

REPUBLIC OF SOUTH AFRICA



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

Case Number: 43585/2019

Reportable: NO
Of interest to other Judges: NO

19 May 2023

In the matter between:

ANNETTE CRONJE	1 st Intervening Applicant
ELENA FORNO-NASH	2 nd Intervening Applicant
ANNA HUGHES	3 rd Intervening Applicant
PETER WILLIAMS	4 th Intervening Applicant
IRIS SCHOEMAN	5 th Intervening Applicant
MTHOKOZISI MAZIBUKO	6 th Intervening Applicant
ONIKA MATHEWS	7 th Intervening Applicant
ISAIAH MASITHA	8 th Intervening Applicant
MARION NEZAR	9 th Intervening Applicant
MAUREEN FREDERICKS	10 th Intervening Applicant
EVANO BUSCH	11 th Intervening Applicant
XOLILE TOKOTA	12 th Intervening Applicant

MOSES MACHE	13 th Intervening Applicant
HOLOISE BENADE	14 th Intervening Applicant
NATASHA MORRIS	15 th Intervening Applicant
IZAK VAN ROOIJEN	16 th Intervening Applicant
JUSTIN SWARTZ	17 th Intervening Applicant
MATTHEW HANER	18 th Intervening Applicant
CLIVE BOTHA	19 th Intervening Applicant
ROSHINA REDDY	20 th Intervening Applicant
IMELDA MUDAU	21 st Intervening Applicant
AIDEN KOMER	22 nd Intervening Applicant
ELVIS MABASO	23 rd Intervening Applicant
ALETTA SITHEBE	24 th Intervening Applicant
SAMANTHA MAYS	25 th Intervening Applicant
CLINTON OVERWEG	26 th Intervening Applicant
PATRICK DOLL	27 th Intervening Applicant
THULANE MBHELE	28 th Intervening Applicant
NICOLA WILKINSON	29 th Intervening Applicant
DUMISANI KHUMALO	30 th Intervening Applicant
BRANDON NEZAR	31 st Intervening Applicant
JAN MAFANGU	32 nd Intervening Applicant
DAMIEN KAPP	33 rd Intervening Applicant
DAPHNE MUDAU	34 th Intervening Applicant
and	
SIMON JOHN NASH	First Respondent
CADAC (PTY) LTD	Second Respondent

THE CADAC PENSION FUND (in curatorship) Registration No. 12/8/0020425)	Third Respondent
ANTON LOUIS MOSTERT N.O.	Fourth Respondent
JOHAN ESTERHUIZEN N.O.	Fifth Respondent
KAREN KEEVY N.O.	Sixth Respondent
NMG ADMINISTRATORS (Pty) Ltd Registration No. 1998/005937/07	Seventh Respondent

In re:

The matter between:

SIMON JOHN NASH	First Applicant
CADAC (PTY) LTD	Second Applicant

and

THE CADAC PENSION FUND (in curatorship) Registration No. 12/8/0020425)	First Respondent
ANTON LOUIS MOSTERT N.O.	Second Respondent
JOHAN ESTERHUIZEN N.O.	Third Respondent
KAREN KEEVY N.O.	Fourth Respondent
NMG ADMINISTRATORS (PTY) LTD Registration No. 1998/005937/07	Fifth Respondent

Neutral Citation: *Annette Cronje and 33 Others v Simon John Nash and 6 others: In Re: Simon John Nash and another v Cadac Pension Fund and 4 others* (Case No.: 43585/2019) [2023] ZAGPGJC 522 (19 May 2023)

JUDGMENT

Vally J

Introduction

[1] The thirty-four applicants herein seek to intervene in an application brought by Mr Simon John Nash (Mr Nash) on 9 December 2019 (main application) wherein he seeks to review and set aside certain decisions taken by the curators of the Cadac Pension Fund (in curatorship) (the Fund). Mr Nash was the executive chairman of Cadac (Pty) Ltd (Cadac) and one-time trustee of the Fund. Initially Mr Nash sought only an order declaring, (i) the decision of the curators to flag his pension fund payment to be unlawful, and (ii) that he is entitled to withdraw his full pension benefits from the Fund. On 13 February 2020 the curators answered to his application. Mr Nash replied to the answer on 28 February 2020. The matter should then have been ripe for hearing, save that the parties would have had to file their heads of arguments as per the practice directives of this court.

[2] However, between 18 – 25 March 2020 the curators communicated a decision taken by them to Cadac and to '158 members' that the Fund had been closed as from 1 March 2003, that all of them had unlawfully been admitted as members since that date, that all contributions received from them since that date were unlawfully received, that the administrator would no longer be accepting any contributions from them, and finally that all the contributions received from them would be refunded together with interest less costs. This energised Mr Nash and Cadac to bring an urgent application wherein they sought relief, (i) granting Mr Nash leave to institute the application¹ (this relief was necessary in terms of paragraph 4 of a court order issued by Claassen J in case number 2010/50596); (ii) granting Cadac leave to

¹ His application of 9 December 2019

intervene in the main application; (iii) pending the outcome of the main application, interdicting the curators and the administrators of the Fund from 'refusing to accept further contributions from or on behalf of Cadac and members of the Fund', and from refunding any contributions from and on behalf of Cadac and/or the members; and, (iv) costs to be paid personally by the curators. The urgent application was brought on 20 April 2020. Thus, the relief sought in the main application was now expanded. On 29 April 2020, Ms Antoinette Cronje (Ms Cronje), Ms Iris Rose Schoeman (Ms Schoeman) and Ms Samantha Mays (Ms Mays) applied to intervene in the interim application of Mr Nash and Cadac.

[3] The two applications – application by Mr Nash and Cadac and application by Ms Cronje, Ms Schoeman and Ms Mays – were consolidated and finalised in the SCA on 11 October 2021. The SCA, (i) granted Mr Nash leave to institute the main application, Cadac leave to intervene in the main application and Ms Schoeman, Ms Cronje and Ms Mays leave to intervene in the interim application; (ii) interdicted the curators and the administrators from refusing to accept any contributions from Cadac and/or members of the Fund and from refunding any contributions to Cadac and/or the members; (iii) ordered the Fund to pay the costs of the application; and (iv) ordered that the Fund, the curators and the administrators were to jointly and severally pay the costs of the appeal, including the costs of two counsel.

[4] Three months after the SCA allowed Cadac to intervene, Cadac, on 17 December 2021, launched its application. This was two years after the main

application was instituted. Cadac's case is different from that of Mr Nash. It seeks an order reviewing and setting aside the decision of the curators (i) not to accept any contributions from the 'members' of the Fund; (ii) to refund the 'members' contribution to the Fund; and (iii) to refuse to effect an amendment to the rules of the Fund as per a resolution passed by the trustees prior to the Fund being placed under curatorship (amendment no. 4). It also asked for the matter to be remitted to the curators, and for the normal costs order to be made should it be successful. Cadac's application is brought in terms of rule 53 of the Uniform Rules of Court (the rules). It would be convenient to refer to this as Cadac's review application.

[5] The curators filed their answering affidavit to Cadac's review application on 17 January 2022. In their answer the curators inform that Cadac's business has been sold to another entity called Hudaco, and in terms of the sale agreement all the employees of Cadac would be transferred in terms of s 197 of the Labour Relations Act, 66 of 1999. Thus, Cadac would have no employees and would have no interest in the application. They further challenged the legal standing of Cadac to institute the proceedings. Having relayed the fact of the sale of Cadac's business and recorded their contentions arising therefrom, the curators went on to present the substance of their case against the granting of the relief in Cadac's review application. Cadac filed its replying affidavit eight months later, on 21 September 2022.

[6] Thereafter, the thirty-four applicants (individual applicants) brought this application to intervene in the main application (the intervention application). They seek to review and set aside certain decisions of the curators. Later on

they brought an application in terms of rule 35(13) of the rules asking this court to order that the rules relating to discovery in action proceedings are also applicable to the main application.²

The Intervention Application

[7] The individual applicants seek to review and set aside some of the decisions of the curators, including the decisions referred to in Cadac's review application. To this end they have filed this application to intervene in the main application. Their application was filed on 17 January 2022, the same day as the curators' answering affidavit in Cadac's application was filed. The first applicant in their application is referred to as Ms Annette Cronje. It is not clear if she is the same person as Ms Antoinette Cronje, referred to in the urgent intervention application that was finalised in the SCA. But nothing turns on this. The thirty-four applicants are all former employees of Cadac. Their application is also brought in terms of rule 53 of the rules. The relief they seek appears at first blush to be far more extensive than the relief sought by Cadac and by Mr Nash. Their relief is couched in the following terms:

1. Granting [them leave to intervene in the main application]
2. declaring that the [curators] alternatively, a majority of the curators
 - 2.1. had determined-
 - 2.1.1 that an amendment to the Rules of the Fund would be necessary to bring the de jure position of the [Fund] (as a defined benefit scheme) into line with the de facto position of the [Fund] (as a defined contribution scheme);
 - 2.1.2 That a suitable amendment, known as "Amendment No 4" existed as had been passed

² In their notice of motion, they ask that the rules relating to discovery in action proceedings be made applicable to their review application. However, they want their review application to be part of the main application, so if they succeed in the intervention application as well as in their rule 35(13) application then the rules relating to discovery in action proceedings would be made applicable in the main application and not only in their review application.

on or about 15 April 2009 by the former trustees of the [Fund] but that Amendment No. 4 had not been approved by the FSCA [the successor in title to the FSB] and registered in terms of section 12(4) of the Pension Fund Act, 24 of 1956;

2.1.3 That there was sufficient intent to justify a retrospective rule amendment in terms of Amendment No. 4 (or another suitably worded amendment) (“the Rule Amendment”) which would align the *de jure* with the *de facto* positions of the [Fund];

2.2. Had recommended that;-

2.2.1 The Rules of the [Fund] should be amended to “normalise the fund”;

2.2.2. The “pensioners” (which included both retired and unretired members) should be outsourced as soon as possible;

2.2.3 After the finalisation of further investigations and recoveries the [Fund] should be liquidated;

3 Declaring that on or about 23 October 2018 the curators, alternatively a majority of them, undertook to the members of the [Fund]:-

3.1 To outsource all pensioners; and

3.2 To permit all remaining members to exit the Fund and receive their actuarial values; and

3.3 To take all steps necessary to accomplish this result,

4 Declaring that the curators had failed to implement:-

4.1 the steps recommended in their report to the [SCA];

4.2 the undertaking made on or about 23 October 2018.

5 Ordering and directing the curators to implement their recommendations in their report to the [SCA]; and/or the undertaking made on or about 23 October 2018.

6 Reviewing and setting aside

6.1 the decisions of the curators during or about March 2020 wherein the curators decided to –

6.1.1 Refuse and/or decline to accept further contributions to the [Fund] from or on behalf of the members of the [Fund] or their employer, [Cadac]; and

6.1.2 Refund the contributions made on behalf of Cadac and/or the members of the Fund;

6.1.3 Not effect the Rule Amendment alternatively to rescind the undertaking to effect the Rule Amendment (“the rescission decision”); alternatively

6.2 The failure to make a decision to effect the Rule Amendment (“the failure to decide”);

- 6.3. The curators failure to make such other decisions and take such other steps as will be necessary to regularise and/or secure the position of the intervening applicants as members of the [Fund].
- 7 Ordering and directing the curators to –
 - 7.1 Amend the Rules of the [Fund] in accordance with the Rule Amendment; alternatively
 - 7.2 Take such steps as may be necessary to secure the position of the intervening applicants as members of the [Fund]
- 8 [Deals with the issue of costs]'

[8] The individual applicants claim that the relief they seek is more extensive than that sought in the main application. I disagree. Paragraphs 2, 3 and 4 of the notice of motion merely craft the facts relied upon by Mr Nash and Cadac in the main application as relief. Paragraph 6 is a key one. It is the same relief that Cadac seeks. Paragraph 5 can only be granted if paragraph 6 is successful. In every material respect the individual applicants' application is the same as that of Cadac: the two are simply indistinguishable. Thirty-two paragraphs from the founding affidavit of Cadac dealing with the facts as well as contentions or allegations - such as, for example, ulterior objectives of the curators - are, by reference, incorporated into the founding affidavit of the individual applicants. These averments capture all the relevant facts and contentions by Cadac and the individual applicants. The individual applicants add nothing new to the application. In a word, they encore rather than augment the case of Cadac.

[9] The offer made to the 158 employees of Cadac by the curators was accepted by some of them. Eleven of them are applicants in this application. They are applicants 6, 9, 12, 17, 24, 26, 28, 30, 31 and 32. They have not

withdrawn from this application. Instead strangely, they have filed confirmatory affidavits supporting the application. However, it was conceded by Mr Vetten acting for all the individual applicants that they should be regarded as no longer being part of this application. The answering affidavit makes reference to an additional four individual applicants having accepted the offer, but these have not been identified.

[10] The founding affidavit has a telling averment. It reads: 'Mr Nash is also a member of the [Fund], and the rights the intervening applicants seek to enforce in all likelihood also pertain to him.' The curators, who oppose the application, claim that the individual members are really brought in by Mr Nash in order to bolster his own application. This averment in the founding affidavit certainly gives credence to the claim. Reading Mr Nash's application, Cadac's application and the individual applicants' application collectively there is no doubt that there is an extensive coincidence of interests between Mr Nash and the individual applicants.

[11] In their answer to the application the curators, through Mr Anthony Louis Mostert (Mr Mostert)³, who has been a curator of the Fund since December 2010, say that the application is an abuse of the process of court. They make four claims:

- a. They say that 11 individual members have accepted an offer that has been made to all of them, and that the offer remains open. If they accept the offer they will receive the same amount that they

³ In fact, in all the litigation post the appointment of the other two curators, Mr Johan Esterhuizen and Ms Karen Keevy, the affidavits on behalf of the curators have been deposed to by Mr Mostert

would be entitled to had they been members of the Fund on a defined contribution basis. As a result, they claim, the individual members have nothing to gain by bringing the application. However, they are alive to the fact that the individual members would be liable for tax should they accept the offer, and to overcome this they have sought a ruling from the Commissioner of the Revenue Service (Sars) releasing each individual applicant from the tax liability. A Sars official has replied to the call for a ruling. The official opines that the individual members, if paid out as if they were members of a defined contribution scheme, will for tax purposes be treated in the same manner, i.e. they would be liable for tax. Thus, they contend, no individual applicant is adversely affected should s/he accept the offer, as they would be paid out as if they were members of a defined contribution fund, which is beneficial to them. In normal circumstances, the only obligation of the curators would have been to return all the contributions received as these were received in error by the Fund. By not doing this, and by treating them as if they were members of a defined contribution fund, they have benefitted in that they will receive more than they would get if they simply got a refund.

- b. They say that all the individual applicants wish to exit the Fund as they are now employed by Hudaco.

- c. They highlight the fact that Mr Nash has previously been found by various courts to be the person behind applications brought by other persons against the Fund.
- d. They claim that the 16th respondent informed them that he has been indemnified by Mr Nash should this or any other court order him to pay the costs of the application.

[12] On these four facts they draw the conclusion - and ask this court to draw the same conclusion – that Mr Nash is the ‘protagonist’ of their application. They say that Mr Nash has brought this application under the guise of the individual applicants because Cadac has ceased to be an employer, and consequently lost its legal standing to pursue the review application.

[13] The curators filed a supplementary affidavit, deposed to by Mr Mostert, in order to place certain facts before the court that came to light long after the answering affidavit was filed. The facts arise from interactions they had with some of the former employees of Cadac who sought payment. Mr Mostert, who deposed to the affidavit, says that during these interactions it was brought to his attention that those former employees were unaware that they were part of the individual applicants seeking to intervene in the main application. He identifies two of the present applicants who specifically informed his office that they were ignorant of the fact that they are applicants in the present application. They are Ms Emelda Mudau (cited as ‘Imelda Mudau) who sent

an acceptance form on behalf of the thirty-fourth applicant, Ms Daphne Mudau. Ms Daphe Mudau has now been paid. However, she has not withdrawn from the application and has signed a confirmatory affidavit indicating her support for the application. During some of the interactions it was established that the 26th applicant, Mr Clinton Overberg, indicated that he did not wish to be part of the application. A similar experience occurred with many of the other applicants. This places in doubt whether they truly joined in this application voluntarily. The supplementary affidavit contains the disturbing allegation that Mr Darryl Furman (Mr Furman), the attorney representing the individual applicants in this case, had made a 'threatening call' to Ms Cronje (the first applicant) after he learnt that she had contacted the curators. There is also an allegation that Mr Furman had no contact with the third applicant even though she is cited as an applicant in this matter.

[14] There is no substantial answer to these claims of the curators by the individual applicants. The Mr Isaiah Masitha (Mr Masitha), the 8th intervening applicant, in reply states that he is mandated by the other 33 applicants to bring the application. His averment to this effect constitutes a single sentence. There is no substantiation thereof. There is no direct response to the allegations. His claim is simply an unsupported assertion – an *ipse dixit*. It cannot hold. On the contrary, the claims of the curators have to be accepted. In the circumstances, I have to find that Mr Masitha has not been candid with this court.

[15] The answering affidavit and the supplementary affidavit of the curators certainly raise very serious doubts about the veracity of the claim that all the thirty-four applicants in this application have freely and voluntarily brought, or joined in, the application. For that reason, they ask that the intervention application be dismissed. I agree that there is too much controversy as to whether each of the individual applicants have voluntarily brought or joined in this application. However, there are two applicants in the present application of whom it can be said that there is no doubt about their voluntary involvement. It is the 8th applicant, Mr Masitha, and the second applicant, Mrs Elena Forno-Nash (Mrs Nash). Mr Masitha is the deponent to the founding affidavit. Mrs Forno-Nash is the wife of Mr Nash and the deponent to the founding affidavit in Cadac's application. While there certainly is doubt about the voluntary involvement of the other applicants, there can be no such doubt with regard to Mr Masitha and Mrs Forno-Nash.

[16] There certainly is substance to the contention that Mr Nash is the driving force behind the litigation by Cadac and the individual applicants. The facts referred to above clearly support the contention. Mr Nash has the most to lose – he claims that he is entitled to R36 525 806.31 as a pension benefit, which constitutes about one-third of the Funds' assets - from the decisions of the curators to steadfastly hold on to the view that the Fund was a closed one since 2003, and to refuse to accept any further contributions from Cadac and the members. There is no doubt that by allowing Cadac to intervene in the application of Mr Nash, the SCA has allowed for the expanding of the relief

sought, and for the amplification of the dispute in the main application⁴. This has already occurred. The individual applicants' intervention will not, at least at this stage, materially affect the relief sought or the nature of the dispute in the main application.

[17] It is true that based on the fact that Cadac's business has been sold, its legal standing to pursue the relief will be questioned in the main application, and if it is found that it lacks the necessary legal standing then the review application falls away. The intervention of the individual applicants, if granted, will prevent this consequence. That Mr Nash benefits greatly from the amplification of the dispute and expansion of the relief sought is neither doubtful nor debatable. Mr Nash may well be taking full advantage of this coincidence of interests. I have to accept this claim of the curators, as there is no denial of this by the individual applicants, but this is no ground to deny the intervention application. The fact that Mr Nash benefits from their review application is of no moment. The only concern for the court is whether the decisions the curators have taken constitutes a reviewable irregularity. The curators, too, should not be concerned with the fact that Mr Nash would benefit from the review. The review is based on, amongst others, an allegation that the curators were unduly influenced by their desire to deprive Mr Nash of any benefit that may accrue to him by virtue of them refusing to endorse and give effect to 'Amendment No. 4'. Should this be found to be so, it may result in their decision being reviewed and set aside.

⁴ The main application is brought by both Mr Nash and Cadac (who have been granted authorisation by the SCA to intervene in Mr Nash's application).

[18] The SCA has, in allowing Cadac to intervene in the main application (which was initially Mr Nash's application only), and Ms Cronje, Ms Schoeman and Ms Mays to intervene in the urgent application had this to say:

'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 ... 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.'⁵

[19] The facts have changed significantly since the SCA issued its order. Subsequent thereto, many former employees of Cadac have approached the curators indicating that they are unhappy with deductions being made from their salaries each month and paid over to the Fund. They simply wish to accept the offer made by the curators and do not want any monies deducted from their salaries and paid to the Fund. They have been informed that the curators do not have the power to halt the deductions. For this to occur, they have to instruct Cadac (or Hudaco if it is doing so) to halt the deductions.⁶ They have also been informed that as long as Cadac (or Hudaco if it is doing so) pays over the monies deducted from their salaries to the Fund, the Fund has an obligation in terms of the SCA order to accept the monies.

⁵ *Simon Nash and Others v The Cadac Pension Fund (In Curatorship) (Registration Number: 12/8/0020425) and Others* [2021] ZASCA 144 (11 October 2021) at [19]

⁶ It is not clear on the papers if Hudaco – which has purchased Cadac's business as a going concern – still continues to deduct monies from any ex-Cadac employee and pay it over to the Fund.

[20] The only applicants who, without doubt, freely and voluntarily brought the application are Mr Masitha and Mrs Forno-Nash.

[21] Mr Masitha has indicated that he wishes to exit the Fund. While maintaining that he did not lawfully become a member of the Fund, the curators have offered to award him benefits that have accrued to him had he been a member of a defined contribution fund. He has not accepted the offer. He is thus entitled to intervene in the main application and make common cause with Cadac in its review of the decision of the curators.

[22] Mrs Forno-Nash is referred to in the founding affidavit as 'Helena Fomo-Nash' and not as Elena Forno-Nash. All that is said of her in the founding affidavit is that she is the managing director of Cadac and has been admitted as a member of the Fund 'with effect from 1 May 2006.' No further details are provided about her membership. It is common cause though that she was a trustee of the Fund just prior to the Fund being placed in curatorship. She has deposed to the founding affidavit in Cadac's application brought on 17 December 2021. In that affidavit she gives very little detail about her membership of the Fund. In that affidavit she concentrates on showing that Mr Nash is a member and is entitled to the relief he seeks. In fact, she admits in that affidavit that Mr Nash's membership is central to the main application. She then concentrates on exposing the reviewable irregularities in the various decisions of the curators which has prompted Cadac to bring the application. As regards her own membership she simply

claims to be a member without providing any detail thereto. Her membership has now been placed in issue, and decisions have been taken by the curators regarding her membership, which decisions have been highly prejudicial to her interests. She is entitled to defend her membership and claim the rights and benefits that have accrued as a result of the membership by bringing an application to challenge those decisions taken by the curators. Those decisions are the subject of the review application by Cadac, and would have been the subject of the application of the individual applicants. As I remain unconvinced that 32 of the individual applicants are properly before court, it would in my view be most prudent to dismiss the application as regards them. Mrs Forno-Nash should be allowed to bring a fresh application in her own name. This would allow her to place all the facts regarding her membership before court. The curators can then answer to the factual allegations in her affidavit.

Costs In The Intervention Application

[23] As I am not satisfied that the 32 of the applicants have instituted the application it would be unfair to order them to pay the costs. As for the issue of the costs incurred by Mrs Forno-Nash it would be fair and just that it be postponed *sine die*. Mr Masitha on the other hand should be deprived of his costs as he has failed in his duty of candour to this court.

The Sub-rule 35(13) Application

[24] While awaiting a determination on their application to intervene, the individual applicants brought an application in terms of sub-rule 35(13) asking

that this court orders that the rules relating to discovery in action proceedings are applicable to their review application should they be allowed to intervene. They do not believe that the filing of the record in terms of rule 53 is sufficient. They seek the curators to make discovery 'in accordance with sub-rule 35(1) of all relevant documents that may be applicable to the alteration, rescission, or addition to, any rules of the Fund', and granting them the right to seek further and better discovery. Aware that this relief is open ended, which any court would be very hesitant to grant, they seek, in the alternative, an order that is extremely wide and that requires the curators to furnish documents going back to 2008.⁷ They are essentially seeking access to almost all the documents that the curators have had between 2008 and 2010 and between

⁷ They seek an order compelling the curators to supplement the record:

'2.1 with all documents'disclosing the rights of any creditor during the period 2008 to 2010 and for the period 2008 to 2010 and 2019/ 2020.

'2.2 For the period 2008-2010 and 2019/2020:

2.2.1Copies of all resolutions or proposed resolutions for the proposed alteration or rescission of any rule or for the adoption of any additional rules;

2.2.2 Copies of

- (a) any reports and/or certificates issued by the valuator of the Fund, alternatively if no valuator was appointed,
- (b) statement by the Fund, as to the financial soundness of the Fund, having regard to the rates of contributions by employers and, if the Fund was not in a sound financial condition,
- (c) a statement by the Fund recording what arrangements have been made to bring the Fund into a sound financial condition,

pertaining to or in connection with any alteration, rescission or addition to the rules and its effect upon the financial condition of the Fund.

2.3 Any correspondence with the Financial Sector Conduct Authority ("FSCA") (and its predecessor the Financial Services Board ("FSB")) of and pertaining to the alteration, rescission, addition or amendment of any rule or the making of any additional rule.

2.4 All information pertaining to the financial condition of the Fund during the period 2008 to 2010, as well as the period 2019 to 2020.

2.5 Any correspondence between the Fund and the Registrar of the FSCA or the FSB pertaining to any consolidation of the Fund's Rules.

2019 and 2020. The documents, especially those that may be relevant from the period 2019 and 2020, have been included in the rule 53 record. The documents from the 2008 to 2010 period are irrelevant. None of these documents, in my view, bear any material relevance to the decision of the curators that is being impugned by either Mr Nash or Cadac or themselves. Accordingly, I see no sound reason to make the provisions of sub-rule 35(13) applicable to their review application. Articulated differently, the relief they seek in the sub-rule 35(13) application would result in a full-blown examination of the conduct of the curators since the inception of the curatorship. This falls well outside the scope of their rule 53 application. The application, I hold, is misconceived and warrants a costs order against Mr Masitha as he is the only applicant that is allowed to intervene in the main application and therefore he is the only applicant that is before court in the sub-rule 35(13) application.

Order

[25] The following order is made:

- a. In the Intervention application
 - i. The application by first to the seventh and the ninth to the thirty-fourth applicants to intervene in main application is dismissed.
 - ii. The second applicant, Elena Forno-Nash, is granted leave to, within 15 days of this order, institute an application in her own name to intervene and join in the main application.

- iii. The eighth applicant is granted leave to institute this application and hereby authorised to intervene in the main application.
- iv. The issue of costs incurred by the second applicant in this application is postponed *sine die*.
- v. Save for paragraph iv above, there is no order as to the costs of the intervention application.

b. In the discovery application

- i. The application is dismissed
- ii. The eighth applicant is ordered to pay the costs of the application.

B VALLY
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the applicants: D Vetten Instructed by Darryl Furman & Associates
For the 3rd- 6th respondents: Wasserman SC Instructed by Assheton-Smith Ginsberg Inc
Date of hearing: 17 March 2023
Date of judgment: 19 May 2023