



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Venator Africa (Pty) Ltd v Watts and Another (053/2023) [2024] ZASCA 60 (24 April 2024)

Today the Supreme Court of Appeal (SCA) dismissed with costs, including the costs of two counsel where so employed, an appeal against the decision of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court).

The appeal, which arose from an exception upheld by the high court, concerned the interpretation of s 218(2) of the Companies Act 71 of 2008 (the Act), which provides for civil liability against any person who contravenes the provisions of the Act, read with s 22(1) prohibiting reckless trading by a company. These were viewed alongside provisions dealing with fiduciary duties of directors (s 76(3)), consequential liability (s 77(2)) and the longstanding principle that a company has a legal personality separate from its directors and shareholders.

The appellant, Venator Africa (Pty) Ltd, instituted 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. 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. Parties are referred to as plaintiff and first and second defendants as in the action.

In the particulars of claim, the plaintiff alleged that it had contracted with Siyazi to issue disbursement accounts to it. The plaintiff would then pay the amounts reflected on the disbursement accounts to Siyazi. Siyazi would then pay SARS the amounts received. During the periods of 2018 and 2019, the plaintiff paid total amounts of some R66 million to Siyazi. However, Siyazi did not make the full payment to SARS. SARS raised assessments, which resulted in the appellant suffering damages.

The plaintiff relied on s 218(2) read with s 22(1) of the Act to claim against the directors of Siyazi. The second defendant filed an exception to the particulars of claim, alleging that s 22(1) does not impose duties on the directors, but the company, and that s 218(2) would only find application where a person breaches a provision of the Act.

In upholding the exception, the high court went through a line of cases dealing with the interpretation of s 218(2) read with s 22 and, in some instances, s 214(1)(c) (which provides for criminal liability) of the Act. It referred to *Rabinowitz v Van Graan and Others* [2013] ZAGPJHC 151; 2013 (5) SA 315 (GSJ) (*Rabinowitz*) and related judgments, which said 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 s 22(1) thereof’.

The high court disagreed with *Rabinowitz* and the cases that followed it. It observed that 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.

The high court embraced the approach adopted in *De Bruyn v Steinhoff International Holdings N.V. and Others* [2020] ZAGPJHC 145; 2022 (1) SA 442 (GJ) (*Steinhoff*), which held that ‘[s]ection 218(2) should not be interpreted in a literal way. Rather, the provision recognizes that liability for loss or damage may arise from contraventions of the Companies Act. And so the statute confers a right of action. But what that right consists of, who enjoys the right, and against whom the right may be exercised are all issues to be resolved by reference to the substantive provisions of the Companies Act.’

The high court also referred to the judgment of this Court in *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* [2020] ZASCA 83; [2020] 3 All SA 650 (SCA); 2020 (5) SA 419 (SCA) (*Hlumisa*) which held: ‘[t]hese provisions of the Companies Act 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. It is also clear that the legislature was astute to preserve certain common law principles. It makes for a harmonious blend.’

The high court, consequentially, upheld the second defendant’s exception, set aside the particulars of claim, and granted leave to the plaintiff, if so advised, to file amended particulars of claim within 10 days from the date of the granting of its order.

The SCA held that s 218(2) does not itself create liability. It imposes liability in the event of a contravention of some other provision of the Act. The SCA also stated that s 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 s 22(1) as being capable of infringement by the directors is to read into the section a prohibition that is not there.

It further observed that s 76(3) imposes duties upon the directors to, inter alia, act in good faith and in the best interests of the company. These are common law principles which have now been entrenched in the 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 s 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 s 76(3)(b); any provision of the Act, not otherwise mentioned in the section; or any provision of the company’s Memorandum of Incorporation.

The plaintiff was unable to identify a provision that had been contravened by the directors in order to invoke s 218(2). In the circumstances, the SCA concluded that *Rabinowitz* and other high court cases were wrongly decided. It was irrelevant that *Hlumisa* and *Steinhoff* concerned claims brought by shareholders against directors.

For these reasons, the SCA found that it could not fault the high court in upholding the exception.

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