



**IN THE HIGH**

**COURT OF ESWATINI**

**JUDGMENT**

CASE NO.386/2020

In the matter between:

**PAN AFRICAN ASSET MANAGEMENT  
SWAZILAND (PTY) LIMITED  
AQUARIAN ASSET MANAGER (PTY) LIMITED  
ABEL SIBANDZE**

**1<sup>st</sup> Applicant  
2<sup>nd</sup> Applicant  
3<sup>rd</sup> Applicant**

And

**PAN AFRICAN ASSET MANAGEMENT  
SOUTH AFRICA (PTY) LIMITED  
ROYAL ENERGY GROUP (PTY) LIMITED  
FORMERLY KNOWN AS PGC MANAGEMENT  
SERVICES (PTY) LTD**

**1<sup>st</sup> Respondent  
  
2<sup>nd</sup> Respondent**

In Re:

**PAN AFRICAN ASSET MANAGEMENT  
SOUTH AFRICA (PTY) LIMITED  
ROYAL ENERGY GROUP (PTY) LTD  
FORMERLY KNOWN AS PGC MANAGEMENT  
SERVICES (PTY) LTD**

**1<sup>st</sup> Applicant  
  
2<sup>nd</sup> Applicant**

And

**PAN AFRICAN ASSET MANAGEMENT  
SWAZILAND (PTY) LIMITED**

**1<sup>st</sup> Respondent**

**AQUARIAN ASSET MANAGER (PTY) LIMITED  
ABEL SIBANDZE  
REGISTRAR OF COMPANIES  
ATTORNEY GENERAL**

**2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent  
5<sup>th</sup> Respondent**

**Neutral citation:** *Pan African Asset Management Swaziland (Pty) Limited & Two Others v Pan African Asset Management South Africa (Pty) Limited & Another In re: Pan African Asset Management South Africa (Pty) Limited & Another v Pan African Asset Management Swaziland (Pty) Limited & Four Others (386/2020) [2020] SZHC 266 (2 December 2020)*

**Coram** : **T. L. Dlamini J**  
**Heard** : 24 April 2020  
**Delivered** : 2 December 2020

**Summary:** *Respondents in the main application moved an interlocutory application seeking leave to file a supplementary affidavit – They allege that in the replying affidavit the applicants introduced new matter which is incorrect, inaccurate and misleading to the court and submit that the supplementary affidavit is to put things into proper perspective – In the alternative, the respondents seek an order striking out the paragraphs they allege to be introducing new matter – The principles of when the court may grant such leave, and the merits of this matter, considered.*

**Held:** *That having considered the three sets of affidavits filed, no new matter has been introduced in the replying affidavit.*

**Held further:** *That the paragraphs which the respondents seek to impugn do not assist in the determination of the fundamental and real issues to be decided in the main application. The sought leave to file a supplementary affidavit is refused, and the application is dismissed with costs.*

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**JUDGMENT**

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## **Introduction**

- [1] Before court is an *interlocutory* application wherein the respondents in the main application seek leave to file a supplementary affidavit. For convenience, I will refer to the parties as are described in the main application.

## **Background**

- [2] The first applicant and first respondent are corporeal persons registered and carrying on the business of asset management. The first applicant is registered and carrying on business in the Republic of South Africa whilst the first respondent is registered and carrying on business in the Kingdom of Eswatini. For convenience, I will hereinafter refer to the company registered and carrying on business in South Africa as PAAM SA whilst the one registered and carrying on business in the Kingdom of Eswatini as PAAM ESWATINI.
- [3] Prior to the institution of these proceedings, according to the founding affidavit in the main application, PAAM SA held 30% shares in PAAM ESWATINI, while the majority shareholding of 70% is held by a company called Aquarian Asset Manager (Pty) Ltd, the second respondent. The third respondent, Mr. Abel Sibandze, is a former Chief Executive Officer and executive board member of PAAM SA. He however resigned these positions in the month of August 2019 and is the current chairperson of PAAM ESWATINI.
- [4] It appears from the papers filed before this court and it is common cause that the third respondent played a pivotal role in the establishment and registration of PAAM ESWATINI and in its operations in the Kingdom. In the course of

the registration processes, PAAM SA caused to be paid a sum of two million emalangenji (**E2,000,000.00**) to a local bank, First National Bank (FNB), as base capital for PAAM ESWATINI. This was for purposes of compliance with regulatory requirements for registration as an asset manager in the Kingdom.

[5] Through correspondence and enquiries from the financial services' regulatory authorities of Eswatini and the Republic of South Africa, it came to the attention of PAAM SA, according to the papers before court, that through Resolution 94, the shareholders of PAAM SA considered and approved a resolution to disinvest from PAAM ESWATINI. Pursuant to this resolution, PAAM SA relinquished its 30% shareholding of PAAM ESWATINI to the third respondent. Further to that, it came to their knowledge that the third respondent sought to withdraw a sum of **E1,000,000.00** from the **E2,000,000.00** which forms the statutory base capital for PAAM ESWATINI licence. This information is contained in Annexures "TM3" and "TM5" which were filed as supporting documents. A confirmation of these transactions was sought by the Financial Services Regulatory Authority of South Africa from PAAM SA. According to the applicants, it is out of this consultation that PAAM SA got to know about these transactions.

[6] PAAM SA denies the truthfulness of these transactions and claim to have no knowledge of them. In order to forestall finalization of the disinvestment process and to restore the *status quo ante*, the applicants launched motion proceedings before this court under a certificate of urgency. They seek, amongst other prayers, an order directing that the transfer of the first applicant's 30% shareholding in the first respondent be rescinded and set aside, and that the second and third respondents be ordered to take all

necessary steps to reinstate the first applicant as a 30% shareholder in the first respondent.

- [7] In the alternative, they seek an order directing and authorizing the Registrar of this court to sign and execute all documents necessary to facilitate a transfer of the 30% shares from the first respondent to the first applicant. They also seek an order interdicting and restraining the second and third respondents from dissipating and/or alienating the assets of the first respondent.

### **The present application**

- [8] Having been put to timelines for filing the necessary court processes, and consequent upon the filing of a replying affidavit by the applicants, the respondents moved the present *interlocutory* application seeking leave to file a supplementary affidavit on the basis that the applicants have introduced new matter in their replying affidavit. They allege that the new matter is one that is not before court and is prejudicial to the respondents' case. They further allege that the new matter being introduced is incorrect, inaccurate and misleading, hence the need to be granted leave to file a supplementary affidavit in order to put things into proper perspective.
- [9] In the alternative, they seek an order striking out the information they allege to be constituting new matter, and which they submit, is an attempt by the applicants to make out their case in order to remedy the defects of their application.

### **The law applicable**

- [10] In motion proceedings the ordinary rule is that three sets of affidavits are allowed to be filed. These are the founding and supporting affidavits,

answering affidavit and a replying affidavit. The court however, may in its discretion allow the filing of further affidavits. **Rule 6 (13)** of the **High Court Rules** provides as quoted below:

*“Within seven days of the service upon him of the affidavit and documents referred to in sub-rule (12)(b) the applicant may deliver a replying affidavit but the court may in its discretion permit the filing of further affidavits.”*  
(own emphasis)

[11] **His Lordship Maphanga J**, correctly stated, in another matter which involves the same litigants *in casu* under case number 122/2020 delivered on 17 March 2020, that the courts have held that leave for filing further affidavits is granted only in special circumstances, or in exceptional circumstances. **(Pan African Asset Management SA (Pty) Ltd v Pan African Asset Management Swaziland (Pty) Ltd & 6 Others (192/20200) [2020] SZHC 95 (17/03/2020)**. The court may also grant leave where it considers it advisable to do so.

[12] Special circumstances, according to **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition at p.359**, have been held to exist where there was something unexpected in the applicant’s replying affidavit or where new matter has been raised in the replying affidavit. It has also been held to exist where the court desires to have fuller information, and where there is a possibility of prejudice to the respondent if further information is not allowed.

[13] The authors, **Herbstein and Van Winsen (supra)**, further state that the court will not grant leave “*where the affidavits sought to be filed do not constitute a reply but raise wholly fresh issues, entailing the filing of further affidavits by the applicant*” (p.360). There must be a proper and satisfactory explanation as to why it was not done earlier.

[14] Where facts alleged in an answering affidavit reveal the existence of a further ground for the relief sought by the applicant, the court will allow the applicant in his reply to utilize and expand upon what has been revealed by the respondent. It will also allow the applicant in his reply to set up an additional ground for the relief arising from the answering affidavit. **See: Shakok Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701**

### **Respondents' contentions**

[15] The founding affidavit of the interlocutory application is deposed to by **Abel S. Sibandze** who is the third respondent in the main application. He deposed that the applicants "*have attempted to make their case in reply and have introduced new matter, which was not before court...*". A summation of the new matter raised, as submitted by the respondents, is set out below in bullet form:

- Applicants introduced a search from the office of Registrar of Companies in South Africa which was not in the application and it misrepresents the facts of the matter. The respondents therefore wish to give their version of the facts and what the document represents;
- Applicants attached annexure TM9 which introduced information from one Husselmann in an attempt to circumvent points raised *in limine*;
- Financial records of PAAM SA were introduced through annexure TM14 in an attempt to make out a case for the points taken about the amounts due and the claims made by the applicants, and that these need to be put in the correct context;
- A media statement has been introduced through annexure TM18 and needs to be put in perspective as it is detrimental to the respondents' case;

- A sale of shares agreement has been introduced through annexure TM19 and is incorrectly represented in an attempt to establish the *locus standi* of the applicants;
- Contents of para 14 are new matter and an attempt to make out the applicants' case yet applicants knew the requirement they had to meet as they represent a juristic person;
- Contents of para 19 are new material that was at the disposal of applicants when the application was made. The information therein is defamatory and not supported by facts or evidence, and respondents have not been allowed an opportunity to respond to them;
- Contents of para 19.1 are incorrect and are a deception calculated to cause damage to the reputation of the third respondent as they are false and scandalous;
- Para 24.5 challenges the authenticity of annexure AS4 which is material to this matter hence must be responded to;
- Para 24.2 uses unbecoming language which is totally disrespectful and calculated to damage the reputation of third respondent by building between him and one Mr. Mdletshe a relationship that defines them as thieves yet there is no such evidence before court.

### **Applicants' contentions**

[16] An affidavit deposed to by Tshaka Mdiya was filed in opposition. The deponent described himself as Chairman of the interim Board of the first applicant. He raised two points *in limine* before answering the merits. The first being that of lack of urgency. This is based on a fact which appears *ex facie* the papers, *viz.*, that the papers were prepared and signed on 18 March 2020, and were therefore ready to be served and filed on that date. Instead, they were served and filed some days later, on 27 March 2020. The second point being that the application is materially defective as it fails to disclose the applicants on whose behalf the affidavit is deposed.



[17] On the merits, the applicants submit that the respondents raised points *in limine* to the main application to which they “*had to reply in abbreviation and clarification to statements made and facts already contained in their founding affidavit to the main application.*”

[18] I now proceed to determine the contested issues, the points of law being the first.

### **Urgency**

[19] The respondents contend that the application was drafted and finalized, signed and commissioned before a commissioner of oaths on 18 March 2020 but was served and filed in court on 27 March 2020. This service date is confirmed by the acknowledgement of service of the process by the applicants’ attorneys. Of interest and obviously questionable, is the fact that the Registrar’s date stamp which shows the date of filing of the application with her office, reflects 11 March 2020. This certainly cannot be true and correct because the processes, *viz.*, certificate of urgency, notice for leave to file supplementary affidavit and the founding affidavit were signed on 18 March 2020. The affidavit was sworn to before a commissioner of oaths on this same date as well.

[20] As much as the court appreciates and concurs with the applicants on the factual evidence placed before it as proof of the respondents’ failure to file this application at the earliest opportunity they had, and the delay of more than a week that they allowed, the circumstances of the case warrants, in my view, a hearing of the matter on an urgent basis. The application was filed in the course of a main application that was filed under a certificate of urgency, and which was due to be heard soon. Of fundamental importance is the fact that

this application ought to be heard first as it is interlocutory. To follow the requirements of the rules of this court relating to service of process and time limits would not, in my view, have allowed the matter to be heard prior to hearing the main application. It therefore follows that it had to be filed under a certificate of urgency and be heard as such. For the foregoing, the point of law on lack of urgency is dismissed.

### **Alleged defect in application**

[21] The applicants submitted that the interlocutory application is materially defective as it does not disclose the persons on whose behalf the affidavit is deposed. The affidavit is deposed to by Mr Abel S. Sibandze who is the third respondent in the main application. He is the third applicant in this interlocutory application. He deposed in paragraph 1 as quoted below:

**I am an adult male Swazi, Respondent residing at Mbabane, in the Hhohho District, Kingdom of Swaziland. As the Respondent, I am duly authorized to depose to this affidavit as I am a party to the proceedings. The facts deposed to herewith are within my personal knowledge, unless otherwise stated and I believe to be true and correct. (own underlining)**

[22] Mr Sibandze correctly states that he is a party to the proceedings and in my view, depositions that he made are to be attributable to him and his case. For this reason, depositions made therein represent his case. It therefore would occasion injustice to declare the affidavit a defective process. This would unavoidably cause a complete collapse of the third respondent's case before court. The fact that the founding affidavit has not disclosed the persons on whose behalf the depositions are made does not, in my opinion, render the

affidavit defective as the affidavit also places before court the third respondent's case.

[23] I am further of the opinion that given Mr Sibandze's relationship with the first and second respondents who are both artificial persons, it would occasion a further injustice to uphold this point and consequently strike out the affidavit in so far as it relates to the first and second respondents. In so finding, I am guided by the judgment of the Court of Appeal in the famous **Shell Oil Swaziland (Pty) Ltd v Motor World t/a Sir Motors (23/2006) [2006] SZSC 11 (21 June 2006)** case which enjoins the courts to decide matters on their real merits than on technical points. I therefore dismiss this point of law as well.

### **The merits**

[24] Respondents contend that annexure TM8 introduced a search from the Registrar of companies in South Africa and was at the disposal of the applicants, hence ought to have formed part of the application. They also contend that this document (annexure TM8) is misrepresenting the facts of this case. The applicants contend, on the other hand, that the annexure contains exactly the same identity and registration number of the second applicant which were disclosed in paragraph 13 of the founding affidavit. Applicants submitted that the annexure only reiterates and amplify the information disclosed in paragraph 13. This is information which the third respondent has full knowledge of by virtue of having been the Chief Executive Officer of the company. The knowledge he has, according to the applicants, include knowledge about the directorship of the company.

[25] Paragraph 13 of the founding affidavit states what I quote below:

13. The second applicant is Royal Energy Group (Pty) Ltd (formerly known as PGC Management Services (Pty) Limited, Registration no: 2005/033303/07, a company duly incorporated in accordance with the company laws of the Republic of South Africa having its principal place of business at Unit A-1003, Block A, Corobay Building, Menlyn Maine, Pretoria, South Africa. The second applicant is the 68% majority shareholder in the first applicant. The second applicant has a vested financial interest in this matter, not only through its shareholding in the first applicant but also as a substantial creditor of the first respondent. **The Honourable Court's attention is drawn to the fact that there are two entities that are registered in the Republic of South Africa as PGC Management Services, the second entity has registration no: 2012/129375/07, however it has no relevance or interest in the present application.** (Bolded text reflects my own emphasis)

[26] The third respondent, in paragraph 1.4 of his opposing affidavit, deposed as quoted below:

*“Mpho Dipela, who seeks to authorize litigation on this matter, is not a director of PGC Management Services as is clear from the returns from the Registrar of Companies in South Africa, attached hereto marked “AS1”.*

[27] As evidence of the alleged fact that Mpho Dipela is not a director of PGC Management Services, an extract of the company profile search from the Registrar of Companies in South Africa was attached as annexure “AS1”. I wish to highlight however, that “AS1” is for PGC Management Services with company registration number 2012/129375/07. Indeed, Mpho Dipela does not appear as a director of the company in terms of annexure “AS1”.

[28] In the replying affidavit the applicants contend that the company profiled in annexure “AS1” only shares a similar name to that of the second applicant but has a different company registration number, viz., 2012/129375/07 and that this company is being deliberately used to mislead the court.

[29] Tendered as evidence of the version of the facts contended by the applicants, an extract of the company profile search from the Registrar of Companies of South Africa was attached as annexure “TM8”. This annexure profiles Royal Energy Group which, according to the citation and depositions made in the affidavits, is formerly known as PGC Management Services. It has company registration number 2005/033303/07. In terms of this annexure, Mpho Dipela is an active director of Royal Energy Group (Pty) Ltd. The company search was done on 15 March 2020, according to the annexure, hence Mpho is reflected as an active director on that date. This is the same company registration number which the applicants disclosed in paragraph 13 of their founding affidavit at p.13 of the Book.

[30] On the basis of the facts set out in the above paragraphs, I find no merit in the contention by the third respondent that the applicants raised new matter by introducing annexure “TM8”. The fact of the matter is that in his effort to prove that Mpho Dipela is not a director of PGC Management Services, the third respondent tendered to this court a company profile of a company that shares a similar name but with a different company registration number. The applicants, in turn, tendered a company profile of the correct company which they described in paragraph 13 of their founding affidavit. The application for leave to file a supplementary affidavit to deal with annexure “TM8” is meritless in my finding. There is no new matter being introduced. Paragraph 13 of the founding affidavit succinctly introduced the company named PGC Management Services and even expressed in clear terms that two companies are sharing this name but have different company registration numbers. In the replying affidavit the applicants produced evidence to show that the third respondent wrongfully, and most likely intentionally, profiled the other

company with a similar name in an effort to mislead the court. Through annexure TM8, the applicants profiled the company which they mentioned in paragraph 13 of their founding affidavit. The application for leave to file a supplementary affidavit to deal with annexure TM8 is without merit and is accordingly refused.

[31] The third respondent also contends that applicants introduced information through annexure TM9 obtained from one Husselmann who is unknown to him and this is an attempt to cover up the issue and the points taken by the respondents. The third respondent submitted that annexure TM9 is an attempt to develop the *locus* of the deponent of the founding affidavit and it needs a reply.

[32] The applicants, in response, contend that the issue of “PGC Management Services” is raised for the first time by the respondents in paragraph 1.4 of their opposing affidavit. They submitted that the respondents deny knowledge of the second applicant whilst they very well know the second applicant’s identity. To buttress their denial, the respondents attached annexure “AS1” which is a profile of another company that shares a similar name with the second applicant.

[33] Annexure “TM9”, which is now a subject of contest, is a letter signed by the sole director of the company whose profile was furnished by the respondents through annexure “AS1”. The contents of the letter disassociate the company profiled in annexure “AS1” from PAAM SA and PAAM ESWATINI. It also denies that Mr. Mpho Dipela is a director of the company.

[34] The applicants’ submission in response is that they are entitled to furnish evidence to refute the allegations made by the respondents, and this is exactly

what they did. The information contained in annexure “TM9” is not a cover, they submitted, but merely a factual refute of the allegations made by the respondents in their opposing affidavit.

[35] Annexure “TM9” addresses and refutes an issue which the respondents raised through annexure “AS1” in their opposing affidavit. The information which is furnished through annexure “AS1” is denied by the applicants and, in turn, they furnished evidence in support of their denial. It is my finding that there is no new matter being introduced by annexure “TM9”. The applicants are merely dealing with evidence which the respondents furnished in their opposing affidavit. Both annexures ‘AS1” and “TM9” purport to be information about the directorship of the second applicant. The deponent of the opposing affidavit was a Chief Executive Officer of the second respondent until August 2019 when he resigned. The information he furnished through annexure “AS 1” was known to him, including its accuracy and completeness. I have not been given any explanation why the respondents elected to furnish evidence that relates to another company and not the one involved in the proceedings before court. Leave to file a supplementary affidavit is therefore refused with regard to the contents of annexure “TM9”.

[36] The respondents also submitted that the introduction of the financial records of PAAM SA through annexure TM14 is an attempt to make out a case for the points taken about the amounts due and the claims that the second applicant claims to have. It was submitted that these financial records were not in the founding papers yet they were at the applicants’ disposal, hence need to be put in the correct context.

[37] The applicants, in response, submitted that the financial records were introduced and relied upon in order to refute the denial of the identification of the second applicant and its shareholding in the first respondent. This denial is made in paragraph 1.4 and 6.5 of the opposing affidavit where the applicants are also put to the proof thereof. In paragraph 6.5 of the opposing affidavit the respondents deposed as quoted below:

**6.5 It is denied that the 2<sup>nd</sup> Applicant is a 68% shareholder in the 1<sup>st</sup> Respondent and they are put to the proof thereof.**

[38] In reply to the above submission, the applicants stated what I quote below:

**25.21 I have already dealt extensively with the ownership of the shareholding in the first applicant and repeat what I have stated. It is clear from annexure “TM14” and on page 6 thereof which the third respondent signed that the second applicant is the owner of 68% shares in the first applicant.**

[39] The applicants therefore submitted that through annexure “TM14”, they refute the challenge made by the respondents. The financial statement furnished belongs to the first respondent whose CEO was the third respondent before tendering his resignation in August 2019. It bears his signature and verify some claims by the applicants in that it confirms the identity and shareholding of the second respondent.

[40] I have considered the factual allegations made in the three sets of affidavits and in my view and finding, there is no new matter being introduced by annexure TM14. The factual allegations made in the founding affidavit were denied by the respondents and in proof of same the applicants tendered



annexure TM14. Leave to file a supplementary affidavit in order to deal with annexure TM14 is therefore denied.

[41] Respondents also submitted that through annexure TM18, the applicants introduced a media statement which has to be put in perspective. In their heads of argument, they state that the applicants had the statement at their disposal before they moved the application. They further state that **“the statement goes to impute the wrongdoing of the 3<sup>rd</sup> respondent in that he is a criminal and a thief.”** They submitted, in argument, that the media statement is about one Zwelinkosi Mdletshe who is not a party to these proceedings but has been brought in, and should therefore be given an opportunity to explain the statement. The said Mr. Mdletshe, according to the respondents, is being accused of fraud which he allegedly committed in collusion with the third respondent. Mr. Mdletshe should therefore be given an opportunity to explain the statement and the facts around it as it is detrimental to the respondents’ case, argued the respondents.

[42] In response, the applicants submitted that the reference to Mr. Mdletshe and the introduction of annexure TM18 was in reply to the allegations made by the respondents in paragraph 6.1 of their opposing affidavit where they refer and bring into the fold Mr. Mdletshe. They also submitted that in their founding affidavit, serious allegations are made of Mr. Mdletshe, including the fact that criminal charges have been laid against him and are being investigated. This is denied however, by the respondents. The applicants then attached the press release contained in annexure TM18 not only to corroborate the allegations they make in the founding affidavit but to also confirm that a warrant of arrest was issued against the said Mr. Mdletshe on 04 November 2019.

[43] In paragraph 34.1 of the founding affidavit, the applicants state, *inter alia*, that **“There is no resolution of the Board of Directors of the first respondent, authorizing the then chairman Mr Mdletshe to sell or transfer the shares from the first applicant to the second respondent.** In paragraph 42 of the founding affidavit, the applicants also state what is quoted below:

**“Coming back to the issue of shares, it is submitted that this is an important issue for the first and second applicants. On a conspectus of the foregoing, it is therefore apparent that the third respondent, with the connivance of Mr Mdletshe fraudulently misrepresented to the Registrar of Companies on 30<sup>th</sup> July 2019 that the first applicant had agreed to sell and transfer the 30% shares to the second respondent. It is crucial to note that the date of the transfer in fact precedes the meeting of the shareholders which has been tasked to consider the resolution to disinvest from Eswatini.”**

[44] In their opposing affidavit, the respondents denied all the averments made by the applicants as reflected in the above paragraph. In paragraph 8.7 of their opposing affidavit, they state, *inter alia*, that **“a resolution was passed to transfer the shares as it is clear that the effect of the resolution was that the shares be disposed off and transferred to the 2<sup>nd</sup> Respondent.** In paragraph 8.15, the respondents deny that there was any fraudulent misrepresentation to the Registrar by Mr Mdletshe. They also state that Mr Mdletshe is being accused but has not been served and is not a party to these proceedings.

45] It is my finding that the role which Mr Mdletshe allegedly played in the transfer of the contested shares is an issue that has been raised in the founding affidavit and the respondents had the opportunity to fully address it in their opposing papers. They however elected to be sketchy when dealing with it but denied the allegations made. Notwithstanding that Mr Mdletshe is not a party to these proceedings, the respondents had all the opportunity to prepare and

attach to their opposing affidavit a supporting affidavit deposed to by him. Annexure TM18 does not, in my view, introduce a new matter. All it does is to support an averment made in the founding affidavit and which is denied by the respondents. It is further my view that allowing a supplementary affidavit to be filed in order to deal with annexure TM18 will not constitute a reply but will raise fresh issues that will entail the filing of further affidavits. Leave to file a supplementary affidavit to deal with annexure TM18 is therefore refused.

[46] In connection with annexure TM18, according to the respondents' submissions, are allegations to the effect that the third respondent is a criminal and a thief. This is imputed, argued the respondents, by the wording used when detailing the alleged conduct of Mr Mdletshe and the third respondent. The wording is that **“there is no honour amongst thieves”**. In the exact words of the respondents, ***“the imputation is that the 3<sup>rd</sup> Respondent is a thief and is party to the theft by a certain Zwelinkosi Mdletshe.”***

[47] The text complained of is in paragraph 24.2 of the replying affidavit and is quoted below:

**24.2 There is no credibility in the statement made by the respondents that they “accepted” the shares of the applicant in the first respondent from Mdletshe who transferred the shares. This reminds me of the saying that “there is no honour amongst thieves” as it seems that this now is an attempt by the third respondent to shift the blame to Mdletshe. The fact remains that neither Mdletshe nor Sibandze had the authority to alienate the shares. (underlining is emphasis by respondents)**

[49] In their argument, the respondents submitted that this allegation is not supported by an affidavit or a document from the South African Police

Service to the effect that the 3<sup>rd</sup> respondent has been charged. They contend that this is calculated to destroy his reputation as the sole intention is to see him not licensed to trade. They argued that this averment needs to be addressed because the third respondent is a trader in assets and commodities, and it would cause him to be deregistered as a trader should he be convicted.

[50] In all honesty, the statement does not, in my opinion, impute on the third respondent that he is a thief and a party to the theft by Mr Mdletshe. The statement commences by stating that there is no credibility in the averment that the shares were accepted by the first respondent from Mdletshe who transferred them. Immediately after saying that, it goes on to say that “this reminds me of the saying that” there is no honour amongst thieves as it now seems that an attempt is made to shift the blame to Mr Mdletshe.

[51] Even if it may be argued and proved that the averment is sufficient enough to make the third respondent lose his license as a trader, that surely cannot be on the basis of these proceedings. Criminal proceedings would be required to be first instituted and a guilty verdict returned. I am unable to find, as the respondent does, the imputation attributed to the averment made by the applicants. I also do not find the averment to be prejudicial to the respondents' case. Leave to file a supplementary affidavit to respond to it, or an order for it to be struck out is unsuccessful, and accordingly refused.

[52] The respondent further contend that applicants introduced annexure TM19, a sale of share agreement. They submitted that this agreement *“has been represented incorrectly”*, in an effort to establish the *locus* of the applicants in the main case. They contended that the *“agreement is in the direct and*

*personal knowledge of the 3<sup>rd</sup> Respondent, as he was a witness to the same and it is being misrepresented” by the applicants.*

[53] The applicants, on the other hand, contend that there is no misrepresentation of annexure TM19. They submitted that the introduction of the annexure is to corroborate facts they have already stated and made in paragraph 13 of their founding affidavit, which facts are denied by the respondents. Paragraph 13 is quoted in paragraph 25 of this judgment. The corroborated facts, according to the applicants, are that the second applicant is a 68% shareholder in the first respondent and that it identified itself as a second applicant in the main application. These facts and the identity of the second applicant, according to the applicants’ submission, are denied on various occasions by the respondents, hence annexure TM19 is introduced to refute the denial. They further submitted that it is evident from annexure TM19 that the third respondent Mr. Abel Sibandze signed the agreement on behalf of the second applicant. He signed the agreement not as a witness but as a director. He signed the agreement in circumstances where the identity and registration number of the second applicant is known and disclosed in clause 1.1.21 at page 4 of the agreement.

[56] In the founding affidavit, it is stated in paragraph 20 that the first applicant is an asset administrator whose license, however, has been conditionally suspended temporarily by the Financial Sector Conduct Authority (FSCA). It is stated in paragraph 22 that the first applicant has two shareholders, and these are PGC Management (Pty) Ltd, which is the second applicant, and Helen Mason. In their opposing affidavit, the respondents denied that the first applicant’s license has been conditionally suspended. It contended that the license was suspended and that this is the first stage of having the license

revoked by the FSCA in South Africa. The respondents further deposed that the shares do not belong to the second applicant and have never belonged to it, and that it has no cause of action against the respondents. (own emphasis)

[57] In reply, the applicants then brought in annexure TM19, being a sale of shares agreement. The applicants stated that it is evident from annexure TM19 that the first applicant is an incorporated company that has authority to act. They also stated that it is clear from the annexure that the sale of shares agreement was between the second applicant and Helen Masson, and that the third respondent clearly knows who is the majority shareholder in the first respondent because he personally signed the agreement.

[58] Having taken into consideration the depositions made by the parties in the three sets of affidavits, I am of the opinion that no new matter has been introduced by annexure TM19. The applicants correctly submitted, in my finding, that the annexure refutes denials that the respondents made in their opposing affidavit. I am therefore not persuaded to grant the respondents leave to file a supplementary affidavit in order to respond to annexure TM19, and the sought leave is accordingly refused.

[59] The respondents further submitted that certain statements made by the applicants introduce new facts and must be struck out. Paragraph 14 of the replying affidavit is contended by them to be a new matter and a fraudulent attempt to make out a case which the applicants knew was a requirement for them to make as they represent a juristic person. The contested paragraph 14 is couched as follows:

**AD PARAGRAPH 3.1 AND 3.2**

**There was a typographical error in the resolution with respect to the second applicant and in any event the resolution was unsigned. I annex**

hereto marked "TM 17" being the corrected resolution. The resolution was passed on the 25<sup>th</sup> February 2020 authorizing Mr Dipela to sign an affidavit on behalf of the second applicant. Mr Dipela is a director of the second applicant.

[60] The real issue being sought to impugn is the content of annexure TM17.

Quoted below is a reproduction of the statement made in annexure TM17:

**MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF ROYAL ENERGY GROUP (PREVIOUSLY KNOWN AS PGC MANAGEMENT SERVICES (PTY) LTD**

**Registration number: 2005/033303/07**

**DATE: 25 FEBRUARY 2020**

**PLACE: PRETORIA, REPUBLIC OF SOUTH AFRICA**

**PRESENT: MPHO JOHANNES DIPELA**

**BOAS MOGALE**

**LAWRENCE MSINTO**

**RESOLVED:**

- 1. That the Company through its newly appointed board of directors is authorized to proceed to launch or institute any legal action or application that it may be advised of in any competent court in the Kingdom of Swaziland to protect its interest in PAN AFRICAN ASSET MANAGEMENT (PTY) LTD (SOUTH AFRICA) and or PAN AFRICAN ASSET MANAGEMENT (SWAZILAND) (PTY) LTD;**
- 2. That Mpho Dipela is authorized to sign any document, affidavit, to appoint attorneys or to take any such action as which are reasonably necessary to give effect to this resolution.**
- 3. All resolutions previously signed by Mpho Dipela are ratified retrospectively, and all his actions and affidavits filed are accepted and authorized retrospectively.**

**RECORDALS BY THE BOARD**

- 1. The board confirms that the Company is a 68% shareholder in PAN AFRICAN ASSET MANAGEMENT SERVICES (PTY) LTD with registration number: 1996/008413/07.**
- 2. The board confirms that up until 1<sup>st</sup> November 2019 that Mpho Dipela was the only director of the Company and as such was ordinarily the only person to act on behalf of the Company. Through the habit of being the only previous director and signatory his actions are condoned as being bona fide.**
- 3. That the company recently undergone a name change from PGC Management Services (Pty) Ltd to Royal Energy Group (Pty) Ltd.**

4. That when the Company acquired its shareholding in PAN AFRICAN ASSET MANAGEMENT SERVICES (PTY) LTD from Mrs. Hellen Masson that Mr. Abel Sibande (alias Sibandze) was authorized to sign the Sale of Shares and Claims agreement on behalf of the Company, and that the identity and company registration number of the Company is well within his personal knowledge as would attest from his signature to the agreement.

Signed at Pretoria on this 25<sup>th</sup> day of February 2020,

Mpho Johannes Dipela:.....(not signed)

Boas Mogale:.....(signed)

Lawrence Msinto:.....(signed)

[61] The background to annexure TM17 is in the founding and opposing affidavits. Tshaka Mdiya deposed in paragraphs 1 and 3 of the founding affidavit that he is Chairman of the Interim Board of PAAM SA. He also deposed that by virtue of his position as stated above, and also by virtue of a resolution of the Board of Directors of the applicant, he is authorized to depose to the affidavit and to institute the present application. He referred the court to annexure “TM1”, being a resolution of the Board of Directors of PAAM SA which authorizes him to institute any legal action or application, or to defend any existing applications or actions in the High Court of Eswatini for the return of its shares or any alternate relief.

[62] In paragraphs 13 and 14 of the founding affidavit, Tshaka Mdiya deposed that the second applicant is Royal Energy Group (Pty) Limited, formerly known as PGC Management Services (Pty) Limited, with registration number 2005/033303/07. He also deposed that the second applicant is a 68% shareholder in the first applicant and has a vested interest in this matter as a shareholder and a substantial creditor of the first applicant. He referred this court to a resolution of the Board of Directors of the second applicant



authorizing him to institute any legal action or application in the Kingdom of Eswatini in order to protect its interests in PAAM SA and PAAM ESWATINI. The resolution is contained in annexure “TM2”. Quoted verbatim, Tshaka Mdiya states in paragraph 14 that ***“I attach hereto a resolution by the Board of Directors of the second applicant, Mr. Mpho Dipela marked as annexure “TM2”.*** The resolution is couched in the following terms:

**MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF  
PGC MANAGEMENT SERVICES (PTY) LTD**

**DATE: 24 FEBRUARY 2019**

**PLACE: PRETORIA, REPUBLIC OF SOUTH AFRICA**

**PRESENT: MPHO JOHANNES DIPELA**

**RESOLVED:**

- 1. That the Company through its only director is unauthorized to proceed to launch or institute any legal action or application that it may be advised of in any competent court in the Kingdom of Swaziland to protect its interest in PAN AFRICAN ASSET MANAGEMENT (PTY) LTD (SOUTH AFRICA) and or PAN AFRICAN ASSET MANAGEMENT (SWAZILAND) (PTY) LTD;**
- 2. That Mpho Dipela is authorized to sign any document, affidavit, to appoint attorneys or to take any such action as which are reasonably necessary to give effect to this resolution.**

**Signed at Pretoria on this 24<sup>th</sup> day of February 2020,**

**Mpho Johannes Dipela:**

.....

[63] In paragraphs 3.1 and 3.2 of its opposing affidavit, the respondents denied that annexure “TM2” authorizes Mpho Dipela to institute the current proceedings. They submitted that the annexure states in clear terms that

Mpho Dipela is unauthorized to proceed to move the application, and he therefore cannot rely on it as it prohibits him from doing so. They further submitted that the authority to institute the application has been challenged and the deponent has to prove the said authority. They submitted further, that Mr. Dipela cannot be authorized as averred by him, in ***“light of the fact that he is not a member of the Applicant and therefore he has no relationship with the Applicant.”***

[64] The respondents further deposed in paragraph 6.6 of their opposing affidavit what is quoted below:

**“the resolution TM2 does not support the contention by the Applicant. It clearly states that they have no authority to institute these proceedings before the court. The resolution does not in any way prove the allegation that they have an interest in the matter. The parties 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are not in dispute, in so far as they have been described correctly. The 3<sup>rd</sup> Respondent is me if they are referring to me as the CEO and the Principal Officer of the 1<sup>st</sup> Respondent. I deny that I caused the transfer of the shares in so far as they allege. The shares were transferred to the 2<sup>nd</sup> Respondent by the Chairman as submitted above. This was done transparently and with full knowledge of the board and the shareholders to the best of my knowledge.”**

[65] In reply, the applicants stated that there is a typographical error in the resolution with respect to the second applicant, and that the resolution was not signed. It is on this basis that the applicants furnished annexure “TM17” as a corrected resolution.

[66] A fundamental issue about these two annexures is that they provide evidence of the averment that Mpho Dipela is authorized to institute

proceedings and to sign affidavits on behalf of the second applicant. When looking at annexure “TM2”, I have no doubt that the word used, viz., unauthorised, is an honest typographical error. This view is placed beyond doubt by the wording of the resolution that immediately follows, which states that “***Mpho Dipela is authorized to sign any document, affidavit, to appoint attorneys or to take any such action as which are reasonably necessary to give effect to this resolution*** (underlining for own emphasis)

[67] With due respect to counsel, I find that there is no new matter being introduced by paragraph 14 of the replying affidavit. I am also unable to see how the averments made in this perceived impugnable paragraph 14 will prejudice the respondents’ case. For these reasons, leave to file a supplementary affidavit to deal with the facts made in this paragraph is refused, and the application for it to be struck out is also refused.

[68] The respondents further contend that the contents of paragraph 19 are a new material that was at the disposal of the applicants when the application was made. They submit that the content is defamatory and is not supported by any facts or evidence. They further submitted that same is incorrect, and is a deception that is injurious and calculated to cause damage to the reputation of the third respondent. They therefore seek to have paragraph 19 struck out for being scandalous and vexatious.

[69] The above referred to paragraph makes averments to the effect that the shares were fraudulently transferred at the time when the third respondent was the

CEO of the applicant, and that this was done in collusion with the former chairman of the Board of Directors.

[70] In response, the applicants have correctly submitted, in my finding, that the allegations about the shares having been unlawfully and fraudulently transferred without authorization are made in paragraphs 7, 8 and 9 of their founding affidavit. In paragraphs 4 up to 4.3 of respondents' opposing affidavit, the respondents answered these allegations and denied any unlawfulness in the transfer of the shares. In reply, the applicants furnished a document in proof of the allegation they made. There is clearly no new matter being introduced, in my view and finding, by paragraph 19 of the replying affidavit. As a matter of fact, these are the issues whose determination is pending in the main application and are mentioned in the founding papers. The application for leave to file a supplementary affidavit to deal with paragraph 19 of the applicants' replying affidavit is therefore refused. This is equally true with the application to have this paragraph struck out.

[71] The last issue in respect of which the respondents seek leave to respond to by filing a supplementary affidavit concerns the authenticity of their annexure "AS4" attached to the respondents' opposing affidavit. This annexure introduced a letter that was written to the Financial Sector Conduct Authority (FSCA) by the former CEO Mr. Sibandze (third respondent) about declining capital reserves at PAAM SA. In response to the annexure, the applicants questioned the authenticity of the letter in their replying affidavit. Consequent upon the questioning of the authenticity of the letter, the respondents submitted that the letter is material to this matter and they wish


to respond as they are aware of it and was indeed received by FSCA, hence the suspension of the licence of PAAM SA.

[72] The suspension, according to the applicants, does not constitute a limitation to the second applicant's *locus standi* in these proceedings. This is correct, in my opinion, as suspension of a licence becomes a bar from continuing with the business for which the licence was issued. It does not deregister the company and make it non-existent. It therefore follows that other ancillary activities such as rectifying shortcomings that led to the suspension of the licence, are not prohibited but can be undertaken in the name of the company.

[73] The applicants correctly submitted, in my view, that their denial of the letter does not constitute any new matter as alleged. They also correctly submitted that the letter is not material to this matter as the matter relates to the unauthorised transfer of the shares and not the suspension by FSCA. They further submitted, and I agree, that even if the authenticity of the letter is admitted, it does not take the matter any further and does not advance the respondents' case. The issue before court concerns the transfer of the applicants' shares to the second respondent. The issues contained in annexure "AS4" will therefore not assist in determining the main application, hence the alleged need to respond to them is not convincing. For this reason, the application for leave to file a supplementary affidavit that responds to the applicants' reply to annexure "AS4" is refused.

[74] On the basis of the findings I have made, the application by the respondents for leave to file a supplementary affidavit is refused, and the application to strike out certain paragraphs of the replying affidavit is also refused. The

end result is that the application is dismissed, and I so order. Costs of suit are granted in favour of the applicants who are respondents in this interlocutory application.



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**T.L. DLAMINI J**

**JUDGE OF THE HIGH COURT**

For the applicants : Mr. Z. Jele

For the Respondents : Mr. L. Howe