



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Reportable

Case No.: 6045/2008

In the matter between:

SHABEER LATIB

Plaintiff

and

**BONITAS MEDICAL FUND
(Formerly: PRO SANO MEDICAL SCHEME)**

Defendant

Coram: Francis J

Heard: 26 November 2025

Delivered: 19 February 2026

ORDER

1. The plaintiff's claim is dismissed.
2. The plaintiff is to pay the defendant's costs on scale 'C', such costs to include the costs of two counsel where so employed.

JUDGMENT

FRANCIS J

Introduction

[1] The plaintiff, Mr Shabeer Latib, seeks a declaratory order that the parties concluded a binding novated agreement on 27 October 2004. He contends that this agreement replaced and settled all claims arising from two alleged underlying agreements: one for the provision of consultancy services, the other for the licensing of proprietary software to the defendant medical scheme.

[2] The defendant, Bonitas Medical Fund (formerly Pro Sano Medical Scheme), denies that any binding agreement—whether the original contracts or the alleged novation—was ever concluded. It pleads, in the alternative, that even if an agreement was concluded at the meeting of 27 October 2004, it is unenforceable for want of authority, want of consensus on essential terms, and the non-fulfilment of a suspensive condition.

[3] Although the plaintiff pleads the agreement as a novation of the original causes of action, the defendant in argument characterised it in the alternative as a compromise; the defects identified below apply with equal force irrespective of the characterisation.

[4] The trial extended over several days. The plaintiff testified and called three witnesses: his attorney, Mr Sadick Nacerodien; a former trustee of the defendant, Mr Stewart Cloete; and a former employee, Mr Faldie Kamalie. The defendant called its former principal officers, Dr David Green and Mr Mervyn Cookson. A voluminous documentary record, including board minutes, multiple draft agreements, correspondence, the official minutes of the meeting of 27 October 2004, and a transcript of that meeting, was placed before the court. The resolution of the dispute depends fundamentally on an assessment of the credibility of the witnesses and the inherent probabilities of their versions, viewed against the documentary evidence.

Background and chronology

[5] The following chronology, drawn from the evidence and the documents, is largely common cause:

(a) In early 1999 the defendant's Benefits Management Committee engaged the plaintiff to propose a managed care system.

(b) By letter dated 31 May 1999 (annexure "A" to the particulars of claim), the defendant appointed the plaintiff to render benefit management services. The letter was expressly stated to be "subject to an agreement acceptable to the Council of Pro Sano Medical Scheme". No such final, signed agreement was ever concluded.

(c) Notwithstanding the absence of a final written contract, the plaintiff commenced work. He developed software (the system later referred to as the managed care system) and provided consultancy services. He was paid monthly for

consultancy services actually rendered, based on invoices submitted at an agreed rate of R456 per hour.

(d) Between 1999 and 2002 numerous draft written agreements—for consultancy services, for software licensing, and for a proposed joint venture—were circulated. None was ever signed or approved by the defendant's Board of Trustees.

(e) The plaintiff's active provision of services ceased around July/August 2002, when the software system was disconnected and replaced by a different system.

(f) In November 2002 the plaintiff, for the first time, submitted substantial invoices not only for outstanding consultancy fees but also for software licence fees, backdated to 1 June 2000.

(g) By letter dated 9 December 2002 the defendant's attorneys disputed all claims. This marked the commencement of a formal dispute and triggered a protracted period of settlement negotiations.

(h) A competing claim by Diamond Computer Systems (Pty) Ltd ("DCSS") and its director, Mr Rudy Reicher, who also asserted rights to payment for the same or similar software, complicated the matter.

(i) Between 2003 and 2004 the defendant's Board of Trustees held several meetings at which the plaintiff's claims were discussed, often together with the DCSS claim. Resolutions referred to "settlement bands" (e.g., R3.5 million to R5.5 million) and mandated committees to negotiate a resolution. A consistent and critical condition was minuted: no payment would be made to the plaintiff until the DCSS claim was fully resolved, so as to avoid any risk of double payment.

(j) On 27 October 2004 a meeting was held between the plaintiff, his attorney Mr Nacerodien, and representatives of the defendant: Mr Stewart Cloete (trustee and convenor), Mr Mervyn Cookson (principal officer), Mr Salim Young (legal advisor), and the defendant's attorney, Mr Dawson. Official minutes of this meeting were kept and a transcript was made; both are in evidence.

(k) Following the meeting of 27 October 2004, no final settlement was consummated. The defendant paid only the outstanding consultancy invoices for June and July 2002. All other amounts, including the claimed licence fees, were withheld pending the resolution of the DCSS litigation.

(l) The plaintiff instituted the present action in 2008. A special plea of prescription was dismissed by a Full Bench of this Division in 2015, which held that the claim for a declaratory order is not a "debt" for purposes of prescription. That issue is no longer before me.

The issues

[6] The primary issue for determination is whether the parties concluded a binding novated agreement or, in the alternative, a compromise (*transactio*) at the meeting of 27 October 2004. If no such agreement was concluded, it is necessary to ascertain whether valid and binding consultancy and software licence agreements existed.

[7] Accordingly, the issues for determination are:

(a) Did the parties conclude a binding novation agreement on 27 October 2004?

(b) If not, did they conclude a binding compromise (transactio) on that date?

(c) If no novation or compromise was concluded, did a valid and binding consultancy agreement exist between the parties?

(d) Did a valid and binding software licence agreement exist between the parties?

(e) What is the effect of settlement privilege on the evidence adduced, and for what purpose may that evidence be used?

Settlement privilege and the admissibility of evidence

[8] A substantial portion of the evidence upon which the plaintiff relies—including board minutes discussing "settlement bands", the minutes and transcript of the 27 October 2004 meeting, and related correspondence—is prima facie protected by settlement privilege. The rule, founded in public policy, is that communications genuinely aimed at settlement are inadmissible to prove liability or admissions of fact (*Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 66 (A)).

[9] An established exception to the rule is that without-prejudice communications are admissible to prove whether a settlement agreement was in fact concluded. The defendant, with appropriate caution, conditionally waived privilege for the limited purpose of allowing the evidence to be led on the express basis that if the Court found no binding agreement was concluded, the privileged status of the communications would remain intact.

[10] It is necessary to state explicitly the basis on which this evidence is used. The Court has considered the minutes, transcript, and correspondence solely for the purpose of determining whether a binding compromise or novation was concluded on 27 October 2004. To avoid any misapprehension, I record that the findings on these issues rest exclusively on evidence independent of privileged communications, including the express wording of the 31 May 1999 letter, the absence of Board approval, the plaintiff's own admissions, and the objective documentary record unrelated to settlement discussions. The without-prejudice material has been considered solely for the limited purpose stated.

The alleged novated agreement on 27 October 2004

[11] The plaintiff's primary case is one of novation. Novation is the substitution of a new obligation for an existing one, with the intent to extinguish the original obligation (*Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A) at 940H). It is essentially a matter of intention and consensus. The onus rests on the plaintiff to prove, on a balance of probabilities, that a binding novated agreement was concluded.

[12] A foundational requirement of novation is the existence of a valid existing obligation to novate. One cannot novate a non-existent debt. As will appear from the analysis that follows, the plaintiff has failed to prove the existence of either a binding consultancy agreement or a binding software licence agreement on the pleaded terms. There is, accordingly, no valid underlying obligation capable of being novated. This is fatal to the claim for novation, irrespective of any other defects in the alleged agreement of 27 October 2004.

[13] Moreover, even if the underlying obligations had been established, the alleged novation would fail for the following reasons:

(a) absence of animus contrahendi

[14] The contemporaneous minutes of the 27 October 2004 meeting record that it was convened "*to ascertain whether Mr Latib would be willing to co-operate with the court case and outline a framework as to how Mr Latib would co-operate*". This is not the language of contract formation. The meeting was convened to explore the possibility of settlement, not to conclude it.

[15] The transcript of the meeting provides compelling objective evidence that the parties understood themselves to be engaged in negotiations that would require further approval. Mr Dawson, the defendant's attorney, stated at the conclusion of the meeting:

"Please Mr Nacerodien put down what you have proposed now in writing, address it to the Principal Officer or myself being copied in, whatever and we – Mr Cloete and yourselves, we meet again very quickly over the next few days, whatever, before the board meets..."

Mr Nacerodien agreed and undertook to have the offer ready by the next day. This exchange is fatal to the plaintiff's case. It demonstrates that the parties did not consider themselves to have concluded a binding agreement. They were, at best, in the process of formulating a proposal to be submitted to the Board for approval.

[16] The plaintiff's own attorney, Mr Nacerodien, was cross-examined on this point. He conceded that the parties were "exchanging views" to prepare a proposal

for the Board. He did not assert, either in his contemporaneous correspondence or in his testimony, that a binding agreement had been reached at the meeting. This concession, made by a witness called by the plaintiff, is dispositive. It is objective, contemporaneous evidence, consistent with the documentary record, that no animus contrahendi—no intention to create legal relations—was present.

(b) lack of authority to bind the defendant

[17] Even if the attendees at the meeting had subjectively intended to conclude an agreement (which they did not), the plaintiff bore the onus of proving that the defendant's representatives possessed the necessary authority to bind the medical scheme. He failed to do so.

[18] The defendant is a medical scheme regulated by the Medical Schemes Act 131 of 1998. In terms of s 57(4) the board of trustees is the governing body charged with managing the affairs of the scheme and must act collectively. Individual trustees, the principal officer, legal advisors or ad hoc committees have no authority to bind the scheme unless the board has expressly delegated that power in accordance with the scheme's rules and recorded the delegation in writing (King IV Principle 6, applied by analogy to medical schemes). No such delegation was proved.

[19] The transcript of the 27 October 2004 meeting records Mr Young expressly disavowing authority (*"I am not a board ... I'm not even going to vote on this, can't vote on this"*) and Mr Cloete (the plaintiff's own witness) confirming that the committee's role was limited to negotiation and recommendation to the board. This evidence is clear, contemporaneous and unimpeached.

[20] The plaintiff invoked both ostensible authority and the Turquand (indoor management) rule in argument, though not explicitly pleaded. Neither assists him. Ostensible authority requires a representation by the principal (here, the Board) creating a reasonable belief in authority, which is absent. The Turquand rule presumes regularity of internal procedures but does not apply where, as here, the lack of authority is evident from the transcript and the plaintiff's knowledge of the Board's role.

(c) No consensus on the essential term of quantum

[21] A contract must be sufficiently certain to be enforced. Where the quantum of payment is an essential term, and the parties have not agreed on it, there is no contract (*Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para [36]). The plaintiff himself testified: "*we were not able to reach any kind of agreement on the quantum.*" This admission is dispositive.

[22] The plaintiff pleaded consensus on quantum via an implied term allowing court determination post-DCSS resolution, but the objective record shows no such agreement. The minutes and transcript reveal deadlock on the amount, with proposals ranging widely and no final figure accepted.

[23] Absent consensus on this essential term, no binding novation arose. Even a purported "agreement to agree" lacks enforceability without a deadlock-breaking mechanism (*Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA)). As the Constitutional Court held in *Vodacom (Pty) Ltd v Makate* 2016 (4) SA 121 (CC), a good-faith negotiation clause is enforceable only if accompanied

by a deadlock-breaking mechanism. The plaintiff's reliance on an alleged "deadlock-breaker" clause is unsupported by the objective record. The post-meeting correspondence confirms negotiations continued without resolution.

(d) the suspensive condition: resolution of the DCSS claim

[24] The evidence from the board minutes, the minutes of the 27 October 2004 meeting, and Mr Cloete's testimony is unanimous: any payment to the plaintiff was always conceived as conditional upon the final resolution of the competing DCSS claim. The language used (e.g. "pending", "until resolved") and the consistent board minuting support the characterisation of this requirement as a suspensive condition (condition precedent). Its purpose was to avoid the risk of double payment for the same or similar software.

[25] The condition was never fulfilled. The DCSS litigation was not resolved; indeed, the plaintiff's co-operation was sought precisely to assist in that litigation. The non-fulfilment of a suspensive condition means that no enforceable obligation ever came into existence. The plaintiff's own understanding, as reflected in his testimony, acknowledged that his payment was linked to his assistance in the DCSS matter and the finalisation of that case. The condition was not waived, and there is no evidence that the defendant ever dispensed with it.

(e) Subsequent conduct confirms the absence of a binding agreement

[26] The letter of 3 November 2004, written by Mr Nacerodien to the defendant's attorneys, is of critical importance. It does not demand performance of an agreement concluded on 27 October. It does not assert that a binding novated

agreement has been reached. It contains, instead, a confirmation that no agreement was reached on payment or quantum. He sets out a fresh settlement proposal and, towards the end of the letter, states:

"In the circumstances, we trust that your client will now realize (sic) that it is eminently favourable for your client to settle this matter on the basis proposed."

This language is unequivocal. It is an offer, not a demand for performance. It is a proposal to be considered by the Board, not an assertion that an agreement already binds it. The letter is objective, contemporaneous, and emanates from the plaintiff's own attorney. It is wholly inconsistent with the existence of a binding novated agreement.

[27] The plaintiff's attorney's letter of 20 April 2005, written many months later, complains about the defendant's conduct and the Board's apparent change of position. It does not assert that a binding agreement had been concluded on 27 October 2004. If such an agreement existed, one would have expected an immediate demand for its performance, or at the very least an unequivocal assertion of its existence. The absence of any such assertion, in correspondence written by an attorney, is telling.

[28] In light of the foregoing, the plaintiff's case on novation cannot succeed.

Compromise

[29] As Defendant's counsel pointed out in their heads of argument, the plaintiff's case may also be characterised as the parties having concluded a binding

compromise (transactio) at the meeting of 27 October 2004. A compromise is a contract whereby parties settle a disputed obligation or claim by mutual concession. Its essential characteristics are: (a) the existence of a disputed claim; (b) an intention to resolve the dispute by way of a new agreement; and (c) finality—the compromise is intended to replace the disputed claim with new obligations (*The Road Accident Fund v Taylor and other matters* [2023] ZASCA 64 (8 May 2023)). Unlike novation, a compromise does not depend on the validity of the underlying claim; it is a self-standing contract and must satisfy all the ordinary requirements for a valid agreement: consensus, certainty, capacity, legality, and, where relevant, compliance with any prescribed formalities.

[30] The plaintiff has failed to prove, on a balance of probabilities, that a binding compromise was concluded on 27 October 2004. The same objective defects that defeat the novation claim apply with equal force: there was no animus contrahendi; the attendees lacked authority to bind the defendant; there was no consensus on the essential term of quantum; any purported agreement was subject to an unfulfilled suspensive condition regarding the DCSS claim; and the subsequent conduct of the parties, particularly the 3 November 2004 letter, confirms that no final, binding settlement was reached at the meeting.

The alleged consultancy agreement

[31] In light of the findings above, it is strictly unnecessary to determine whether a consultancy agreement existed. However, given the extensive evidence led and the submissions made, and to provide completeness, I now proceed to do so.

[32] The plaintiff pleaded that a consultancy agreement came into existence partly in writing (the letter of 31 May 1999) and partly orally or tacitly through his performance of services and the defendant's payment of invoices over several years.

[33] The letter of 31 May 1999 imposed an express suspensive condition: the appointment was “subject to an agreement acceptable to the Council of Pro Sano Medical Scheme”. The plaintiff acknowledged that he understood this stipulation. Where parties expressly stipulate that their agreement is subject to approval by a specified authority, no binding contract arises until that approval is obtained.

[34] The plaintiff contended that the defendant’s acceptance of his services and payment of invoices constituted waiver of the condition or the conclusion of a tacit contract. Neither contention can be sustained. Waiver requires clear and unequivocal conduct evincing an intention to abandon a known right. The persistent circulation of draft agreements for board approval over several years is inconsistent with any waiver. Part performance pending formalisation does not impliedly waive an express condition precedent.

[35] Nor does the conduct establish a tacit contract on the pleaded terms. A tacit contract is inferred only where the parties’ conduct is unequivocally consistent with consensus on all the essential terms alleged. The evidence revealed material uncertainty regarding hours, escalation, duration and scope. Payment for services actually rendered on an hourly basis is legally explicable without positing a comprehensive consultancy contract on the terms pleaded.

[36] The relationship that emerged was one of ad hoc remuneration for services rendered pending possible formalisation. That arrangement does not translate into the binding consultancy agreement contended for.

The alleged software licence agreement

[37] The plaintiff's claim in respect of software licensing is similarly unproven and is attended by a fundamental and insuperable difficulty.

[38] First, the plaintiff's claim in respect of software licensing fails at the threshold on locus standi. Under cross-examination he conceded that the intellectual property in the managed care software vested in PNL (Powell, Nacerodien and Latib), a separate legal entity. In terms of s 21(1) of the Copyright Act 98 of 1978, copyright vests in the author (or the employer if the work was made in the course and scope of employment). Thus, a party who is neither the owner nor the holder of a valid cession, assignment or written authority from the owner lacks standing to claim licence fees in his personal capacity. No board resolution of PNL, cession, or written authority was produced. The plaintiff's attempt in re-examination to qualify the concession was unsupported by any documentary evidence and inconsistent with the pleaded case (a personal claim). Even if joint authorship were argued, standing to enforce the entity's copyright still requires proper mandate, which is absent. This defect is fatal and insuperable. The point emerged from the plaintiff's admission in evidence, was fully ventilated during the trial, and no application to amend pleadings or recall the witness was made.

[39] Second, there is a complete absence of evidence proving consensus on essential terms. The claimed rate of R4.92 per member per month appears only in

unsigned draft joint venture or licence agreements that were never agreed upon. No evidence was presented to substantiate the pleaded 10% annual escalation clause. The conduct of the parties is wholly inconsistent with a subsisting licence agreement: the first invoice claiming licence fees was rendered in November 2002, over two years after the alleged commencement date and after services had ceased. This belated invoicing suggests an ex post facto attempt to create a claim.

[40] Third, the conditional and inchoate nature of any discussions regarding software licensing is clear from the documents. Draft documents stated that the defendant ‘may’ and ‘without obligation’ licence the software at its ‘sole discretion’. The plaintiff confirmed under cross-examination that the proposed licence was part of broader, unconsummated joint venture discussions.

[41] The evidence of Mr Kamalie does not assist the plaintiff. His report, which calculated a potential liability of approximately R5.5 million, was explicitly based on the unsigned draft joint venture agreement and on speculative assumptions. It cannot prove the existence of a binding contract, nor does it cure the fundamental defect in the plaintiff’s locus standi.

[42] I find that the plaintiff has failed to prove the existence of a valid software licence agreement between himself and the defendant.

Constitutional and equitable considerations

[43] The plaintiff’s heads of argument invoked constitutional values of good faith, fairness, and ubuntu, referencing *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC). It is correct that our law increasingly

recognises the role of good faith in contractual relations. However, as cautioned in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), good faith is an underlying value that informs the law of contract; it is not a free-standing basis upon which a court may disregard the fundamental requirements of contract formation. These values were raised in argument, not pleaded as a separate cause.

[44] This court cannot create a contract where the essential elements of consensus, certainty, and authority are absent. The evidence demonstrates a protracted and ultimately unsuccessful negotiation process, characterised by a consistent failure to obtain the prescribed Board approval, by unresolved conditions, and by the absence of final agreement on the amount to be paid. Constitutional values cannot supply that which the parties themselves failed to achieve.

[45] The defendant's conduct in utilising the plaintiff's services and software for an extended period while failing to finalise a written agreement may attract criticism. The plaintiff may understandably feel a sense of equitable grievance. However, such equitable considerations cannot transmute what may appear to be a quantum meruit arrangement or incomplete negotiations into a binding contract with specific, unagreed terms. Recognition that services were remunerated does not equate to recognition of the specific contractual framework pleaded. Moreover, the plaintiff did not plead any alternative claim based on unjustified enrichment or contractual quantum meruit. The defendant in fact paid all consultancy invoices submitted for services actually rendered on an hourly basis. In the absence of a pleaded enrichment claim, and given the plaintiff's lack of standing in respect of the software, equitable considerations cannot supply a cause of action that was never advanced.

Conclusion

[46] The plaintiff has failed to discharge the onus of proving his case on a balance of probabilities:

(a) He failed to prove that a binding novation or compromise was concluded on 27 October 2004. The discussions were without-prejudice negotiations conducted without animus contrahendi by persons lacking authority to bind the defendant. There was no consensus on the essential term of quantum, and any purported agreement was subject to an unfulfilled suspensive condition regarding the DCSS claim. The contemporaneous correspondence, particularly the letter of 3 November 2004, confirms that no binding agreement was reached.

(b) He failed to prove the existence of a binding consultancy agreement. The express condition precedent of Board approval was never fulfilled, and the evidence revealed material inconsistencies on essential terms.

(c) He failed to prove the existence of a binding software licence agreement. This failure is rooted in his own admission under oath that he lacked personal ownership of the intellectual property and is compounded by the absence of consensus on essential terms and conduct inconsistent with a subsisting licence.

[47] In the result, the claim for a declaratory order must fail, together with the ancillary claims for payment and interest. The matter was factually and legally complex, involved a substantial documentary record and justified the briefing of two counsel on behalf of the defendant.

Order

I make the following order:

1. The plaintiff's claim is dismissed.
2. The plaintiff is to pay the defendant's costs on scale 'C', such costs to include the costs of two counsel where so employed.

FRANCIS, J

Judge of the High Court, Cape Town

Appearances

For Plaintiff: Adv Gary Oliver & Adv Adiel Nacerodien

Instructed by: M S Nacerodien Attorneys

For Defendant: Adv Pieter van Eeden SC & Adv Jolene Bernstein

Instructed by: Hayes Incorporated