

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

APPEAL CASE NO: A2024-058081

GJ CASE NO: 41796/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
16 September 2025	
DATE	SIGNATURE

In the matter between:

MCCARTHY (PTY) LTD

Appellant

and

BARBARA OLINSKY

Respondent

JUDGMENT

WINDELL J

Introduction

[1] This appeal lies against the order of Senyatsi J (the court a quo) granting absolution from the instance in favour of the respondent, Ms Lauren Barbara Olinsky ('Olinsky'). The appellant, McCarthy (Pty) Ltd ('McCarthy'), sued Olinsky for repayment of a loan of R5 million plus interest, paid to Cancom (Pty) Ltd ('Cancom') while she was

its sole director. Its primary claim was that, in the lead-up to and during the conclusion of certain agreements, Olinsky made fraudulent misrepresentations to McCarthy, culminating in the payment of the R5 million to Cancom. In the alternative, McCarthy relied on s 424(1) of the Companies Act 61 of 1973, alleging that Olinsky knowingly participated in fraudulent conduct of Cancom's business and was personally liable for the repayment of the R5 million.

[2] The appeal turns on the proper interpretation of three agreements — the Memorandum of Understanding of October 2015 (the MOU), the Alliance Agreement of February 2017, and the Loan Agreement of June 2017 — considered against the documentary and oral evidence. Two issues arise:

- (a) whether these agreements, properly construed, made Cancom the sole debtor of McCarthy, as the Loan Agreement expressly recorded, or whether, as the MOU and Alliance Agreement envisaged, the business was to be conducted through a separate company (Newco, later Canfleet (Pty) Ltd); and
- (b) whether the evidence adduced by McCarthy disclosed a prima facie case that Olinsky misrepresented the contractual structure or acted fraudulently or recklessly in the conclusion of the Alliance and Loan Agreements, and in connection with Cancom's subsequent liquidation.

[3] Leave to appeal was refused by the court a quo but subsequently granted by the Supreme Court of Appeal.

Background Facts

[4] The essential facts are largely common cause. On 23 October 2015, Cancom, represented by Mr Kevin Olinsky, and McCarthy, represented by Ms Carla Seppings, concluded the MOU.

[5] The MOU recorded the parties' intention to develop and commercialise two products, Canfleet and Canrent ('the products'). It required the establishment of a new company ('Newco'), wholly owned by Cancom, into which the products, contracts and patents would be transferred. McCarthy was to advance R5 million, treated as a shareholder's loan, in return for a 30% share of Newco's profits. In early 2016, McCarthy advanced the R5 million to Cancom ('the shareholder's loan').

[6] On 17 February 2017, the parties signed the Alliance Agreement. The Alliance Agreement defined Canfleet and Canrent (Newco) as *'a division of Cancom trading under the name and style of Cancom through which the Canfleet and Canrent product business is conducted.'* Clause 3 stated:

'CANFLEET AND CANRENT (NEWCO)

3.1 Cancom has in terms of the Memorandum of Understanding, established a separate division known as Canfleet and Canrent (Newco) to develop, test, market, launch, sell and maintain the Products.

3.2 As a division, Cancom shall be solely responsible for the management and administration of Canfleet and Canrent (Newco).'

[7] Clause 5.2 and 5.4 further provided that *'Canfleet and Canrent (Newco) is a division of Cancom in which McCarthy have no interest, whether financial or otherwise,*

save for the payment of the Commission’, and ‘if any losses are suffered by Canfleet and Canrent (Newco), such losses shall be for the account of Cancom as sole owner of that business’.

[8] On 9 June 2017, the parties concluded the Loan Agreement in the form of a ‘Letter of Intent.’ Under its terms, McCarthy was to advance R5 million (hereinafter referred to as ‘the loan’) to the ‘*Canfleet and Canrent division of Cancom (Pty) Ltd*’. The loan was repayable after three years or upon 10 000 installations, whichever occurred first, and would thereafter bear interest at prime compounded monthly. The agreement further stipulated that, in the event of default or liquidation, McCarthy would acquire ownership of the intellectual property relating to the products.

[9] On 12 June 2017, Olinsky requested McCarthy’s Chief Financial Officer, Ms Sharon Downing (‘Downing’), to pay the loan into a separate company, Canfleet (Pty) Ltd’s (‘Canfleet’) account, of which she was the sole director. Downing responded the same day by email, recording her concern that this request was inconsistent with the Alliance Agreement, which treated Canfleet and Canrent as ‘divisions’ of Cancom. She emphasised that, on her understanding, the contracting parties were McCarthy and Cancom and requested confirmation of the group structure.

[10] The following day, 13 June 2017, Downing nevertheless effected payment of the loan to Cancom and not to Canfleet. McCarthy later contended that this payment was made because Cancom, as debtor under the Loan Agreement, was regarded as the proper recipient.

The pleaded case

[11] McCarthy instituted action against Olinsky on the basis that she had conducted herself 'with the intent of defrauding' McCarthy. The alleged period of misrepresentation was pleaded as extending *'prior to and in conclusion of the Alliance Agreement and the Loan Agreement'*. On McCarthy's version, therefore, the fraud persisted from before February 2017 until at least July 2019, when Cancom was placed into voluntary liquidation.

[12] In its particulars of claim, McCarthy alleged that Olinsky misrepresented Cancom as both the developer and true owner of the products and the debtor under the agreements. It pointed out that the Loan Agreement of June 2017 expressly recorded Cancom as the debtor. In truth, so McCarthy contended, Olinsky knew that the products were being developed and marketed by Canfleet and owned either by Canfleet or by Kevin Olinsky personally. As a result of these alleged misrepresentations, McCarthy entered into the Alliance and Loan Agreements and paid the loan to Cancom.

[13] McCarthy further alleged that Cancom's voluntary liquidation in July 2019 was deliberately orchestrated by Olinsky *'to do away with Plaintiff's claim for repayment of the loan amount'*. It further claimed that Canfleet's representation that it had merged with Cancom into a holding company Cancom/Canfleet (Pty) Ltd was false.

[14] In the alternative, McCarthy pleaded that Olinsky's conduct amounted to reckless trading within the meaning of s 424(1) of the Companies Act 61 of 1973, rendering her personally liable for repayment of the loan.

Findings of the court a quo

[15] The court a quo considered the agreements and the evidence. It found that: (a) the MOU envisaged the establishment of a Newco; (b) the Alliance Agreement, though using the word, 'division', imposed reciprocal rights and obligations that suggested a separate juristic entity; (c) McCarthy was aware of Canfleet's role before advancing the loan; (d) Olinsky had asked that the loan be paid into Canfleet's account, after which Canfleet's financials reflected the loan liability and, (e) McCarthy continued to negotiate with Olinsky after Cancom's liquidation.

[16] On this basis, the court held that there was no factual foundation for concluding that the voluntary liquidation was undertaken to extinguish McCarthy's claim for repayment. In particular, the fact that Olinsky had requested payment into Canfleet's account before the loan was paid, undermines any suggestion that she induced payment to Cancom with fraudulent intent. The court concluded that McCarthy had therefore failed to establish a prima facie case of fraud or reckless trading. Applying the test for absolution — whether there is evidence on which a reasonable court might find for the plaintiff — the court concluded there was none. Absolution was accordingly granted, with costs.

The parties contentions

[17] The three agreements must be construed contextually. The MOU expressly required the incorporation of a separate Newco, while the Alliance Agreement, though describing Canfleet as a 'division', simultaneously imposed obligations that only a juristic person could bear. The Loan Agreement compounded the uncertainty by naming Cancom as debtor but referring to the 'division' as borrower. These internal contradictions frame the core dispute and must be resolved by applying the interpretive approach set out in

University of Johannesburg,¹ which requires consideration of the contractual language, the purpose, and the wider factual matrix.

[18] McCarthy's argument was that, on a literal reading, the agreements fixed liability squarely on Cancom. Although the MOU originally contemplated the formation of a Newco, McCarthy contended that no such company was ever incorporated and that the Alliance Agreement superseded the MOU. By repeatedly defining Canfleet as a 'division' of Cancom, the Alliance Agreement, it argued, confirmed that Cancom remained the sole debtor.

[19] McCarthy further emphasised that the Loan Agreement named Cancom as debtor and that the loan was in fact paid into Cancom's account. When Cancom was voluntarily liquidated in 2019, McCarthy was left without a party against whom it could enforce the loan. It contended that this was no accident but a deliberate stratagem by Olinsky to defeat its claim.

[20] Olinsky, on the other hand, submitted that McCarthy's interpretation was overly literal and divorced from context. The MOU expressly required the establishment of a new company, and the Alliance Agreement's description of Canfleet as a 'division' was simply loose drafting. Its substantive provisions — requiring transfer of patents, provision of facilities, and recognition of McCarthy's shareholder's loan — presupposed a separate juristic entity.

¹ *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 92. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 and *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 53.

[21] She also relied on the conduct of the parties: in March 2017 McCarthy completed a vendor application for Canfleet; on 12 June 2017 Olinsky requested that the loan be paid into Canfleet's account; Canfleet's financial statements recorded the loan as a liability in October 2017; and in later correspondence McCarthy itself referred to the 'Canfleet loan'. These, she argued, show that both sides treated Canfleet as the debtor.

[22] Olinsky maintained that she consistently attempted to regularise the position through substitution agreements, but McCarthy did not finalise them for its own commercial reasons. The failure to substitute Canfleet was therefore not the product of fraud or concealment.

The interpretation of the agreements and the meaning of 'division'

[23] In *Barloworld Logistics*,² the court held that a 'division' is merely an internal part of a company and, as such, has no separate legal personality. That principle is settled. The question here is whether, in the Alliance Agreement, the parties used the term 'division' in that strict sense or merely as a loose description for the separate company envisaged in the MOU.

[24] Interpreted contextually, the MOU required the incorporation of a new company (Newco). Clause 3(vii) obliged Cancom to secure rights to component products, while

² *Barloworld Logistics Africa (Pty) Ltd v Silvertron 481 CC & Others* [2013] ZAGPPHC 198 (15 July 13) ('Barloworld Logistics') para [37]: 'A division in company terms denotes a portion of a business entity (see "Longman Business English Dictionary") that operates under a different name. It is still a part of the entity itself even though it operates under a separate name, at the same place or at a different place, generally the equivalent of a corporation or Ltd liability company obtaining a fictitious name or 'doing business as' certificate and operating a business under that fictitious name. The parent company is legally responsible for all of the obligations and debts of the division. So although a division operates separately it does not run itself separately and is owned by the primary business. As generally accepted, the division would be unregistered and have a fictitious name, so incapable of suing or being sued in their own names as they lack capacity to contract or to sue'.

clauses 5(i) and 5(ii) required it to transfer its business and the related patents into Newco. At the time, patent 2013/08873 was owned by Kevin Olinsky, and the parties knew it would be transferred to Newco. These provisions make sense only if Cancom and Newco were intended to be different juristic entities.

[25] The Alliance Agreement reinforced this. Clause 3.1 recorded that Cancom had, in terms of the MOU, '*established a separate division known as Canfleet and Canrent (Newco)*' which it would manage and administer. While the word 'division' might literally suggest an internal department, the reference back to the MOU shows that what was intended was a company. This is consistent with Cancom being the sole shareholder of Newco, and inconsistent with Canfleet being an internal department of Cancom.

[26] Other provisions of the Alliance Agreement point the same way. Clause 13.1.2 required Cancom to transfer intellectual property to Newco; clause 3.1.7 obliged it to sign the awarded patent into Newco; and clause 13.1.10 required it to make space in its facilities available for Newco. Clause 13.1.12 went further, granting Newco access to Cancom's customer database. Such provisions presuppose reciprocal rights and obligations between two juristic persons. They would be meaningless if Newco were an internal division.

[27] McCarthy's suggestion that these references were merely internal accounting devices finds no support in the agreements. Nothing indicates that the business then being conducted by Canfleet would revert to Cancom, or that the separate entity envisaged in the MOU would cease to exist.

[28] Clause 14.1.4 is decisive: it required McCarthy's R5 million to be paid into Newco's bank account as 'a shareholder's loan from Cancom'. Only a company with share capital can receive a shareholder loan. Read with the other provisions of the Alliance Agreement, this confirms that Newco (later Canfleet) was intended to be a separate company, wholly owned by Cancom, and that the description of it as a 'division' was the product of imprecise drafting. The Loan Agreement added to the muddle by naming Cancom as debtor while simultaneously referring to the 'Canfleet and Canrent division of Cancom', a combination of terms more consistent with drafting confusion than with any deliberate intention to confine liability to Cancom. Properly construed, the agreements support—rather than contradict—the MOU's structure, and the court *a quo* rightly rejected McCarthy's literal construction.

[29] The documentary and oral evidence supported the interpretation that Canfleet functioned as the Newco envisaged in the MOU. At a meeting on 7 March 2017 between Bidvest Finance (on behalf of McCarthy) and Cancom, attended by Olinsky and Downing, it was recorded under the heading *"Accounting Status, Terms and Invoicing"* that McCarthy would update its vendor application in order to load Canfleet. The minutes further recorded that the original vendor registration had been created '*using the company documentation for Orililogix*', that a new application was required for Canfleet, and that '*all Canfleet company documentation*' needed to be submitted. This was wholly consistent with Canfleet being an incorporated entity rather than a mere internal division.

[30] Shortly before the loan was advanced, on 12 June 2017, Olinsky again requested that the loan be paid into Canfleet's account — a clear reminder that Canfleet was regarded as the debtor. Downing nevertheless instructed that payment be made into

Cancom's account, as confirmed in her email of that date, which explicitly referred to '*Canfleet (Pty) Ltd*'. This shows, first, that McCarthy was aware of Canfleet's separate corporate identity before payment, and, second, that it deliberately chose to disregard Olinsky's request.

[31] On 13 June 2017, Olinsky followed up in writing, explaining that the arrangement had always been for the services to be provided through a separate company — initially Orililogix, later Canfleet. This was consistent with the minutes of the 7 March meeting and cannot be reconciled with the intention to mislead.

[32] McCarthy argued that Olinsky's failure to challenge Downing's construction of the Alliance Agreement amounted to a concession. That submission overlooks the subsequent record. Far from conceding, Olinsky continued to treat Canfleet as the responsible entity, as demonstrated by later correspondence, financial statements, and negotiations. This is directly at odds with McCarthy's pleaded case that she orchestrated Cancom's liquidation in order to extinguish its liability. The contemporaneous record shows the opposite: she sought to ensure that Canfleet, not Cancom, was recognised as the debtor.

[33] The point was reinforced on 19 October 2017, when Olinsky provided Downing with Canfleet's statement of financial position. The document described the entity as '*Canfleet (Pty) Ltd*' and reflected the loan from Bidvest under reference 5401 in Canfleet's bank account. Notwithstanding that the funds had initially been paid into Cancom's account, Olinsky treated the loan as Canfleet's liability and disclosed this openly.

McCarthy raised no objection. If concealment had been intended, there would have been no reason to provide such documentation.

[34] Later developments confirm the same pattern. By August 2019, McCarthy had been advised that Cancom would become a dormant entity and that a cession agreement was required to substitute Canfleet as debtor under the Alliance Agreement. In her email of 20 August 2019, Downing expressly referred to the loan as having been paid to Canfleet in June 2017. By this stage McCarthy itself acknowledged the debt as a Canfleet loan.

[35] The pattern persisted into 2020. Internal McCarthy correspondence continued to describe the debt as the ‘Canfleet loan – R5m’. In July and August 2020 Olinsky sought to repay the loan through Canfleet. Downing acknowledged that such repayment would have discharged the debt but explained that she refused to accept it because she no longer regarded Canfleet as the contracting party. Both Downing and McGhee confirmed that the substitution agreements were abandoned for McCarthy’s own commercial reasons, linked to restructuring and the planned sale of its business to Bluu Car Rental—decisions independent of anything Olinsky did.

[36] The evidence and the agreements, read together, thus show that the term ‘division’ was a drafting anomaly. The parties intended Canfleet to serve as the corporate vehicle envisaged in the MOU. The *Barloworld Logistics* principle—that a division has no separate legal personality—does not assist McCarthy, because the issue is not the abstract meaning of ‘division’ but its use within this contractual framework.

[37] On this footing, the court a quo rightly held that the record pointed not to concealment but to transparency and repeated efforts at regularisation. McCarthy therefore failed to establish even a prima facie case of fraud.

Waiver and Acquiescence

[38] The evidentiary record shows that McCarthy, by its own conduct, accepted Canfleet's role and thereby waived reliance on the Alliance Agreement's literal wording. By March 2017 it sought to load Canfleet as a vendor. In October 2017 it received Canfleet's financials recording the loan as Canfleet's liability. By August 2019 Downing herself described the loan as paid 'to Canfleet in June 2017', treated Cancom as dormant, and proposed a cession to substitute Canfleet as debtor. Internal correspondence in 2019–2020 repeatedly referred to the 'Canfleet loan'.

[39] By October 2017 McCarthy had already received Canfleet's financial statements reflecting the loan, yet it raised no objection. When Olinsky later asked to whom Canfleet should make repayment, Downing again conceded that payment by Canfleet would have been valid but declined to accept it on the basis that McCarthy chose not to recognise Canfleet as the debtor. The refusal to complete the substitution was thus a strategic business decision, not a response to any misrepresentation.

[40] McCarthy's submission that waiver had to be pleaded is misplaced. In *McGrane*³ the Supreme Court of Appeal confirmed that waiver may be inferred from conduct proved at trial. The Court remarked that litigation 'is not a game', and a court may give effect to

³ *McGrane v Cape Royale The Residence (Pty) Ltd* (831/2020) [2021] ZASCA 139 (6 October 2021).

waiver where the issue is fully ventilated on the evidence. Here, the emails, financials, and viva voce testimony of Downing and McGhee show that by late-2019 McCarthy had accepted Canfleet as debtor and proceeded on that footing.

[41] This conclusion also defeats the s 424(1) claim. That provision required prima facie proof that Olinsky carried on Cancom's business fraudulently or recklessly. Yet she urged that the loan be paid to Canfleet and later sought to repay through Canfleet. Where McCarthy chose to pay into Cancom's account against her advice, it cannot claim to have been misled. Moreover, the Loan Agreement's security clause preserved McCarthy's access to the technology and intellectual property in the event of default or liquidation, irrespective of whether Cancom or Canfleet was the debtor.

[42] McCarthy argues that Olinsky's silence in response to Downing's 12 June 2017 email amounted to a concession that payment had to be made to Cancom. The subsequent record contradicts this. On 13 June 2017 Olinsky reiterated that services were to be provided through a separate company, in October 2017 she sent Canfleet's financials reflecting the loan, and in 2019–2020 she pursued documentation to substitute Canfleet formally.

[43] By August 2019 McCarthy knew Cancom would be dormant and sought a cession to substitute Canfleet. Its later demands were directed to Canfleet, and yet it refused to accept repayment from Canfleet despite acknowledging that such payment would discharge the debt. This conduct is inconsistent with any insistence on Cancom's sole liability and amounts to waiver by acquiescence.

Absolution from the instance

[44] The test for absolution from the instance is settled: the question is whether, at the close of the plaintiff's case, there is evidence on which a court, applying its mind reasonably, could find for the plaintiff.⁴ To succeed, McCarthy had to show a prima facie case of fraudulent misrepresentation: (a) a representation of fact by Olinsky, (b) its falsity, (c) materiality, (d) an intention to induce McCarthy to act, and (e) action by McCarthy to its prejudice.

[45] McCarthy failed on every element. There was no proof that Olinsky made a knowingly false statement. On the contrary, she repeatedly urged payment to Canfleet and later sought repayment through Canfleet. The alleged misrepresentation—that Cancom was the debtor—is contradicted by the record, which shows McCarthy itself recognised Canfleet's role. Any looseness of wording did not amount to fraud, and there was no causal link between Olinsky's conduct and McCarthy's loss. The decisive act was Downing's deliberate instruction to pay Cancom against Olinsky's advice.

[46] The same is true of the s 424(1) claim. That provision required at least prima facie proof that Olinsky carried on Cancom's business with intent to defraud or recklessly. Yet the evidence was that she urged the loan be channelled through Canfleet and attempted to regularise that position through subsequent cession agreements. Where payment into Cancom's account occurred over her objection, the loss cannot be attributed to fraud or reckless trading on her part.

⁴ *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA).

[47] With no evidence of misrepresentation, falsity, intent to induce, or resulting prejudice — and no proof of reckless or fraudulent conduct under s 424(1) — McCarthy’s case never reached the minimum threshold. On this record, the court a quo was correct to find that McCarthy failed to establish even a prima facie case of fraudulent misrepresentation and, by its own conduct, had acquiesced in (and thereby waived reliance on) Canfleet’s role.

[48] In the result the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the respondent’s costs, such costs to include the costs of two counsel (including senior counsel) on Scale B and Scale C in terms of Uniform Rule 69(7).

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

A. MAIER-FRAWLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

M.P. MOTHA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 September 2025.

APPEARANCES

For the appellant: G Farber SC

J Kaplan

Instructed by: Hirschowitz Flionis Attorneys

For the respondent: WN Shapiro SC

I Veerasamy

Instructed by: MacGregor Erasmus Attorneys Inc

Date of hearing: 21 May 2025

Date of judgment: 16 September 2025

