

REPUBLIC OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA
(HIGH COURT OF SOUTH AFRICA)

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

[Signature]

20th August 2015

20/8/15
CASE NO: ~~A~~ 48567/2014

In the matter between:

BUSINESS PARTNERS

APPLICANT/ PLAINTIFF

(Reg No. : 1981/0009/18/06

AND

NT MAKHUBELA ENTERPRISE CC

1ST RESPONDENT/ DEFENDANT

(ID No.: 640727 5360 080)

NATHANIEL TSAKANE MAKHUBELA

2ND RESPONDENT/ DEFENDANT

HITEKANI FAST FOODS CC

3RD RESPONDENT/DEFENDANT

Reg No.: 1999/051085/23

JUDGMENT

MAKUME J

- [1] This is an application for summary judgment. I shall refer to the Applicant as the Plaintiff and the Respondents as Defendants.
- [2] The Plaintiff's claim against the defendants is based on a loan agreement entered into between the Plaintiff and the First Defendant where in the second and Third Defendants bound themselves as surety and co-principal debtors in *solidum* to the Plaintiff for the due and proper repayment by the 1st Defendant of the amount loaned.
- [3] Annexure 'A' to the loan agreement is a document titled "Royalty Agreement". The Royalty agreement forms an integral part of the loan agreement in terms of which besides repayment of the loan the Defendants agreed to pay to the Plaintiff a fixed amount annually calculated on the bi monthly VAT returns submitted by the 1st Defendant to the Commission of Revenue.
- [4] On receipt of the summons the Defendants entered appearance to defend on the 9th September 2014. The application for summary judgment was delivered on the 18th September 2014 and was enrolled for hearing for the first time on the 27th October 2014.
- [5] On the 23rd October 2014 the Defendants instead of filing an opposing affidavit to the application for summary judgment filed a substantive

application seeking a postponement. The main reason advanced for seeking a postponement was that the Full Bench was seized with a matter between Business Partners and Silverstars Trading 245 CC in which the validity of the Royalty agreement was to be decided.

- [6] Another reason advanced for seeking a postponement was that the Defendants and their advisors were in the process of calculating the amount including VAT payments made to the Plaintiff as Defendant intended to reclaim those payments as having been made wrongfully. The Defendants needed time to finalise the calculations. It was said that once the calculations shall have been properly done then those payments will serve to extinguish the entire debt incurred in terms of the loan agreement.
- [7] The Defendants deny that they do not have a *bona fide* defence and indicated that in approximately two weeks the calculations referred to above would have been finalised.
- [8] In conclusion the Defendants placed in issue the signatures on the deed of suretyship as not being those of the 2nd and 3rd Defendants. The Defendants indicated that this aspect had been referred to forensic experts for investigation.
- [9] It was on the basis of what appears in the affidavit by Defendant's attorney that the application for summary judgment was postponed *sine die* on the 27th October 2014.

[10] On the 12th June 2015 the plaintiff enrolled the application for summary judgment for hearing on the 3rd August 2015. The Plaintiff did so after the Full Bench had on the 27/5/2015 handed down judgment in the matter of **Business Partners Pty (Ltd) v Silverstars Trading 245 CC case number 14408/2008 North Gauteng High Court**. In that judgment the Full Bench concluded that the Royalty agreement was valid.

[11] The Defendants filed and served their opposing affidavit resisting the granting of summary judgment on the 30 July 2015 one day before hearing on the 3 August 2015.

[12] In the affidavit deposed to by the second defendant on behalf of all three defendants the following were raised as defences to the claim:

12.1 That a company known as Yoltsa Trading CC in which the Second Defendant is the sole member has a claim for damages in the amount of R11.9 million and that the Second Defendant intends to cede that claim to the 1st Defendant to be raised as a counterclaim to this action.

12.2 That the Royalty agreement was unlawful and unconstitutional.

12.3 That the Royalty agreement was a simulated agreement which was used to secretly raise further interest without that aspect having been explained to the Defendants.

12.4 That the Royalty agreement was an agreement in contravention of the Conventional Penalties Act.

12.5 The Second Defendant denies that the signature on the suretyship by the 3rd Defendant is his signature.

12.6 That the Plaintiff's affidavit does not meet the requirements of Rule 32 (1).

[13] I now deal with each of the defences raised in both the postponement affidavit as well as in the opposing affidavit and commence with the Defendant's bold and unsubstantiated allegation that the Plaintiff's application does not meet the requirements of Rule 32 (1). Rule 32 (1) read as follows:

“Where the defendant has delivered notice of intention to defend the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

- (a) On a liquid document
- (b) For a liquidated amount in money
- (c) For delivery of specified movable property or
- (d) For ejectment together with any claim for interest.

[14] The Plaintiff's claim on both the loan agreement and the Royalty agreement are liquidated amounts in money. The Defendant has not said why they are not liquidated. This defence is accordingly dismissed.

[15] The other defence raised is the Defendant's desire to cede a claim that one of his business entities has against the Plaintiff to the 1st Defendant to enable the 1st Defendant to raise that as a counterclaim. The argument

advanced in support of this contention is so far-fetched and legally untenable that it requires no further consideration. That defence is equally dismissed.

[16] Then there is the defence disputing the signatures of the second Defendant on the deed of suretyship. The Defendant raised this issue as far back as October 2014 and told the court then that he has referred that aspect to forensic experts. What is strange is that nine months later still no forensic report is available. The Defendant does not even tell the court who the forensic expert is who he instructed. The fact of the matter is that the signed suretyship was a condition precedent to the granting of the loan which loan agreement the Defendants do not dispute. The Defendant also admits that the amount of R860, 000 was advanced it could never have been advanced if the second and third Defendants had not signed the deeds of suretyship. I accordingly find that this defence has no merit and falls to be rejected.

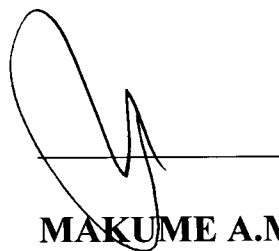
[17] The last defence raised is the invalidity of the Royalty agreement. The Defendant persists with this view as a defence notwithstanding, the finding of the full bench. The Second Defendant says in his affidavit and it was so argued by his Counsel in this application that the decision of the Full Bench will be appealed. There is no mention when the appeal will be launched and by whom. The defendant's Counsel does not say that he also acts for Silverstars in the matter against Business Partners. The court is not told what sort of interest the Defendants have in that matter. The Defendants only became aware of the judgment of the full bench two

months after it had been handed down, which clearly shows their lack of interest.

[18] I hold the view that all the defences raised by the Defendants are not *bona fide* and fail to comply with the provisions of Rule 32 (3). In **OOS RANDSE BANTOESAKE ADMINISTRASIERAAD v SANTAM VERSEKERINGSMAATSKAPPY BPK EN ANDERE (2) 1978 (1) SA 164 (W) at 171** it was stated that not a great deal is required of a defendant but that he must lay enough before court to persuade it that he has genuine desire and intention of adducing at the trial evidence of facts which if true would constitute a valid defence.

[19] What is laid before this court is unsubstantiated findings by an actuary as well as promises of the forensic expert reports. It is clear that the Defendants have been buying time since October 2014 in order to delay the inevitable outcome. I accordingly dismiss the defences raised and hereby grant summary judgment in terms of the draft order attached hereto marked "X".

Dated at Pretoria on the ...¹⁷.....day of August 2015.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line and a small flourish.

MAKUME A.M.

(JUDGE OF THE HIGH COURT)

Date of hearing: 3 August 2015

Date of Judgments: 20 August 2015

Counsel for Plaintiff: **Adv Riley**

Instructed by: Strydom Britz Mohulatsi Inc

266 Sprite Avenue

Faerie Glen

Pretoria

Tel: 012 365 1883

Ref: WNOLTE/TJVR/DL 37665

Counsel for Defendants: **Adv Ciller**

Instituted by: Jacques Van der Merwe Attorney

176 Oliver Street

Brooklyn

Pretoria

Tel: (012) 346-3420

Ref: J VD MERWE/ pv/V97/2014

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

ON 20/8/2015 BEFORE HONOURABLE JUDGE Makame

Case No: 48567/2014

In the matter between:

BUSINESS PARTNERS LIMITED
(Reg no : 1981/000918/06)

PLAINTIFF

and

NT MAKHUBELE ENTERPRISES CC
(Reg No: 2001/008243/23)

1ST DEFENDANT

NATHANIEL TSAKANE MAKHUBELE
(ID no: 640727 5360 080)

2ND DEFENDANT

HITEKANI FAST FOODS CC
(Reg No: 1999/051085/23)

3RD DEFENDANT

DRAFT ORDER

SUMMARY JUDGMENT is hereby granted in favour of the PLAINTIFF against:

A: THE DEFENDANTS, JOINTLY AND SEVERALLY, IN SOLIDUM WITH EACH OTHER THE ONE TO PAY, THE OTHER TO BE ABSOLVED, FOR:

1. Payment of the sum of **R314 398.88**, together with interest thereon at the rate of **10%** per annum, calculated daily and compounded monthly in arrears as aforesaid, calculated from **25 May 2014** to date of payment, both days inclusive;
2. Payment of the sum of **R 175 983.46**, together with further interest thereon at the rate of **10%** per annum, calculated daily and compounded monthly in arrears as aforesaid, calculated from **25 May 2014** to date of payment, both days inclusive;

3. Costs of suite to be taxed on an attorney & client scale;

B: THE SECOND DEFENDANT FOR:

5. An order declaring the following immovable property specially executable in favour of the Plaintiff:

ERF 1838 PROTEA NORTH TOWNSHIP

REGISTRATION DIVISION I.Q, PROVINCE OF GAUTENG

MEASURING: 345 (THREE HUNDRED AND FIVE FIVE) SQUARE METRES

Held by Deed Transfer T48187/2000

6. An order that the Registrar be authorized and directed to issue a writ of execution - immovables - against the hypothecated property above in accordance with the terms of any judgment granted as sought per the prayers herein;

THE REGISTRAR OF THE HIGH COURT

STRYDOM BRITZ MOHULATSI INC. (362)
REF.: W. NOLTE /TJVR/DL37665