IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Reportable

Case no: 18777/18

In the matter between:

PABAR (PTY) LTD **PLAINTIFF**

and

AZOTEQ (PTY) LTD **DEFENDANT**

Coram: **JONKER AJ**

Heard: 6 May 2026

Delivered: 8 May 2026

Summary: Application for leave to appeal - s 17 of the Superior Courts Act 10 of 2013 - applicable test - whether reasonable prospect of success on appeal - whether some other compelling reason - challenges to factual findings made after trial - deference owed to trial court - application dismissed with costs.

ORDER

1. The application for leave to appeal is dismissed.

2. The plaintiff is ordered to pay the costs of the application on scale C, including the costs of two counsel where so employed.

JUDGMENT

JONKER AJ:

Introduction

[1] This is an application for leave to appeal against the judgment and order of this Court delivered on 18 March 2026. The parties are referred to herein as in the main judgment.

[2] Pabar seeks leave to appeal to the Full Court of this Division. The grounds of appeal are set out in the application. They traverse, in substance, the same ground that was canvassed at trial.

[3] At the hearing, counsel did not address each of the grounds individually but identified what he submitted were the principal points. He accepted that the

legal principles applied in the main judgment had been correctly identified, and that the methodology adopted by the court was not the subject of criticism. The challenge advanced was, as he stated, directed at the application of settled principles to the facts of this matter. He further indicated that leave, if granted, was sought to the Full Court of this Division rather than to the Supreme court of Appeal.

The applicable test

[4] Section 17(1) of the Superior Courts Act 10 of 2013 provides that leave to appeal may be given only where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.[1]

[5] An applicant for leave must satisfy the court that there is a reasonable prospect - that is, a realistic chance, of success on appeal. A mere possibility of success, an arguable case, or a case that is not hopeless, will not suffice.[2]

[6] In *Dexgroup*[3], Wallis JA observed that the requirement to obtain leave to appeal is ‘a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.’ That gatekeeping function is integral to the scheme of s 17.

[7] In *Four Wheel Drive*[4], the Supreme Court of Appeal emphasised that leave should be granted only where there is a sound, rational basis for the conclusion that there are prospects of success on appeal.

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[1] Section 17(1) of the Superior Courts Act 10 of 2013.

[2] *Mont Chevaux Trust v Tina Goosen* [2014] JDR 2325 (LCC) at para 6; *MEC for Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 paras 16-17; *Notshokovu v S* [2016] ZASCA 112 para 2.

[3] *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and others* 2013 (6) SA 520 (SCA) at para 24.

[4] *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) para 34.

[8] The compelling-reason ground in s 17(1)(a)(ii) is engaged where, for example, a substantial point of law arises, where there are conflicting judgments on the question, where the matter is of great public importance, or where the interests of justice otherwise require that the appeal be heard. I do not believe this ground is engaged in this matter.

[9] An application for leave is not an opportunity to re-argue the merits. It requires the party seeking leave to identify, with precision, the respect or respects in which the trial court is alleged to have erred and to demonstrate that another court would, on those grounds, come to a different conclusion. In R v Dhlumayo[5], the Appellate Division laid down what has become the locus classicus on the function of a court of appeal. The appellate court does not retry the case. It does not hear the witnesses afresh. It does not substitute its own discretion for that of the trial court merely because, sitting in the trial judge's chair, it might have come to a different conclusion. Its function is altogether more circumscribed: to determine whether the judgment under attack discloses a misdirection, whether of fact or of law, sufficient to warrant interference. It is not enough that another court might possibly take a different view. Nor does an appeal lie against the reasoning of a judgment; it lies against the order or substantive outcome.[6]

The grounds advanced

[10] The grounds advanced by Pabar may, for convenience, be grouped under three broad heads:

[11] First, grounds challenging the primary factual finding that no binding agreement was concluded between the parties on 14 March 2017 in the terms

[5] R v Dhlumayo and Another 1948 (2) SA 677 (A).
[6] *B[…] E[…] v N[…] T[…] and Others* (505/2025) [2026] ZASCA 25 (11 March 2026) at para 11.

ultimately pleaded in the amended particulars of claim. These include challenges to the court's evaluation of the probabilities, to its treatment of the parties' subsequent conduct, and to the inferences drawn from the contemporaneous correspondence.

[12] Secondly, grounds challenging the court's evaluation of particular pieces of evidence: the so-called ‘concession’ said to have been made by Dr Bruwer in cross-examination, the construction given to the phrase ’your proposed agreement’ in the email of 10 March 2017, and the absence of an account in respect of the Parow pilot store.

[13] Thirdly, grounds challenging certain legal conclusions said to flow from the court's findings, including the relevance of the absence of a written recordal, the materiality of the distinction between the T5 and T6 tubes, the alleged mutual destructiveness of Azoteq's defences, and the scope of the December 2025 amendment.

[14] The grounds advanced by Pabar predominantly challenge findings of fact made by the court following a four-day trial during which the two principal witnesses, Mr Barbaglia and Dr Bruwer, were observed and assessed. The settled principle is that an appellate court will not lightly interfere with such findings. The trial court's advantage of having seen and heard the witnesses, of having absorbed the atmosphere of the trial, and of having been steeped in the documentary record, is one to which appellate courts traditionally accord considerable deference.

[15] In *AM*[7], the Supreme Court of Appeal reiterated that the findings of a trial court are overturned only where there has been a clear misdirection, or where the findings are clearly erroneous. The principle applies with particular force where credibility and reliability are in issue. The same decision underscores that

[7] *AM and another v MEC for Health, Western Cape* (1258/2018) [2020] ZASCA 89.

direct evidence is to be preferred to reconstruction after the event, a consideration of particular significance in the present matter, as it was at trial.

[16] An appellate court enjoys somewhat greater latitude in reviewing inferences and the assessment of probabilities. But where, as here, the probabilities have been considered alongside the credibility and reliability of the witnesses in the manner contemplated by *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie*[8], an appellate court will be slow to substitute its own view.

[17] These considerations form the backdrop against which each of Pabar's grounds must be assessed.

The primary factual finding

[18] Pabar's central contention is that the court ought to have found that a binding agreement was concluded between the parties on 14 March 2017 in the terms set out in the amended particulars of claim. The factual conclusion to the contrary, which forms the foundation of the judgment, was reached after a careful evaluation of the credibility and reliability of the two witnesses and a comprehensive consideration of the probabilities, applying the analytical framework prescribed by *Stellenbosch Farmers' Winery* and *Pitout*.[9]

[19] The court found, in summary, that: (a) Mr Barbaglia's evidence, while not dishonest, bore the hallmarks of reconstruction. Material aspects of his version had shifted across successive amendments to the pleaded case, and his oral evidence at trial revealed inconsistencies as to the chronology and location of the alleged agreement; (b) Dr Bruwer's evidence, including his candid admission that he had no independent recollection of the substance of the Brewery meeting,

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[8]*Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) para 5.
[9]*Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A); *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A).

was largely consistent with the contemporaneous documentation generated by him at the time; (c) The probabilities, viewed as a whole and on the evidence as a whole, did not establish that a binding agreement had been concluded in March 2017 on the terms alleged. The strong pointer against a concluded contract identified in *CGEE Alsthom*, namely the existence of unresolved material matters, was not displaced by sufficiently cogent factors pointing the other way.

[20] The challenges advanced in the application do not identify any material misdirection in the application of the controlling framework. That is consistent with the position taken at the hearing that the legal principles and methodology adopted by the court were correctly identified. The argument is, in substance, that the court ought to have weighed the evidence differently. That is not a basis on which an appellate court would interfere with findings of this character.

[21] Pabar places particular reliance on the evidence said to support an inference that an agreement was concluded: the September 2017 email referring to ‘our agreed structure’, the joint ordering of 1 000 T6 tubes in June 2017, the joint branding sticker arrangement of 31 March 2017, and the December 2017 email contemplating a similar arrangement on a further potential transaction. Each of these was specifically engaged with in the judgment. The court accepted that they were the strongest features of Pabar's case but found that they were equally, and on the evidence more naturally, explained as the conduct of a party who confidently anticipated the formalisation of an arrangement and was pressing forward to make that outcome inevitable. They fell short of the unequivocal manifestation of intention to be immediately bound that the objective test requires.

[22] That conclusion was supported by, among other things: (a) Mr Barbaglia's own contemporaneous email of 10 March 2017 referring to ‘your proposed agreement’, language that, on the objective test, is more naturally read as a reference to a draft still under negotiation than to a concluded contract; (b) Dr

Bruwer's persistent presentation of further draft cooperation agreements after the date on which the agreement was alleged to have been concluded, including the August 2017 third draft, which expressly continued to treat Pep as an open opportunity, and the October 2017 email proposing revised profit-sharing terms; (c) the absence of any contemporaneous written confirmation of an agreement having been reached at the Brewery meeting, in circumstances where Dr Bruwer's established practice was to record material understandings in follow-up correspondence; and (d) the parties' conduct in relation to the Parow pilot store, which, on Pabar's own pleaded case, would have constituted the first transaction caught by the alleged 60:40 obligation. Pabar did not account, and offered no satisfactory explanation for not having done so. Equally significant, a point pressed by counsel for Azoteq at the hearing, it did not, on its side, conduct itself as if bound by the alleged obligation either: it did not invoice Pabar, it did not claim 40% from Pabar, and it issued the invoice to Lightmart. The conduct of both parties in relation to the first transaction said to have fallen within the alleged agreement is, on any view, more consistent with there having been no such agreement than with one having existed.

[23] There is, in my view, no reasonable prospect that another court would come to a different conclusion.

The amendment of 23 February 2026 and paragraph 26 of the main judgment

[24] Pabar contends that paragraph 26 of the main judgment misstates the scope of the amendment of 23 February 2026, in particular by suggesting that the amendment reintroduced a broader location for the conclusion of the agreement. The criticism is properly directed at one sentence in paragraph 26. The amendment of 23 February 2026 was, on closer examination, confined to the alteration of the 60:40 split: previously pleaded as 60:40 in favour of Pabar, it

was amended to provide for a 60:40 split in favour of whichever party undertook the work or made the sale.

[25] Read in that limited sense, the criticism in the application has some force. It does not, however, assist Pabar. The paragraph cannot be read in isolation. It must be read with preceding paragraphs 24 and 25, and with the broader finding at paragraph 44 that Mr Barbaglia's evidence was marked by reconstruction and that material aspects shifted over time when measured against the pleadings. The point made in those paragraphs, that there were three successive iterations of the case, the cumulative effect of which was a marked shift in the location, sequence and substantive terms relied on, does not depend on the precise scope of the February 2026 amendment. It is grounded in the pleadings as a whole. Even if paragraph 26, read in isolation, may be understood to overstate the reach of the February 2026 amendment, the underlying conclusion is unaffected. An appeal lies against the order, not against an isolated proposition in the reasoning.

The so-called concession by Dr Bruwer

[26] Pabar places considerable weight on what is said to have been a concession by Dr Bruwer in cross-examination that an agreement had been reached. The exchange in question was addressed in the main judgment. The court treated Dr Bruwer's initial response as a concession concerning the operation of the pricing formula only, that, had a Pep order been received in March 2017, the email of 10 March 2017 would have provided the operative pricing mechanism. When the proposition was reformulated in legal terms a moment later, Dr Bruwer rejected it immediately and unequivocally, stating: ‘Oh no, not at all.’

[27] As counsel for Azoteq submitted at the hearing, the second proposition put, that ‘what transpired in March was an agreement’, was not phrased as a

question, and was framed in legal rather than factual terms. The court observed the resulting confusion, and Dr Bruwer did not initially apprehend that he was expected to respond. Once the proposition was reformulated, his response was clear and unequivocal. The contention that the retraction was elicited only after intervention by counsel does not, in my view, accord with the exchange as it unfolded at trial. As an evaluative judgment made in the course of the trial, with the benefit of having observed the witness, this is the kind of finding to which an appellate court would accord particular deference. There is no reasonable prospect that a different conclusion would be reached on appeal.

The interpretation of 'your proposed agreement'

[28] The interpretation given in the judgment to Mr Barbaglia's reference, in his email of 10 March 2017, to 'your proposed agreement' was reached by application of the principles in *Endumeni*[10]: the language used, in its proper context, against the relevant background. Pabar's preferred construction, that the phrase referred only to the pricing methodology rather than to the legal status of the arrangement, was canvassed in argument at trial and considered. It remains an available reading, but it is not, on the objective test, the more natural one. There is no reasonable prospect that an appellate court would prefer it.

The material terms outstanding and written recordal grounds

[29] Pabar contends that the court erred in finding that material terms remained outstanding at the alleged date of conclusion, and erred in concluding that a written recordal was required for a binding agreement to have come into existence. Both contentions, with respect, mischaracterise the judgment.

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[30] As to the first, the court did not hold that Azoteq had pleaded any specific material term that had to be agreed before a contract could come into existence. The unresolved status of various matters, including warranties, insurance, product liability and letters of authority, was treated as a probability factor under *Pitout* and *CGEE Alsthom*: namely that the existence of outstanding material matters constitutes a strong pointer against a binding contract having been concluded, in the absence of cogent factors pointing the other way. That is a recognised analytical tool, and its application does not depend on the matter having been pleaded as part of the defence. To the extent that the application proceeds on the premise that the court found, as a substantive legal conclusion, that the absence of agreement on any specific material term precluded the formation of a contract, the premise is incorrect. The point was a probabilities point, weighed in the balance, not a substantive legal threshold.

[31] As to the second, the court did not find that a written recordal was a precondition of a binding agreement. The judgment expressly disavowed any such finding.[11] The absence of any contemporaneous written confirmation of an agreement having been reached at the Brewery meeting, against the backdrop of Dr Bruwer's established practice of recording material understandings in writing, was simply one factor among several in the probabilities analysis. It was not, and was not intended to be, a substantive legal requirement for the existence of a contract.

The essentialia ground

[32] Pabar contends that the court ought to have found that the parties had reached consensus on the *essentialia* of the alleged agreement. The contention falls to be distinguished from the probabilities-based reliance on outstanding material matters. Consensus on the *essentialia* is the legal threshold for the formation of a binding contract; the existence of unresolved material matters

[11] para 63 of main judgment.

operates, by contrast, as a probability factor under *Pitout* and *CGEE Alsthom*. Both points were engaged with in the judgment. The matters left outstanding at the alleged date of conclusion, including the basis on which the 60:40 split was to be calculated, the parties' respective accounting and reporting obligations, warranties, insurance and product liability, and letters of authority, were not, on the court's assessment, peripheral details of an otherwise concluded bargain. They went to the substance of the bargain itself. On that finding, consensus on the *essentialia* was not, on the probabilities, established. There is no reasonable prospect that an appellate court would come to a different view.

The T5/T6 ground

[33] Pabar submits that the court erred in finding that the T6 tubes did not form part of any agreement concluded in March 2017. It contends that the T6 was simply a different version of the standard T5 tube and that the agreement, properly construed, encompassed both. The judgment, however, did not turn on a finding that the T6 was, in some technological sense, a different product from the T5. It turned on the absence of any contemporaneous communication extending the March 2017 pricing arrangement to a proprietary product (the T6 with Crystal drive technology) that did not exist in its eventual form at the time of the alleged conclusion of the contract, and on the absence of any commercial justification for the 60:40 split in circumstances where Pabar performed none of the metalwork, assembly or testing contemplated in the draft cooperation agreements that underpinned the proposed split. That analysis is not displaced by the technical similarity between the two products.

The joint branding sticker and the related email grounds

[34] Pabar contends that the joint branding sticker arrangement of 31 March 2017, and an email exchange said to contemplate a similar *ad hoc* arrangement on a further potential transaction, ought to have led the court to infer that a binding agreement had been concluded in the terms pleaded. As to the email, the reference appears in the application to the December 2017 exchange but in argument was treated as the September 2017 exchange. Nothing turns on the choice for present purposes, since the analysis applies in the same way to either. Each of these features was considered as part of the conduct relied on by Pabar in support of its case on the probabilities. They were found to be equally, and on the evidence more naturally, explained as the conduct of parties moving forward in confident anticipation of the formalisation of an arrangement still under negotiation, rather than as the implementation of a binding contract already concluded. The point was canvassed in argument and the analysis in the judgment was not, in my view, displaced. That conclusion accords with the *Endumeni* approach to the contemporaneous documentary record and with the evaluation of the probabilities as a whole. There is no reasonable prospect that an appellate court would draw a different inference from these particular features against the broader evidential canvas.

The mutually destructive defences ground

[35] Pabar contends that Azoteq advanced mutually destructive versions in its plea: a denial of the existence of any agreement, alternatively a contention that any such agreement was repudiated and cancelled, alternatively cancelled by mutual consent in January 2018. This is not, as a matter of either pleading or substantive law, a mutually destructive contradiction. Conditional alternative defences are an established and unobjectionable feature of South African pleading practice. The alternative defence was raised expressly on the assumption, not conceded, that the primary defence failed. The pursuit of the alternative in evidence does not impair the primary defence, and the documentary correspondence of January 2018 is, in any event, equally

consistent with the primary defence: namely that no agreement was ever reached, and that whatever negotiations had been ongoing were brought to an end by the parties' communications of that month.

The remaining grounds

[36] I have considered each of the remaining grounds advanced in the application. None of them, individually or cumulatively, displaces the conclusion that the appeal would have no reasonable prospect of success. Most are restatements, in different form, of the principal contention that the court ought to have weighed the evidence differently. Others, including the contention that the court erred both in attaching weight to the parties' conduct in relation to the Parow pilot store and in admitting the correspondence dealing with that store, fall away once the underlying findings of fact are accepted. As to admissibility in particular, the correspondence in question concerned a transaction which, on Pabar's own pleaded case, would have been the first to fall within the alleged 60:40 obligation, and was plainly relevant to the assessment of the parties' conduct after the alleged date of conclusion.

[37] It is trite that an appeal lies against the order of a court, not against its reasoning.[12] Even if it were to be accepted that the court had, in some respect, erred in its reasoning on a particular evidential point - and save for the limited qualification recorded in respect of paragraph 26 of the main judgment, no such error has, in my view, been demonstrated - that would not, of itself, justify the grant of leave where the order, considered as a whole, is correct.

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[12] *Western Johannesburg Rent Board and Another v Ursula Mansion (Pty) Ltd* 1948 (3) SA 353 (A) at 354-355.

Compelling reason

[38] Pabar has not advanced any other compelling reason within the contemplation of s 17(1)(a)(ii). The position is reinforced by the indication given at the hearing that the legal principles applied by the court were correctly identified and that the methodology adopted was not the subject of criticism. There is, on Pabar's own framing, no novel point of law in issue. The legal principles applied are well-established and the authorities relied upon are settled. There are no conflicting judgments on the questions in issue; on the contrary, the legal framework adopted finds express support in, among others, the Full Bench decision of this Division in *Jehring* referred to in the judgment. The matter is not one of public importance. Nothing in the interests of justice requires that the appeal be heard.

Costs

[39] Azoteq has been successful in opposing the application and seeks costs on scale C, including the costs of two counsel where so employed. There is no reason to depart from the general rule that costs follow the result.

Order

[40] In the result, the following order is made:

1. The application for leave to appeal is dismissed.
2. The plaintiff is ordered to pay the costs of the application on scale C, including the costs of two counsel where so employed.

EM JONKER

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: JR Peter SC with RJ Bouwer

Instructed by: Martini-Patlansky Attorneys, Johannesburg.

For Defendant: RGL Stelzner SC with JR Whitaker

Instructed by: Basson-Blackburn Inc, Paarl.