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When the company cannot pay: Directors held personally liable for a R2.8 million trade debt

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Trading through a company usually protects directors – if the company fails, its debts belong to the company, not to them. That protection is not unlimited. A director who keeps ordering goods on credit while knowing the company cannot pay for them may have to pay for them personally.

The High Court in Mahikeng has given a clear example. Yokogawa South Africa, a supplier of process-control instruments, sued the two directors of its former distributor, 3E Control and Instrumentation (Pty) Ltd, after 3E Control went into voluntary liquidation in August 2021 owing Yokogawa **R2 832 601.73** on 59 unpaid invoices. The court held that both directors, Mr Letsie and Ms Letsie, are jointly and severally liable for the full amount, plus interest and costs. Werksmans acted for Yokogawa.

What happened?

Since 2017, 3E Control had distributed Yokogawa's process-control instruments in the North West. It bought the products on credit, resold them mainly to Rustenburg Platinum Mines, and paid Yokogawa once the mine paid it. Under the written agreement between the parties, 3E Control acted as Yokogawa's distributor and had to pay for the instruments it ordered within 30 days, while Yokogawa remained the owner of the goods until it was paid.

By November 2019, 3E Control owed Yokogawa about R6.5 million. Mr Letsie signed a payment plan admitting that about R2.2 million paid by customers for Yokogawa products had not been passed on, which the court called "*an admission under his own*

hand". The plan depended on a R1.5 million loan that never materialised. Even so, between December 2019 and April 2021, 3E Control placed 59 further orders on 30-day terms, totalling R2 832 601.73, none of which was paid. In June 2021, 3E Control asked to withdraw from the agreement, and Yokogawa demanded payment within 30 days.

On 2 August 2021, Mr Letsie admitted in writing that 3E Control could not pay within 30 days or pay for orders in advance, offering 50% of future profits instead. The company then resolved to wind itself up, with effect from 27 August 2021.

At the trial, Mr Letsie relied on the fact that roughly R32 million that 3E Control had paid Yokogawa over the years, and to the future servicing work its installed equipment would bring. The court found that neither entitled the company to keep taking on debts it could not pay.

Yokogawa relied on 3E Control's bank statements. These showed, inter alia, payments to restaurants, a spa and a series of payments to Mr Letsie labelled as "loan repayments", and an unexplained R450 000 transfer on 24 June 2021, just five days before 3E Control asked to withdraw from the agreement. Mr Letsie explained the restaurant, spa and insurance payments as business expenses.

The loan repayments were more serious. Mr Letsie testified that he had invested about R700 000 of his own money into the company, and Mr Letsie testified that about R240 000 was still owed to him when it was liquidated. Yet the repayments came to considerably more than that, and they were not backed by a section 45 board resolution or a written loan agreement, only a bookkeeper's schedule. Mr Letsie also could not explain the R450 000 transfer.

Finally, the liquidator's report recorded that neither director handed over the company's books. No explanation was given, and the court inferred that the books would probably not have supported the directors' version. This counted against both directors, including Ms Letsie, who did not testify.

The Companies Act 71 of 2008 ("Companies Act") provisions: what they say and how the court applied them

Section 22: the company must not trade recklessly

Section 22(1) of the Companies Act provides that a company must not carry on business recklessly, with gross negligence, with intent to defraud any person, or for any fraudulent purpose. The duty sits with the **company**, not with its directors. Yokogawa accepted this and dropped its request for an order that the directors had themselves breached section 22. The court agreed with that concession.

However, section 22 still mattered. It is the starting point for the routes to personal liability discussed below. The court applied the familiar objective test: would a reasonable businessperson, standing in the directors' shoes, have seen no reasonable prospect of creditors being paid on time? Relevant factors include the scope of the business, the directors' functions, assets and liabilities, working capital, cash flow, access to capital and the prospects of payment when each debt was incurred. Here the answer was obvious. The court called the case "*a textbook example of a company incurring debts with no reasonable prospect of repayment*". Mr Letsie was the only defence witness, and the court found his evidence was not supported by documents and relied on emails and minutes that were never produced.

Section 214(1)(c): knowingly taking part in conduct calculated to defraud

Section 214(1)(c) makes it a criminal offence to knowingly be a party to an act or omission by a company that is calculated to defraud a creditor, employee or shareholder, or has another fraudulent purpose. The court made two important points. First, the creditor does not have to prove common-law fraud, including that the director profited personally. It is enough that the conduct objectively tends to cause financial harm to a creditor. Second, the director must have actual knowledge. It is not enough that the director ought to have known, although knowledge can be inferred from the director's role and the information available to them.

The court found that Mr Letsie contravened section 214(1)(c) in two ways. He kept customer payments due to Yokogawa while continuing to order on credit. This was significant because Yokogawa was 3E Control's sole main supplier, and no creditor other than Yokogawa was identified. When the mines paid 3E Control for Yokogawa's products, that money should have gone

to Yokogawa, yet it was never passed on, and Mr Letsie did not account for it. He also caused the company to repay his own loans while Yokogawa went unpaid. The court also noted an unexplained R450 000 transfer made five days before the attempted withdrawal from the distribution agreement, which Mr Letsie could only suggest was possibly an overdraft repayment.

Section 218(2): the route to a damages claim

Section 218(2) provides that anyone who contravenes any provision of the Companies Act is liable to any other person for loss suffered as a result. The court held that a person guilty of the section 214(1)(c) offence has "contravened" the Companies Act, so civil liability follows. The creditor does not need to prove the usual elements of a delictual claim, such as wrongfulness and fault, separately. Mr Letsie was therefore personally liable for Yokogawa's full loss. The court held that all 59 invoices were incurred after he knew, in November 2019, that the company could not pay.

Section 45: loans and financial help to directors

Section 45 requires a board resolution before a company gives financial assistance to a director. Mr Letsie admitted that no such resolution existed for his loan arrangements as reflected in the bank statements, explaining only that the advisory board had not yet been appointed when the first advances were made. There was no written loan agreement either after such appointment, and the bookkeeper's statement he relied on was not supported by independent documents. The repayments also considerably exceeded the R240 000 he said was still owing at liquidation. The court relied on these failures to treat the loan repayments as an unauthorised preference of his own interests over the company's main creditor.

Section 76: directors' duties and the company records

The court referred to section 76, which sets the standard of conduct for directors, to explain why the second director, Ms Letsie, could not avoid liability by staying in the background. Mr Letsie signed all the key documents and described her as having no particular operational role, and she did not testify. But she was a director from the start of a closely held, two-director company, was in a position to know its finances, and gave no evidence that she was kept in the dark. The court inferred that she knew of and acquiesced in the reckless trading and held her liable under section 218(2) read with section 22. It declined to make a section 214(1)(c) finding against her, because there was no evidence linking her to the retained payments or the loan repayments. The court also relied on the directors' failure to deliver the company's books to the liquidators. That failure supported an adverse inference: had the records been produced, they would probably not have supported the directors' explanations.

Section 424 of the Companies Act 61 of 1973 and Schedule 5

As an alternative, Yokogawa relied on section 424(1) of the Companies Act 61 of 1973. Under that section a court may declare anyone who was knowingly a party to reckless or fraudulent trading personally responsible for the company's debts. Schedule 5 of the 2008 Act keeps the section alive for the winding-up of insolvent companies. The court did not need to decide this claim but noted that its requirements were also met against both directors. The company was being wound up and could not pay its debts. There was also a sufficient causal link between the reckless trading and the unpaid invoices.

Practical takeaways

The lesson for creditors is that a failed company does not have to mean a lost debt. Where directors ran the company recklessly, you may be able to recover from them personally, as Yokogawa did here. The key is the evidence of what the directors did, not simply the fact that they were directors of that company.

The lesson for directors is that the company structure protects you only while you run the business responsibly. If you trade a company recklessly, your home, savings and other personal assets may be exposed. Two points stand out:

- A silent director is not a safe director. Ms Letsie never signed a key document and stayed out of the day-to-day running of the business, yet the court still ordered her to pay the company's debt from her own pocket. Each director owes the

company fiduciary duties, and those duties do not fall away because a co-director runs the business. Insist on seeing the management accounts and company records, read them, and ask the hard questions.

- Taking advice at the first sign of financial trouble keeps your options open, such as business rescue or a formal restructuring, and can protect both the company and its directors personally. In this case, the directors kept trading for almost two years in the hope that things would turn around, and that decision turned a company debt into a personal one.

The judgment is available on SAFLII at https://www.saflii.org/za/cases/ZANWHC/2026/234.html



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