**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: **45134/16**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
26/11/2018 Keightley
DATE SIGNATURE

In the matter between:

**RAINMAKER LOGISTICS (PTY) LTD** Applicant

**and**

**GRAVITAS CAPITAL (PTY) LTD** Respondent

**JUDGMENT**

KEIGHTLEY J

1. This is an application for an order directing the respondent, Gravitas Capital (Proprietary) Limited ("Gravitas") to pay the applicant, Rainmaker Logistics (Proprietary) Limited ("Rainmaker"), an amount of R1.8million.

2. The application arises out of two disputed agreements. In terms of the first agreement, ("the initial sale agreement"), Rainmaker sold 30% of its shares in a different (but similarly named) entity called Bongani Rainmaker Logistics (Pty) Ltd ("BRL"), and 75%

of Rainmaker's claims as shareholder against BRL to Gravitas for an amount of R3million.

3. The dispute arising from the sale agreement involves the suspensive conditions precedent ("the conditions precedent") contained in clause 8. In terms of the conditions precedent the parties were required to enter into a shareholder's agreement, to sign a memorandum of incorporation, and Rainbow was to conclude a service level agreement with BRL, all before 28 February 2013. The sale agreement further provided that if these conditions were not met, the sale agreement would be void *ab initio* and neither party would have any claim against the other arising from it.

4. It is common cause that the conditions precedent were not met, although the parties continued to conduct themselves as if they had been. What is in dispute for present purposes is the legal consequences of the failure to comply with the conditions: Rainmaker contends that the legal consequences are that the agreement must be treated as if it was never entered into, and hence, that there never was a lawful and binding transfer of shares to Gravitas in terms of the initial sale agreement. Gravitas disputes this for various reasons, which I will deal with later.

5. The second disputed agreement is an oral agreement alleged to have been entered into between Rainmaker and Gravitas on 24 February 2016 in terms of which Rainmaker repurchased Gravitas' shares in BRL for an amount of R1.8million. I refer to this as the repurchase agreement. Rainmaker avers that the agreement was entered into with Mr Schwankhart representing it, and Professor Khumalo ("Prof Khumalo") representing Gravitas. Prof Khumalo is a shareholder in Gravitas and he deposed to the answering affidavit on its behalf. Mr Schwankart is a shareholder in Rainmaker, and he deposed to the founding affidavit.

6. Prof Khumalo disputes the existence of the repurchase agreement. He admits that he received an amount of R1.8million soon after 24 February 2016, but his version is that this was a personal loan to him from Mr Schwankart.

7. Rainmaker's claim is based on unjustified enrichment. It says that because the conditions precedent were not met, the initial sale agreement never took effect, although the parties continued to conduct themselves on the *bona fide* assumption that it was effective. Acting on the *bona fide*, but mistaken belief that the initial sale agreement had taken effect, and thus that Gravitas was the owner of 30% of the shares in BRL, Rainmaker agreed to repurchase the shares for R1.8million. It paid the purchase price on 25 February 2016 in the *bona fide* belief that Gravitas held shares in BRL and was entitled to sell them. This belief was mistaken: because of the underlying and original invalidity of the initial sale agreement, Gravitas had never lawfully taken transfer of the shares under that agreement, and could thus not sell them back to Rainmaker under the repurchase agreement. Consequently, Rainmaker concludes, the repurchase agreement was void, and it is entitled to the repayment of the repurchase price it paid for the shares.

8. There are two broad issues of substance arising from Rainmaker's claim, and from Gravitas' defence: firstly, what were the legal consequences of the failure to comply with the conditions precedent and, secondly, whether the parties indeed entered into the repurchase agreement as claimed by Rainmaker. If Rainmaker is correct that the failure to comply with the conditions precedent in the sale agreement rendered it void *ab initio*, this establishes one leg of its claim. However, to succeed ultimately, Rainmaker must also establish that the payment of R1,8,million on 25 February 2016 was a payment in terms of the repurchase agreement. If Gravitas is correct that it was

a loan to Prof Khumalo, unrelated to the business dealings between Rainmaker and Gravitas, then no claim based on unjustified enrichment will follow.

9. Gravitas raises a third, and procedural issue: it contends that prior to the launch of the application, in an email dated 30 July 2016 addressed to Rainmaker, Prof Khumalo categorically denied that he had sold his (i.e. Gravitas') shares to Rainmaker. This averment relates, of course, to the alleged repurchase agreement. Gravitas contends that Rainmaker accordingly must have known that the dispute involved a material dispute of fact (i.e. as to whether the parties had indeed concluded the repurchase agreement). Gravitas requests, in the interests of justice, that the matter be referred to trial, alternatively to oral evidence for a proper determination of this disputed issue.

GRAVITAS' POSITION AT THE HEARING

10. Both parties filed heads of argument for purposes of the hearing. In its heads, Rainmaker addressed all of the issues in dispute. However, Gravitas elected only to address the question of whether the matter ought properly to be referred to oral evidence or trial in view of what it contended were material disputes of fact on the papers. In Gravitas' practice note, it advised the court that: "*Because Respondent maintains there is an intolerable dispute of fact, it is submitted that whilst all the papers should be read, they need only be read as to ascertain that there is such a dispute of fact.*"

11. When the matter was called in court, there was no appearance (by either counsel or an instructing attorney) for Gravitas. I was advised by counsel for Rainmaker, Mr Whittcutt, that there had been no prior communication emanating from Gravitas' attorney, or its counsel to indicate that they would not be at court. I was provided with

copies of three letters sent from Rainmaker's attorney to Gravitas' attorney advising, among other things, of the set down date of the hearing for 29 October 2018. I was advised that no response was forthcoming.

12. As things transpired, counsel for Rainmaker, and its instructing attorney eventually ascertained on the morning of the hearing, and shortly before court was due to commence, that there would be no appearance for Gravitas.

13. In light of these events, counsel for Rainmaker submitted that it would be proper for me to deal with the matter as if it were a default judgment. In view of the fact that I was favoured with a full answering affidavit from Gravitas, and a set of heads (albeit on the limited issue described above), despite Gravitas failure to appear at the hearing, I deal with the merits of the matter fully in this judgment.

14. It will be convenient to start with Gravitas' contention that the matter ought properly to be referred to trial or oral evidence. If this contention is correct, then it will be for the trial court to make a determination on the merits of the other substantive issues raised. As will become apparent from my treatment of this issue, below, it overlaps with, and as it turns out, is decisive of, the merits of the matter on the substantive issue of the existence of the repurchase agreement.

THE REQUEST BY RESPONDENT FOR A REFERRAL TO ORAL EVIDENCE OR TRIAL

15. Gravitas submits that there is a total dispute of fact that cannot possibly be decided on the papers. This dispute, it is submitted, revolves around the purpose of the payment of R1.8million: was it the purchase price in terms of the repurchase agreement, as claimed by Rainmaker, or was it a personal loan to Prof Khumalo, as Gravitas contends? It is on this basis that Gravitas requests a referral to oral evidence or trial.

16. Rainmaker's contention is that although Gravitas disputes the existence of the repurchase agreement, and relies instead on a personal loan as the cause for the payment of the R1.8million, this is not a "true" dispute of fact which, on the authorities, should be referred to oral evidence or trial. It contends that the matter can be decided on the papers. Furthermore, in line with the applicable authorities (which I refer to later), Rainmaker submits that Gravitas' version is so untenable that it should be rejected, and judgment granted in favour of the applicant, Rainmaker.

17. As to the competing versions of the parties, Rainmaker makes out its case for the existence of the alleged repurchase agreement on the following factual averments:

    (a) In February 2016 Gravitas, through Prof Khumalo initiated negotiations to re-sell its shares in BRL to Rainmaker, as Gravitas was anxious to obtain cash.

    (b) Prof Khumalo contacted Mr Schwankhart late on the evening of 24 February 2106 and was anxious to meet immediately.

    (c) They duly met and conducted the negotiations for the resale of the shares in the space of less than an hour.

    (d) The outcome of the negotiations was that the parties (with Rainmaker represented by Mr Schwankhart, and Gravitas by Prof Khumalo) entered into an oral agreement in terms of which Rainmaker repurchased Gravitas' shares in BRL for R1.8million.

    (e) The material terms of the agreement included that payment of the purchase price would be made by 12h00 on 25 February 2016.

    (f) A copy of proof of payment was annexed to the founding affidavit.

(g) Mr Schwankhart made numerous attempts thereafter to get Prof Khumalo, as the representative of Gravitas, to sign a written version of the oral repurchase agreement and the necessary paperwork to give effect to it. However, Prof Khumalo became evasive and refused on numerous occasions to sign any of the paperwork.

18. Much of the answering affidavit is devoted to dealing with the question of the conditions precedent. Prof Khumalo, on behalf of Gravitas, also deals, at relative length with what appear to be extraneous issues, such as corporate governance in the entities, the action proceedings pending between the parties, documents that Gravitas requested in terms of rule 35(14), allegations that BRL may not have been acting in accordance with the B-BBEE Act, and allegations that Rainmaker is denying Gravitas access to documents etc. There is relatively little by way of a response to Rainmaker's averment that the R1.8million was the purchase price under the repurchase agreement agreed between the parties.

19. What Prof Khumalo does say about this issue may be summarised as follows:

(a) The payment of R1.8million was paid to him in his personal capacity, and not into Gravitas' bank account, as it was never intended to constitute the proceeds of a sale of Gravitas' shares in BRL.

(b) The manner of payment was consistent with the manner in which Mr Schwankhart personally had made loans to him before.

(c) The loan was made to him by Mr Schwankhart personally.

(d) The payment to him was unrelated to both Gravitas and Rainmaker.

(e) There could not have been a repurchase agreement as none of the formalities set out in BRL's memorandum of incorporation for the sale of Gravitas' shares were even considered.

(f) Furthermore, Prof Khumalo was not authorised and therefore not able to sell the shares through the repurchase agreement.

(g) Prof Khumalo refuted the allegation that Gravitas had sold its BRL shares to Rainmaker in an email of 30 July 2016. This was in response to Mr Schwankhart's email of 27 February 2016, in which "*he first raised the allegation that I, on behalf of Gravitas, had sold my shares in BRL*". A copy of both emails is attached to the answering affidavit.

(h) The issue of the purported sale of the shares was "*a stratagem*" to ensure that Gravitas relinquished its shares in BRL.

20. In its replying affidavit, Rainmaker submits that Prof Khumalo's version that the payment of R1.8million was a loan is patently implausible:

(a) It attaches extracts from its books of account reflecting the amount of the payment and to whom it was made. Rainmaker submits that this is dispositive of the fact that the payment was not made by Mr Schwankhart personally to Prof Khumalo as a personal loan.

(b) Rainmaker acknowledges that the payment was made into Prof Khumalo's bank account but contends that this is not evidence that it was a personal loan. It states that this was the account nominated by Prof Khumalo into which he requested that the R1.8million be paid. A text message from Prof Khumalo contemporaneous with the time when Rainmaker says that Prof Khumalo and Mr

Schwankhart met to conclude the repurchase agreement is attached to the replying affidavit as evidence of this fact.

(c) It avers that the formalities required for the sale of shares in BLR's MOI were considered. As evidence of this, a resolution from the other shareholder in BLR, Eratis Technologies (Pty) Ltd is attached to the replying affidavit. The resolution notes that Rainmaker wishes to buy Gravitas' shares in BRL and its loan capital. Eratis agrees to waive its pre-emptive rights to the sale of the shares in terms of BRL's MOI, and, as a shareholder, it authorises BRL to enter into the sale agreement. The resolution is dated 24 February 2016. Rainmaker avers that the resolution was provided in accordance with clause 7.3 of the MOI.

(d) In addition, Rainmaker attaches emails between Mr Schwankhart and Prof Khumalo which it says bear out its version that the money was paid in accordance with the repurchase agreement, and not a loan.

(e) It also attaches pages of text messages between the same parties reflecting what Rainmaker says were its repeated requests to Prof Khumalo to sign the repurchase agreement so that his exit from BRL could be finalised.

21. As far as the law is concerned, the dictum of the Supreme Court of Appeal in *NDPP v Zuma* is often cited as more recent authority for the principles applicable to disputes of fact in motion proceedings:

"It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have been admitted by the respondent ... together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is palpably implausible, far-fetched or so clearly

untenable that the court is justified in rejecting them merely on the papers."[1]

(Emphasis added)

22. Rainmaker submits that Gravitas, through Prof Khumalo's denial of the existence of the repurchase agreement as being the *causa* for the payment is fictitious, palpably implausible and a transparent attempt at trying to evade its obligations under that agreement. On this basis, Rainmaker submits that Prof Khumalo's version, on behalf of Gravitas, falls to be rejected on the papers.

23. In its submissions, Gravitas refers to the authorities that warn courts against taking too robust an approach to disputes of fact on the papers in motion proceedings. It relies on *Soffiantini v Mould*,[2] in which it was held that due consideration should be given to the advantages of the court hearing *viva voice* evidence in these circumstances, rather than deciding them on the papers. Gravitas relies also on two full bench decisions of the KwaZulu-Natal High Court.[3] It submits that what emerges from these cases is that where a material dispute of fact exists in motion proceedings, a respondent's version should only be rejected if it demonstrates "clear falsity". Gravitas submits that even if certain inconsistencies can be identified in its version, they are not so clearly false as to warrant rejection without a referral to oral evidence or trial.

24. On my reading of the full bench decision in one of the cases referred to, viz. *South Coast Furnishers CC* (see below), the court did not purport to supplant the well-established principles for determining when it is permissible to reject a respondent's version where disputes of facts arise in motion proceedings. In fact, the court not only

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[1] 2009 (2) SA 277 (SCA)
[2] 1956 (4) SA 150 (E)
[3] *Sewmungal and Antoher v Regent Cinema* 1977 (1) SA 814 (N); *South Coast Furnishers CC v Secprop 30 Invesgtments (Pty) Ltd* 2012 (3) SA 431 (KZP)

cited the above dictum from *NDPP v Zuma*, but also applied those principles in upholding the appeal.[4] Where the court in *South Coast Furnishers CC* makes reference to the need for "*clear falsity*" to emerge from the papers, it is in the context of the evaluation of the creditworthiness of a witness. It does not seem to me to have been intended to introduce a stricter test than the one already laid down by the courts to determine when it is appropriate to reject a respondent's version on the papers.[5]

25. What does appear to be clearly demonstrated in *South Coast Furnishers CC* is that a court must consider the nature of any alleged improbabilities in the respondent's version before being robust in rejecting them. These probabilities must be considered within the context of all the evidence before the court, including the applicant's own papers. The court stated in this regard that:

> "These submissions (of the applicant regarding the alleged improbabilities in the respondent's version) have some force. However, they cannot be viewed in isolation. There are features of the applicant's case which must be weighed against the apparent improbabilities on which the applicant relies."[6]

26. In that case, the respondent had given a detailed explanation of facts which it said supported its case. The court found that while there were some improbabilities with the respondent's version, the applicant itself had elected not to respond to them in reply. This was one of the reasons why the court found that despite the existence of a measure of improbability, the court *a quo* had erred in rejecting the respondent's version on the papers rather than referring the matter to oral evidence.

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[4] See at 433G-434A; 439H-I
[5] At 439E-F
[6] At 438G

27. Unlike the respondent in *South Coast Furnishers CC*, Gravitas does not provide much detail in support of its version that the payment of R1.8million was a personal loan to Prof Khumalo rather than payment of the agreed purchase price under the repurchase agreement. In essence, it relies on a statement by Prof Khumalo to this effect in the answering affidavit; an averment that Prof Khumalo did not have authority to sell the shares; an averment that the formalities for the sale as provided for in BRL's MOI were not even considered; and the fact that payment was made into Prof Khumalo's personal bank account. There are no details provided about when the loan agreement was entered into or its terms.

28. Tellingly, the answering affidavit does not specifically deal with paragraph 11 of the founding affidavit, in which Mr Schwankhart describes a late night call from Prof Khumalo on 24 February 2016 saying that he needed cash and wanted to negotiate the sale of his (i.e. Gravitas') shares in BRL. It was this approach that Rainmaker says led to the negotiations that evening and the conclusion of the oral repurchase agreement. Gravitas provides a generalised answer in paragraph 69 by offering a broad denial of the content of paragraphs 10 to 13 of the founding affidavit and simply states: "*... it was never my intention to dispose of, or sell or engage in any process to relinquish Gravitas'shares in BRL.*"

29. It is common cause that the R1.8million was paid the next day, on 25 February 2016. It is telling, in my view, that Gravitas provides no response to the allegations that there was a telephone call, followed by a meeting between the parties, followed by the payment of the money the next day. Save for the generalised denial of the contents of the relevant paragraphs in Rainmaker's affidavit, we do not know, on Gravitas' version, whether indeed a meeting took place or not. We do not know, in the event that the

parties did meet as contended by Rainmaker, what was discussed, if not the repurchase agreement. Instead, there is silence from Gravitas as to what precipitated the payment (in the face of a factual version put up in the founding affidavit), and the court is left with impression that the loan contended for by Gravitas simply dropped from the air.

30. Gravitas' inadequate response to the averments made in the founding affidavit support Rainmaker's contention that its denial of the existence of the repurchase agreement as the basis for the payment of the R1.8million does not raise a genuine dispute of fact on the papers.

31. Not only is there silence from Gravitas about what precipitated the payment, but there are contemporaneous text messages that support Rainmaker's version. In its founding affidavit Rainmaker says that it subsequently made numerous attempts to get Prof Khumalo to sign the written version of the oral repurchase agreement on Gravitas' behalf, and that Prof Khumalo became evasive, and refused a number of times to sign. Once again, in its answering affidavit, these averments are met with a broad denial, together with an explanation that Prof Khumalo refused to sign because the documents "*sought to create a sale ... in circumstances where this was neither envisioned nor desired by either myself or Gravitas.*"

32. Rainmaker provides copies of text messages dated 25 February 2016. The first, from Mr Schwankhart says: "*Prof, my brother can assist so I will be able to make the payment. I'm waiting for the funds to clear. I need some help from you too please, which is to sign our original shareholders agreement when you exit, its the only protection we will have against the new guys. Are you okay to do that for us please?*" And later: "*R1m has been paid. Balance when my brother's money clears. Will let you*

*know when that is paid. Good luck Prof. I hope this decision changes your fortunes.*" (Emphasis added) Prof Khumalo simply responds: "*Fantastic!*". He does not query what Mr Schwankhart is referring to when he talks about his "*exit*" or "*the new guys*". He also doesn't comment on what Mr Schwankhart is referring to by the "*decision*" that may change his fortunes. Bearing in mind that Gravitas does not give a version as to what may have been discussed in the run up to these payments, the text messages can only be understood as referring to the negotiations of the evening before as described in the founding affidavit concerning the sale of Gravitas' shares, thus leading to Prof Khumalo's exit from BRL consequent on that sale.

33. An email (although not contemporaneous with the events of 24 and 25 February 2016) attached to the replying affidavit provides further background to Rainmaker's version. The email is sent from Mr Schwankhart to Prof Khumalo on 23 September 2016. In it, Mr Schwankhart says: "*At the root of this finality, is the agreement reached at Tashas, in Morningside, on 24 February 2016 at around 21h30, where you agreed to sell Gravitas' stake in the Company for a cash payment of R1.8million and the assumption of the R825,000 loan account the Company has against you in your personal capacity. I remember, vividly, how reluctant you said you felt about your exit - given your fond feelings towards the Company - but that matters greater than your shareholding in Rainmaker required your immediate attention; and how you implored me to make payment before 12h00 the following day (25th February) so that you would be able to secure your other, more pressing, business interests. I remember also you offering your regret about meeting late at night to conclude a discussion around your exit that had been brewing since you first announced this intention at an informal meeting of the board in August, 2015, and how you asked me to allow you time to communicate your exit to Lennox, Willem and the staff in person. At the closing of the meeting, I*

*remember standing to say that it was a big and sad day that you had decided to leave the Company since this had never been our wish, and that I could only imagine the enormous pressure you were under at the time. I assured you I would do my utmost to make payment within your tight deadline. I confirmed the critical details of the agreement, we looked each other in the eye and shook hands. The next day, I complied with and delivered on all our obligations. Payment was indeed made, and this payment was accepted by you, thus completing the transaction.*" The email is consistent with the contemporaneous text messages sent on 25 February, discussed earlier, which refer specifically to the exit of Prof Khumalo.

34. There is also further evidence to back up the reference by Mr Schwankhart in the 23 September 2016 email to earlier discussions in August 2015 regarding the exit of Gravitas from BRL. An email from Mr Schwankhart to Prof Khumalo on 24 August 2015 is attached to the replying affidavit. The email states that: "*I think that it's important for us to make sure your exit from Bongani Rainmaker is properly managed and is complete in all its detail. As a starting point, I suggest that we compile a single document that deals with the following ... agreement on the re-purchase price of your equity ... agreement on how to deal with and settle your loan account to the company... managing the statutory requirements of your exit regarding CIPC requirements as well as the associated transfer of shares ... .*" It seems quite clear from this that the exit by Gravitas from BRL through the repurchase of its shares had been on the agenda for some time before the alleged meeting and agreement on 24 February 2016. This lends the lie to Gravitas' assertion that Rainmaker's reliance on the repurchase agreement was merely a stratagem to exclude Gravitas from BRL.

35. There are also numerous text messages attached to the replying affidavit that confirm Rainmaker's averment that it tried over and over again to get Prof Khumalo to meet and to sign the written repurchase agreement and other documents to finalise Gravitas' exit from BRL. For example, on 10 March there is a text message from Mr Schwankhart to Prof Khumalo asking when they can meet with "*Leon and Willem (who were involved in BRL) so that we can update the guys and conclude the paperwork*". (words in brackets added). After no response, Mr Schwankhart writes again on 4 April 2016 saying: *"Are you around we need to finalise our paperwork please*". Prof Khumalo responds: "*Hallo Oli. I got your message. I shall revert.*" Two weeks later, on 19 April, Mr Schwankhart writes: "*Hi Prof, pls don't forget about me*". Prof Khumalo responds: "*I will call you later this morning. Pardon my delayed* response". Then on 5 May, Mr Schwankhart texts more anxiously that: "*I am taking some pressure getting our rainmaker governance in order. I have needed to break rank and have asked Simon to Draft your exit documents. I need to conclude with our Durban friends and am literally stuck Prof and need your support to conclude these dealings. Please make time for me so that we can tie up the loose ends please*" (my emphasis). Then almost 3 weeks later, from 24 May 2016 all the way up to 18 June there are repeated texts from Mr Schwankhart to meet with Prof Khumalo. Eventually, it seems that on 19 June arrangements were made to meet, although from later texts, it appears that further meeting requests were made. In mid-July, Mr Schwankhart was still texting Prof Khumalo saying that they needed to meet and that they needed to resolve the paperwork. The last text message attached was from Prof Khumalo saying that he could not meet that day (25 July 2016) as he was not well.

36. Two days later, Mr Schwankhart sends an email to Prof Khumalo. A copy was attached to Gravitas' answering affidavit. In the email, Mr Schwankhart says, amongst

other things in a paragraph numbered 1: "*For clarity and completeness, I have also attached the sale of share agreement which formalizes the sale of your shares in Feb 2016 for R1,8m which was paid at the time at your request, on trust and on a handshake plus R825,000 paid previously - so a total of R2,6m for your 10% of your shares that had vested, the balance of the 20% being invested and revert to Rainmaker as the original owner.*" It was this email that led to Gravitas' first denial of the existence of the repurchase agreement. In his response on 30 July 2016, Prof Khumalo states: "*I reject your assertions in the sub paragraph numbered 1. In your email and deny that I have disposed of, sold or engaged in any process to relinquish in any way my shares or stake [or any part thereof] in the Company. I ask that this subject, "for clarity and completeness", be discussed in all its aspects (including loans) at the requested meetings, most particularly the SGM.*" In its answering affidavit, Gravitas (through Prof Khumalo) says that this was the first time that Rainmaker had raised the allegation that he had sold Gravitas' shares in BRL.

37. From the text messages referred to earlier, it is plain that Gravitas' exit from BRL had been referred to many times between Mr Schwankhart and Prof Khumalo in the previous months. It simply cannot be true that this was raised for the first time in the email of 27 July 2016. Nor had Prof Khumalo ever queried what Mr Schwankhart meant when he referred to his "*exit*" from the company and the need to finalise the relevant documents.

38. What is also critical, in my view, is that Prof Khumalo's denial of the agreement in his email of 30 July 2016 is stated in broad terms. Although in his 27 July email Mr Schwankhart made specific reference to the payment of R1,8 million as being for the repurchase of the shares Prof Khumalo does not assert in response that the payment

of R1.8million was a personal loan. Had this truly been the position, it is reasonable to expect that he would have made this assertion then and there, rather than waiting for the present proceedings to raise this defence.

39. If Gravitas' version is considered in light of all the evidence before the court, it is patently lacking in substance and plausibility. The other factors relied upon by Gravitas do not take the matter further, in my view. The payment of the money into Prof Khumalo's account is neither here nor there without the existence of further evidence to lend substance to his assertion that it was a personal loan. The averment that he did not have authority to sell the shares is made as a bald averment. He does not explain why he did not have authority when, on the papers, it is clear that for all intents and purposes, Gravitas was treated as Prof Khumalo's entity, and the shares were referred to interchangeably as being both his and Gravitas'. This bald assertion that he did not have authority to sell the shares is not sufficient to raise a genuine dispute of fact. The same holds true of Gravitas' bald assertion that no consideration was given to the formalities for the sale of shares. In any event, Rainmaker demonstrates that important formalities were considered.

40. The improbabilities of Gravitas' version are significant. It's reliance on a personal loan to Prof Khumalo as being the source of the payment of R1.8million is not backed up by any plausible evidence, and does not go much beyond a bald assertion. Gravitas fails to provide answers to important averments relating to the events that precipitated the payment. Further, in the critical email in which it denies what it says was the first assertion by Rainmaker that Gravitas had sold its shares, Gravitas inexplicably fails to assert that the payment of R1.8million was not for the sale of its shares but was a personal loan from Mr Schwankhart to Prof Khumalo.

41. For all the above reasons, in my view, this is one of those cases where a robust view is justified and there is no necessity for a referral to oral evidence or trial. I am further satisfied that the version put up by Gravitas is so palpably implausible and so clearly untenable that it falls to be rejected on the papers. I find, accordingly, that Rainmaker has established that the parties entered into the repurchase agreement, and that Rainmaker duly paid the R1.8,million in fulfillment of its obligations under that agreement.

THE VALIDITY OF THE SALE AGREEMENT

42. As I indicated earlier, in order to succeed, Rainmaker must establish not only the existence of the repurchase agreement, but also the invalidity of the initial sale agreement in terms of which Gravitas purchased its shares in BRL. It is this invalidity that will establish that the repurchase agreement consequently also had no basis in law, and hence that the R1.8million was paid in error.

43. In its answering affidavit, Gravitas did not dispute that the suspensive conditions precedent were never fulfilled. However, it disputed that this had the consequence that the initial sale agreement was void *ab initio*. It relied on a number of grounds in support of this.

44. Gravitas said that the conditions precedent were waived. There can be no merit in this assertion, as the sale agreement specifically provided for waiver by Gravitas of this conditions "*by written notice* " (my emphasis) by the purchaser to the other parties (clause 8.3). Gravitas does not contend that it ever gave written notice of waiver to the other parties.

45. It further contended that by virtue of the parties' conduct, a new agreement came into existence between the parties in terms of which the conditions precedent were waived. There is some overlap here with the initial waiver point, but there is additional reason for why there can be no merit in it. In addition to the specific requirement for waiver, referred to earlier, the sale agreement specifically provides that no amendment to the agreement could be effected except by written agreement between the parties (clause 11.6). Accordingly, to be effective and binding, any waiver by agreement between the parties would have to have been reduced to writing and signed by the parties. It could not have been effected by conduct.

46. Gravitas relied on the fact that the parties conducted themselves as if the sale agreement was valid, and that both parties intended that Gravitas would acquire the shares. It contended that for these reasons, Rainmaker should be estopped from relying on the non-fulfillment of the conditions precedent. Further, that the fulfillment of the conditions precedent were mere formalities and thus their non-fulfillment did not affect the validity of the sale agreement.

47. Again, there is no merit in these contentions. The terms of the sale agreement are clear: clause 8.4 provides that in the event that the suspensive conditions precedent are not fulfilled, the agreement "*shall be void ab initio*". In *Africast (Pty) Ltd v Pangbourne Properties LImited*,[7] the Supreme Court of Appeal ruled on the issue of the non-fulfillment of suspensive conditions precedent in an agreement of this nature. It held as follows:

> "A contract containing a suspensive condition is enforceable immediately upon its conclusion but some of the obligations are postponed pending fulfilment of the

[7] 2014 JDT 0616 (SCA)

suspensive condition. If the condition is fulfilled the contract is deemed to have existed *ex tunc*. If the condition is not fulfilled, then no contract came into existence. Once the condition is fulfilled, '[T]he contract and the mutual rights of the parties relate back to, and are deemed to have been in force from, the date of the agreement and not from the date of the fulfilment of the condition, ie *ex tunc*.'"[8] (my emphasis)

48. As in the present case, in *Pangbourne*, both parties had believed the agreement to have been valid and binding despite the non-fulfillment of the conditions precedent. The defence of estoppel was also raised by the respondent in that case. The SCA nonetheless stated the legal position to be that:

> "Upon signature of the agreement an inchoate agreement came into being, pending the fulfilment of the suspensive condition. In the event that the suspensive condition was not fulfilled, neither party would be bound to the agreement. ... The terms of the suspensive condition were not met. It follows that the contractual relationship between the parties lapsed due to non-fulfilment of the suspensive condition."[9]

49. The legal position is thus clear. The sale agreement expressly provided that failure to fulfill the conditions precedent would lead to invalidity (or voidness) *ab initio*. Thus, it simply cannot be that the conditions were a mere formality, as suggested by Gravitas. Nor can Gravitas rely on estoppel: estoppel cannot be used to revive an agreement that by law never received the breath of life to begin with.

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[8] At para [39], with reference to R H Christie and G B Bradford The Law of Contract in South Africa 6th ed (2011) at 151-153; S W J Van der Merwe, L F van Huyssteen, M F B Reinecke and G F Lubbe Contract General Principles 4th ed at 253 and the authorities cited there at footnote 276.
[9] At para [40]

50. For all of these reasons, I am satisfied that Rainmaker has established that the initial sale agreement was void *ab initio*. I am satisfied, too, that despite this, like Gravitas, Rainmaker *bona fide* but mistakenly believed that the sale agreement was valid, otherwise it would not have paid R1.8million for the repurchase of the shares. In the circumstances, I find that Rainmaker has established its claim for the repayment of the repurchase price.

ORDER

51. I make the following order:

1. The respondent is directed to make payment to the applicant of the amount of R1.8million ("the principle debt").
2. The respondent is directed to pay interest on the principal debt at the rate of 10.5% *per annum per tempore mora* from 17 November 2016 (being the date of the letter of demand) to the date of final payment.
3. Respondent is directed to pay the costs of suit, including the costs of senior and a junior counsel.

**R M, KEIGHTLEY**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING : 29 OCTOBER 2018

DATE OF JUDGMENT: 26 NOVEMBER 2018

**APPEARANCES**

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|---|---|
| APPLICANT'S COUNSEL | : C WHITCUTT; FR MCADAM |
| INSTRUCTED BY | : NORTON INCORPORATED |
| RESPONDENT'S COUNSEL | : DG TOBIAS |
| INSTRUCTED BY | : NDAMASE INCORPORATED |