IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 192/2020

In the matter between:

PAN AFRICAN ASSET MANAGEMENT SOUTH AFRICA (PTY) LIMITED	Applicant
and	
PAN AFRICAN ASSET MANAGEMENT . SWAZILAND (PTY) LIMITED	First Respondent
AQUARIUS ASSET MANAGEMENT (PTY) LIMITED	**Second Responent**
ABEL SIBANDZE	**Third Respondent**
FIRST NATIONAL BANK (ESWATINI) LIMITED	**Fourth Respoent**
FINANCIAL SERVICES REGULATORY AUTHORITY	**Fifth Respondent**
REGISTRAR OF COMPANIES	**Sixth Responent**
ATTORNEY GENERAL	**Seventh Respondent**

Neutral citation: *Pan African Asset Management South Africa (Pty) Limited vs Pan African Asset Management Swaziland {Pty) Limited & 6 Others (192/2020)[2020JSZHC 95 (12/05/2020).*

Coram: Maphanga J

Heard: 06/02/2020;21/02/2020 and 17/03/2020

Delivered: 12/05/2020

Summary : *Civil Law- Company Law- minority shareholder application for an interdict to prevent an alleged fraud on the company - applicant on the one part seeking to forestall a divestiture, alianation and transfer of its shareholding held in*

a subsidiary company and in another, the dissipation of a *special reserve fund deposited* as *security in terms of prudential regulatory requirements in terms of the Securities Act of 2010 of Swaziland (eSwatini) and the purported trasfer of the licence of the company to operate* as a *financial Services provider (FSP) in the Kingdom;- Applicants apprised of divestiture of its* shares *in the subsidiary*

Locus Standi- respondents raising a *preliminary point on locus standi in iudicio questioning the applicants standing to bring the application- distinguished from directors or deponents authority to bring the application- requirements ofr standing considered and applied: Held sufficient legal interest established entitling applicant to act.*

Company Law - Alleged Ultra vires *conduct - respondents relying on resolutions made by the Applicant's erstwhile directors- crucial* issue *being third respondent and the applicants erstwhile directors' source of authority for the purported divestiture of applicants* shares *and withdrawal of reserve deposits - Erstwhl1e directors having issued* a series *of resolutions whereby they sought to procure shareholder approval of* a *raft of proposals aimed at rescuing the financial viabilty of the company;- no evidence of members' resolution;- renegade board removed and third respondent having resigned* as *chief executive of the applicant- new interim board of directors appointed in the meantime.*

Company Law- Derivative Action- Rule against the so-called reflective loss *and its exceptions considered - the rule (also referred to* as *the* Foss *v Harbottle Rule) operates to prevent shareholders form bringing actions where the* loss *merey reflects the loss suffered by the company- scope of the exceptions to the* Foss *v Harbottle rule discussed*

Held: *One of the permissible exceptions to the reflective* loss *rule is recognised where the company* is *itself virtually emasculated and unable to pursue* a *cause of action against the wrongdoer on account of the defendants being the very perpertrators of the wrongdoing - particularly* so *where the wrongdoers are the directors of the company therefore the directing mind of the entity in control of its* affairs - *In such* cases *the piercing of the veil in the sense of going beyong the construct or farcade of company separate persona appropriate.*

Held *- In the absence of evidence by the Respondents to discharge the onus of establishing their defence that they had the requisite authority to carry out the actions complained of to the prejudice of the applicant and their failure to dispel the a/legation of fraudulent, unlawful and improper conduct in the form of the actions complained of applicants entitled to the relief of an interdict. Application granted with* costs.

JUDGMENT

[1] The applicant, Pan African Asset Management South Africa (Pty) Ltd (PAAM-SA or the applicant), as the name suggests, is an asset management company registered in the Republic of South Africa. On the 06th February 2020, it launched the present application on an urgent basis initially ex parte seeking certain interim interdicts and a rule nisi. The interim orders and the order nisi were granted by her Ladyship Justice Mabuza on the 6th February 2020 subject to a return date of the 2s1 t February 2020. The matter was postponed at least twice; partly on account of the need to enable a full set of affidavits to be filed entailing the answering and repylying affidavits but also on account of a subsequent application by the first to the third respondent's application launched. on the 25th February seeking the admission of an affidavit supplementing their answering affidavit. That is when the matter came before me and was placed for the determination of the interlocutory application. In the event and having heard the application for admission of a supplementary affidavit, on the 17'h March 2020, I dismissed the same and on that date proceeded to hear the main application.

The Facts

[2] In this application the applicant seeks to halt or forestall certain transactions allegedly impending or underway that involve the disposition of certain shares claimed by the applicant in the third respondent (a subsidiary registered in the Kingdom), the liquidation of certain funds held as a capital reserve fund in a financial institution cited herein as the First National Bank of Eswatini Ltd (The fourth respondent herein) and the transfer of a licence held by the first respondent, Pan African Asset Management Swaziland (Pty) Ltd ((PAAM-SZ or first respondent)) as a registered financial services provider in the Kingdom of Eswatini (formerly Swaziland) to a third party entity. That third party concern has been named simply Ris Cura but is not a party to these proceedings.

[3] In light of the nature of the relief being to restrain the disposition of assets applicant characterises the relief it seeks as an anti-dissipation proceedings although technically its scope entails much more than the aversion of a feared dissipation of liquid assets but also includes the preservation of the status and intergrity of the first respondent as a viable business unit and an investment undertaking in the Kingdom.

[4] At all times material hereto PAAM ...:.sA has been a minority shareholder holding a 30% stake in the share capital of PAAM - SZ, with the major equity of 70% held by Aquarius Asset Manager (Proprietary) Limited. The latter company is also incorporated in the Kingdom.

[5] The third respondent Mr Abel Mphile Sibandze is a former chief executive (CEO) and executive board member of the applicant having resigned these positions recently in August 2019. He is the current chairman of the first respondent and its interlocutor in the present proceedings. It is common cause that he was instrumental in the establishment of the first respondent and its operations in the Kingdom - a process that entailed its incorporation and its registration and licencing as a financial services advisor in accordance with the financial services and secuties regulatory statutory laws in the country. In the course of these processes the applicant effected the deposit of certain funds to be deposited with the fourth respondent, the First National Bank of Eswatini in the order of E2 million Emalangeni in order to comply with capital reserve deposit required under section 74 the Securities Act under the supervision of the Financial Services Regulatory Authority ('FSRA' the fifth respondent in the proceedings). It is common cause that this fund is still retained by the fourth respondent.

[6] In the Notice of Motion the applicant seeks the following substantive orders all in the form of injunctive relief:

6.1 Interdicting and restraining the second, third and fourth respondents from withdrawing and/or causing to be withdrawn the base capital of E2million that was deposited by the applicant on behalf of the first respondent with First National Bank, Eswatini in Mbabane (the fourth respondent);

6.2 Interdicting and restraining the second, third and fifth respondents from transferring the first respondent's licence to Ris Cura or any other thrid party without the consent of the applicant;

6.3 Interdicting and restraining the second, third and sixth respondents from interfering and /or reconstituting the shareholding and/ or de registering the first respondent form the Registrar ofCompanies (sic);

[7] The fifth respondent, the Financial Services Regulatory Authority ('the regulator' or "FSRA") has been cited as a regulator of the financial services industry and in its connection to certain circumstances that have given rise to this application. I shall revert to its status and stance in these proceedings in a moment. I understand the 6th respondent has been cited in its designated capacity as the Registrar of companies again on account of the peculiar circumstances of the matter and the transactions involving the corporate interests and affairs of the adversaries herein.

[8] As stated above and in my ruling on the interlocutory application, the applicant has had the advantage of an earlier interim interdict restraining the transfer of shares to the 2nd respondent, the holding over of any transaction involving the liquidation of the capital reserve held in terms of the Securities Act and the and the transfer of the first respondent's license to the said third party entity, Ris Cura. The applicant is now seeking a final and confirmatory interdict. It has been submitted on behalf of the applicant, and this has been confirmed by the respondents, that a second parallel proceedings aimed at asserting the substantive rights of the applicant and dealing with the merits pertaining to the shareholding and ancillary issues to do with the licencing and control of the funds held as security reserves has been launched before the Court under a separate case number. The applicant persists however on its approach for the sought relief in the form of a final interdict although it is desirous of securing a interim interdict pending the outcome of the second proceedings and the resolution of further disputes as alternative relief.

I must say that no material has been placed before the court as evidence of the second proceedings nor is the court privy to the nature and purpose thereof, the only reference thereto being merely cursory on the margins of the oral submissions. No proper and practical regard can be had to the said proceedings nor is it advisable to take that approach herein. In view of the orders sought on the notice of application and the parties submissions as of record, the relief prayed for by the applicant should be considered only against the requirements for a final permanent interdict. It is in that setting that I intend to proceed and consider it and determine if the application meets the requirements of a final interdict.

THIS APPLICATION

[9] The circumstances giving rise to the application are set out in the founding affidavit deposed to by one Mr Tshaka Mdiya in support of the relief sought. He describes himself therein as the chairman of the interim board of directors of the applicant. He states therein that he is authorised in this capacity to bring the application and attaches a resolution ostensibly taken to confir on him the requisite mandate to so bring the proceedings. It appears as 'Annexure TM1'. To the extant that it has been called into question in these proceedings I deal with the relevant content of the resolution further in this judgment.

[10] In his affidavit Mr Mdiya makes a series of material allegations as foundation for the application. These may be summarised as follows. By way of background he describes the two principal shareholders of the applicant as an entity named PGC Management Services (Ply) Ltd and a one Ms Hellen Masson. He states that at the material times before his

resignation from his position as chief executive and executive director of the applicant, the third respondent was involved in the management of the applicant in the Republic. It is alleged however that whilst he was at the leadership helm there were serious differences and a falling out between the shareholders internally; this fallout leading to a leardership crisis. Mr Mdiya's version of the circumstances in a nutshell is that this led to the affairs of the applicant being exploited by the 3rd respondent and the then board of directors of the applicant in the management of the applicant's affairs. He further accuses the third respondents conduct as partly responsible for the dispute between the shareholders and that in the ensuing tensions the 3rd respondent resigned his post and the board of directors was replaced with the current interim board chaired by the deponent. Mr Mdiya describes the major reason for the removal of the board of directors as the discovery during 2019 of a series of what he refers to as a series of irregularities in the conduct by the management of the business operations of the applicant. He alleges further that in the run up to and aftermath of the en masse exit of the board and the management the new officers of the applicant came upon information pointing to the existence of various untoward and unauthorised transactions attributed to the former board of directors and the third respondent. He further alleges that this led to a concerted investigative process into the affairs of the company and that in the midst of these investigations that the officers of the applicant came upon certain information that have precipitated the present application.

[11] As evidence of the uncovered maladministration attributed to the 3rd respondents Mr Mdiya attaches two e-mail communications the first of which was what he terms an internal note between the 3rd respondent and one Marietjie who is described as a former employee of the applicant in which it is suggested the third was engaging in 'unlawful conduct in the operations of the first respondent's business activities and in particular undermining and or circumventing the regulatory authority (the fifth respondent). It is further suggested that the third respondents actions as suggested in the e-mail evinced unlawful and dishonest intentions that posed a reputational risk to both the integrity of the applicants and the first respondents business entities.

[12] Of keen interest and pertinence to this application is Mdiya's disclosure in his founding affidavit of an e-mail that is alleged to have precipitated the relief sought in this matter - this being an e-mail enquiry by officers of the Financial Sector Conduct Authority of South Africa (FSCA) allegedly addressed by one Ms Noma-Afrika Sandlana to Mr Mdiya on the 31[51] Jaunary 2010. It merits quoting its contents:

'Dear Tshaka and Nontokozo,

We are in receipt of an enquiry from the Financial Services Regulatory Authority (FSRA) regarding the shareholding of PAAM Swaziland (PAAMS SZL) a subsidiary of Pan African Asset Management (Pty) Ltd (PAAM).

The FSRA is in receipt of a letter from Mr Mphile Sibandze informing them that the management of PAAM relinquished 30% of its shareholding of PAAM to him and he provided signed Board resolution to that effect.

Further Mr Sibandze related the intent to withdraw a sum of E1 000 000 which currently forms part of E2 000 000 statutory base capital for the PAAM SZL licence.

Please confirm if PAAM the following

If PAAM relinquished 30% of its shareholding of *PAAM SZL to Mr Sibandze; and*

- *If PAAM has any objections to the intended capital withdrawal of E1 000 000.*

We would appreciate prompt response to this matter and submit supporting documents by no later than 4 February 2020.03.12

Regards.

Noma-Africa Sandlana." (sic)

[13] Mr Mdiya alleges that the revelation of this e-mail led him to conduct an internal investigation from which he established that there had never been any resolution by the shareholders authorising the divestment of the applicant's interests and shares in the first respondent although he alleges that in his findings he did establish evidence in the form of a resolution (heretofore described as RESOLUTION 94) purportedly passed by the erstwhile board of directors dated the 24th July 2019 as follows:

"RESOLUTION OF THE DIRECTORS MEETING OF PAN AFRICAN ASSET MANAGEMENT (PROPRIETARY) LIMITED REG/STRATION AT DIRECTORS MEETING AT 392 MAIN ROAD BRYANSTON ON 24 JULY 2019

RESOLUTION NUMBER: 94 DISINVESTMENT FROM PAAM SWAZILAND

RESOLVED THAT:

Without the prospect of a shareholders dispute resolution coupled with a limited prospect of funding for PAAM in general, that:

1.1 ***The shareholders duly consider and approve a resolution to disivenst from PAAM Swaziland.***

1.2 ***To allow for the process to follow the timeframe that would be commensurable with the laws and regulations of Swaziland governing such a process:***

Signed: ***Director***

Signed: ***Director***

Signed: ***Director"***

[14] He annexes a copy of the resolution as TM 3 to which appears appended the signatures of certain Messrs Zwilenkosi Mdletshe, Calvin Maseko, Chris Marathe, Courtenay Harebottle and Ms Ntshekiwa Molefe and the date 24th July 2019 as the date on which the signatures marking accession thereto are entered. As further evidence of the 3rd Applicant's conduct Mr Mdiya further alludes to a letter addressed by the latter to the chief executive of the regulator (the fifth respondent) dated 31st January 2020 headed "RE: URGENT REQUEST TO LIQUIDATE FUNDS OF PAN-AFRICAN ASSET MANAGEMENT" in which the author implores the regulator to accede to the first respondent's request for approval of the liquidation of 50% of the capital reserve kept in the investment account. Further the e-mail makes a plea for expeditios of approval of an application for the transfer of the first respondent's licene to Ris Cura SA[1] . The e-mail strikes an indignant if impassioned tone expressing extreme frustration at the regulator's non approval. It is further alleged by Mr Mdiya in reference to the contents of

Annex TM4 pages 33 and 34 of Book of Pleadings

this letter that his investigations had revealed that the 3rd respondents had in his representations to the regulator informed the regulator that:

1. the first respondent had taken a decision to cease operations on 31st January 2020;

2. required the release of 50% of the base capital from the investment account at FNB and pledged as security to FSRA;

3. that the first respondent intended to trasfer its licence to the entity Ris Cura Solutions.

[15] All this, according to Mr Mdiya occurring, without the disclosure let alone consultation consent or approval being sought by the respondents from the applicant as a minority shareholder. He alleges until these findings and the advent of the letter TM 4 he and the applicant were not aware of these intended or imminent actions and specifically that neither the closure of the business operations of the first respondent, the intended liquidation of the base capital nor the sought transfer of the trading licence of the first respondent had been sanctioned by the applicant or its management. It is further alleged that in any event there was no evidence that the decision to close the operations of the first respondent had been approved by the shareholders of the company; there being no evidence of a resolution to this effect and as to the liquidation of the company's assets.

[16] Finally the gist of Mr Mdiya's allegation in the founding affidavit is that it is these developments and the information gleaned from the paper trail led the applicant to conclude that the second and third respondents had embarked on an ulterior scheme of unlawfully and fraudlently appropriating, and stripping the first respondent of its assets and that in the process they they have either sought or purport the unauthorised and unlawful transfer the assets including the company licence to third parties; these being done with the intention to 'defraud the applicant and its shareholders and to illegally procure the funds being held as capital by FSRA.

. ***The Respondent's*** **case**

(17] The first respondent has filed an answering affidavit vigorously opposing the application. The affidavit is deposed to by the third respondent.

[18] In rebuttal to the Applicants allegations of fraud, the respondents have raised the series of legal points; some advanced in limine; on the basis whereof they see the dismissal of the application for interdict. I have dealt with the various points in limine and the substantive contentions of the respondents under specific headings in an attempt to .take a systematic

approach in dealing with the issues ansmg from this matter and the respondents case discerned from the papers.

[19] In summary I note that a substantial position of the answering affidavit that has been deposed by the third on behalf of the other respondents, is dedicated to averments whose prime focus appears to cast doubt or question the authority, bona fides and standing of the applicant's officers (the interim board) on the one hand and on · the other advance the respondents' versionof the facts pertaining to the applicants state of affairs in a bid to explain the respondents' actions - in particular the role of the third respondents.

[20] In defence of his actions and that of the applicants' previous board of directors, the third respondent paints a bleak picture of the applicants' situation and the state of the business matters. His major complaint turns on his personal grievance in light of the allegations made against him and the unlawful actions attributed to him in the applicant's founding affidavit. He alleges there is a conspiracy born out of an alleged collusion between the

· regulator (the fifth respondent) and the present interim board of directors of the applicant which he seeks to characterise as an illegitimate cabal. He reserves his most caustic and disparaging allegations against the regulator in particular. He laments that the applicant in collaboration with the regulator have sought to tarnish his person and good name by casting him in bad light in the allegations of fraudulent conduct attributed to him and the actions of the erstwhile board of the applicant. He deems the allegations malicious. His and the supporting affidavit deposed to by Mr Mdletshe comes short of providing any evidence to substantiate the alleged collusion or conspiracy nor does it assist this court in addressing the critical issues in this matter. I fail to see the relevance of these averments to the instant matter.

[21] Most significantly, ostensibly as a backdrop, he seeks to make an account of the applicants erstwhile board resolutions against the financial distress of the company in South Africa and the alleged failure of its members to take appropriate corrective action to rescue the company from its woes against the advice and the recommended measures proposed by the board of directors in the said resolution. I have dealt with the issues pertaining to the said resolutions separately elsewhere in this judgment.

[22) The third respondent has reserved his most caustic and disparaging comments for the fifth respondent and its officers in a language that I find most odious especially as I have said because no evidence of the alleged malice that the third respondent alleges drives the fifth respondent's actions has been placed before this court. I note that these attacks have

actuated the fifth respondent to file an affidavit in its defence even though it has

indicated its neutrality in these proceedings. I must say the respondent's conduct in the manner it has made these spirited attacks against the reputation of the regulator is to be deprecated and deserves censure from this court. I was urged by Mr Warring, the attorney retained by the fifth respondent especially for the purpose of registering its complaint and representations in light of these unwarranted allegations, to make an appropriate order for costs in its favour against the respondents. I do not think it appropriate to go so far especially because the fifth respondent is not participating as a party in the proceedings although it cited. I think a word of caution suffices.

[23] Turning to the material facts and issues at hand I am reminded of this caveat expressed by the court in ***Dadoo Ltd v Krugersdorp Municipal Council*** **1920 AD 530** at page 547 when it said:

> *'the fundamental doctrine that the law regards the substance rather than the form of things* - a *doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim* ***plus valet quod agitur quam quod simulate concipitur"***

[24] The latin maxim directly translated means 'what is actually done is more important than that which seems to have been done' - it is an apposite mantra in the instant case. Thus in all this I am impelled to consider the substance of the respondent's case in the specific contentions they make. It is to these that I now turn.

Point on Locus standi

[25] In their answer to the applicant's case, the respondents have put up the defence that the applicant lacks *locus standi* in the matter in the sense that it has no justiciable interest in the subject matter of the main application having allegedly divested itself of such interest by way of a resolution purportedly made by the applicants board of directors - Resolution 94. The respondents seek to call into question the applicant's shareholding in the first respondent and further seeks to question its legal status or capacity.

[26] In the affidavit deposed to by the third respondent, the respondents appear to conflate the concepts of locus standi in regard to legal capacity and or authority to act and also in the second sense of a legal· interest in the subject matter of litigation. This is evident in paragraph 3.1 of Mr Sibandze's affidavit where he says the following:

> ***"3.1.1 The deponent has approached this court under*** **a**

> ***respondent yet the applicant has no locus standi to bring these proceedings as it has no real and substantial interest in the relief sought nor in the outcome of the proceedings. On the face of the resolution being Annexure TM 1 on the applicant's papers tehre are two (2) glaring issues. Firstly, the resolution is not on the Applicant's letter head nor does it have any information of the Applicant viz-a-viz TM 3. Secondly, there are typo errors o fthe dates on the resolution as the date the meeting was held was not the 4th February 2019 but only signed on the 4th February 2020. In February 2019 there was another board in the office and not that of the February 2020 if any:***
>
> ***3.1.2 To make things worse, Applicant seized operations in November 2019 and as such is not longer trading and one wonders whose interests the deponent and or/so called interim board is serving. In addition the Applicant's licence in the Republic of South Africa has also been suspended as a result of its non-operation."*** (sic)

[27] The balance of the answering affidavit is devoted to advancing the proposition not only that the applicant alienated its interest in the first respondent but also that it has no legal standing on account of it having ceased its business operations and lost its licence to carry on business as an asset manager in the South African market. It is also directed at a host of unsavoury allegations against the 5th respondent in the conduct of its regulatory mandate to which I have alluded above. The latter have given rise to the 5th respondent taking an unusual step of filing an affidavit in response whilst maintaining it will abide the courts decision.

[28] The nub of the first to third respondents' case appears to be this:

a) that the applicant is not existent in law or is lacking legal status or personality; and
b) that it has legally disposed of its interests and shareholding in the first respondent.

(29] The heart of the applicants claim is firstly that it asserts its position as a shareholder in the first respondent and that on that basis it has a locus standi to seek interdictory relief. As I have pointed out earlier the substance of the respondent's point on *locus standi* appears to straddle two concepts both to do with the Mr Mdiya's authority and secondly and chiefly what appears to be the substantive thrust of the respondents defence to the whole matter, that the applicant having lost its shareholding in the company, no longer has a direct and legal interest in its affairs.

[30] The respondents call into question the deponent's (Mr Mdiya's) claim to authority to prosecute the application on behalf of the applicant. In this regard the third respondent contends that in so far as the said authority derives from a resolution by the interim board of directors of the applicant granting such authority on Mr Mdiya, the said resolution is ineffectual on account of certain defects apparent on its fact. It is contended firstly that the resolution does not bear or display the applicant's letterhead nor does it have 'any information of the Applicant'.. 1 am not certain what the latter aspect relates to but it would appear that what is being referred to is that it is lacking the detail of information as pertains the features when compared with resolution 94 attached as Annex TM3 to the founding affidavit. The field of features in the form and format of Resulution TM3 include the masthead logo, the designation or name of the company with its company registration number·on the one hand and at the bottom displays both the signatures and the capacities of the signatories thereto. In my view its an objection to do with form than substance. I must say that the extract of the minute bearing the resolution cited by Mr Mdiya is remarkably different in form and style from the format of the Resoluton 94.

[31] In its answering affidavit the first respondent relying on the depositions of the third respondent itself referres to the so called defects in the resolution ostensibly authorising the application as 'typo errors of the dates" as pertains the meeting. That to me appears to be a concession and and an acknowledgement of a mere technical or clerical error in the preparation of the document. I do not think it is the sort of objection that can sustain an impediment to the application on locus standi as contended by the respondents. In any event the question of 'authority' appears subsidiary to the substance of the objection on locus standi which refers interest in the sense of 'a real and substantial interest 'in the relief sought' or 'the outcome of the proceedings". This is evidednt in Mr Sibandze's opening statement which is prefaced as follows:

> ***"The Deponent has approached the court under a resolution of the Applicant for an interdict of the 1st to 3rd Respondent yet the applicant has no locus standi to bring these proceedings as it has no real and substantial interest in the relief sought nor in the outcome of the proceedings"***

[32] I fail to see the connection between the point about the 'typographical errors' and the issue of locus standi in its stated essence. In so far as the point seems to bring on board the objection as to authority I must say this is not done in unequivocal terms as to lend certainty and clarity as regards the objection. I am mindful of the distinction as pertains the point on authority between the nature of the objection as to authority and its concise

articulation in the case of *Shell Oil Swaziland (Ply) Ltd v Motor World (Ply) Ltd Ila Sir Motors* and the contention on *locus standi* in the matter at hand. The points are miles apart. Even in the Shell Oil where an objection as to the existence of 'authority' proper was raised which is not the case herein, the Court of Appeal was keen to caution that:

> ***"An a/legation by a deponent that he is duly authorised to depose to an affidavit on behalf of a corporate body is generally not expected to be challenged and accordingly the source of his authorisation is not usually set out by the deponent"***

[33] Indeed to insist on such technical perfection would stultify access to justice and promote fastidious taking of technical points at the expense of the due adjudication of substantive commercial disputes. What is remarkable in this case is the deponet to the the first respondent's answering affidavit has himself eschewed any evidence or assertion of the source of his authority to depose to the answering affidavit on behalf of the first respondent. Surely the idiom 'whats good for the goose is good for the gander' should apply here. I am therefore not satisfied that a genuine point on authority has been raised herein. That leaves the essence of the locus standi point to be dealt with next.

Interest in the Subject Matter

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[34] The first contention in regard to *locus standi* that the respondents have raised is that on account of the applicant being a deregistered asset management firm in the Republic of South Africa (and it is common cause that due to compliance issues the FSCA has expunged the registration of the applicant as a financial services provider and suspended its operating licence as an asset management entity there) then on this basis it lacks the legal competence or capacity to institute the present proceedings.

[35] I do not find any legal merit or substance to this contention given that it is not being contended that the applicant has ceased to be an incorporated entity in the sense of being either de-registered or liquidated as a company in that country; the only point being raised being that it has merely ceased its business operations. I do not see how that would extinguish any shareholder value or interest in another jurisdiction where the applicant may seek to protect, prosecute or vindicate any claim arising out of that interest. There is no sound legal proposition to the contrary which is supported by any arguments by the respondent's counsel that has been advanced before me.

[36] In so far as the respondents seek to rely on the supposed transfer of the applicant's shares to the second respondent, it would appear to me that

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even this point proceeds from a misconception that the mere declaration of the return appearing as **'Annex AMS 4'** constitutes evidence of such transfer. There is no support for this position. The filing of company annual returns is provided for in Section 151 of the Companies Act 8 of 2009. It is clear from that section that all an annual return does is render a statement of the company particulars as pertains to its state of affairs including a list of its members and its statement of the share capital as contained in its register of members. Section 151 (3) confers powers on the Registrar to demand an inspection of the annual return of the company and to require the furnishing of extracts of transactional entries in the register of members.

[37] Likewise section 57 of the Act, provides for the maintenance of a register of members and the recording of transfer of shares or any changes as pertains to the shareholding structure in the company.

(38] It follows that without evidence of the underlying transaction to which the declared transfer of shares in the return, the annual return uttered cannot serve as evidence of such a sale or transfer. In *casu* the respondents have not placed any evidence of the sale of shares and any entry in the company register reflecting any such sale and transfer to the 2nd respondent.

Authority for the divestiture

(39] A recurring theme in the main defence to the application for the interdictory relief is. the position put up by the respondents that the divestment and the ancillary acts undertaken by the third respondents in regard to the shareholding, licence and capital reserve fund were legitimate actions sanctioned and approved by the applicant by way of a board resolution issued by the applicants former board of directors; the so-called 'Resolution 94'. It is necessary to examine the detail of the said resolution and ascertain its purported import or legal efficacy.

(40] I have alluded to its contents in the context of my ruling on the interlocutory application for leave to file additional affidavits but it warrants to highlight its core element. It reads:

> ***"RESOLUTION OF THE DIRECTORS MEETING OF PAN· AFRICAN ASSET MANAGEMENT (PROPRIETARY) LIMITED REGISTRATION AT DIRECTORS MEETING AT 392 MAIN ROAD BRYANSTON ON 24 JULY 2019***
>
> **RESOLUTION NUMBER: 94 DISINVESTMENT FROM PAAM SWAZILAND RESOLVED THAT:**

Without the prospect of* a *shareholders dispute resolution coupled with* a *limited prospect of funding for PAAM in general, that:

The shareholders duly consider and approve a resolution to disinvest from PAAM Swaziland.

To allow for the process to follow the timeframe that would be commensurable with the laws and regulations of Swaziland governing such a process:

Signed: ***Director***

Signed: ***Director***

Signed: ***Director".***

[41] Also emerging from the 3rd respondents answering affidavit is that resolution 94 was allegedly made in conjunction with another resolution dubbed resolution 93 and that these resolutions sought to activate the shareholders to urgently undertake a raft of measures commended to it by the board which in the collective view of the board were necessary to right the ship and address certain concerns identified by the board.

(42] It is the latter resolution pertaining to the proposed divestment that is of particular pertinence in this application. From the plain wording of this statement and it is very clear that it was intended and amounts to to be no more than a mere recommendations by the board to the members of the company to sanction the proposed disinvestment from PAAM Swaziland; in reference to the third respondent.

(43] There is no evidence that has been placed before me by the respondents that the proposed resolution by the shareholders approving this proposition was passed or was ever procured. When pressed on this the respondents attorney, Mr Mabuza was hard put to concede that none existed. Instead he urged the court to give consideration to the affidavit of one Mr Zwilenkosi Reuben Mdletshe attached as an annex to the third respondent's answering affidavit as evidence in support of the respondents proposition that the said resolution 94 was the valid basis and authority of the applicant's approval of the third respondent's actions complained of.

[44] Mr Mdletshe was the then chairman of the board of directors at the helm of the applicant at the time and confirms that he participated in the meeting that led to the making of the resolutions. Of significance in the contents of the affidavit he deposed to is his assertion that he attended that meeting in his representative capacity as the 'lead representative' of the majority shareholder with a full mandate to bind it in all decisions undertaken at that meeting. Most critically he reaffirms the third respondents position that at that meeting the board, and by extension the applicant, resolved to dispose of the shares in the PAAM Swaziland and thus divest itself of its interests therein. However firstly what belies Mr Mdletshe's statement in this regard is that the said resolution does not reflect that the directors had a mandate to bind the shareholders either in regard to the said majority shareholder or the rest of the shareholders for that matter, in the divestiture. Secondly as stated earlier, the resolutions only purport to urge the shareholders to 'duly consider and approve a resolution to disinvest from PAAM Swaziland'. It speaks for itself in a very clear and unambiguous langueage and does not bear out the interpretation that Mr Mdletshe and the third respondent seek to give it. The resolution was as Mr Sibandze affirms in his answering affidavit was an ultimatum by a seemingly frustrated board of directors who were keen to have things their way in the proposed judgement as to what was best for the company's turnaround prospects.

[45] Having dealt with the respondents' legal contention on *locus standi* the only issue that remains is whether the applicant meets the requirements for the final (permanent) interdict. Final in the sense that of having the relief sought with the effect of securing a permanent cessation of an unlawful course of conduct or state of affairs (See Jones and Buckle *Civil Practice* 81; also Prest C.B., *The Law and Practice of Interdicts).* I also understand the permanence of the relief in the sense of signifying the opposite of a contingent interim relief subject to a further and final determination of rights. That is what appears to be the object of the present application - a definitive solution to protect a vested right. Has it shown the existence of such rights?

A CLEAR RIGHT

[46] In order to establish a clear right the applicant has to prove it on a balance of probality (see LAWSA XI para 296; see also Prest at p43). It is common cause that in the period leading to the events in consideration and prior to the circumstances giving rise to this matter, applicant has been a registered shareholder of the first respondnt. It has thus established a *prima facie* existence of a right and a direct and substantial interest for purposes of an interdict. This much was submitted by Mr Jele who appeared for the applicant and I am inclined to agree with him. Mr Jele referred to this as a balance of convenience. I would prefer to to refer to it as a discharge of the

evidential burden on the onus the applicant bears overall which tilts the scales in its favour. It arises at the pain of the respondent's disproving it and unless the respondent tips it otherwise, the evidential burden would translate to proof of the right on a balance of probabilities.

[47] It is for the respondents to demonstrate or prove their assertion that as at the launch of the proceedings, the applicant had either as they term it 'relinquished' lost or alienated of its rights by divesting itself of its interests and shares in the company (the first respondent). The applicant application is predicated on the protection of its shareholder rights or interests in the company. As stated earlier in regard to the point taken by by the respondents on the applicant's lack of legal interest alluded to in the ruling, it is my judgment that the respondents have failed to adduce credible evidence of the alleged disposition by the applicant of its shares in the first respondent in light of the so-called resolution 94 falling short of a legally effectual and competent warrant of authority or sanction authorising the transfer of the applicant's shares and the absence of an underlying transaction of the sale of the said shares referred to in the company returns filed by the third respondent. In any event as it turns out it was not in any event, a company resolutiion of divestiture as asserted by the respondents but a mere recommendation directed at the members for proposed action.

Status of Form C

[48] It has been contended on behalf of the first respondent; as more fully stated in the respondents answering affidavit; that the principal basis for the respondent's assertion that the applicant lacks interests turns on the alleged transfer of shares from itself to the 2nd repondent. It is, as it were, presented as a *fail accompli* in so far as the 3rd respondent seeks to rely on it as a *de jure* fact. It becomes necessary to examine the legal effect of the the filing of an Form C declaration.

[49] The third respondent's assertion that there has been a transfer of shares to the 2nd Respondent is only supported by the annual return forms annexed to his answering affidavit. However a declaration made in statutory annual forms amounts to no more than mere statements by the officers of the company in compliance with the provisions of the Companies Act.

Section 26 of. the Act obliges companies to file a list of members and a statement of their respective shareholding in the company. Such a list is required to also state not only the names and addresses of the members but any change in the shareholding structure including any transfer of shares occuring since the last returns were filed. In the form relied on by the respondents it is indicated that the 30 shares held by the applicant were transferred pursuant to a sale transaction. However no evidence of

the

underlying sale transaction has been placed before this court nor is there any document produced as evidence of an entry in the company register to signify the transfer has been adduced. Section 33 of the act provides that the register and any matters recorded therein shall be prima facie evidence of any matters directed or authorised by the Act to be so entered. No such evidence is before this court. All we have is the third respondents say so.

[50] As it is the respondents who claim that there has been a legitimate transfer of the shares the onus falls on them to prove the existence and legality of such a transaction on a balance of probabilities and this is a trite position in our law. As they have not been able to do so we are left with the position that the applicant remains a member and minority shareholder with an vested interest in the first respondent company.

(51] All said this application although not technically brought as an interlocutory application, anticipates the confluence of both a derivative and private action being brought by the applicant as a minority shareholder to protect both the company and its individual private interest. Its design is to prevent the respondents from perpetrating a fraud on the minority and on the company at the same time.

Cilliers Benade *et al* define a derivative action as a right of action by a member against unratifiable irregularities and wrongs against the company (an exception to the Foss *v Harbottle* rule).

The Rule in Foss *v Harbottle*

[52] Succinctly put, the Foss *v Harbottle* rule[2] is that an individual shareholder is precluded from bringing an action to complain of an irregularity in the conduct of the compay's internal affairs provided that the irregularity is one that can be cured by way of a vote of the company in general meeting. Thus a shareholder becomes a stranger in relation to transactions between the company and third parties and thus cannot interfere where a right of action would accrue in favour of the company and intercede on behalf of the said company. I must hasten to add that the rule does not apply in regard to conduct that amounts to an illegality or conduct that is ultra vires the corporation; which transaction or action even the majority could not ratify.

[53] The latter position receives careful articulation as one of the elements of the rule set out by Brightman LJJ in *Prudential* Assurance Co. *Ltd v Newman Industries and Others (No.2)* (1982] 1 All ER 354j to 358b where the learned judge states:

2This principle was originally propounded lnthe English case of *Foss v Harbottle* [1843] 2 HRE, 67 ER 189,

"The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkins LJ in. Edwards v Halliwell [1950] 2 All ER 1064 at 10661067 as follows. (1) The proper plaintiff in an action in respect of a *wrong alleged to be done to* a *corporation is, prima facie, the corporation. (2) Where the alleged wrong* is *a transaction which might be made binding on the corporation and on all its members by* a *simple majority of the members, no individual member of the corporation* is *allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There* is *no room for the operation of the rule if the alleged wrong* is *ultra vires the corporation, because the majority of members cannot confirm the transaction. {4) There* is *also · no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by* a *special resolution or the like. because* a *simple maiority cannot confirm* a *transaction which requires the concurrence of* a *greater maiority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring* a *minority shareholders' action on behalf of themselves and all others. The reason for this is that. if they were denied that right. their grievance could never reach the courl because the wrongdoers themselves, being in control. would not allow the company to sue."*

[54] The rule in *Foss v Harbottle* has been relied on by the first to third respondents in support of their point on *locus standi* as more fully amplified in their attorney, Mr Mabuza's written submissions. But I think that the argument proceeds from a misconception of the principles involved. It was contended that the rule holds in the instant case in so far as it is urged the applicant cannot show an injury which the applicant has suffered or a cause of action vested in it. I think the respondents error lies in so far as it does not take into account that the exceptions in the above passage by Brightman LJJ are not directed at harm or injury to the shareholders individual interest as it is to the interests of the company itself. In the matter at hand the applicant company *qua* shareholder in the first respondent company, brings an action on account to a wrong against the company itself
; an alleged fraud or wrong to the company in one distinct respect as opposed to merely its own shareholder interests.

[55] I therefore understand the position advanced by the applicants to be the

actions complained of are *ultra vires.* It contends the misconduct to be a

wrong that is inherently unratifiable as the wrongdoer has as a director acted mala fide towards the company in the sense that were a resolution to ratify the action to be passed it would result in the wrongdoer receiving a benefit at the expense of the company to the prejudice of the company on account of the assets being placed either directly or indirectly in the hands of the wrongdoer. [3]These are precisely the sort of alleged misconduct which the respondent does not answer or dispel in its answering affidavits.

[56] Here is a case where based on the uncontroverted prima facie facts the classic conditions for the proverbial derivative action appear to exist - where what is placed before the court is evidence of an alleged fraud against the minority carried out by persons in control of the company, whose conduct is potentially prejudicial to the interests of the company and its shareholders and if not forestalled would result in irreperable harm to these interests.

[57] The apprehended harm alleged in these proceedings is of the kind that will occur especially where the company itself is unable to act in its own interest as in where a rogue element in its management as the alleged wrongdoers themselves are 'in control of the company'. The authors Cilliers and Benade also refers to a private shareholder action in the sense of a right of a member to protect and assert his individual membership rights or interests derived from the constitution as one of the exceptions to the Foss v Harbottle rule.

[58] On these facts and for these reasons I am satisfied that the applicant meets the 'clear right' test for an interdict.

AN ACT OF INTERFERENCE OR INVASION OF THAT RIGHT

[59] The applicant contends that the first to the third respondent have in the conduct complained of, sought to interfere or unlawfully and fraudulently deprive it of its interests in the company or that in so far as this is an allegedly continuing wrong, have enagaged in a process (although inchoate) that is designed, or has the potential of invading, interfering and depriving it of its rights and interests which it now seeks to protect and preserve in the sought relief. In part it is based on a reasonable apprehension of injury to its rights in light of the conduct being in progress and that it stands to be permanently prejudiced if they succeed in their efforts unless restrained. The apprehension is reasonable and well grounded on account of the incontrovertible facts and circumstances of the various transactions attributed to the 2nd and 3rd respondents designed to achieve the cessation of the first respondent's business operations, the

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3 **Cilliers and Benade op cit at page 296,**

intended transfer of the licence and liquidation of the financial resources in the form of the capital reserve.

[60] In the absence of the applicants or shareholder approval or resolution by members of the company in a duly constituted general meeting authorising the disposal of the assets, the transactions that are the subject of this application have been established and proven on a *prima facie* basis to be unlawful and unauthorised. In my view the applicant has shown the existence of a reasonably founded apprehension of imminent harm induced, as it is has been shown, by the the respondents conduct.

NO ALTERNATIVE RELIEF

[61] Finally it was contended by Mr Mabuza on behalf of the respondents that even if the applicant could prove the mischief it alleges it should not be entitled to a final interdict as it would have an alternative remedy to the prejudice it would have suffered. To this end he·submitted that redress in the form of damages should avail the applicant and would adequately compensate for any injury suffered. He submitted further that damages *in lieu* of the sought relief would be readily ascertainable and quantifiable rendering an interdict incompetent.

[62] On the other hand it was contended by the applicant's attorney, Mr Jele that the applicant has satisfied the requisite proof on a balance of probabilities that no satisfactory alternative remedy would avail the applicant in averting harm or prejudice to its interests relative to the sought relief.

[63] Considering these submissions against the evidence I think that the respondents' contention that an award of damages would be adequate begs the question as to what pecuniary compensation would make good the harm the applicants seek to forestall in the sought interdict. The applicants quest is the holding over, abatement of the apprehended deleterious actions of the respondents. Its aim is the attainment of a preservation order sought to salvage and prevent the distruction or loss of its shareholder interests in the company by the alleged unlawful ulterior conduct of the respondents that is under way. It seeks to avert an irreversible and irreperable harm that could result if the respondents are permitted to have their way in their manifest designs.

[64] But I also understand the grand objective to be _the prevention of a virtual dissolution without proper channels and procedures, of the company, the liquidation or spiriting away of its assets. It is a derivative action. It is also the shielding of the shareholders form the ominous risk posed by the raft of steps which are calculated to hollow out the first respondent as an entity by

alienating its assets (including the intangible intellectual property) and

placing them out of the members reach. Ultimately the self-avowed intent of the respondents is to put paid to its existence as a going concern and to put it out of business and virtually liquidate it without following the due process either for liquidation or winding up. All this without the approval of the general meeting of the company by resolution. What would it take to disentangle these attempted transactions if permitted to be carried out? I do not think damages would be a suitable solution to the feared risk.

[65] In the applicant's written submissions it was further urged by Mr. Jele that the applicant's remedy is also well founded in terms of section 214 of the companies act. That section provides any member of a company with a remedy to seek an order forestalling any unfairly, prejudicial, unjust or inequitable conduct or act of the said company which has an adverse effect *inter alia* of altering or interfering with that members rights in respect of shares in the company. In such applications the court is conferred with a discretion to grant such orders as it deems meet with a view to bringing the mischief or misconduct complained of to an end.[4] The range of relief the court may grant as envisaged in the act includes an order regulating the future conduct of the company affairs.

[66] Moreover the nature of the potential prejudice and the apprehended harm to a member who has in interest in the company may take the form of reputational harm occasioned by his or her association with the company which may go beyond mere financial interest pertaining to its standing on matters concerning prudential regulation. That appears to be a consideration that would naturally arise in relation to any unauthorised withdrawal of any reserve securities. I do not suppose such risk or harm is financially quantifiable or readily compensable in pecuniary terms.

[67] So in sum and on an analysis of the evidence before me, I am satisfied that the applicant has made a *prima facie* case for the interdict. That it has an interest as a shareholder which is at risk of harm and that it asserts an abiding interest in the welfare and interests of the company to justify its . taking the course of bringing this application to stave off the unauthorised irregularities and conduct of the respondents as person in control of the company from carrying out the unauthorised transactions. On the other hand there is nothing in the evidence led by the respondents that show that the purported actions were legal, proper and duly authorised including the purported disposition and transfer of the applicant's shares in the first respondent. It is a matter that plain and uncomplicated. On that basis the application succeeds. In the event I make the following orders:

1. The second third and fourth respondents are hereby interdicted and restrained from withdrawing and/or causing to be withdrawn the

4see section 214 (2) (c) and (3) of the Companies Act No.B of 2009.

whole or any portion of the base capital of 2 million Emalangeni held in an account in the First National Bank of Eswatini;

2. The second, third and fifth respondents are hereby interdicted from transferring the first respondent's licence to Ris Cura or any other third party without the consent of the applicant;

3. The second, third and sixth respondents are hereby interdicted and restrained from interfering and or reconstituting the shareholding structure and or deregistering the first respondent from the Registry of Companies without the consent of the applicant; and

4. The second and third respondents are directed to pay the costs of the applicant in these proceedings on an ordinary scale as between party and party.

MAPHANGA J
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Mr. Z. Jele

For the Respondents: Mr. M. Mabuza