

# Dispute Resolution

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### SOUTH AFRICA

Can directors be held liable to creditors under section 218, read with section 22 of the Companies Act?



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## DISPUTE RESOLUTION ALERT

# Can directors be held liable to creditors under section 218, read with section 22 of the Companies Act?

This is the question that the Supreme Court of Appeal (SCA) had to answer in the recent case of *Venator Africa (Pty) Ltd v Watts and Another* (053/2023) [2024] ZASCA 60.

Venator Africa (Pty) Ltd (Venator), instituted action in the High Court seeking to hold the directors of Siyazi Logistics and Trading (Pty) Ltd (Siyazi) personally liable for losses incurred due to alleged fraudulent and reckless trading practices. Siyazi conducted a clearing and forwarding agent business and was contracted by Venator to act as its clearing and forwarding agent. Despite receiving the necessary payments from Venator, Siyazi failed to pay large amounts due to the South African Revenue Services (SARS) on behalf of Venator. As a result, Venator suffered a financial loss due to penalties, interest and value-added tax levied by SARS. Venator sought to recover this loss from Siyazi's directors.

Venator claimed that the conduct of the directors should be seen as a contravention of section 218(2) read with section 22(1) of the Companies Act 71 of 2008 (Act). Section 218 states 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". While section 22(1) 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 second defendant filed an exception to Venator's claim alleging, amongst other things, that section 22(1) of the Act did not impose duties on the

directors, but rather on the company and, as such, the directors could not be found to have breached section 22(1) read with section 218(2) of the Act.

### The High Court's findings

The High Court rejected previous cases that found that directors could be held personally liable under section 22, read with section 218, of the Act.

The High Court embraced the approach adopted in:

- *De Bruyn v Steinhoff International Holdings N.V. and Others* [2022] (1) SA 442 (GJ) (Steinhoff), which held that while section 218(2) confers a right of action, 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 Act; and
- *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and* [2020] (5) SA 419 (SCA), where the court found that the legislature had made a decision where liability should lie for the conduct of directors, and who could recover with respect of such claims.

The High Court therefore concluded that "the legislature in not providing expressly for the liability of the director to other persons, such as creditors ... is a clear indication that it was not its intention to do so". Consequentially, it upheld the second defendant's exception, set aside Venator's particulars of claim, and granted leave to the plaintiff to file amended particulars of claim within 10 days from the date of the granting of its order.

Venator took the matter on appeal to the SCA.

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## SCA's findings

The SCA confirmed the principle set out in *Steinhoff* and held that section 281(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 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.

The SCA further observed that section 76(3) of the Act 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 that 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 section 77(2)(b) of the Act 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.

According to the SCA, Venator was unable to identify a provision "*protecting their rights*" that had been contravened by the directors in order to invoke section 218(2) of the Act. For these reasons, the SCA found that it could not fault the High Court in upholding the exception.

The SCA also emphasised (i) what the court said in the *Hlumisa* case, being that to interpret section 218 as imposing "*wholesale liability*" for all persons who suffered a loss of damage would give rise to such a burden of liability and risk that no person would accept a directorship position. If that was the intention of the legislature, it would have made such a burdensome liability clear; and (ii) the necessity to respect the sanctity of companies being treated as separate, juristic legal entities. This is especially so as the Act has already set out specific obligations and liabilities for directors.

In summary, this case reinforces the autonomy of a corporate entity but also goes further to clarify the conditions under which director liability can be invoked. By reaffirming the scope of both section 218(2) and section 22(1) of the Act, this judgment protects the foundational legal principles of company law while also ensuring that directors are held appropriately accountable under clearly defined statutory breaches.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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