IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: ___

Date: 3 July 2026

Signature: [redacted]

CASE NO: 2024/124224

DATE: 3 July 2026

In the matter between:

3SIXTY HERBAL HEALTH (PTY) LIMITED	Applicant
and	
MAKHULU'S LOGISTIC SERVICES (PTY) LIMITED	Respondent

Coram: M Van Nieuwenhuizen, AJ

Heard on: 16 February 2026

Delivered: 3 July 2026

JUDGMENT

<u>M VAN NIEUWENHUIZEN, AJ</u>:

INTRODUCTION

[1] The applicant seeks an order directing the respondent to restore to it possession of certain industrial manufacturing machinery, <u>alternatively</u> payment of damages in the amount of R2 573 110,00 less the amounts outstanding to the respondent for unpaid storage fees. The relief is premised on the allegation that the applicant is the owner of the machinery, <u>alternatively</u> entitled to possession thereof, and that the respondent is in unlawful possession and/or dispossession of the machinery that the applicant had allegedly stored at the respondent's warehouse, <u>alternatively</u> unlawfully disposed of the machinery.

[2] The applicant is 3Sixty Herbal Health (Pty) Limited, a private company. The applicant is part of a broader corporate group linked to 3Sixty Biomedicine and ultimately to the NUMSA Investment Company.

[3] The respondent is Makhulu's Logistic Services (Pty) Limited, a private company with limited liability, registered and duly incorporated in terms of the company laws of the Republic of South Africa with its principal place of business situated at OR Tambo International Airport. The respondent conducts business primarily as a freight forwarding and logistics service provider. The respondent alleges that it is not a warehousing or commercial storage facility and does not market or operate itself as such.

[4] The respondent opposes the application. It denies that it ever possessed or controlled the machinery and contends that the machinery was stored at the premises of a third party, Momentus Trading (Pty) Limited (*"Momentus"*), pursuant to an agreement concluded between the parties. The respondent further disputes that it assumed responsibility for the safekeeping of the machinery and alleges that the applicant's persistent failure to pay storage charges and to furnish customs documentation ultimately resulted in the machinery either being disposed of by Momentus

or confiscated by the South African Revenue Services (*"SARS"*). The respondent states that it is unable to determine which of these events occurred.

THE APPLICANT'S CASE

[5] The applicant's case is advanced primarily through the founding affidavit of Mr Mbatha. Mr Mbatha candidly acknowledges that he was not employed by the applicant during the entire period relevant to the dispute. His account is therefore, to a considerable extent, reconstructed from documents and information obtained from others. No confirmatory affidavits have been filed by the persons who allegedly participated in the negotiations or concluded the alleged oral agreement.

[6] The applicant alleges, in broad terms, that an oral agreement was concluded in terms of which the respondent undertook to store the machinery safely on behalf of the applicant and that the applicant would pay the respondent monthly rental of R21 645,64 for the storage of the machinery. However, no material terms of the agreement are pleaded. The founding affidavit does not identify when the agreement was concluded, who represented the respective parties, nor does it set out the essential contractual obligations allegedly assumed by the respondent.

[7] The applicant further relies upon a facility agreement concluded with the National Empowerment Fund (*"NEF"*). However, the facility agreement attached to the founding affidavit (**"FA1"**) relied on by the applicant is unsigned by the NEF, incomplete and as alleged by the respondent is replete with unfulfilled suspensive conditions. It names Troy Pharmaceuticals (Pty) Limited as purchaser, not the applicant.

[8] Clause 11 of Annexure **"FA1"** expressly states:

"Notwithstanding delivery of the Assets to the Purchaser, <u>ownership of the assets shall vest in and remain with the Seller</u> and shall not pass to the Purchaser until the Facility Outstandings has been paid in full." [Court's

underlining]

[9] The applicant's own Annexure **"FA2"** confirms that as of February 2024, it owed the NEF R4 418 618,70. This constitutes a clear acknowledgement that ownership has not passed.

[10] The assertion in the founding affidavit that ownership passed *"upon payment of the invoice from Megaxus"* is contradicted by the contents of **"FA1"**, which imposes a retention of title clause in favour of the NEF. In particular clauses 11 and 12.5 makes it clear that ownership does not pass until the purchase price had been paid in full and the Purchaser is furthermore deemed to have re-ceded all rights, title and interest in the Assets to the Seller.

[11] Moreover, clause 5 of the facility agreement requires the provision of guarantees and security as a condition precedent. The applicant makes no allegation that such condition precedent has been fulfilled, nor does it attach any documentation proving that such conditions were fulfilled.

[12] The applicant also fails to annex a signed copy of the agreement, any proof of payment of the capital acquisition costs of the machinery or supporting schedules that would verify the identity and delivery of the goods, despite the fact that the onus is on a party alleging payment to prove this.[1] No bill of lading, proof of custom clearance, or delivery notes are annexed.

THE RESPONDENT'S VERSION

[13] The respondent's answering affidavit is deposed to by Mr Phekga Ramalepe (Managing Director of the respondent). The contents of the answering affidavit is confirmed by Mr Relebogile Ramalepe (Operations

---

[1] *Pillay v Krishna* 1946 AD 946

Manager of the respondent) insofar as it relates to him and/or insofar as it relates to the business dealings between the respondent and the applicant.

[14] The respondent's version is that it never agreed to store or retain possession of the machinery. Instead, it agreed to source an appropriate warehouse facility. Pursuant to that arrangement, the machinery was transported by a third party to the premises of Momentus as arranged by the applicant, where it remained under the custody and control of that entity.

[15] According to the respondent, it was expressly agreed, alternatively implied, further alternatively tacitly agreed, that the applicant would bear all risk associated with the storage of the machinery, that the respondent would only pay storage charges to Momentus if the applicant remained up to date with the account and that the respondent would not itself become responsible for the custody or safekeeping of the machinery. The respondent further alleges that the applicant persistently failed to pay the agreed storage charges. The amount owing is substantial. Numerous demands were addressed to the applicant. Payment arrangements were concluded but repeatedly breached. These allegations are not disputed by the applicant.

[16] The respondent further states that the applicant was repeatedly requested to furnish customs documentation required by SARS in anticipation of an audit at the Momentus warehouse. It is alleged that the applicant was warned on several occasions that failure to furnish the required documentation could result in the machinery being confiscated by SARS. The respondent further states that Momentus had reserved the right to dispose of the machinery to recover outstanding storage charges.

EVALUATION

[17] The applicant bears the onus of establishing its entitlement to the relief

sought.

[18] The first and fundamentally difficulty confronting the applicant concerns ownership. The facility agreement upon which the applicant relies expressly provides that ownership of the machinery remained vested in the NEF until repayment in full. The applicant admits that a substantial portion of the indebtedness remained outstanding. On the papers before this Court, the applicant has therefore failed to establish ownership of the machinery.

[19] In *Chetty v Naidoo*[2] the Appellate Division stated *"The fundamental principle is that possession must yield to ownership. It is not for the defendant to prove anything until the plaintiff has established title"*.[3]

[20] Equally problematic is the applicant's inability to establish that the respondent ever possessed the machinery. On the respondent's uncontested version, the machinery remained throughout under the custody of Momentus. The respondent denies ever exercising physical possession or control over the machinery. A vindicatory claim cannot ordinarily succeed against a party who is not in possession of the property sought to be recovered.

[21] The applicant's contractual case fares no better. The alleged oral agreement is pleaded in the vaguest possible terms. None of the essential terms are identified. The founding affidavit does not establish the contractual obligations allegedly undertaken by the respondent. The applicant's reliance upon an oral agreement is therefore wholly inadequate.

---

[2] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-D. See also *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 779 (A) at 782A

[3] Ibid at 20G per Jansen JA

[22] The evidential difficulties are compounded by the fact that much of Mr Mbatha's evidence constitutes hearsay. His own affidavit acknowledges that he lacked personal involvement during substantial portions of the relevant period. The failure to file confirmatory affidavits from those who allegedly participated in the negotiations or had firsthand knowledge of the alleged oral agreement and events materially weakens the applicant's case. Mr Mbatha was not involved in either the conclusion of the agreement or in the transportation of the single machine and accessories (as alleged by the respondent) to Momentus. In the absence of primary facts, the alleged secondary facts are merely unsupported conclusions of law.[4]

[23] The respondent's version by contrast, is detailed, internally consistent and based upon direct personal knowledge. It explains the role performed by the respondent, the arrangements with Momentus, the repeated default in payment, the repeated warnings issued regarding customs documentation, the payment plan proposed and breached and the events preceding the loss of access to the warehouse after Momentus entered business rescue.

[24] The applicant's founding affidavit omits any meaningful reference to its prolonged default in payment, the repeated demands for payment, the agreed payment plan, the repeated requests for customs documentation, or the warnings allegedly given by the respondent. These omissions concern matters central to the dispute and materially affect the reliability of the applicant's version.

[25] At the very least, the application gives rise to numerous genuine and *bona fide* disputes of fact concerning the existence and terms of the alleged agreement, the identity of the party who possessed the machinery, the

---

[4] *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G. See also *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2007 (2) SA 128 (C)

allocation of risk, the effect of the applicant's non-payment and the circumstances of the machinery’s whereabouts. These disputes cannot properly be resolved on affidavit. Applying the well-established approach to factual disputes in motion proceedings, the respondent’s version must prevail where it is neither farfetched, nor untenable on factual disputes in motion proceedings.[5]

[26] There is a further obstacle to the relief sought. On the respondent’s version, Momentus retained physical possession and custody of the machinery at all relevant times. The respondent further alleges that Momentus reserved the right to dispose of the machinery in the event of continued non-payment and that it is uncertain whether the machinery was ultimately sold by Momentus or confiscated by SARS.

[27] Momentus therefore plainly has a direct and substantial interest in the determination of the issues before this Court. Any finding concerning the alleged disposal of the machinery or liability arising therefrom could directly affect its legal interests. Its non-joinder is material.

[28] Likewise, if the machinery was confiscated by SARS pursuant to customs enforcement proceedings, SARS would similarly possess a direct and substantial interest in any order concerning possession or ownership of the machinery. The applicant elected not to join either Momentus or SARS, notwithstanding the respondent’s version that either entity may ultimately have dealt with the machinery. The absence of these parties provides a further reason why the relief sought cannot be granted.

CONCLUSION

[29] The applicant has failed to establish ownership of the machinery. It has further failed to establish that the respondent possessed or controlled the

---

[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D

machinery or that the applicant unlawfully disposed thereof.

[30] The applicant's contractual case is inadequately pleaded and largely supported by hearsay evidence. The respondent's version is supported by direct evidence and gives rise to genuine disputes of fact, which cannot be resolved in favour of the applicant on motion proceedings.

Non-joinder

[31] In addition, the failure to join Momentus and SARS, constitutes a material non-joinder of parties having a direct and substantial interest in the relief sought.[6]

[32] There is no causal link between the respondent and the loss – even if the machinery has disappeared, the respondent's evidence is that:

[32.1] Momentus retained custody, access was later prevented following business rescue, the machinery may have been sold by Momentus; <u>alternatively</u>

[32.2] SARS may have confiscated it.

[33] On this version the respondent, neither possessed, nor disposed of the machinery.

Applicant assumed the contractual risk

[34] The respondent alleges express, <u>alternatively</u> implied, <u>further alternatively</u> tacit terms that:

[34.1] storage would be provided by a third party warehouse;

---

6 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)

[34.2] all risk remained with the applicant;

[34.3] respondent was not obliged to pay storage if the applicant defaulted;

[34.4] the warehouse could dispose of the goods in the event of continued non-payment.

[35] Those allegations are supported by detailed factual averments absent from the founding affidavit.

Damages claim

[36] If damages are sought in the alternative, the applicant must establish a legal duty owed by the respondent, breach, wrongful disposal, causation and quantum. None of these elements is established.

[37] The respondent's evidence suggests that it acted merely as an intermediary or logistics co-ordinator, while custody remained with Momentus. If that is accepted, the respondent would not have been a bailee with physical possession of the machinery. That distinction is likely to be central both to the vindicatory claim and to any alleged contractual duty to safeguard the machinery.

[38] Overall, the respondent's version appears considerably more detailed, fact specific, and supported by direct evidence than the applicant's founding papers, which weighs significantly in the application of the *Plascon-Evans* Rule to any disputed facts.

[39] The applicant has accordingly failed to make out a proper case for the relief sought.

ORDER

[40] In the result I make the following order:

[40.1] The application is dismissed.

[40.2] The applicant is ordered to pay the costs of this application, including the costs consequent upon the employment of counsel.

[redacted]

M VAN NIEUWENHUIZEN
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 3 July 2026.

HEARD ON:	16 February 2026
DATE OF JUDGMENT:	3 July 2026
FOR APPLICANT:	V Mndebele
INSTRUCTED BY:	Shandu Attorneys Inc. Email: Sijabonga@shanduattorneys.co.za / fezile@shanduattorneys.co.za Ref: C01004
FOR RESPONDENT:	Adv S Davies
INSTRUCTED BY:	Jenkins Incorporated Attorneys Emal: izelle@jenkinsinc.co.za / info@jenkins.co.za Ref: I M Jenkins/KVM/MR0008