IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 48567/2014

In the matter between:

NT MAKHUBELE ENTERPRISES CC	First Applicant
NATHANIEL TSAKANE MAKHUBELE	Second Applicant
HITEKANI FAST FOODS CC	Third Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

02/06/17
DATE

SIGNATURE

BUSINESS PARTNERS LIMITED	Respondent
YOLTSA TRADING CC	Intervening Party

JUDGMENT

Tuchten J:

1 The corporate applicants and the intervening party are all controlled by the second applicant. Dr NT Makhubele, a scholar, PhD graduate of the University of the Witwatersrand and businessman. Dr Makhubele lives in Roodepoort and the corporate applicants carry on business in Soweto.

2 This case arises from arrangements under which the respondent (BPL) first funded and then further declined to fund Dr Makhubele's franchised outlets conducted under the style of Chicken Licken and to be conducted through one or other of his corporate vehicles. The individual corporate vehicle generally need not for present purposes be identified, so when I refer to Dr Makhubele, I mean him alone or him and one or more of those vehicles. Where a specific reference to a corporate vehicle is necessary, I shall of course name the vehicle concerned. I shall frequently refer to the three applicants collectively as the "three defendants", for reasons which will become clear.

3 Dr Makhubele's business suffered considerable setbacks. The causes of his financial reverse were touched upon but do not form an issue before me. BPL declined at a stage further to fund Dr Makhubele. His franchisor cancelled his franchise agreements. Dr Makhubele was advised to claim damages from the franchisor. But later he came to believe that BPL was legally liable to him for the profits his franchised businesses would have, he says, earned, if matters had taken another course. Around the same time, Dr Makhubele suffered matrimonial problems. It seems that his former wife intervened or participated in the commercial dispute, which made matters no better from Dr Makhubele's perspective.

4 By combined summons dated 30 June 2014, BPL instituted action against the three defendants for amounts arising from two agreements, a loan agreement concluded in Johannesburg between BPL and NT Makhubele Enterprises CC on 8 March 2010 and a so-called royalty agreement, which was concluded apparently on the same date and at the same place between the same parties to, and formed an annexure to, the loan agreement.

5 Under the loan agreement, BPL advanced certain sums to Dr Makhubele. One of the reasons he took up the loan, thus Dr Makhubele, was to make certain financial arrangements upon his divorce. The purpose of the royalty agreement was, it seems, nothing more than to increase the interest BPL was to receive on its loan. But, he says, this purpose was concealed and dressed up to suggest that Dr Makhubele was paying a royalty during the currency of the loan agreement somehow linked to the prosperity of his unnamed business.

6 BPL also alleged that on 24 February 2010, Dr Makhubele personally and the third defendant in the action and third applicant before me, Hetikani Fast Foods CC, had signed separate deeds of suretyship in favour of BPL for the debts of NT Makhubele Enterprises CC.

7 Certain securities were provided to BPL to secure the loan, including a bond over Dr Makhubele's house in Protea North, Soweto. As Dr Makhubele lives in Roodepoort, this Protea North house is not his primary residence.

8 In its action, BPL claimed R313 398,88 under the loan agreement and R175 983,46 under the royalty agreement together with ancillary relief including relief directed at execution against the security held by BPL. BPL specifically pleaded that the consumer protection provided by the National Credit Act, 34 of 2005, was not available to the then defendants because the principal debt exceeded R250 000.

9 Dr Makhubele gave written notice of the three defendants' intention to defend in a notice dated 20 August 2014. He had no right to do so on behalf of the first and third defendants because he was not an attorney, practising or otherwise. But no point was ever made of that irregularity by BPL. I mention this because BPL's attorney gave as BPL's address for service an address in Faerie Glen, Pretoria, which Dr Makhubele tells me is 23km from this court. Before me, Dr Makhubele made a point of this alleged deviation from the Rules (which require such an address to be no more than 15km from the office of the Registrar). I shall deal, shortly, with this point in due course.

10 BPL applied for summary judgment by notice dated 3 September 2014. By notice dated 23 October 2014 an attorney practising in Pretoria appointed to represent the three defendants applied for a postponement of the summary judgment application. The three defendants' proposed defences were disclosed in an affidavit deposed to by the attorney.

11 On 30 July 2015 Dr Makhubele himself deposed to the defendants' affidavit resisting summary judgment. He raised certain defences in this affidavit. The first was that the royalty agreement was just a dishonest way to charge extra interest which was "not disclosed to the borrower ...". He then stripped out the royalty liabilities and asserted that his liability had to be recalculated in accordance with a schedule he said had been prepared by an actuary. What the proverbial bottom line was on this version after the stripping out was not explicitly stated. The second defence also related to the royalty agreement: that its provisions amounted to an impermissible "penalty interest clause". The third defence was that the signature on the suretyship allegedly executed by Hitekani Fast Foods CC was a forgery.

12 Dr Makhubele's affidavit also referred to a judgment in this court by Kollapen J in *Business Partners Ltd v Silverstars Trading 245 CC and another*, case no 14408/2008 in this court and the judgment of the Full

Bench reversing Kollapen J in case no A762/2012. Kollapen J had found that a royalty agreement similar to that at issue in this case was *contra bonos mores*, contrary to the common law and void. The Full Bench found on the facts that the royalty agreement was enforceable.

13 In addition, the affidavit raised the possibility that he *intended* to cede a claim for damages, presumably against BPL which Dr Makhubele averred vested in Yoltsa Trading CC (Yoltsa), a corporation which he controlled, to NT Makhubele Enterprises CC so that the latter would have a counterclaim against BPL. This claim, it was asserted, was one for damages amounting to "some" R11,9 million. But there was no allegation that this claim had *in fact* been so ceded.

14 The summary judgment application came before Makume J. The parties were all represented by lawyers. On 20 August 2015, Makume J upheld the application for summary judgment and, in a written judgment, ordered the three defendants to pay the amounts claimed, interest and costs and declared the bonded property executable.

15 By notice dated 28 August 2015, the three defendants, through their Pretoria attorney, applied for leave to appeal against the order granting summary judgment.

16 Up to this point, the system had apparently worked as it should. But after the application for summary judgment was noted, it was asserted by Dr Makhubele that things had in fact gone seriously wrong in his case. In an amending notice dated 14 September 2015, Dr Makhubele personally, with address care of his attorney, sought to amend the notice of application for leave to appeal. As amended, the notice provided quite properly that the application for leave was to be heard on a date and time determined by Makume J. But the amended notice then proceeded to make far reaching allegations against Makume J's judicial impartiality. I shall say no more about these allegations than that Dr Makhubele expressly disavowed any reliance on them before me.

17 In addition, Dr Makhubele raised for the first time a complaint which has come to feature prominently before me: the proposition that the Pretoria High Court lacked jurisdiction to hear the case and that the three defendants had had their right to a fair hearing denied because this court is, so it is said, 70km away from the three defendants' ("their") home and the location of the property sought to be declared executable.

18 This was, as far as I could determine, the first time that Dr Makhubele used his exceptional intellect and academic training to research his own case and advance arguments which up to then had not been put up in court.

19 On the same date, Dr Makhubele, again care of his attorney, gave notice that the three defendants applied for the rescission of the summary judgment order.

20 In the affidavit supporting the application for rescission of the summary judgment order, Dr Makhubele repeated his allegations of bias against Makume J and asserted again his contention that the Pretoria High Court had no jurisdiction in the case - in this instance because the Rules allegedly required them to have physical addresses for service within 15km of the court.

21 Dr Makhubele repeated in this affidavit that he was considering ceding Yoltsa's claim to NT Makhubele Enterprises CC. He had not done so as at the date of his affidavit, he said, because he was taking legal advice on the tax implications of the cession he contemplated.

22 For the rest, I think I do no injustice to Dr Makhubele's case when I characterise the other grounds on which he seeks rescission of the summary judgment order as being that in one respect or another, Makume J erred.

23 By notice dated 9 November 2015, the three defendants' attorney withdrew because the defendants had terminated his mandate and provided the defendants' addresses. By letter dated 12 November 2015, Makume J, through his secretary, notified the two attorneys by fax that the application for leave to appeal would be heard on 14 December 2015.

24 But the letter sent to the three defendants' erstwhile attorney did not reach the defendants. BPL's attorney also tried to give the defendants notice of the hearing. But he sent it to an incorrect email address. Makume J heard the application for leave in the absence of the three defendants or their representative and dismissed it with a punitive costs order on 14 December 2015.

25 By notice dated 28 January 2016, the three defendants, through Dr Makhubele, noted an application to set aside the decision of Makume J dismissing the application for leave to appeal. The point was made that the defendants had not received notice of the hearing

of the application for leave but the affidavit went on to accuse BPL's attorney of deliberately sending the notice to an incorrect email address and to accuse Makume J of having committed gross irregularities. The alleged absence of jurisdiction on the part of this court was also raised.

26 This is all by way of background. I come now to the applications in fact before me. I have referred to the applications to rescind the summary judgment order and the order dismissing the application for leave to appeal the summary judgment order.

27 By notice of motion dated 8 February 2016, Yoltsa applied, with the support of the three defendants, to be joined in the "proceedings between the parties". This it sought to do to bring a counterclaim in its own name against BPL for the damages of R11,9 million to which I earlier referred.

28 BPL opposed the joinder application, asserting that the joinder was not sought *bona fide*, that the joinder would be incompetent in law and that Yoltsa's alleged claim against BPL had in any event prescribed.

29 Dr Makhubele delivered a series of supplementary affidavits in the joinder application. The fourth supplementary affidavit elicited an attack for irregularity in the form of an application under rule 30 and in response an application to condone the irregularity. The attack was abandoned before me so I need not deal with either of these interlocutories regarding the irregularity of the fourth supplementary affidavit, Dr Makhubele disclosed in the fourth supplementary affidavit that Yoltsa had ceded its rights to NT Makhubele Enterprises CC.

30 By notice dated 15 August 2016, Dr Makhubele, on behalf of the three defendants and, no doubt also authorised to do so by Yoltsa, gave notice of a "counter-application" by which was sought against BPL "damages, counter-claim and/or summary judgment relief". A reference to Dr Makhubele's affidavit in support of the counter-application shows that the counter-application is sought to be brought by NT Makhubele Enterprises CC and/or Yoltsa.

31 Motion proceedings are not competent in a claim for damages such as these and summary judgment relief is not available to a counterclaimant. The notice of counter-application is probably irregular but no steps have been taken in this regard and Dr Makhubele has taken no steps directly to prosecute the counter-application. I formed the impression during argument that the notice

of counter-application was subordinate to his main strategy in the litigation to which I shall come immediately below.

32 By notice of motion dated 27 March 2017, Dr Makhubele brought an application in the name of the three defendants for wide ranging relief. He sought orders discharging both the summary judgment order and the order dismissing the application for leave to appeal the summary judgment order, the costs of those proceedings and, most importantly from his perspective an order removing the proceedings between the parties from this court to the Johannesburg High Court with a stay of all proceedings pending the finalisation of the removal application.

33 This prayer for removal (with the ancillary prayer that the processes of law and execution against the three defendants be halted pending its adjudication) forms the centrepiece of Dr Makhubele's strategy. The removal relief was sought under s 27 of the Superior Courts Act, 10 of 2013 read with rule 33(4). Section 27 reads:

> (1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings-
> (a) should have been instituted in another Division or at another seat of that Division; or
> (b) would be more conveniently or more appropriately heard or determined-
> (i) at another seat of that Division; or

> (ii) by another Division,
>
> that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

34 Rule 33(4) reads:

> If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.

35 The factual grounds on which the removal relief was sought are that through being sued in Pretoria rather than in Johannesburg Dr Makhubele, who lives in Roodepoort, and the other defendants were subjected to "enormous emotional, commercial and financial prejudice and harm they endure because of the violation of their constitutional rights of access to the courts, fair trial, enjoyment of the benefit and protection of the law, freedom, equality and human dignity."

36 All this because an affluent,[1] educated man with modern communication devices at his private command and his own private motor car, who lives in Roodepoort, was sued in Pretoria rather than Johannesburg!

37 The case for removal was made in oral argument on two bases. The first is that this court in fact did not have jurisdiction over the three defendants because they lived or had their principal places of business in Roodepoort and Soweto. This argument is simply wrong. Roodepoort is in the magisterial district of Johannesburg West. Soweto is in the magisterial district of Johannesburg Central. By Government Notice 1266 published in the Government Gazette of 21 December 2015, the area of jurisdiction of this court was defined to include these two magisterial districts. Before the inception of GN 1266, the area of jurisdiction of this court was the whole of the former Transvaal, which of course included Roodepoort and Soweto.

38 The Johannesburg High Court also has territorial jurisdiction over these two districts. This has been the position for at least 100 years. The position where more than one court has territorial jurisdiction is known colloquially as concurrent jurisdiction. In practice, it means that

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1 He has a cash flow problem which he says will be resolved within a few months but he has a house which he does not need to live in.

a plaintiff, as *dominus litis*, may lawfully choose the forum with jurisdiction that suits him best.

39 The second basis for the case for removal was grounded on the argument that this case would more conveniently, in the language of s 27(1)(b(i), be heard at Johannesburg, being another seat of the Division. I came to the conclusion during the presentation by Dr Makhubele of his oral submissions that this argument was not advanced to deal prospectively with what remained of the case. The real purpose of the argument is to form a foundation for an attack on the summary judgment order and the order dismissing the application for leave to appeal the summary judgment order on the ground that a fatal irregularity had occurred which deprived these orders of any legal validity.

40 I am firmly of the view that whatever conclusion to which I come on the removal relief, a removal in 2017 can have no effect on those orders made in 2015. The three defendants were represented by counsel and attorney. No point was made of the alleged inconvenience until the amending notice dated 14 September 2015 was drawn by Dr Makhubele personally.

41 Dr Makhubele sought to blame his lawyers for the initial omission of any reliance on this argument. He told me during oral argument that they had disobeyed his instruction to make that point in three defendants' affidavit resisting summary judgment. But this cannot be true because Dr Makhubele deposed to this affidavit himself. His affidavit is to be found at pp115-138 of the summary judgment bundle before me. A copy of this affidavit was served on BPL's attorney on 30 July 2015.

42 It was not in any way inconvenient to Dr Makhubele in 2014-2015 for the case against the three defendants to be adjudicated in Pretoria. If it had been, he would have said so at the time. He had Pretoria lawyers acting for him. There is no merit at all in the suggestion that in bringing the case in Pretoria rather than Johannesburg BPL violated any right of the three defendants.

43 Prospectively, there is no demonstrated inconvenience in directing that the case proceed in Pretoria. With respect to the industry which went into the preparation and presentation of the argument, it is simply absurd. The application for the removal relief cannot succeed.

44 When the case was called before me, Dr Makhubele wanted me to hear only the application for the removal relief and one or perhaps both of the rule 30 applications that appear in the papers. The strategic reasons for this request are obvious from what I have said. But in this regard, Dr Makhubele had a problem. His own application dated 27 March 2016 asked for extensive relief. Dr Makhubele himself did not set the matter down. BPL did so in a notice of set down dated 23 January 2017 which Dr Makhubele acknowledged in court having received.

45 The notice of set down expressly set down for hearing the rescission application and BPL's rule 30 application with Dr Makhubele's condonation application and the joinder application. Dr Makhubele can hardly complain that, in addition, I heard the application for removal relief as he himself requested.

46 The record contains correspondence between the parties and the Deputy Judge-President of this Division. By letter dated 22 March 2017, BPL's attorney asked the DJP formally to allow all the proceedings mentioned in the notice of set down to be heard by the same judge in the opposed motion court. Dr Makhubele responded in a letter to the DJP dated 24 March 2017. He denied that the proceedings in question were ripe for hearing and urged the DJP to

direct that the removal relief be heard separately and the other relief stayed or postponed sine die.

47 According to the record before me, the DJP, not surprisingly did not react to the requests of the parties. This was no doubt because it is in the discretion of the court in which a matter is set down and not the DJP acting administratively, to direct separations under rule 33(4).

48 When this was pointed out to Dr Makhubele, he told me that he had misunderstood the position and was not prepared to argue the other matters. He pointed out that heads of argument and practice notes had not been exchanged on the rescission application.

49 But during oral argument, it emerged perfectly clearly that Dr Makhubele was fully prepared on all the issues and was in no way disadvantaged by the way in which the matter had been developed. In my view BPL was entitled to set the matter down as it did. Full argument was presented on both sides. Dr Makhubele must have been aware that if his request for separation relief under rule 33(4) - for which he expressly asked and to which he expressly referred in the application dated 27 March 2017 - was refused, all the separate facets of this litigation could and probably would proceed to adjudication.

50 I have concluded from the presentation by Dr Makhubele of his case that one of his motives is to string this litigation out as long as possible and to blur what are quite straight forward issues, once the case is understood as a whole. I decline to adjudicate the case piece meal.

51 The rule 30 applications can be disposed of shortly. BPL no longer objects to the admission of the fourth supplementary affidavit. There is no reason to adjudicate on this rule 30 application.

52 The rule 30 application brought by Dr Makhubele relates to the manner in which BPL's answering affidavit to the application dated 27 March 2017 (which included the removal relief) was attested. The complaint was that each page of the affidavit was not initialled by the commissioner of oaths, a police official, as required in the South African Police National Instruction and Standing Order (General) on the attestation of statements issued pursuant to Chapter 8 of the South African Police Act, 68 of 1995. I incline strongly to the view that this Order, made pursuant to the power conferred by s 25 of the Act, operates merely in regard to the maintenance of good order and discipline within the SAPS and does not impose a restriction on the power of a court to receive and have regard to an affidavit.

53 Nevertheless, out of abundant caution, I required the deponent to the affidavit under attack to confirm in the witness box under oath that he had signed the affidavit and regarded its contents as the whole truth. Accordingly, no order need be made on this rule 30 application either. Moreover, the application for removal relief can be determined without reference to this affidavit.

54 I turn now to the joinder application. Ultimately, the discretion whether or not to permit a joinder is in the judicial discretion of the court to which the request for joinder is made. I shall assume in favour of Dr Makhubele that Yoltsa has a good claim against BPL and that it is legally permissible to order a joinder such as this even after judgment. But Dr Makhubele weighed the question before deposing to his affidavit resisting summary judgment and decided at that stage not to raise the issue that BPL owed Yoltsa the substantial sum claimed. Considerations of fairness dictate that BPL should not, after the event, be required to defend an action against it before it can enforce the judgment in its favour. I give weight here as well to the motive of Dr Makhubele to delay the resolution of these proceedings. The door is not closed to Yoltsa by this decision. Yoltsa, after all, can sue BPL for the damages it suffered. It might have been different if Dr Makhubele had raised this question at the proper time. But he did not; and that in my judgment is in the circumstances of this case decisive against him.

55 If on the other hand, there has been a valid cession of Yoltsa's claim to NT Makhubele Enterprises CC, then no joinder is necessary; the alleged cessionary merely proceeds to enforce its alleged claim according to law.

56 The result is that the application for joinder cannot succeed. I turn to the application for the rescission of the summary judgment order. It will be recalled that this was not an order made in default of the three defendants. It was made after a consideration of the arguments raised on their behalf by their legal representative in open court. This application can only succeed if, all other things being equal, Dr Makhubele can show that the summary judgment order was a nullity. This he sought to do by arguing that this court either lacked jurisdiction to hear the case or, on his argument, it was inconvenient for this court rather than the Johannesburg High Court to hear it. I am firmly against these propositions. That the learned judge might wrongly have decided the case, even (as Dr Makhubele argues) have gone egregiously wrong, cannot turn this court as presently constituted into a court of appeal. Right or wrong (it is not for me to decide whether the summary judgment order should have been made and I do not do so), a valid order was made; it remains valid unless and until overturned by a duly constituted court of appeal.

57 Dr Makhubele also argued that summary judgment should not have been granted because BPL's summons was excipiable. The excipiability is said to lie in the fact that the address provided by BPL's attorney did not le within 15 km of the office of the Registrar. This point, such as it is, was not taken in any proceedings to date. Even if it had been taken in the affidavits or during the summary judgment proceedings, it would not have invalidated the order for summary judgment.

58 The application for the rescission of the summary judgment order therefore cannot succeed.

59 The application for rescission of the order dismissing the application for leave to appeal the summary judgment order stands on a different footing. BPL accepts that Dr Makhubele did not get notice of the hearing of the leave to appeal and that the application to set aside the refusal of leave to appeal must be set aside. This means that the application for leave to appeal the summary judgment order must once again be set down for hearing.

60 To summarise: none of the several applications before me can succeed except the application to rescind the order dismissing the application for leave to appeal the summary judgment order. This

judgment is intended to dispose of all the litigation between the parties disclosed in the papers except the action for damages for R11,9 million contemplated by Yoltsa and/or NT Makhubele Enterprises CC. Of course the application for leave to appeal the summary judgment order remains to be adjudicated.

61 As to costs: both sides have had a measure of success. I do not think that this is a proper case to make costs orders on each of the components of the dispute which served before me. It would be more appropriate to give recognition to the success both sides have enjoyed by making no order as to costs.

62 I make one final comment. The record before me was exceptionally unwieldy. It was divided into different bundles. I had to take considerable time to locate documents which were in one or other of the bundles or not even in any of them. The pagination of each bundle began at page 1 which caused further delays. If this litigation is to go further, the record of what has transpired to date should be consolidated into a single, comprehensive, chronological, paginated bundle.

63 I make the following order:

1 The application to join Yoltsa Trading CC as a party to these proceedings is dismissed.

2 The application to rescind, discharge or otherwise set aside the summary judgment order made by Makume J on 20 August 2015 ("the summary judgment order") is dismissed.

3 The order made by Makume J on 14 December 2015 dismissing the application for leave to appeal the summary judgment order is set aside and it is directed that the application for leave to appeal must once again be set down for adjudication.

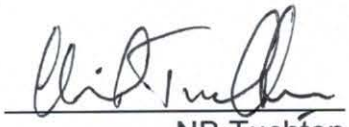
4 The application to remove the proceedings between the parties from this court to the Gauteng Local Division, Johannesburg, is dismissed.

5 The application to stay or postpone the hearing of all the matters between the parties is dismissed.

6 The application to compel the respondent, Business Partners Limited, to pay certain costs is dismissed.

7 No order is made on any of the applications brought by the parties under Rule 30.

8 No order is made as to costs.



NB Tuchten
Judge of the High Court
2 June 2017