

SOUTH AFRICA / JUDGMENT

Metro Minds (Pty) Ltd v Pienaar (14399/2018) [2020] ZAGPPHC 817 (17 December 2020)

[2020] ZAGPPHC 817

COURT

North Gauteng High Court, Pretoria

BEFORE

Basson

CASE / FILE NUMBER

14399/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case

no: 14399/2018

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
In

the matter between:

METRO
MINDS (PTY)
LIMITED
Plaintiff
and
HENDRIK
DANIEL
PIENAAR
Defendant

JUDGMENT

BASSON,J

The

issues

[1] In this matter the Court is called upon to decide two questions: (i) Firstly, whether the defendant (Mr Hendrik Daniel Pienaar – “the defendant”) should be held liable for the debt owed by ICT International Consulting and Training Worx (Pty) Ltd Limited trading as ICT Worx (“the contracting company”) to the plaintiff (Metro Minds (Pty) Ltd) as a consequence of him (the defendant) acquiescing in reckless, grossly negligent or fraudulent conduct of company business as contemplated in terms of section 22(1) read with section 218 of the Companies Act[1] (“the Companies Act”). (I will refer to this question as “the personal liability question”). (ii) The second question is whether the defendant should be declared delinquent for acting in such reckless, grossly negligent or fraudulent conduct of company business as contemplated in section 77(3)(b) of the Companies Act in terms of section 162(5)(c)(iv)(aa)

and/or (bb) of the Companies Act. (I will refer to this as the “the delinquency question”).

The factual background

- [2] The contracting company, duly represented by the defendant, had entered into a contract with Bidvest in terms of which it (the contracting company) would present a learnership programme to Bidvest. In terms of this agreement, Bidvest would pay the contracting company for services rendered.
- [3] During or about November 2016 the plaintiff (represented by Ms Juliette Fourie - “Fourie”) and the contracting company (duly represented by the defendant) entered into an oral agreement. In terms of this agreement, the plaintiff was subcontracted by the contracting company to facilitate the learnership program on behalf of the contracting company to Bidvest. The plaintiff was therefore appointed as the subcontractor to the contracting company, who was responsible for rendering the facilitation of the learnership program to Bidvest in terms of the agreement between the contracting company and Bidvest.
- [4] The oral agreement was at the insistence of the plaintiff reduced to writing and was finally undersigned by the contracting company, duly represented by the defendant, on or about 8 February 2017 (“the service level agreement”).
- [5] In terms of the service level agreement, the contracting company agreed to pay the plaintiff a 10% deposit on registration, together with a monthly fee calculated per session over a period of 10 months.

- [6] It was common cause that, despite the fact that the plaintiff complied with its obligations and despite numerous demands made to the contracting company it has not paid a single cent to the plaintiff. The full amount for which the contracting company was liable to pay to the plaintiff was R 779 850.00 excluding VAT.
- [7] During the period 13 January 2017 to 7 February 2017 a series of e-mails were exchanged between the plaintiff and the contracting company (represented by the defendant). In these emails the plaintiff, inter alia, enquired about payment for services rendered. Fourie also confirmed in her evidence that the defendant informed her in February 2017 that the contracting company was in the process of relocating to new offices. The defendant also told her that the moving costs were funded with some of the money Bidvest paid to it (the contracting company) and which was earmarked for payment to the plaintiff. This was not disputed by the defendant in his evidence. In fact, the defendant readily admitted that he used the money received from Bidvest towards the aforesaid moving costs.
- [8] On 13 January 2017, Fourie wrote an email to the defendant urging him to furnish her with the signed service level agreement. This email was followed by numerous further emails urging the contracting company to furnish the plaintiff with a signed agreement. I have already pointed out that the agreement was finally signed on 8 February 2017.
- [9] Even before the service level agreement was signed confirming the oral agreement, the problems relating to the payment outstanding monies surfaced: On 13 January 2017, Fourie sent an email to the defendant in which she (apart from restating her request that the service level agreement be signed) stated that the plaintiff was still awaiting payment of the deposit. She also warned the defendant that the plaintiff will have to place a hold on the project if the deposit (and the signing of the service level agreement) is not sorted out in light of the fact that the plaintiff has already incurred a lot of costs towards the project.
- [10] On 29 March 2017 the contracting company, again duly represented by the defendant, and Bidvest, entered into a written amendment of the agreement between them whereby the final payment would be made directly from Bidvest to the plaintiff to the value of R375 000.00 in full and final settlement of Bidvest's financial obligations to the contracting company. The said amount was in fact paid over to the plaintiff. However, despite payment of this amount, the contracting company still owed the plaintiff an amount of R404 850.00 together with VAT.
- [11] It is common cause that, at the time when this amount was paid over by Bidvest directly to the plaintiff, the contracting company had numerous creditors and was experiencing severe financial difficulties. By allowing the plaintiff to be paid in these circumstances, the defendant thus effectively actively allowed one creditor to be favoured over another.

Written demand of 5 April 2017

[12] On or about 5 April 2017 the plaintiff sent a written demand per

email to the contracting company which included an acknowledgement of debt agreement. The plaintiff required of the contracting company to sign the document. In this demand the following is recorded that: 1. Bidvest strictly adhered to its contractual obligations towards the contracting company and diligently paid the learnership amounts due to the contracting company under the Bidvest agreement; and 2. notwithstanding the contracting company's obligation to effect payment in such circumstances as set forth in the scope of the service agreement, the contracting company utilised the funds received from Bidvest to pay for its own operational expenses not remotely related to the Bidvest agreement.

[13] It was further recorded in this email that the defendant had in fact admitted that the contracting party was under a lot of financial pressure and not being able to pay its debts as it fell due. More importantly, the defendant admitted that the payment which it received from Bidvest and which was earmarked for the plaintiff, was utilised for the infrastructure expenses which the contracting company incurred for the refurbishment of its new offices. Lastly, it was recorded that the defendant had made several verbal payment arrangements on behalf of the contracting company, all of which has been breached.

Communication of 7 June 2017

[14] On 7 June 2017 the plaintiff again contacted the defendant and requested an update as to how the contracting company would resolve the monies still outstanding.

WhatsApp message of 14 July 2017

[15] In a WhatsApp message dated 14 July 2017 Fourie asked the defendant the following:

“Ek het so ‘n paar maande kans gegee dat jy kan terugvoer gee of the R400k wat ICT worx Metro Minds skuld en gehoop jy sou al laat weet het om dit te begin betaal. Soos genoem en bevestig is ons tevrede dat julle dit in klein porsies afbetaal voor ons jaareinde Feb 18.

Kan ek asb indikasie kry van wat jou plan is mbt julle uitstaande gelde? GROETE Juliette.”

[16] Fourie received no response.

Incorporation of novel company

[17] On or about 17 July 2017 the novel company was incorporated and

registered, trading under the same name and style as that of the contracting company, namely “ICT Worx”.

[18] On 1 August 2017 the defendant distributed a written communiqué

which provided, inter alia, that the novel company traded, as from 1 August 2017 (i) as “ICT Worx” and (ii) at the same premises as the contracting company’s principal (original) place of business. So, as from 1 August 2017 the novel company was incorporated and was represented by the defendant and had the same name, contact details and website as the contracting company.

[19] Further, as from 1 August 2017 (at the latest) the defendant by his own admission alienated the contracting company’s goodwill and intellectual property in the form of its brand and its computers, furniture and office equipment, to the novel company (in which he held 30% shares) for no commercial value. On behalf of the defendant it was submitted that the defendant “acted under desperate circumstances and that the goodwill contained no commercial value. The Defendant could not afford the luxury of being unduly academic. He adopted a business approach to matters”. This is, unfortunately, as pointed out hereinbelow, no excuse for the reckless manner in which the defendant conducted the affairs of the contracting company.

[20] Under cross- examination the defendant admitted that during the

relevant period he did not know that he, as a director, owed the contracting company a fiduciary duty. According to him, he only knows that now.

[21] The defendant further admitted in cross-examination that he did not liquidate the contracting company despite the fact that it was in debt but allowed it to trade despite being unable to pay its employees or creditors.

Personal liability of the defendant

[22] Generally, directors of companies do not act in their personal capacity but as agents for their company. Where a director enters into a contract with a party, it acts on behalf of the company and not in his personal capacity. In order to prevent the abuse of the separate legal personality of a company, the Companies Act provides in sections 22(1) (read with section 218(2)) and 77(3)(b) for the personal liability of a director towards a company for reckless or fraudulent trading. Directors may also be personally held liable for any loss, damage or costs sustained by a “third party” as a direct or indirect consequence of the director having acquiesced in carrying on the company’s business despite knowing that it is being conducted in a manner prohibited by section 22(1) of the Companies Act. Where a director acquiesced in such reckless or fraudulent behaviour as contemplated in section 22, a court must declare a director acting in the manner contemplated in s 77(3)(b) to be a delinquent director in terms of section 162(5)(c)(iv)(bb) [see s 214(1)(c)]. (I will return hereinbelow to the delinquency question.)

[23] Thus, a third party may in terms of section 22 read with section

218(2) and section 77(3)(b) of the Companies Act hold a director personally liable for acquiescing in reckless, grossly negligent or fraudulent conduct of company business where such conduct causes damage to such third party. Section 22 of the Companies Act sets out the general basis upon which a company may be held liable:

“22 Reckless trading prohibited

- (1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.”

[24] In terms of section 218(2) of the Companies Act, “any person”

(in this instance the defendant acting at all times on behalf of the contracting company) may be held liable for the loss or damages of a third party (in this case the plaintiff) as a result of the contravention of any of the provisions of the Companies Act (most

notably section 22 of the Companies Act) that resulted in such a loss. Section 218 reads as follows:

“218 Civil actions

- (2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.”

[25] The onus is on the party alleging recklessness to prove on a balance of probabilities the necessary facts to establish conduct of a reckless nature.

[26] On behalf of the plaintiff it was submitted that the common

cause facts and evidence establish that the defendant knowingly (alternatively grossly negligently or acquiesced) allowed the contracting company to continue trading in insolvent circumstances and continued to have the plaintiff render a service to Bidvest

knowing that the contracting company could not pay it for. This was not denied by the defendant. He in fact acknowledged that he allowed the contracting company to utilise funds that should have been paid to the plaintiff to pay for its own operational expenses. By doing so, the defendant allowed the contracting company to trade recklessly to defraud the plaintiff.

[27] Importantly, the defendant also knowingly allowed the contracting company to alienate its assets for no value to the novel company, which constituted a breach of trust in relation to the performance of a director’s functions and duties to the company particularly in circumstances the defendant was fully aware of the fact that the contracting company was not able to pay its creditors. It is alarming that the defendant freely admitted that he was not even aware of what it meant to have a fiduciary duty towards a company despite the fact that he acknowledged that he had previously been a director in other companies. Although it is so that it is not necessary that a director must be aware of the legal consequences of the facts as stated in *Philotex (Pty) Ltd and others v Snyman and others*; *Braitex (Pty) Ltd and others v Snyman and others*,^[2] I am persuaded that, in the present matter, the defendant

knew exactly what the consequences of his actions would be.[3]

[28] As far as “recklessness” is concerned the Court in *Philotex*[4] explained what it means:

“As far as 'recklessly' is concerned its meaning, to which the meaning of 'recklessness' corresponds, has been the subject of many reported judicial pronouncements. It suffices to refer to the following. In Shawinigan v Vokins and Co Ltd [1961] 3 All ER 396 (QB) at 403F it was said that 'recklessly' means 'grossly careless' and that recklessness is 'gross carelessness - the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as "reckless"”.

That definition seems, with respect, to involve some circuitry of reasoning but the important point it contains is the involvement of a risk, whether or not the doer realises it. That was the point adopted, together with indicia distilled from, inter alia, earlier judgments of this Court, in *S v Van Zyl* 1969

(1) SA 553 (A) at 559D--G in arriving at the conclusion that the ordinary meaning of 'recklessly' includes gross negligence, with or without consciousness

of risk-taking. In *S v Dhlamini* 1988 (2) SA 302 (A) at 308D--E gross negligence was described as including an attitude or state of mind characterised by 'an entire failure to give

consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'.

The test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge: *S v Van As* 1976 (2) SA 921 (A) at 928C--E. One should add that there may also be a subjective element present if the defendant has the risk-consciousness mentioned in *Van Zyl* but that, as indicated, is not an essential component of recklessness and its existence is no impediment to the application of the objective test referred to above.”[5]

[29] In summary: I am persuaded, having regard to the common cause facts, that the defendant patently knew that the contracting company could not trade any longer. Instead of seeking its liquidation it recklessly allowed it to trade and remain extant in insolvent circumstances. The defendant gave no consideration to the consequences of his actions but instead displayed, using the words in *Philotex*, “an attitude of reckless disregard of such consequences”:[6]

(i) The defendant (in his capacity as director of the contracting company) allowed the plaintiff to continue render a service in circumstances where he was fully aware of the fact that the contracting company was unable to pay its debts and more in particular, in circumstances where the defendant knew that the contracting company still owed the plaintiff an amount of R404 850.00. The defendant allowed the contracting company to use funds earmarked for

the plaintiff for services rendered to Bidvest, for its operational costs whilst knowing that payment to the plaintiff is outstanding. As a direct result of the defendant's reckless action as director of the contracting company, the plaintiff suffered damages in the amount claimed in the particulars of claim. (ii) The defendant further patently preferred one creditor (the plaintiff) over others when it concluded the agreement with Bidvest in circumstances where it knew that it was not able to pay the plaintiff any monies due to it. (iii) Lastly, and most indicative of the defendant's recklessness, alternatively grossly negligent, alternatively trading with a fraudulent purpose, is the fact that the defendant knowing allowed the transfer of all its assets and alienated all the contracting company's goodwill and intellectual property in the form of its brand to the novel company for no value. The defendant knew full well that the contracting company is unable to pay its debts but nonetheless, and clearly in an attempt to avoid having to pay the debts of the contracting company, created a new company. This constitutes an abuse of the juristic personality of both the contracting party and that of the newly established novel company.

- [30] In *Ebrahim and Another v Airport Cold Storage (Pty) Ltd*[7] made important observations regarding the abuse of juristic personality in circumstances where a controlling member (in the present matter the defendant in his capacity as director) recklessly use the corporation instrumentality to promote its own interests:

"[14] Acting 'recklessly' consists in 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'. In applying the recklessness test to the running of a closed corporation, the court should have regard to amongst other things the corporation's scope of operations, the members' roles, functions and powers, the amount of the debts, the extent of the financial difficulties and the prospects of recovery, plus the particular circumstances of the claim 'and the extent to which the [member] has departed from the standards of a reasonable man in regard thereto'."

- [31] In *Ebrahim* the corporate entity was also used to circumvent a debt payable to a creditor. In that matter the father and the son had run the CC without books or documentation and had allowed the debt due to the respondent to be transferred to the CC from another CC without

consideration. [8] The court concluded that the actions of the members were reckless:

"[18] The statutory provision targets just such heedlessness of corporate autonomy and form. The transfer of Zaki's debt without any quid pro quo showed reckless disregard for the CC's solvency, for its ability to repay the debts it incurred, and for its capacity as a legal entity to accumulate and preserve assets of its own. (It is no doubt with an eye to the importance of a corporate entity's independent asset-accumulating capacity that Henochsberg says that 'recklessly' means carrying business on 'by conduct which evinces a lack of any genuine concern for its prosperity'.)"

[32] I have no hesitation that the defendant caused the contracting company to act in a manner prohibited by the provisions of section 22(1) of the Companies Act. Moreover, at all material times the defendant acted in his representative capacity as director on behalf on the contracting company when he conducted business in the way that contravenes the provisions of section 22(1) of the Companies Act. This was confirmed by the court in *Rabinowitz v Van Graan and others*:^[9]

“[18] Various authors writing on the interpretation of s 218(2) also suggest that directors are personally liable if s 22(1) is breached. In this regard counsel for the plaintiff referred me to, inter alia, the following:

[18.1] In *Cassim et al Contemporary Company Law* the following is said (at 587):

'A further important statutory provision that must not be overlooked in this context is s 218(2), which provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. The wide scope and ambit of this section has already been emphasised elsewhere in this chapter (see 12.9). Creditors, in particular, will be entitled to redress from the company or its directors for fraudulent or reckless trading.

All these statutory provisions heavily underscore the gravity of a contravention of s 22(1). No director or prescribed officer should treat s 22 lightly.'

[18.2] *Meskin et al Henochsberg on the Companies Act 71 of 2008* say the following:

'This subsection [218(2)] provides a general remedy to any person, which could obviously include the company, shareholder, creditor etc, to sue any person who contravenes any provision of the Act for any loss or damage suffered as a result of the contravention. Contravene here would obviously mean any offence in terms of the Act, but, it is submitted, it would also include any non-compliance with the provisions of the Act that may not be an offence (eg s 22 conduct).’

[33] It is therefore concluded that the defendant is personally liable to the plaintiff for the of the amount of R 404 850.00 plus VAT in terms of section 218(2) of the Companies Act.

[34] The delinquency question generally follows naturally upon the personal liability question.

[35] A court has no discretion but to declare a director acting in the

manner contemplated in section 77(3)(b) of the Companies Act to be a delinquent director in terms of section 162(5)(c)(iv)(bb) of the Companies Act:

(5) A court must make an order declaring a person to be a delinquent director if the person-

(a) ...;

(b) ...;

(c) while a director-

(i) grossly abused the position of director;

(ii) ...;

(iii) ...;

(iv) acted in a manner-

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77 (3) (a), (b) or (c);”

[36] Where a director engages in conduct that falls within the ambit of section 22(1) of the Companies Act, a court may not only hold such director personally liable under the Act, a court must declare the defendant delinquent.

[37] I have already referred to the facts that establish the conclusion

that the defendant, as a director, abused his position not only to divert funds earmarked from the plaintiff, but also to strip the contracting company of its own property for no value.

[38] The defendant as a director is therefore declared delinquent.

[39] Costs should follow the result.

Order

[40] In the event the following order is granted:

1. The defendant is declared delinquent in term of section 162(5)(c)(i) and (iv)(aa) and (bb) of the Companies Act.
3. The defendant is ordered to pay the costs of suit.

A C BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment 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 17 December 2020.

Case number

: 14399/2018

Matter heard on : 19 October 2020

Appearances For the plaintiff:

Adv HP Van Nieuwenhuizen

Instructed by: Jarvis Jacobs Raubenheimer Inc

For the defendant

M Fehler of Mervyn Fehler Attorneys

[1] Act 71 of 2008.

[2] 1998 (2) SA 138 (SCA)

[3] Ibid at 143A – C: “Before discussing the meaning of recklessness, it is convenient first to dispose of the aspect of being ‘knowingly a party’. ‘Knowingly’ means having knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on recklessly; it does not entail knowledge of the legal consequences of those facts: Howard’s case at 673I--674A. It follows that knowingly does not necessarily mean consciousness of recklessness. Being a party to the conduct of the company’s business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in the conduct of the business: Howard’s case at 674H.”

[3] Ibid at 143A – C: “Before discussing the meaning of recklessness, it is convenient first to dispose of the aspect of being ‘knowingly a party’.

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Being a party to the conduct of the company’s business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in the conduct of the business: Howard’s case at 674H.”

[4] Ibid.

[5] Ibid at 143F – H.

[6] Ibid.

[7]

[2008] ZASCA 113; 2008 (6) SA 585 (SCA). Although that matter was decided in the context of a closed corporation, the comments made by the court is equally apposite where the legal entity is a company.

[8] The Court in Ebrahim held as follows: “[16] This is a good case in point. The CC was lifted from its shelf existence in early 2005 for the expedient but legitimate purpose of providing the Ebrahims' creditors with a valid VAT number. As Gaertner testified, it made no difference to him through which

entity his enterprise was credited for the comestibles the Ebrahims ordered; he merely wished to supply a valid VAT number when claiming his own input tax credits. Thus far, the change of corporate vehicle was contrived but permissible. But the Ebrahims then overstepped the bounds. They transferred to the CC the entire debt owed to the plaintiff by the entity with which the plaintiff had until then been trading, Zaki. This was an amount in excess of R600 000. The CC received no consideration for taking over Zaki's debt. The Ebrahims just did it.”

[9] 2013 (5) SA 315 (CSJ).

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