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
10/03/2026	[redacted]
DATE	SIGNATURE

In the matter between:

NADESONS INVESTMENTS (PTY) LTD Plaintiff

and

VALUE CAPITAL PARTNERS (PTY) LTD Defendant

JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

MANOIM J:

1. This is an application for leave to appeal brought by Nadesons, which was the plaintiff in a trial that I heard last year, concerning a contractual dispute.

2. The dispute concerned the payment of a dividend in respect of shares in a listed company called Grand Parade Investments Limited, that the plaintiff had sold to the defendant, Value Capital Partners Limited. The plaintiff alleged that the defendant was liable to it for payment of a dividend in respect of those shares. There was no dispute that the shares had been sold ex dividend. This meant that if a dividend were payable later in respect of the shares, the plaintiff would be entitled to receive that dividend from the defendant, despite no longer owning the shares. The dispute concerned the amount and timing of the dividend payment.

3. The agreement had been concluded in April 2019. GPI's financial year ends in June. But no dividend was declared at the end of the 2019 financial year nor in the following financial year. A dividend was eventually declared at the end of the 2021 financial year, but as a special dividend of 88 cents per share. Based on the common cause fact that the plaintiff had sold the defendant 20 million shares, the plaintiff claimed R17,6 million.[1]

4. The plaintiff's case was that notwithstanding that the dividend was declared, two financial years later, and as a special not an ordinary dividend, the full amount declared was owing to it. The defendant's case was that the plaintiff would only be entitled to a dividend of approximately 10 cents per share, if

[1] 20 million shares x 88c. Later mid-trial the plaintiff filed an amended particulars of claim with an alternative claim for R 2 million based on 20 million shares with a dividend of 10 cents per share.

declared, in the period April to June 2019. Later the defendant amended its plea to say that the plaintiff would only be entitled to a dividend of 10 cents per share, if declared, for the financial year ending 2019.

5. I found for the defendant which meant that the plaintiff was not entitled to any dividend.

6. The plaintiff now seeks leave to appeal and has advanced five grounds of appeal. Counsel for the plaintiff in oral argument indicated that his primary ground of appeal was my decision to allow the defendant to amend its plea during the first phase of the trial, after the plaintiff had closed its case and the defendant had initially argued for absolution.

7. I give some more detail because of the centrality of the amendment issue in respect of the leave to appeal. When it initially pleaded the defendant expressed itself as follows:

"If GPI declared a dividend of approximately 10 cents during the period April to June 2019, then in respect of such dividend, the defendant would pay to the plaintiff the amount thereof."

8. This was the defendant's version that the plaintiff faced during the first phase of the trial. To meet this version, the plaintiff's case during that first phase was to lead evidence through its two witnesses (Adam passed away before the trial commenced) that GPI had never paid a dividend during this period, as its financial year only ended in June, and it was unlikely that such an agreement would have been reached. On that basis the plaintiff then closed its case. The defendant then applied for absolution. Plaintiff's counsel asked for an

adjournment to the following day to be allowed to respond to the application, but on the following day the defendant abandoned its application for absolution and applied to amend its plea to state that:

"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.

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."

9. The plaintiff objected, but I allowed the amendment and granted the plaintiff a postponement and costs occasioned by the late amendment. The trial then resumed some months later and ran till the end, but I allowed the plaintiff to re-open its case and recall its two witnesses.

10. The plaintiff, in the leave to appeal, argues first that I had not followed the formal procedures set out in Rule 28 of the Uniform Rules in allowing the amendment. Had I done so, it argued, the defendant's sole witness Mr Sithole would have had to be deposed and if he had, it was contended, he would have been unable to justify the amendment. If this was the outcome, the argument continued, then the defendant's case would have failed, based on the original plea.

11. The plaintiff went on to argue that because Dr Adams, the only person apart from Sithole with knowledge of what was agreed, had passed away well before the amendment was sought, the plaintiff was irreversibly prejudiced because it had no one to take instructions from to meet the new case put up in the amended plea.

12. But as the defendant argued, there are several problems with this approach. The version the defendant put up in the amended plea had been made previously in the letter that Mr Sithole had sent in response to the invoice received from the plaintiff prior to the institution of this litigation. The invoice was sent on 8 December 2021 and Sithole responded to it a week later on 15 December 2021. Dr Adams would have received Sithole's email prior to his death, and he could have at that time instructed his legal team on an appropriate response. The plaintiff is thus not taken by surprise by this version only after Dr Adams' passing.

13. Second, Mr Sithole was in any event cross examined on how the amendment came about during the trial. Aside from the passing of Dr Adams there is no other reason the plaintiff was prejudiced by the amendment. The defendant tendered costs occasioned by the postponement, there was further discovery and ample time for the plaintiff to prepare. Indeed, the plaintiff itself amended its particulars on the first day of the resumed hearing.

14. I thus do not consider there has been any prejudice by my allowing the amendment in the sense contemplated in *Moolman v Estate Moolman* 1927 CPD at 29.

15. Finally, even if the plea had not been amended, in my view the plaintiff would still have failed to make out its case because it had failed to discharge its onus.

16. Regarding onus, I am criticised for following the *Kriegler* [2]case when instead, argues the plaintiff, I should have followed *Stellenbosch Farmers Winery Group*

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[2] *Kriegler v. Minitzer* 1949 (4) SA 821 (A).

Ltd v Martel et Cie and Others 2003(1) SA 11 (SCA). But that case, as counsel for the defendant points out, deals with the approach to the determination of factual disputes in witness evidence.

17. Then there was an argument that, in terms of the practice note, it was agreed that the contract had been concluded on 8 April 2019. If that was the case, then the only evidence for the contract were the WhatsApp messages of that date which the plaintiff had annexed to its particulars of claim, and no reliance should have been placed on earlier emails between Sithole and Dr Adams. But as I set out in my decision, this could never have been the complete contract because the WhatsApp note dealt only with the dividend payment, which was then given context by Mr Sithole to refer to the payment of dividends for the Women's Legal Trust. It was thus not the embodiment of their entire agreement but the last word on their agreement, its conclusion in the secondary sense of the meaning of that word.

18. The remaining grounds of appeal dealt with my interpretation of the WhatsApp message of 8 April 2019, and what conclusion I should have come to on its language. This required me to ignore the previous evidence and the plaintiff's incorrect characterization of this evidence as pre-contractual – it was not; rather it was evidence of what the agreement between the parties was.

19. Finally, I am criticised for accepting the evidence of Mr Sithole. I heard his evidence and assessed it as credible and consistent with his past correspondence. My conclusion that he could be relied upon is not a subject on which another court would likely take a different view.

20. The courts have set a high standard for granting leave to appeal. As the Supreme Court of Appeal said in *MEC for Health, Eastern Cape v Mkhitha and another* [2016] ZASCA 176 at para 17:

"An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

21. For all these reasons I conclude that the plaintiff has not met the threshold test for leave to appeal and the application must fail.

ORDER

1. The application for leave to appeal is dismissed.

2. The plaintiff must pay the costs of the application including senior counsel on Scale B.

[redacted]

MANOIM J
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES:

For the Plaintiff:	G W AMM SC
Instructed by:	MORGAN LAW INC
For the Defendant:	M A CHOHAN SC
Instructed by:	DLA PIPER SOUTH AFRICA (RF) INC
Date of hearing:	06 March 2026
Date of Judgment:	10 March 2026