



**IN**  
**THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

CASE NO.386/2020

In the matter between:

**PAN AFRICAN ASSET MANAGEMENT  
SOUTH AFRICA (PTY) LIMITED**

**Applicant**

And

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

**Respondent**

In Re:

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

**Applicant**

And

**FINANCIAL SERVICES REGULATORY AUTHORITY**

**Respondent**

In Re:

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

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

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

And

**PAN AFRICAN ASSET MANAGEMENT  
SWAZILAND (PTY) LIMITED  
AQUARIAN ASSET MANAGER (PTY) LIMITED  
ABEL SIBANDZE  
REGISTRAR OF COMPANIES  
ATTORNEY GENERAL**

**1<sup>st</sup> Respondent  
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 South Africa (Pty) Limited v Pan African Asset Management Swaziland (Pty) Limited In re: Pan African Asset Management Swaziland (Pty) Limited v Financial Services Regulatory Authority In re: Pan African Asset Management South Africa (Pty) Limited & Another v Pan African Asset Management Swaziland (Pty) Limited & Four Others (386/2020) [2022] SZHC 4 (31 January 2023)*

**Coram** : **T. Dlamini J**  
**Heard** : 03 May 2022  
**Delivered** : 31 January 2023

**[1] Civil procedure – Withdrawal of an application – Rule 41 considered**

**Summary:** *The applicant herein moved an application in terms of Rule 30 of the Rules of this Court, seeking an order setting aside, as irregular step, two notices of withdrawal of an application in which the applicant is a second respondent – The notices of withdrawal are alleged to contravene Rule 41 of the High Court (Amendment) Rules and therefore liable to be set aside – The respondent contended that the matter was not ready for argument and therefore was not set down for hearing.*

**Held:** *That the application had been set down for hearing and therefore cannot, in terms of rule 41, be unilaterally withdrawn, but may be withdrawn by consent of the parties or leave of the court – Application granted.*

## JUDGMENT

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### **The application**

- [1] This matter first came before me in September 2020. Before court now are two applications made in terms of Rule 30 of the High Court (Amendment) Rules. The applicant is the second respondent in the application being challenged by invoking Rule 30 and it (the applicant) seeks an order setting aside, as an irregular step, two notices of withdrawal of the application. According to the applicant, the application was already set down for hearing. It therefore contends that the withdrawal contravenes Rule 41 of the Rules of this Court, and therefore liable to be set aside as an irregular step.

### **Background**

- [2] The respondent, Pan African Asset Management Swaziland (Pty) Ltd, (hereinafter referred to as PAAM ESWATINI) filed an application, under a certificate of urgency, on the 15 September 2021, against the Financial Services Regulatory Authority (FSRA) seeking an order directing the FSRA to release to it the sum of Two Million Emalangeni (**E2, 000,000.00**) held in the respondent's name as statutory capital in terms of the Securities Act of 2010. The application was however not served upon the applicant herein but only to the FSRA.
- [3] The applicant herein, viz., Pan African Asset Management South Africa (Pty) Limited, became aware of the application and filed an application to intervene and to be joined as a second respondent, and to be granted leave to file a substantive answering affidavit in the proceedings. These orders were granted by my brother **Maseko J.** on 17 September 2021 and the matter was referred

to me for arguments on the merits as I was seized with it and had previously dealt with it and endorsed a consent order that the parties agreed to.

- [4] The relevant facts are that Pan African Asset Management South Africa (Pty) Limited, hereinafter referred to as PAAM SA, and PAAM ESWATINI, are corporeal persons registered and carrying on the business of asset management. PAAM SA is registered and carrying on business in the Republic of South Africa whilst PAAM ESWATINI is registered and carrying on business in the Kingdom of Eswatini.
- [5] According to the founding affidavit of an earlier application I became seized with and was finalized by the issuance of a consent order in March 2021, PAAM SA held 30% shares in PAAM ESWATINI, while the majority shareholding of 70% was held by a company called Aquarian Asset Manager (Pty) Ltd. Mr. Abel Sibandze is a third respondent in the earlier application referred to above, and he deposed to the founding affidavit in the application sought to be set aside in these proceedings. He is also a former Chief Executive Officer and executive board member of PAAM SA. He however resigned these positions in the month of August 2019 and became the chairperson of PAAM ESWATINI.
- [6] From the papers filed of record in the earlier application, it is common cause that Mr. Abel Sibandze played a pivotal role in the establishment and registration of PAAM ESWATINI, and also in its operations in the country. In the course of the registration process of PAAM ESWATINI, a sum of two million emalangeni (**E2, 000,000.00**) was allegedly caused to be paid by PAAM SA to the local First National Bank (FNB), as base capital for PAAM

ESWATINI. This was for purposes of compliance with the regulatory requirements for registration as an asset manager in the Kingdom.

- [7] On the 15 September 2021 the respondent (PAAM ESWATINI) moved an urgent application against FSRA seeking an order directing FSRA to forthwith release to it the sum of two million emalangeni held in its name as statutory capital in terms of the Securities Act, 2010. The application was set down for hearing on 17 September 2021. The applicant, through filing an urgent application, sought an order to intervene and to be joined as the second respondent, and to be granted leave to file a substantive answering affidavit. The matter was heard by my brother Maseko J. on the 17 September 2021 and he granted the order joining the applicant as a second respondent. He also granted the applicant leave to file a substantive answering affidavit. His Lordship further granted an order referring the matter to myself for hearing of the merits as I was seized with it.

### **The challenged notices of withdrawal**

- [8] After two weeks following the order granted by Maseko J., the respondent withdrew the application by notice dated 04 October 2021. The applicant opposed the withdrawal and filed a Rule 30 application seeking an order setting it aside as irregular. The applicant alleged that it was not open to the applicants as cited in the notice of withdrawal to withdraw the application because they did not institute the application and are not the *dominus litis*.
- [9] The applicant also contended that if the notice of withdrawal is in respect of the interlocutory application, it offends the provisions of Rule 41 as the matter had already been set down, arguments tendered and orders were issued. It therefore is not open to the respondent to unilaterally withdraw the

application without the consent of the other parties. It further contended that the FSRA has not been cited as a party in the notice of withdrawal and this is impermissible. Lastly, the applicant contended that the tender to pay costs is irregular because no discussion or agreement was reached on the nature of the costs, and which of the parties are entitled to them.

[10] The respondent filed another notice, dated 08 October 2021, of withdrawal of the application. This withdrawal was also opposed and a Rule 30 application was filed seeking an order setting it aside as irregular because the applicant was granted an order to intervene and became the second respondent but had not been cited. The notice was therefore alleged to be defective and prejudicial to the applicant. It was further contended that the notice of withdrawal offends the provisions of Rule 41 as the matter had already been set down, arguments tendered in court and orders issued. It therefore cannot, it was alleged, be unilaterally withdrawn but the withdrawal needed the consent of the parties or leave of the court.

### **The law applicable**

[11] This application has been brought in terms of Rule 30. The rule provides that where a party has taken an irregular step in a matter, the other may apply that the step or proceeding be set aside. The rule is quoted below:

30. (1) *A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen days after becoming aware of the irregularity, apply to court to set aside the step or proceeding:*

*Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application.*

[12] The applicant contends that the notices of withdrawal of the application offends the provisions of Rule 41 which does not allow a party to unilaterally withdraw a matter once the matter has been set down for hearing. Such a matter may only be withdrawn by consent of the parties or with leave of the court. Rule 41 is quoted below:

41. (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the Taxing Master shall tax such costs on the request of the other party.

(b) A consent to pay costs referred to in paragraph (a), shall have the effect of an order of court for such costs.

(c) If no such consent to pay costs is embodied in the notice of withdrawal, the other party may apply to court on notice for an order for costs.

### **Determination of the issues**

[13] In both notices filed in terms of Rule 30 the applicant contends that it is no longer open to the respondent to unilaterally withdraw the application as the matter had already been set down, arguments heard by the court and orders were issued. It also contends that the withdrawal of the application constitutes an abuse of the court process because it stays the determination of a live issue concerning the fate of the E2, 000,000.00 (two million emalangeni) deposited into FNB as the statutory base capital required for the licensing of PAAM ESWATINI. It further contends that the notices of withdrawal are defective because the first notice did not cite FSRA while the second notice did not cite PAAM SA who had been joined as second respondent in the proceedings. The last contention is that the tender to pay costs was not agreed upon, and that it is ambiguous because it is unclear about which of the parties is entitled to the costs.

- [14] The main issue for determination however, according to the submissions made, is the question of whether the withdrawal notices offend the provisions of Rule 41 as contended by the applicant.
- [15] The wording of Rule 41 is clear and unambiguous. Sub-rule (1) provides that a person who has instituted proceedings may at any time before the matter is set down withdraw the proceedings. If, however, the matter has been set down, he may only withdraw the proceedings by consent of the parties or with leave of the court. If the matter has been set down and there is no agreement between the parties, the court retains the discretion to allow or refuse the withdrawal. *See: Pearson & Hutton NNO v Hitzeroth 1967 (3) SA 591 at 594.*
- [16] In terms of the notice of motion, the application sought to be withdrawn was set down for hearing on 17 September 2021 at 9:30 a.m. or soon thereafter, for an order, amongst others, directing the FSRA to release to the respondent forthwith the sum of **E2, 000,000.00** (Two Million Emalangeni) held in its name, Pan African Asset Management Fixed Deposit Account Number 71670458987, as statutory capital and/or Pledge in terms of the Securities Act, 2010.
- [17] Pursuant to the set down per the notice of motion, the matter appeared before my brother **Maseko J.** who granted prayers 1 and 2, plus costs of the day against the applicant therein (respondent herein). His Lordship however referred the matter to me for arguments on the merits given that I am seized with it. There is therefore no hesitation in my mind that the matter was set



down and was ready for hearing, hence submissions were made before **Maseko J.** and orders were issued. It therefore was incompetent for the respondent to withdraw the application without the consent of the applicant or without leave of the court.

[18] The legal authors *Herbstein & Van Winsen, The Civil Practice of the High Courts and the Supreme Courts of South Africa, 5<sup>th</sup> ed., Vol.1*, cite the cases of *Levy v Levy 1991 (3) SA 614 at 619-620* and *Huggins v Ryan, NO 1978 (1) SA 216 at 218* and state that *it is not ordinarily the function of the court to force a person to proceed with an action against his will or to investigate the reasons for abandoning or wishing to abandon one and a plaintiff is normally permitted to withdraw a claim, ..., unless the withdrawal amounts to an abuse of the court's process or justice requires that finality should, if possible, be reached.* (p.750).

[19] The applicant contended that the withdrawal of the application constitutes an abuse of the court process because it stays the determination of a live and contested issue concerning the two million emalangeni that was deposited into FNB as statutory base capital required for the licensing of PAAM ESWATINI.

[20] In case no. 192/2020 which appeared before Mabuza PJ and involved these parties, the right of ownership and title to withdraw the two million emalangeni was a subject of dispute and contest between them. The ownership and right to the two million emalangeni is again contested under case no. 386/2020 which I became seized with. This contested issue is still obtaining and alive. There is abundant evidence of the contest in the

correspondences exchanged between PAAM ESWATINI's attorneys and the FSRA dated 14 July 2021, 4 August 2021 and 10 August 2021. This also appears in correspondences exchanged between PAAM SA's attorneys and PAAM ESWATINI's attorneys dated 10 August 2021, two letters dated 11 August 2021, and another dated 16 August 2021.

[21] I therefore agree with the applicant's submission that the sought withdrawal constitutes an abuse of the court's process because the dispute over ownership of the two million emalangenzi is seriously contested and needs to be decided to finality. The withdrawal of the application will only help to keep this issue stayed and pending before this court in perpetuity, yet justice requires a final determination of the issue.

[22] It has been held that the litigant who withdraws an application is in the same position as an unsuccessful litigant. *See: Sentraoer Kooperatief Bpk v Mphaka 1981 (2) SA 814 at 818*. It is my considered view that where a litigant withdraws an application, sound reasons must exist why the respondent should not be entitled to costs.

[23] For the considerations and reasons stated in the paragraphs above, I make the following order:

[23.1] The applications made in terms of Rule 30 of the Rules of this Court dated 10 October 2021 and 13 October 2021 succeed and are hereby granted.

[23.2] The notices of withdrawal dated 04 October 2021 and 08 October 2021 are set aside for being irregular steps.

[23.3] Costs are granted in favour of the applicant at the ordinary scale.

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**T. DLAMINI**  
**JUDGE – HIGH COURT**

For the applicant : Mr. Z. Jele

For the Respondent : Mr. O. Nzima