



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

NOT REPORTABLE
Case No: 676/2012

In the matter between:

MEDX (RANDBURG) (PTY) LTD

APPELLANT

v

ANDREW SHAUN BRANFIELD

RESPONDENT

Neutral citation: *MedX (Randburg)(Pty) Ltd v Branfield* (676/12) [2013] ZASCA 113 (18 September 2013).

Coram: Brand, Maya, Wallis, Petse JJA *et Zondi* AJA

Heard: 27 August 2013

Delivered: 18 September 2013

Summary: Incorporated company – claim against director personally for debts of company pursuant to memorandum of incorporation prescribed by s 53(b) of Companies Act 61 of 1973 – defence based on express undertaking on behalf of creditor not to hold director personally liable – credibility issue as to whether undertaking was given.

ORDER

On appeal from: A full court of the South Gauteng High Court, Johannesburg (Tsoka J with Carelse J and Dörfling AJ concurring, sitting on appeal against a judgment of Sibeko AJ):

- 1 The appeal is upheld with costs.
- 2 The order of the court a quo is set aside and replaced with the following:
'The appeal is dismissed with costs.'

JUDGMENT

BRAND JA (MAYA, WALLIS, PETSE JJA et ZONDI AJA CONCURRING):

[1] The appellant, Medx (Randburg) (Pty) Ltd (Medx), instituted action in the South Gauteng High Court, Johannesburg, against the respondent, Dr A S Branfield (Branfield) for payment of about R365 000. The claim arose from a lease agreement between Medx and a company, Dr A S Branfield Incorporated (the company). The basis upon which Medx sought to hold Branfield personally liable for the debts of the company arose from the provision in the memorandum of association of the company to the effect that the directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the latter contracted during their periods of office. The provision is, of course, prescribed for companies designated 'incorporated' or 'Inc' by s 49(4) read with s 53(b) of the Companies Act 61 of 1973.

[2] While admitting that he was a director of the company when the debt in favour of Medx was incurred, Branfield nonetheless denied liability. In essence his denial rested on an express oral agreement between him and Mr Brian Wylie (Wylie), the director in control of Medx, that despite the stipulation in the memorandum of

association of the company, Medx would not hold Branfield liable for its claims against the company. Wylie in turn denied that he ever entered into an agreement of that kind. In the event, the existence of this alleged oral agreement constituted the crucial dispute between the parties.

[3] Despite the narrow ambit of the dispute and the relatively modest amount involved, the case followed a meandering and costly path through the courts. As an opening gambit, Medx sought to enforce its claim against the company and Branfield, jointly and severally, in the magistrates' court. While Branfield successfully raised a plea that the magistrates' court had no jurisdiction to entertain the claim against him, judgment was granted by default against the company for the amount claimed. As a next step Medx tried to secure judgment against Branfield by way of motion proceedings in the High Court. In his opposing affidavit Branfield, for the first time, relied on the plea of an oral agreement between him and Wylie that Medx would not hold him personally liable for the debts of the company. Because of the dispute of fact thus arising, the application was dismissed with costs.

[4] Undeterred by these two setbacks, Medx then instituted the action which eventually resulted in this appeal. At the trial the parties were in agreement that the onus to prove his defence of an oral agreement rested on Branfield. At the end of the proceedings Sibeko AJ held that Branfield had failed to rebut that onus. In consequence he granted judgment as prayed in favour of Medx with costs. Branfield's appeal to the full court was however successful in that Tsoka J – with Carelse J and Dörfling AJ concurring – set aside the order by the court of first instance and replaced it with an order dismissing Medx's claim with costs. The present appeal against the judgment of the full court is with the special leave of this court.

[5] The outcome of the appeal turns exclusively on issues of fact. Those issues are to be determined against the background that follows. At the beginning of 1999 Medx started a back and neck rehabilitation centre in Randburg. For that purpose it

imported equipment costing roughly R1 million. After it started the practice the Health Professions Council insisted, however, that the centre should be under the control of a medical doctor which Wylie, who was in control of Medx's affairs, was not. He was a chartered accountant. In consequence there were some exploratory exchanges between Wylie and Branfield who, at the time, had been his family physician for some ten years, about the latter becoming involved in the clinic. Subsequently Wylie presented Branfield with a written proposal. This was towards the end of September 2002.

[6] In broad outline the proposal was that Branfield and nine other doctors, who all practised at Medicross in Randburg, should establish a multidisciplinary practice which would lease its premises and equipment from Medx. According to the proposal the benefit for Medx would be the rental derived from the lease while the doctors participating in the practice stood to earn a handsome profit after a few years. The proposal also gave some consideration to whether the new practice should be conducted as an incorporated company or by way of a partnership between the participating doctors. In leaning towards an incorporated company the proposal inter alia stated under the heading 'Limited liability' that:

'Partners in a partnership have unlimited liability, whilst the liability of shareholders in an incorporated company is limited to liabilities contracted by the company.'

Under the heading 'Bridging finance from Bank' the proposal further stated that:

'To finance working capital. Surety will be given by all the doctors in proportion to their shareholding.'

During examination-in-chief Branfield was asked by his own counsel how he understood the statement concerning liability of an incorporated company. To this he responded:

'That if I involved myself I would not be placing myself at financial risk.'

[7] It is common cause that on 18 October 2002 Wylie presented and explained the same written proposal to the ten doctors, including Branfield, at whom it was aimed. Towards the end of November 2002 it became apparent, however, that, apart from Branfield, none of the other doctors would become part of the practice. This

appears from an e-mail dated 22 November 2002 in which Branfield informed Wylie that:

'I don't mind filling in my section but none of the other doctors are too keen to get involved at this stage. The biggest concern remains financial that they are going to acquire debt. Until this is proven to them I do not see too many becoming involved.'

[8] In the meantime, according to Branfield's version, there was a meeting between him and Wylie on 3 October 2002 at a Portuguese restaurant in Randburg where Medx's then bookkeeper and Wylie's girlfriend at the time, Ms Bronwen Frylinck, was also present. At the meeting where, so Branfield testified, he explained to Wylie that he had previously been involved in a partnership where he was held liable for the debts of one of his partners and that he was therefore determined not to expose himself to any personal financial risk again. Thereupon, so Branfield testified:

'Wylie . . . said I was not putting myself at financial risk and this venture would not cost me a cent out of my own pocket. And those are Mr Wylie's words . . . Those were the exact words that he used.'

[9] Frylinck was called to testify on behalf of Branfield. She corroborated his version of a meeting between him and Wylie which took place in her presence at a Portuguese restaurant in Randburg during about October 2002. Although she had no independent recollection of exactly what was said, she could remember that Branfield was wary about exposing himself to financial risk and that Wylie repeatedly assured him that there was no personal risk to Branfield at all. She also testified that the relationship between her and Wylie subsequently came to an end. This appears to have happened during about June 2004. By all accounts it is clear that the termination of the relationship was acrimonious and unpleasant in the extreme. This is illustrated by an interdict obtained by Frylinck against Wylie restraining him from assaulting her to which Wylie retaliated by laying criminal charges against Frylinck for theft.

[10] But to resume the chronological sequence of events: when it became apparent towards the end of 2002 that Branfield would be the sole participant in the multidisciplinary practice, he informed Wylie of his intent to use the company, which was dormant at the time, as the vehicle for this purpose. So it happened that at the beginning of January 2003 the company started the multidisciplinary practice in the premises and using the equipment of Medx although the leases for these were only concluded in March 2003. At the end of January 2003 it became apparent that the company was in financial difficulty in that it could not pay the rental for the premises and the equipment to Medx nor could it pay the salaries of its employees.

[11] This situation gave rise to an exchange of e-mails between Wylie and Branfield on 30 and 31 January 2003, which proved to be of some relevance. It started with a suggestion by Wylie that Medx would agree to a postponement of rental payments for two months and that it would lend the company an amount of R30 000 until April 2003 for payment of salaries. This led to a query by Branfield:

'What if the INC [ie the company] does not have the funds by April 2003? Is it fair to charge me all the interest when it is a joint venture between both of us? . . . This is a joint venture. Surely I should be liable for 50% of the amount.'

In response to this query Wylie explained in an e-mail of 31 January 2003, that the multidisciplinary practice was not a joint venture but was solely owned by the company and that Medx's position was that of a lessor and a moneylender. Then the e-mail continued as follows:

'MedX does not have all the cash to lend to your company – I am in absolute good faith putting myself at risk by lending MedX money so that it can lend it to your company. . . . [Y]ou are not personally liable for anything and are therefore not at risk at all in a personal capacity.'

[12] The reasoning by Sibeko AJ underlying his finding in favour of Medx, went along the following lines. What Branfield's defence amounted to, he held, was that Medx had waived its right to claim payment from Branfield personally in terms of the provision to that effect in the company memorandum of association. In order to succeed with this defence, so he further held, Branfield had to establish that at the

time of the oral agreement Wylie was aware of the provision in the company's memorandum of association, the benefit of which he is alleged to have waived. In this light, so Sibeko AJ concluded, the defence of waiver could not succeed, since Branfield tendered no evidence that Wylie was aware of the provision of the company's memorandum of association at the time of the alleged oral agreement. 'This is more so', he said, because 'on the evidence tendered, no agreement had been reached at that time [when the alleged oral agreement was concluded in October 2002] as to the identity of the entity through which the multidisciplinary practice would be conducted.'

[13] Although the full court found no difficulty with the proposition of law that underlies Sibeko AJ's conclusion, it disagreed with his findings of fact. In the view of the full court this finding could not be sustained in the light of the express statement in the written proposal prepared by Wylie, that if the multidisciplinary practice were to be conducted through the medium of an incorporated company, the shareholders would only attract personal liability for contractual claims against the company. As I see it, however, the full court and Sibeko AJ were talking about two different things. While the full court held that Wylie was plainly aware of the legal implications of using the medium of an incorporated company in general terms, Sibeko AJ found that Wylie did not know in October 2002 of Branfield's intention to use an incorporated company as the vehicle for the multidisciplinary practice. Thus understood, they were both right. It is common cause that in October 2002 it was not foreseen by anyone that Branfield would conduct the multidisciplinary practice on his own, let alone that he would do so through an incorporated company. That much was implicitly accepted on behalf of Branfield when an application to amend his plea was sought and obtained after both he and Frylinck had given evidence. According to the amended version of the plea Wylie agreed that Branfield would not be held personally liable by Medx for any debts incurred by any incorporated entity of which Branfield was a director or shareholder, in a multidisciplinary practice to be established at Medx's premises. Hence the import of the amendment was that

Wylie's alleged undertaking was no longer limited to the debts of the company, but pertained to any incorporated body in which Branfield was a director or shareholder.

[14] As I see it, Sibeko AJ's problem with Branfield's case was removed by the amendment to his plea. According to the amended version Wylie's oral undertaking of 3 October 2002 was not limited to the debts of the company. Hence the fact that the involvement of the company was at that stage unknown, was no longer of any consequence. If one were therefore to accept Branfield's amended version, namely that Wylie's undertaking not to hold Branfield liable extended to the debts of any incorporated body which Branfield would choose as a vehicle for his participation in the multidisciplinary practice, Medx's claim against him personally would be in conflict with that undertaking. On the acceptance of that version the full court could therefore not be criticised for dismissing Medx's claim.

[15] Hence the outcome of the appeal is entirely dependent on issues of credibility. Can it be said that Branfield had established his version of the disputed facts on a balance of probabilities? The full court, as we know, found that he did. From the court's judgment it is plain that its credibility finding was motivated by the court's conclusion that three considerations rendered Branfield's version more probable. These were: (a) that because of his personal experience Branfield would be unwilling to attract the risk of personal liability; (b) that the other medical doctors declined to become involved in the multidisciplinary practice precisely because of their reluctance to attract the risk of personal liability; and (c) Wylie's e-mail of 31 January 2003 in which he assured Branfield that 'you are not personally liable for anything and therefore not at risk at all in a personal capacity'. In argument counsel for Branfield contended that there was a further consideration in favour of his version, namely, that Wylie was desperate to ensure Branfield's involvement in the multidisciplinary practice. I propose to deal with these four considerations in turn.

[16] I start with the consideration introduced by counsel, that Wylie was desperate to ensure Branfield's involvement in the practice. This consideration is plainly a valid

one. The Health Professions Council insisted that the centre established by Wylie on behalf of Medx should be under the control of a medical doctor. Without the involvement of a doctor, the equipment imported for the price of about R1 million would therefore be gathering dust. The only question is whether Wylie was desperate enough to forego the comfort of the doctor's personal liability. We know that initially ten doctors were interested. The only reason why they eventually declined to become involved is that they were not prepared to run the risk of personal liability. Ten doctors were obviously better than one. Logic therefore dictates that if Wylie was prepared to forego the comfort of personal liability of the shareholders in an incorporated company, he could easily take ten doctors on board by giving them the very undertaking that he allegedly gave to Branfield. The same logic defeats Branfield's argument that Wylie obviously believed that one doctor was better than none. For the same price he could actually get ten instead of one. The fact that he did not pay the price of giving this undertaking to all ten, in my view, favours his version that he was not prepared to do so at all.

[17] This leads me to a consideration that swayed the court a quo, namely that it was unlikely that Branfield could expose himself to the risk of personal liability while nine other doctors were not prepared to do so. Again this consideration has some attraction. But it must be borne in mind that on his own version Branfield had his reasons for wanting to enter into the practice. Apart from being a general practitioner, he has a master's degree in sports medicine and it had always been his vision, so he said, to establish the type of comprehensive sports medicine clinic envisaged in Wylie's written proposal. Moreover, Branfield stood to make substantial profits if he was able to properly follow the business model contained in the proposal. Indeed the defence relied upon by the company in the magistrates' court revolved around Branfield's dissatisfaction that the handsome profits forecasted in the proposal had not been made. In my view it is therefore not unlikely that Branfield had more confidence in the financial future of the practice than the other nine doctors.

[18] With regard to the written proposal there are, in my view, considerations that indeed tend to favour Wylie's version. As we know, the proposal was sent to Branfield towards the end of September 2002 and presented and explained by Wylie to the other nine doctors on 18 October 2002. The agreement relied upon by Branfield was allegedly concluded on 3 October 2002. The written proposal specifically referred to the liability of shareholders in an incorporated company – which was the suggested vehicle for the proposed practice – for the contractual liabilities of the company. In addition it referred to the likelihood that the company would have to borrow working capital from the bank and that the bank would require suretyships from the individual shareholders. It is common cause that Wylie was not prepared to release the other nine doctors from their personal liability towards Medx. But if Wylie were to exonerate Branfield from personal liability shortly before his meeting with the other nine, this would in all likelihood become known to them. In fact, I believe he and Branfield would be obliged to reveal this exoneration to them. But how would he explain this to them? On what basis would he be able to resist their insistence, which was bound to follow, that they be exonerated from personal liability on the same basis as Branfield?

[19] This brings me to the consideration that, because of his personal experience in the past, Branfield would be unwilling to attract personal liability, which was referred to by the full court as the phenomenon of 'once bitten twice shy'. Purely at face value, the consideration again appears to be a weighty one. But of course, it must be seen in context. Part of the context is that the relationship in which Branfield was bitten was one of partnership and the debts for which he was held liable were the personal debts of a partner, not the debts of the partnership. Of further significance, I believe, is Branfield's own evidence as to how he understood Wylie's proposal with regard to the legal effect of an incorporated company, namely:

'[T]hat if I involve myself I would not be placing myself at a financial risk.'

What all this means in sum, as I see it, is that Branfield had thought that he could avoid the difficulties he previously encountered because of a partnership by making use of an incorporated company instead. But this, of course, leaves no room for

Branfield seeking and obtaining immunity from Wylie against personal liability for the debts of the company. According to his understanding, that immunity would follow as a matter of course.

[20] Finally there is Wylie's e-mail of 31 January 2003 in which he assured Branfield that 'you are not personally liable for anything and therefore not at risk at all in a personal capacity'. Wylie's explanation for this e-mail is that it was said in the context of the Medx loan of R30 000 to the company for the payment of salaries. On a proper analysis of the e-mails I think that this is probably true. It was argued on behalf of Branfield that the assurance was unsolicited. But I do not believe that is so. Branfield was complaining about his risk of being held liable for interest on the loan if the company did not have the funds to repay by April 2003. Wylie thereupon explained that the true state of affairs was the other way around in that it was he, Wylie, who was 'putting himself at risk by lending MedX money so that it can lend it to your company'. Branfield, on the other hand, so Wylie explained, was not liable in terms of the loan agreement that Wylie had prepared 'with the help of Legal Write' which 'does not require you to commit yourself personally to the loan'.

[21] Unlike the full court I am therefore not persuaded that the inherent probabilities favour Branfield's version. On the contrary, I believe they go the other way. In addition there are other features of Branfield's case that I find disturbing. So, for instance, one wonders, if this immunity against personal liability was so important to him, why Branfield did not refer to it in any of his many e-mails or insist that it be recorded in the lease agreements. And why was it only raised for the first time in his opposing affidavit in the High Court motion proceedings which followed the magistrates' court litigation? I do not suggest that these considerations are in themselves decisive but they do tend to add weight to Wylie's case. Of course I have not lost sight of the evidence of Ms Frylinck. But other than what was suggested to her by way of blatantly leading questions, her evidence seems to amount to little more than this: Branfield was worried about his exposure to personal liability. Wylie thereupon repeatedly assured him that he did not lay himself open to any financial

risk at all. That could easily have been said in the context of a secure investment. However, be that as it may, apart from Ms Frylinck's potential motive to prejudice Wylie, I regard her evidence of insufficient weight to swing the balance in favour of Branfield's version. In this light I believe the appeal should be upheld with costs.

[22] It is ordered:

- 1 The appeal is upheld with costs.
- 2 The order of the full court is set aside and replaced with the following:
'The appeal is dismissed with costs.'

F D J BRAND
JUDGE OF APPEAL

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