

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2022/8083**

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

21/01/2026

DATE

SIGNATURE

In the matter between:

NADESONS INVESTMENTS (PTY) LTD

Plaintiff

and

VALUE CAPITAL PARTNERS (PTY) LTD

Defendant

JUDGMENT

MANOIM J:

Introduction

- [1] This case involves a contractual dispute over the payment of a dividend pursuant to a sale of shares in a listed company called GPI. The plaintiff, Nadesons Pty Ltd (Nadesons), which sold the shares in GPI, claims payment of a dividend of R17.6 million rand from the defendant who bought the shares, Value Capital Partners Limited (VCP). VCP denies it owes payment.

- [2] Only two people, Dr Hassan Adams from Nadesons, and Sam Sithole from VCP, know the terms of the agreement between them. There is no disagreement about the price for the shares. Moreover the defendant has paid the purchase price and the shares were transferred to it. There is also no disagreement that the shares were being sold ex dividend. This, in normal commercial parlance means that the purchaser would not get the dividends on the shares once they were declared. The dividend would be retained by the seller.

- [3] The dispute concerns when the dividend had to be paid and how much it was to be. Although the shares were sold to VCP in March 2019, GPI did not declare a dividend at the end of that financial year (June 2019) or the following financial year. The next time GPI declared a dividend was in December 2021. The dividend was 88 cents per share. It is common cause it included a capital reimbursement to shareholders, as one of the underlying businesses had been sold.

- [4] The plaintiff's case is that it was entitled to this full dividend regardless that it was only paid in 2021 and that it was a special dividend. The defendant claims that Adams had represented to it that a 10 cent dividend was likely and that it

was to be paid for the 2019 financial year. Since no dividend was paid for that year, no amount was owed to it.

- [5] But Hassan Adams passed away before the trial commenced making the plaintiff's case more difficult. But before I discuss the issue further, it is necessary to go into the history of the contacts between the two groups.
- [6] VCP is an asset manager. Its speciality is to invest in listed companies whose share price is below its intrinsic value.¹ Its modus operandi is straight forward. It buys shares in the languishing company, proposes certain changes and hopes to turn it around to drive up the share price. It buys strategic stakes rather than majority stakes, and then strikes an alliance with other disaffected shareholders to drive through the changes it considers the target company requires.
- [7] In 2018 VCP identified Grand Parade Investments Limited (GPI) as one such company. VCP came across it because GPI was the empowerment shareholder of certain companies which had casino licences in which VCP was also invested.
- [8] But GPI was proving a controversial shareholder in the casino groups. Anxious that the dissident would become obstructive, VCP embarked on a strategy of turning GPI around by buying into it. The main protagonist from VCP was its co-founder and then director, Sam Sithole, who is still with the company. His counterpart in this saga was Adams representing Nadesons.

¹ According to Investopedia "*The intrinsic value of shares refers to the true, fundamental worth of a stock based on its underlying business fundamentals, rather than its current market price.*" Accessed on 3 November 2025,

- [9] Adams was the founder of the GPI group, whose early fortunes were founded on stakes it had in licenced casinos in the Western Cape, where GPI was the empowerment partner. He had leveraged the casino stakes to get GPI into other businesses. He had secured the South African franchise for Burger King, the prominent United States hamburger brand, as well as two other US food brands, Dunkin Donuts and Baskin Robbins. Adams held his stake in GPI through the plaintiff, Nadesons.
- [10] Adams and Sithole had first met in 2018 to discuss the casino investments. That contact is not relevant to this matter, but it did establish the first business relationship between the two men. The crucial and last meeting between them took place on 29 March 2019. At that stage Adams was already seriously ill. Sithole met him at Adams' flat in Sea Point in Cape Town. The purpose of the meeting was to discuss VCP's proposal to buy a further block of shares in GPI. But Sithole also wanted to discuss proposals for turning the company around.
- [11] The only person who can testify about what was discussed at that meeting is Sithole. This is because he and Adams were the only persons present and Adams, as noted earlier, had passed away before the trial commenced. Sithole did testify, although he conceded that his recollection of that meeting, now more than seven years ago, was hazy.
- [12] His main recollection was that an agreement was reached on the following. That Nadesons, Adams family investment vehicle, would sell 20 million shares in GPI to VCP at a price of R3.00 per share. Second, that Adams would procure that another entity, the GPI Women's Empowerment Trust, would sell a further 14 million shares to VCP at the same price of R3.00 per share. It was further

agreed that the shares, both for Nadesons and the Women's Trust, would be sold ex dividend. Ex dividend means that any dividend that becomes payable on the shares would be for the benefit of the seller, not the buyer. Thus far the plaintiff does not dispute this version of the meeting.

[13] What is in contention is what the ex-dividend agreement meant. Sithole cannot recall the exact language used in the discussion. What the defendant relies on instead is a series of emails, commencing with one from Sithole, in which he seeks to confirm what had been agreed at the 29 March meeting. Adams replied to the email to which Sithole responded, in the form of confirmations of what Adams had set out in his email. This exchange took place from 1 to 2 April 2019.

[14] The plaintiff in turn relies not on this email exchange, but a later WhatsApp exchange between the two men on 8 April 2019. I return to the content of the emails and WhatsApp's later in this judgment, but it is worth noting that neither expressly answers the two key questions about the dividend in this case – how much it was and when was it to be paid.

[15] This lack of specificity explains why both parties had to resort to last minute amendments to their pleaded cases.

The pleadings

The Pre-amendment pleadings

[16] The pleadings in this matter are brief because the facts are mostly common cause. For this reason, I confine myself to how the issue of the dividend was pleaded. The plaintiff pleaded that the contract was concluded on or about 8

April 2019. As to its form, the plaintiff's uncertainty on this point becomes evident from the manner of the pleading. The plaintiff pleaded that:

“On or about 8 April 2019 and at Cape Town, alternatively Johannesburg, the plaintiff, duly authorised and represented by Dr. Hassen Adams, and the defendant, duly authorised and represented by Mr. Sam Sithole, concluded a written, alternatively oral sale agreement, of which the terms were embodied in writing (the sale agreement)”.

[17] On the issue of the dividend the plaintiff pleaded that:

“5.3. the defendant would acquire the shares ex-dividend, in that, upon the declaration of a dividend by GPI pursuant to the sale and transfer of the shares, the plaintiff would be entitled to such dividends due in respect of the shares;

5.4. the transfer of ownership of the shares would be effected on payment of the purchase price (excluding the dividend yet to be declared by GPI); and

*5.5. the defendant would pay to the plaintiff the dividend in respect of the shares **within a reasonable time after it was declared by GPI.**” (My emphasis)*

[18] Notably the pleaded case does not say how much the dividend would be or when it would be declared. The sole temporal limit is that the dividend once declared would be paid within a reasonable time.

[19] The plaintiff went on to plead that on 8 December 2021, GPI declared a dividend of 88 cents per share. This, the plaintiff pleaded, entitled it to the dividend in an amount of R17,6 million. (The arithmetic of how this amount was arrived at is

not controversial – the plaintiff had sold the defendant 20 million shares – multiplied by 88 cents, this is a figure of R17,6 million).

[20] The plaintiff later amended its particulars of claim in one crucial respect. But before I consider this, I must set out the defendant's plea, which likewise underwent an amendment from what was initially pleaded.

[21] The crucial point of difference in the defendant's pre-amendment plea was that on its version:

5.1.1. GPI would potentially be declaring a dividend of approximately 10 cents in the period April to June 2019; and

5.1.2. the plaintiff wanted the amount of the dividend that may be declared by GPI during the period April to June 2019 to be paid to it notwithstanding the sale of the shares to the defendant. (My emphasis).²

The first hearing

[22] The trial then proceeded on 2 September 2024, based on these pleadings. The plaintiff called two witnesses; Dr Adams' son Ryaan Adams, who for convenience I will refer to as Adams junior, (simply for convenience to distinguish him from his father and not to diminish him) , and Mr Serveras Smith, who was the chief financial officer of Nadesons from 1 July 2019 to 13 September 2022.

[23] It is common cause that neither were directly aware of the terms of the agreement between Adams and Sithole. Thus, their evidence on this point is

² The underlined portion was later amended.

confined to what Adams had told them about the dividend. The plaintiff seeks to have this evidence admitted under Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (the ‘Hearsay Act’). The defendant challenged the admissibility of this evidence, and I will return to this topic later in this judgment.

[24] The thrust of their remaining non-hearsay evidence, during this first hearing, was to show that the company had never historically declared a dividend during the period April and June, and hence this version of the agreement, as pleaded by the defendant, was improbable. The plaintiff then closed its case, and the defendant applied for absolution. The matter was postponed till the following day to allow the plaintiff an opportunity to prepare its reply. But on the following day the defendant’s counsel announced that it was bringing an application to amend its plea. There was some dispute over the timing of this application, but eventually the defendant tendered costs and the matter was postponed sine die so that the plaintiff could respond to the case on the basis of the amended plea. Any prejudice to the plaintiff was thus addressed by the opportunity for the postponement and the tendering of costs.

[25] In its amended plea the defendant retreated from its assertions that the dividend would be declared for the April to June 2019 period and instead asserted that Adams had represented to Sithole that:

“5.1.1 He was confident that the strong third quarter performance of Burger King to 31 March 2019 would support a dividend declaration of 10 cents per share for the year ending 30 June 2019.”

5.1.2. The plaintiff requested that if such dividend is declared by GPI in respect of the financial year ending 30 June 2019, that the plaintiff be paid such amount.

[26] And further:

“5.2.3 if GPI declared a potential dividend of 10 cents per share in respect of the financial year ending 30 June 2019, then the defendant would pay to the plaintiff the amount of such dividend;”

[27] When the trial resumed again on 21 October 2025, there was a further twist. The plaintiff's counsel announced that the plaintiff would be amending its particulars of claims to provide for an alternative version. There was no objection from the defendant, so the amendment was allowed. What the plaintiff now alleged, in the alternative, was there was to be a dividend of 10 cents a share. Hence if the alternative version was established, then the claim was reduced to one of R2 million. Nevertheless, although the alternative version was a concession on what amount was payable, it was not on when it was payable. Thus, even on its alternative version, the plaintiff was still pleading that this (now R 2 million) was payable as and when a dividend was declared.

[28] The plaintiff then by consent re-opened its case and recalled both its witnesses. Once again, the plaintiff's case was hampered by the fact that it no longer had Adams to rely on to prove the terms of the agreement. Instead, it led its case as one on inference based on the financials. Its case was that Adams could never have confined himself to a dividend paid at the end of the June 2019 financial year as he must have known that GPI, now entering the final quarter of its financial year, was unlikely to be paying a dividend. The evidence of the witnesses (again Smith and Adams junior) amounted to an evaluation of the company's financials to show why such a version was unlikely and why the plaintiff's version was more likely.

The evidence

The hearsay evidence

- [29] The first question is whether I should admit the evidence of Smith and Adams junior, on what Adams had told them about the payment of the dividend. Both counsel made lengthy submissions on the subject. Other than illustrating the fact that the case law on the Hearsay Act shows considerable differences in the approach courts have taken, I did not find this debate illuminating.
- [30] Nevertheless, I consider that the plaintiff had justified why it needed to lead hearsay evidence. Adams was still alive, although extremely ill, when the litigation commenced, but by the time of the trial he had passed away. The fact that a party's key witness is no longer available to testify in these circumstances justifies the invocation of the Hearsay Act. As stated in *S v Cupido*, the primary objective of the Hearsay Act " *...is to cater for non-witnesses who are no longer available to testify due to, for example, death or mental incapacity after the incident.*"³
- [31] Although accepting this, the defendant criticised the plaintiff for not attempting to do more to ensure that an earlier date was secured or evidence was obtained on commission. I do not think this criticism is justified. I was informed that the plaintiff's legal team had sought to get an earlier hearing date from the Deputy Judge President but this request was refused. Once Adams had passed away the plaintiff's choices were limited.

³ *S v Cupido* 2024 JDR 0034 (SCA) at para 47.

[32] That said, although Smith and Adams junior recall being told a dividend was due, their evidence lacked any specificity about when and how much. Those are the two key issues in this case, and they were not able to take the plaintiff's case on this point any further. Moreover, neither were aware of the email trail in April 2019, that preceded the WhatsApp's.

[33] What matters is what was told to them and when. For the period between the date on which the shares were sold and until the GPI board decided not to declare a dividend for that year, it would be common cause that Nadesons could have expected to receive a dividend on the shares it sold if a dividend was declared. If this was what was conveyed to them by Adams this would not be controversial. Then for the period after the special dividend was declared by GPI in November 2021, it is likely that at least Smith was told by Adams that this dividend was due to Nadesons. This can be inferred from the fact that Smith was instructed to send an invoice for the claimed amount on 8 December 2021.

[34] But what mattered for their evidence was to explain what they were told was happening to the dividend during the intervening period – after the June financials were released (20 September 2019) and before the 2021 dividend was announced on SENS on 11 November 2021. Was the dividend still expected and if so, how much? Thus although I have admitted their hearsay evidence, I do not find it relevant to the points in issue in this case.

The Nadesons' financials

[35] One place one might have expected Adams' version of the dividend to appear would be the minutes of Nadesons given that Nadesons, not Adams personally, would be acquiring the dividend. Yet there is no mention of the dividend in the

minutes although the sale of shares is recorded. On 8 April 2020, the minutes of the previous three years were approved. According to Adams junior, although the 2020 minute refers to the sale at R3 per share the reason no dividend is mentioned is that it was still anticipated. This is not a particularly convincing explanation. So these minutes do not take the plaintiff's case any further and rather, if anything, are consistent with the case of the defendant.

GPI's 2019 financials

- [36] GPI's financial year ends each year on 30 June. In 2019 GPI's Annual Financial statements show that it had a basic loss of 8.48 cents per share. No dividend was paid. Since Adams was discussing the issue at the end of the third quarter, with the company having suffered a loss in terms of the interim results after the end of the second quarter, it was argued that he could not have contemplated a dividend would be paid at the end of that year. Indeed, the dividend history of the company for the preceding financial years did not present a picture for optimism as no dividend had been paid for the previous few years.
- [37] Thus, the plaintiff argued, it is improbable that Adams would have told Sithole that a dividend of 10cents was likely at the end of the 2019 financial year.
- [38] What served as grist to the mill for the plaintiff's further argument that a 2019 year-end dividend could not have been contemplated, was a document that had been discovered subsequently by the defendant after the first hearing. Prior to Sithole's meeting with Adams, VCP had conducted its own due diligence on GPI and took a dim view of its short-term prospects. It is a lengthy document but the conclusion was that GPI was unlikely to return to profit in the short term. This document had been prepared in January 2019, and was based on the mid-

year financials of GPI which reflected a loss. The plaintiff argued that if VCP with its “clever” analysts did not foresee a dividend then, it was highly unlikely that Sithole who had participated in its preparation and had sat in on the presentation to the board on 28 January 2019, could have understood otherwise.

[39] Thus, the argument was that on the probabilities, Sithole must have understood that no dividend at the end of 2019 was likely and hence must have had the same understanding as Adams, that the agreement was that the dividend would be paid within a reasonable time but not confined to the 2019 year end.

[40] Sithole, when cross-examined on this, explained that the due diligence was premised on what historic public information was available to VCP then, namely the mid-year December results and the preceding years. The other information was based on assumptions from those in the industry. But VCP did not have the same non-public, current information, that Adams had access to, as to how the GPI business was prospering after the third term; in particular on whether the performance of Burger King had turned around.

[41] Thus, I do not consider this due diligence report to be destructive of Sithole’s version.

[42] Nor do I consider the 2019 Annual Financial statements contradict the defendant’s version. Granted GPI did not pay a dividend that year. But the company had a headline profit per share of 8.91 cents, up from a loss in headline earnings in the previous 2018 financial year of 11.18 cents. Even the loss per share of 8.48 cents was an improvement on the previous year of 11.66 cents per share. Burger King showed great improvement at the end of that year.

If it was the performance of Burger King that had made Adams confident about a likely dividend at the end of the June 2019 financial year, there was a factual foundation for this. In the report the following is said about Burger King:

*“Burger King has reported a significant R38.8 million improvement in headline earnings with a positive (profit) contribution of R11,7 million compared to a loss R27.1 million in the prior period. The profitability of the business has been long awaited by the investment community and is a major milestone in the life of the business. This was driven by strong top line growth due to new restaurant sales and a substantial increase in same store sales of 10.3% compared to prior year. Gross margin gains during the second half of the financial year and an improvement in labour margins, further assisted the improvement in the headline earnings contribution.”*⁴

[43] Further on in the same report it is stated that:

*“Burger King's sales for the year increased by 34.2% from R756.2 million in the prior year to R1.015 billion in the current year. Burger King continued to focus on market share growth by actively managing the menu pricing architecture to increase traffic through the stores.”*⁵

[44] Adams, as the then chairman, presented these financial reports in September 2019. It is reasonable to assume that in March 2019, at the end of the third quarter, he had a rational basis for concluding that a dividend might be paid, based on this improvement. Granted GPI is a holding company, and not all its income comes from Burger King, but these figures suggest that it is reasonable

⁴ Trial record page 018 -403

⁵ Ibid, 018-405.

to assume that at the end of the third quarter, he could have anticipated that a dividend might be payable at the end of the 2019 financial year.

The lead up to the claim

- [45] I next consider whether Sithole's evidence on the agreement has been consistent since he became aware of the claim which was first brought to his attention not by Adams, but by Serverus Smith.
- [46] Smith joined Nadesons as Chief Financial Officer on 1 July 2019, thus after the agreement in this matter had been concluded. On his evidence Adams had told him that a dividend would be forthcoming from GPI, but not any of the details of when and how much. The first time he became aware of the agreement in respect of the dividend was when Adams instructed him to issue an invoice to VCP for the dividend payment. For this he was given sight of the April 2019 WhatsApp exchange, which was attached to the particulars of claim. He sent off the invoice on 8 December 2021, having calculated what the dividend payment should have been, based on the dividend declaration at the end of GPI's 2021 financial year as it appeared in the SENS announcement that had come out just before.
- [47] Sithole responded to this invoice in an email dated 15 December 2021. Whilst he acknowledged that the sale of the shares was ex dividend, he disputed Nadesons version on the payment terms for the dividend. He said the agreement was based on the representation that GPI was likely to declare a 10c dividend "*within a short period after the conclusion of the transaction*". But Sithole went on to say as the contemplated dividend was not declared in 2019, the right to claim payment never accrued to Nadesons.

[48] Sithole went on to state:

“It was never in contemplation of the Parties at the relevant times, nor would it make commercial sense on any interpretation of the terms of the transaction, that the specific agreement between the Parties regarding dividends would apply beyond the financial period in which the transaction took place, let alone in perpetuity for any future dividends, which at face value appears to be the basis of Nadesons claim.”

[49] Sithole’s oral testimony was consistent with what he stated in this email.

WhatsApp and emails

[50] I next consider the contemporaneous documents that were annexed to the respective pleadings because they are the only form of direct communication between Adams and Sithole in the record. The plaintiff annexed copies of WhatsApp messages exchanged between Sithole and Adams, whilst the defendant annexed an earlier email exchange between them. Since the sequence matters, I start with the emails attached to the plea.

[51] Recall that the meeting took place on 8 April 2019 at Adams’ Sea Point flat. According to Sithole the essential elements of the agreement were concluded then. Sithole on 1 April 2019 then sent an email to Adams in which he sought to confirm the terms of the agreement. This suggests the terms had already been agreed between the two men and what Sithole sought to do, was to confirm they both had the same understanding.

[52] When he testified, Sithole, by his own admission, had a poor recollection of what was said at the 29 March 2019 meeting. For this reason, I regard the

contemporaneous emails exchanged between the two men as a more reliable source for what was understood, supplemented by Sithole's interpretation of certain aspects. It is important to note that the men had discussed a wide variety of subjects. It does not appear from the tone of the communications that the dividend held much significance for them. At issue for them was the future governance of GPI, with the defendant and others wanting Adams to step down as executive chairman in favour of another nominee, and the future sale of assets. These issues occupied most of the detail of the first email which Sithole sent on 1 April 2019 (the Monday after the Friday meeting).

- [53] In his 1 April email, Sithole states that he wants to confirm what he terms their *"discussion/ agreement"* on the previous Friday. Most of the items canvassed in the email do not concern the present matter. What does, is how Sithole summarises the discussion on the sale of shares as follows:

"You have agreed to sell 33-34 million GPI shares to VCP or its nominees for R3/share ex-div of a potential 10cents dividend per share. You anticipate 14 million shares to be available this week, and the other 20 million shares between now and end of April 2019;

- [54] This email from Sithole is followed up by one from Adams in which he repeats the outlines of the discussion contained in the Sithole email. Again, the sale of shares occupies one paragraph of the email and largely follows the framing set out in the Sithole email. Adams wrote:

"1(a) - Sale of shares in GPI: The transaction of the sale of 20 million shares from Nadeson Investments to VCP and the sale of approximately 14.3 million shares in the Trust has been agreed by the parties at a price of R 3.00 per share

(ex Div) of a potential 10c dividend per share. **Confirmed**” (The black type is the response of Sithole, the underlining is my emphasis)

[55] Sithole then sent this email back to Adams indicating that he confirmed this. Notably in relation to the dividend payment, Adams had copied the Sithole formulation in the exact terms in the latter’s email to the former on 1 April 2019. The only difference in their formulations involves the number of shares to be sold to VCP and by whom. Neither fact is relevant to the present dispute but is relevant to the context of the later WhatsApp sent by Adams on which the plaintiff relies for its claim.

[56] The next communication between the two men is a series of WhatsApp messages. The first was sent by Sithole on 8 April 2019, in which he asks if the share trades were to go through on that day or the next. Adams replies in which he says he states:

“I have the resolutions of the Trust in hand and the sale agreements will be forwarded today.”

[57] Sithole in his oral evidence explained what this reference meant. When the two had met Sithole had expressed a wish to buy additional GPI shares. Adams had indicated that he could arrange the sale of 14 million shares from the GPI Women’s Empowerment Trust. Although Adams was not a trustee, he was apparently able to persuade the Trust to agree to the sale on the same terms as Nadesons. However, the Trust, unlike Nadesons, required certain formalities before a sale could take place. First, there needed to be a sale agreement and second, the necessary resolution. A sale agreement was drawn up by one of Nadesons’ employees and has been discovered. It is mostly a standard form

sale of shares agreement, but notably it contains no reference to the sale being concluded ex dividend. As it happened this agreement was never signed, and no sale took place between VCP and the Trust.

- [58] What the plaintiff seeks to rely on is the following sentence in the same WhatsApp message:

“Can we include the divvie, (sic) because once we conclude the shares will be transferred to you and distribution of dividends is passed directly to you.”

- [59] Sithole replies that he only has a mandate for R3 per share ex dividend but that he was *“...happy to pass this on to you once declared.”* This phrase then becomes the source of the plaintiff’s case that the agreement was for any dividend payable once declared i.e. not subject to any time restriction as to when declared.

- [60] But is Sithole’s reference to being happy to pass this on to you once declared, a novation of the agreement as reflected in the prior emails, or simply a restatement of the prior agreement, in less formal terms, or only a reference to the shares in respect of the GPI Women’s Empowerment Trust. Sithole’s evidence is that it referred only to the Trust. This makes sense in the context.

- [61] The agreement on the dividend had already been confirmed in the terms set out in the earlier emails. It would have been redundant to record them again a few days later. Sithole’s version that this reflected the Trust transaction is the more likely one. There was uncertainty in Adams’ mind about whether the Trust would also receive the dividend and hence the need for the reassurance which Sithole then gave him. But even if it referred to the dividend payable in respect

of both transactions (the Nadesons and that of the Trust as both would on Sithole's version been on the same terms) the reference to the "divvie" is not inconsistent with the terms of the earlier emails.

[62] Plaintiff's counsel sought to discredit Sithole's evidence by suggesting that his version on the dividend was inconsistent. Sithole to this end was cross examined on why the defendant had amended its plea at the end of the first day of hearing. Recall that the defendant changed from alleging that the dividend would be paid at the end of April 2019 to at the end of the 2019 financial year. It was suggested that this change of version came about because of the evidence of the plaintiff's witnesses that no dividend had been paid in April during the past financial years. Sithole who was testifying in the second round of the hearing some thirteen months later, admittedly could not recall why the plea had changed. His own version is that dividends are normally paid only at the end of a financial year as that is when the company knows if it can pay a dividend.

[63] I do not find the fact that the plea was amended in this respect, albeit at the eleventh hour, significant. Sithole is not a detail man as his emails suggest. More likely is that when he gave instructions about a likely dividend because of the third quarter improvement, he was misunderstood by his legal team. Indeed his email in response to the invoice from Smith, prior to the launch of these proceedings, which I discussed earlier, is consistent with his evidence and the amended plea. Thus it is not a recent fabrication.

[64] Nor does this alleged inconsistency materially alter what matters for his version. The dividend was to be paid in respect of the financial year during which the

shares were sold. As he testified this reflects normal commercial understanding that if a share is sold ex dividend it means that the dividend becomes payable in respect of the financial year during which the transferred shares were sold.

[65] But this is not the only factor that favours the defendant's version. If Adams had been expecting a dividend at some time in the future in an indeterminate amount why was this never reported back to the Nadesons' board of directors. No mention is made of the dividend during the meetings of the period. Whilst this fact alone may not be decisive, as Adams ran Nadesons as if he was the sole director and owner, the size of the amount suggests he would have recorded this at some stage or at least confided in his son a fellow director. Smith who issued the invoice was not briefed earlier on this even though he was the financial director. Neither Smith nor Adams junior were aware of the email exchange until they prepared for trial.

[66] Sithole has suggested that Adams was motivated to claim the dividend when he did not get his way with the GPI board over a dispute. Adams had solicited Sithole's support for certain resolutions that the former wanted to propose at GPI's Annual General meeting. When Sithole declined, his evidence is that Smith had sent the invoice to VCP on the morning of the AGM. It was sent at 10h37 and the meeting was scheduled to commence at 18h00 that same day.

[67] Whatever the legitimacy of Adams' complaint, the timing is suggestive that he was using the prospect of litigation over the dividend dispute as leverage on the governance issue. Whilst this propitious timing of the demand is not decisive, it does suggest that Adams did not seriously entertain the expectation that he was still entitled to a dividend given his silence on the issue until then.

- [68] It was argued for the plaintiff that until the dividend was declared that December in 2021, Adams had no need to press for the dividend.
- [69] Let me reprise the chronology and facts of this dividend in more detail. On 11 November 2021 GPI announced on SENS that it was declaring a special dividend of 88 cents per share. It was announced in the media on 23 November 2019. Nadesons through Smit then invoiced VCP for this dividend on 8 December 2019 – an amount of R17,6 million, hence the main claim. The reason that this dividend was so high was that it involved a capital payment in respect of the sale of the Burger King business. But it is clear that the sale of this business was never contemplated in March 2019 when Sithole and Adams met. From the emails at the time it is clear that the strategy then was to turn around the Burger King business. This included retaining Adams as a consultant to help negotiate with the Burger King franchise holder.
- [70] There is also no indication in the emails that the dividend would be based on a sale of assets. The sole evidence on this point is that of Sithole, and whilst he was vigorously cross examined on this point, he stood his ground. It is unlikely that either man contemplated a special dividend being paid when they discussed the ex-dividend payment in April 2019. The plaintiff was thus not able to sustain its main claim nor to rebut the defendant's version.
- [71] I must now consider the alternative claim. Like the amendment to the plea, this amendment also came at the last-minute when the case resumed on 21 October 2025. This is despite a lapse of some thirteen months between the hearings. The alternative claim is for payment of R2 million which is based on a dividend of 10c per share. Clearly the plaintiff as an afterthought has sought

to align its claim in line with what was stated in the email chain between Sithole and Adams where the 10c is referred to. Thus, the alternative claim is that what the parties contemplated was an anticipated dividend of 10 cents per share whenever the next dividend was declared.

- [72] But this has never been the plaintiff's case. Nor were any of its two witnesses able to advance this aspect of the case. Nor was it made out in the letter of demand sent by the plaintiff's attorneys which commenced the case, nor was it part of the original particulars of claim, nor the first leg of the trial. As with the main claim it is also unsustainable.

Which case is more consistent with the pleadings?

- [73] The first issue is when was the contract concluded. The plaintiff argued that it is common cause from the pleadings that the contract was concluded on 8 April 2019. The plaintiff alleges this, and the defendant admits this. This date suits the plaintiff as this is the date of the WhatsApp messages exchange. The defendant's plea however goes further than this admission. It states that the conclusion of the sale agreement was *"... preceded by oral and written negotiations between Dr Adams and Mr Sithole over the period 29 March and 1 and 2 April 2019"*
- [74] This is not inconsistent with one of the alternative formulations pleaded by the plaintiff that the agreement was *"...further alternatively a partly written partly oral, sale agreement ("the sale agreement")*.
- [75] Thus, Sithole's evidence is perfectly consistent with the pleadings. The only evidence of an oral agreement was what took place on 29 April when the parties

met at Adams' flat and agreed the basic terms. The emails of 1 and 2 April were written confirmation of what had been agreed orally. The 8 April WhatsApp exchange was a conclusion as it dealt with the remaining issue – that of the shares of the Women's Trust. In this sense the 8 April WhatsApp did not supplement or amend any prior understanding in respect of the dividend issue but merely confirmed that in respect of the dividend the Woman's Trust would be treated in the same way as Nadesons.

[76] The undisputed evidence is that the special dividend that was paid in 2021 arose from the sale of Burger King. GPI had never before paid a dividend in this amount. GPI had incurred a trading loss at the end of the 2021 financial year. It is highly unlikely that this was the dividend contemplated by Adams and Sithole. From the exchange of emails between the two in April 2019 it is clear that they discussed the sale of certain assets belonging to GPI. But Burger King was not amongst them because at that stage both men considered it could be turned around. This mention of the sale of assets is contained in a separated paragraph from the one that discusses the dividend. The two issues, it appears, were not linked. It is highly unlikely that if a special dividend was contemplated from the sale of assets, this would not have been specifically mentioned. Clearly, what was contemplated was a dividend from profits.

[77] While no limiting period is mentioned in the emails in the ordinary course of business, an agreement to sell ex dividend contemplates the end of the financial year in respect of the sale of the shares from which the dividend arose. That makes commercial sense. It is unlikely, absent an express agreement, that a purchaser would agree to purchase shares ex dividend without some finite

date on which the dividend would be declared. After all, by purchasing its shares ex dividend, it is foregoing the dividend on those shares and giving them up to the seller. Why would a purchaser of an asset be willing to forego its fruits for some indefinite period. When a dividend is eventually declared it has an effect on the price of that share in the market. Here Sithole was willing to forego the next dividend since he had factored that into the purchase price. Approximately, a willingness to pay another 10 cents per share.

- [78] It is improbable that either he or Adams had contemplated that Nadesons would receive a special dividend two financial years later in an amount that has no reference in the emails. This understanding that this would be for the next dividend payment accords with normal commercial understanding of the term ex dividend. According to the Merriam-Webster dictionary:

“A stock is said to be sold “ex-dividend” when the sale occurs just before the next dividend on the stock is due to be paid, so that the payment date comes after the order to buy is executed but before the stock changes hands. In such cases, the dividend is paid to the seller, and the price of the stock is reduced by an appropriate amount.”⁶ (my emphasis).

- [79] Thus, this approach to the interpretation is to be preferred because it leads, in the language of *Endumeni*, to favouring the sensible and business-like approach.⁷

Conclusion

⁶ Accessed online.

⁷ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 18.

[80] The approach to proof in this matter is common cause. The onus on the plaintiff is not only to prove the terms of the agreement it contends for, but also to prove a negative – that the parties did not agree an additional term alleged by the defendant.⁸

[81] In the present matter for the reasons I have given, the plaintiff has failed in both respects.

[82] As far as costs are concerned, both parties were represented by senior counsel, so costs for senior counsel is justified. The plaintiff considered that costs on Scale C was justified; the defendant more cautiously sought costs on Scale B. I consider the latter more justified.

ORDER

[1] The plaintiff's claim is dismissed.

[2] The plaintiff is liable for the costs of the defendant including senior counsel on Scale B.


 MANOIM J
 JUDGE OF THE HIGH COURT
 JOHANNESBURG

⁸ On the plaintiff's onus of proof of the terms of the contract relied on see *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A). On proof of the negative see Harms: *Amler's Precedents of Pleadings*, Ninth Edition, at 107, relying on *Kriegler v. Minitzer* 1949 (4) SA 821 (A) and *Topaz Kitchens (Pty) Ltd v Naboom Spa (Edms) Bpk* 1976 (3) SA 470 (A)

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Date of hearing:	21 - 24 October 2025
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