REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22939/20

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

SIGNATURE 26/4/2021 DATE

In the matter between:

ANTHONY LOUIS MOSTERT	**FIRST APPLICANT**
ANTHONY LOUIS MOSTERT N.O.	**SECOND APPLICANT**
SABLE INDUSTRIES PENSION FUND (IN LIQUIDATION)	**THIRD APPLICANT**
POWER PACK PENSION FUND (UNDER CURATORSHIP)	**FOURTH APPLICANT**

and

SIMON JOHN NASH	**RESPONDENT**

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. This is the latest in a long line of judgments in the ongoing litigation saga involving these parties. The main applicant on this occasion is Mr Mostert, both in his

personal capacity, and in his capacity as curator of the Sable Industries Pension Fund ("the third applicant") and the liquidator of the Power Pack Pension Fund ("the fourth applicant"). The respondent is Mr Nash. He was a trustee of the Sable Industries Pension Fund ("the Sable Fund"). Both it, the Power Pack Pension Fund ("the Power Pack Fund"), and other pension funds became embroiled in what has been referred to as the "Ghavallas scheme". This involved, it is alleged fraudulently, removing the surplus from pension funds through simulated transactions. Mr Nash currently stands accused in the Specialised Commercial Crimes Court on charges of fraud, theft and money laundering for his alleged part in the scheme.

2. All of this is by way of broad background. The nub of the present application lies in what Mr Mostert says is an ongoing smear campaign by Mr Nash and some associates against, among others, Mr Mostert. Mr Mostert says that the motive behind the smear campaign ultimately is to interfere with Mr Nash's criminal prosecution. However, one of the consequences is to damage Mr Mostert's good name and reputation.

3. The existence of the smear campaign is not a new averment. It was central to at least two previous judgments in this court. On 14 August 2018, the learned Matojane J handed down an order and judgment[1] in an application brought by Mr Mostert against Mr Nash ("the Matojane judgment or order"). The Matojane order, among other things, directed that Mr Nash (and identified others):

> "*either themselves or through entities in which they hold interest (sic), are interdicted from disseminating, directly or indirectly, false and defamatory allegations pertaining to (Mr Mostert in his personal and nomine officio capacity), associates or persons engaged in assisting (Mr Mostert) in the administration of*

[1] *Mostert & Others v Nash & Others* [2018] ZAGPJHC 511

the curatorship of the (Sable Fund) and in the liquidation of the (Power Pack Fund)".

4. On 28 July 2020, the learned Crutchfield AJ *in the matter of Mostert and Another v Nash and Others*[2]*,* handed down an order and judgment ("the Crutchfield judgment or order") against Mr Nash, Mr Paul O'Sullivan, Mr O'Sullivan's company, Paul O'Sullivan & Associates Proprietary Limited, and one of its associates, Ms Trent. That order, among other things, interdicted these respondents from making defamatory allegations on similar terms to that set out in the Matojane order. In addition, it interdicted them from:

> "*Publishing, causing to be published or in any other manner disseminating or causing to be disseminated to any person or to the public whether in the media and/or on social platforms or otherwise, (Paul O'Sullivan & Associates' Proprietary Limited) 'forensic report' compiled by (Mr O'Sullivan and Ms Trent) dated 30 March 2019 or any variations, updates or amendments thereof and the contents of any correspondence between Mr O'Sullivan and the (Old Mutual Life Insurance Company (South Africa) Limited)."*

5. Leave to appeal against the Matojane judgment and order was refused. At the time that this application was heard, an application for leave to appeal against the Crutchfield judgment was pending. I believe that the application was recently dismissed. I do not know whether Mr Nash has filed a petition for leave to appeal to the Supreme Court of Appeal ("SCA")

6. In this application Mr Mostert asserts that Mr Nash should be held in contempt of the Matojane order. The alleged contempt arises from statements Mr Nash made in an email to a journalist, Mr Beamish, on 30 August 2020. Mr Mostert says that

[2] [2020] ZAGPJHC 187

these statements are false and are defamatory of him, and that in making the statements Mr Nash breached the interdict granted by Matojane J.

7. For his part, Mr Nash denies that the statements contained in the email are false and defamatory. If they are not false and defamatory, he cannot be held to be in contempt of the Matojane order. Mr Nash contends further that even if the statements are found to be false and defamatory, he had no intention to act in breach of the Matojane order, and so, for this reason too, he cannot be found to be in contempt.

THE EMAIL TO MR BEAMISH

8. The Crutchfield judgment and order was handed down on 28 July 2020. On 29 August 2020, Mr Beamish, who is said to be an investigative journalist (and who is not a party to these proceedings) wrote an email to Mr Nash in the following terms:

> "*Dear Mr Nash*
> *In 1999 Mr O'Sullivan was convicted of:*
> *(i). Common Assault - upon his wife.*
> *(ii). Contempt of Court for failing to comply with a court order - a domestic violence interdict obtained by his wife;*
> *(iii). Malicious Injury to property; and*
> *(iv). Crimen injuria. He was fined R1,500-00. The docket reflecting the convictions and sentence is attached.*
> *I will be covering matters consequent upon the recent judgment of Crutchfield AJ and I wish to know- for publication —whether Mr O'Sullivan disclosed to you his criminal convictions at the time at which you retained the services of the O'Sullivan respondents? Furthermore, has he indicated to you whether these convictions were disclosed to the Private Security Industry Regulatory Authority (PSIRA) at the time when he joined it - a relatively short time period after he was convicted?*
> *These questions are relevant to the publication of news stories about the interdict matter and any sequelae. I wait to hear from you.*
> *Yours sincerely*
> *Tony Beamish"*

9. Mr Nash forwarded the email to Mr O'Sullivan, who responded to Mr Beamish. His response is not material to this application. Mr Nash's response is. It was copied to Mr O'Sullivan and to a Wynand Grobler of the television programme, Carte Blanche. It read as follows:

> *"Mr Beamish,*
> *Firstly the matter has been appealed and as such is of no legal consequence. All Appellants are sure that when the matter goes to the SCA that Mostert actions (sic) will once again be over turned— as they always are at the SCA.*
> *I am sure you also know of (but failed to report on) the very recent judgment by Judge Wanless where Mostert tried to gag the public protector and the EFF. He failed and was castigated by the judge for 'mulching pension fund money' for his own personal vendetta. By the way, it should certainly be of interest to you that Mostert has paid himself personally more in fees than the total he has ever paid to the 'poor pensioners / fund members' who supposedly he is so concerned about. Clearly, it seems that he sees himself personally is worth more (sic) than the total sum of all 'poor pensioners/members' who were paid any money in surplus distributions.*
> *What Mostert is attempting to gag is a Report by P O'Sullivan Associates where a secret and Confidential Agreement between Mostert, Old Mutual and Mr Tshidi of the FSB agreed to have Old Mutual pay Mostert R106m in highly questionable circumstances. The Report is already publically (sic) distributed ---------- (sic) to the knowledge of Mostert. This was in 2008 and only recently was Mostert forced by subpoena to disclose it. In the light of current questions on public officials / corporate morality it seems this is an appropriate subject to be publically (sic) aired and questioned and the truth to be exposed.*
> *Apart from this, I note that you have now stopped sending the numerous lewd and disgraceful secret g-mails to myself and wife."*

10. I have underlined the portions of the email to identify those statements that Mr Mostert contends are false and defamatory and in breach of the Matojane order.

11. The circumstances of the case require a two-stage inquiry. Although, ultimately, I must determine whether Mr Nash should be committed for contempt, first I must determine whether the statements are false and defamatory. It is only if they are

false and defamatory that the second stage of the inquiry is triggered: this involves a determination of whether a case for contempt of the court order has been established. Consequently, this judgment first considers the question of the false and defamatory nature of the statements, and thereafter considers the question of contempt.

GENERAL LEGAL PRINCPLES APPLICABLE TO DEFAMATORY STATEMENTS

12. The parties are agreed that the Motojane order interdicts Mr Nash from disseminating false and defamatory allegations about Mr Mostert in both his personal and *nomine officio* capacities.

13. Defamation is the wrongful and intentional publication of a defamatory statement concerning the plaintiff. The statement need not be false (although in this case, it must in addition be shown to be false). 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. The defendant may then raise a defence to rebut the unlawfulness or the intention. The most commonly raised defences to rebut unlawfulness are that the publication is true and in the public benefit, or that the publication constituted fair comment.[3]

14. The onus on a defendant to rebut one or the other presumption (of unlawfulness or intention) is a full onus: it is not only the duty to adduce evidence, but instead is an onus that must be discharged on a preponderance of probabilities. A bare denial is not sufficient. The defendant must plead and prove facts sufficient to establish the defence.[4]

[3] *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC) at para 18
[4] *Le Roux v Dey* 2011 (3) SA 274 (CC) at para 85

15. In order to determine whether a statement is defamatory, regard must be had to its meaning. The primary meaning of a statement is the ordinary meaning given to the statement in context by a reasonable person.[5] The test for determining the ordinary meaning of the statement is objective, and not subjective. Thus, the court is not concerned with the meaning the maker of the statement intended to convey, or the meaning given to it by the persons to whom it was directed. The test is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. It is understood that this reader would understand the statement in its context, and that she would have regard not only to what is expressly stated, but what is implied.[6]

16. If the statement is ambiguous in the sense that it can bear one meaning that is defamatory and others that are not, the normal standard of proof in civil cases is applied. If the defamatory meaning is more probable than the other, the defamatory meaning will have been established as a matter of fact. If the non-defamatory meaning is more probable, then the plaintiff will have failed to satisfy the onus she bears.[7]

17. Once the meaning of the statement has been established, the court moves to the next stage of the inquiry, which is to determine whether the meaning is defamatory. The question is whether it is likely to injure the good esteem in which the plaintiff is held by the reasonable or average person to whom it is published.[8] Statements attributing guilt of dishonest, immoral or dishonourable conduct to a plaintiff are common examples of statements of this nature. So too are those that belittle a

[5] *Le Roux*, above n4, para 87
[6] *Le Roux*, above n4, para 89
[7] *Le Roux*, above n4, para 91(b)
[8] *Le Roux*, above n4,para 91

plaintiff or that render her less worthy of respect by her peers.[9] The court does not consider evidence of whether an actual observer thought less of the plaintiff. The test is rather whether it is more likely, or more probable than not, that the statement will harm the plaintiff.[10]

ARE THE STATEMENTS COMPLAINED OF DEFAMATORY OF MR MOSTERT?

The statements pertaining to the judgment of Wanless AJ

18. Mr Mostert's first complaint is directed at the statements made by Mr Nash in connection with the judgment of the learned Wanless AJ[11] ("the Wanless judgment"). They appear as the second set of underlined wording in the email set out above. Mr Nash told Mr Beamish that the Wanless AJ judgment dealt with an attempt by Mr Mostert to "*gag the public protector and the EFF*". Further that Wanless AJ *"castigated"* Mr Mostert for *"mulching pension fund money"* for his *"own personal vendetta*".

19. Mr Mostert says that this statement conveys to the reasonable reader that the learned Wanless AJ castigated him for inappropriately using pension fund money for his own personal vendetta. Also that he tried to gag the Public Protector and the Economic Freedom Fighters ("EFF"), when in fact he had sought the legal remedy of an interdict.

20. As to the first part of the statement, Mr Mostert says that it is false. Mr Nash put the term "*mulching pension fund money*" in inverted commas, indicating that the learned

[9] *Le Roux*, above n4, para 91
[10] *Le Roux*, above n4, para 91(a)
[11] *Mostert v The Public Protector & Others*, unreported, *ex tempore* judgment of the Gauteng Division, Pretoria in Case no. 5860/19, dated 3 February 2020

Acting Judge had used this term in his judgment. It is common cause that he did not use this phrase.

21. The judgment of Wanless AJ dealt with the costs of an urgent application for an interdict that Mr Mostert had instituted against the Public Protector and the EFF. He sought to interdict the Public Protector from publishing her report after the EFF had lodged with her a complaint against Mr Mostert. The complaint was based on the O'Sullivan report. However, after instituting the application, Mr Mostert failed to proceed with it. He eventually withdrew it without tendering to pay costs. The issue of costs was brought for determination before Wanless AJ.

22. Wanless AJ criticised Mr Mostert for the way in which he had litigated the matter (or failed to progress the litigation for that matter). He was particularly unimpressed that Mr Mostert had withdrawn the application without tendering costs. He said that he did not understand why the Sable and Power Pack Funds had been joined in the litigation, and he found that: "… *the pension funds and members thereof <u>should not be mulcted in costs</u>*" (my emphasis). On this basis he found that Mr Mostert should pay the costs in his personal capacity. Mr Mostert was a litigant in both his personal and *nomine officio* capacities in the matter.

23. It is plain that the Wanless AJ judgment did not say that Mr Mostert was "*mulching pension fund monies*". This was an obviously false statement to attribute to the learned Acting Judge. It is also incorrect that the application was an attempt to "*gag*" the Public Protector and the EFF. The EFF was cited as a party in the application, but no relief was sought against it. In the Crutchfield application, Mr Nash argued that Mr Mostert was attempting to "*gag*" him and the other respondents. The Crutchfield judgment made it clear to Mr Nash that a "*gagging order*" in legal terms applies to interdictory relief sought against the media. Whether or not it has a

broader meaning, as Mr Nash argued before me, is not material. This is because the real mischief of Mr Nash's statements about the Wanless judgment is not to be found solely in his use of the term "*gag*".

24. Mr Nash went further to say that Wanless AJ had found that Mr Mostert was "*mulching pension fund money*" for his own personal vendetta. Mr Nash did not use quotation marks for the latter part of his statement. However, the language he chose is explicit. No language of this kind is to be found in the Wanless judgment. What Wanless AJ in fact found was that the Public Protector's notice that she would be carrying out an inquiry and publishing a report applied only to Mr Mostert in his personal capacity.[12] Thus, he found that the pension funds had no real interest in the matter. For this reason they should not be mulcted in costs and only Mr Mostert in his personal capacity should be ordered to pay the costs.

25. Mr Nash submitted that the only inference to be drawn from the Wanless judgment was that the court had in fact castigated Mr Mostert for pursuing his own personal vendetta against the Public Protector and the EFF. That this is not so is clear from my explanation of the relevant portion of the judgment above.

26. Read together the two parts of the statement clearly convey to the ordinary reasonable reader that Wanless AJ found that Mr Mostert was using pension fund monies inappropriately for his own personal vendetta. In other words, that he abused monies entrusted to him in his role as curator or liquidator to effect personal vengeance against those he considered to be his enemies. This is what a personal vendetta entails. It is a private feud in which vengeance is sought, or a prolonged

[12] See pg 9 of the Wanless AJ judgment at para 10. The second reference to "first respondent" in lines 12-13 appear to be in error. It should read as a reference to "first applicant" being Mr Mostert in his personal capacity. He is usually cited as second applicant in his N.O. capacity.

and bitter feud.[13] Mr Nash expressly stated that the vengeance exacted was personal to Mr Mostert.

27. Plainly, the statement is defamatory. It implies immoral, dishonourable and unprofessional conduct on the part of Mr Mostert. The effect would likely be to lower his esteem as a curator and liquidator. This would affect his good standing in both his *nomine officio* and personal capacities.

28. It follows that the statement is both false and defamatory.

29. But this is not the end of the matter. Mr Nash says that in making the statement he only expressed his genuine and *bona fide* reading of the Wanless judgment , and that his statement amounts to fair comment.

30. The defence of fair comment has four elements. It must be a comment and not a statement of fact; it must be fair in the sense that it must be an honestly held opinion; the facts on which it is based must be true and must be clearly stated; and it must relate to a matter of public interest.[14]

31. This defence cannot hold. The statement by Mr Nash was not in the nature of a comment. He stated, as a fact to Mr Beamish, what Wanless AJ had found in his judgment. This is indicated quite clearly by the quotation marks he used. His statement was not in the nature of a comment at all. In addition, as I have already found, it was not true. Consequently, the elements of the defence are not met, and Mr Nash has failed to satisfy the onus he bears to show that the statement was not unlawful.

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[13] Collins English Dictionary, 12 ed, 2014
[14] *Economic Freedom Fighters & Others v Manual* [2021] All SA 623 (SCA) (*EFF v Manual*), para 38

32. In making the statement, Mr Nash breached the Matojane order. I consider later whether the breach is such as to justify a finding that he must be held in contempt of court.

The statement pertaining to Mr Mostert's fees

33. In this part of the email, Mr Nash said that: "*Mostert has paid himself personally more in fees than the total he has ever paid to the 'poor pensioners / fund members' who supposedly he is so concerned about."*

34. Mr Mostert asserts that the statement gives the impression that he has paid himself fees unlawfully to the detriment of the pensioners for whom he has no regard. He says that this is untrue and is defamatory. He has recovered collectively an amount of R1 billion to date, and over 14 years, for the affected pension funds. R800 million of this has been allocated for distribution to former members and R350 million has been paid, with approximately R200 million more in the process of being paid. He says that the balance will be paid as and when beneficiaries are traced. Mr Mostert does not disclose in his founding affidavit the fees that have been paid in respect of the curatorship and liquidation. However, he says that they are prescribed in terms of orders of court and are regulated and monitored by the Financial Sector Conduct Authority ("FSCA").

35. In his answering affidavit, Mr Nash says that Mr Mostert is using the application as a continuation of his attempt to prevent the truth about his fees as a curator of the funds from being brought to the public attention, and, in particular, the thousands of members and pensioners who have not been paid. He states that Mr Mostert has never disclosed his fees. The only time he has done so was in 2011 when the Financial Services Board ("FSB") answered questions in Parliament. However, he

says that it is not in dispute that Mr Mostert earned "*hundreds of millions of rands*" in curator fees up to 2011. He says that the pensioners and the public have an interest in knowing what fees have been paid, and that he ought to be permitted to ventilate the issue without fear of reprisal from Mr Mostert for disclosing "information *relating to suspected or alleged irregular conduct".*

36. In addition, Mr Nash contends that in order to show the falsehood of his statement regarding the fees, it was required of Mr Mostert to disclose the exact amount of fees he has earned. Without a detailed disclosure in this regard, Mr Nash says his statement cannot be shown to be false.

37. Further, he says the statement he makes does not convey the meaning that Mr Mostert has paid himself fees unlawfully, as contended. It is a simple statement of fact, namely, that Mr Mostert has been paid more in fees than the pensioners have been paid. He goes on to say that based on information in the public domain, he genuinely believes what he has stated. He points to the Public Protector's report, which was the subject matter of the Wanless judgment on costs, as well as a report in the Daily Maverick titled "*Public Protector tears into Financial Services Board and Former Boss Dube Tshidi vindicating EFF's Julius Malema*". The article deals, in part, with the Public Protector's findings regarding the fees issue.

38. In order to determine whether the statement in the email to Mr Beamish is false and defamatory, it must first be established what it means, that is, what is its ordinary meaning (both express and implied) to the reasonable reader. Is its meaning simply a statement of the fact that Mr Mostert has been paid fees in excess of the amounts that have been paid to pensioners? If this is so, then Mr Nash's submissions have merit.

39. In determining the ordinary meaning, regard must be had to both what the statement expresses and implies. Mr Nash's statement is not a simple statement of fact. This is clear from the words used and their implication. Mr Nash says Mr Mostert has paid himself "*personally"* more in fees that the total ever paid to the "*poor pensioners/fund members who supposedly he is so concerned about"*. The clear implication here is that Mostert of his own accord has paid fees to himself to the detriment of the fund members or pensioners. Further, that in doing so he has shown no concern for those whose interests he is required, as curator, to safeguard.

40. It is so that Mr Nash does not expressly say that Mr Mostert has acted unlawfully. But if one considers what is stated, the implication is certainly that Mr Mostert has acted contrary to his obligations as curator, which are legally binding on him. As I indicated earlier, Mr Nash says expressly in his answering affidavit that the issue is one "*relating to suspected or alleged irregular conduct*". In other words, on Mr Nash's own version, the statement implies that Mr Mostert is acting irregularly and,hence, unlawfully as a curator in the fees he has been paid.

41. For a curator to be said to have acted outside of his legal obligations and in his own personal interests, to the detriment of those whose interests he is lawfully required to protect obviously reduces the esteem in which he is held, both in his personal capacity, as a professional, and in his capacity as the curator *bonis*. The meaning of the statement is thus defamatory.

42. However, Mr Nash says he believes it to be true. What must be established to be true is the meaning given above to the statement, namely, that Mr Mostert has acted irregularly and unlawfully in allocating to himself fees to the detriment of the pensioners, for whose interests he has no regard. Contrary to Mr Nash's contention, it is not enough for him simply to set out how much has been paid in fees as opposed

to how much has been paid to pensioners or members of the funds. This is because this is not what his statement means. Nor, for the same reason, does it assist him to argue that, in the absence of Mr Mostert giving a detailed accounting of his fees and how much has been paid out to fund members or pensioners in respect of each fund, the falsity of his statement has not been established.

43. As far as evidence of unlawfulness or irregularity in respect of Mr Mostert's fees is concerned, Mr Nash points to the Public Protector's report and the Daily Maverick article referred to earlier. The latter article was based on the Public Protector's report. It is common cause that the O'Sullivan report was provided to the EFF and to the Public Protector, and that the Public Protector's subsequent report was based on a complaint by the EFF. This complaint was informed by the O'Sullivan report. One of the findings in the O'Sullivan report was that Mr Mostert had breached the law by drawing excessive fees.[15] However, Crutchfield AJ interdicted the further publication of the report partly because of its untrue and defamatory content. In turn, the Public Protector subsequently instituted disciplinary proceedings against the investigators involved in the EFF's complaint, based on the alleged grossly negligent and reckless manner in which they carried out the investigation. A report in City Press to this effect is attached to Mr Mostert's replying affidavit. It is not disputed that the reason why the urgent application resulting in the Wanless judgment on costs did not proceed was because the Public Protector undertook in her answering affidavit not to publish her report before giving Mr Mostert the opportunity to make full submissions to her.

44. What the evidence shows is that the origin of the allegations about Mr Mostert's alleged unlawful and irregular fee allocations (implied by Mr Nash in his statement)

[15] Crutchfield judgment para 79

was in fact Mr Nash himself. He has made these allegations for many years, as the previous judgments of the courts show. He secured the services of Mr O'Sullivan to produce a report to justify these allegations. He gave this report to the EFF. The EFF lodged a complaint with the Public Protector, who produced a report based on the O'Sullivan report and no submissions from Mr Mostert. Thus, Mr Nash cannot point to the Public Protector's findings or the Daily Maverick article on those findings to establish the truth of what he continues to say: they are in effect an echo chamber for Mr Nash's original allegations which have not been independently proven. In light of the Crutchfield judgment, the O'Sullivan report cannot be regarded as independently justifying Mr Nash's statements as the truth. In light of the Public Protector's stance, nor can her report.

45. Mr Nash's own belief that his statement is true falls to be considered in the context of whether a case has been made out to hold him in contempt of the Matojane order. However, for purposes of determining whether the statement regarding the fees is false and defamatory, I am satisfied, given the meaning I have attached to the statement, that Mr Mostert has established this to be so.

The statement pertaining to the Old Mutual agreement

46. In his email to Mr Beamish, Mr Nash said that: "*What Mostert is attempting to gag is a Report by P O Sullivan (sic) Associates where a secret and Confidential Agreement between Mostert, Old Mutual and Mr Tshidi of the FSB agreed to have Old Mutual pay Mostert R106m in highly questionable circumstances.*"

47. Mr Mostert contends that this statement conveys to the reasonable reader that the agreement concluded between him, as at the liquidator of the Power Pack Fund and Old Mutual, and which was approved by Mr Tshidi of the Financial Services Board

at the time, is in some manner secretive and clandestine, and that it involved a payment to Mr Mostert personally of some R106 million "in highly questionable *circumstances*". He says that it also conveys that he has acted questionably and dishonestly in having concluded the agreement with Old Mutual. Further, that in attempting to "*gag*" the report, Mr Mostert is attempting to keep the truth from coming to light.

48. Mr Mostert also contends that the statement is false. He says that the agreement was concluded between Old Mutual and the Power Pack Fund. It involved an advance by Old Mutual of R106 million to the Power Pack Fund without any admission of liability. This was to facilitate the recovery of assets of the Fund that had been denuded by the perpetrators of the alleged fraud. Thereafter, the advance would be refunded to Old Mutual.

49. He points out that the application before Crutchfield AJ was for an interdict, not a "*gagging order*", and that he was entitled to take legal issue with the report because it is common cause that it contained statements defamatory of him.

50. Mr Nash defends his statement on the basis that it was neither false nor defamatory. He attached a copy of the agreement to his answering affidavit, and stated that on its own terms, it was secret and confidential. This is because clause 5.1 of the agreement obliged the parties to keep the agreement and related information "*private and confidential and (to) take reasonable care to prevent any disclosure of the Confidential Information to any third party*."

51. Mr Nash averred that there was a factual basis for his statement that the agreement was concluded in "*highly questionable circumstances*". This was because, although it purports to provide for a loan from Old Mutual to the Power Pack Fund, it "quite

obviously" is not a loan agreement. He says that Mr Mostert's explanation, described above, is only partially true. He states that "*in truth*" the agreement was to settle a damages claim by the Power Pack Fund against Old Mutual, and that the payment was styled as a loan: "*so that Mr Mostert/the Power Pack Fund could, despite having received payment from Old Mutual, continue with an action against so-called Perpetrators*." He then points to aspects of the agreement that he says are "*highly questionable*."

52. Mr Nash also contends that his statement was not meant to suggest that Mr Mostert was paid personally. He says that he did not use the term, and that the statement was made in the context of Mr Mostert in his official capacity.

53. As the well-established legal principles dictate, it is not what Mr Nash intended to convey when he made the statements, but rather what meaning is conveyed to the reasonable reader. This includes the implied meaning. While the statement does not expressly say that Mr Mostert personally was involved in the agreement, or that he was personally paid the R106 million, the statement gives no impression to the reader that reference is being made to him in his official capacity. He is called "*Mostert*", not "*Mr Mostert*", or "*the liquidator, Mostert*".

54. It is difficult to avoid the impression created that the statement is about Mr Mostert personally. This is particularly so given that in the second paragraph of the email, Mr Nash had said that according to the Wanless judgment, Mr Mostert was using pension fund money for "*his own personal vendetta*". The theme of the email, from commencement, undoubtedly placed in the mind of the reasonable reader that Mr Mostert was acting with a personal motive. The email also said that: "*Clearly, it seems that he sees himself <u>personally</u> (my emphasis) is worth more than (sic) the total sum of all 'poor pensioners/members who were paid any money in surplus*

distributions."(my emphasis). This statement reinforces the impression for the reader that any critical statements made in the email are about Mr Mostert personally. What then follows is the statement about the Old Mutual agreement. There is no change of wording or of tone to indicate to the reader that Mr Nash is now departing from his pervious personal criticism of Mr Mostert. The inevitable consequence is that the reader understands that it is Mr Mostert who is being criticised personally for his role in the agreement and for ensuring that he would be paid R106 million.

55. I conclude that the statement would not convey, to the reasonable reader, that Mr Nash was commenting on Mr Mostert as liquidator as he claims. But even if this were so, it does not mean that the statement did not carry a defamatory meaning.

56. Read as a whole, the statement contains strong pointers as to its meaning. The statement says that Mr Mostert was attempting to "*gag*" the O'Sullivan report, which dealt with a "*secret and confidential agreement*" in terms of which it was agreed that Mr Mostert would be paid a very large sum of money "*in highly questionable circumstances*". The reference to gagging would convey to the reasonable reader that Mr Mostert was trying to prevent an investigation into the agreement from coming to light. The statement implies that the reason for this is because Mr Mostert's role in the agreement was self-serving (involving payment to him) and suspicious (highly questionable). It also conveys that for these reasons, the agreement was in the first place entered into under a cloak of secrecy (secret and confidential). In other words, that it was a clandestine arrangement. Contrary to Mr Nash's assertion, the statement means a lot more than a simple factually correct statement that the agreement was subject to a confidentiality clause.

57. Mr Nash gave his analysis and interpretation of various clauses of the agreement in an attempt to show that he was factually correct in describing the agreement as "*highly questionable*". As I have indicated, he also attached the agreement to his answering affidavit. The difficulty with this strategy is that, in the first place, this defence is simply based on Mr Nash's own analysis of the agreement, and his own conclusions. For example, he concludes that the agreement was an abuse of the court process. This is clearly his opinion, based no doubt on the fact that he is one of the alleged perpetrators of the fraudulent scheme that allegedly stripped the Power Pack Fund of assets. He is one of those who is being sued civilly for the recovery of R42 million in this regard. Thus, his analysis of the terms of the agreement cannot be regarded as amounting to objective evidence as to the "*highly questionable*" nature of the agreement.

58. But perhaps the greater difficulty for his defence to the statement is that what Mr Nash said to Mr Beamish was that the agreement was concluded in highly questionable circumstances, not that the agreement was highly questionable. Thus, the truth (as he would have it) of his statement cannot be determined through an analysis of the agreement. It would really depend on evidence of the circumstances in which the agreement was concluded.

59. For all of these reasons, I conclude that once the objective meaning of the statement is understood, it was not true and was defamatory. Mr Mostert's personal standing as an individual professional lawyer, and in his *nomine officio* capacity as curator of the Power Pack Fund would be lowered in the eyes of his peers, the general public and the recipients of the email as a result of the statement made. The statement paints him as being a person who, despite holding a position of trust, engaged in an underhand and dishonest manner to secure an agreement that resulted in him being

paid a very substantial sum of money. This is obviously not conduct that anyone expects from a court appointed officer or a duly admitted officer of the court.

60. I will deal separately with Mr Nash's defence that he did not wilfully and maliciously breach the Matojane order.

The statement pertaining to the SCA

61. The final statement identified by Mr Mostert as being false and defamatory of him, and thus in breach of the Matojane order is Mr Nash's statement that: "*All Appellants are sure that when the matter goes to the SCA that Mostert (sic) actions will once again be over turned -- as they always are at the SCA.*" Mr Mostert says that this statement conveys that Mr Mostert litigates recklessly, without merit and that he is regularly sanctioned and overturned by the SCA.

62. In defending the truth of his statement, Mr Nash refers to two judgments of the SCA in which Mr Mostert has not succeeded on appeal. In the first, *Mostert NO v Registrar of Pension Funds*,[16] Mr Nash was not a party. It was an application by Mr Mostert for the judicial review of regulation 35(4) of the regulations made under the Pension Funds Act.[17] Mr Mostert failed to succeed in reviewing the regulation in both the High Court and in the SCA. It was found that the review was brought outside of the 180-day period prescribed in s7(1) of the Promotion of Administrative Justice Act.[18]

63. The second judgment Mr Nash refers to is that of *Mostert & Others v Nash & Another*.[19] Mr Nash was a party to the litigation. He sought and obtained an order

[16] 2018 (2) SA 53 (SCA)
[17] Act 24 of 1956
[18] Act 3 of 2000
[19] 2018 (5) SA 409 (SCA)

in the High Court setting aside a contingency fee arrangement between Mr Mostert N.O. and the FSB in relation to his curatorship of the Sable Pension Fund. Mr Mostert appealed the order but his appeal was not successful. The judgment was critical of Mr Mostert's having extended the length of the record by litigating separately in his personal and *nomine officio* capacities. While the SCA upheld the main finding of the High Court judgment, it amended the terms of that order in material respects.

64. Mr Nash further claimed in his answering affidavit that he had effectively succeeded at the SCA in an appeal against the dismissal of his application to have Mr Mostert's appointment as curator of the Cadac Pension Fund set aside. While the SCA did not uphold his appeal, he says that Mr Mostert agreed to the appointment of two additional trustees. Such an outcome cannot be categorised as the SCA overturning Mr Mostert's actions. The fact of the matter is that Mr Nash sought his removal, and he did not succeed in this on appeal to the SCA.

65. Even on the express statement that Mr Mostert's actions are always overturned in the SCA, the statement is not factually correct. What is critical to consider is what meaning is conveyed to the reasonable reader by the statement. It is not factually correct, and it is not just mere exaggeration. The use of language is instructive: the reader is told that Mr Mostert's actions are "*always*" overturned by the SCA, and that they will be so overturned again. The implication is that when adjudicated on by a higher court Mr Mostert's actions are regularly revealed to have been without merit. The statement that he is "*always*" overturned at the SCA implies that he is reckless in the litigation he pursues. These are obviously defamatory statements: professionals and persons holding positions of trust should not litigate recklessly and without merit.

66. Mr Nash says that he was merely expressing himself as to the assuredness of the appellants in the Crutchfield judgment that they would succeed on appeal. He says that it was an opinion based on legal advice that he had good prospects of success. He says further that it was no more than a minor and trivial statement, particularly in the circumstances where the courts have recognised that the litigation between the parties has been arduous and mean-spirited.

67. However, as I have indicted already, the statement meant far more than an expression of Mr Nash's confidence in his prospects of success in respect of the Crutchfield judgment. A statement of that nature would simply have said that Mr Nash has been advised that he has good prospects of success. Instead the statement goes further, giving rise to the implied meaning discussed earlier. A statement implying that Mr Mostert regularly litigates without merit and thus acts recklessly in litigating against Mr Nash is not trivial. This is particularly so if one has regard to the balance of the email, which casts clearly directed aspersions against Mr Mostert's actions. Once the meaning of the statement is understood, Mr Nash's defence that it was a trivial and *bona fide* comment, which bore no defamatory element, cannot stand.

BREACH OF THE MATOJANE ORDER

68. The Matojane order interdicted Mr Nash from disseminating false and defamatory allegations pertaining to him in both his personal and *nomine officio* capacities. Any statements that are both false and defamatory in nature will obviously constitute a breach of that order.

69. Having considered each of the impugned statements, I conclude that they are indeed false and defamatory. This means that Mr Mostert has succeeded in

satisfying the first element of his contempt application, namely, the breach of an order of this court.

70. It remains for me to consider whether the breach constitutes a contempt of the Matojane order and, if so, what the appropriate sanction should be.

CONTEMPT OF COURT

71. The rationale underlying contempt of court proceedings is that a person who fails to obey a court order is guilty of "*violating the dignity, repute or authority of the court*".[20] Thus, contempt proceedings serve a dual purpose. They secure the rights of the individual litigant arising out of the court order. At the same time, they serve the broader public purpose of ensuring that there is compliance with court orders and thus with the rule of law.[21]

72. An applicant in contempt proceedings must establish the existence of the order, service or notice thereof on the respondent, and her non-compliance therewith.[22]

73. Until the judgment of the SCA in *Fakie*, once these three requirements were met, the respondent assumed a reverse onus to demonstrate that her compliance was neither wilful nor *mala fide*. *Fakie* introduced a change in the law in this regard. The court held in its judgment that a respondent in civil contempt proceedings in which imprisonment is sought is in the same position as an accused person in criminal contempt proceedings in the sense that her wilful and *mala fide* non-compliance with the court order must be established beyond reasonable doubt. In these cases, once the applicant has established the basic three requirements, the

[20] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at [6]
[21] *Fakie*, n20 above, at [8]
[22] *Fakie,* n20 above, at [22]

respondent assumes an evidentiary (as opposed to a legal) burden to raise reasonable doubt as to whether her non-compliance was *mala fide* and willful.[23]

74. In this case, Mr Mostert seeks an order that Mr Nash be committed to prison for his breach of the Matojane order. As such, the principles laid down in *Fakie* apply.

75. There is no dispute about the existence of the order or that Mr Nash was served with it. I have found that his email to Mr Beamish contravened the Matojane order. The first three elements having been established, Mr Nash assumes an evidentiary burden to raise reasonable doubt that he acted wilfully and *mala fide* in making the false and defamatory statements in contravention of the order.

76. Mr Nash averred in his answering affidavit that Mr Mostert was using the contempt proceedings as an intimidatory tactic to prevent the truth emerging about the fees he has earned as curator. He said that the Constitution, the courts and the legislature recognise that irregular conduct by organs of state and private bodies is detrimental to good, effective, accountable and transparent governance in organs of state, and good corporate governance in private bodies. According to him, members of the pension funds and pensioners have an interest in knowing what fees have been paid to the curator of the funds. He said that the statements he made relate to the fact that Mr Mostert has never disclosed his fees. Because of this, he said that he ought to be permitted to ventilate and raise this issue without fear of reprisal from Mr Mostert (and especially the threat of incarceration) and to disclose information relating to suspected or irregular conduct.

77. Mr Nash pointed out that his email was in response to a request from Mr Beamish. Further, that he believed that Mr Beamish and Mr Grobler might be interested in

[23] *Fakie*, n20 above, at [22]

investigating and questioning these issues. He specifically said in his email that the issues should be "*publicly aired and questioned and the truth exposed*". The gist of this general approach adopted by Mr Nash is that he was simply attempting in his email to provide an avenue for what he regards as the truth about Mr Mostert and the fees he has earned to be exposed. As I understand his submissions, Mr Nash says that his intention in sending the statement to Mr Beamish was to expose the truth and that the public has an interest in knowing the truth. His intention was never willfully and with *mala fides* to undermine the court order.

78. In order to uphold Mr Nash's defence, I must find that he has placed sufficient evidence before me to establish that he was acting *bona fide* in the statements he made in his email to Mr Beamish. I must take into account that the Matojane order was not made in a legal vacuum. Nor, too, were the statements made by Mr Nash in his email. The contempt application arose within a particular context. This context is critical to determining whether or not there is reasonable doubt as to Mr Nash's wilfulness and *mala fides* in breaching the Matojane order.

79. In the Matojane judgment reference is made to a judgment by the learned Heaton-Nichols J[24] (as she then was) in which she found that Mr Nash had embarked on a smear campaign against Mr Mostert involving allegations of a corrupt relationship between him (Mr Mostert) and Mr Tshidi of the FSB. Matojane J noted in his judgment that:

> "*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*

[24] *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

> *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."*[25]

80. The contempt application follows these two court findings that, despite his vehement denials, he has over a considerable period of time engaged in repeated statements aimed at, and having the effect of undermining Mr Mostert's standing in the public eye. It is not necessary to adopt the epithet of a "*smear campaign*" for the point to be made that Mr Nash has been warned previously by courts that conduct of this nature is not lawful. The Matojane order went so far as to impose an interdict to bring this home to Mr Nash.

81. He has repeatedly accused Mr Mostert of suspicious and even criminal conduct in relation to the fees he has earned as curator and liquidator. This was part of the factual matrix that led to the Matojane J order. The events leading to the Crutchfield order involved allegations, originating from Mr Nash, that Mr O'Sullivan communicated to Old Mutual to the effect that: "*Mostert is raking in further millions in fees on what can best be described as 'double-dipping' since Mostert has already received the funds (and then some) from OM (Old Mutual)*."[26] It was common cause in the application before Crutchfield AJ that Mr Nash had appointed Mr O'Sullivan and his company to investigate the Old Mutual agreement. Mr O'Sullivan's findings included one to the effect that the purpose of that agreement was to enrich Mr Mostert in his personal capacity. Crutchfield AJ found that these types of statements were shown to be false.[27]

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[25] Matojane judgment, para 71
[26] *Mostert and Another v Nash and Others* at para 69
[27] *Mostert and Another v Nash and Others* at para 69

82. Mr Nash failed in his attempts to appeal the Matojane judgment and order. The findings in it stand. It is so that the Crutchfield judgment and order may yet be the subject of a petition for leave to appeal to the SCA. However, until set aside, Mr Nash cannot ignore the fact that a third court refused to countenance allegations of wrongdoing on the part of Mr Mostert, his fees and the Old Mutual agreement.

83. These findings by previous courts go to the alleged *bona fides* on the part of Mr Nash. In the face of them, it is difficult to accept as credible his statement that what he said in the email to Mr Beamish on the fee issue and the Old Mutual issue was an honest attempt at exposing the truth. His version of the truth on these issues has been tested previously and found wanting, as the earlier findings demonstrate. Significantly, two of those judgments involved defamation applications. The fact that Mr Nash says that he believes there is truth in his statement cannot hold against court findings indicating that this is not a defence. Despite his protestations of his *bona fides*, he cannot truly and genuinely have believed that in repeating, albeit in less strident terms, allegations he had previously made, he would not be acting in breach of the Matojane J order.

84. What is more, both the Matojane and Crutchfield judgments, found that Mr Nash could not claim to have a duty to make public his allegations in the public interest. Matojane J held that:

> *"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."*[28]

[28] Matojane judgment, para 63

85. The learned Judge also found that the defamatory statements made by Mr Nash were not made honestly and in good faith, but were made in retaliation against Mr Mostert for uncovering Mr Nash's fraud and corruption.[29] Similarly, in the Crutchfield judgment the court found that:

> "… *the O'Sullivan respondents are not acting in the public interest as regards the Old Mutual agreements (the issues in respect of which will be ventilated in the Power Pack action), or the forensic report, but are motivated by Nash's personal interests as they relate to the Power Pack action."*[30] (words in brackets in the original)

86. In the face of these findings, Mr Nash cannot genuinely have believed that he was acting innocently, in the public interest, and not with the intention of defaming Mr Mostert, in making the statements that he did about the fee issue and the Old Mutual issue. His version lacks credibility and the evidence he has presented to support his evidentiary burden is not sufficient to raise the reasonable doubt required to avoid the conclusion that he was acting wilfully and *mala fide* in making false and defamatory statements in respect of Mr Mostert.

87. The statements regarding the Wanless judgment had not previously been the subject of either the Matojane or Crutchfield judgments. Mr Nash says that he had no intention of breaching the Matojane J order in making these statements. He says that he was only expressing his genuine and *bona fide* reading and understanding of the judgment. I have already dismissed his defence based on fair comment. The question is whether he has placed evidence before the court to sow reasonable doubt as to his absence of *bona fides* for the purposes of avoiding a finding of contempt against him.

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[29] Matojane judgment, para 74
[30] Para 90

88. The statement made by Mr Nash was a serious one: it quoted from the judgment incorrectly, and ascribed to Wanless AJ a finding that Mr Mostert had embarked on a personal vendetta by instituting the urgent application. The use of the term "personal vendetta" is loaded. Not only does it imply needless, badly carried out, meritless or even reckless litigation on the part of Mr Mostert, it goes far further by implying a personal and wrongful motive on the part of Mr Mostert. To avoid *mala fides* in its making, Mr Nash would have to have been very sure that this is what the judgment said. The court did not make a finding of a personal vendetta on the part of Mr Mostert, albeit that it criticised him on aspects of his litigation strategy. In light of the history of Mr Nash's attacks against Mr Mostert, as detailed in the judgments discussed earlier, little weight can be placed on Mr Nash's assertion that he *bona fide* believed that Wanless AJ had found Mr Mostert to have been motivated by personal vengeance. The credibility of this claim is not supported by his previous conduct, by the other statements made in the email, or by the overall tone of the email. It does not raise reasonable doubt as to Mr Nash's *mala fide* and wilful intent.

89. Similarly, as regards his assertion that the SCA will again find against Mr Mostert as it always does, the falsity of the claim and its sting belie the credibility of his assertion that he was simply expressing the opinion, based on legal advice, that he had good prospects of success on appeal. As I have already found, in dealing with the defamatory aspects of this statement, if this had been his *bona fide* intention, the statement would simply have said that he had received legal advice to the effect that he had good prospects of success on appeal and that he was confident of his chances. This is not what he said, and it is not what the statement means. I am not satisfied that Mr Nash's averment raises any reasonable doubt as to his wilful and *mala fide* intent in including this statement in his email.

90. I have found that in respect of each of the impugned statements Mr Nash acted in breach of the Matojane order. Consequently, the burden rested on Mr Nash to place evidence before the court to raise reasonable doubt as to the wilful and *mala fide* nature of his breach in respect of all or any of the impugned statements. For the reasons cited in detail above in respect of each of his impugned statements, his version that he did not act willfully or *mala fide* is demonstrably uncreditworthy and falls to be rejected. In the absence of reasonable doubt as to his wilful and *mala fide* breach of the Matojane order, Mr Nash must be found to have acted in contempt of that order. What remains to be determined is the appropriate penalty.

PENALTY

91. Civil contempt of court has both a private and a public dimension.[31] Even where a party acts to ensure compliance with a court order, the proceedings have an inevitable public dimension, which is to vindicate judicial authority.[32] It has at its heart the very effectiveness and legitimacy of the judicial system. This means that the court is not only dealing with the individual interests of the frustrated successful litigant, but also, as importantly, it is acting as guardian of the public interest.[33]

92. It follows that an appropriate penalty must take into account both the private interests of those involved, and the public interest in ensuring that court orders are obeyed. Mr Mostert is aggrieved by the particularly personal nature of the contempt in this case. It is understandable that repeated defamation in the face of a court interdict will have this effect. It is obviously important, too, that the public has

[31] *Fakie*, *n20 above,* para 39
[32] *Fakie*, *n20 above,* para 38
[33] *Victoria Park Ratepayers Association v Greyvenouw* [2004] 3 All SA 623 (SE) at para 5

confidence that the civil justice system will be effective in protecting individuals against invasions of their rights to dignity by enforcing interdicts of this nature.

93. On the other hand, I must take into account that the relationship between these two parties is extremely litigious and has been so for a long time. While this circumstance does not provide a defence to Mr Nash's contempt, it is a contextual factor to bear in mind in an attempt to balance the interests involved. I take into account, too, that Mr Nash is over 70 years of age. A penalty of direct imprisonment must be carefully considered before it is imposed on a person who falls into this vulnerable age category.

94. In the notice of motion, Mr Mostert sought a committal of Mr Nash to a period of imprisonment for three months, or an alternative sanction, at the discretion of the court. Neither of the parties discussed what that alternative might be.

95. In my view, an appropriate penalty must be such as to facilitate the public purpose of these proceedings, while at the same time balancing this with the interests of the offender (albeit that Mr Nash is a civil offender). The appropriate way to do this is to impose a period of imprisonment, but subject to the suspensive condition that Mr Nash refrains from disseminating, either directly or indirectly, any false and defamatory averments about Mr Mostert in either his personal capacity or his capacity as liquidator or curator *bonis*.

96. Mr Mostert sought an attorney and client costs order in the matter. In view of the nature of the proceedings, which involve the wilful and *mala fide* disobedience of a court order, I consider that a costs order of this nature is warranted.

ORDER

97. I make the following order:

The respondent is in contempt of the Order of the Honourable Judge Matojane, dated 14 August 2018 under case number 3466/2017 (the Matojane J Order).

2. The respondent is committed to a period of imprisonment of 2 months, which committal is suspended on condition that the respondent does not disseminate, directly or indirectly, false and defamatory allegations pertaining to the first and second applicants, or in any other manner breach the Matojane J Order.

3. The respondent is directed to pay the costs of the application, including the costs of two counsel, on the attorney and client scale.

R.M. KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for the hand-down is deemed to be 26 April 2021

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Attorneys for the respondent:	KWA Attorneys
Date of hearing:	4 February 2021
Date of judgment:	26 April 2021