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

Case number: 21393/2017

In the matter between:

WHITECAT TECHNOLOGIES CC Plaintiff

and

MIANZO ASSET MANAGEMENT (PTY) LTD Defendant

Coram:	Van Zyl, AJ
Heard on:	13-16 October 2025; 22-23 October 2025; 13 March 2026; 25 March 2026
Judgment:	13 April 2026

Summary: Claim for payment under contract – absolution from the instance sought at close of plaintiff's case on basis that contract voidable at defendant's instance because of breach of director's fiduciary duties towards defendant when concluding the contract – attractive argument but plaintiff has adduced at least some evidence that requires an answer from defendant – absolution refused

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ORDER

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1. The amendment to the defendant's plea is granted, with no order as to costs.

2. The defendant’s application for absolution from the instance is refused, with costs, including the costs of counsel on Scale B.

3. All other questions of costs stand over for later determination.

JUDGMENT

VAN ZYL, AJ:

Introduction

1. In this action, the plaintiff (”Whitecat”) has closed its case. The defendant (“Mianzo”) does not believe that a *prima facie* case has been made out against it, and therefore seeks absolution from the instance.

2. The two entities are essentially asset management firms. Whitecat’s claim against Mianzo is based on a licensing agreement which it concluded with Mianzo on 27 July 2010 for the exclusive use of a computer programme known as the Tacit Asset Allocation System (“TAAS”). The cause of action is founded on breach of contract, and its claim is for specific performance, being payment of the amounts due to it under the licensing agreement (some R7 million, plus value-added tax).

3. Whitecat has the onus to prove the existence and enforceability of the licensing agreement, that Whitecat has performed in terms of the agreement, that Mianzo has breached the agreement, causing Whitecat’s damages, and the *quantum* of such damages. If it has adduced sufficient evidence to prove these requirements, Whitecat has established a *prima facie* case and the application for absolution must be refused.

4. On Mianzo's argument at this point, however, Whitecat's performance in terms of the licensing agreement, Mianzo's breach of the agreement, Mianzo's breach causing Whitecat's damages, and the *quantum* of Whitecat's damages, are not proffered as reasons as to why the application for absolution should be granted. This application for absolution from the instance is not made on the basis that the evidence of the witnesses called on behalf of Whitecat should be rejected on credibility, but is based on a legal argument. The application turns on one issue only, namely the enforceability of the licensing agreement.

5. The agreement was concluded while the Companies Act 61 of 1973 was in effect. Consequently, the validity and legal consequences of the agreement fall to be determined under the provisions of the 1973 Companies Act.[1]

6. In its plea, Mianzo denies the existence of the licensing agreement. In the alternative, and if it is proven that the agreement was in fact concluded, Mianzo pleads that the agreement is voidable at its (Mianzo's) instance. Mianzo pleaded that:

> "*Baise was precluded from entering into such an agreement in terms of section 234 (read with sections 235 to 241) of the 1973 Companies Act (which was applicable at the time) as he had a direct, alternatively indirect, interest in the Agreement which was not disclosed in terms of the Act and the Agreement was not approved by an ordinary resolution of shareholders of the Defendant*."

7. And:

> "*The Defendant denies that the Agreement was entered into and pleads that if it was entered into it is voidable at the instance of the Defendant for the reasons set out above and the Defendant asserts that the Agreement is void*."

8. Mianzo wishes to nip this matter in the bud on its alternative agreement. It says that the court should find that the agreement is void because Mr Baise,

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1 See section 12(2) of the Interpretation Act 33 of 1957.

the director who concluded it on Mianzo's behalf, had breached his fiduciary duties towards Mianzo. As the agreement is void in the circumstances, that is the end of the matter.

The principles applicable to applications for absolution from the instance

9. There is no dispute between the parties as to the applicable principles. The law regarding absolution is set out as follows in Harms *Civil Procedure in the Superior Courts:*[2]

> "*The test to be applied by the court at this stage of the trial is: Is there evidence upon which a court might reasonably find for the plaintiff? Another approach is to enquire whether the plaintiff has made out a prima facie case. To the extent that the plaintiff relies upon inferences, it is sufficient if the inference the plaintiff wishes to draw is a reasonable one; it need not be the only reasonable inference.*
> *The court has a discretion to grant or refuse absolution from the instance. In the exercise of this discretion it will normally not have regard to the credibility of witnesses unless the plaintiff's witnesses are so obviously lying or have so palpably broken down that the court cannot reasonably place reliance upon them. The court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging during the defendant's case.*"

10. In *Gordon Lloyd Page and Associates v Rivera and another*[3] it was held that:

> "*The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:*
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> > *'... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes 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, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty)*

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[2] At B39.7. Emphasis supplied.

[3] 2001 (1) SA 88 (SCA) at 92E-93A.

Ltd v Adelson (2) 1958 (4) SA 307 (T).)'

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 evidence no court could find for the plaintiff .. …. As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one …. 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. …"

Onus, and facts within Mianzo's knowledge

11. A court should refuse absolution where the onus rests on Mianzo, as defendant, to prove particular issues. Absolution from the instance cannot be decreed at the end of the plaintiff's case where the plaintiff has first adduced evidence because the burden of proving some of the issues was on him, but the burden of proving other issues was on the defendant.[4]

12. The same principle applies where certain particulars facts fall within the knowledge of the defendant. In such a case, the court should take this into account and more readily refuse to grant absolution from the instance.[5]

Whitecat's evidence is accepted as true

13. The evidence adduced by Whitecat, as plaintiff, must be accepted as true, unless it is inherently unacceptable. It must be assumed that, in the

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4 See the discussion in Van Loggerenberg *et al Erasmus Superior Court Practice* (Jutastat online version, revision service 27, 2025, D1: Rule 39-18, and the authorities there cited.

5 Ibid.

absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true.[6] Mianzo concedes that for the purpose of this application, it must be accepted that the licensing agreement exists. Whitecat's sole member, Mr Paul Baise testified on all facts surrounding the conclusion of the agreement. Therefore, the existence of the agreement was proven, albeit *prima facie*.

No need to prove a balance of probabilities

14. Whitecat is not required to prove an actual preponderance of probability in its favour. The court will only grant absolution if no reasonable inference can be drawn from the evidence adduced. The test at this stage of the trial is that the court will refuse the application for absolution unless it is satisfied that no reasonable court could draw the inference for which the plaintiff contends.[7]

Interpretation of contracts

15. Counsel for Whitecat points out that if the question for consideration is the interpretation of a contract, the court should not confine itself to the interpretation that a reasonable court would give to the contract, but should refuse absolution unless the proper interpretation of the contract is beyond question.[8]

16. In the present matter, however, I do not think that the interpretation of the licensing agreement is really in issue. The terms are fairly clear. It is, rather, the effect of those terms upon which Mianzo relies for the purposes its absolution application, and a director's duties under the relevant company law principles.

Fiduciary duties

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6 *Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E) at 527C–D.

7 *Sinqobile Equestrian Security Services (Pty) Ltd v Marks Koko Latha* [2023] ZANWHC 12 para 42.

8 *Malcolm v Cooper* 1974 (4) SA 52 (C) at 59D–E.

17. Mr Baise has testified that he concluded the agreement on behalf of both Whitecat and Mianzo, as he was the sole director of Mianzo at that stage, and the sole member of Whitecat.

18. Our company law does not prevent a person from acting in two representative capacities when concluding an agreement on behalf of two separate entities. The only proviso is that the party must be properly authorised to act on behalf of each of the entities: *"… it is in order for a person acting as a representative of a company to contract with himself or herself".*[9]

19. The parties are in agreement on this score. Mianzo has no objection to the fact that the licencing agreement was concluded by Mr Baize on behalf of both Whitecat and Mianzo. Where the trouble arises is when the person who concludes the agreement fails to adhere to his or her fiduciary duties in relation to one of the entities to the agreement. The position under the common law[10] is that a director has to act *bona* fide and in the best interests of the company in all his dealings as representative of the company, even if such person is the sole director.[11] The requirement is that the director, having taken reasonably diligent steps to become informed, should subjectively have believed that his or her decision was in the best interests of the company, and such belief (on his or her part) must have a rational basis.[12]

20. There is no magic in the term "*fiduciary duty*". The existence of such a duty, by its nature and extent, are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship.[13] In *Volvo*

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9 Blackman *et al Commentary on the Companies Act* at p. 49B.

10 A director's common law fiduciary duties, which includes a duty to act in the best interests of the company, have now been codified in Section 76 of the New Companies Act:

11 Delport *Henochsberg on the Companies Act 71 of 2008* at p. 289(9) to (11); *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) para 18.

12 Delport *Henochsberg on the Companies Act 71 of 2008* at p. 289(12).

13 *Phillips v Fieldstone Africa (Pty) Ltd and another* 2004 (3) SA 465 (SCA) at 477.

(Southern Africa) (Pty) Ltd v Yssel[14] the court stated that there is no closed list of fiduciary relationships. This depends on the facts of the particular case. There are certain characteristics that impart fiduciary qualities to a relationship. Discretion, influence, vulnerability, and trust are some of the factors to be taken into account. The kernel of the matter is whether one party has relinquished his own self-interest and agreed to act solely on behalf of the other party.[15]

21. The beneficiary's primary remedies entitle him to set aside all transactions tainted with the fiduciary's self-interest, and to claim all profits obtained by the fiduciary by use of his position or otherwise as a result of his breach of fiduciary duty. Thus, they are directed at the fiduciary's gain rather than the beneficiary's loss (if any). Their purpose is to "*deprive the fiduciary of any inducement that will affect his absolute and disinterested loyalty*".[16] In *Hely-Hutchinson v Brayhead Ltd*[17] Lord Denning MR said that "*[n]on-disclosure does not render the contract void or nullity. It renders the contract voidable at the instance of the company and makes the director accountable for any secret profit which he has made*."

22. Mianzo argues that, on the evidence led on Whitecat's behalf, Mr Baise entered into the agreement when he was the sole director and shareholder of Mianzo, as well as the sole member of Whitecat. Mr Baise had the fiduciary duties which a director had in respect of a company which he was a director of. Those included the duty to avoid conflicts of interest and to act in the best interests of the company. the Agreement was one-sided against Mianzo, and contained onerous provisions which were prejudicial towards it.

23. Mr Baise breached his fiduciary duties when he entered into the agreement, both in respect of his duty to avoid conflicts of interest and to act in the best interests of Mianzo. In addition, the evidence establishes that Mr Baise did

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14 2009 (6) SA 531 (SCA) at 16.

15 *Hodgkin v Simms* (1995) 117 DLR (4th) 161 at 176 - referred to with approval in *Volvo v Yssel supra*.

16 Per Learned Hand J in *Phelan v Middle States Oil Corporation* 220 F (2d) 593 602 (1955).

17 [1968] 1 QB 549 585; [1967] 3 All ER 98 103 (CA).

not make the required disclosures of his personal interest in the agreement before and when it was entered into in violation of the provisions of the 1973 Companies Act.

24. Accordingly, the agreement is voidable at Mianzo's instance. That means that there is no agreement on which Whitecat's claim can be based. As a result, Whitecat has not adduced *prima facie* evidence on which a claim against Mianzo could be granted.

The 1973 Companies Act

25. As indicated, Mianzo relies on various provisions of the 1973 Companies Act, in particular section 234 (alternatively section 238), and section 235.

26. Section 234(1) requires that a director who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract referred to in section 234(2), "*shall declare his interest and full particulars thereof as provided in this Act*". This provision, then, applies to all directors regardless of whether or not they act (or acted) on behalf of the company in connection with the contract.

27. Section 234(3)(a) provides for a manner of disclosure where the director is a member of a specified company or firm and is to be regarded as interested in any contract to be made with that company or firm. All other declarations of interest must be made in the manner and at the time prescribed in section 235.

28. Section 236 provides that, notwithstanding that the articles permit resolutions of the directors to take the form of written resolutions signed by each director, any such resolution concerning a contract referred to in section 234 is invalid unless the provisions of sections 234 and 235 are complied with.

29. Section 237(1) provides that an officer who is materially interested in any proposed contract which he has been authorised by the board to enter into on

behalf of the company must (as must a director who is so authorised) declare his interest in terms of section 235; and that such a director or officer must make that disclosure before entering into the contract.

30. Section 238 requires full particulars of director's material interest in a contract to be contained in the notice convening a general meeting of the company where the contract in question is to be placed before the general meeting for its confirmation or authorisation.

31. Section 239 provides for the minuting of declarations of interest. Section 240 imposes a duty on the company to keep a register of declared interests in contracts, and section 241 imposes a duty on the company's auditor to satisfy himself that that register is being kept as required by section 240.

32. Failure to comply with the declaration of interest provisions is an offence. The offences in sections 234(4) and 237(4) are punishable by a fine or imprisonment for a period not exceeding one year, or both such fine and such imprisonment

33. In the English case of *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald*,[18] the court had to consider the interpretation and application of section 317 of the UK Companies Act 1985,[19] and in particular, whether there must or can be compliance, and if so how, in the case of a company with a sole director. It was held that where a director is interested in a contract, the statutory disclosure provisions secure that three things happen at a directors' meeting. First, all the directors should know or be reminded of the interest; second, the making of the declaration should be the occasion for a statutory pause for thought about the existence of the conflict of interest and of their duty to prefer the interests of the company to their own; third, the disclosure or reminder must be a distinct happening at the meeting which therefore must be recorded in the minutes of the meeting. The existence of this record operates as a necessary caution to directors who might otherwise think that

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18 [1995] 3 All ER 811.

19 This section is similar to section 234 of the 1973 Companies Act.

their interest might pass unnoticed if the contract falls to be scrutinised at some later date; and it affords valuable information as to the existence of any interest and its disclosure and, thereby, protection for shareholders and creditors alike in case they later wish to investigate a contract.

34. It was further held that, in the context of legislation which specifically authorises sole directorships,[20] the legislature cannot have intended by use of the word "*meeting*" in the sections to exclude sole directors from their ambit, and hence from the achievement of the statutory object; and that this conclusion is reinforced by the consideration that the concept of the holding of a directors' meeting in the case of a sole directorship is familiar to company lawyers. Both the fact that the making of the declaration should be the occasion at the meeting for a statutory pause for thought by the directors (about the existence of the conflict of interest and their duty to prefer the interests of the company to their own) and the requirement that the declaration be recorded, must have enhanced value and importance in case of a sole director, where there are no other directors to witness or police his actions.

35. It was further held that in the case of a sole director, two different situations may arise. The sole director may hold a meeting attended by himself alone or he may hold a meeting attended by someone else, normally the company secretary. When holding the meeting on his own, he must still make the declaration to himself and have the statutory pause for thought, though it may be that the declaration does not have to be made out loud, and he must record that he made the declaration in the minutes. The court may well find it difficult to accept that the declaration has been made if it is not so recorded. If the meeting is attended by anyone else, the declaration must be made out loud and in the hearing of those attending, and again should be recorded. In this case, if it is proved that the declaration was made, the fact that the minutes do not record the making of the declaration will not preclude proof of its making.

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20 Such as section 200 of the 1973 Companies Act.

36. *Neptune* did not address the question of whether the contract is void or merely voidable as a result of non-compliance with the statutory provision. The case of *Hely-Hutchinson v Brayhead Ltd* is apposite in this regard.

37. There is force in Mianzo's argument. It is clear from Mr Baise's evidence that he did not have regard to these statutory provisions when he concluded the agreement. He thought it unnecessary in the circumstances. He instructed an attorney who he knew only as "*Peter*" to draft the agreement. The agreement was drawn up and amended before a final version was produced which was signed by Mr Baise. Mr Baise did not take any other independent advice on Mianzo's behalf in respect of the agreement. Mr Baise did not have any meetings in Mianzo, nor did he record his decision to enter into the agreement or his personal interest in the agreement. That was also not contained in any register of directors or shareholders' interests. Mr Baise indicated that he did not believe he was required to make disclosures nor have meetings as he was the sole member of Whitecat and the sole shareholder and director of Mianzo at the time.

38. In cross-examination Mr Baise was taken to a number of contractual terms which were, so counsel submitted, onerous and one-sided in the sense that they seemingly protect Whitecat at the expense of Mianzo. Mr Baise conceded that the agreement involved a large amount of money and was one which was outside the normal course of business of Mianzo – although the latter concession might be debatable given that the TAAS was licensed to Mianzo specifically to assist it in the operation of its business.

39. Be that as it may, Whitecat's counsel argued that the 1973 Companies Act does not find application in this matter, where a sole director is involved. The fiduciary duties of a director of a company when concluding an agreement in which he or she has an interest is governed solely by the common law:

"It is submitted that s 234 and s 237 can have no application in the case of a

private company which has only one director (but cf Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald [1995] 3 All ER 811 (Ch)). His position in relation to his having an interest in a contract with the company is accordingly regulated solely by the common law…"[21]

40. Counsel pointed out that although the English case of *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* (relied on by Mianzo and discussed above), is mentioned in Henochsberg in his commentary on the 1973 Companies Act, there is no case authority in South Africa in which our courts have applied the principles set out in such case or even referred to such case.

41. As Mianzo has relied squarely on the statutory provisions of the 1973 Companies Act in its plea, and not on the common law, Whitecat's counsel argued that it (Mianzo) could not make out a case under the common law for the purposes of its absolution application. Although Mianzo's counsel expressed disagreement with the approach in Henochsberg on this score (*inter alia* because no authority is cited in Henochsberg for the proposition), Whitecat's objection nevertheless resulted in Mianzo *ex abundanti cautela* seeking an amendment to its plea to incorporate express reliance on the relevant common law principles. The amendment was not opposed, and was accordingly granted.

<u>Is the licensing agreement voidable?</u>

42. Although Mianzo has denied the existence of the licensing agreement, Whitecat's version regarding the conclusion and terms of the agreement is the only version before this court (through the pleadings and the evidence), and is to be accepted as true. Such version does not, in my view, lead to the unassailable conclusion sought by Mianzo in this application, which is that the agreement is voidable.

43. In his evidence, Mr Baise conceded that certain clauses in the licensing

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21 Delport *Henochsberg on the Companies Act 61 of 1973* at p. 445.

agreement are onerous towards Mianzo. He provided an explanation as to why that was the case: some of the clauses were onerous because Mianzo was acquiring the use and enjoyment of a very valuable tool (a Tactical Asset Allocation System ("TAAS")}, which would enable Mianzo to generate a substantial amount of income and profit in due course. He testified that the TAAS had in fact generated substantial income for Mianzo over the years.

44. Mr Baise also said that payment of all amounts due for the use and enjoyment of the TAAS (under the licensing agreement) were deferred so as to enable Mianzo to generate income prior to it having to make any payments for using the system. This was because Mianzo was just starting up at the time of the conclusion of the agreement. Some of the clauses were undeniably onerous so as to protect Whitecat's interests in light of the benefits that Mianzo stood to gain from its use – the TAAS was, after all, Whitecat's property.

45. Mr Baise testified that he took legal advice from an attorney[22] when the licensing agreement was drawn up. Mr Baise was confused as regards which entity he took the instructions for. I do not, however, have to make any credibility findings at this stage. What is clear is that Mr Baise was wearing two hats, acting on behalf of both entities.

46. Mr Baise also testified that he showed a draft version of the licensing agreement to Mr Luvuyo Tyandela, Mianzo's current director (the circumstances and timing of his appointment are in dispute), prior to it being signed, which points to a possibility that Mianzo in fact did have some input into the agreement. It also militates against the argument that Mr Baise's personal interest in the licensing agreement, as sole member of Whitecat, was not disclosed. Such evidence has not been challenged by way of contradictory evidence as yet. Although it was put to Mr Baise that Mr Tyandela will deny that a draft of the licensing agreement was shown to him, Mr Baise remained adamant that he did show Mr Tyandela such draft

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22 Referred to, tongue in cheek, by counsel as "the mysterious Peter".

agreement. Without evidence to the contrary, Mr Baise's evidence on this issue must be accepted as correct.

47. Mianzo's counsel argued that Mr Tyandela would not be able to contribute anything further to the debate, but that remains to be seen. He will have to give evidence as to his involvement (or lack thereof) in the conclusion of the agreement, and Whitecat will have the opportunity of cross-examining him.

48. What was required of Mr Baise was that he was to act in accordance with his fiduciary duties when concluding the licensing agreement in two representative capacities in respect of two separate entities. Mr Baise's testimony was that the licensing agreement was to the benefit of both parties. Mianzo gained the use and enjoyment of the valuable TAAS, without having to pay for such usage for an extensive period of time. Whitecat gained an advantage in that it was protected in the event that Mianzo used the TAAS and never paid for it or dissipated assets to the detriment of Whitecat.

49. I agree with Whitecat's counsel that what the common law required was that Mr Baise had to comply with his fiduciary duties to act *bona fide* and in the best interests of Mianzo when the licensing agreement was concluded. The evidence at this stage does not necessarily prove that Mr Baise acted in breach of his fiduciary duties when he concluded the licensing agreement as sole director of Mianzo. Evidence to the contrary needs to be led by Mianzo to reach such a conclusion.

50. Even if Mianzo is correct in its assertions that the licensing agreement is one- sided and prejudicial towards Mianzo, the fact remains that the agreement is not void, but instead voidable on the part of Mianzo. It is not sufficient for Mianzo simply to plead that the licensing agreement is voidable at its instance.[23] Mianzo bears the onus as regards the voidability of the agreement, and I think that its evidence in this regard is required to answer

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23 *Peters NO v Schoeman* 2001 (1) SA 872 (SCA) para 12.

the evidence given by Mr Baize in this respect.

51. I agree with Whitecat's counsel's submission that Mr Baise's evidence showed that the identified onerous clauses are not necessarily evidence that the licensing agreement is one-sided or prejudicial. Further evidence might well show that the agreement strikes a balance between the substantial benefit that Mianzo would gain from using the TAAS, without having to pay for its use for the first seven years, whilst ensuring that Whitecat's interests were protected should Mianzo (or its directors) use the TAAS but fail to make payment for doing so.

52. The court has not heard from Mianzo's director or employees as to the use to which the TAAS has been put over the years, and the benefits is has brought to Mianzo. Accepting for the sake of the argument that the matter does include an aspect of contractual interpretation, it cannot be said at this stage that a proper interpretation of the agreement leads to only one conclusion, namely, that the licensing agreement is so onerous and one-sided against Mianzo that it should be declared voidable at Mianzo'a instance. The only way that the court will be able to make a determination on the issue is once Mianzo's witnesses testify on the agreement, its role and purpose within Mianzo's business, and on the use to which the TAAS has been put.[24]

<u>Conclusion</u>

53. For these reasons, I do not think that Mianzo has satisfied the requirement *"that no reasonable court could draw the inference for which the plaintiff contends"* – at least not at this stage.

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[24] *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Ltd* 2023 (6) SA 327 (CC) para 48: "*As I understand Endumeni, the language used in the document should be given its grammatical and ordinary meaning unless this would result in some absurdity, repugnancy or inconsistency with the rest of the instrument. The mode of construction, however, should never be to interpret the particular word or phrase in isolation. It is remiss to focus on individual aspects of the agreement and to read the entire agreement in a piecemeal fashion. The purpose of the impugned clauses requires a court to counterpoise the purpose of the agreement, on the one hand, on the other to ensure that the contextual approach to the proper interpretation of the exemption clause is not ignored.*"

54. Mianzo's argument is an attractive one which will no doubt require careful consideration again in due course in the context of both parties' evidence. The applicability of the 1973 Companies Act in a situation such as the present, and in particular whether *Neptune* should be followed in our law (in relation to which I make no finding at this point) will require scrutiny at the hand of all of the relevant facts, and on consideration of both parties' evidence as to how the conclusion of the agreement came about.

Costs

55. There is no reason to deviate from the general rule that costs should follow the result. Counsel were agreed that their fees should be taxed on Scale B because although not simple, the issues were not so complex as to warrant fees on Scale C.

56. These costs relate only to the application for absolution. All other costs stand over for later determination.

Order

57. In the circumstances, I grant the following orders:

1. The amendment to the defendant's plea is granted, with no order as to costs.

2. The defendant's application for absolution from the instance is refused, with costs, including the costs of counsel on Scale B.

3. All other questions of costs stand over for later determination.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the plaintiff:	Mr J. K. Felix
Instructed by:	Dunsters Attorneys
For the defendant:	Mr D. van Reenen
Instructed by:	Herold Gie Attorneys