



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

REPUBLIC OF SOUTH AFRICA

CASE NO: 41796/2020

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |
| (4) | DATE: 13 OCTOBER 2023 |
| (5) | SIGNATURE: <i>ML SENYATSI</i> |

In the matter between:

MC CARTHY PTY LIMITED

Plaintiff

And

LAUREN BARBARA OLINSKY

Defendant

JUDGMENT

SENYATSI J

Introduction

- [1] On 5 October 2023, I granted an application for absolution from the instance and the reasons for the order are as set out in this judgment.
- [2] This is an application for absolution from the instance brought by the defendant (“Olinsky”). The plaintiff (“McCarthy”) sued Olinsky for the alleged damages it suffered. The quantum claimed by McCarthy is R5 million, which it claims was induced by Olinsky’s misrepresentation and caused it to advance the amount to CanCom (Pty) Ltd (“CanCom”), a company which Olinsky was the sole director and shareholder of.
- [3] McCarthy’s basis, so it contends, is delict because Olinsky deceived and caused it to advance R5 million to CanCom during 9 June 2019 and thereafter proceeded to put CanCom in voluntary winding up on 31 July 2019. The pleaded case by McCarthy is that the business of CanCom represented by Olinsky was carried on with the intent of defrauding McCarthy in various ways as set out in paragraphs 6 and 7 of the particulars of claim; which include for instance the alleged inducement to enter into the Alliance Agreement and Loan Agreement as well as the change of name of CanCom to Zevoli 158 (Pty) Ltd on 23 July 2019 and name change of Canfleet to CanCom/Canfleet (Pty) Ltd on 24 July 2019.
- [4] McCarthy contends furthermore that; the claim by Olinsky that CanCom owned a keyless patent was not correct because the patent belonged to her husband, Mr. Kevin Olinsky. Furthermore, that Olinsky put CanCom into liquidation in July 2019 in order to do away with the obligation to repay the R 5 million owed to McCarthy.

- [5] As a result of the representations by Olinsky, so argues McCarthy, it suffered damages in the sum of R5 million which is made up of the loan amount paid to CanCom together with interest thereon at prime interest rate compounded monthly from 31 July 2019 to date of payment.
- [6] Alternatively, by virtue of the facts set out in the particulars of claim, and in accordance with section 424(1) of the Companies Act 61 of 1973, it would be appropriate to hold Olinsky personally liable for the amount of R 5 million owed by CanCom to McCarthy.

Contentions

- [7] Olinsky contended through Mr Shapiro SC, that the evidence led is not sufficient that the Court applying its mind reasonably to the evidence will find for (in favour of) McCarthy. This is so because the two witnesses who testified for McCarthy both conceded the existence of the intention that the final agreement to regulate their relationship would be carried out by a new company which was referred to in the Memorandum of Understanding (“MOU”) concluded in 2015 and the Alliance Agreement concluded in 2016. She contended that putting CanCom (Pty) Ltd into voluntary liquidation was consistent with the MOU and Alliance Agreement and there was no misrepresentation which caused McCarthy to lend and advance R 5 million to CanCom. This was so if regard is had that the R5 million loan was reflected in the books of Canfleet (Pty) Ltd and was supported by the Cession of Contract Agreement and the Assignment of the two patents forming the subject of the products. Consequently, so the contention continued, there was no evidence presented that Olinsky lied about the formation of the new

company and placed CanCom in voluntary liquidation with the intention of defrauding McCarthy.

- [8] Mr Kaplan contended on behalf of McCarthy that it could not be denied that Olinsky was the sole shareholder and director of CanCom and that she represented to MacCarthy that CanCom was developing and marketing products which it owned together with the patents. According to McCarthy the representation was false and for that reason alone, a case of fraud has been proven. For the reasons that follow below, I do not agree with this contention.

Issue for determination

- [9] The issue for determination is whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might find for the plaintiff.

The legal principles on absolution from the instance and delict.

- [10] The test for an application for absolution from the instance is regulated by Rule 39(6). When absolution from the instance is sought in terms of sub rule 6 at the close of the plaintiffs case the test to be applied is not whether the evidence established is what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (*not should or ought to*) find for the plaintiff.¹ This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such

¹ Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T); Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) 409G-H; McCarthy Ltd v Absa Bank Ltd 2010(2) SA 321 (SCA) at 328H;

evidence no court could find for the plaintiff.² Differently put, the Court will be required in such cases to assess whether a *prima facie* case has been made for the plaintiff.³ In deciding in an application for absolution from the instance whether the evidence is sufficient enough to find for the plaintiff, the Court is not called upon to make a determination on the witnesses' s credibility.⁴

[11] The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the plaintiff” - a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury. Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice.⁵

[12] If a *prima facie* case has been made, the defendant will be required to meet the case and if there is none, then the Court will grant absolution from the instance. Each case will, of course, as usual, depend on its own facts. The plaintiff bears the onus to prove its case.

² *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 37G-38A; *Schmidt -Bewysreg* 4th ed 91-92

³ *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* [2023] ZANWHC 12 (6 February 2023) paras 41-42; *Gordon Lloyd Page & Associates v Rivera and Another* 2001(1) SA 88 (SCA) para 2.

⁴ *Sinqobile Equestrain* above para 45

⁵ *Gordon Lloyd Page & Associates v Rivera and Another* (384/98) [2000] ZASCA 33; 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A) (31 August 2000) para 2.

[13] To be able to sustain a case for delict or for reckless trading to fall foul of section 424 of the Companies Act 61 of 1973, McCarthy was required to make out a case on the two bases of its claim.

[14] In order to succeed in proving delict, the plaintiff is required to lead evidence to prove-

(a) a wrongful act or omission;

(b) fault which consists of either intention or omission;

(c) causation, which must not be too remote; and

(d) patrimonial loss.⁶

(e) that McCarthy suffered damages.

[15] In South African law the foundations of delectable liability, are the *aquilian* action and the *actio iniuriarum*. The former provides a general remedy for wrongs to interest of substance, the latter a general remedy for wrongs to interest of personality.⁷

[16] For reasons set out below, it is evident that McCarthy has failed to establish a *prima facie* case against Olinsky.

[17] Section 424(1) of the Companies Act 61 of 1973 (“the old Companies Act”) provides that:-

“When it appears, whether it be in the winding up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person order for any fraudulent papers, the Court may on the application of the master, the liquidator, the judicial manager, any

⁶ Boberg, *The Law of Delict*, Vol 1 p18

⁷ Boberg, above p18.

creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or liabilities of the company as the court made direct.”

- [18] The Court has a discretion to exercise where such an application for a declaratory order is made. It goes without saying that sufficient evidence must be produced by the applicant to enable the Court to consider such application favourably. Normally, a prelude to such a declaratory order would be a liquidation inquiry carried out in terms of sections 417 and 418 of the Old Companies Act.

The evidence

- [17] McCarthy relied on the evidence of two witnesses, Ms McGhee, the former chief executive officer of Bidvest Car Rental and Ms Downing, the former chief financial officer. They both admitted the existence of the Memorandum of Understanding of 2015 as well as the Alliance Agreement of 2016. Both those documents refer to the fact that a new company will be created to replace CanCom in relation to the commercial agreement between the CanCom and McCarthy.
- [18] The evidence at the end of McCarthy's case was that Olinsky had offered to secure repayment of the debt owed to McCarthy through Canfleet and McCarthy refused to accept that offer because it was unhappy about the vehicle through which any such payment would be made. Ms Downing refused to accept that payment of the loan should be made through Canfleet and her basis of refusal was that the loan agreement was in the name of CanCom. She confirmed the existence of the financial statements

which indicated that the loan of R5 million was in Canfleet's books and not CanCom's. She also conceded when asked by the Court that it would actually not matter who repaid the R5 million.

[19] Both witnesses conceded that the negotiation to try and give effect to the MOU as well as the Alliance Agreement that Canfleet (Pty) Ltd should substitute CanCom occurred. They both had no difficulty with the proposal but gave varying reasons why the agreements could not be finalized.

[20] Olinsky had procured the necessary draft agreements which were prepared and sent to McCarthy for consideration. The documents included the draft Cession of the Contract between McCarthy and the new company. It should be remembered that both witnesses had testified that the initial R5 million grant had preceded the loan agreement amount which was paid to CanCom during 2017. They both admitted that McCarthy was using the products consisting of the keyless system used in the rented cars. The patent which was registered in 2013 pertaining to that product belonged to Mr. Kevin Olinsky, the husband to the defendant. It can reasonably be assumed that he had no issues with the use of that patent, and the other patent registered in 2014 belonged to CanCom and was for the traffic management system pertaining to the rented cars.

[21] The proposed agreements were never finalized and according to Ms McGhee, who had no issues with the proposed agreements, the reason they were never signed to give effect to the MOU and the Alliance Agreement, was due to Covid-19 interruptions and change of strategy pertaining to the sale of Bidvest Car Rental. She confirmed that Olinsky sent her the proposal that CanCom should be replaced by Canfleet and that she had no issues with the fact that McCarthy's R5 million loan was now reflected in Canfleet's books. She also confirmed that she sent all the

Assignment and Cession Agreements proposed by Olinsky to McCarthy's Legal Department for their consideration and did not object to the fact that the loan was reflected in Canfleet's financial statements. There was no evidence on the input of McCarthy's Legal Department about the proposed agreements. This is understandable because McCarthy's car rental business was sold.

[22] Ms Downing objected to the R5 million payment to be made in Canfleet's bank account as she felt that it would not be consistent with the loan agreement which was in the name of CanCom. She was aware of the MOU although it was concluded in 2015 which was a year before she was employed by McCarthy. She was also aware about the Alliance Agreement which was concluded in 2016 as well as the proposed Cession and Assignment Agreement to which Canfleet financial statement were attached showing the debt of R5 million advanced to CanCom in Canfleet's books. She testified that she was not involved directly with the negotiations to give effect to the MOU and the Alliance Agreement.

Considerations

[23] The evidence after the close of the case was insufficient to make out a *prima facie* case for McCarthy as it was obliged to approve each step in this alleged conspiracy, each misrepresentation that, as it pleaded, cumulatively amounted to the conduct that apparently induced it to sign two agreements and advance a loan of R5 million which caused it to suffer damages in an equivalent amount. This has not been established because the MOU and the Alliance Agreement clearly shows that it was the intention of the parties that CanCom was going to be supplemented as

a party to the loan agreement by the new company to be formed by Olinsky.

[24] Even if I am wrong on this assessment, I am fortified by the fact that Olinsky is the one who initiated the steps to give effect in bringing the substitution of CanCom by Canfleet to life. She sent the proposed draft agreements showing the new company as envisaged in the MOU and the Alliance Agreement to Ms McGhee together with the financial statements of Canfleet clearly showing the R5 million debt in the books of Canfleet. That conduct cannot amount to deceit; conspiracy or fraud and it is devoid of the intention to cause harm to McCarthy.

[25] The proposition on behalf of McCarthy that the voluntary liquidation of CanCom was done with the intention to kill off the claim of R5 million in CanCom has no factual basis. This is so because even after becoming aware of the voluntary liquidation of CanCom in December 2019, McCarthy still continued to negotiate with Olinsky way into 2020 and as already stated, the reasons as understood by Ms McGhee why the new agreements, which she had no problem with could not be finalized was because of the Covid-19 interruptions and the decision by McCarthy to sell its car rental business.

[26] The proposition by McCarthy that fraud by Olinsky was also evidenced by the fact that CanCom did not own the keyless patent, which is common cause was owned by Olinsky's husband, cannot in my view, establish a *prima facie* case of fraud. This is so because McCarthy was using the patent and admittedly, as previously stated Olinsky's husband did not have any issue with the *status quo*. It could well be that had he been requested to assign the patent for the keyless product to McCarthy, chances are that he would have no issue with such assignment. Accordingly, the contention of fraud based on this ground must fail.

[27] McCarthy has failed to lead any evidence which demonstrates an intent on the part of Olinsky to defraud it. She co-operated with McCarthy until McCarthy decided to sell its car rental business. Her conduct was at all times consistent with what she understood the MOU and Alliance Agreements referred to in respect of the formation of a new company to replace CanCom. In my view, her conduct is not consistent with someone with an intention to mislead and cause harm to McCarthy.

[28] Based on the evidence led, there is no basis to suggest that Olinsky carried on the business of CanCom with the intention of defrauding McCarthy of its R5 million. On the contrary, the uncontroverted evidence from the two witnesses is that the loan would be repaid by Canfleet which is consistent with the MOU and Alliance Agreement. The contention on behalf of McCarthy is that the MOU and Alliance Agreement should not be considered by this Court as their agreement to agree is flawed. Olinsky did all she could to give effect to what the two agreements stated in terms of creating the new company to take over the agreement from CanCom and McCarthy's change of strategy by selling its car rental business appears to be the reason the proposed agreements could not be finalized. It follows accordingly that no *prima facie* evidence of reckless trading in violation of section 424 of the Old Companies Act was established.

[29] Accordingly, no *prima facie* case has been made and I therefore stand by my order to grant absolution from the instance.

ORDER

[30] I stand by my order made on 5 October 2023 to grant absolution from the instance with costs including the costs of two counsel.

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **13 October 2023**.

APPEARANCES

Counsel for the Plaintiff: Adv J Kaplan
Instructed by: Hirschowitz Flionis Attorneys

Counsel for the Defendant: Adv W Shapiro SC
Adv I Veerasamy
Instructed by: Mcgregor Erasmus Attorneys Inc

Date of Hearing: 02 – 05 September 2023

Date of Judgment: 13 October 2023

