



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

*Not reportable*

*Not of interest to other Judges*

**CASE NO: 48860/2014**

22/12/17

**RIAN VENTER**  
**ELIZABETH MARIA VENTER**  
and

First Applicant  
Second Applicant

**PAUL MOEKETSI TATI**

First Respondent

**NKOKA TRAINING CC**

Second Respondent

**THE SHERIFF FOR THE DISTRICT OF  
CENTURION WEST**

Third Respondent

and in the counter-application of

**NKOKA TRAINING CC**

First Applicant

**PAUL MOEKETSI TATI**

Second Applicant

and

**RIAN VENTER**

First Respondent

**ELIZABETH MARIA VENTER**

Second Respondent

**NKOKA IPC TRAINING (PTY) LTD**

Third Respondent

<b>FIRST NATIONAL BANK LIMITED</b>	Fourth Respondent
<b>BRUNT BOTHA &amp; CO ACCOUNTANTS (PTY) LTD</b>	Fifth Respondent
<b>STANDER ACCOUNTANTS</b>	Sixth Respondent
<b>LIZA WOOD</b>	Seventh Respondent
<b>SMITH &amp; SMITH PROFESSIONAL ACCOUNTANTS</b>	Eighth Respondent
<b>MARCUS TIMOTHY OSHRY</b>	Ninth Respondent

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### **ORDER**

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1. The matter is referred to trial.
2. The applicants' notice of motion stands as the simple summons and the first respondent's notice of intention to oppose stands as a notice of intention to defend;
3. The Applicants are directed to file their declaration within 30 days of this order;
4. The first respondent is directed to serve and file his plea to the applicants' declaration, together with any counter-declaration, if any, within 10 of the service of the applicants' declaration;

5. The applicants are directed to serve and file their plea to the first respondent's counter-declaration within 10 days of the service of the first respondent's counter-declaration;
6. Thereafter the Uniform Rules of Court regarding the filing of notices and other procedures shall apply;
7. The costs incurred to date are costs in the action, which costs include the costs consequent upon the employment of two counsel.

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### JUDGMENT

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#### MAKGOKA, J

[1] The applicants, Mr Rian Venter and Mrs Elizabeth Venter, seek an order directing the first respondent, Mr Paulus Moeketsi Tati, to effect transfer of all his members' interest in the second respondent, Nkoka Training CC (Nkoka) to them in the respective percentages of 17.7% and 15.6%.

[2] The applicants also seek an order declaring that the debatement of account as ordered by this court on 15 October 2013 and 10 July 2014, respectively under case

numbers 41550/2013 and 488860/2014, has been finalized. In the alternative, the applicants seek an order declaring the first respondent to be in contempt of an order of this court granted on 10 July 2014, and for his imprisonment, alternatively for the suspension of the imprisonment on condition that he complies with the orders.

[3] The relief sought by the applicants is opposed by the first respondent, who in addition, has launched a counter-application for: a declaratory order that the applicants and the sixth respondent in the counter-application, Stander Accountants, are in contempt of court orders of this court under the case numbers referred to in para 2 above; a declaratory order that the business being conducted by the third respondent in the counter-application, Nkoka IPC, is part of the business of Nkoka and that the income of R2 202 996.17 received by Nkoka IPC while conducting the business of Nkoka was due and payable to Nkoka for services rendered; an order directing the applicants to deliver certain documentation; finalization of the account debatement process and the purchase of his member's interest in Nkoka by the applicants; confirmation of the seventh respondent, Ms Liza Wood, as an independent valuator and the definition of her powers ; declaring the cut-off date of the valuation of Nkoka to be 10 July 2014; the setting aside of the ninth respondent, Mr Marcus Oshry's, appointment as a valuator; the repayment of monies allegedly misappropriated by the applicants and Nkoka IPC, alternatively for such monies to



be factored into the valuation of Nkoka for the purpose of determining the value of his member's interest; referral to trial of any issue arising out of the relief sought by him in the counter-application.

[4] The applicants and the first respondent are members of Nkoka. The applicants, husband and wife, hold a total of 66.7% of the member's interest in Nkoka. The first respondent, a practising attorney, holds the balance of 33.3% of the member's interest. The business of Nkoka is electronic technician training in the broadcasting industry, and electronic manufacturing training.

[5] The relationship between the applicants and the first respondent has become acrimonious. It is common cause that the relationship should not continue. It has resulted in litigation in this court. As foreshadowed already, two of the orders granted in this court are relevant to the present application: one granted on 15 October 2013 and the other on 10 July 2014.

[6] The order of 15 October 2013, under case number 41550/2013 was obtained by the first respondent against the applicants under the following circumstances. The applicants had registered a company with a confusingly similar name to that of Nkoka (styled Nkoka IPC Training (Pty) Ltd) (Nkoka IPC). That company was

positioned in direct competition with the Nkoka and to the detriment of Nkoka, and for the financial benefit of the applicants.

[7] The application was successful and the applicants were interdicted from competing with Nkoka through Nkoka IPC. According to the first respondent, the revenue generated by Nkoka IPC for the period February 2012 up to June 2014 amounted to R2 202 996.17.

[8] The applicants were interdicted from: competing with Nkoka through Nkoka IPC; unlawfully utilising information and resources of Nkoka; holding out Nkoka IPC to be an entity accredited to provide training under Nkoka's accreditation; representing that Nkoka IPC is Nkoka and that the two entities have an association; and doing business with Nkoka's clients.

[9] The mandatory interdict granted by the court was for the debatement of account. Paragraphs 3, 4 and 5 of the order provide for the applicants to:

- (a) hand over to the first respondent and Nkoka all books and records relating to the affairs of Nkoka IPC as from 22 June 2012 to date of compliance with the order;
- (b) render a full accounting to the first respondent and Nkoka, of Nkoka IPC's affairs for the period 22 June 2012 to date of compliance with the order. Such accounting was to take place within 30 days of the order;

- (c) debate the account with the first respondent and Nkoka, within 30 days of having rendered the account referred to in (b) above.

[10] There was no agreement between the parties with regard to the implementation of the order of 15 October 2013. From the correspondence exchanged between the parties it appears that the parties were not of one mind as to the nature and ambit of the accounting in respect of Nkoka IPC, and the debatement of account, referred to in the order. According to the applicants, the first respondent's understanding of the debatement is a forensic audit, which the applicants contend, was not provided for in either of the orders of 15 October 2013 or 10 July 2014.

[11] Subsequently, the applicants launched an application under case 48860/2014, to interdict the first respondent from being involved in the affairs of Nkoka, and from entering its premises. The first respondent opposed the application, which came before court on 10 July 2014, on which occasion the matter was settled. The court made the following order by agreement between the parties:

1. That the respondent<sup>1</sup> is interdicted and restrained from entering the premises of Nkoka Training CC (the Third Applicant), situated at 71 Goshawk Street, Wierda Park Extension 2, Centurion, Gauteng;

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<sup>1</sup> Reference here is to the first respondent.

2. That the respondent hereby resigns his signing powers over all the third applicant's banking accounts;
3. That pending the finalisation of paragraphs 4 and 5 hereunder, the first and second applicants are directed to account to the third applicant's auditor, Stander Rekenmeester (hereafter referred to as "Stander"), every Friday at 15h00, in regard to all the income generated by the third applicant and all expenses incurred by the third applicant. Stander shall forthwith furnish the aforesaid information to the respondent and/or his attorney;
4. The debatement of accounts which has been instituted under case number:41550/13 shall be finalised by the parties on Thursday, 17 July 2014, or on such date as the parties may agree;
5. Pending the completion of the debatement referred to in paragraph 4 above, the chief executive Officer of the South African Institute of Chartered Accountants is directed to appoint an independent Chartered Account to determine the value of the respondent's interest in the third applicant;
6. The third applicant shall pay the foresaid independent chartered account's reasonable fees;



7. The first and second applicants are directed to pay the value determined in paragraph 5 above, to the respondents within 30 (thirty) days of the first and second applicants being informed in writing of the amount that is payable in terms of paragraph 5 above.
  8. The respondent is directed upon payment by the first and second respondents to him of the amount referred to in paragraph 5 above, to do all that is necessary and/or sign all documents so as to transfer the respondent's interest in the third applicant to applicants in the following manner:
    - 8.1 Seventeen point seven percent of his interest to the first applicant, so that the first applicant has fifty-one percent of the interest in the third applicant;
    - 8.2 Fifteen point six percent of his interest to the second applicants, so that the second applicant has forty-nine percent of the interest in the third applicant.
  9. The costs referred to in paragraph 6 and 10, are to be taken into account in determining the value referred to in paragraph 5 above;
  10. The taxed or agreed costs occasioned under the present application, instituted under case number: 48860/14, occasioned by the applicants, inclusive of the costs of two counsel, and the costs occasioned by the respondent are to be paid by the third applicant.
- [12] After a period of acrimonious exchange of correspondence the parties' accountants finally met on 5 September 2014. The first respondent's accountant was

Mr Kali Dikana (Mr Dikana) while the applicants were represented by Mr Deon Smith (Mr Smith). The purpose of that meeting, and its outcome, are controversial. According to the applicants, the debatement ordered on 15 October 2013, was finalised during that meeting. On the other hand, the first respondent's view is that the meeting was 'an information gathering exercise' and that the final debatement of the account was still to be done.

[13] The applicants rely for their view, on an affidavit by their accountant, Mr Smith. In his affidavit, he sets out a series of meetings held between him and Mr Dikana, in the build-up to the meeting of 5 September 2014. At their first meeting on 27 June 2014. Subsequently, and in accordance with their agreement in their first meeting, he provided Mr Dikana with the following documents of Nkoka IPC: general ledgers, trial balances, financial statements as well as source documents for the periods ending 28 February 2013; 28 February 2014 and the management accounts to 19 June 2014 used to draft the financial statements.

[14] Having had sight of the documents, Mr Dikana provided him with a list of queries. On 17 July 2014 he met with Mr Dikana and the queries raised by the latter were discussed and debated. Agreement was reached on some of the queries raised, while on certain issues there was no agreement. A follow-up meeting was scheduled for 5 August 2014, which meeting was attended also by the first respondent's

attorney and two of his colleagues, Mr Gerhadus du Plessis and Ms Zonia Bronkhorst. He and Mr Dikana reached agreement on the issues outstanding from their previous meeting.

[15] According to Mr Smith, it was agreed between him and Mr Dikana that for their purposes the debatement was finalised and Mr Dikana accepted the financial statements to be reasonable and in accordance with the generally accepted accounting practice, and that they fairly reflected the position of Nkoka IPC, and satisfactorily addressed all the issues previously raised by him. Thus, as between him and Mr Dikana, there was agreement that the debatement as ordered by the court under case number 41550/2013 had been completed.

[16] It was during that meeting that the first respondent's attorney expressed a view that despite the accountants acting for the parties agreeing to the content of the financial statements, he believed that the debatement 'should now only start.' After the meeting, he (Mr Smith) informed the applicants' attorneys of the view expressed by the first respondent's attorney.

[17] On the other hand, the first respondent relies on a report compiled by Mr Dikana dated 29 April 2015. In that report, titled a 'report of factual findings' Mr Dikana states in the first paragraph that the procedures in respect of the financial

records of Nkoka IPC were ‘performed solely to assist you [the first respondent’s attorneys] on the matters to be undertaken to the debatement...’ Later in the report he identified certain expenses which he said would ‘be concluded at the debatement.’ From Mr Dikana’s report, although not expressly stated, the denial that the debatement was finalised is implicit. On 7 March 2017 Mr. Dikana deposed to an affidavit confirming the contents of his report.

[18] The parties’ views in this regard are thus divergent. They are best encapsulated in letters dated 16 September 2014 and 2 October 2014. In the former letter, the applicants’ attorneys asserted that the debatement of the account had been finalised in the meeting of 5 September 2014<sup>2</sup> on behalf of the parties by their respective accountants.

[19] In their response, the first respondent’s attorneys asserted the contrary, stating that there could not have been a debatement of the account at the said meeting as only the accountants were present. According to the first respondent’s attorneys, all the accountants did was to compile the books of account. They did not deal with the legitimacy and appropriateness of entries in these books, which process, according to the first respondent’s attorneys, can only be done by the parties themselves.

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<sup>2</sup> According to the affidavit of Mr Smith, the date of the meeting is 5 August 2014.



[20] There are many other factual disputes between the parties. For example, it is alleged by the first respondent that notwithstanding the order of 10 July 2014, the applicants have refused to provide the first respondent with Nkoka's books of account, the allegation which, unsurprisingly, is denied by the applicants, who assert that they have complied with the court order in that respect.

[21] Also at issue is the amount of R2 202 996.17 which the first respondent asserts was generated by Nkoka IPC for the period February 2102 to June 2014. According to the first respondent, the whole of this amount belongs to Nkoka. However, according to the applicants, half of the money was, upon receipt, paid to Nkoka on the basis of a profit sharing agreement between Nkoka and Nkoka IPC. The remaining amount, the applicants assert, was already subject to the debatement of the accounts of Nkoka and Nkoka IPC. The first respondent denies this.

[22] The difficulty is that the applicants provide neither proof of the alleged agreement, nor payment to, and receipt of, this money by Nkoka. However, the applicants' averments cannot be dismissed as far-fetched or clearly untenable. The other aspect on which it would be difficult to make a factual finding on the papers is the prayer by the first respondent to declare the business of Nkoka IPC to be in fact the business of Nkoka. There are serious disputes in this regard.

[23] Rule 6(5)(g) of the Uniform Rules of Court, provides:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specific issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

See *Ploughman N.O. v Pauw* 2006 (6) SA 334 (C) para 14.

[24] The sum total of all these is that the court is not in a position to determine either the applicants’ application or the first respondent’s counter-application. This was foreshadowed by the parties. The first respondent made provision for this in the counter-application. In his written submissions, counsel for the applicants also acknowledged the eventuality. After much reflection, I come to the conclusion that one cannot do justice to the manifold and complex disputes between the parties by trying to resolve them on paper.

[25] The dismissal of the application is not an appropriate order in the circumstances of the case, where the disputes of fact arise both from the main

application and the counter-application. Although the general rule, as explained by Harms DP in *Law Society of the Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) para 23, is that an application for the hearing of oral evidence must be made in *limine*, I do not understand this to be an immutable one. The exceptional circumstances of this case demand that the issues between the parties should be fully and exhaustively ventilated in a trial.

[26] In the result the following order is made:

1. The matter is referred to trial.
2. The applicants' notice of motion stands as the simple summons and the first respondent's notice of intention to oppose stands as a notice of intention to defend;
3. The Applicants are directed to file their declaration within 30 days of this order;
4. The first respondent is directed to serve and file his plea to the applicants' declaration, together with any counter-declaration, if any, within 10 of the service of the applicants' declaration;

5. The applicants are directed to serve and file their plea to the first respondent's counter-declaration within 10 days of the service of the first respondent's counter-declaration;
6. Thereafter the Uniform Rules of Court regarding the filing of notices and other procedures shall apply;
7. The costs incurred to date are costs in the action, which costs include the costs consequent upon the employment of two counsel.



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TM Makgoka  
Judge of the High Court



## APPEARANCES:

For the Applicants:

DA Smith SC (with J. Sullivan)

Instructed by:

Waldick Jansen Van Rensburg Inc., Pretoria

For the First Respondents:

AC Botha

MV-J Chauke

Instructed by:

Motlanthe Incorporated, Johannesburg

Mushwana Incorporated, Pretoria

No appearance for the Fourth to nine respondents in the counter-application.

5. The applicants are directed to serve and file their plea to the first respondent's counter-declaration within 10 days of the service of the first respondent's counter-declaration;
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### JUDGMENT

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#### **MAKGOKA, J**

[1] The applicants, Mr Rian Venter and Mrs Elizabeth Venter, seek an order directing the first respondent, Mr Paulus Moeketsi Tati, to effect transfer of all his members' interest in the second respondent, Nkoka Training CC (Nkoka) to them in the respective percentages of 17.7% and 15.6%.

[2] The applicants also seek an order declaring that the debatement of account as ordered by this court on 15 October 2013 and 10 July 2014, respectively under case numbers 41550/2013 and 488860/2014, has been finalized. In the alternative, the

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