of them (be it in liquidation and/or curatorship). The rationale for these appointments has been that he has institutional knowledge and special expertise in relation to the Ghavalas transactions. Mr Mostert's investigation into Mr Nash's involvement in this scheme have set him up as something of a nemesis in relation to those involved in the scheme. This is particularly true of Mr Nash.

[15] Mr Nash has fought back. He has done this in the popular media and in the courts[4]. He has embarked on what is sometimes facetiously called "*lawfare*"[5]. It suggests a tactical manipulation of court proceeding so as to set up impediments to the conduct of proceedings so as to avoid or delay adverse consequences to those employing such tactics. Mr Nash has also launched attacks against Mr Mostert and his firm, aimed at setting aside of Mr Mosterts's various appointments and calling into question the fees earned by Mr Mostert and his firm.

[16] Nicholls J in her judgment 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*[6] , an application brought by Mr Nash for the purposes of setting aside Mr Mostert's various appointments, was sceptical of this alleged special position and expertise in relation to the administration of the funds. She however made reference to the fact that that matter had been fought in the context of "intense animosity" between Mr Nash and Mr Mostert. She declined to set aside Mr Mostert's provisional appointment as requested by Mr Nash. She did, however,

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[4] The matter of Mostert and Others v Nash and others(34664/2017) [2018] ZAGPJHC 511; [2018] 4 All SA 267 (GJ) (14 August 2018) per Matojane J dealt with defamatory matter relating to Mr Mostert and his firm disseminated by Mr Nash on websites and other platforms. An interdict was granted against Mr Nash in this regard. In addition Mr Nash and Midmacor were directed to obtain the court's leave to institute any further proceedings against Mr Mostert and his firm.

[5] A play on the word "warfare".

[6] 2010/50596) (2013] ZAGPJHC 401 (13 December 2013) at para 89.

express disquiet in relation to the use by Mr Mostert of his own firm to litigate on his behalf in his representative capacities. The point was rightly made that this could result in a penchant for litigating excessively.

[17] In more recent proceedings the remuneration agreement in relation to the charges of Mr Mostert and his firm have been called into question at the instance of Mr Nash.[7]

[18] The judgment of Nicholls J is replete with findings of deliberate delay strategies being employed by Mr Nash and abuses of the courts processes for this purpose. Costs were awarded against Mr Nash and others in this matter on the scale as between attorney and client. This hearing spanned some 4 days and the papers ran to nearly 8000 pages.

[19] The FSB and the Registrar of Pension Funds sought, in early 2017, to review and set aside the Registrar's certification that the business requirements of certain of the pension funds, which were victims of the scheme, had been satisfied in terms of s 14(1)(a)-(d) of the Pension Funds Act[8]. The aim of the review was to protect the pension fund assets concerned. Mr Nash and Midmacor opposed the review. They raised a number of disputes and sought the dismissal on this and other bases. Again the papers were swelled to more than 4000 pages. Victor J who heard the application held that the attempts by Mr Nash to perpetuate the consequences of the grant of the licences based on demonstrably false facts which had been placed before the Registrar (with the alleged involvement of Mr Nash) justified a punitive costs order[9]. Once again, attorney client costs were granted against Mr Nash and Midmacor. Victor J saw fit also to reject many of the disputes raised by Mr Nash on paper.[10]

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[7] Tuchten J in the judgment reported as Nash and Another v Mostert and Others found that the remuneration agreement between Mostert and the FSB was invalid. On appeal the SCA per Wallis J held that the remuneration charged was not in accordance with the order which appointed Mostert curator.(see *Mostert and Others v Nash and Another* (604/2017 and 597/2017) [2018] ZASCA 62 (21 May 2018)).

[8] 24 of 1956.

[9] Victor Judgment [26].

[10] Id [17].

DISCUSSION ON REMAINING RELIEF

The alleged breach of legal professional privilege

[20] Central to the relief claimed by Mr Nash and Midmacor is a complaint that there have been breaches of legal professional privilege by Ms Marks, his erstwhile attorney. In essence Mr Nash alleges that Ms Marks has collaborated with the FSB, Mr Mostert, and the DPP to bring about his conviction and that of Midmacor in the criminal trial. In that matter, as in this, there were a number of disputes of fact. It is seldom otherwise where matters of alleged fraud and conspiracy are at play.

[21] The determination of admissibility of evidence is, by and large, one for the trial court. This is implicit in in the right to adduce and challenge evidence being part of the right to a fair trial.[11] Such questions, more often than not, involve factual disputes and such disputes are often rooted in the narrative of each case. I do not say that there would never be a matter where admissibility should be determined separately and by resort to application in order to avoid injustice but, experience dictates that these would be few.

[22] Admissibility is often an issue at discovery stage – however this is a more preliminary enquiry. To separate the enquiry as to the admissibility of evidence to be led from the trial process itself seems counterintuitive. The rules of court and the rules of evidence are such that they lend themselves to determination of these aspects as the trial progresses.

[23] On 25 February 2014 a further judgment was handed down in the saga in this court by Wright J.[12] This case concerned an application brought by Mr Nash and Midmacor against the FSB and others seeking orders aimed at assisting them in the conduct of their defence in the criminal trial. These included seeking that the criminal trial to be heard in camera (which was abandoned at the hearing); seeking orders that certain documents should not be covered in terms of the secrecy provisions in *inter*

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[11] S 35(3)(i).

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

alia the FSB Act; seeking production, under subpoena, of documents; relief as to the admissibility of documents; and the giving of evidence in relation thereto.

[24] The contention raised by Mr Nash was that the Magistrate did not have the power to grant the relief sought in the application. Wright J held that the Magistrate had such power under the Constitution and specifically section 35. He also went further and held that the Magistrate was best placed to hear the evidence relating to the question whether there had been a breach of privilege such as would lead to documents or testimony being inadmissible.[13]

[25] Wright J thus dismissed the relief sought by Mr Nash and Midmacor and granted costs on the scale as between attorney and client. He too remarked on the inordinate length of the papers (in excess of 4000 pages). Wright J furthermore attended to strike out certain matter which was defamatory of Mr Mostert and others accused of the conspiracy. He found the tone of the founding affidavit to be "strident and provocative"[14].

[26] Mr Nash has, in addition to allegations made in court papers, conducted a media campaign which has involved him making allegations of dishonesty and impropriety against Mr Mostert. Mr Nash has accused Mr Mostert of fraud, forgery, uttering, and perjury.

[27] Mr Nash relies in this interlocutory argument in the criminal trial on what can be said to be essentially the same contentions as are made in support of the relief in this matter. The narrative put forward by Mr Nash goes thus: Ms Marks, who is the 4th Respondent represented him and the pension funds which were investigated in relation to his unlawful conduct. She betrayed him, he says, by colluding with Mr Mostert, the DPP, and the FSB to disclose privileged communications and documents to them for the purposes of prejudicing Mr Nash and Midmacor in the criminal and civil proceedings which are underway. The contention is that the nature of the breach of privilege is such that it has the effect of rendering it impossible for a fair trial to ensue both in relation to the criminal and the civil proceedings. This is all denied. To the extent that there is anything new it is along the same lines. In essence Mr Nash on his

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[13] Id [23]-[25].
[14] Id [28].

version has been the victim of a conspiracy orchestrated by Mr Mostert and the FSB and with the assistance of his attorney who has disclosed privileged information to them and to the DPP.

[28] Whilst constrained to concede that that this was not a matter which could be decided by way of affidavit, Mr Katz was adamant in his assertion that the declaratory relief sought under the constitution must follow. He asserts that there must be a referral to oral evidence on this point. The purpose of this relief is he says merely to vindicate the rule of law. It makes no matter on his contention that this will serve no direct purpose in relation to the facts and circumstances of this matter. He went so far as to argue that this court had no choice but to entertain the relief sought given that it must find, at very least, that there has been an attempt to mislead the court. The applicants thus soughtthe referral to oral evidence on the issue of whether Ms Marks represented Mr Nash personally.

[29] Whether Ms Marks did or did not represent Mr Nash, there remains an irresoluble dispute of fact in relation to whether the legal professional privilege of Mr Nash was breached by Ms Marks. The law relating to whether privilege may be claimed or whether it exists in relation to any one case is fact bound. The enquiry extends to matters of waiver, both implied, express, or imputed. A selective exercise is required to determine whether to withhold only those documents seeking or giving advice and to disclose any which merely recorded information or events or gave instructions. There is also a dispute as to whether, given that Ms Marks represented the PowerPack Pension Fund, the Cadac Pension fund and possibly Mr Nash, documents and communications would not be privileged on the principle espoused in *Kelly v Pickering and another*[15] which held that communications to an attorney common to parties who later become adversaries are not privileged between them. This is an evidence bound inquiry. It would, of necessity, involve specific reference to evidence to be used and an objection to such use. But the applicants eschew any such specificity. They say that, once it has been determined that the conspiracy which they allege was real, then this goes to the heart of the matter.

[15] Kelly v Pickering and another (1) 1980 (2) SA 753 (R).

[30] The applicants would have the matter dealt with on the basis that a finding is made that given the alleged nefarious intentions of the conspirators the process is tainted to its core and thus should be stayed.

[31] Not only is this a different case to the one launched, but the approach is far reaching and optimistic. It also loses sight of the fact that the interest of the public and victims of the alleged fraud have rights which cannot be regarded as totally eclipsed by the policy dictates of professional privilege. The fact that an attorney breaches privilege in certain respects cannot equate to a blanket determination that all documents that may have emanated in this context are tainted and thus inadmissible. In these proceedings many of the documents in issue were obtained by the FSB under subpoena, others were proffered strategically by Nash for plea bargaining and other purposes. Many are financial records which were brought into existence in the normal course.

[32] Mr Katz concedes this. He maintains however that I should exercise my discretion to allow oral evidence in terms of r 6(5)(g) on the narrow point of whether Ms Marks represented Mr Nash. This is notwithstanding the hypothetical acceptance of this point by the opposing respondents. His argument loses sight of the fact that this is but one of the disputes. Central questions are: the nature of the documents; the purpose with which they were disclosed; the obligation to disclose; whether Mr Nash gave instructions to disclose; and whether the alleged conspiracy occurred.

[33] The imbroglio which has been conjured up in this matter by Mr Nash will decidedly not be unlocked by the determination of whether Ms Marks acted for him or not.

The Declaration

[34] Mr Nash has attempted, on this factual morass, to seek a declaration of rights. Mr Katz argues that the purpose of this is to vindicate the Rule of Law. Thus he argues that this declaration may be made without any reference to a result or remedy which

has effect in relation to this case. It is he says "free standing" relief which can be had without reference to the case in relation to the stay relief.

[35] This declaratory relief suffers from the same deficiency of evidence as to whether the rights of the respondents have indeed been affected.

[36] Mr Katz sought to avoid this problem by resort to the fact that the respondents agreed to argue the matter on the hypothetical basis that Ms Marks did represent Mr Nash for the purposes of showing that the evidence sought to be led would not cure the disputes. Mr Katz argued that accepting this fact must logically attract the conclusion that Ms Marks has lied in her evidence before the Magistrate and this court. It follows from this he argues that the declaration must be granted.

[37] This is a new case. In any event, quite how these hypothetical lies to the court would operate to deprive Mr Nash of a fair trial was not explained. The argument also fails to appreciate the hypothetical nature of the admission. On this specious basis Mr Nash seeks a declaration which is bound and, no doubt, intended to have relevance if not influence in the further conduct of this matter and its ancillary or related processes.

[38] The argument misses the fact that even with the hypothetical lies, the declaration is still sought on disputed facts and on the basis that it will not – without the stay relief – have a direct impact on the process.

[39] The upshot is that this relief also cannot be determined on the papers.

CONCLUSION AND COSTS

[40] The remedy which applies is for the objection to the evidence to be dealt with as prescribed in the normal course. The point is made by the FSB that the discovery is relatively modest. It runs to less than 200 documents. It pertinently raises the

question why no specific objection is made to any document as to legal privilege. Only speculative and argumentative posits are made: "What if Ms Marks had disclosed the whole basis for the defence of Mr Nash" was one such preface. There was no such evidence. It was purely a further hypothetical wrangle.

[41] There is also the fact that the nature of the enquiry in both the criminal and civil matters is to determine the legality of the financial transactions which have occurred. The nature of the inquiry involves the forensic analysis of transactions which emerge from the record of deposits and withdrawals of monies. This is often called the "follow the money" approach. This approach lends itself to a determination of what money has gone and where. The reasons for these tranfers are a matter of explanation by those overseeing the transactions, such as Mr Nash. As Wright J pointed out constitutional protections are to be found in s 35.

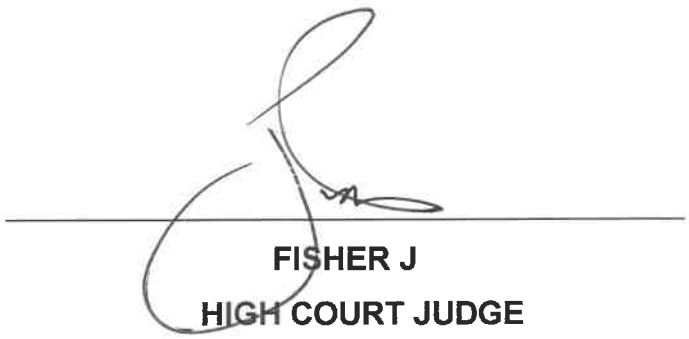
[42] I align myself with the findings of referred to above that Mr Nash is involved in a campaign designed to delay determination of his guilt and liability. There was clearly never any merit in any of the relief. The relief was fashioned in a cynical way. Its aim has been and is to delay the process. The fact that the majority of the relief has be jettisoned along the way without explanation is suggestive of the relief being sought strategically and with no foundation.

[43] What is clear is that this is nothing more than a transparent attempt to create further delay in relation to the civil trial. The tactic employed by the resort to a declaration of rights which the court was enjoined to exact on the basis that it was imperative because of the hypothetical concession was a contrivance.

[44] In the circumstances the relief falls to be dismissed with costs on the scale as between attorney and client.

ORDER

1. The application is dismissed with costs.
2. The applicants are to pay the costs of the application on the scale as between attorney and client.



FISHER J
HIGH COURT JUDGE
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 19 - 21 November 2018.
Judgment Delivered: 04 February 2019.

APPEARANCES:

For the Applicants	**:** Adv A Katz SC with Adv S Pudifin-Jones.
Instructed by	: Ian Levitt Attorneys.
For the First Respondent	**:** Adv L Montsho-Molisane SC with Adv K Bokaba.
Instructed by	**:** The State Attorney.
For the Third & Fifth Respondents	**:** Adv J Wasserman.
Instructed by	: Assheton-Smith Incorporated.
For the Fourth Respondent	:June Marks (attorney with right of appearance).

Instructed by : June Stacey Marks Attorneys.

For the Sixth and Seventh Respondent: Adv L Hollander.

Instructed by : SWVG Inc Attorneys.

For the Twentieth Respondent : Adv E Theron SC with Adv L Mbatha.

Instructed by : Rooth & Wessels Incorporated.