
REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: **10978/05**

In the matter between:

BONPURE (PTY) LIMITED

First Applicant

RAPHAEL-KATZ, JOANNE

Second Applicant

and

PARRY, SIMON JAMES

First Respondent

COX, GAVIN

Second Respondent

BENFIELD, MICHAEL JOHN

Third Respondent

WOMANS PRIVATE EQUITY FUND ONE

Fourth Respondent

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

1] Joanne Raphael-Katz, the Second Applicant is a Johannesburg-based businesswoman who is a sole director of a Johannesburg private company,

Bonpure (Pty) Limited, the First Applicant ("Bonpure"). Both Applicants (the Applicants) approached this Court as a matter of extreme urgency in an application filed on 27 October 2005, in relation to which I heard hurried arguments on 15 November 2005. I reserved judgment which I now hand down.

- 2] The Applicants urged me to order, specifically, because on their argument he was obligated to do so, - Simon James Parry, the First Respondent ("Parry") to furnish irrevocable financial guarantees that were embodied in clause 9 of an agreement - (about which later) - concluded between the Applicants and Parry, signed by the Applicants in Johannesburg on 7 September 2005. This agreement was signed at various times, at various places, by various people.

- 3] For the sake of completeness, the agreement, styled "Heads of Agreement" annexed to the Applicants' affidavit as "JK 2", was signed in Johannesburg by the Second Applicant on 7 September 2005, on her own behalf as well as on behalf of her company, Bonpure (Proprietary) Limited. It was also signed by one Michael John Benfield, Third Respondent ("Benfield"), against whom no relief is sought, and who is a businessman in Johannesburg, on the same day as the Applicants, and by one Gavin Cox, Second Respondent ("Cox"), also a Johannesburg-based businessman, also against whom no order is sought. Cox signed the agreement on 14 September 2005. Exactly the same agreement, annexed to the Founding Affidavit as **"JK 3"** was signed by Parry at Constantia, Cape Town on 9 September 2005.

- 4] Clause 9 of the agreement reads as follows:-

“SP [Simon Parry] agrees to furnish adequate irrevocable financial guarantees issued by a registered commercial bank and/or financial institution whose identity is acceptable to the party in favour of whom the guarantee is issued in respect of SP’s obligations to BP as described in 6 above, within 14 days of the date of signature of these heads of agreement. These guarantees will be issued in favour of JK for the obligations referred to in 6.1, 6.2 and 6.3, in favour of WPEF for the obligations referred to in 6.6 above.”

5] Relying on this clause, the Applicants, in essence moved this Court urgently seeking an order for specific performance of an agreement to pay Bonpure the sum of R28,5 million rands in accordance with Clause 6 of the agreement over and above furnishing the guarantees as aforesaid. In paragraph 3 of their notice of motion, the Applicants set out a timetable, in accordance with which Parry must inject funds contemplated in the agreement. According to the schedule, some monies were supposed to have been paid “immediately”, some even before the case was argued – R8 million on 31 October 2005, - which would have been barely 3 days after the Applicants had filed their papers for the very first time in the case.

6] The Applicants claimed that the matter was being brought by way of urgency, and on motion because “no dispute of fact exists or is reasonably anticipated”, and also because Parry’s “repudiation of the agreement has catastrophic implications for the Applicant”. If the relief was not granted, so it was submitted, the Applicant would fail as a viable business entity and would be forced into liquidation, with a number of parties being severely prejudiced. Applicant’s business opportunity would be lost forever. I was urged to ensure, by granting the application, that Parry’s “unconscionable” repudiation of the agreement should not be countenanced coming as it did at an inopportune time for the Applicants, just as they were poised for

tremendous success in this country and abroad, and for which venture, the injection of the requisite funds and the furnishing of the guarantees were the life blood.

- 7] This application is resisted by Parry on several bases, principal amongst which are what Parry understands as “five (5) conditions precedent” to which the agreement itself is subject. The actual payment of the money itself, as far as Parry is concerned, was expressly made subject to the fulfilment of the five conditions precedent. One of the issues I have to decide, therefore, is whether Applicants have made out a case for the payment to them of the R28,5 million, given the conditions and obligations embodied in the Heads of Agreement (the Agreement).

FACTUAL BACKGROUND

- 8] The Second Applicant claims that she set up Bonpure as a vehicle for the exploitation of a chemical product in the domestic and industrial water cleaning business, claimed to be “*highly effective in disinfecting and sanitizing water*”. The product is called O2H. According to Raphael-Katz, the business would succeed only with a substantial capital injection from an outside investor. Against that backdrop, Parry proposed an acquisition by him of 75,1% of Bonpure’s shares for which he would inject R28,5 million capital into the business. A due diligence having been conducted for Parry by Benfield, and Parry having been satisfied with the result thereof, the Agreement was concluded, clause 4 of which mentioned the five conditions precedent.

9] According to Raphael-Katz, she and Bonpure have complied with all of the obligations imposed upon them by the Agreement, over and above the fact that the conditions precedent themselves had been fulfilled. Before I look at the evidence in the papers, from which I will have to determine whether in fact the suspensive conditions were fulfilled and whether the Applicants had indeed complied with all of the obligations imposed upon them by the Agreement, which they claim they have, but which Parry denies, it is apposite to reproduce the five conditions precedent here before evaluating the evidence and factoring in the arguments by Counsel before me on the 15th November 2005.

THE CONDITIONS PREDECENT

10] Clause 4 of the Agreement expressly provided that the Agreement would be subject to the following five conditions precedent, namely:-

- 10.1 That Raphael-Katz purchase the 40% shareholding in Bonpure currently held by the Fourth Respondent, the Womens Private Equity Fund (WPEF), for a consideration not exceeding R1,2 million, in terms of a sale agreement to be concluded and signed prior to all agreements pertaining to this transaction being signed;
- 10.2 That Raphael-Katz assign all patents relating to water purification to Bonpure;
- 10.3 That Raphael-Katz agree to a service agreement with

Bonpure for the position of marketing director for a fixed two-year term with effect from 1 September 2005 to 31 August 2007, at a cost to the company of R600 000,00 during the first year, increased by no less than CPI during the second year;

10.4 That Second Respondent (Cox) and Third Respondent (Benfield) agree to personal terms with Parry in relation to a shareholding in Bonpure of at least 10% each, and also agree with Parry as to the mechanisms by which they can increase their shareholding to Bonpure; and

10.5 That Cox and Benfield agreed to service contracts with Bonpure.

11]Counsel for Applicants argued that the first three conditions, whose fulfilment depended on Raphael-Katz herself, had been properly fulfilled. For example, it was argued, the agreement to sell, contemplated in 4.1 of the Agreement for the purchase of the requisite shares, ("*purchase*" being the operative word), had been signed by both parties on 26 October 2005. Equally, condition 2 had been fulfilled inasmuch as there had been an assignment made in writing, and the response by Parry that Raphael-Katz had provided no proof of the fulfilment of these conditions, was merely seeking to create a dispute of fact that was opportunistic and fanciful, and that Parry was clutching at straws in order to avoid his obligations under the Agreement.

12]Condition 3 had also been fulfilled, Raphael-Katz's direct evidence as deponent together with supporting documents being conclusive of the fact that the condition had been fulfilled. Mr Wynne, Counsel for the Applicants, referred me to e-mail correspondence between Raphael-Katz, Benfield and Cox, between 27 September 2005 and 13 October 2005, from which it is clear, it was argued, that the service agreement contemplated in 4.3 of the agreement had been agreed to, and that Parry was wrong in thinking that there was a business risk in the condition the nature of which warranted him withdrawing his support from it.

13]With respect to the two remaining conditions, - and it was argued that there was little the Applicants could do anything about those, having been clearly inserted for the Parry's benefit, - on a proper evaluation of the evidence, there were indications that Parry had conducted himself bound by agreements which could only be in place because these conditions had been fulfilled. Parry had paid R1,5 million as contemplated in the Agreement, had apologised for "*letting everyone down*". In the light of these indications, he had waived any right upon which he could rely for a claim that the conditions precedent had not been fulfilled. Given the evidence indicating that he himself considered himself bound by the agreements - the payments and the apologies, and so on - it could not be accepted that he should now contend that the conditions had not been fulfilled. It was argued that his conduct was such that even if he had established non-fulfilment of the conditions, this Court would be justified in deeming them to have been fulfilled. In any event, Mr Wynne argued, the conditions precedent, whether or not they had been fulfilled, had no relationship to the obligation that Parry had under clause 9, which called upon him to issue the requisite guarantees

within 14 days of the signature of the Agreement. It was submitted that this obligation had to be complied with, regardless of whether the conditions precedent had been fulfilled or not.

14]In supplementary heads of argument handed up during argument, Mr Wynne argued that the first three conditions had been proved to have been fulfilled on the “unassailable” facts put up by the Applicants. The facts were “*unassailable*” because, despite claims by Parry that there was a massive dispute of fact, on a proper analysis of the evidence, I would find there was no “*bona fide dispute of fact*”. Mr Wynne argued that with respect to the first condition, the fact that the sale agreement contemplated thereat, evidencing the rights and obligations of the parties to that sale may be subject to further revision and signature was irrelevant. What was germane was that the sale had taken place as required by the clauses.

15]With regard to the second condition, the evidence showed that patents had been transferred as had been claimed by Raphael-Katz. Parry’s denial that this was so was dismissed as being “*unconvincing*”. Parry’s evidence was that various documents had been provided purporting to evidence assignments on 16 September 2005. However, Parry deposed, it was not apparent whether what was assigned was the amended (non-combustible) product, consequent upon which he could not deal with the matter any further on the basis of the documents provided.

16]With regards to the service contract with Bonpure, it was argued that Raphael-Katz had agreed with the terms thereof. It was not necessary that this agreement should have been in writing. As for the fourth condition that

Cox and Benfield should agree personal terms with Parry in relation to a shareholding in Bonpure, the condition had either been fulfilled on the facts (despite denials by Cox and Parry), or it had been waived because of the clear and unequivocal acknowledgements of the binding and unconditional nature of the obligations under the Agreement which had led Parry to “*implement*” the Agreement and apologise “for letting everyone down”.

17]Further, on the facts, it was argued, the fifth condition that Cox and Benfield “agree to service contracts with Bonpure”, had also been fulfilled. Parry himself had acknowledged that Cox and Benfield were managers in Bonpure and held his “*proxy*”. Benfield having failed to file an affidavit, and it being Parry who relies on the failure of the fulfilment of this condition as its defence, it was up to them to put up convincing argument that Parry’s conduct, in paying the R1,5 million, and in apologising for his decision not to comply with the Agreement, was not conduct from which I could reasonably infer that he had waived compliance with the condition. It was conduct, I was told, that could only have been consistent with an unequivocal intimation that Parry intended to be bound by the contract, and to proceed with it.

18]For these submissions, Mr Wynne relied on a speech by Marais J in **Westmore v Crestanello and Others**¹ in which, in an analogous scenario, the learned judge had held that a contract became “unconditional by means of a waiver of the subject to bond clause” after having found, in that case, that “... *an unequivocal intimation that the Applicant intended to be bound by the contract, and to proceed with it*”, even though, as a matter of fact, there had not been compliance with the bond clause. However, in that case,

¹ 1995 (2) SA 733 (W) at 739 C-H

the Applicant had informed the Respondents that guarantees would be furnished by the due date. Marais J had held that in the circumstances, the Applicant was entitled to enforce her bargain, and that “there is no reason in law or in equity not to order specific performance”. In this case, Mr Wynne argued, I was confronted with a “*simple case of a buyer’s remorse*” who wishes to wriggle himself out of a contract validly entered into, and for which I ought to order specific performance.

RESPONDENT’S CASE

19]Mr Dickerson, appearing for Parry, and relying also on Heads apparently prepared by Mr Farlam (who apparently had been Junior Counsel to Mr Hodes), raised, in oral argument what I understood to be two templates from which he launched his attack on the Applicant’s case. The first position he took was that the Applicants must make out a case that unequivocally demonstrates the fulfilment of all five conditions-precedent for them to succeed. This is a case that must be made on proof that all five conditions were met. By its very nature, therefore, it is a case that cannot be made by reliance on a “*fictional fulfilment*” of any of the conditions, or by a resort to an argument based on a presumed “*waiver*” of the conditions by Parry. If the facts showed there were conditions that had not been fulfilled, either because no proof could be proffered by the Applicants, or the facts relied upon by them were disputed, ***cadit quaestio***; the application could not succeed.

20]I must confess that I am inclined to agree with this argument. A waiver is not a remedy that can be resorted to lightly, particularly in application

proceedings. Referring me to **Amler**,² Mr Dickerson argued that waiver is a question of fact, with the party relying on waiver having to allege and prove the waiver on a balance of probabilities.

[See: **Borstlap v Spangenberg**.³]

In assessing the probabilities, the factual presumption that a party is not likely deemed to have waived his rights, should be borne in mind as clear evidence of a waiver is required.

[See: **Feinstein v Niggli**.⁴]

In my view, the upshot of this stringent test for alleging waiver of rights is that a party that seeks to rely on waiver in application proceedings must be reasonably confident that there will be no **bona fide** dispute of facts. If there is or are disputes, as Mr Dickerson argued, the law as commanded by **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd**⁵ will apply.

21]It is trite that the **Plascon-Evans (supra)** case is authority – sometimes much abused – for the proposition that where, as here, Applicants in motion proceedings seek final relief, the Courts accept Respondents’ version where there is a **bona fide** dispute of fact. Insofar as the Applicants justify their application for final relief by arguing that there is no **bona fide** dispute of fact, I therefore hold that the above statement of the law, as commanded by **Plascon-Evans (supra)** is common cause between the litigants in this case.

² LTC Harms: **Amler’s Precedents of Pleadings**, Fifth edition

³ 1974 (3) SA 695 (A)

⁴ 1981 (2) SA 684 (A)

⁵ 1984 (3) SA 623 (A)

22]The question to be answered is therefore whether the evidence indisputably shows all the conditions to have been fulfilled, or whether there is a **bona fide** dispute, the nature of which would bind me to follow **Plascon-Evans** (***supra***), and accept the Respondent's version in the event of such a dispute. Mr Dickerson argued that I would find such a dispute, over and above finding that, in any event, not all of the conditions had been fulfilled. With regard to the notion of fictional fulfilment of a condition, Mr Dickerson argued that Mr Wynne's submissions thereanent could not be supported – neither by the facts nor by the application of legal principles. For legal authority, he relied on **Amler** (***supra***) where the learned author writes that a party alleging fictional fulfilment of a condition must allege and prove:

- a) the non fulfilment of the condition; and
- b) that the breach of duty by the Defendant was committed with the intention of frustrating that condition's fulfilment.

[See: **Scott v Poupard**.⁶]

23]The second main plank from which Mr Dickerson launched his attack on the Applicants' case was that an order for specific performance would be inappropriate in this case. For one thing, there was no evidence that would justify any of the prayers contemplated in the timetable set out by the Applicants in Prayer 3 of their Notice of Motion. For another, as was acknowledged by the Applicants themselves – (although they were emphasizing another point) – some of the conditions (Conditions 4 and 5) were **not** in the power of Parry to fulfil, the cooperation of Cox and Raphael-

6 1971 (2) SA 373 (A)

Katz being key to their fulfilment. In the circumstances, an order for specific performance as claimed was quite clearly inappropriate, it was argued.

24]Mr Wynne had earlier submitted that this Court, in a Full Bench decision – (see: **Santos Professional Football Club (Pty) Ltd v Igesund and Another**⁷) – had held that specific performance was a remedy invented in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract. Whereas in English common law specific performance was a supplementary remedy, Mr Wynne, on the strength of this authority, and in view of his submission as to how the evidence showed that Parry was reneging on a commitment to be bound contractually because all the conditions had been fulfilled and the Applicants’ obligations in terms of the agreement were all met, submitted that this was an appropriate case in which I should order specific performance as prayed and as a primary remedy than as a supplementary one.

25]Mr Dickerson, however, countered this argument by pointing out that although the Court will, as far as possible, give effect to a Plaintiff’s choice (Applicants in this case) to claim specific performance, it has a discretion in a fitting case to refuse to decree specific performance and leave the Plaintiff, as it was held in **Haynes v Kingwilliamstown Municipality**,⁸ “to claim and prove his ***id quod*** interest”. As it was held in **Haynes** (*supra*), the discretion, although exercised judicially, is not confined to specific cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances. Mr Dickerson submitted that regard must be had to the

⁷ 2003 (5) SA 73 (C)

⁸ 1951 (2) SA 371 (A)

evidence, but more importantly, to the case made out by the Applicants in their founding papers. Applicants had relied principally, on a claim that all the suspensive conditions had been met that would justify the order for specific performance; in answering these claims, Parry had actually exposed the hopelessness of the Applicant's case, a case which could not be cured by them seeking to make out another case - waiver, fictional fulfilment, and so on, - in reply. Under those circumstances, to compel Parry to perform as claimed would be, in the words of the ***Haynes*** (*supra*) case, "*out of all proportion to the corresponding benefit to the Plaintiff, and the latter could equally be compensated by an award for damages*".

26]I am in respectful agreement with these submissions. Indeed, Parry, in my considered opinion, in his Answering Affidavit, successfully undermined the basis of the Applicants' case. I say so fortified in my analysis by the fact that in the event of a clear ***bona fide*** dispute of facts, I will be guided by the Respondent's version on the disputed facts.

27]In the view that I have taken of the evidence, and the legal principles applicable to the facts of this case, I do not intend to dwell at length on an analysis of the evidence that shows the weakness of the Applicants' case, save merely to mention some aspects that stand out. Firstly, the Applicants moved this Court for specific performance on the basis that all five conditions precedent had been fulfilled, and that they had met all their obligations in terms of the Agreement. However, even they (in reply) did not persist that **all** the conditions were met, certainly the last two conditions pertaining to agreements between Cox, Benfield and Parry, and service agreements between Cox, Benfield and Bonpure. When once even they

made the concession that one or more of the conditions had not been fulfilled, the case upon which they came to Court for an order for specific performance cannot be sustained.

28]Nor can it be permissible, further, for them to seek to make a different case in reply in which they claim that Parry waived compliance with the fulfilment of the suspensive conditions. It just is not done.

[See the very recent judgment of this Court in **Body Corporate Shaftesbury v Rippert's Estate**.⁹]

29]In any event, that the last two remaining conditions have not been fulfilled is manifest from the evidence. Cox had not signed any service agreement with Bonpure at the time this Court was moved, nor was there any attempt to do so, neither had he seen any draft. The Agreement in clause 4.5 contemplates the conclusion of this agreement as a condition precedent. His sworn testimony in this regard cannot be trumped by the Applicants, by them relying on an inconclusive e-mail which in and of itself can never be the basis for me concluding that Cox read the contract (draft), let alone that he signed it. He said under oath that he had not been shown even the draft contract appended to the founding papers.

30]Cox, in his own words, did not conclude any agreement with Parry (or with Benfield and Parry) regarding taking shares in Bonpure, nor has he any intention to do so, nor has he ever seen a draft shareholders' agreement. Given that Cox was supposed to benefit from the inclusion of the conditions, and the fulfilment thereof, it cannot be suggested, seriously, that he wilfully

9 2003 (5) SA 1 (C)

frustrated their fulfilment when that was evidently supposed to be for his own benefit. The truth is, it seems to me, that the conclusion of these service contracts was something in relation to which he had an arms length relationship, so to speak. He was a passive investor, hence he had given his proxy to Cox and Benfield to carry out all management functions.

31]It has also been submitted that the Applicants' argument that the unfulfilled conditions were imposed solely for the benefit of Parry, who now must be deemed to have waived them, is untenable. Firstly, they were not for Parry's benefit. Secondly, no evidence had been referred to that Parry deliberately and consciously waived any rights conferred upon him by the Agreement. Thirdly, condition 4.4 was manifestly for the benefit of Benfield and Cox. Fourthly, the much relied upon payment of R1.5 million and apology as ***indiciae*** of a waiver of rights and an acknowledgement of being contractually bound cannot be reasonably held to be indicative of an intent by Parry to abandon any of the rights he has under the Agreement.

I agree.

32]Clear proof of an intention to waive rights must be provided by the party alleging such waiver. Insofar as Mr Wynne was urging me to infer waiver from Parry's conduct – payment of the R1,5 million, and so on – he must satisfy me that this conduct was an unequivocal pointer to an intention on Parry's part to waive the fulfilment of the conditions conceded by the Applicants not to have been fulfilled. Looking at Parry's whole conduct, and not merely at an element or two thereof, I am not satisfied that the instances relied upon manifest a behaviour on the basis of which I can conclude,

unequivocally, that Parry who must have known what his rights were, nonetheless intended to surrender them. I cannot, with respect, go that far on the evidence before me.

[See generally: **Road Accident Fund v Mothupi**¹⁰ and **Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd**.¹¹]

Besides, this Court has expressed its misgivings about the appropriateness of deciding an issue such as waiver in application proceedings.

[See: **De Villiers v Pyott**.¹²]

33]It has also been submitted on behalf of Parry, that at least four of the conditions were not satisfied, and that the Applicants have in any event not performed all their obligations under the agreement, either timeously, or at all. Once again, in the view that I have taken of this case, it is unnecessary for me to make a detailed analysis of the evidence in order to agree with the submissions made by Mr Dickerson in this regard. A cursory glance at the evidence, – and the annexures, – for example, will show that the agreement contemplated in 4.1 of the Agreement, which envisages it being concluded “*prior to all agreements pertaining to the transaction being signed,*” had not yet been concluded or signed when these proceedings were launched. The best that can be said is that there was a first draft in circulation. That is not by a long way sufficient.

34]Equally, the 40% of Bonpure shares from WPEF which Raphael-Katz was

10 2000 (4) SA 38 (SCA)

11 1915 AD 1

12 1947 (1) SA 381 (C) at 387

supposed to have purchased had not been bought yet, nor had there been any delivery of either the guarantee or payment of any money contemplated in the Agreement. Parry had himself stated that he had never been asked for any indemnity to protect any former WPEF nominee directors on the Bonpure board from any claims from Bonpure creditors, as contemplated in the Agreement.

35]It was further contended on behalf of Parry – and this in fact, was, according to Mr Dickerson, the crux of the matter – that it is indisputably clear from the facts that the fixed two-year service contract with Bonpure that was intended to be agreed to by Raphael-Katz had not happened, as required by clause 4.3 of the Agreement. This is the clause that provided for Raphael-Katz to hold the position of marketing director at an agreed salary. Contrary to Raphael-Katz's contention that this condition had been fulfilled, the evidence showed that the agreement she annexed to the Founding Affidavit as proof of fulfilment was merely an unsigned draft, incomplete in many ways. That agreement was not even capable of being fulfilled in view of developments that had led to a suggestion that the Heads of Agreement should be altered to provide for Raphael-Katz concluding a two-year Consultancy Agreement (my emphasis), (as against her taking a position of marketing director) with Bonpure on terms mutually acceptable to her and Parry. However, no such amendment of the agreement had taken place. The upshot was that not only had the service agreement not been concluded as contemplated in clause 4.3; it was now not even feasible under the new proposed terms.

36]Further, the submission was made that in the absence of documentary or

any other evidence, Raphael-Katz was in no position to state authoritatively that a condition that envisaged personal terms being agreed between Parry, Cox and Benfield with regards to the participation of Cox and Benfield in Bonpure had in fact been fulfilled. If anything, contrary to Raphael-Katz's ***ipse dixit*** that the condition had been fulfilled, evidence proves otherwise. Both Parry and Cox, under oath, have denied that any service agreements have been signed. Benfield himself has not even deposed to an affidavit in these proceedings. Even when Raphael-Katz sought to "*confirm*" that indeed this condition had been fulfilled, by referring to a "*shareholders agreement*" (to be concluded between her, Parry and Bonpure, and, potentially, Benfield), this agreement turned out to be a first draft for discussion purposes only. That is a position far removed from one in relation to which a claim can be properly made, that a condition precedent has been fulfilled.

37]I have already referred to the fact that evidence by Cox, stated unequivocally, is that not only has Cox not concluded any service contract (between him and Bonpure or Benfield); he does not intend to conclude any. The documents, once again, relied upon by Applicants as proof of the conclusion of the service contracts, turned out to be draft unsigned agreements, notably incomplete, and about which I need say no more in this judgment. In the Heads on behalf of Parry, it is also submitted that Parry has stated categorically that Raphael-Katz has not transferred any shares to him, nor could she have tendered same because she had not yet received transfer of WPEF's 40% shareholding in Bonpure that would have enabled her to transfer 75.1% of Bonpure shares to Parry. Parry's obligation to pay any money to Bonpure in terms of clause 6 of the agreement – or in terms of any provision in the agreement – is subject to the fulfilment of the five

conditions precedent. There can be no basis, therefore, for me ordering Parry to act in terms of his undertaking to pay R28,5 million to Bonpure. Applicants cannot ask for Parry's reciprocal obligations to be performed at this stage, when they have not met their side of the bargain in the many ways indicated above. A contract has no legal effect if the suspensive conditions to which it is subject have not been fulfilled. *In casu*, because the suspensive conditions to which the agreement is subject have not been satisfied, the agreement is still inchoate, and thus devoid of legal effect.

[See: ***De Villiers and Another NO v BOE Bank Ltd***.¹³]

38]In the light of the conclusion that I have come to, it becomes unnecessary for me to deal with other submissions in the First Respondent's Heads, save only to state that I am in respectful agreement with the sentiments stated therein as issues that have not been addressed by the Applicants in argument. As I stated at the beginning of this judgment, I cannot fathom the basis of the demands made in paragraph 3 of the Applicants' Notice of Motion. For example, they demand that I should order Parry to pay R21 million immediately (whenever that is), R1 million in November 2005, R1 million in December 2005 and various amounts up to September 2007. In the end, Parry would end up paying R5,7 million more than the R28,5 million contemplated in the agreement. How can I then order specific performance in such circumstances? The order would quite clearly be incompetent, let alone that I have not been able to find any basis for ordering the payment of the monies demanded, and them to be paid at the times stated in paragraph 3 of the Notice of Motion.

13 2004 (3) SA 1 SCA

CONCLUSION

39]In all the circumstances of this case, I have come to the conclusion that this application cannot succeed. The application is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel.

D B NTSEBEZA

Acting Judge of the High Court of South Africa

Date of Hearing: 15 NOVEMBER 2005

Date of Judgment: 17 MAY 2006

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