



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

Reportable

Case No.: 6045/2008

In the matter between:

SHABEER LATIB

Applicant/Plaintiff

and

BONITAS MEDICAL FUND

(Formerly: PRO SANO MEDICAL SCHEME)

Respondent/Defendant

Coram: Francis J

Heard: 10 April 2026

Delivered: 15 April 2026

ORDER

1. The application for leave to appeal is dismissed.
 2. The applicant is directed to pay the respondent's costs on scale 'C', such costs to include the costs of two counsel where so employed.
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JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

FRANCIS, J:

Introduction

[1] This is an application for leave to appeal against the entire judgment and order I delivered in this matter on 19 February 2016. In that judgment, I dismissed the plaintiff's claim for a declaratory order with costs on scale 'C', including the costs of two counsel where so employed.

[2] The applicant (whom I shall continue to call the plaintiff, as he was in the main action) now seeks leave to appeal to a Full Bench of this Division. He has filed a lengthy notice of application – nineteen pages – together with a detailed summary of oral argument. The respondent (the defendant) opposes the application and has filed heads of argument contending that there is no reasonable prospect of success on appeal.

[3] I have considered the papers carefully. I have also reread my own judgment – a task that is always somewhat uncomfortable, I confess, because one cannot help but wonder whether one might have expressed something differently. But having done so, and having weighed the grounds advanced by the plaintiff, I am firmly of the view that leave to appeal should be refused. Let me explain why.

The legal threshold

[4] The law on leave to appeal is now settled, though it has become more exacting since the advent of the Superior Courts Act 10 of 2013. Section 17(1)(a) of that Act provides that leave to appeal may only be granted where I am of the opinion that “*the appeal would have a reasonable prospect of success*” or there is “*some other compelling reason why the appeal should be heard*”. The word ‘would’ is

significant. It signals a degree of certainty, not mere possibility. As the Land Claims Court put it in *The Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC), the threshold has been raised. The Supreme Court of Appeal has echoed this in *Caratcon (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para [12], requiring a sound, rational basis for concluding that there are prospects of success. A mere arguable case is no longer sufficient.

[5] I must apply that test to each of the plaintiff's grounds. I do so mindful of the fact that the plaintiff has litigated this matter for nearly two decades. He feels, no doubt, a deep sense of grievance. But sentiment cannot supply what the law requires.

The plaintiff's grounds in summary

[6] The plaintiff's grounds are numerous, but they cluster around two central contentions: first, that I erred in finding that there was no prior binding contract between the parties – no consultancy agreement and no software licence agreement – that could be novated; and second, that I erred in finding that the meeting of 27 October 2004 did not give rise to a binding novation or compromise. Subsidiary grounds relate to the alleged misapplication of *Goldblatt v Freemantle* 1920 AD

123 and ***Woods v Walters*** 1921 AD 303, the alleged failure to give proper weight to the evidence of Mr Kamalie, and the alleged failure to apply ***Vodacom (Pty) Ltd v Makate*** 2016 (4) SA 121 (CC) and ***Tubatse Estate (Pty) Ltd v Chief Land Claims Commissioner and Others*** 2026 JDR 0781 (LCC).

[7] I will deal with each cluster in turn, but I must say at the outset that the plaintiff has not engaged in any meaningful way with the most damaging findings against him. I will come to those.

The prior agreements: consultancy and software licence

[8] The plaintiff argues that I ignored the clear evidence of a binding verbal agreement between the parties, relying on ***Goldblatt*** and ***Woods***. He says the defendant led no evidence to discharge the onus of proving that the parties intended the legal validity of their agreement to be postponed until a written document was signed.

[9] I have reread the relevant parts of my judgment. At paragraphs [33] to [36], I set out why the consultancy agreement was not proved. The letter of 31 May 1999 was express: the appointment was “*subject to an agreement acceptable to the*

Council of Pro Sano Medical Scheme”. Those are plain words. The plaintiff himself accepted that he understood them. No such agreement acceptable to the Council was ever signed or approved. The parties continued to exchange drafts, and the drafts kept changing. That is indicative of ongoing negotiations, not of a binding contract. The fact that the plaintiff rendered services and was paid for them on an hourly basis does not, without more, prove the existence of a comprehensive consultancy agreement on the specific terms pleaded. People sometimes work on an ad hoc basis while they wait for a formal contract to be finalised. That is what happened here.

[10] The plaintiff says I should have found that the defendant waived the condition or that a tacit contract came into being. But waiver requires clear conduct evincing an intention to abandon a known right. The persistent circulation of draft agreements for board approval over several years points in the opposite direction. And a tacit contract requires conduct unequivocally consistent with a consensus on all essential terms. The evidence showed material uncertainty about hours, duration, scope, and escalation. I cannot infer a contract where the parties themselves could not agree on the terms.

[11] Then there is the software licence agreement. This is where the plaintiff's case hits a wall – a wall he himself built under cross-examination. He conceded that the intellectual property in the managed care software vested in PNL, a separate legal entity. He sued in his personal capacity. He produced no cession, no written assignment, no authority from PNL. That is not a technical quibble; it is a fundamental defect in standing. As I said in paragraphs [37] - [38] of my judgment, this defect is fatal and insuperable. The plaintiff's notice of application for leave to appeal barely mentions this finding. He simply asserts that "*Pro Sano always acknowledged that Plaintiff was the owner of the intellectual property*". With respect, that assertion contradicts his own sworn testimony. And in any event, an acknowledgment by Pro Sano (even if it existed, which is disputed) cannot vest ownership in the plaintiff if the copyright law says otherwise.

[12] An appellate court will not lightly interfere with findings of fact based on credibility assessments and the weight of the evidence. Here, the finding on standing is based on the plaintiff's own admission. There is no prospect that another court would come to a different conclusion. And because there was no valid software licence agreement, there was nothing to novate.

The meeting of 27 October 2004: novation or compromise?

[13] The plaintiff's primary case is that the parties concluded a binding novation – or in the alternative, a compromise – at the meeting of 27 October 2004. He relies heavily on the board minutes and the transcript of that meeting.

[14] I dealt with this extensively in my judgment at paragraphs [11] to [28]. Let me highlight what I consider to be the insurmountable obstacles.

[15] First, *animus contrahendi*: the intention to contract. The contemporaneous minutes of the 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*”. That is not the language of contract formation. It is the language of exploration and co-operation. More tellingly, the plaintiff's own attorney, Mr Nacerodien, conceded under cross-examination that the parties were “*exchanging views*” to prepare a proposal for the Board. I recorded this concession at paragraph [16] of my judgment. That concession came from a witness called by the plaintiff himself. It is difficult to imagine a clearer indication that no binding agreement was intended.

[16] Second, authority. The plaintiff bore the onus of proving that the defendant's representatives at the meeting had the power to bind the medical scheme. He failed to do so. The transcript shows Mr Young saying, "*I am not a board ... I'm not even going to vote on this, can't vote on this.*" Mr Cloete, the plaintiff's own witness, confirmed that the committee's role was limited to negotiation and recommendation to the board. The Board of Trustees had not delegated final authority to the committee. The plaintiff knew this – he had been dealing with the Board for years. He cannot now claim that he reasonably believed the committee could conclude a binding agreement.

[17] Third, quantum. The plaintiff himself testified: "*we were not able to reach any kind of agreement on the quantum.*" Those are his words. Without agreement on the amount to be paid, there is no contract. A promise to pay an undetermined sum in the future, with no mechanism for determining that sum, is not enforceable. The plaintiff says that the parties tacitly agreed that a court would determine the amount if negotiations failed. But where is the evidence of that? I have read the transcript of the 27 October 2004 meeting from beginning to end. There is no mention of a court determining quantum. The post-meeting correspondence, including the letter of 3 November 2004 from Mr Nacerodien, sets out a fresh settlement proposal; it does not assert that an agreement has already been reached.

That letter ends with the hope that the defendant “*will now realise that it is eminently favourable for your client to settle this matter on the basis proposed*”.

That is an offer, not a demand for performance of an existing contract.

[18] Fourth, the suspensive condition. The board minutes, the transcript, and Mr Cloete’s testimony all confirm that any payment to the plaintiff was conditional on the resolution of the Diamond Computer Systems (DCSS) claim. The reason was obvious: the defendant feared paying twice for the same software. That condition was never fulfilled. The DCSS litigation was not resolved. The plaintiff’s own agreement to co-operate as a witness was part of the process of trying to resolve that claim, but it did not remove the condition.

[19] The plaintiff relies on ***Makate*** and ***Tubatse Estate*** to argue that a good-faith negotiation clause can be enforceable if there is a deadlock-breaking mechanism, and that a court can serve as such a mechanism. I do not quarrel with the general principle. The problem is that no deadlock-breaking mechanism was agreed upon here. There was no clause – express or tacit – referring quantum to a court. The parties simply failed to agree on the amount. That is not a deadlock-breaking mechanism; it is a deadlock. ***Makate*** does not allow a court to write a contract for the parties.

What the plaintiff has not appealed

[20] I must also note what the plaintiff has not challenged in his notice of application. He has not specifically appealed against my finding that there was no *animus contrahendi* – a finding based squarely on Mr Nacerodien's concession. He has not appealed against the finding that he lacked standing to claim software licence fees. Even if he succeeded on every other ground, that standing point would still defeat his claim. That alone is a sufficient reason to refuse leave.

Conclusion on prospects

[21] Having considered all the grounds advanced by the plaintiff, I am satisfied that there is no reasonable prospect that an appellate court would come to a different conclusion. The findings of fact are firmly rooted in the evidence, including concessions from the plaintiff's own witnesses. In my view, the findings of law are orthodox and correctly applied. There is no other compelling reason to grant leave to appeal.

[22] I also note that this litigation has been ongoing since 2008. That is eighteen years. Witnesses have died or become unavailable. Costs have mounted. Finality is a value, too. There comes a time when even a disappointed litigant must accept the outcome and move on. I say this not to be harsh, but because it is the truth.

Costs of this application

[23] The defendant asks for costs on scale ‘C’, including the costs of two counsel. The matter has been complex. The notice of application for leave to appeal was lengthy and raised numerous issues. I see no reason to depart from the normal rule that costs follow the result, with costs on scale ‘C’.

Order

[24] I make the following order:

1. The application for leave to appeal is dismissed.
2. The applicant is directed to pay the respondent’s costs on scale ‘C’, such costs to include the costs of two counsel where so employed.

M FRANCIS
JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Gary Oliver & Adv Adiel Nacerodien

Instructed by: Nacerodien Attorneys

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

Instructed by: Hayes Incorporated