THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 604/2017

In the matter between:

ANTONY LOUIS MOSTERT	**FIRST APPELLANT**
ANTONY LOUIS MOSTERT N O	**SECOND APPELLANT**
THE SABLE INDUSTRIES PENSION FUND	**THIRD APPELLANT**
A L MOSTERT & CO INCORPORATED	**FOURTH APPELLANT**

Case No: 597/2017

THE EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD	**FIFTH APPELLANT**
THE REGISTRAR OF PENSION FUNDS	**SIXTH APPELLANT**

and

SIMON JOHN NASH	**FIRST RESPONDENT**
MIDMACOR INDUSTRIES LIMITED	**SECOND RESPONDENT**

Neutral citation: *Mostert and Others v Nash and Another* (604/2017 and 597/2017) [2018] ZASCA 62 (21 May 2018)

Coram: PONNAN, WALLIS, WILLIS and SWAIN JJA and PILLAY AJA

Heard: 3 May 2018

Delivered: 21 May 2018

Summary: Pension fund – curatorship in terms of s 5(2) of Financial Institutions (Protection of Funds) Act 28 of 2001 – trustee's remuneration – court order that it be agreed with Executive Office of the Financial Services Board in accordance with the norms of attorneys' profession – whether fee as a percentage of amounts recovered on behalf of fund in accordance with those norms – whether contrary to public policy or an infringement of Contingency Fees Act 66 of 1997.

Whether conclusion of fee agreement administrative action in terms of PAJA – whether application to set aside fee agreement a review in terms of principle of legality – applicability of delay rule – *locus standi* of applicants – abuse of process and doctrine of unclean hands.

ORDER

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

1 The appeal against paragraphs 1, 2, 3, 6 and 7 of the order of the high court is dismissed.

2 The appeal against paragraphs 4 and 5 of the order of the high court succeeds and those paragraphs are set aside.

3 Each party is to pay his or its own costs of the appeal.

JUDGMENT

Wallis JA (Ponnan and Swain JJA and Pillay AJA concurring)

[1] On 20 April 2006 and at the instance of the fifth appellant, the Executive Officer of the Financial Services Board,[1] the Sable Industries Pension Fund (Sable Fund), the third appellant, was placed under provisional curatorship in terms of the provisions of s 5(2) of the Financial Institutions (Protection of Funds) Act 28 of 2001 (the FI Act). The court order appointed the second appellant, Mr A L Mostert, as the provisional curator. Mr Mostert, in his personal capacity is the first appellant. He is an attorney practising as the eponymous partner of the

[1] Then Mr Dube Tshidi. The Executive Officer is by virtue of his office also the Registrar of Pension Funds, the sixth appellant, although the role is usually filled by one of his deputies. For the purposes of this judgment they are referred to collectively as the FSB.

fourth appellant. The present dispute relates to his remuneration as curator. On 6 June 2006 the provisional order of curatorship was made final and Mr Mostert's appointment as curator was confirmed.

[2] Paragraph 9 of the order appointing Mr Mostert as provisional curator of the Sable Fund read:

'The curator shall be entitled to periodical remuneration in accordance with the norms of the attorneys' profession, as agreed with the applicant [the Executive Officer of the FSB], such remuneration to be paid from the assets owned administered or held by or on behalf of the Fund, on a preferential basis, after consultation with the applicant.'

The agreement Mr Mostert concluded with the FSB provided for him to be paid remuneration on the basis of a percentage of the amounts recovered on behalf of the Sable Fund.

[3] The first respondent, Mr Simon Nash, and a company controlled by him, Midmacor Industries Ltd (Midmacor), whose interest in the matter will emerge later in this judgment, challenged the lawfulness of this agreement, *inter alia*, on the basis that the agreement was not in accordance with the norms of the attorneys' profession. Their challenge succeeded before Tuchten J in the Gauteng Division of the High Court, Pretoria. This appeal is with his leave.

Background

[4] Defined benefit pension funds, such as the Sable Fund, provide for members to make regular contributions in fixed amounts, usually a percentage of the employee's monthly remuneration. Their employer is required to contribute such amounts as the fund's actuary determines is needed to provide the benefits that the fund's rules promise to members. If investment performance is better than predicted by the actuary the

result may be that the assets of the fund are greater than the actuary determines is necessary to provide those benefits. Under the conventional rules of such funds this surplus enables the employer to take a contribution holiday, that is, make no contributions at all to the fund. This will deplete the surplus but may not extinguish it entirely.

[5] In the early 1990s a number of defined benefit funds had significant actuarial surpluses and there was a debate regarding the rights to such surplus. From the side of fund members and pensioners the attitude adopted was that any surplus not needed to provide for future benefits should be used to enhance the benefits of members and pensioners. From the side of employers, generally with the support of fund administrators, the approach adopted was that any surplus had accrued as a result of past excessive contributions by employers and in that sense 'belonged' to the employer. Neither view was in law correct. The true position was that all assets belonged to the fund and could only be disposed of in accordance with the rules of the fund and the provisions of the Pension Funds Act 24 of 1956 (the PFA).[2]

[6] The absence of specific statutory provisions dealing with pension fund surpluses was ultimately remedied by way of the provisions of ss 15A to 15K of the PFA. The transactions that led to the Sable Fund being placed under curatorship were implemented before those provisions came into operation with a view to 'unlocking' the surplus in that fund for the benefit of the employer. They need to be described briefly in view of the various preliminary points that have been raised and are dealt with

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[2] *Tek Corporation Provident Fund and Others v Lorentz* [1999] ZASCA 54; 1999 (4) SA 884 (SCA) paras 15-17.

below, but I do so using neutral language because there is a heated dispute as to their lawfulness. Mr Mostert maintains that the arrangements were a fraudulent scheme devised by a Mr Peter Ghavalas to 'strip' the fund of its surplus and leave it with no assets and liabilities. This has led to Mr Nash and Midmacor being criminally prosecuted in proceedings that have not yet reached a conclusion. For his part Mr Nash maintains that these arrangements were lawful, their implementation was sanctioned by the FSB as the regulator of pension funds and involved no criminal conduct on his part. Given that this dispute is to be resolved in another court on another occasion and that its resolution is unnecessary in order to resolve the present case, it is important that this court not express a view on the merits of the opposing contentions.

[7] With effect from January 1994 companies controlled by Mr Nash and his family acquired Midmacor from KNJ Industrial Holdings Ltd. Midmacor had a number of subsidiaries and operated various businesses. Its employees were members of the Sable Fund, which had previously operated under a different name, and Midmacor became the principal employer of the fund. Mr Nash was the Chief Executive Officer of Midmacor and an employee of an associated company, Trina Investments (Pty) Ltd. According to some of the documents in the record he became a member of the Sable Fund. The Sable Fund had an actuarial surplus of some R36 million and the principal employer was enjoying a contribution holiday.

[8] In 1995 Midmacor acquired another business known as Cadac. This business also had a pension fund for its employees that, like the Sable Fund, had an actuarial surplus. The principal employer in respect of that fund was also enjoying a contribution holiday. Mr Ghavalas devised

the following arrangements to enable the surplus in the Sable Fund to be unlocked immediately for the benefit of the employer, without waiting to exhaust it through a contribution holiday. All the active members of the Sable Fund were transferred to the Cadac Fund, leaving the Sable Fund with a number of pensioners and only four active members, one of whom was Mr Nash. Provision was made to purchase annuities for the pensioners to provide them with the benefits to which they were entitled under the rules of the Sable Fund and possibly some enhancement of those benefits. This left the Sable Fund with four active members and an actuarial surplus of some R36 million, represented by assets held by the fund and not required to provide for future benefits.

[9] An otherwise dormant subsidiary of Midmacor, called Pro-Base Products Pty Limited (Pro-Base), was made the principal employer under the rules of the Sable Fund. Pro-Base had no assets and its only value lay in the potential to unlock the surplus in the Sable Fund. This required the assets representing the surplus to be transferred out of the Sable Fund. That was achieved through an agreement in terms of which Midmacor sold to Lifecare Group Holdings Limited (Lifecare) the entire issued share capital of Pro-Base for a price of R34 560 000 and the business of the Sable Fund was merged with that of the Lifecare Group Holdings Pension Fund (the Lifecare Fund). Illustrative of the fact that unlocking the surplus was the focus of this transaction was clause 7.1.21 of the sale agreement, which required Midmacor to warrant that the financial statements of the Sable Fund as at the effective date would fairly present the assets and liabilities of the fund. In other words it warranted that the surplus reflected therein would in fact exist.

[10] The merger of the business of the Sable Fund with that of the Lifecare Fund occurred in terms of the provisions of s 14 of the PFA. The Lifecare Fund thereby acquired the assets of the Sable Fund, which assets exceeded its liabilities by some R 36 million. At the same time Lifecare assigned to the Lifecare Fund its obligations under the sale agreement with Midmacor in respect of the shares in Pro-Base. This obliged the Lifecare Fund to pay Midmacor the purchase price of R34 560 000, which it did. The four active members of the Sable Fund agreed to the merger of the businesses of the Sable Fund and the Lifecare Fund and should notionally have become members of the Lifecare Fund, although this does not appear to have happened.

[11] These transactions left the Sable Fund as an empty shell. After an investigation by the FSB in 2003 the application to place the Sable Fund under curatorship was made and Mr Mostert was appointed as its curator. He formed the view that these various transactions were unlawful and involved the commission of criminal offences and reported accordingly to the FSB. In his report he indicated that he believed the Sable Fund had claims against various parties including Mr Nash and Midmacor. His problem was that it lacked the resources necessary to conduct the necessary investigations and then pursue actions against these parties to recover what he believed was due to the Sable Fund. This led to him concluding the disputed fee agreement with the FSB.

The fee agreement

[12] As already mentioned, paragraph 9 of the order appointing Mr Mostert as the provisional curator of the Sable Fund provided for him to receive ‘periodical remuneration in accordance with the norms of the attorneys’ profession’ to be agreed with the Executive Officer of the FSB.

On 17 July 2006 Mr Mostert wrote to the Executive Officer reporting that the Sable Fund had no assets other than its contingent claims against various parties arising from the transactions described above and that this presented a problem for him as curator. He said:

'4 In terms of paragraphs 6.2 of the order of court whereby the Fund was placed under curatorship the costs of the curatorship was anticipated to be paid by the Fund *alternatively* from assets owned, administered or held by or under the control of the Fund.

5 In terms of paragraph 9 of the order, the curator is entitled to periodic remuneration in accordance with the norms of the attorneys' profession, as agreed and after consultation with the Financial Services Board.

6 It would be most unfortunate if due to the lack of finance the curatorship, and particularly the legal proceedings that will inevitably have to be undertaken, could not continue. This would obviously be prejudicial to the Fund members.'

[13] Having expressed these sentiments, Mr Mostert offered the following as a potential solution to the problem:

'7 In the circumstances I am, in my capacity as curator of the Fund, and as a director of A. L. Mostert & Company Inc, prepared to continue the curatorship and undertake any legal proceedings at risk, and at my expense (including disbursements) on the basis of a contingency arrangement in terms of which my remuneration will only become payable against recoveries of monies on behalf of the Fund.

8 I am agreeable to finance the disbursements, including counsel's fees in respect of the litigation, on the basis that should there be recovery by the Fund these disbursements would be a first charge thereagainst, to be refunded to A. L. Mostert & Company Inc, and that the proposed remuneration be one third of the amount recovered thereafter.'

[14] This letter brought the following response from the Executive Officer on 10 August 2006:

'SABLE INDUSTRIES PENSION FUND 12/8/20317/1: CONTINGENCY FEE

With reference to your facsimile dated 7 August 2006, I wish to confirm that, for the work done by the curator and A L Mostert and Company Incorporated relating to the Sable Fund, since the date upon which the fund was placed under curatorship, which include the exercise of the duties of the curator as well as any legal work undertaken by A L Mostert and Company Inc, the curator and the aforesaid law firm shall be jointly entitled to 33.33% (ie 16.66 per cent each) of all amounts recovered for the benefit of the aforesaid Fund, upon the further undertaking that all disbursements of the curator and the said law firm, shall be paid by the said law firm and or the curator out of any recovery made on behalf of the Fund, failing which shall be paid by the said law firm and/or the curator out of own funds.'

[15] Other than Mr Mostert not being entitled to recover disbursements separately, the FSB agreed to his proposal. Two years later, because the Sable Fund was entitled to receive funds from another curatorship that would enable it to discharge legal expenses already incurred and self-fund future expenses, this agreement was varied in terms of a memorandum of understanding (MOU) concluded between Mr Mostert, his law firm and a representative of the FSB. The preamble recorded that:

'The remuneration of the curators/liquidators, the attorneys and other costs with regard to the business of the Funds is determined in terms of the relevant curatorship orders, and the provisions of Section 28 of the Pension Funds Act (in relation to those Fund which have been or will be placed into liquidation)'

The reference to 'funds' arose because the MOU related to a number of different pension funds including the Sable Fund, some of which were in liquidation and some under curatorship. It was alleged that all of these funds had, on the advice of Mr Ghavalas, and in terms of arrangements similar to those in respect of the Sable Fund, been reduced to shells after the surpluses in the funds had been 'unlocked' for the benefit of the employers.

[16] The MOU made the following provision in respect of the curator's fees payable to Mr Mostert:

'4. From the date of curatorship until the date of liquidation of the Fund, the remuneration of the curators and attorney/s shall be in terms of the applicable court orders relating to these funds. This remuneration is subject to the maximum amounts stated in 6 below.

5. From date of liquidation of each of the funds the liquidators' remuneration and costs shall be in accordance with section 28(A)(1) of the Pension Funds Act and, based on the value of assets recovered, the liquidators' remuneration shall be 16.66% (exclusive of VAT) which shall be due and payable to the liquidator, or his nominee, immediately from any recovery of assets being made.

6. It is recorded that the curator of the Sable Pension Fund has applied for the fund to be placed in liquidation. Formal notification from the FSB with regard to the fund so being placed in liquidation has not been received. In the circumstances recovery of assets made prior to the fund being placed in liquidation shall be subject to the curators' remuneration of 16.66% (exclusive of VAT) of such assets recovered.'

[17] The previous agreement in respect of the legal fees payable to A L Mostert & Co Incorporated was also varied to provide a cap to the total fees payable to the firm and a restriction on the annual fees payable to it in the future. This aspect of the MOU is not in dispute between the parties and nothing more need be said about it. The focus must fall on the curator's fees.

Preliminary issues

[18] Mr Mostert was represented in his personal capacity, together with his law firm, and separately in his capacity as curator, together with the Sable Fund. In the former capacity he opposed the application on its merits as well as raising several preliminary issues. In the latter capacity he abided the decision of the court on the question of the lawfulness of the fee agreement – the only subject matter of the case – but opposed it

on the basis that Mr Nash and Midmacor lacked *locus standi* to bring the application. In argument before the high court and this court the argument was expanded to include a contention that the application was an abuse of the process of the court and should be dismissed on the grounds of undue delay. Mr Mostert raised the same three points in his personal capacity, save that the abuse of process argument was formulated as an application of the 'unclean hands' doctrine. The FSB addressed only the merits of the fee agreement.

[19] No explanation was proffered by Mr Mostert for taking this course and incurring the expense of two sets of two counsel, as well as separate attorneys, one based in Johannesburg and one in Cape Town. In my view, it was not only wasteful, but inappropriate. The fee agreement was concluded between him in his capacity as curator and the FSB. In his personal capacity he was not a party to it and once his firm was no longer claiming a contingency fee, but conventional legal fees for services rendered, subject to a cap, it had no interest in the matter. Why it was necessary for them to become separately embroiled in the litigation is not apparent, any more than it is apparent why he thought it inappropriate for him in his capacity as curator to defend the agreement he had concluded with the FSB in that capacity. The reality is that he did not abide the decision of the court on the merits or the preliminary issues. If his intention was to project himself as independent and above the fray the attempt failed miserably, and brought to mind the aphorism 'willing to wound, but afraid to strike'.[3] His two answering affidavits were replete with allegations of misconduct and criminality against Mr Nash, who responded with an equally bitter attack on Mr Mostert and the FSB

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[3] Alexander Pope's 'Portrait of Addison' in his Satires, *Epistle to Doctor Arbuthnot*.

involving allegations of a corrupt relationship between them. This quite unnecessarily increased the length of the papers and the costs of the litigation.

Locus standi

[20] Under s 38 of the Constitution the grounds of standing in our law have been considerably expanded and a broad approach is to be taken to 'own interest' standing under s 38*(a)*.[4] In approaching that question Mr Nash's contention that the fee agreement is unlawful must be assumed to be correct.[5] If it is correct then some amounts that have been paid to Mr Mostert as curator may have to be disgorged and repaid to the Sable Fund. Any resulting surplus accruing in the Sable Fund will fall to be distributed in accordance with a scheme of apportionment of surplus under s 15B of the PFA. As Mr Nash claims to have been a member of the Sable Fund before the impugned transactions were undertaken and Midmacor was the principal employer they would potentially at least be entitled to benefit from such an apportionment. That seems to me to be more than sufficient to give them own interest standing to pursue these proceedings.

[21] Mr Mostert in his capacity as curator attacks the standing of Mr Nash and Midmacor on the footing that the former's membership of the Sable Fund and the latter's position as principal employer were part of the scheme to 'unlock' the surplus in the fund. He then characterises their respective positions as a charade. That overlooks two things. First, it ignores the requirement that the allegations by the parties claiming

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[4] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 36.
[5] *Ibid* paras 32 and 33.

standing must be accepted as correct, as standing is an issue to be determined *in limine* before the merits are addressed.[6] Second, it requires us to enter upon and determine the merits of Mr Mostert's contentions about the nature of the arrangements and determine whether they were unlawful, criminal or a charade. As noted in para 6 it is inappropriate for us to do so. That is not the question before us, it is before another court and it is impossible to resolve the factual disputes on these papers.

[22] An approach that asked whether Mr Nash and Midmacor had a direct and substantial interest in the outcome of the litigation arrives at the same result.[7] The issue is the validity of the fee agreement between the curator and the FSB. There are no trustees to protect the interests of persons, such as pensioners, former members or a former principal employer. The invalidity of the fee agreement is directed at recovering funds for the Sable Fund that would in turn form part of a surplus in the fund available for distribution in accordance with a surplus apportionment exercise. That provides a sufficiently direct and substantial interest in the outcome of the litigation to confer standing on Mr Nash and Midmacor.

[23] At the risk of piling Pelion upon Ossa there is a further ground for recognising standing on the part of Mr Nash and Midmacor. It lies in s 5(8) of the FI Act, which provides that:

'Any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the registrar with

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[6] *Ibid* para 32.
[7] *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415A-416C.

regard to any matter arising out of, or in connection with, the control and management or the business of an institution which has been place under curatorship.'

This section is clearly addressed to the question of standing and not necessarily a possible review regime distinct from PAJA, an issue debated in argument that we do not need to decide. It is couched in wide language ('any person') and requires only that good cause be shown for challenging a decision or action by either the curator or the registrar. The conclusion of the fee agreement is an action by the curator and the FSB in connection with the control and management of the Sable Fund. While the section might not permit of a challenge by someone with no connection whatsoever to a fund that can hardly be said of Mr Nash and Midmacor. The claim that they lacked *locus standi* to bring these proceedings must be rejected.

Unclean hands and abuse of process

[24] This argument depended entirely upon the contention that Mr Nash was a party to a dishonest scheme to strip the Sable Fund of its surplus and to do so by practising a fraud upon the Registrar of Pension Funds in procuring the s 14 approval for the merger of the Sable Fund with the Lifecare Fund. It was submitted that the high court was correct in approaching the matter by holding that Mr Nash was guilty of the alleged crimes on an application of the *Plascon-Evans* rule. I disagree and think that the high court was wrong to adopt that approach. Were it correct a respondent who made allegations of criminality against the applicant, however hotly disputed, would be able to invoke those allegations in support of the contention that the litigation constituted an abuse of process and insist that the court determine the issue on their papers and allegations. That cannot be. I have already given reasons for saying that it is inappropriate for this court in this case to determine the lawfulness of

Mr Nash and Midmacor's conduct or whether they are guilty of the crimes Mr Mostert imputes to them. That is equally true for the purpose of an argument that they are acting in a manner amounting to an abuse of process.

[25] While courts are entitled to prevent any abuse of process it is a power that should be sparingly exercised.[8] The starting point is the constitutional guarantee of the right of access to courts in s 34 of the Constitution. That right is of cardinal importance for the adjudication of justiciable disputes.[9] But where the procedures of the court are being used to achieve purposes for which they are not intended that will amount to an abuse of process.[10] The argument on behalf of Mr Mostert arises from an email in which Mr Nash expressed the hope that this litigation, if successful, would be a 'dagger at their commercial heart' referring to Mr Mostert and his claims against Mr Nash. The sentiment being expressed was that he hoped success in this litigation would deprive Mr Mostert of the sinews of war to continue pursuing his claims against Mr Nash and Midmacor.

[26] I could understand this argument if the litigation was wholly and obviously frivolous or unsustainable in law,[11] or the sole purpose in launching it was to bring Mr Mostert to his financial knees by burdening the proceedings with an enormous range of unnecessary interlocutory procedures. But that is not the complaint, nor was it the tenor of Mr Nash's email. His view expressed in the same document was that 'we

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[8] *L. F. Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L. F. Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 275B-D (*Boshoff Investments*).
[9] *Beinash and Another v Ernst and Young and Others* [1998] ZACC 19; 1999 (2) SA 116 (CC) para 17.
[10] *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734F-H.
[11] *Boshoff Investments* at 275B-C.

have a very good case' and that if it were successful it would have the financial consequence of rendering it difficult or impossible for Mr Mostert to continue pursuing him. This is not a case such as *Beinash v Wixley* where a subpoena was issued solely to harass the recipient. Mr Nash has not been the one responsible for the papers in this appeal running to nearly 900 pages. That was Mr Mostert through his adoption of separate representation for himself personally and in his capacity as curator, with a resultant duplication of affidavits. Throughout, Mr Nash's main purpose has been to set aside the fee agreement between Mr Mostert and the FSB governing his fees as curator of the Sable Fund. Only success in that perfectly proper litigious endeavour may bring with it the financial consequences for which he hopes. The contention that the application should be dismissed as an abuse of process, or as being tainted by 'unclean hands' must be rejected.

Delay

[27] This argument was based on the contention that the conclusion of the fee agreement constituted administrative action and these proceedings were a review of that action. That was a strange contention because, speaking in his personal capacity, Mr Mostert had admitted in his answering affidavit that the conclusion of the remuneration agreement did not constitute administrative action, and the FSB adopted the same stance. It was accordingly accepted by all parties on the affidavits that this was not administrative action.

[28] In argument a different stance was adopted. It was submitted that the conclusion of the fee agreement between Mr Mostert and the FSB

constituted administrative action by an organ of state. A challenge to the lawfulness of the agreement had to be made in terms of s 6(2) of PAJA.[12] By virtue of s 7(1) of PAJA the application needed to be brought within 180 days of Mr Nash becoming aware of the allegedly unlawful administrative action. He had obtained a copy of all the documents constituting the fee agreement on 13 January 2011 in response to a subpoena served in the course of his criminal trial. This application was launched on 11 July 2013 some 30 months later and considerably out of time so far as the 180 day period prescribed by PAJA was concerned. Unless that period could be extended in the interests of justice in terms of s 9(1)*(b)*, read with s 9(2), of PAJA the court was precluded from entering into the merits of the review[13] and, so it was submitted, there were no grounds for extending the period of 180 days. As an alternative it was submitted that even if the proceedings constituted a review outside the purview of PAJA under the principle of legality the broad common law delay rule applied[14] and there was no reason to overlook the delay.

[29] On behalf of Mr Nash it was submitted that we were not concerned with administrative action or a review, whether under PAJA or the principle of legality, but with whether the fee agreement concluded between Mr Mostert and the FSB complied with the requirements of para 9 of the order appointing Mr Mostert as provisional curator of the Sable Fund. If it did that was an end to the matter. If it did not then it was an arrangement falling outside the ambit of that order and appropriate

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[12] The Promotion of Administrative Justice Act 3 of 2000.
[13] *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) paras 22, 41 and 43.
[14] *Khumalo and Another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) paras 45-48; *State Information Technology Agency SOC Ltd v Gijima Holding (Pty) Ltd* [2017] ZACC 40, 2018 (2) SA 23 (CC) paras 43 to 50.

declaratory relief should be granted together with any relief necessarily consequential upon that declaration.

[30] It is correct that the FSB is an organ of state as defined in s 239 of the Constitution. For present purposes I also accept that in general the conclusion of a contract for the procurement of goods or services by an organ of state constitutes administrative action.[15] My principal difficulty lies with the proposition that the fee agreement between Mr Mostert and the FSB was such a contract. Mr Mostert is the curator of the Sable Fund because he was appointed as such by the high court. His entitlement to remuneration for his services arose from the terms of that order, which the court was empowered to make in terms of s 5(5)*(c)* of the FI Act. The only function of the FSB was to agree with him the basis for his periodic remuneration in accordance with the 'norms of the attorneys' profession'. That agreement was not one to procure his services on behalf of the FSB or any other organ of state. He was to render services as curator of the Sable Fund because the high court appointed him to that position, not in terms of a contract with the FSB.

[31] This accords with the FSB's own approach as reflected in an answer it prepared for the Minister of Finance in response to a parliamentary question posed and answered on 18 February 2011 in relation to the appointment of curators to pension funds. The answer reads:

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[15] *State Information Technology Agency SOC Ltd v Gijima Holding (Pty) Ltd* [2016] ZASCA 143; 2017 (2) SA 63 (SCA) para 16. This proposition was neither questioned nor endorsed in the subsequent appeal to the Constitutional Court and its wide terms may require some qualification in the light, for example, of decisions of that court holding that the relationship between organs of state and their employees does not generally constitute administrative action.

'*Curators are appointed by a Court under the provisions of section 5 of the Financial Institutions (Protection of Funds) Act, No 28 of 2001*, on application by the Executive Officer of the FSB (the Registrar). …

The provisions of the Financial Institutions Act do not specify any requirement for the identification of curators. However, although not obliged to accept or take names of possible curators proposed by any party, the court normally allows the FSB to propose names to consider for appointment when an application for curatorship is brought before the High Court. Hence the Registrar conventionally identifies and nominates proposed curators for consideration and appointment by the Court. In making application for the appointment of curators, the Registrar attaches the proposed individuals' CV's to the Court papers and *the Court has to be satisfied that they are suitable candidates*.

The remedy of curatorship is a regulatory tool at the disposal of the Registrar. *The appointment of a curator is by the court, and not an outsourcing of a function or service which would require a tender process.*' (Emphasis added.)

[32] In the light of this answer it is no surprise that the FSB has not aligned itself with the objection that these proceedings are review proceedings under PAJA or the principle of legality. It has quite properly contented itself with defending the conclusion of the fee agreement as having been concluded in terms of para 9 of the court order appointing Mr Mostert as curator of the Sable Fund.

[33] The fee agreement was not a contract. A contract is an agreement arising at the conclusion of negotiations between the parties entered into with the intention of creating contractual relations. It is often said to involve an offer and an acceptance with the intention of creating legal obligations. Not every agreement is a contract. Only those concluded with the *animus contrahendi*, the intention to create a contractual relationship, are contracts. It is incorrect to assume that when the FSB and Mr Mostert agreed the basis upon which Mr Mostert would charge fees, purporting to

act in terms of the court order, their agreement was a contract. The subsequent conclusion of the MOU made this point even more clearly. Not only did it describe itself as an understanding not an agreement, but it recorded in clause A of the preamble that the remuneration of the curators was determined in terms of the relevant curatorship orders. The failure to appreciate this is the first error underlying the contention that the conclusion of the agreement was administrative action. As the FSB correctly said, in agreeing the basis upon which Mr Mostert could charge fees it was not concluding a contract for his services, but seeking to comply with the court order. This does not involve a conjuring trick or a work of magic, but an application of basic legal principles.

[34] The second error is to treat the court ordained means for determining Mr Mostert's remuneration as an exercise of public power or the performance of a public function in taking a decision of an administrative nature in terms of any legislation.[16] The FSB was acting in terms of the court order, not in terms of any legislation. It was not performing any function in the administration of the state. Had no agreement been reached Mr Mostert and the FSB would have needed to go back to the court to ask it to resolve their differences and itself fix the remuneration. Mr Mostert's position as provisional curator would not have altered. Nor would his entitlement to be remunerated for performing that function have been altered or ceased. If the remuneration so determined was unsatisfactory to Mr Mostert, he could have applied to the court to be released from his role as curator. That would not have

[16] These are essential requirements for action to constitute administrative action in terms of PAJA. See *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) (*Motau*) para 33.

involved any breach of contract for the simple reason that he was not a party to any contract with the FSB.

[35] Properly viewed it is apparent that the court was the arbiter of whether the fee agreement complied with its order. The FSB accepted that the court could vary any agreement if it transpired that its terms were inappropriate or it could fix the remuneration itself. There were examples in the papers of its doing so. If it came to the court's attention that the agreement concluded between Mr Mostert and the FSB fell outside the parameters it had set, it could intervene to give effect to its own order. That flows from the rule of law and the fact that in terms of s 165(5) of the Constitution court orders must be obeyed until set aside.[17] It is common cause between the parties that the court order meant that Mr Mostert was only entitled to a reasonable fee. If the court discovered that the remuneration agreed between Mr Mostert and the FSB was grossly exorbitant, it would clearly have been entitled, and in my view obliged, to intervene *mero motu*. The suggestion that its hands would be tied unless some party were to bring review proceedings does not hold water. It is important to recognise this because, were it otherwise, there might be no means whereby the court could secure compliance with its order, bearing in mind that the agreement is one between the curator and the FSB and the curator's subsequent actions are subject to external supervision only by the FSB.

[36] For that reason alone the complaint of delay must be rejected. But even had I accepted that these proceedings are properly a review under

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[17] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC) paras 177-183.

PAJA or the principle of legality, I would without hesitation have extended the time period of 180 days[18] or overlooked the delay, as the case might be. I accept that Mr Nash gives little or no explanation for waiting for over two years in order to bring these proceedings, but there are obvious mitigating factors. First and foremost the documents only came to hand as a result of a subpoena addressed to the FSB in the course of the criminal trial in which he and Midmacor are the accused. It is understandable that their relevance would initially be considered in the light of their need to defend themselves there. Indeed the record shows that documents relating to the FSB nominating Mr Mostert for appointment as curator of another fund formed the subject of cross-examination of the Registrar of Pension Funds at the criminal trial and resulted in the disquieting answer that he invoked his privilege against self-incrimination.

[37] Second, it is apparent that Mr Mostert has received very substantial amounts pursuant to the arrangement both in respect of the Sable Fund and in respect of ten other funds, similarly situated. This emerges from the answer by the Minister of Finance to another parliamentary question on 18 February 2011. That revealed that Mr Mostert had earned some R23.6 million as curator of the Sable Fund in addition to there having been legal fees and disbursements of over R7 million of which a reasonable proportion must represent fees paid to his law firm. Taking all 10 funds together he had recovered nearly R946 million and fees as curator or liquidator amounted to R118.5 million. Legal fees and disbursements were over R45.5 million. These are very substantial sums of money and substantially reduced the amounts recovered for the benefit

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[18] Such an order was sought by Mr Nash and Midmacor ‘in so far as it may be necessary’.

of pensioners and members of these funds.[19] If the fee agreements concluded by Mr Mostert and the FSB were not in accordance with the court orders under which he was appointed, it seems to me a matter of public importance that a court determine this, so that the interests of past members of funds and pensioners are protected.[20] That is so notwithstanding the fact that according to the FSB they have already been the beneficiaries of the recoveries by the curators to the tune of some R750 million.

[38] Third, that view is reinforced by the approach that the FSB has taken of addressing only the challenge to the fee agreement and doing so on its merits. It is consistent with the view of the Executive Officer of the FSB, Mr Tshidi that curators are officers of the court by which they are appointed. As an organ of state that is likely to be confronted with similar situations in the future, the FSB is naturally anxious that it should know once and for all whether a fee arrangement of the type it concluded with Mr Mostert and has apparently concluded in other cases is legitimate and, if so, within what parameters.

[39] Fourth, I am unconvinced that the setting aside of the fee agreement would have the cataclysmic effects on the funds suggested by Mr Mostert when wearing his curator's hat. He painted a gloomy picture where all financial statements and reports would have to be retracted and re-audited to determine the surplus assets for distribution. The

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[19] Approximately R395 million of the recoveries has been allocated to three funds where Mr Mostert is a joint curator with a Mr Wandrag and the curators' fees in respect of these three funds, amounting to nearly R90 million were calculated at a rate of 25% of recoveries in accordance with a court order relating to those funds alone. This included the legal fees due to the two curators' law firms for legal work.

[20] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2009] ZASCA 85; 2010 (1) SA 333 (SCA) especially paras 81-82; *South African National Roads Agency v City of Cape Town* [2016] ZASCA 122; 2017 (1) SA 468 (SCA) paras 107 and 108.

determination of a reasonable fee for the work to date would have to be recalculated on an hourly basis for a senior attorney which would be impossible because time-billing was not generated for the curatorship. A delay of several years was foreshadowed with some 13 000 former members of funds being prejudiced and having their benefits suspended. Mr Mostert even went so far as to suggest that there might be claims for refunds of overpaid surplus.

[40] My scepticism over the weight to be attached to these allegations is considerable. Mr Mostert said that the court must exercise its remedial powers in order to prevent prejudice to the Sable Fund and its beneficiaries. Quite so, but then in the next breath he said that the court must ensure 'that the benefits of the fee agreement to the Fund are maintained'. It is quite unclear what he meant by this. He is himself the beneficiary of the fee agreement not the Sable Fund. These are amounts forming part of the recoveries made by him as curator that have been paid to him as curator. If they were not properly paid, because the agreement was unlawful, so that he has to repay amounts to the fund that will be a benefit enuring to the former members of the fund, not a disadvantage.

[41] Nor can I see that the logistical nightmare scenario that Mr Mostert tries to paint will arise in the event that the fee agreement is held to be unlawful. That will not disentitle him to a reasonable fee for his services as curator determined in accordance with the norms of the attorneys' profession. Such a fee would need to be determined as between him and the FSB in an open and transparent way and approved by the court that appointed him. If he was overpaid under the current fee agreement there would be an obligation to refund some amount to the Sable Fund and potentially to other funds similarly situated. Any amount so repaid would

then be available to be distributed to former members of the fund by way of a supplementary apportionment exercise.

[42] None of this should involve the logistical problems that someone with his claimed experience and knowledge of the field would not be able to cope with. Insofar as he says that it would be impossible for another curator to be appointed at this stage of the curatorship, that hardly seems relevant as the decision over the lawfulness of the fee agreement would not impinge on his appointment as curator or require the appointment of a new curator. In any event the same problem would arise were he to die, or become unable to pursue his duties as curator, or decide to retire. It is a possibility ever present in this situation where the curator is not a partner in a large organisation or firm, but an attorney in a small firm with only one other partner and one professional assistant.

[43] Lastly under this head it is significant that the FSB does not raise similar concerns if the agreement is set aside. Neither in the affidavit deposed to by the Executive Officer of the FSB, nor in the heads of argument on behalf of the FSB, is there any suggestion that the effect of setting aside the fee agreement would lead to any seriously detrimental consequences for the Sable Fund and its former members. The general information circulars to the members of affected funds issued by the FSB in November 2011 and October 2012 make it clear that monies already distributed in terms of surplus apportionment exercises have been lawfully distributed and the beneficiaries would not be under any obligation to refund them.

[44] Cumulatively, even if the delay rule were applicable, either under PAJA or under the common law, those factors outweigh the impact of the

delay and justify an extension of time under s 9 of PAJA or that the delay be overlooked. There is no suggestion, beyond the prospect of Mr Mostert being required to repay to the Sable Fund some amounts received by him as fees, of anyone being prejudiced by the delay between January 2011 and July 2013, when these proceedings were commenced. Finally, Mr Mostert has not approached the matter with any urgency. An application launched in July 2013 was met with two answering affidavits deposed to on 4 May 2016, nearly three years later. In the meantime he pursued a range of other litigation against Mr Nash and Midmacor. The preliminary objections based on delay must be dismissed.

The merits

[45] Turning to the merits all parties (and my colleague) are agreed that the source of the fee agreement is the requirement in para 9 of the order appointing Mr Mostert as curator that he would be entitled to 'periodic remuneration in accordance with the norms of the attorneys' profession' as agreed between him and the FSB. When the provisional curatorship order was made final and the curator's powers expanded, further provision was made empowering him to bring about a voluntary dissolution of the fund. In that event his remuneration was to be subject to the provisions of s 28A of the PFA dealing with the remuneration of a liquidator. That section provides for a very different fee regime to that in the fee agreement. It reads:

'(1) The registrar shall prescribe the services for which remuneration shall be payable to the liquidator of a fund which is terminated or dissolved voluntarily, whether wholly or in part, and prescribe the tariff of remuneration in respect of those services.

(2) Notwithstanding subsection (1) the registrar may reduce or increase the liquidator's remuneration if satisfied on reasonable grounds that there is good reason for doing so, and the registrar may disallow the liquidator's remuneration because of

any failure or delay to carry out the liquidator's duties or to carry them out properly and effectively.'

[46] Mr Nash expressed the objection to the fee agreement in the following way in his founding affidavit:

'This is an application for the setting aside of certain unlawful agreements … purportedly concluded, inter alia, between the curator of the Sable Fund (Mostert) and the FSB, and ancillary relief to enforce the provisions of prayer 9 of the order by Poswa J … dated 20 April 2006 ("SJN1"). The unlawfulness of the agreements arises, amongst others, from non-compliance with paragraph 9 of "SJN 1" [the court order] read with section 5(5) of the Financial Institutions (Investment of Funds) Act … and the Contingency Fees Act, [66 of] 1997 [CFA].'

The complaint was thus that the fee agreement did not comply with the requirements of the court order when read in the light of the two mentioned statutes. There is an ambiguity about this. It is not clear whether he was saying that the unlawfulness lay in non-compliance with the court order, read in the light of the FI Act, with non-compliance with the CFA providing a separate ground of unlawfulness, or whether he was saying that the court order needed to be read in the light of both these statutes. That will need to be addressed in due course.

Public policy

[47] The high court upheld Mr Nash's attack on the fee agreement, but on the grounds of an extension of public policy and not on the basis advanced by him. The judge held that the curator's remuneration had to be agreed in accordance with the norms of the attorneys' profession. He recognised that the main activity of the curator, at least at the outset, would be to frame demands upon persons believed to be liable to the fund and to prosecute legal proceedings if his demands were not met. To that end he was empowered to employ counsel and attorneys.

[48] Tuchten J then considered the cases that are authority for the proposition that at common law agreements between a legal practitioner and the client that the legal practitioner would be remunerated out of the proceeds of the litigation were contrary to public policy, unenforceable and unlawful.[21] He rejected a submission that these cases applied when an attorney undertook non-litigious work as opposed to litigation on behalf of a client and said:

'I do not read the cases to say this. To my mind the position is rather that the question whether contingency fee agreements between legal practitioner and client in non-litigious matters were permitted at common law has not yet been expressly decided.'

[49] Tuchten J analysed the reasons underpinning this prohibition at common law and concluded that:

'With all this in mind, there can be no justification for allowing legal practitioners to conclude contingency fee agreements in relation to non-litigious work. … I find that contingency fee agreements in relation to non-litigious work are against public policy for broadly the same reasons that such agreements are contrary to public policy in relation to litigious work.'

Having reached this conclusion he engaged in a brief consideration of the provisions of the CFA and, while accepting that on its terms it did not apply to the work of a curator, held that there was no reason why it did not create a norm of the attorneys' profession and that the parties could have concluded a remuneration agreement that complied in substance with the CFA and thus brought themselves within that norm.

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[21] *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* [2004] ZASCA 64; 2004 (6) SA 66 (SCA); *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* [2013] ZAGPPHC 34; 2013 (2) SA 583 (GSJ) and *Ronald Bobroff and Partners Inc v De La Guerre* [2014] ZACC 2; 2014 (3) SA 134 (CC).

[50] Wisely in my view, counsel for Mr Nash did not seek to support this line of reasoning. Whether described as champerty, maintenance or a *pacta de quota litis*, the arrangements between legal representatives and their clients that have over the years been condemned as contrary to public policy have been those where the legal representative or a third party was remunerated out of, or took a share of, the proceeds of litigation. The public policy reasons that have informed this condemnation relate to the undesirability of stirring up litigation and, in regard to legal representatives, the undesirability of the lawyer having a personal financial interest in the outcome of the litigation. In that case the fear is that the lawyer will cease to be an impartial adviser to the client and may be tempted to depart in various ways from the strict path of rectitude in the conduct of the litigation.

[51] None of this has any direct bearing on the situation with which we are concerned, much less on situations where attorneys negotiate an agreement on behalf of a client; advise on the structure of a commercial transaction; obtain a valuable licence on behalf of a client; or act and provide advice in relation to the many and varied areas of life on which people may seek their assistance. How public policy should play out in those areas is not immediately apparent, especially when it is recognised that public policy is now informed by the norms and values in the Constitution and particularly the Bill of Rights.

[52] The judge was not asked by Mr Nash to engage in such a dramatic extension of public policy and there was no material before him that justified the extension. If the common law prohibition on financial arrangements between attorney and client that involve the attorney being remunerated with a share of the proceeds of litigation is to be extended to

other situations, that should be done on a case by case basis after a careful analysis of all the interests involved, the likelihood of this conducing to conduct on the part of the attorney that is unacceptable and the impact of constitutional values on transactions of the type under consideration. For those reasons the approach of the judge in the high court cannot be supported.

The CFA

[53] The argument on behalf of Mr Nash was more nuanced. It took as its starting point the proposition that the fee agreement concluded between Mr Mostert and the FSB needed to be in accordance with the norms of the attorneys' profession. It contended that on a proper analysis of the role Mr Mostert was to play as curator, bearing in mind that he would use his own firm to perform legal work, he was in substance an attorney pursuing the recovery of amounts for the Sable Fund by way of demands and, if necessary, litigation. In any litigation he would be both the *de facto* claimant as curator of the fund and the lawyer acting for the fund. He would personally provide the means to litigate and take the risk of the litigation not succeeding. The glittering prize at the end of the day was the prospect of a substantial share in the proceeds of that litigation. Any distinction between his situation and that of an attorney conducting litigation in terms of a champertous agreement or a *pactum de quotis litis*, to the extent that those may encompass slightly different arrangements, was illusory. His situation as curator should be treated as being identical with that of an attorney acting for a client in the position of the Sable Fund. Such an arrangement was not only unlawful, but also incompatible with the norms of the attorneys' profession.

[54] Recognising that the CFA introduced an exception to this situation in permitting attorneys to conduct litigation on behalf of clients under a contingency fee agreement, it was submitted that the exception was limited. In terms of s 2 of the CFA attorneys are now permitted to conduct litigation on a contingency basis in the sense of only having a claim for payment of professional fees if the action or proceeding succeeds. If the claim succeeds they may then recover their fees from their client. They may also agree with their client to conduct the litigation on the basis that they will not charge their ordinary fees, but will, if the claim succeeds to an agreed extent, charge an enhanced fee. Such an enhanced fee is subject to two restrictions. It may not be greater than double their ordinary fee and overall it may not exceed 25 per cent of the amount recovered by the client. Furthermore the contingency fee agreement must be in writing and conform to specific formal requirements set out in s 3 of the CFA. Any non-compliance with, or departure from, the requirements of the CFA, either as to substance or as to form, renders the contingency fee agreement invalid and unenforceable.[22]

[55] Building upon this, it was contended that the norms of the attorneys' profession had been altered by the CFA, but only to a limited degree, and if Mr Mostert wished to conclude a fee agreement entitling him to a share in the amounts recovered on behalf of the Sable Fund he needed to do so in a way that in substance complied with the provisions

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[22] *Ronald Bobroff and Partners Inc v De La Guerre and Another* [2014] ZACC 2; 2014 (3) SA 134 (CC); *Fluxmans Inc v Levenson* 2007 (2) SA 520 (SCA). See also *De La Guerre v Ronald Bobroff and Partners Inc and Others* [2013] ZAGPPHC 33 para 13.

of the CFA. Counsel summarised the argument in the heads in the following terms:

'The respondents contend that (i) the Poswa Order incorporates the CFA as part of the norms of the attorneys' profession, (ii) any contingency agreement that does not comply with the CFA is illegal, (iii) the contingency fee agreement does not comply with the provisions of the CFA, and consequently the contingency fee agreements is illegal.'

[56] Two flaws in this argument emerged in the course of argument and were, as I understood it, accepted by counsel. The first related to the endeavour to equate Mr Mostert with an attorney conducting litigation for a party. That was not his role and there was no attorney client relationship between him and the FSB. An attorney conducts litigation for a client in terms of the mandate given by the client. Mr Mostert had no such mandate from the Sable Fund or the FSB. He was a court appointed curator charged with taking control of the fund and administering it. Others would conduct litigation and he was authorised to employ others for that purpose. His role was to investigate what had happened, with the advantage of the report on the investigation already undertaken by the FSB; to take decisions on how to proceed; to make demand on parties he identified as being responsible to reimburse or compensate the fund for any amounts; to negotiate if possible with those parties to make a recovery for the benefit of the fund;[23] to institute proceedings if he thought it appropriate; to invest and care for funds recovered and to prepare and implement schemes for the appropriation of any surplus arising in the fund in consequence of his endeavours. The endeavour to

[23] The papers reveal that he was able to conclude a settlement without admission of liability with one of the pension fund administrators involved in the transactions arranged by Mr Ghavalas in an amount of R325 million.

equate his role with that of a legal representative acting for a share in the proceeds of litigation was misplaced.

[57] The second flaw lay with the CFA itself and the suggestion that it established a new norm for the legal profession permitting the charging of contingency fees, but defining and restricting the parameters within which that could be done. Here the difficulty lies in the fact that the CFA is specific in providing for contingency fees for legal representatives in the performance of their professional obligations. Mr Mostert was not acting as a legal practitioner and was not engaged in proceedings as defined in the CFA. His responsibilities as curator involved the management and administration of the Sable Fund including the apportionment and distribution of any surplus arising from his endeavours to recover amounts from third parties. The CFA does not deal with that situation and the strait jacket that the argument sought to put around the fee arrangements for the curator did not fit and cannot be made to fit. One may not take a statute that expressly deals with one set of circumstances and apply it in a wholly different context to which it is inapplicable.

Non-compliance with para 9 of the court order

[58] Accepting these difficulties with the argument as articulated in the heads of argument, counsel narrowed its scope in the following way. Paragraph 9 of the provisional curatorship order remained the starting point. It provided that the curator would be entitled to periodic remuneration in accordance with the norms of the attorneys' profession. This expression fell to be construed in the same way as any other court

order.[24] It meant in the first instance that the fees charged by the curator should be subject to the ordinary professional constraints of the profession. In practice this meant that fees had to be reasonable, or as counsel for Mr Mostert put it 'reasonable, appropriate and not excessive'. In the second place it meant that the fees agreed upon should be determined in the ordinary and conventional way in which attorneys charge for their services and any departure from this was not permitted by the terms of the order.

[59] Counsel contended that the fee agreement did not comply with the second requirement, in that to charge a fee on the basis of a percentage of the amount recovered on behalf of a client is not the ordinary and conventional way in which attorneys' fees are determined. Conventionally attorneys charge for their professional services on a time basis calculated at an hourly rate, the amount of which will depend upon the skill, experience and seniority of the attorney, the nature and complexity of the work and its importance to the client and factors of that nature. While the work of the curator was different from the conventional role of an attorney in litigation, there were substantial similarities insofar as the recovery of amounts on behalf of the Sable Fund was concerned. The norm in regard to litigation was clear, namely that charging on the basis of being paid a percentage of the amount recovered was not permissible save within the narrow constraints provided by the CFA. For those reasons the fee agreement was not one contemplated or permitted by the court order. Had the judge who granted it (Poswa J) been asked whether his order contemplated that the curator's fees would be

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[24] *Firestone South Africa (Pty) ltd v Gentiruco A.G.* 1977 (4) SA 298 (A) at 304D-H.

determined as a percentage of the total amount recovered, it was submitted that he would have answered in the negative.

[60] Before the merits of this argument can be addressed it is necessary to decide whether it was open to counsel to advance the argument in this way. What this boils down to is whether the argument that the fee agreement did not comply with the court order was so inextricably linked to the contention that it had to conform to the requirements of the CFA that it cannot be advanced in a way that divorces it from the CFA. It had been advanced in the heads of argument in the passage quoted in para 55 on the footing that the CFA was one of the norms of the attorneys' profession and any contingency agreement not complying with the CFA was illegal. Was it open to Mr Nash now to contend that the agreement did not comply with the norms of the attorneys' profession, without tying the argument so directly to the CFA? I should make it clear that this argument was not that the fees charged were unreasonable. Compliance with the court order was the issue.

[61] This raised two questions. Was the argument one that was open on the papers before the court and, if so, would the appellants be prejudiced in any way by permitting it to be argued. Subject to the first of those receiving an affirmative answer and the second a negative answer it was open to counsel to advance the argument.[25] This court has repeatedly held that it is open to parties to argue fresh points on appeal, provided that involves no unfairness to the party against whom the point is directed.[26]

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[25] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68; *Fischer and Another v Ramahlele and Another* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.
[26] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G is the leading authority.

[62] The passage from the founding affidavit already quoted in para 46 was ambiguous in saying that:

'The unlawfulness of the agreements arises, amongst others, from non-compliance with paragraph 9 of "SJN 1" [the court order] read with section 5(5) of the Financial Institutions (Investment of Funds) Act … and the Contingency Fees Act, 1997.'

The important question is whether Mr Nash complained of the fee agreement's unlawfulness on the simple ground of non-compliance with para 9 of the court order, or was the argument restricted to unlawfulness flowing from non-compliance with the CFA. In developing it in his founding affidavit he drew attention to the fact that in relation to another pension fund a court order was obtained that specifically provided for the curators to receive a fee calculated as a percentage of the amounts recovered. Mr Nash commented that this demonstrated that Mr Mostert and the FSB knew that such a fee was not one permitted by the norms of the attorneys' profession.

[63] Mr Nash said specifically that the court order, based on s 5(5) of the FI Act 'did not (and does not) authorise payment of any contingency fee'. He repeated this at a later stage of the founding affidavit when summarising his contentions regarding the lawfulness of the fee agreement, saying:

'Fifthly, any purported agreement in [the letter quoted in para 14] between the FSB and Mostert as curator does not comply with paragraph 9 of the Poswa order. The yardstick is the attorneys' profession.'

He went on to say that 'in any event' the CFA capped a success fee.

[64] There is no doubt that Mr Nash launched a general assault on the validity of the fee agreement. To that end he prayed in aid the Constitution, the principle of legality, the CFA, the common law and the

terms of the curatorship order. But in the face of the statements that 'all contingency fees agreements contravene paragraph 9 of the Poswa order' and the transaction itself 'contravenes the law – the CFA, the common law and the Poswa order', it seems to me impossible for Mr Mostert and the FSB to contend that they were taken by surprise by the contention that the fee agreement was not in conformity with the provisions of para 9 of the order because it was not in accordance with the norms of the attorneys' profession. Nor did they do so. Mr Tshidi, who deposed to the answering affidavit on behalf of the FSB, specifically argued that the fee agreement was a permissible one within the broad guideline provided by the norms of the attorneys' profession.

[65] As to the content of the norms of the attorneys' profession these were canvassed in some detail in the affidavit of Mr Mostert and that of Mr Tshidi. Both had every opportunity to show where those norms operated to permit a fee agreement based on payment of a percentage of the amounts recovered. Finally, it was not suggested by any of the three teams of counsel who appeared before us representing Mr Mostert and the FSB that they were prejudiced by this argument or that it was impermissible for it to be advanced on the papers as they stood. It was therefore permissible for counsel to advance his argument on behalf of Mr Nash and Midmacor on this revised basis. I turn then to consider the argument on its merits.

[66] The Executive Officer of the FSB, Mr Tshidi, explained that at the provisional stage of a curatorship the court will state a basis for the curator's remuneration and the details will then be agreed between the curator and the FSB 'within the ambit of the Order'. Over the years courts have approved different bases for remuneration. The usual basis is the

norms of the curator's profession. Where the curatorship is no more than a run-off of the entity's business and a sale of its assets, the same basis as a liquidator, that is, an *ad valorem* or commission basis, is appropriate. Sometimes a monthly salary or hourly fee is stipulated and at others the tariff of the Auditor-General for outsourced auditing work by private auditors.

[67] In one instance (the Datakor case), in relation to three pension funds, the court approved the charging of a contingency fee as a percentage of amounts recovered for the funds. Originally the curators had been appointed on the usual basis of receiving fees in accordance with the norms of the attorneys' profession. The order providing for them to be paid on a contingency basis altered this. The interesting feature of this arrangement, which also involved Mr Mostert, is that it was not simply an agreement concluded under the rubric of 'the norms of the attorneys' profession', but was concluded and then endorsed by the court in an application brought by the FSB to alter the original basis for remuneration.

[68] The order in the Datakor case provided that the curators were to be remunerated at the hourly rates agreed between them and the FSB, subject to a cap, for work done prior to its being granted. This suggests that the arrangement for the curators to be paid fees based on a percentage of the recoveries on behalf of the three funds was regarded as a special arrangement requiring the consent of the court, rather than an arrangement in accordance with the norms of the attorneys' profession.

[69] In the answering affidavit the FSB described it as a special arrangement outside the norms of the attorneys' profession. Dealing with the present case Mr Tshidi said:

'In fact this type of arrangement has its origins in an order of court which was compelled by a specific situation *which did not allow the curators in that matter* [both attorneys] *to be remunerated on the usual basis according to the norms of their profession.*' (Emphasis added.)

Mr Tshidi added that the order in the Datakor case had been the subject of much controversy and criticism, but that it had not been challenged. He recorded that the order had subsequently been amended to cap the remuneration at 25 per cent of the recoveries up to R140 million and thereafter at a rate of 16,66 per cent in anticipation of the funds' liquidation. Even the latter more limited fee is greater than that conventionally earned by liquidators.

[70] I have no difficulty with the notion that in circumstances such as those that arose in both the Datakor case and the present case there might be good reasons for a curator to be remunerated on a basis other than the norm, including a fee calculated as a percentage of the amount recovered on behalf of the fund. For the reasons advanced by both the FSB and Mr Mostert that may be the only feasible way in which to undertake the curatorship with an appropriately skilled curator. Nor would I regard it as *per se* unlawful.[27] Thus far my colleague and I arrive at the same conclusion. But that is not the sole issue in this case, and by the end of argument counsel for Mr Nash had accepted that the law did not rule out contingency fee arrangements in all circumstances. What remained

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[27] *Incorporated Law Society of Natal v J.V. and F.M. Hiller* (1913) 34 NPD 237 at 244 provides an example of a fee being charged on an unconventional basis, but it does not mean that such a fee is one in accordance with the norms of the attorneys' profession. It merely means that the conclusion of such an agreement in relation to fees is not *per se* unprofessional conduct by the attorney.

outstanding was whether an arrangement of that sort, which is the arrangement with which we are confronted, was one providing for periodical remuneration in accordance with the norms of the attorneys' profession. In other words, did it comply with the terms of para 9 of the provisional curatorship order? According to the evidence of the FSB the answer is 'No'. It is an arrangement that can be authorised by a court in the exercise of its powers under s 5(5)*(c)* of the FI Act, as was done in the Datakor case, but that is an entirely different matter.

[71] Mr Mostert's evidence supported the view of the FSB. In his answering affidavit in his personal capacity and on behalf of his firm he dealt in some detail with the remuneration agreements. He referred particularly to an affidavit Mr Tshidi had deposed to in the application to authorise the fees in the Datakor case and said that this disclosed, (as did his affidavit in this case), that:

'… the general rules and practices concerning the remuneration of curators and funding of curatorship expenses could not be followed.'

Such an arrangement was legally permissible and the court had the power – presumably in terms of s 5(5)*(c)* of the FI Act – 'to endorse such an arrangement'.

[72] Dealing with the conventional arrangement, when an attorney was appointed as curator subject to receiving periodical remuneration in accordance with the norms of the attorneys' profession, Mr Mostert explained that:

'… in the ordinary course, in implementing the court order, I as curator would have received an hourly fee at the rate of a senior attorney with more than 40 years experience …'

He then dealt with the difficulties confronting the Sable Fund leading up to the conclusion of the fee agreement and explained that this was concluded:

'… given the peculiar circumstances applicable to the Sable Fund whereby the mechanism provided for in the original court order *could not be implemented* as there were no monies to do so in the Fund.' (Emphasis added.)

[73] The picture that emerges from these affidavits is that an arrangement in terms of which a curator is to be remunerated on a periodical basis in accordance with the norms of the attorneys' profession is one under which the attorney is paid a fee calculated at an hourly rate, plus an amount to cover any disbursements. This accords with the experience of members of this court. The practice among attorneys for many years, both in South Africa and internationally, has been that the ordinary (normative) basis for them to charge their clients is by way of an hourly rate for services rendered, the rate being determined by the attorney's standing, expertise, experience and the like.

[74] Mr Nash said that charging at an hourly rate was precisely the way in which it should have been done under para 9 of the court order. In the case of the curatorship of the related Cadac fund the order appointing Mr Mostert as curator provided that he be remunerated in accordance with the norms of the attorneys' profession. Documents placed before the court by Mr Nash recorded that on this basis Mr Mostert was being paid R2 000 per hour subject to a monthly cap of R320 000. Mr Cowan, a senior commercial attorney, deposed to an affidavit in which he said that commercial attorneys in Johannesburg would have been happy to take on the work of a curator at their ordinary hourly rates had it been open to them to do so.

[75] This review of the evidence demonstrates that remuneration of an attorney in accordance with the norms of the attorneys' profession is to be understood as a fee calculated on a time basis at an hourly rate. That is the meaning to be attached to para 9 of Poswa J's order. In strict law it may be that the attorney is only entitled to remuneration once the work is completed, but the more conventional practice is for regular, usually monthly, accounts to be rendered while the work is being undertaken, as reflected in the provision for payment of 'periodic remuneration'. The evidence demonstrates that this was the arrangement contemplated when the order was taken for Mr Mostert's appointment on the basis that he would be periodically remunerated in accordance with the norms of the attorneys' profession. The arrangement in fact made was not in accordance with that requirement. It follows that Mr Nash was entitled to an order declaring it to be inconsistent with para 9 of the order appointing Mr Mostert as curator.

Relief

[76] The high court granted an order declaring the fee agreement to have been null and void *ab initio* and setting it aside. The court added that this did not affect the rights of Mr Mostert and any co-curator or liquidator under the MOU in relation to any other fund. It then ordered Mr Mostert to render an account supported by vouchers in respect of all curators' fees charged by him in relation to the Sable Fund and authorising any party thereafter to apply to court on notice for an order that Mr Mostert should repay any money received by him as his fee under the remuneration agreement.

[77] That order went far further than is appropriate in the light of the narrow basis upon which I decide this case. A declaration that the fee agreement was not in accordance with the provisions of para 9 of the court order appointing Mr Mostert and should be set aside, does not alter the position that he was properly appointed as curator of the Sable Fund and was entitled to be remunerated for his services in discharging that function. All it does is hold that by virtue of the terms of the court order he was not entitled to be remunerated on the basis set out in the fee agreement. The precise basis upon which he should be remunerated remains to be determined. So long as the present order stands it is open to him and the FSB to agree upon a basis for remuneration that is in accordance with the norms of the attorneys' profession. That could, by way of example, be an hourly rate, enhanced to take account of the risks that he has run as curator in financing the activities of the curatorship in effecting at least the original recoveries. Such an agreement could be concluded without the need to obtain further approval from the court, although given the circumstances of this litigation it would be wise to do so to forestall any challenge to the reasonableness of the fees due under such an agreement.

[78] If an hourly rate is not thought to be appropriate or is, at this late stage, not able to be determined or calculated because records have not been kept of the hours spent on this curatorship, a different basis for remuneration needs to be determined between Mr Mostert and the FSB. I wish to make it clear that this does not exclude a fee determined as a percentage of the amounts recovered for the benefit of the Sable Fund, provided that the fee so determined is reasonable, having regard to the risks undertaken, the work involved, the uncompensated costs to Mr Mostert and his firm in performing the work and the like. A percentage

fee subject to an appropriate cap or a sliding scale would be a possibility in this regard. Such a fee arrangement would involve a departure from the terms of the order granted by Poswa J and would require the sanction of the court. If Mr Mostert and the FSB are unable to arrive at an agreement it will be necessary for them to approach the court for a determination of the basis upon which Mr Mostert must be remunerated for his services.

[79] An order that Mr Mostert either account for the amounts he has received thus far as fees for the Sable Fund curatorship, or repay any amount to the fund, is premature at this stage. These questions will only be capable of being explored once a new and permissible basis for his remuneration has been determined. Once that has been done the FSB will need to examine what Mr Mostert has already received and assess it against what will be due in terms of a fresh agreement. Only then will it be possible to determine whether there has been an overpayment. In accordance with the need for transparency and accountability in public affairs that process will need to be open to input from interested parties and especially the former members of the Sable Fund.

[80] The appeal is therefore unsuccessful on the main point, but the order of the high court must be substantially altered. Mr Nash and Midmacor have succeeded in preserving the order that the fee agreement was inconsistent with para 9 of the curatorship order and therefore unlawful. However, they do so on a far narrower basis than in the high court and the consequential relief that they were granted in that court must be set aside. Mr Mostert has therefore obtained some substantial success in this appeal. As far as the FSB is concerned the finding by the high court that the fee agreement was unlawful in principle has been set aside. But this court has said that in principle, subject to obtaining the

approval of the court in terms of s 5(5)*(c)* of the FI Act, there is no objection to a fee agreement for a curator involving the payment of a percentage of the amounts recovered in the course of the curatorship. This is also significant success. In the circumstances I think the appropriate order is that each party pay his or its own costs of the appeal. While the order of the high court went further than in my view it should, Mr Nash and Midmacor were compelled to bring the proceedings in order to establish their primary point. The costs order in the high court should not be disturbed.

Order

[81] The following order is made:

1 The appeal against paragraphs 1, 2, 3, 6 and 7 of the order of the high court is dismissed.

2 The appeal against paragraphs 4 and 5 of the order of the high court succeeds and those paragraphs are set aside.

3 Each party is to pay his or its own costs of the appeal.

M J D WALLIS

JUDGE OF APPEAL

Willis JA (dissenting)

Introduction

[82] Shorn of analysis, this appeal is concerned with whether or not an agreement for the remuneration of a curator of a pension fund 'is in accordance with the norms of the attorneys' profession'. Essentially, however, the vital issue is the validity of an agreement (the agreement) for what are generally known as, and have been referred to by the parties, as 'contingency fees', in circumstances where the curator is a member of that profession. This was the basis upon which the case was contested in the court a quo and the issue to which it applied its mind when delivering its judgment. The parties to the agreement were: (a) Mr Antony Louis Mostert, the second appellant (the curator), who is the curator of the Sable Industries Pension Fund, the third appellant (the pension fund) and (b) the executive officer of the Financial Services Board, the fifth appellant (the FSB). The sixth appellant is the registrar of pension funds (the registrar). The first respondent is Mr Simon John Nash. The second respondent is Midmacor Industries Limited (Midmacor). The first and second respondents in this appeal were, respectively, the first and second applicants in the court a quo (Tuchten J).

[83] This judgment is regrettably lengthy. The issues are complex and numerous. Along the way, there are a number of side-alleys and cul-de-sacs, the gates to which have to be closed. It may therefore be helpful if I summarise my reasoning now. It is that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) applies to the contested agreement, that the respondents were out of the 180 day time limit provided for in PAJA; that there was no good reason to extend that time period in the circumstances and that, in any event, to the extent that the merits were relevant,

agreements for contingency fees of the kind in question were not unlawful, even though unsettling questions may have arisen as to the rate of remuneration and the quantum of the fees. One must be careful not to elide or conflate the presumption of unlawfulness when it comes to determining locus standi with the determination of unlawfulness itself, once it has been accepted that the applicant has standing.[28]

[84] In the founding affidavit, the first respondent alleged that:

'This is an application for the setting aside of certain unlawful agreements ("SJN9" to "SJN13" purportedly concluded, inter alia, between the curator of the Sable Fund (Mostert) and the FSB, and ancillary relief to enforce the provisions of prayer 9 of the order by Poswa J ("*the Poswa order*") dated 20 April 2006 ("SJN1"). The unlawfulness of the agreements, arises, amongst others, from the non-compliance with paragraph "SJN1" read with section 5(5) of the Financial Institutions (Investment of Funds) Act, 2001 ('*the FI Act*") and the Contingency Fees Act, 1997 ("*the CFA*').'

[85] In their heads of argument the respondents contend that:

'The ancillary issues raised by the appellants overshadow the real issue in the matter, namely whether paragraph 6 of "SJN13" is valid and unlawful.'

and

'The real focus should however be on (i) whether the CFA is of application; (ii) if so, "SJN13" is illegal; (iii) if not, whether at common law a contingency fee agreement in respect of non-litigious work is unlawful; (iv) if so "SJN13" is illegal.'

These are indeed issues that cry out for an answer because they impact not only on the whole question of contingency fees for attorneys but also, as will become apparent later, on the future viability of appointing curators for pension funds.

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[28] See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) SA BCLR 251 (CC) paras 32, 33 and 36 concerning the presumption when it comes to standing.

[86] In the founding affidavit, the first respondent goes on to contest the reasonableness of the fees received by the curator but this is adjectival to the contentions that the agreement did not comply with what the parties have referred to as 'the Poswa order' inasmuch as it provides for contingency fees, which are unlawful. In other words, the 'unreasonableness' point raised by the respondents was used to bolster their argument that the Contingency Fees Act 66 of 1997 (the CFA) applied to and prohibited the agreement, alternatively that contingency fees for non-litigious work by attorneys was illegal. The respondents did not advance any substantive grounds or argument as to what reasonable fees might be in the circumstances. In particular, the first and second respondents did not suggest a lesser percentage than the one in question. This is hardly surprising. Any form of commission would, in their submission, have been unlawful. The respondents made application to the court with an 'all-or-nothing' approach to the substantive issue. In the result, there was no exploration in the court a quo as to what may have been a reasonable alternative fee structure for the curator. None was called for and none was given.

[87] Reasonableness always depends on the facts and circumstances of each particular case.[29] Outside of the 'contingency fees issue', no court can make a final, determinative finding as to the reasonableness of the fees, without a full examination of a range of facts put before the court for consideration. No evidence was put before the court as to what 'the norms of the attorneys' profession' might otherwise be, in circumstances

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[29] See for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 45 and the authorities therein cited.

such as these. Besides, if PAJA applies, the test in s 6(2)*(h)* thereof, upon which the respondents have relied, is not 'ordinary' reasonableness. The agreement must, in the words of the subsection, have been 'so unreasonable that no reasonable person' could have entered into it.

[88] Moreover, the judgment of the court a quo was wrong, over and over again, on almost every substantive point in issue. For this court to endorse the order of the court a quo because it disapproves of the scale of the curator's fees could, in this situation, have all manner of untoward, unforeseen and regrettable results.

[89] The parties have raised numerous preliminary, procedural, ancillary or *in limine* points. If the appellants can straddle these and, vice versa, the respondents cannot, it would, in my opinion, be unfortunate, to say the least, if this court were to strike down the agreement on the basis that the fees were unreasonable. Even more so would this be the case if this court disagrees with the respondents' substantive proposition (the one they insist is all that matters): that where an attorney acts as a curator in a case such as this, contingency fees are, per se, unlawful.

[90] The respondents alleged that the agreement was concluded in an exchange of correspondence and a memorandum of understanding (MOU), contained in annexures SJN to SJN13 to the founding affidavit to which the first respondent had deposed. These annexures straddle a period of time from July 2006 to January 2011. The respondents brought the application before the court a quo seeking various forms of relief, including an extension of the 180 day time period stipulated in s 7(1) of PAJA, to the extent that this was necessary. For reasons outlined above and which will be dealt with more fully later in this judgment, the pivotal

issue has been the question of whether the agreement should be declared invalid. The application was dated 11 July 2013 but it would seem it was lodged and served around 15 July 2013. The court a quo found on 5 April 2017 that the agreement was indeed invalid and, in addition to granting a declaratory order to this effect, directed the curator to account for all fees received in terms thereof and to repay these to the pension fund. On the same day that it made these orders, the court a quo granted leave to appeal to this court.

[91] Mr Mostert is an attorney. He was cited in his personal capacity as the first respondent in the application and, in his capacity as curator, as the second respondent. He is now, in these different capacities, the first and second appellant respectively. The firm in which Mr Mostert has, at all material times, been the leading player is AL Mostert & Company. It was cited as the fourth respondent and is now the fourth appellant.

Outline of the relevant facts

[92] Fifty percent of the shares in Midmacor were owned by Trina Investments CC of which the first respondent was the sole member. The balance was held by the first respondent's family through a company known as Trishand (Pty) Ltd. The first respondent had been the chief executive officer of Midmacor which had, in turn, been the principal employer contributing to the pension fund. Before the fund had been deregistered and placed under curatorship, the first respondent caused funds to be transferred from the pension fund, first to the so-called Lifecare Fund and, thereafter, to what is known as the Cadac Fund. The respondents contended that both the deregistration of the pension fund

and the second appellant's appointment as curator were irrelevant for the purposes of the application. Essentially, as far as the respondents were concerned, all that were relevant to the application were that they had locus standi to bring the application and that the agreement had been unlawful.

[93] There were serious disputes of fact in the application. In their answering affidavit, the first and fourth appellants contend that the pension fund was one of nine funds, the surplus of which had been plundered in the 1990's through a series of transactional devices to which they refer as the 'Ghavalas Scheme'. They named this scheme after one Peter Ghavalas, alleging him to be 'the architect and instigator' thereof. The first and fourth appellants contend that the scheme enabled the first respondent unlawfully to remove the surplus of the pension fund to benefit himself and Midmacor.[30] Some R36 million was allegedly 'stripped' from this pension fund. 'Unlocked', rather than 'stripped' is the term preferred by those who wish to put a more neutral loss on events. The first and fourth appellants have asserted that this amount is equivalent to more than R200 million at present day values. After his appointment as curator, the first appellant, upon investigation, discovered that the pension fund was 'impecunious' as a result of the surplus stripping under the Ghavalas Scheme. The first appellant alleged that the surplus stripping was done by 'laundering' money under the guise of a transfer of assets from one pension fund to another. Mr Ghavalas had, at the time, been a trustee of the Lifecare Fund.

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[30] That the first respondent was implicated in the Ghavalas scheme was a finding made by Nicholls J, in another matter, *Executive Officer of the Financial Services Board v Cadac Pension Fund* [2013] ZAGPJHC 401; 2014 JDR 2721 (GJ).

[94] This alleged scheme had received the attentions of the inspectorate of the FSB during 2003. This resulted in the registrar successfully making an application to court for the pension fund to be placed under curatorship. Consequent upon this investigation, Mr Ghavalas was arrested and charged with various counts, including fraud. He entered into a plea bargain with the State, which entailed setting out the activities and system of operation in an affidavit some 34 pages long, which was annexed to the answering affidavit. In that affidavit Mr Ghavalas implicated the first respondent as a participant in the scheme. Indeed, Mr Ghavalas described him in the affidavit as having been 'fully aware of the true intention' behind the scheme.

[95] Mr Ghavalas' affidavit is, in turn, supported and corroborated by the affidavit of Mr Quentin Alfred Southey who, at the relevant time, had been employed by Midmacor. Shorn of a wealth of detail provided in the answering affidavit and its annexures, the scheme involved moving investment funds of the pension fund to Midmacor disguised as bona fide investments, which they were not. In particular, surplus assets held by the Lifecare Fund were allegedly used to pay a simulated price to a dormant subsidiary of Midmacor, known as Pro-Base (Pty) Ltd and these funds were then rerouted to pay dividends to Midmacor and Soundprops 178 (Pty) Ltd, (Soundprops) a company owned and controlled by Mr Ghavalas. According to the appellants, all of this was done with the assistance of the guise of a so-called 'subscription agreement' to which Lifecare Group Holdings Limited, Soundprops and Midmacor were made to appear as 'parties'.

[96] The second and third appellants contend that a further important aspect of the Ghavalas scheme – and which is indicative of its artificial

nature – was the transferring of the pensioners and members of the target fund to another fund, so that they did not hamper the effecting of the scheme.

[97] The affidavit of Mr Gavin Finch, an independent actuary, investment and retirement fund specialist was also highly critical of the personal financial benefits that the first respondent derived from the pension fund, indicating that there was no justification for this whatsoever.

[98] Much of the relevant detail set out in the answering affidavit was accepted by the court a quo. For example, it accepted that Midmacor had, at all relevant times, been under the control of the first respondent. Indeed, the court a quo accepted that the first respondent had been able to influence the transactions of the pension fund itself. It accepted that Midmacor had been the pension fund's 'principal employer' in terms of the Pension Funds Act 24 of 1956 (the PFA), as that term had been used in the PFA at the relevant time. The court a quo specifically recorded that the first respondent had been charged in a criminal trial relating to the Ghavalas scheme, that this trial had been on-going for several years and that, at the time of the hearing, the trial was part-heard. The charges relate, inter alia, to fraud, theft and money laundering.

[99] The court a quo noted that the first respondent had denied any wrongdoing but observed that for the purposes of the case, the allegations in the answering affidavit must be accepted. I shall deal more fully with this aspect later. The first respondent denied that the actuarial surplus of the pension fund had been removed through the Ghavalas scheme. He also denied that he was the effective owner of Midmacor.

[100] The court a quo accepted that, as a result of the Ghavalas scheme, the pension fund was left 'without any assets under its control' and that, in this regard and in such situations, the FSB had been vested with certain powers in terms of s 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 (FIA), as it read at the relevant applicable time, before FIA's amendment in terms of the Financial Laws General Amendment Act 45 of 2013. The FSB was established in terms of the Financial Services Board Act 97 of 1990. Its members are, in terms of s 4 of that Act, appointed by the Minister of Finance and its functions, set out in s 3 thereof, make it clear that it is an 'organ of state', performing a 'public power or performing a public function' in terms of s 1 of PAJA, read with s 239 of the Constitution.

[101] The FSB brought an application before the high court for an order placing the pension fund under curatorship and appointing the first appellant as curator. That application was separate and different from the one in respect of which the present appeal lies. The matter came before Poswa J, who made an order relating thereto on 20 April 2006. As mentioned previously, this is the order to which the court a quo and the parties have referred as 'the Poswa order'. For convenience, I shall do the same. Obviously presented to the judge as a draft, the order provided comprehensively for the scope of the curator's powers and duties as well as his authority. For example, it authorises the curator 'to take control of, manage and investigate the business and operations of' the pension fund, to pay 'pensions and other benefits to those members of the Fund who are legitimately entitled thereto', to invest the funds and so on. These powers are set out over some five pages of the order. The curator was no mere 'debt collector'.

[102] Of critical importance to this case is paragraph 9 of the Poswa order, which reads as follows:

'The curator shall be entitled to periodical remuneration in accordance with the norms of the attorneys' profession, as agreed with the applicant [the fifth appellant in this appeal], such remuneration to be paid from assets owned, administered or held on behalf of the Fund [the pension fund in this appeal], on a preferential basis, after consultation with the applicant.'

[103] The first and fourth appellant have alleged that, following his appointment, the curator sought to recover the assets of the pension fund and that, because of this, the curator would focus his attention on Midmacor and the first respondent himself, the two main beneficiaries of the surplus stripping exercise. The first and fourth appellants allege that therein lies the real purpose of the application. It was, in the *ipsissima verba* used by the first respondent himself, to strike 'a dagger' at 'the heart' of the curatorship itself.

[104] Although the respondents alleged that the agreement had been concluded in an exchange of correspondence contained in correspondence and a memorandum of understanding (MOU), referred to as annexures SJN to SJN13 to the founding affidavit to which the first respondent had deposed, the first and fourth appellants allege that the only applicable remuneration agreement, arising from the Poswa order is SJN13, which is a MOU, entered into on or about 17 October 2008, relating to remuneration for the curatorship of several funds, including the pension fund itself. The court a quo accepted this. Both the first and the fifth appellant signed the MOU. So did the FSB. For reasons that I shall

develop later, this has the consequence that the agreement constitutes 'administrative action' for the purposes of PAJA.

[105] Clause 4 of annexure SJN13 provides as follows:

'From the date of curatorship until the date of liquidation of the Funds [the various funds to which the MOU applied, including the pension fund] the remuneration of the curators and attorney/s shall be in terms of the applicable orders relating to these funds [these orders include the Poswa order]. This remuneration is subject to the maximum amounts stated in 6 below.'

Clause 6 thereof reads as follows:

'It is recorded that the Sable Pension Fund [the pension fund] has applied for the fund to be placed in liquidation. Formal notification from the FSB with regard to the fund being so placed in liquidation has not been received. In the circumstances, recovery of assets made prior to the fund being placed in liquidation shall be subject to the curators' remuneration of 16.66% (exclusive of VAT) of such assets recovered.'

Clause 6 accordingly renders the curator's fees contingent upon the recovery of assets of the pension fund, being a percentage thereof. Clause 7 of the MOU provides specifically for the fourth appellant's fees as 'attorneys fees' to be capped according to a formula. As far as the substantive issue in this case is concerned, everyone, including the court a quo, has accepted that clause 6 is the vitally relevant clause. This, of course, has to be linked back to paragraph 9 of the Poswa order, which provided that remuneration was to be 'in accordance with the norms of the attorneys' profession'.

[106] By way of an agreement concluded between Alexander Forbes Financial Services (Pty) Ltd and the first appellant on 22 April 2010, he succeeded in recovering R335 million, plus interest, as a part recovery of funds lost under the Ghavalas scheme, including those of the pension fund. The successes of the curator were also reported to Parliament by the

Minister of Finance, on the advice of the registrar, during February 2011. The auditor for the pension fund, Mr Liedeman of Price Waterhouse Coopers, verified in March 2017 that the curatorship fees (excluding VAT) debited to Mr Mostert, for the period 6 June 2006 to 30 June 2015, did not exceed 16,66 percent of the assets recovered. Although the percentage is known, the precise amount, in rand terms, to which this has been translated, at this stage, is unclear.

[107] The court a quo considered itself to have been on the horns of a dilemma as far as the disputes of fact are concerned. On the one hand, it considered itself bound by the time-honoured *Plascon-Evans* rule.[31] On the other, it did not want to prejudice the first respondent in his criminal trial and said that 'this judgment should not be read as pronouncing on Mr Nash's guilt or innocence'. The manner in which the court a quo dealt with the issue was unfortunate. In parts of the judgment, it appears that it accepted that the first respondent was indeed guilty of criminal misconduct and in other parts, either that he was not or, if he was, it would be irrelevant to the determination of the case before it.

[108] I have mentioned that the parties have raised numerous preliminary, procedural, ancillary or *in limine* points. The case may be

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[31] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) this court said: 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (Para 26.) The *Plascon-Evans* rule has been emphatically endorsed by the Constitutional Court. See for example *President of the Republic of South Africa and Others v M and G Media Ltd* [2011] ZACC 32; 2012 (2) SA 50 (CC) para 34.

said to bristle with them. Among these points is that the respondents were out of time in terms of the 180 day time rule provided for in s 7(1) of PAJA and that they did not qualify for an extension in terms of s 7(1) thereof. Mr Loxton fairly and correctly contended not only that if this point was successful, it would have been unnecessary to deal with the alleged misconduct either of the first respondent or Mr Ghavalas, for that matter, but also that it would have been improper to do so. For reasons that I shall advance in more detail later in this judgment, I consider that the respondents were indeed time-barred. As this is a minority judgment and my colleagues do not consider the time bar to dispose of the matter, it is necessary to deal with the other preliminary, procedural, ancillary or *in limine* points before I engage with the 180 day rule in PAJA.

Preliminary, procedural, ancillary or *in limine* points: (i) the question of *locus standi*

[109] The question of whether the respondents were time barred in terms of the 180 day rule in PAJA is fundamentally bound up with the question of *locus standi* but on that very question of *locus standi* there were other questions that were raised. The parties agree that, in terms of s 5 of the FIA at the time, the registrar could apply to court for the appointment of a curator and that the court could determine the remuneration of that person. Moreover, the parties agreed that, in terms of this s 5(8)(*a)* of the FIA, 'any person' could make application to the court 'on good cause shown' to 'set aside or alter any decision made, or any action taken, by either the registrar or the curator'. In other words, there was no dispute that the respondents had sufficient interest in the matter to approach the court for relief. Questions arose, however, and with which I shall deal later, as to whether s 5(8)*(a)* is merely an enabling provision or whether

it, ipso facto, creates a separate and independent basis of review, standing apart from PAJA and which may be considered without regard to it. Questions also arise as to whether the application was one for a review at all or whether it was simply an application for a declarator interpreting an order of court.

[110] Additionally, the appellants argued that by reason of the applicability of the *Plascon-Evans* rule, the court a quo had to find that the respondents had brought the application with unclean hands and accordingly, for this reason, did not have the necessary locus standi: they should have been refused a hearing. In other words, the respondents should have been barred from a hearing because they were abusing the processes of the court. The court a quo accepted that the first respondent had the motives imputed to him by the appellants but concluded that as the issue was a complaint raised by the first respondent that related 'to the remuneration of an office bearer who is exercising a public power' and that it was 'in the highest degree in the public interest that such complaints should be ventilated and that appropriate relief should issue if such a complaint is well-founded'. This 'degree of public interest' raises its head also when consideration is given to whether there should be an extension of the 180 day time bar in PAJA.

[111] It becomes necessary to consider the correctness of the court a quo's decision concerning the 'clean hands' point only if that decision is not found wanting in other respects.

[112] The pension fund has chosen to abide the decision of this court on the lawfulness of the agreement. The pension fund contests however, the respondents' standing to bring the application contending, as have the

other appellants, that the respondents have been abusing the court process to obstruct the curator's recovery of the pension fund's assets. The pension fund has argued that the application should have been dismissed for unreasonable delay.

Preliminary, procedural, ancillary or *in limine* points: (ii) the question whether the relationship between the curator and the pension fund is one between attorney and client

[113] The first, fourth, fifth and sixth respondents submitted that the relationship between an attorney and client is essentially one of mandate and that the relationship between the curator and the pension fund does not fall into this category. They also argued that the curator acts as curator, not of the pension fund as a juristic person, but as a curator of the pension fund's actual business assets.

[114] Leaving aside the fact that the Poswa order pertinently stipulated that the curator's entitlement to remuneration had to be 'in accordance with the norms of the attorneys' profession', this question needs be decided only if it appears that the agreement falls foul of what attorneys are allowed to do.

Preliminary, procedural, ancillary or *in limine* points: (iii) The non-joinder of various parties to the MOU

[115] Although the respondents concede that the non-joinder of various parties who were signatories to the MOU (SJN13, which was sought to be struck down) presented a difficulty, that difficulty could be overcome by

a simple expedient of not making the order applicable to any of the parties not before the Court.

Preliminary, procedural, ancillary or *in limine* points: (iv) the residual discretion of the court

[116] The second and third appellants argued that, even if the agreement was unlawful, the court a quo should have exercised its discretion in terms of s 172(1)*(b)* of the Constitution. Relying on *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others*[32] and *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others*,[33] they contended that factors such as the effluxion of time, practicalities and the disruptive, unjust or inequitable effects have been taken into account by this court not to strike down an unlawful act. Self-evidently, this is a consideration that arises only if the agreement is unlawful or the application is not dismissed on some other ground.

Preliminary, procedural, ancillary or *in limine* points: (v) the 180 day time period in PAJA

[117] In terms of s 1 of PAJA, 'administrative action' includes 'any decision', which must be of an administrative nature, taken by 'an organ of state, when … exercising a public power or performing a public function in terms of any legislation'. Section 6 thereof provides for

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[32] *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 90; 2008 (2) SA 638 (SCA) paras 20, 28-29.
[33] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) paras 25-30.

judicial review of 'administrative action'. There is no dispute that the respondents became aware of the contents of annexure SJN13 by 13 January 2011 at the latest but launched their application on or about 15 July 2013. This was more than two years after they had become aware of the agreement and well after the 180 day period provided for in s 7(1) of PAJA. The relevant portions thereof read as follows:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) …; or

(b) Where no such remedies [internal remedies] exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

This provision is qualified by s 9 of PAJA, the relevant portions of which read as follows:

'(1) The period of –

(a) …;

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

[118] Mr Subel, who appeared for the respondents, argued that by reason of the provisions of s 5(8)*(a)* of FIA, the application was not an application for review but merely one for the interpretation of an order of court alternatively, even if it was an application for review, PAJA did not apply, further alternatively, even if PAJA did apply the 'interests of justice' required that an extension of time should be given so as to allow the matter to be heard. If PAJA applied, the respondents relied on the

following provisions thereof: s 6(2)*(f)*(i) (the action 'contravenes a law or is not authorised by the empowering provision') and s 6(2)*(h)* (the action 'is so unreasonable that no reasonable person could have so exercised the power or performed the function'). I shall deal with these points in turn.

[119] The fact that an act may derive or purport to derive from an order of court does not, without further ado, necessarily deprive it of its administrative character and quality. An administrative act authorised or prohibited by an order of court is not thereby removed from scrutiny according to the law of review. The fact that an administrative act may have been preceded by, or follow consequent upon, an order of court also does not isolate it from the law of review. In order for outsiders such as the respondents in this case successfully to challenge acts or actions that are derivative from a court order they will have to demonstrate not only *locus standi* but also a recognised legal peg upon which to hang their case.

[120] Every working day in our land, innumerable administrative acts are authorised or prohibited by orders of court. This derives from the self-evident fact that when a court orders or authorises an organ of State to do or not to do something, it authorises or forbids an administrative act. If, for example, a court sets aside a municipal tender and directs that the tender process be undertaken afresh, the fact that the second tender process derives from an order of court cannot possibly have the consequence that it escapes judicial scrutiny upon review. The hard, ineluctable truth in this matter is that a court order cannot hoist an agreement entered into with an organ of State outside of the purview of PAJA.

[121] The fact that the respondents have alleged that the agreement failed to comply with the requirement in a court order that the curator's remuneration should be 'in accordance with the norms of the attorneys' profession' does not alter the reality of the fact that the application is one for review. As mentioned above, s 6(2)*(f)*(i) of PAJA proscribes the contravening of a law or an action not authorised by a particular empowering provision. It relates, more generally, to acts outside of the law, rather than outside of a particular court order.

[122] Section 5(8)(*a)* of FIA provides as follows:

'Any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the registrar with regard to any matter arising out of or in connection with, the control and management of the business of an institution which has been placed under curatorship.'

The respondents argued that this created a basis for review that is separate and independent, standing apart from PAJA and s 33 of the Constitution. Section 5(8)(*a)* of FIA relates to *locus standi* and not to the substantive grounds upon which decisions or actions of either the curator or the registrar may be set aside. Rarely, if ever, will a curator be an organ of State. Inevitably, he or she will perform acts independently of any organ of State. Section 5(8)(*a)* of FIA permits persons to challenge acts that do not necessarily constitute 'administrative action' but, once locus standi has been established, there must be a recognised, clear and identifiable legal ground upon which to strike down or set aside the act or action in question. Otherwise, I fear that this court will have admitted a Lernaean Hydra into its bosom.

[123] It seems to me that *Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Others*[34] has remarked approvingly of the apparent legislative intention to codify the law of review.[35] Professor Cora Hoexter in her *Administrative Law in South Africa* argues that logic therefore requires that applicants should bring their cases for review under PAJA 'where possible'.[36] There is no impossibility in applying PAJA in this case. Furthermore, FIA was enacted after PAJA and the edition of Hoexter's book to which I have referred, some eleven years after FIA. Significantly, she does not mention even the possibility that s 5(8)(*a)* of FIA may have established a review regime that stands apart from PAJA. Moreover, the long title and the preamble to PAJA not only record that it is enacted to give effect to the general right to fair administrative action in terms of s 33 of the Constitution but also seem to be comprehensive in their scope. It also seems to me that will be confusing to the general public and generally undesirable to have an ever expanding range of different regimes for review.

[124] Perhaps, however, the answer lies in a decision in the Constitutional Court itself, *Walele v City of Cape Town & others*.[37] There, as Clive Plasket pointedly notes, Jafta AJ said: 'All statutes which authorise the making of administrative action must now be read with PAJA unless their provisions are inconsistent with it'.[38] Jafta AJ's was a minority judgment but the majority, referring to his judgment, did not appear to disagree with this proposition.

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[34] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) paras 22-25.
[35] C Hoexter , 2012, *Administrative Law in South Africa,* (2 ed, 20110) p118.
[36] Ibid.
[37] *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC).
[38] Para 51. Clive Plasket 'Administrative Law' 2008 *Annual Survey of South African Law* 24 at p35.

[125] In *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*[39] the Constitutional Court unanimously came to the conclusion that : 'Once a particular administrative process is prescribed by law it is subject to the norms of procedural fairness codified by PAJA, this , it seems to me, must apply to the agreement.'[40]

[126] In *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign and another as Amici Curiae)*),[41] Chaskalson CJ held that:

'PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so.'[42]

Similar views were expressed by Ngcobo in *Zondi v MEC for Traditional and Local Government and Others*.[43]

[127] I accept that there may be exceptions to PAJA covering the field when it comes to reviews. In this regard it is instructive to read the unanimous judgment delivered by Navsa JA in *Fesi v Ndabeni Communal Property Trust*.[44] In my opinion, the Constitutional Court's perspective has been clearly set out: PAJA must, at least as a general rule,

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[39] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC). See also *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) para 43.

[40] Para 40.

[41] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC).

[42] Para 95. See also C Plasket 'Post -1994 Administrative Law in South Africa: The Constitution, The Promotion of Administrative Justice Act 3 of 2000 and the Common Law' (2007) 21 *Speculum Juris* 25.

[43] *Zondi v MEC for Traditional and Local Government and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC) paras 101 and 102. See also Plasket *supra*.

[44] *Fesi v Ndabeni Communal Property Trust* [2018] ZASCA 33 (27 March 2018) para 54. See also *Nel & another NNO v The Master (ABSA Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA) paras 22-23.

apply to all reviews of administrative action. Accordingly, the exceptional cases must be transparently evident and unambiguously required. Section 5(8)*(a)* of FIA is not one of them.

[128] Moreover, in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*[45] this court held that a decision by a State entity to award a contract for services constitutes administrative action for the purposes of PAJA.[46] Subsequently, the Constitutional court held that an organ of State, when reviewing its own administrative decision, may not rely on PAJA but must bring a 'legality review' in terms of s 1*(c)*, read with s 33 of the Constitution.[47] This did not alter this court's broad observation that contractual awards by State entities constitute administrative action for the purposes of PAJA. Indeed, the vast administrative machinery of the State functions largely through its various organs entering into contracts with private persons. That is how service delivery takes place. Therein lies both the strength and weakness of State administration in any country. All over the world, in our scrutiny thereof, we have to sail through the Scylla of corruption and maladministration and the Charybdis of dysfunctional tardiness. Against this background, it seems to me that simply has to have been the intention both of s 33 of the Constitution and indeed PAJA itself that the review of all agreements entered into by organs of State are determined within a single cohesive legal framework, rather than in some piecemeal fashion. That framework is PAJA.

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[45]*State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143; 2017 (2) SA 63 (SCA).
[46] Para 16.
[47] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd supra*.

[129] Apart from these general observations, it seems to me that there is a still more specific reason why s 5(8)(*a)* of FIA does not establish a different regime for reviews that is separate from PAJA. It is plainly an enabling provision. It confers *locus standi* rather than creating a separate system for review. This is apparent from a plain reading of the subsection. The point is underlined by the fact that the phrase 'on good cause shown' is positioned where it is and not at the end of the subsection. The 'good cause shown' relates to the reason to be heard, not the substantive merits of the application itself. In summary, the subsection does not give any person having an interest in the matter, willy-nilly or holus-bolus to apply for the setting aside of a decision of the curator or registrar on any ground and at any time that he or she may choose.

[130] Referring to s 1, the definitions section of PAJA and the *Shorter Oxford English Dictionary*, the court a quo held that PAJA applies not to contracts (such as the one in question) but to decisions. This, it seems to me, is clearly wrong.

[131] In *Opposition to Urban Tolling Alliance & others v The South African National Roads Agency Ltd & other*,[48] (OUTA), Brand JA, delivering the unanimous judgment of this court affirmed the general principle that, in review applications, a court should deal with the delay rule before considering the merits.[49]

[132] In OUTA Brand JA went on to say that:

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[48] *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA).
[49] Paras 22 and 43.

'The delay rule gives expression to the fact that there are circumstances in which it is contrary to the public interest to attempt to undo history. The clock cannot be turned back to when the toll roads were declared, and I think it would be contrary to the interests of justice to attempt to do so.'[50]

Moreover, this court has generally disapproved of unreasonable delay in initiating proceedings.[51] Delays not only clog up the administration of the State but also have the consequence that prudent and competent persons of business are wary of entering into contracts with organs of State. In my opinion, it would also not be in the interests of justice to attempt to undo history in this case. Ordinarily, that would be dispositive of the matter. Nevertheless, apart from the fact that this is a minority judgment, there are two other reasons why I consider it appropriate to touch upon the merits. The first is, as mentioned previously, the trenchant finding by the court a quo that it is in the 'highest degree in the public interest' that the matter should be considered. The second is that responsible persons and bodies such as the registrar and the FSB, who are required to act in the public interest, consider it imperative that there be clarity on the question of contingency fees in circumstances such as these.

[133] Additionally, I do not understand Brand JA to have said that the merits in an application for condonation should never be considered in review applications, but merely that it is generally undesirable to do so. Ordinarily, when it comes to the sound administration of the State, it will not be in the interests of justice to be indulgent towards applicants when it comes to delays in their bringing applications for review. There are other vital interests of society, which come into play as well. Delays

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[50] Para 41.
[51] See for example *Associated Industries Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) para 46. See also *Khumalo and Another v MEC for Education, Kwazulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) para 44.

render the administration of the State apparatus sclerotic, thereby hampering the delivery of services in society. There may, however, be exceptions to the general rule that the merits should be considered separately from the explanation for the delay. After all, in a recent matter dealing with condonation, *Mulaudzi v Old Mutual Insurance Company (South Africa) Limited and Others, National Director Public Prosecutions and Another v Mulaudzi* [52] Ponnan JA, delivering the unanimous judgment of this court, albeit in a different context, said that in applications for condonation the substantive merits of the case may be relevant, but this was not necessarily the case and neither are they decisive.[53] Moreover, the merits may conceivably be so closely bound up with the reasons for the delay that it is neither sensible nor practical to consider them separately.

[134] I am fortified in my opinion that Brand JA's setting out of the process to be adopted was not meant to be understood in absolute terms by reference to *South African Roads Agency Limited v Cape Town City*,[54] in which Navsa JA, delivering the unanimous judgment of this court said that it 'cannot be read to signal a clinical excision of the merits of the impugned decision'.[55] This qualification by Navsa JA has been approved by this court more recently, when Swain JA delivered the unanimous judgment in *Asla Construction (Pty) Ltd v Buffalo City Metropolitan*

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[52] *Mulaudzi v Old Mutual Insurance Company (South Africa) Limited and Others, National Director Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; 2017 (6) SA 90 (SCA).
[53] Para 34.
[54] *South African Roads Agency Limited v Cape Town City* [2016] ZASCA 122; 2017 (1) SA 468 (SCA).
[55] Para 81.

Municipality[56] With some hesitation, reservations and reluctance, I turn now to consider the merits of the case.

The merits of the case: the lawfulness of the agreement

[135] I have previously indicated that I consider it to be an error of law to elide or conflate the presumption of unlawfulness when it comes to determining locus standi with the determination of unlawfulness itself, once it has been accepted that the applicant has standing. Leaving aside the appellants' 'clean hands' point, I accept, without any difficulty, that the respondents have locus standi to bring the application. As Cameron J said in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*,[57] it is a matter of logic.[58] It is not a 'smoke and mirrors' exercise. Botha JA, delivering the unanimous judgment of this court in *Ritz Hotel Ltd v Charles of the Ritz Ltd and Another*,[59] made it plain that the presumption for the purposes of determining locus standi has nothing to do with the substantive determination of the contested issues in the case.[60]

[136] It is apparent from the judgment of the court a quo, as well as the heads of argument of the parties that they were all in agreement that the real issue in this case, overshadowing all else, is whether annexure SJN13 is lawful and therefore valid. Put differently, the fundamental point in

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[56] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* [2017] ZASCA 23 (24 March 2017).
[57] See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others supra* paras 32, 33 and 36 concerning the presumption when it comes to standing.
[58] Para 32. See also *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A) at 536A; *Ritz Hotel Ltd v Charles of the Ritz Ltd and Another* 1988 (3) SA 290 (A) at 307H. As Botha JA, delivering the unanimous judgment of the court said in *Jacobs* at 536B: 'Die veronderstelde nietigheid van die besluit hou nie verband met die applikante se bewerings oor hoe hulle besigheidsbelange daardeur getref is nie.'
[59] *Ritz Hotel Ltd v Charles of the Ritz Ltd and Another* (supra).
[60] At 536B.

contention has been whether the agreement offended against public policy, constituting an unlawful contingency agreement. The first and fourth appellants contend that, in order to reach that conclusion, the court a quo needed to come to two further conclusions fundamental to the appeal and did, in fact, do so. The first was that the common law prohibition on contingency agreements was a widely recognised 'norm' or rule of practice in the attorneys' profession. The second was that that prohibition extended to fees charged for non-litigious work.

[137] The first and fourth appellants contend that the court a quo took a step in the right direction when it found that 'the norms of the attorneys' profession' meant that the remuneration regime should be constrained by the 'well-known ethical norms applicable to legal practitioners'. They argue that this interpretation would have meant nothing more than that the Poswa order was designed to ensure that the remuneration of the curator was reasonable, appropriate and did not venture in the sphere of overreaching. The first and fourth appellants point out, however, that the case made out by the respondents was not that the curator's fee was unreasonable but that the agreement was invalid for failing to comply with the Poswa order which, in turn, required compliance with the Contingency Fees Act 66 of 1997 (the CFA).

[138] Related to the point mentioned earlier concerning the nature of the relationship between a curator and a pension fund, the first and fourth appellants contend that the CFA does not apply to remuneration of curators, even if they happen to also be qualified as legal practitioners. A curator need not necessarily be an attorney (or any other kind of legal practitioner) for the purposes of the CFA. The court a quo seemed to

accept that the work of a curator is different from that done by an attorney, whether in litigation or outside of it. Accordingly, the first and fourth appellants contend that the norm (if such it is) prohibiting contingency fees as between attorney and client is irrelevant to the lawfulness of the agreement.

[139] The first and fourth appellants accept that, of course, an attorney is not entitled to overreach his client in any circumstances (whether litigious or not), but contend that this consideration goes to the reasonableness of the attorney's fee, not the manner in which the fee is determined. The first and fourth appellants have submitted that the only sensible meaning to be given to the phrase 'in accordance with the norms of the attorneys' profession' in the Poswa order is that it sought to ensure that the curator's fees were reasonable, appropriate and not excessive. That, so their argument went, did not imply that it prohibited the curator and the FSB from determining the appropriate fee with reference to a percentage of the assets recovered. The first and fourth appellants argue that as there were no other funds from which the fee could be paid, the fee could only be determined with reference to the assets recovered. Correspondingly, in their submission, it was appropriate and necessary in the circumstances to set the curator's fee as a percentage of the amounts recovered.

[140] The Law Commission considered the potentially negative consequences of a contingency fee agreement in its working paper that resulted in the Contingency Fees Act, but nonetheless supported the promulgation of the Act.[61] The CFA followed the pattern adopted in England in 1990. The government of that country had published a Green

[61] Law Society Working Paper 36, Project 93 'Speculative and Contingency Fees' November 1996.

Paper on contingency fees in 1989. There has been a 'sea change', a shift of massive proportions, in attitudes. In this regard it is instructive to read *Price Waterhouse Coopers v National Potato Co-operative,*[62] which deals comprehensively with the history of contingency fees. The appellants have argued that the report of the Law Commission and the CFA represent a clear recognition in the Republic of South Africa that the abuses associated with champerty are not the invariable result of all varieties of contingency fee agreements.

[141] In an old case, *Incorporated Law Society of Natal v JV and FM Hiller,*[63] it was recognised that fees for an attorney in non-litigious work could be charged on a percentage or commission basis.[64] Our common law has never set its face against the payment of remuneration or, indeed other kinds of payment being contingent upon the occurrence of an uncertain future event. Were this not the case, most contracts subject to suspensive conditions would be anathema.[65] Payments that depend upon the successful outcome of particular endeavours are commonly called 'commissions'. Estate agents' commission provide a ready example. Our law has, however, historically taken an adverse view of what have been termed 'champertous' agreements.[66] These were agreements in terms of which a person not party to litigation provided finance to enable a person who was such party to litigate, in return for a share of the proceeds of the action if that party was successful, or any agreement whereby a party was

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[62] *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2004] ZASCA 64; 2004 (6) SA 66 (SCA) paras 36-43.
[63] *Incorporated Law Society of Natal v JV and FM Hiller* 1913 NPD 237.
[64] At 244.
[65] For a good summary of what an agreement subject to a suspensive condition is in our law, see *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office L*td [2012] ZASCA 160; 2013 (2) SA 133 (SCA) para 10 and the other authorities therein cited.
[66] See, for example, *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd supra* para 26 and the authorities therein cited. See also *Fluxmans Inc v Levenson* [2016] ZASCA 183; 2017 (2) SA 520 (SCA) para 41.

said to 'traffic', gamble or speculate in litigation.[67] This was, in any event, not an absolute rule: bona fide assistance in the pursuit of a claim that was believed to be just and where the return for such assistance was not extortionate or unconscionable could pass muster.[68]

[142] The common law, both in the Netherlands and England, was influenced by the Reformation.[69] The theology of the Reformation was strongly opposed to gambling.[70] There were two main reasons for this: (a) the income from gambling was 'unearned' and (b) there was much empirical evidence that gambling could lead to financial ruin, casting whole families into poverty.[71] Indeed, gambling was associated with 'drinking in taverns, whoring and singing obscene ballads'.[72] In the face of attitudes such as this, it is hardly surprising that, for several hundred years, lawyers were expected to refrain from anything that smacked of gambling.

[143] As has become apparent, the attitude of both the courts and legislatures, not only in South Africa but also in other parts of the world has, over time, become more relaxed to the payment of fees in litigation being dependent upon success therein.[73] This resulted in the enactment of

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[67] Ibid.
[68] *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* (supra) paras 27 and 28.
[69] See for example Becker S, Pfaff S and Rubin J 'Causes and Consequences of the Protestant Reformation' (2015) 1105 *Warwick Economic Research Paper Series* ISSN 2059 4283 at 29 and 37.
[70] See for example Berman H 'The Spiritualization of Secular Law: The Impact of the Lutheran Reformation' (1999) 14 *Journal of Law and Religion* at 332.
[71] See for example Binde P 'Gambling and Religion' (2007) 20 *Journal of Gambling Issues* at 153-156 http://www.camh.net/egambling/issue20/pdfs/03binde.pdf (Accessed 5 May 2018).
[72] See for example Binde P 'Gambling and Religion' (2007) 20 *Journal of Gambling Issues* at 156 http://www.camh.net/egambling/issue20/pdfs/03binde.pdf (Accessed 5 May 2018).
[73] See, once again, for example, *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd supra* para 23-52 and the authorities therein cited. See also *Fluxmans Inc v Levenson* 2017 (2) SA 520 (SCA) para 41.

the CFA. The CFA permits the payment of contingency fees in relation to 'any proceedings', which are defined as:

'any proceedings in or before any court of law or any tribunal or functionary having the powers of a court of law, or having the power to issue, grant or recommend the issuing of any licence, permit or other authorisation for the performance of any act or the carrying on of any business or other activity, and includes any professional services rendered by the legal practitioner concerned and any arbitration proceedings, but excludes any criminal proceedings or any proceedings in respect of any family law matter.'

[144] The relaxation contained in the CFA relates to litigious matters. The court a quo, however, found that 'there can be no justification for allowing legal practitioners to conclude contingency fee agreements in relation to non-litigious work'[74] and said that:

'I find that contingency fee agreements in relation to non-litigious work are against public policy for broadly the same reasons that such agreements are contrary to public policy in relation to non-litigious work.'[75]

The court concluded that the remuneration agreement in question was 'against public policy because it amounts to an unlawful contingency fee agreement' and that under s 171(1)*(a)* of the Constitution, it 'must declare the agreement to be unlawful and invalid'.

[145] It does not necessarily follow that, because the CFA applies to litigious matters, a residual prohibition against contingency fees for legal practitioners in non-litigious matters applies. The converse may be true: The CFA was enacted to apply to litigious matters because the law already permitted it in non-litigious matters subject, of course, to reasonable limitations. Our law has never been impervious to the need for

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[74] Para 80 of the judgment.
[75] Ibid.

contracts to take into account the vicissitudes of life, its contingencies. If this were otherwise, not only would contracts subject to suspensive conditions not generally have been legally possible but also, more specifically, contracts of insurance, which have been recognised since ancient times.[76] Lawyers, especially those who do not practise as advocates, do not confine their professional work to assisting others in litigation: they do much else besides. The mischief at which the common law concerning 'contingency fees' was directed was champerty, in particular and gambling or speculating in litigation, in general.[77] This is more especially the case where practices of such a kind may prejudice the weak and the vulnerable.[78] There was no blanket prohibition on remuneration being dependent on the outcome of an uncertain future event. To the extent that certain other cases decided in the high court may have suggested that any agreement between an attorney and client that made fees payable on the happening of an uncertain future event were 'unlawful contingency fees', these cases were wrongly decided.[79]

[146] Legal practitioners, like justice itself, are not cloistered in their virtue. There is no good reason why they should not, in appropriate circumstances unrelated to litigation, be able to earn remuneration, which is contingent upon the happening of an uncertain future event (a

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[76] J Voet *Commentarius Ad Pandectas* (1723) 1.5.4. (Translated by Sir Percival Gane in *The Selective Voet being the Commentary on the Pandects* (1955). See also Wille's *Principles of South African Law*, 9th ed, p786.

[77] See Voet, *supra*; *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v SA Post Office Lt*d, *supra*, paras 23 to 52; *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 628H-629H and *Nichol v Burger* 1990 (1) SA 231 (C) at 231J-238D.

[78] *Ibid*.

[79] See for example *SA Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)* [2013] ZAGPPHC 34; 2013 (2) SA 583) (GSJ) paras 9 and 10. But see, by way of contrast, *Headleigh v Private Hospital (Pty) Ltd t/a Rand Clinic v Soller and Manning Attorneys and Others* 2001 (4) SA 360 (W) at 371C-H. See, in particular, *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v SA Post Office Lt*d, *supra*, in which the importance of freedom of contract and the generally careful restraint of the courts to render contracts unenforceable on the grounds of public policy were emphasised in paras 23 and 44.

'contingency fee'). In this regard, they will be on the same footing as so many of their fellow citizens, who go about their business making an honest living. There are powerful restraining factors operating against the mischievous abuse of contingency fees by legal practitioners. In the first instance, there is the constraint of a necessary *consensus ad idem*, an agreement. Secondly, the courts will strike down any unconscionable agreement on the basis that is contrary to public policy.[80] Thirdly, the profession itself may adopt guidelines and even regulation on the question. Above all, sight must not be forgotten of the fact that, as Cameron JA said in *Brisley v Drotsky*,[81] 'shorn of its obscene excesses', contractual autonomy is part of our core constitutional values of freedom and dignity.[82]

[147] As the judgment of the court a quo appears to recognise, the pension fund had, at the relevant time, been stripped of all its assets. Without an agreement of the kind in question, it would not, realistically, have been possible for the fund to recover any of its previously held assets, never mind pay fees in the ordinary course for this purpose. Against the background of facts in this case, there was nothing wrong in structuring an agreement on the basis that the curator would be remunerated on the basis of a percentage of assets successfully recovered. Opinions may vary on how generous the actual percentage may have been but it was not necessarily unconscionably high in all the circumstances of the matter.

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[80] See for example *Safin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I and 9A-C; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782J-783B; *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) para 94; *Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 8; *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Lt, supra,* para 23.
[81] *Brisley v Drotsky, supra*.
[82] Para 94. See also *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v SA Post Office Ltd, supra,* para 44.

[148] Mention has been made earlier of the fact that the task of the curator was no bare debt collection exercise. Some kind of comparative analysis between the norms of the attorneys' profession concerning debt collection and the inputs, not only intellectual but also in terms of time and money spent, when it comes to debt-collecting and curatorship respectively is likely to be necessary before a final view can be formed in the matter. No such evidence was put before the court. The onus was on the respondents. No allegation of collusion between the FSB and the curator was made. As a responsible organ of State, the FSB must be presumed to have intended to act in the public interest. Ex facie the papers before the court, it cannot be concluded, in the words of s 6(2)*(h)* of PAJA, that the agreement was so unreasonable that no reasonable person could have entered into it. The test is a high one. In *Bato Star* it was held that a court 'should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government'.[83] In my opinion, a similar philosophy must apply in respect of this court's gaze upon the agreement.

[149] Accordingly, there is no reason to grant condonation or, put differently, to grant an extension to the 180 day time period within which the respondents should have mounted their challenge to the agreement. In the result, in my opinion, the case of the respondents should fail and for reasons that are not only incontestably substantive but also far deeper than merely being out of time – if such a point can be 'mere'.

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[83] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*, *supra*, para 48. See also *Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC) para 36.

Conclusion

[150] In my opinion, the reasoning and conclusions of the court a quo were, accordingly, wrong. Nothing in this judgment should be construed as giving an imprimatur to the scale of fees of the curator. The respondents should have failed because they approached the court out of time and on a basis that was fatally flawed. Accordingly, in my opinion, the appeal should have been upheld, with costs, including the costs of two counsel. The orders of the court a quo should have been set aside and replaced with an order dismissing the application with costs, including the costs of two counsel.

N P WILLIS
Judge of Appeal

Appearances

For first and fourth appellants: C D A Loxton SC (with him A Milovanovic)

Instructed by: Assheton-Smith Incorporated, Cape Town
Lovius Block, Bloemfontein.

For second and third appellants: J H Dreyer SC (with him J Bleazard)

Instructed by: Polson Attorneys, Johannesburg
Rosendorff Reitz Barry, Bloemfontein.

For fifth and sixth appellants: Q Pelser SC (with him E L Theron SC)

Instructed by: Rooth & Wessels Inc, Pretoria
Phatsoane Henney Attorneys, Bloemfontein

For respondents: A Subel SC (with him W J De Bruyn)

Instructed by: Cowan - Harper Attorneys, Johannesburg
Pieter Skein Attorneys, Bloemfontein.