CASES / VONNISSE

Reckless Trading and Relief for Directors

Venator Africa (Pty) Ltd v Watts [2024] ZASCA 60

1 Introduction

In *Venator Africa (Pty) Ltd v Watts* ([2024] ZASCA 60), the Supreme Court of Appeal (SCA) concluded that in instances where there has been reckless trading in violation of section 22(1) of the Companies Act (61 of 2008) (the 2008 Act), action must be taken against the company and not against directors in their personal capacity. Section 22(1) of the 2008 Act states that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person, or for any fraudulent purpose. The judgment of the SCA in *Venator Africa v Watts* (*supra*) is important as it reaffirmed that directors owe duties to the company. The duties and liability of directors are provided for in sections 75–77 of the 2008 Act. The directors of a company will not be automatically liable to third parties because they occupy the position of director in a company. Directors will be liable in instances where they have been found to have breached the duties that are imposed on them in terms of the 2008 Act (as set out in ss 75, 76 and 77 of the 2008 Act) for any loss or damage the company suffers as a result of the breach (see Delport *Henochsberg on the Companies Act 71 of 2008* (May 2022 – SI 28) 118(2)–118(3); see also generally Phungula "Lessons to Be Learned From Reckless and Fraudulent Trading by a Company: Section 424(1) of the Companies Act 61 of 1973 and Sections 22 and 77(3)(*b*) of the Companies Act 71 of 2008" 2016 28 *SAMLJ* 249; see also *Hlumisa Investment Holdings RF Ltd v Kirkinis* [2020] ZASCA 83; 2020 (5) SA 419 (SCA)).

2 Facts

The appellant, Venator Africa (Pty) Ltd, instituted an action in the High Court against the respondents, Lloyd Mason Watts and Martin Bekker. The respondents were the directors of a company known as Siyazi Logistics and Trading (Pty) Ltd (Siyazi), which conducted business as a clearing-and-forwarding agent (*Venator Africa v Watts supra* par 3). Siyazi had a contractual relationship with the appellant. Mr Bekker was cited as the first defendant and Mr Watts as the second defendant in the action. Mr Bekker did not participate in the appeal. The parties in the judgment were referred to as plaintiff and first and second defendants as in the initial action (par 3).

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The plaintiff contracted with Siyazi for the performance of clearing-and-forwarding duties (issuing of disbursements) on behalf of the plaintiff. The plaintiff would then pay the amounts reflected on the disbursement accounts to Siyazi (par 3). The said agreement commenced during or around 2016 and was orally agreed between the duly authorised representatives of Siyazi and the plaintiff. The material terms of that agreement were that, from time to time and at the request of the plaintiff, Siyazi would perform clearing services in respect of the importation of goods by the plaintiff into the Republic in the performance of those services and that Siyazi would issue to the plaintiff disbursement accounts that represented the amounts owed by the plaintiff to the South African Revenue Service (SARS) (par 3–4).

During 2018 and 2019, the plaintiff paid a total of R66 395 006.27 to Siyazi. However, Siyazi did not make the full payment to SARS. Siyazi caused an amount of only R31 353 697.27 to be paid to SARS on behalf of the plaintiff. The difference between the amount paid by the plaintiff to Siyazi against the disbursements accounts and the amount paid by Siyazi to SARS was R34 612 576.19 (par 4).

As a result of that short payment, SARS raised assessments as follows:

1. VAT due- R34 630 202.00;
2. penalties- R2 143 774.00; and
3. interest- R4 633 244.00.

The total damages suffered by the plaintiff in consequence of the short payment by Siyazi to SARS were therefore R41 407 220.00 (par 4).

The plaintiff argued that the short payment occurred as a result of fraud and/or theft by Siyazi's employees and/or the defendants and that the conduct of Siyazi was reckless, alternatively grossly negligent, further alternatively the business of Siyazi was conducted with the intention to defraud the plaintiff or further alternatively for a fraudulent purpose. The plaintiff accordingly relied on section 218(2) read with section 22(1) of the 2008 Act to claim against the directors of Siyazi (par 4).

The second defendant filed an exception to the plaintiff's claim, alleging that section 22(1) does not impose duties on the directors, but on the company, and that section 218(2) only finds application where a person breaches a provision of the 2008 Act (par 4). The second defendant further contended that, to the extent that the claim was predicated on fraud, the allegations in the plaintiff's claim were insufficient to sustain a case.

2 1 Arguments in the SCA

The plaintiff argued that the High Court did not conduct a discrete interpretative analysis of section 218(2) of the 2008 Act. According to the plaintiff, the High Court provided an opinion on the correctness of the judgments it identified and appeared to have focused prominently on section 22 rather than section 218(2) of the 2008 Act (par 14).

The plaintiff argued further that it was unlikely to have been the purpose of the 2008 Act to intend to exclude liability to creditors of the company for fraudulent or reckless trading by directors. According to the plaintiff, such a

claim against directors by creditors was permitted by common law, and it would require clear language in the 2008 Act to preclude it. Neither the language of section 218 nor any other legislation suggested such a revocation (par 15). The plaintiff submitted that the SCA should prefer an interpretation that promotes access to justice over one that denies any remedy. Thus, it should be slow to accept the interpretation offered by the excipient (par 16). It was argued by the plaintiff that the SCA was not dealing with the breach of a fiduciary duty that is owed to the company, but with the breach of a statutory duty. For purposes of a creditor's claim, the phrase "any person who contravenes the Act" in section 218(2) had to be read to mean the director who is behind the company that contravened section 22(1) (par 17). In the plaintiff's view, there was nothing standing in the way of this interpretation, as previously decided cases had to do with the claims of shareholders against the directors of the company, rather than with the claims of creditors; and shareholders' claims against directors are not permitted. In this instance, however, where the allegation was that the company was used by the directors to perpetrate a fraud on a creditor, the company neither suffered a loss nor was it likely to seek to recover the creditor's loss from the directors (par 18).

2 2 Prior proceedings in the High Court

Bezuidenhout AJ in the High Court had upheld the exception (*Venator Africa (Pty) Limited v Bekker* [2022] ZAKZPHC 50 (High Court judgment) par 90). The High Court referred to a number of cases that dealt with the interpretation of section 218(2) read with section 22 and, in some instances, section 214(1)(*c*), which provides for criminal liability.

In Blue Farm Fashion Limited v Rapitrade 6 (Pty) Limited ([2016] ZAWCHC 35), the court dealt with an exception on the basis that the plaintiff was not entitled, as a third-party creditor, to rely on the provisions of sections 22(1), 77(3)(*b*) and 77(6) of the 2008 Act to hold the directors personally liable for a debt owed to it by the company. The court found that a company "cannot incur losses, damages or cost without the actions of its directors" (High Court judgment par 30). According to Bezuidenhout AJ, although section 77(3)(*b*) envisages that the directors are accountable to the company, the court found that the directors acted recklessly, with the possible intent to defraud the plaintiff and therefore could not escape liability. The court held *inter alia* that to find that the directors were not liable would lead to absurd results (High Court judgment par 54; see also *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) 15; *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* 1972 (2) SA 270 (A) 275G–H). Such an approach would create a lacuna, which the legislator would never have intended (High Court judgment par 54).

The High Court in its judgment made reference to *Rabinowitz v Van Graan* ([2013] ZAGPJHC 151; 2013 (5) SA 315 (GSJ)), which stated that "a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of section 22(1) thereof" (*Rabinowitz v Van Graan supra* par 22; also see *Chemfit Fine Chemicals (Pty) Ltd v Maake* 2017 JDR 1473 (LP); *Maake v Chemfit Finechemical (Pty) Ltd* [2018] ZALMPPHC 71; *Blue Farm Fashion*

Limited v Rapitrade 6 (Pty) Ltd [2016] JOL 35613 (WCC); *Meatworld Factory CC v ET Trading House (Pty) Ltd* 2019 JDR 1351 (GJ); FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 3ed (2023) 790–791; Phungula 2016 *SAMLJ* 249; Esser and Delport "The Protection of Stakeholders: The South African Social and Ethics Committee and the United Kingdom's Enlightened Value Approach: Part 1" 2017 50(1) *De Jure* 98–99).

According to Bezuidenhout AJ, the court in *Chemfit Fine Chemicals (Pty) Ltd v Maake* (*supra*) relied on versions of sections 22(1) and 214(1)(*c*) that had been amended as far back as 1 May 2011. In *Chemfit Fine Chemicals (Pty) Ltd v Maake* (*supra*), the court found that section 214(1)(*c*) was "of cardinal importance" (par 28.4). As Bezuidenhout AJ pointed out, section 214(1)(*c*) had been referred to as it was in its original version, in terms of which a person was guilty of an offence if he was knowingly a party to conduct prohibited by section 22(1), whereas section 214, as amended, renders a director (or any person) guilty of a criminal offence if such director/person was knowingly a party to an act or omission by the company calculated to defraud a creditor or employee of the company, or a holder of the company's securities or with another fraudulent purpose. In *Chemfit Fine Chemicals (Pty) Ltd v Maake* (*supra*), the court also found that liability in terms of section 218(2) ensues as a result of "any contravention, and therefore such ordinary common law requirements for liability as fault or wrongfulness are dispensed with" (*Chemfit Fine Chemicals (Pty) Ltd v Maake supra* par 30; High Court judgment par 83). The court then attempted to find support for its view in the *dictum* of Du Plessis AJ in *Rabinowitz v Van Graan* (*supra*)) and proceeded to find that "[a]ny conduct that contravenes a provision of the Act, catapults any person, including the directors to personal liability" (*Chemfit Fine Chemicals (Pty) Ltd v Maake supra* 36; High Court judgment par 84).

The High Court disagreed with the court in *Rabinowitz v Van Graan* (*supra*) and stated that the court failed to consider that if the legislator had wanted to make a director criminally liable for being a party to conduct prohibited by section 22(1), it would not have amended the Companies Act by removing the reference to section 22(1) in section 214(1)(*c*) (High Court judgment par 85). More importantly, if the legislator intended to hold a director liable to a third party for acquiescing in the carrying on of the company's business as prohibited by section 22(1) or in any other respect for that matter, it would have said so expressly as it has done in section 424 of the 1973 Companies Act (61 of 1973) (the 1973 Act), and in section 19(3) of the 2008 Act. The express provisions in section 64(1) of the Close Corporations Act (69 of 1984) are also relevant in this regard (High Court judgment par 81). According to Bezuidenhout AJ, it could never have been the intention of the legislator to provide for liability in a manner that would involve a convoluted manner of interpreting various sections, and then to arrive at a conclusion that is still open to doubt, based on how certain sections are interpreted (High Court judgment par 9 and 81).

The High Court agreed with the approach and the remarks of the court in *De Bruyn v Steinhoff International Holdings NV* (2022 (1) SA 442 (GJ) par 191), namely that section 218(2) simply "recognises that liability for loss or

damage may arise from contraventions of the Companies Act", but what right that gives rise to and who enjoys it, is to be found in the provisions of the Companies Act itself (High Court judgment par 86 and 87).

This is even more important when considering what was held by the SCA in *Hlumisa Investment Holdings RF Ltd v Kirkinis* (*supra*) with reference to section 77(2)(*b*) and (3)(*b*). The court in that case held that the provisions of the 2008 Act indicate that the legislature decided where liability should lie in the case of conduct by directors who are in contravention of certain sections of the 2008 Act, and who could recover the resultant loss. It is also clear that the legislature took care to preserve certain common-law principles (*Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 50; High Court judgment par 87).

Bezuidenhout AJ was of the view that the so-called lacuna created by the legislature in not providing expressly for directors' liability to other persons, such as creditors, for loss or damage suffered, is a clear indication that it was not its intention to do so, thereby continuing to recognise what has been referred to as a foundation of company law (High Court judgment par 88).

The High Court accordingly upheld the second defendant's exception, set aside the particulars of claim, and granted leave to the plaintiff to file amended particulars of claim (High Court judgment par 88).

3 Issue

The appeal in the SCA arose from the exception upheld by the High Court, which concerned the interpretation of section 218(2) of the 2008 Act, which provides for civil liability against any person who contravenes the provisions of the 2008 Act, read with section 22(1), which prohibits reckless trading by a company. These provisions had to be considered in conjunction with the provisions dealing with the fiduciary duties of directors (s 76(3)), consequential liability (s 77(2)) and the long-standing principle that a company has a legal personality separate from its directors and shareholders (*Venator Africa v Watts supra* par 1).

4 Judgment

Mabindla-Boqwana JA (Mothle and Molefe JJA and Baartman and Keightley AJJA concurring) held that section 218(2) of the 2008 Act does not itself create liability. It imposes liability in the event of a contravention of some other provision of the Act. Mabindla-Boqwana JA stated that section 22(1) plainly imposes a duty on the company, and not its directors, to refrain from carrying on its business recklessly, among other things. To construe section 22(1) as being capable of infringement by the directors is to read into the section a prohibition that is not there (*Venator Africa v Watts supra* par 33).

Mabindla-Boqwana JA held further that section 76(3) imposes duties upon the directors, *inter alia*, to act in good faith and in the best interests of the company. These are common-law principles that have now been entrenched in the 2008 Act. These duties are owed to the company. In the event of a

wrong done to the company in terms of any of the provisions of the section, the company can sue to recover damages. In addition, the SCA held that section 77(2)(*b*) similarly provides that a director of a company may be held liable in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of the duty contemplated in section 76(3)(*b*), or any provision of the 2008 Act not otherwise mentioned in the section, or any provision of the company's Memorandum of Incorporation (*Venator Africa v Watts supra* par 31–33).

The court held that the plaintiff was unable to identify a provision that had been contravened by the directors in order to invoke section 218(2).

For these reasons, the SCA found that it could not fault the High Court in upholding the exception. The appeal was accordingly dismissed with costs, including the costs of two counsel (*Venator Africa v Watts supra* par 36).

5 Discussion

5 1 The test and legal principles on exceptions

In *Living Hands (Pty) Ltd v Ditz* (*supra*), the court provided an overview of the general principles relating to exceptions, as distilled from case law. According to the court:

a) In considering an exception to the effect that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.
b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment that is so serious as to merit the costs even of an exception.
c) The purpose of an exception is to raise a substantive question of law that may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
e) An overly technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars. (See *Living Hands (Pty) Ltd v Ditz supra* par 15)

In *Fairlands (Pty) Ltd v Inter-Continental Motors (Pty) Ltd* (*supra* 275G–H), the court stated that where an exception arises in respect of the interpretation of statutory provisions, the question was not whether the meaning contended for by the appellant is necessarily the correct one, but whether it was a reasonably possible one (see also *Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 22). In the present case, the court had to consider whether or not section 218(2), read with section 22(1) of the 2008 Act, permits what was contended for by the plaintiff.

5 2 Legislative arrangement

Section 1 of the 2008 Act defines a company as a juristic person incorporated in terms of the Act. Section 19(1)(*a*) and (*b*), dealing with the legal status of companies, provides that a company is a juristic person and that it has all the legal powers and capacity of an individual, subject to certain exceptions. Section 19(2) expressly states:

> "A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise." (see *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 550–551; *Salomon v Salomon & Company Limited* [1897] AC 22 (HL) 42–43; *Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 42)

In instances where the company is a personal liability company, the situation will be different. In that case, the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company (s 19(3) of the 2008 Act). This exception serves to highlight the importance of the director's default immunity.

Section 20(9) of the 2008 Act deals with scenarios where there has been unconscionable abuse of the juristic personality of the company as a separate entity. Section 20(9) provides that the court may declare the company not to be a juristic person in respect of any right, obligation or liability of the company and make any further order it considers appropriate. It has been stated that section 20(9) does not disregard the company as a separate entity. It also does not do away with the requirements for piercing the corporate veil. In *Ex Parte Gore NNO* (2013 (3) SA 382 (WC); [2013] 2 All SA 437 (WCC)), the court stated that section 20(9) broadens the bases upon which the courts in this country have been prepared to grant relief that entails disregarding corporate personality. Section 20(9), according to the court, therefore, does not replace the common law; it supplements the common law (see *Ex Parte Gore NNO supra* 31, cited with approval by this SCA in *Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust* [2023] ZASCA 57; [2023] 3 All SA 40 (SCA); 2023 (5) SA 68 (SCA) 40; *Venator Africa v Watts supra* par 23).

These provisions reinforce the long-standing principle that a company's separate legal personality must be respected when identifying the proper party to legal proceedings. In *Hlumisa Investment Holdings RF Ltd v Kirkinis* (*supra* par 42), the SCA stated that the separate personality of a company is "no mere technicality". It is foundational to company law (see also *Itzikowitz v Absa Bank Ltd* [2016] ZASCA 43; 2016 (4) SA 432 (SCA); *Venator Africa v*

Watts supra par 24). A party cannot simply disregard the "corporate veil"; it must be permitted by law to do so. It was against this backdrop that the SCA in the present case set about interpreting section 218(2) read with section 22(1) of the 2008 Act.

5 3 Interpretation of the relevant provisions

The plaintiff based its case on a statutory duty. The starting point in the interpretative process is the text of a particular provision but textual meaning is always informed by context, even where the language is clear (see *Tshwane City v Link Africa* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) 33; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) 90–91; *Venator Africa v Watts supra* par 25).

Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 4 SA 593 (SCA) par 17) formulated what has been described as the "proper approach to interpretation" of documents of every kind, including legislation, statutory instruments and contracts. In terms of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, interpretation is essentially one unitary exercise in methodology requiring simultaneous consideration of the context, purpose and text of a document, with none of these considerations dominating the others (*Natal Joint Municipal Pension Fund v Endumeni Municipality supra* par 18–19; see also *Bothma-Botho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) par 12; *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society* [2019] ZACC 47 par 15; Price "Wagging, Not Barking: Statutory Definitions" 2013 *Scholarly Works* 764).

Consideration of the text, context and purpose of a document at the same time is not novel. This is a trite interpretative technique (see *Road Traffic Management Corporation v Waymark (Pty) Ltd* 2019 5 SA 29 (CC) par 31). In *Coopers & Lybrand v Bryant, (Coopers & Lybrand v Bryant* [1995] ZASCA 64; 1995 3 SA 761 (A) 768A–E), the Appellate Division (now SCA) provided an artificial, two-step process to interpretation. The court held that interpretation entails first establishing the literal meaning of the words being construed (see also Wallis "Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)" 2019 *PELJ* 8). Once ascertained, consideration is then given to the context and background circumstances, applying extrinsic evidence of surrounding circumstances when an ambiguity is found in the language (see generally Moosa "Interpretation of Wills – Does the Endumeni Case Apply?" 2021 *PER* 32).

For present purposes, the essence of the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* is the SCA's expression of the following statement as a representation of the present state of the law governing the interpretation of documents generally:

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where

> more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." (*Natal Joint Municipal Pension Fund v Endumeni Municipality supra* par 18; see also *Raubenheimer v Raubenheimer* 2012 5 SA 290 (SCA) par 21*; Black-Clawson International v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 613; *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 1587; *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 461; *Charter Reinsurance Co v Fagan* [1997] AC 313 384; *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg supra* 650; see also Hoexter *Administrative Law in South Africa* (2012) 45)

According to the court in *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* ([2020] ZASCA 16), the inevitable point of departure when interpreting a section of statute is the language used in the provision under consideration (*Commissioner for SARS v United Manganese of Kalahari supra* par 8; *Venator Africa v Watts supra* par 25).

Section 218(2) of the 2008 Act provides that 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. According to Mabindla-Boqwana JA, this section creates a right to recovery if there has been a breach of a provision of the Act. When a wrongdoer contravenes the Act and causes loss to a person, the wrongdoer is liable to that person. The word "contravenes" in section 218(2) of the 2008 Act includes a breach or an infringement of any provision of the Act "which is by nature prescriptive or which in some way regulates conduct" (see *Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 45; *Venator Africa v Watts supra* par 26).

This section does not itself create liability. It imposes liability in the event of a contravention of some other provision of the Act. The court in *De Bruyn v Steinhoff International Holdings NV* (*supra* par 191–192) stated that the statute does provide a right of action. The court stated further that the right consists of who enjoys the right and against whom the right may be exercised, which are issues to be resolved by reference to the substantive provisions of the 2008 Act. This interpretation, according to the court, answers another difficulty that the literal interpretation of section 218(2) does not. The court in *Hlumisa Investment Holdings RF Ltd v Kirkinis* (*supra* par 49–50) stated that section 218(2) of the 2008 Act should be understood to impose liability without the regulating concepts of fault, foreseeability and remoteness; and an undifferentiated conception of permissible plaintiffs. This understanding would require an interpretation of section 218(2) that gives rise to wholesale liability at the instance of all persons who sustained loss or damage as a result of the contravention. That is to place a burden of liability and hence risk upon directors so great that it is hard to imagine who would accept office on these terms; and if that is what the legislature intended, it would be expected to have made the imposition of so great a burden clear. A better interpretation is that the legislature intended that the specific requirements of any liability are to be found in the substantive provisions of the 2008 Act. Section 218(2) has a different function. It determines the question as posed in *Steenkamp v Provincial Tender Board of the Eastern Cape* ([2005] ZASCA 120; [2006] 1 All SA 478 (SCA); 2006 (3) SA 151

(SCA) par 21–22): "whether there is a right of action, who enjoys the right, and on what basis of all matters regulated by the substantive provision of the Companies Act" (*Venator Africa v Watts supra* par 27).

In the present case, the plaintiff relied on section 22(1) of the 2008 Act. The plaintiff asserts that this provision has been contravened and triggers the operation of section 218(2). Section 22(1) of the 2008 Act provides:

> "A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose."

This section plainly imposes a duty on the company, and not its directors, to refrain from carrying on its business recklessly, among other things. To construe section 22(1) of the 2008 Act as being capable of infringement by the directors is to read into the section a prohibition that is not there (*Venator Africa v Watts supra* par 28).

Section 22(2) and (3) of the 2008 Act provides remedies for the Commission in instances where there has been reckless trading. These provisions, as well, are directed at the company. The section that deals expressly with directors' liability is section 77(3), which states:

> "A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having–
>
> *(a)* …
> *(b)* acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1)." (see *Venator Africa v Watts supra* par 29)

It is important to note that it has been accepted that the law relating to section 424 of the 1973 Act is relevant when interpreting section 22, but only in respect of, for example, the meanings attached to "fraudulent purpose", "recklessly" or "intent to defraud" because the ambit of section 22 of the 2008 Act is otherwise totally different from that of section 424 of the 1973 Act (Phungula 2016 *SAMLJ* 249). The effect of a company trading in terms of the prohibited conduct is the possibility that the Commission will require the company to cease carrying on its business or trading [whereas the] effect in terms of section 424 of the 1973 Act is personal liability for all or any of the debts or other liabilities of the company. A director is liable [in terms of section 77(3)(*b*)] to the company for any loss, damage or costs arising as a direct or indirect consequence of allowing trading as prohibited in section 22(1) (see Delport *Henochsberg on the Companies Act 71 of 2008* 118(2)–118(3); Phungula 2016 *SAMLJ* 249).

The purpose of section 424 of the 1973 Act has been interpreted by the courts as attributing personal liability to all persons who knowingly participate in the fraudulent or reckless conduct of the business of a company (see *Pressma Services (Pty) Ltd v Schuttler* 1990 (2) SA 411 (C) 416). In *Pressma Services (Pty) Ltd v Schuttler,* Van Schalkwyk AJ took the view and held that "the person, in respect of whom the relief is granted, is declared to be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company" (*Pressma Services (Pty) Ltd v Schuttler supra* 416; see also *Philotex (Pty) Ltd v JR Snyman* 1998 (2) SA 138 (SCA) 143; *Triptomia Twee (Pty) Ltd v Connolly* 2003 (4) SA 558 (C)

562). According to Achada, the intention of section 424(1) is to protect the company and give creditors available remedies, as "it was enacted to provide a remedy against fraudulent and/or reckless behaviour by directors" (Achada "Directors' Liabilities for Company Debts: Another Recent Decision" 2002 10 (4) *Juta's Business Law* 199; see also Sigwadi "Compromise and Personal Liability of Directors Under Section 424 of the Companies Act 61 of 1973" 2003 15(3) *SA Merc LJ* 387 388–389; McLennan "The Liability of Agents for Debts Contracted on Behalf of Insolvent Companies" 1995 7 (1) *SA Merc LJ* 69; Phungula 2016 *SAMLJ* 243–244).

Section 77, and in particular section 77(3) of the 2008 Act, deals with the liability of directors, and sets out the circumstances under which a director is liable for any loss, damages or debts sustained by the company. From a plain reading of section 77(3), it is immediately clear that no liability for debts and liabilities of the company is accorded to a director in favour of third parties such as creditors. This was made clear by the court in *Gihwala v Grancy Property Ltd* ([2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) 120) – that is, section 77(3) cannot be invoked to secure payment to a creditor (*Venator Africa v Watts supra* par 30).

According to Delport, section 76(3) imposes duties upon directors, *inter alia*, to act in good faith and in the best interests of the company. These are common-law principles that have now been entrenched in the Act (Delport *Henochsberg on the Companies Act 71 of 2008* 298 (12M)–298(12N)). These duties are owed to the company. The company would always be the proper plaintiff in instances where a wrong or unlawful act was perpetrated against the company. According to Mabindla-Boqwana JA it is therefore no coincidence that section 77(2)(*a*) provides that a director of a company may be held liable for breaches of fiduciary duties resulting in any loss or damage sustained by the company (*Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 48; *Venator Africa v Watts supra* par 31) Section 77(2)(*b*) similarly provides that a director of a company may be held liable in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of the duty contemplated in section 76(3)(*b*), any provision of the Act not otherwise mentioned in the section, or any provision of the company's Memorandum of Incorporation (*Venator Africa v Watts supra* par 31).

Mabindla-Boqwana JA stated that these provisions make it clear that "the legislature decided where liability should lie for conduct by directors in contravention of certain sections of the Act and who could recover the resultant loss". According to Mabindla-Boqwana JA, it was also clear that the legislature was careful to preserve certain common-law principles to make what is referred to as a "harmonious blend" (*Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 50). Furthermore, the Act abounds with provisions for recovery of loss resulting from misconduct on the part of directors. There must clearly be a link between the contravention and the loss allegedly suffered (*Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 51; *Venator Africa v Watts supra* par 32).

The court held that the plaintiff had not identified a provision that had been contravened by the directors in order to invoke section 218(2) (*Venator Africa v Watts supra* par 33). In *De Bruin v Steinhoff International Holdings*

NV, the court stated that the statutory scheme of liability provided for in the 2008 Act does not attach a singular consequence for a contravention of the Act (*De Bruin v Steinhoff International Holdings NV supra* par 213–214). Instead, the 2008 Act attaches a regime of liability for particular contraventions. According to *De Bruyn v Steinhoff International Holdings NV*, this is the case in respect of the contravention of sections 76 and 22 of the 2008 Act. A breach of duty may result in a compliance notice from the Commission (s 22(3)); a breach may be an offence (s 32(5)); and a breach may give rise to liability to make good a loss as a consequence of the breach (s 77). In certain instances, breaches may result in more than one permissible consequence. Therefore, section 22 permits the Commission to issue a compliance notice, and in addition, a director may be held to be liable to the company for reckless trading (s 22(1) read with s 77(3)(*b*) of the 2008 Act (see *De Bruyn v Steinhoff International Holdings NV supra* 213–214; *Venator Africa v Watts supra* par 33).

According to Mabindla-Boqwana JA, it is vital to note that the legislature, from an interpretation point of view, has been careful to stipulate what form of liability, civil, criminal or regulatory, may result from different contraventions. As a result, there is no coherent reading of the Companies Act that would subordinate this specification of differentiated liability for a recognition under section 218(2) of general liability of all persons who contravene the provisions of the 2008 Act in favour of all who suffer loss as a result thereof (see *De Bruyn v Steinhoff International Holdings NV supra* 213–214; *Venator Africa v Watts supra* par 33).

Mabindla-Boqwana JA was of the view that the reasoning of the court in Rabinowitz *v Van Graan* (*supra*), and the other High Court cases that followed it, should not be adopted. Furthermore, Mabindla-Boqwana JA stated that it was irrelevant that the judgments in *Hlumisa Investment Holdings RF Ltd v Kirkinis* (*supra*) and De *Bruyn v Steinhoff International Holdings NV* (*supra*) concerned claims brought by shareholders against directors. According to Mabindla-Boqwana JA, while it may be important to note the facts in those cases, the relevant principles in those decisions, as well as in *Gihwala v Grancy Property Ltd* (*supra*), were instructive for present purposes (*Venator Africa v Watts supra* par 35).

6 Concluding remarks

The finding by the court in *Venator Africa (Pty) Ltd v Watts* (*supra*) will be seen as a welcome relief for directors who currently hold office in a company, and for those who wish to occupy the position of director in the future. The SCA in its judgment made it clear that a company has its own separate juristic personality and that directors in a company cannot be held personally liable to creditors or third parties in instances where there has been a violation of section 22(1) of the 2008 Act for reckless trading (*Dadoo Ltd v Krugersdorp Municipal Council supra* 550–551; *Salomon v Salomon & Company Limited supra* 42–43; *Hlumisa Investment Holdings RF Ltd v Kirkinis supra* 42). The same would apply in relation to section 218(2) of the 2008 Act. In such cases, any remedial action must be instituted against the company. The SCA did indicate that section 218(2) of the 2008 Act creates a right of action, but this provision does not determine the composition of the

right and against whom the right may be exercised. To determine this, reference must be made to the substantive provisions of the Act. The SCA in *Venator Africa (Pty) Ltd v Watts* (*supra*) stated that any other interpretation of the provisions of section 22(1) in the 2008 Act would result in an undue and unreasonable burden on directors, who would be exposed to the risk of personal liability, especially in instances where this was specifically not intended by the legislature. A director may incur personal liability where a director has acted in a manner that is in contravention or in breach of their fiduciary duties (see ss 76 and 77 of the 2008 Act read with s 19(2) of the Act; see also De *Bruyn v Steinhoff International Holdings NV supra* 213–214; *Venator Africa v Watts supra* par 33).

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