

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

Case No.: 04/30267

In the matter between:

PEET, JASON REUBEN

Applicant

and

ROSS, STEVEN M (CEO) - EDCON

Respondent

(EDGARS CONSOLIDATED STORES LIMITED)

JUDGMENT

[1] The applicant seeks a money judgment for unliquidated damages against the respondent in this application. In prayer (a) of his notice of motion, the applicant claims *“payment that is just and equitable (R7, 6 million), justice must therefore be seen to be done.”* The respondent is the managing director and chief executive officer of Edgars Consolidated Stores Limited (“Edcon”).

[2] The applicant’s claim arises out of his arrest and detention for the alleged theft of a compact disc, entitled *“Trouble in Shangri-La”* by Stevie Nicks, from a

CNA store in the Lakeside Mall, Benoni, on 19 August 2002. The applicant was criminally charged for the alleged theft. He stood trial in the Regional Court, Benoni, on 25 September 2002 and on 18 October 2002. The applicant was acquitted on 18 October 2002. The applicant's version is that the compact disc in issue was one of two compact discs which belonged to him and which he had in his possession when he entered the CNA store on the day in question. The compact disc was confiscated from the applicant's person by a member of the staff at the CNA store on 19 August 2002. The value of the compact disc was approximately the sum of R170.00.

[3] On 12 August 2003, the applicant addressed a letter to the respondent in his capacity as the CEO of Edcon. In this letter the applicant demanded the return of the confiscated compact disc. He further advised the respondent that he would institute legal proceedings against the respondent in his personal capacity in the Small Claims Court should his demand not be met.

[4] Edcon's Group Legal Adviser and Company Secretary, Elizabeth Bagley, met with the applicant on 21 January 2004 in an endeavour to address the applicant's unhappiness. The meeting did not yield the desired result and, at the end of the meeting, the applicant handed to Ms. Bagley a second letter of demand wherein he notified the respondent that, should his previous demand not be met, the applicant would present his case to the Small Claims Court and summons the respondent personally to appear as the responsible party.

[5] By letter dated 22 January 2004, signed by the respondent, Edcon denied any liability to the applicant and informed the applicant that Edcon purchased the business carried on by Consolidated News Agencies (Pty) Ltd (in liquidation) and Central News Agency (Pty) Ltd (in liquidation) under the name and style of “CNA” (“the CNA companies”) with effect from 21 October 2002.

[6] The applicant then sued the respondent personally in the Small Claims Court, Benoni on 25 February 2005, for payment of the sum of R3000.00, being “*money owing for replacement of CD.*” Edcon is a large public company carrying on business as a group of 641 retail stores operating under various names throughout the Republic of South Africa. The respondent states that he, in his capacity as the CEO of Edcon, has numerous duties and responsibilities and, whilst Edcon and the respondent denied any liability to the applicant for the return of the compact disc or for payment of the sum of R3000.00, he had important commitments toward Edcon on the date of the trial in the Small Claims Court. The matter in the small claims court was accordingly settled and payment in the sum of R3 000.00 was made to the applicant. Such payment was made to avoid litigation with the applicant and in the interest of maintaining good customer relations.

[7] The applicant thereafter launched the present motion proceedings against the respondent on 1 December 2004. The applicant claims R7,6 million as damages

from the respondent and he lists a number of alleged violations of his rights in paragraphs “(b)” to “(z)” of the notice of motion, all arising out of the same incident, namely his arrest, detention and criminal prosecution pursuant to the accusation of theft of the compact disc made against him.

[8] Mr. P.N. Levenberg, who appeared for the respondent, submitted that no basis for liability has been established against the respondent. This was disputed by the applicant, who appeared in person.

[9] The applicant states in his founding affidavit that Edcon is liable for the wrongs committed against him, because it is the “*umbrella body*” of the CNA companies and the respondent is vicariously liable on the basis of the “*King 2 Report on Corporate Governance*” as he is the chief spokesperson for the companies under the Edcon umbrella.

[10] The respondent’s version is that Edcon and the CNA companies are separate legal entities and they had no connection at the time when the delict against the respondent allegedly occurred. Only the business of the CNA companies, and not the companies themselves, was thereafter acquired by Edcon and it never became liable for the delict allegedly committed by the CNA companies.

[11] The necessary factual foundation for a finding of personal liability on the part

of the respondent, is, however, not furnished by the applicant, such as a wrongful act performed or authorised, directed or procured by the respondent (see: *Blackman Jooste Everingham: Commentary on the Companies Act, Vol 2 at p 8-230 et seq.*; Joubert: *The Law of South Africa (1st Reissue), Vol 4 Part 2 at p 293*).

[12] Mr. Levenberg submitted that motion proceedings are inappropriate in order to obtain a money judgment for unliquidated damages. I agree. It was specifically held in **Williams v Tunstall 1949 (3) SA 835 (TPD)**, at p 839, and in **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)**, at pp 1160 – 1161, that motion proceedings are not permissible in cases of illiquid claims for damages. Insufficient facts have in any event been furnished by the applicant for a proper judicial assessment of his damages, and the amount thereof, even if unliquidated damages could be pursued in motion proceedings.

[13] Mr. Levenberg submitted that the applicant's claim against the respondent is vexatious, he previously unjustifiably sued the respondent in his personal capacity in the small claims court for payment of the sum of R3000.00, being the alleged value of a CD, which was worth less than R200.00, there is no legal basis for his present claim, and that an end should be put to the applicant's harassment of the respondent through an exemplary costs order. There is justification for such an order of costs.

[14] In the result, the application is dismissed with costs on the scale as between attorney and own client.

P.A. MEYER

Acting Judge

3 November 2005